



# PROTECTING MINORITY RIGHTS

A Practical Guide to  
Developing Comprehensive  
Anti-Discrimination Legislation



UNITED NATIONS  
**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER



**EQUAL RIGHTS TRUST**



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**EQUAL RIGHTS TRUST**

New York and Geneva, 2023

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The Equal Rights Trust acknowledges, with appreciation, the donors whose funding supported the work of its staff during the development of the guide, which was produced with the financial assistance of the European Union, the Foreign, Commonwealth and Development Office of the United Kingdom of Great Britain and Northern Ireland and the Sigrid Rausing Trust.

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© 2023 United Nations  
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HR/PUB/22/6  
ISBN: 978-92-1-154243-1  
eISBN: 978-92-1-001390-1  
Sales No.: E.22.XIV.6

The cover and interior page illustrations within this publication were designed by Benito Cabañas, as part of the OHCHR “All in 4 Minority Rights” anniversary campaign. The images were modified by the Publishing Service of the United Nations Office at Geneva, for exclusive use in the *Practical Guide* and with the kind permission of Benito Cabañas.

# CONTENTS

<b>FOREWORD</b>	<b>vii</b>
<b>ACKNOWLEDGEMENTS</b>	<b>ix</b>
<b>EXECUTIVE SUMMARY</b>	<b>x</b>
<b>INTRODUCTION</b>	<b>xx</b>

<b>I. METHODOLOGY, SCOPE AND LIMITATIONS</b>	<b>xxvii</b>
A. Research process and methodology	xxvii
B. Oversight and guidance	xxviii
C. Approach	xxviii
D. Scope and limitations	xxix
<b>II. HOW TO USE THE GUIDE</b>	<b>xxix</b>
A. Structure of the guide	xxix
B. Structure of the sections	xxx

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## **PART ONE: STATE OBLIGATIONS TO ENACT COMPREHENSIVE ANTI-DISCRIMINATION LAW** ..... **xxxii**

<b>I. CONSENSUS ON THE NEED TO ADOPT COMPREHENSIVE ANTI-DISCRIMINATION LAW</b>	<b>1</b>
A. The international human rights law framework	1
B. Obligations to respect, protect and fulfil	2
C. United Nations human rights instruments and their interpretation	4
<b>II. CHARTER BODIES AND OTHER INTERNATIONAL PROCESSES</b>	<b>6</b>
A. United Nations special procedure mandate holders	6
B. Universal periodic review	6
C. Other international processes	7
<b>III. REGIONAL AND NATIONAL LAW DEVELOPMENTS</b>	<b>8</b>
A. Africa	8
B. The Americas	10
C. Europe	11
D. Other national law developments	13
<b>IV. CONCLUSION</b>	<b>15</b>

---

## **PART TWO: CONTENT OF COMPREHENSIVE ANTI-DISCRIMINATION LAW** .... **16**

<b>I. RIGHTS TO EQUALITY AND NON-DISCRIMINATION</b>	<b>17</b>
A. Prohibition of discrimination	17
1. Personal scope of the right to non-discrimination	19
2. Forms of discrimination	29
3. Material scope of the right to non-discrimination	47
4. Justifications	51

B. Positive action .....	56
1. Obligation to adopt positive action measures.....	58
2. Purpose and scope of positive action measures.....	59
3. Principles for the operation of positive action .....	62
4. Positive action under comprehensive anti-discrimination law.....	65
C. Equality duties .....	66
1. Accessibility .....	66
2. Statutory equality duties .....	69
3. Ensuring the effectiveness of equality duties .....	73
<b>II. REMEDY .....</b>	<b>75</b>
A. Remedies in different branches of law.....	77
B. Sanction: bringing perpetrators to justice.....	78
C. Reparation: recognition, compensation and restitution .....	80
D. Institutional and societal remedies.....	81
1. Institutional remedies .....	82
2. Societal remedies .....	83
<b>III. JUSTICE AND ENFORCEMENT .....</b>	<b>87</b>
A. Access to justice and legal procedure .....	88
1. Requirements of access to justice.....	88
B. Evidence and proof.....	93
1. Burden of proof.....	94
2. Exceptions to the rule .....	95
3. Evidence.....	96
C. International justice mechanisms .....	97
1. Individual complaints mechanisms .....	97
2. Complainants, respondents and procedure.....	98
<b>IV. EQUALITY BODIES .....</b>	<b>101</b>
A. Equality bodies and international law .....	102
B. Institutional requirements for equality bodies .....	103
1. Independence .....	103
2. Adequate resourcing .....	104
3. Inclusion, participation and ensuring diversity .....	105
4. Access to equality bodies .....	106
C. Mandates, functions and powers of equality bodies .....	107
1. Promotion and prevention .....	109
2. Support and litigation .....	111
3. Decision-making and enforcement.....	111
D. Ensuring the effectiveness of equality bodies .....	113
<b>V. IMPLEMENTATION OBLIGATIONS .....</b>	<b>115</b>
A. Equality policies and strategies.....	116
B. Equality impact assessment.....	117
C. Monitoring and data .....	119
D. Consultation, engagement and participation .....	120

<b>PART THREE: PROTECTING MINORITY RIGHTS</b>	<b>122</b>
<b>I. MINORITY RIGHTS AND THE BAN ON DISCRIMINATION</b>	<b>123</b>
A. Minority rights under international law	126
B. Who are minorities?	127
<b>II. GROUPS EXPOSED TO RACIAL DISCRIMINATION AND ASSOCIATED HARMS</b>	<b>130</b>
A. Racial discrimination: <i>jus cogens</i> , particularly invidious harm, and the problem of denial	134
B. Community, autonomy, equality and non-discrimination and harmful practices	135
<b>III. RELIGIOUS OR BELIEF MINORITIES AND DISCRIMINATION</b>	<b>139</b>
A. Equality and non-discrimination in the exercise of freedom of religion or belief	139
1. State religion and religious and belief minorities	140
2. Equal recognition of minority religious or belief communities and their members	141
B. Discrimination on the basis of religion or belief in other areas of life	143
1. Religious clothing, symbols and the public sphere	144
2. Religious or belief communities as duty bearers	146
3. Reasonable accommodation and religious practice	147
4. Opting out in the field of health	148
C. Discrimination on the basis of other characteristics in situations in which religion is a pretext	149
1. Conscientious objection and its limits	149
2. Family and personal status law: marriage, divorce, inheritance and burial	151
3. Harmful practices	152
<b>IV. LANGUAGE, LINGUISTIC MINORITIES, DISCRIMINATION, EQUALITY AND INCLUSION</b>	<b>153</b>
<b>V. GENUINE AND EFFECTIVE MINORITY PARTICIPATION AND THE BAN ON DISCRIMINATION</b>	<b>159</b>
<b>VI. RIGHTS OF INDIGENOUS PEOPLES</b>	<b>161</b>

<b>PART FOUR: DISCRIMINATORY VIOLENCE AND HATE CRIME</b>	<b>166</b>
----------------------------------------------------------	------------

<b>PART FIVE: DISCRIMINATION AND EXPRESSION</b>	<b>172</b>
<b>I. ASPECTS OF SPEECH AND EXPRESSION DIRECTLY IMPLICATING ANTI-DISCRIMINATION LAW</b>	<b>174</b>
<b>II. HATE SPEECH AND THE BAN ON INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE</b>	<b>175</b>
A. Advocacy of national, racial or religious hatred as well as in relation to disability, gender expression and gender identity, sex, sexual orientation, sex characteristics or other grounds	179
1. Assessing context	181
2. Distinguishing the speaker	182
B. Disseminating ideas based on racial superiority or hatred	183
C. Incitement to commit genocide	184
D. Incitement to commit terrorist acts	184
E. Defamation	184
<b>III. SANCTIONS FOR INCITEMENT AND OTHER FORMS OF HATE- OR BIAS-BASED EXPRESSION</b>	<b>185</b>
<b>IV. NON-LEGAL MEASURES</b>	<b>186</b>

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**PART SIX: PROMOTING DIVERSITY AND EQUALITY: OBLIGATIONS TO ADDRESS THE ROOT CAUSES OF DISCRIMINATION ..... 190**

**I. INTERNATIONAL LAW OBLIGATIONS TO ADDRESS PREJUDICE, STEREOTYPES AND STIGMA.... 192**

**II. SPECIFIC MEASURES ..... 196**

    A. Participation and representation in public life .....196

    B. Diversity and equal representation .....198

    C. Education .....198

    D. Media and awareness-raising .....199

    E. Training and sensitization .....199

    F. Enforcement and implementation.....200

**III. CONCLUSION: PROMOTING EQUALITY AND DIVERSITY ..... 201**

# FOREWORD

Since the 1990s, calls for the adoption of comprehensive anti-discrimination laws have grown. People exposed to discrimination have come together to advocate for the enactment of comprehensive and effective equality laws. In some countries, these movements have succeeded; in others, the struggle goes on. United Nations human rights experts have echoed and amplified these calls. In the universal periodic review, States from all parts of the world have repeatedly recommended the adoption of these laws to their peers.

These reform movements – whether led by civil society or by Governments – demonstrate a recognition that there can be no equality where there is discrimination and that we cannot eliminate discrimination without the enactment, enforcement and implementation of comprehensive and effective laws.

Comprehensive anti-discrimination laws translate international legal commitments to equality into actionable and enforceable rights under national law. They provide the national legal framework necessary to define the various forms of discrimination; set out the personal and material scope of the rights to equality and non-discrimination; provide guidance on effective remedy; and establish the procedural safeguards required to secure justice for victims. They also establish in law positive duties to eliminate discrimination, to combat prejudice, stereotypes and stigma, and to advance equality.

The law fulfils many roles, beyond simply setting out the rules and specifying what happens when rights are transgressed. The law also expresses our values; it articulates our norms and expectations. A propitious legal framework shapes our world for the better. Bad law, by contrast, or law that leaves gaps in protection, can shape societies for ill.

Comprehensive anti-discrimination laws have the potential to be transformative. At the simplest level, these laws can foster positive change by increasing understanding of discrimination, stimulating action to prevent it, and ultimately fostering a commitment to eliminate it. Those exposed to discrimination gain the tools to challenge the treatment that they have experienced and to secure remedy for the harms that they have suffered. Duty bearers are held to account and respond by putting in place procedures to prevent discriminatory acts, policies and practices. Over time, these changes have the potential to increase the representation and visibility of marginalized groups and so contribute to changed behaviour and ultimately shifts in social norms.

Comprehensive anti-discrimination laws also mandate and provide a framework for positive measures to foster equality. Pursuant to these laws, public and private actors throughout the world have taken a wide range of positive measures. Authorities have worked to render the common spaces of society accessible to persons with physical, mobility or sensory impairments. Employers have identified disparities in their workforce and have established programmes to increase participation by national or ethnic, religious and linguistic minority communities and other groups exposed to discrimination. Governments have adopted public education programmes to combat prejudice, stereotypes and stigma. This list could go on.

Discussions of the value to the legal order of comprehensive anti-discrimination laws – and of the obligation to adopt them – pose a range of questions. Some of these questions are technical, some are conceptual, some are practical. The guide is an attempt – working in collaboration with recognized experts from across the globe – to answer the questions most often raised by government officials, parliamentarians, members of national human rights institutions, human rights defenders and grass-roots community activists as to how best to translate the essential elements of the rights to non-discrimination and equality into their national law.

The United Nations, national human rights institutions, and civil society organizations, such as the Equal Rights Trust, are often called upon to assist and advise governments, legislators and policymakers in the process of developing these comprehensive laws. To date, no clear, comprehensive and authoritative guidance has existed to respond to such requests. The present guide fills that gap. Based on an exhaustive analysis of international law and extensive consultations with experts from across the globe, it provides clear, unequivocal guidance on the laws which States must adopt in order to fulfil their obligations to respect, protect and fulfil the rights to equality and non-discrimination.



Much remains to be done. The adoption of comprehensive anti-discrimination laws is a necessary, but not sufficient, step in the journey towards the elimination of discrimination. The adoption of these laws is most effective when elaborated in comprehensive and adequately resourced national and regional action plans, in close collaboration with affected individuals, their organizations and movements. The guide provides a floor, not a ceiling.

In Our Common Agenda, a vision of the future for global cooperation through an inclusive, networked, and effective multilateralism, the Secretary-General noted: “Racism, intolerance and discrimination continue to exist in all societies, as seen during the pandemic with scapegoating of groups blamed for the virus. As a start, the adoption of comprehensive laws against discrimination, including based on race or ethnicity, age, gender, religion, disability, and sexual orientation or gender identity, is long overdue.”<sup>1</sup>

It is no coincidence that an appeal for the enactment of comprehensive anti-discrimination law is at the heart of Our Common Agenda. States’ recognition of the need to eliminate all forms of discrimination – and their commitment to doing so – is manifest in both the opening words of the Universal Declaration of Human Rights and in the call of the 2030 Agenda for Sustainable Development and its Sustainable Development Goals to leave no one behind.

This guide provides instruction on how to develop and enact such laws and thus to provide the necessary framework and foundation for a world in which all are equal in dignity and rights.



**Dr. Evelyn Collins CBE**  
Chair of the Board of Trustees  
Equal Rights Trust



**Volker Türk**  
United Nations High Commissioner  
for Human Rights

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<sup>1</sup> A/75/982, para. 34. The report of the Secretary-General was presented at the seventy-fifth session of the General Assembly in 2021. See also [www.un.org/en/un75/common-agenda](https://www.un.org/en/un75/common-agenda).

# ACKNOWLEDGEMENTS

The present guide is the product of a two-year collaboration between the Office of the United Nations High Commissioner for Human Rights (OHCHR) – the institutional expression of a global commitment to human rights – and the Equal Rights Trust – the leading international civil society organization supporting those working to secure the adoption and implementation of equality laws.

The research, development and drafting of the guide was carried out by a joint team. For OHCHR, the lead on drafting and development was taken by the Indigenous Peoples and Minorities Section, in consultation with a broad range of its staff working in the field and at headquarters. For the Equal Rights Trust, two members of staff – Jim Fitzgerald and Sam Barnes – were responsible for drafting and development, a process that also drew on the expertise of the Trust’s wide-ranging networks, with particular thanks due to Latham & Watkins law firm for its valuable research on part one of the guide.

The process of developing the guide – from conceptualization through to final review – was guided by an independent advisory committee composed of leading experts in anti-discrimination and equality law, which included experienced advocates, academics and activists and individuals with experience in government, non-governmental and intergovernmental settings, representing a broad range of different legal systems and traditions. OHCHR and the Equal Rights Trust wish to acknowledge and thank the members of the Committee for their support throughout the process: Catalina Devandas Aguilar, Niall Crowley, Sandra Fredman, Nazila Ghanea, Nahla Haidar, Margarita S. Ilieva, Imrana Jalal, Tarun Khaitan, Abdul Koroma, Gay McDougall, Vitit Muntarbhorn and Grace Mumbi Ngugi.

OHCHR and the Equal Rights Trust also wish to thank an additional group of experts who volunteered their time to review, comment upon and validate all or parts of the guide, in particular: Barbora Bukovská (Article 19: International Centre against Censorship); Joshua Castellino (Minority Rights Group); Sophia Fernandes (Westminster Foundation for Democracy); Beth Gaze (Melbourne Law School); Nena Georgantzi (AGE Platform Europe); Tamas Kadar (European Network of Equality Bodies); John Kinahan (Forum 18); Kseniya Kirichenko (International Lesbian, Gay, Bisexual, Trans and Intersex Association); Antonia Kirkland (Equality Now); Susheela Math and Julia Harrington Reddy (Open Society Justice Initiative); Dragana Ciric Milovanovic (Disability Rights International); David Oppenheimer (Berkeley Center on Comparative Equality and Anti-Discrimination Law); Simon Rice (University of Sydney); Bridget Sleaf (HelpAge International); and Meghan Campbell (Oxford Human Rights Hub).

OHCHR and the Equal Rights Trust gratefully acknowledge the many States, national human rights institutions, civil society organizations, United Nations entities and human rights defenders that provided information during the preparation of the guide, either by responding to calls for information, and/or by taking part in one or more of the four consultation meetings.

Finally, OHCHR and the Equal Rights Trust wish to recognize and thank all those survivors of discrimination whose experience, activism and litigation has helped to develop understanding of the right to non-discrimination and to shape the content of comprehensive anti-discrimination law. The legal standards that we set out here are the product of their struggle and we dedicate the guide to them.

# EXECUTIVE SUMMARY

The purpose of the present guide is to provide Governments, legislators, civil society actors and others acting in the public interest with authoritative guidance on the development of comprehensive anti-discrimination legislation consistent with international legal standards on the rights to equality and non-discrimination. The guide examines the development, interpretation and implementation of these international standards in detail, before setting out the key principles that must be codified into law to ensure compliance with international law. These key principles are set out in this executive summary.

The standards presented in this executive summary reflect the necessary content of anti-discrimination legislation if it is to be comprehensive and effective in eliminating all forms of discrimination and realizing equality and thus allow States to meet their core international law obligations to respect, protect and fulfil the rights to equality and non-discrimination. The elements of law presented here are derived from international human rights law, as examined in detail in the substantive chapters of the guide. As detailed in the research methodology, in addition to an exhaustive review of international law in this area, the guide has been prepared following extensive consultations with a broad range of stakeholders. Throughout the guide, alongside discussion of relevant international standards, examples are provided of how legislators around the world have transposed the requirements of international law into the domestic legal order. In addition, the guide includes detailed explanations of the key legal concepts and case studies and examples to demonstrate their operation in practice.

While the complete guide includes detailed discussion of the development, interpretation and application of international legal standards, this executive summary simply sets out key principles that must be codified into national law to comply with these standards. Thus, in addition to summarizing the content of the publication, this summary functions as a stand-alone toolkit for those engaged in the development of comprehensive anti-discrimination legislation. In many cases, adherence to international standards in this area of law requires States to establish rules, procedures or institutions, but allows discretion in how these are reflected in domestic law. In other cases, States are required to adopt specific definitions that are provided in instruments of international law, including the treaties themselves and their interpretation by competent bodies. In these latter cases, the relevant definition is presented in a textbox in order that legislators and civil society groups involved in developing laws may incorporate them directly into draft legislation to ensure its consistency with international human rights standards. In other cases, the summary provides instruction and guidance on what the law must provide for.

## I. OBLIGATION TO ENACT COMPREHENSIVE ANTI-DISCRIMINATION LAW

Comprehensive anti-discrimination legislation<sup>1</sup> is law adopted with the purpose and effect of eliminating all forms of discrimination and promoting equality for all.

States must enact comprehensive anti-discrimination legislation in order to meet their obligations under international human rights law to respect, protect and fulfil the rights to equality and non-discrimination for all. The adoption of such legislation is also a necessary element in the protection of minority rights, given that the prohibition of all forms of discrimination and the realization of equality lie at the centre of international law on the protection of minorities.

Comprehensive anti-discrimination legislation is distinct from specific anti-discrimination laws – those that prohibit discrimination against a particular group, on a particular ground or in a particular area of life. It is also distinct from general non-discrimination and equality guarantees in national constitutions or other laws.

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<sup>1</sup> “Comprehensive anti-discrimination legislation” and “comprehensive anti-discrimination law” are used interchangeably in the present guide.

States may adopt specific anti-discrimination laws or other laws that seek to identify and address structural barriers to participation for members of particular groups. The adoption of such laws or of general non-discrimination provisions does not conflict with the obligation to adopt comprehensive laws, but nor does it discharge it: States are required to adopt comprehensive anti-discrimination legislation, irrespective of the adoption of any specific laws or other non-discrimination provisions already in force.

In order to ensure the effectiveness of anti-discrimination legislation, States must establish detailed rules, institutions and procedures for the effective enforcement and implementation of the rights to equality and non-discrimination and set out clear duties that apply to all persons, including public authorities and private actors. These provisions may be included in the comprehensive anti-discrimination legislation itself or through amendment to laws in areas such as civil procedure.

Comprehensive anti-discrimination legislation usually takes the form of a single law. In a small number of countries, a combination of two or more laws have been adopted that together are comprehensive or near-comprehensive in their coverage.<sup>2</sup> Moreover, even in States with a single law, giving effect to some aspects of States' obligations may require the adoption of other laws and policies.<sup>3</sup> Throughout the guide the terms “comprehensive anti-discrimination law” and “comprehensive anti-discrimination legislation” are used interchangeably.

## II. CONTENT OF COMPREHENSIVE ANTI-DISCRIMINATION LAW

To be comprehensive, anti-discrimination legislation must meet a number of criteria. In particular, international human rights law requires that anti-discrimination legislation:

- Prohibit all forms and manifestations of discrimination on the basis of an extensive and open-ended list of grounds and in all areas of life regulated by law.
- Provide explicit definitions of all forms of discrimination that are consistent with the definitions recognized under international human rights law.
- Explicitly permit, require and provide for the adoption of positive action measures designed to make progress towards the realization of equality for persons and groups that experience or are exposed to discrimination and disadvantage.
- Operationalize the rights to equality and non-discrimination within the public and private spheres by ensuring accessibility and establishing equality duties.
- Provide for: effective remedy, including sanctions that are effective, dissuasive and proportionate; recognition, compensation and restitution for survivors; and relevant institutional and societal remedies.
- Establish the necessary procedural safeguards and adjustments to ensure access to justice, including, but not limited to, provision for the shifting of the burden of proof after a *prima facie* case of discrimination has been made by a complainant and provision for the prohibition of victimization.
- Provide for the establishment of an independent, specialized equality body with sufficient resources, functions and powers to ensure its effectiveness.
- Mandate the adoption of other implementation measures necessary to address structural discrimination and make progress towards equality. This should include the use of equality impact assessment in all aspects of public law and policy to identify and avert any discriminatory policy impacts before they occur and to assess and ensure the necessary impacts on realizing equality.

<sup>2</sup> For example, in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, does not apply in the area of employment. This area is regulated by the Employment Equity Act, 1998, which establishes complementary equality and non-discrimination guarantees. In Finland, the Non-Discrimination Act, 2014, does not expressly list “gender” as a ground of discrimination. However, according to section 3 (1) of the Act, provisions on the prohibition of discrimination based on gender and the promotion of gender equality are governed by the Act on Equality between Women and Men, 1986.

<sup>3</sup> For instance, procedural rules regulating the burden of proof in discrimination cases may be included within codes of civil procedure or regulations governing evidence.

## A. Prohibition of discrimination

To be comprehensive, anti-discrimination legislation must define and prohibit all forms of discrimination on the basis of an extensive and open-ended list of characteristics, in all areas of life regulated by law. The right to non-discrimination can be understood as having four dimensions: (a) the personal scope of the right; (b) the forms of prohibited conduct; (c) the material scope of the right; and (d) justification. Anti-discrimination law should provide clear definitions in each of these areas.

### 1. Personal scope

To meet the requirements of international law, comprehensive anti-discrimination legislation must prohibit discrimination that occurs on the basis of an extensive and open-ended list of protected grounds. This requires the explicit protection of all characteristics recognized in international law, as well as any other grounds that require protection in a given society. Comprehensive anti-discrimination law must permit the possibility of recognizing additional grounds of discrimination, through the inclusion of an “other status” or similar provision. Anti-discrimination law may also include criteria for the identification and recognition of new grounds of discrimination.

**Discrimination is prohibited on the basis of age; birth; civil, family or carer status; colour; descent, including caste; disability; economic status; ethnicity; gender expression; gender identity; genetic or other predisposition towards illness; health status; indigenous origin; language; marital status; maternity or paternity status; migrant status; minority status; national origin; nationality; place of residence; political or other opinion; pregnancy; property; race; refugee or asylum status; religion or belief; sex; sex characteristics; sexual orientation; social origin; social situation; or any other status.**

Anti-discrimination legislation must ensure that discrimination is prohibited in situations in which: (a) it arises on the basis of a person’s association with a group or another person possessing a particular characteristic; and (b) it arises due to a perception (whether accurate or not) that a person possesses a particular characteristic. Discrimination must also be prohibited when it arises on the basis of a combination of characteristics (multiple discrimination).

**The prohibition of discrimination includes discrimination based on association and perception.**

**Discrimination based on perception occurs when persons are disadvantaged on the basis of a perception – whether accurate or not – that they possess a protected characteristic. Discrimination based on association occurs when persons are disadvantaged on the basis of their association with another person or persons possessing a protected characteristic.**

**The prohibition of discrimination includes multiple (intersectional and cumulative) discrimination and recognizes the particular harm involved.**

**Cumulative discrimination takes place when discrimination occurs on two or more, separate, grounds. Intersectional discrimination takes place when discrimination occurs based on a combination of grounds that interact with each other in a way that produces distinct and specific discrimination.**

## 2. Prohibited conduct

Comprehensive anti-discrimination legislation must explicitly define and prohibit all forms of discrimination recognized under international law, including (a) direct discrimination; (b) indirect discrimination; (c) harassment; (d) denial of reasonable accommodation; (e) failure to ensure accessibility; (f) segregation; and (g) victimization (retaliation). Anti-discrimination law must prohibit instruction and incitement to any form of discrimination. Discrimination may be committed intentionally or unintentionally. Discrimination may also be overt or covert.

**The prohibition of discrimination includes all forms of discrimination. It covers each of the following forms of prohibited conduct:**

- **Direct discrimination** occurs when a person is treated less favourably than another person is, has been or would be treated in a comparable situation on the basis of one or more protected grounds; or when a person is subjected to a detriment on the basis of one or more grounds of discrimination.
- **Indirect discrimination** occurs when a provision, criterion or practice has or would have a disproportionate negative impact on persons having a status or a characteristic associated with one or more grounds of discrimination.
- **Ground-based harassment** occurs when unwanted conduct related to any ground of discrimination takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- **Reasonable accommodation** means necessary and appropriate modifications or adjustments or support, not imposing a disproportionate or undue burden, to ensure the enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms and equal participation in any area of life regulated by law. Denial of reasonable accommodation is a form of discrimination.
- **Accessibility** is a proactive, systemic duty that requires the adoption and implementation of measures necessary to ensure equal access to the physical environment, to transportation, to information and communications, to places of work, education and health care and to other facilities and services open or provided to the public. The State is obliged to ensure accessibility in all spheres of life. Failure to comply with accessibility standards is a form of prohibited conduct.
- **Segregation** occurs when persons sharing a particular ground are, without their full, free and informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment.
- **Victimization** occurs when persons experience adverse treatment or consequences as a result of their involvement in a complaint of discrimination or to proceedings aimed at enforcing equality provisions.

Sexual harassment is a distinct form of harm entailing unwanted conduct or behaviour that is sexual in nature. The duty to prohibit sexual harassment forms a specific and complementary obligation. States may prohibit sexual harassment in legislation on specific sexual offences, in the criminal law more broadly or in other legislation. The prohibition of sexual harassment should be defined separately and in addition to the prohibition of ground-based harassment.

**Sexual harassment occurs when unwanted conduct of a sexual nature takes place with the purpose or effect of violating the dignity of a person in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.**

### 3. Material scope

Comprehensive anti-discrimination law must provide protection from discrimination in all areas of life regulated by law and cover the conduct of all persons, including public and private actors.

**The prohibition of discrimination applies in all areas of life regulated by law. The duty to refrain from discrimination applies to all persons, including (but not limited to) public authorities and private entities.**

### 4. Justifications

In some circumstances, differences in treatment or the differential impacts of provisions, criteria or practices arising on the basis of a protected ground of discrimination may be justified. Any justification should be assessed against clear criteria, established in comprehensive anti-discrimination legislation. These criteria should include the existence of a legitimate aim and confirmation that the means of achieving such an aim are appropriate, necessary and proportionate. A legitimate aim may never be justified by reference to discriminatory stereotypes. Certain forms of prohibited conduct (including harassment, sexual harassment and victimization) cannot – by definition – be justified. Direct discrimination may only be justified exceptionally, on the basis of strictly defined criteria.

**Any provision, criterion or practice adopted pursuant to a legitimate aim that is appropriate, necessary and proportionate to that aim will not give rise to a finding of discrimination. Direct discrimination may be justified only very exceptionally.**

## B. Positive action

Comprehensive anti-discrimination legislation must explicitly both permit and require the adoption of positive action measures. Positive action – sometimes referred to as affirmative action, specific measures or temporary special measures – includes any targeted measures developed for the purpose of advancing or achieving equality and redressing disadvantage. Positive action must not result in the perpetuation of isolation, segregation, stereotypes or stigma or lead to the maintenance of unequal or separate standards. Positive action measures must be time-limited, although they must also be established for sufficient time to bring about durable positive change in eliminating disadvantage.

**The right to equality requires the adoption of positive action.**

**Positive action includes any targeted legislative, administrative or policy measures to reduce or overcome inequality and realize equality. Such measures should be time-limited, subject to regular review and proportionate to their purpose of advancing or achieving equality.**

**Time-limited should not be interpreted to mean necessarily short in duration. Positive action measures must be discontinued once their purpose has been achieved.**

**Positive action does not amount to discrimination.**

## C. Equality duties

### 1. Accessibility

States have an obligation to ensure access, on an equal basis with others, to the physical environment, transportation, information and communication, and facilities and services. Accessibility is a proactive, systemic duty. It is an *ex ante* duty, which exists irrespective of an individual request for access; it is an unconditional duty, in that failure to comply cannot be excused by reference to the burden on the provider.

Anti-discrimination laws should establish duties on both State and private actors to identify and remove barriers that prevent equality of access. They should also establish a duty on the State to develop, promulgate and monitor the implementation of minimum standards and guidelines for accessibility. Failure to comply with accessibility standards is a form of discrimination that should be prohibited under comprehensive anti-discrimination legislation.

### 2. Statutory equality duties

Comprehensive anti-discrimination legislation should provide for the establishment of statutory equality duties, which offer an effective and necessary means to operationalize the rights to equality and non-discrimination and ensure their integration in the systems and work of public authorities and other duty bearers. Equality duties include: preventive duties, which seek to avert acts of discrimination before they occur; institutional duties, which seek to advance equality in the work and operations of public and private sector organizations; and mainstreaming duties, which seek to integrate and centralize equality goals in the processes of public decision-making. A combination of these approaches is required in order to be effective.

## D. Effective remedy

Anti-discrimination laws should provide for effective remedy from discrimination. Remedy includes, but is not limited to: sanctions for those found responsible for discrimination; reparations, including recognition, compensation and restitution for victims of discrimination; and institutional and societal measures designed to address the social causes and consequences of discrimination. Anti-discrimination laws should provide for sanctions for discrimination that are effective, dissuasive and proportionate. They should also provide for recognition and reparation for victims of discrimination, including in the form of compensation, restitution and rehabilitation. Reparations should be victim-focused and equality-sensitive.

Anti-discrimination laws should empower courts and bodies with responsibility for determining cases of discrimination to order such institutional or societal measures as appropriate to correct, deter and prevent discrimination and to ensure non-repetition. In situations in which national law specifies types of remedies for victims of discrimination, such lists of possible remedies should not be exhaustive; courts and other adjudicating bodies should have discretion to fashion remedies appropriate to the harm at issue in any particular case.

## E. Enforcement and access to justice

Comprehensive anti-discrimination law must ensure effective access to justice for those who experience discrimination. Effective access to justice consists of justiciability, availability, accessibility, quality and accountability.

To meet these requirements, States must establish and maintain well-resourced, independent and impartial enforcement bodies to deal with complaints of discrimination throughout their territories, including in rural areas. Such bodies may include both judicial and administrative mechanisms, including equality bodies. These bodies should be provided with adequate enforcement powers to provide effective remedy in situations in which discrimination is found to have occurred. Such bodies must be of good quality and accountable, responsive to the views, situations and needs of persons and groups exposed to discrimination, and participatory.



States must remove legal, financial, physical, communicative and other barriers to participation in the enforcement system through accessibility measures and procedural accommodation. Legal aid and support should be provided wherever necessary to ensure that the right to non-discrimination is realizable.

An inclusive approach should be taken to legal standing and the participation of interested third parties.

Anti-discrimination legislation should ensure that there are no barriers to the admissibility of evidence that could establish a finding of discrimination. Rules of evidence must be adapted to ensure effective justice. This includes, in all areas of law except the criminal, the adoption of rules requiring a “shift” in the burden of proof from the claimant to the respondent once a *prima facie* case of discrimination has been established.

**In situations in which a person who is alleged to have experienced discrimination establishes before a court, or other competent authority, facts from which it may be presumed that there has been discrimination (a *prima facie* case), it shall be for the respondent to prove that there has been no breach of the right to non-discrimination.**

In many cases, justice has only been available to victims of discrimination at the international level, after domestic remedies have been exhausted. States should ensure that individuals can submit complaints of discrimination to the United Nations treaty bodies by ratifying the relevant optional protocols and making the necessary declarations under the relevant international human rights instruments. When adopting comprehensive anti-discrimination legislation, States should seize the opportunity to make these declarations, as well as to affirm their role vis-à-vis the national system and to inform the public of their availability.

## F. Equality bodies

Comprehensive anti-discrimination law must provide for the establishment of independent, effective and accessible equality bodies. These bodies must be afforded the resources and given the functions and powers necessary to fully and effectively discharge the full breadth of their mandate to promote equality and prevent discrimination. They must be enabled to: (a) provide support, including legal advice and representation, to persons and groups exposed to discrimination and intolerance and pursue litigation on their behalf; (b) promote good equality practice in all sectors; (c) conduct research; (d) provide information on rights and engage in public debate on equality; and (e) provide policy advice. Equality bodies may also be mandated to consider complaints of discrimination, and issue recommendations or make decisions. In situations in which equality bodies have decision-making authority, they must be empowered to ensure effective access to justice and to provide both remedy and sanction.

## G. Implementation

Comprehensive anti-discrimination legislation must require and provide a framework for the State to discharge its institutional and policy obligations to implement the rights to equality and non-discrimination. This necessitates, among other obligations:

- The development, adoption and implementation of equality and non-discrimination policies and strategies, and the mainstreaming of equality and non-discrimination considerations into all other policies and programmes.
- The integration of equality impact assessment in all aspects of public law and policy. Equality impact assessment entails pre-emptive, consultative, and data-driven assessment of laws, policies or decisions in order to identify and avert any discriminatory impacts; to identify and ensure that the particular needs of persons and groups who experience or are exposed to discrimination are accommodated and addressed; and to ensure that equality is effectively advanced.

- The establishment of a framework to monitor equality and non-discrimination and the effectiveness of laws, policies and practices through the collection, analysis and publication of disaggregated data.
- The establishment and implementation of mechanisms for consultation and participation by persons and groups who experience discrimination, and their representative associations, in legislation, policy and institutional initiatives designed to combat discrimination and promote equality.

International law also requires that States take all appropriate measures to amend or abolish laws, policies or practices that discriminate or lead to discrimination in practice.

## H. Minority rights and anti-discrimination law

The rights to equality and non-discrimination are at the heart of minority rights. These rights apply equally to minorities and are essential to the realization of minority rights. The realization of the rights of national, ethnic, religious and linguistic minorities necessitates effective protection and fulfilment of the right to non-discrimination. As such, the enactment, enforcement and implementation of comprehensive anti-discrimination law is essential if States are to fulfil their obligations to respect, protect and fulfil the rights of minorities.

The prohibition of discrimination inheres within minority rights. States must ensure that all aspects of the right to non-discrimination are effective in their efforts to guarantee minority rights. This includes ensuring that laws, policies and practices do not discriminate directly or indirectly against members of minority communities enjoying their cultures, professing or practising their religions or using their languages. It also includes ensuring that measures to respect and secure the rights of members of minorities, in community with the other members of their group, to engage in cultural and religious practices and the use of language do not result in discrimination on any ground.

The rights of minorities to non-discrimination and equality cannot be effectively realized without a broad range of minority rights guarantees being effective and realized in practice. These include recognition, genuine participation and consultation in all matters of relevance to the community.

While the right to non-discrimination is central to the enjoyment of minority rights, the realization of these rights also requires a range of specific legislative, policy and practical measures, which States should adopt in parallel with the enactment of comprehensive anti-discrimination legislation. Certain groups – in particular indigenous peoples – enjoy explicit rights under international human rights law that go beyond those set out as core requirements for minorities.

## I. Discriminatory violence and hate crime

To meet their commitments and international law obligations to eliminate all forms of discrimination, States must criminalize discriminatory violence and other bias-motivated acts that are criminal in nature. States must ensure that criminal law provides both explicit recognition of, and specific penalization for, bias motive in situations in which violent or other criminal or misdemeanour acts have been committed for reasons related to a ground of discrimination.

Criminal and misdemeanour law should provide for recognition of a bias motive for any crime animated by any ground recognized under international law. This recognition can be done either by designating specific criminal law provisions related to discriminatory violence or hate crime or by adding qualifying provisions on bias motive to criminal law provisions related to extant criminal acts. If the latter approach is taken, it is important that bias motive is recognized in relation to all possible relevant criminal and misdemeanour acts. Recognition of hate- or animus-motivated bias should inform sentencing.

The list of grounds set out under criminal law must, of necessity, be closed (i.e. not include the category “or other similar status”), because of the requirement of foreseeability in criminal law.

## J. Discrimination and expression

The relationship between expression and the law on the prohibition of discrimination is complex.

Expression and communication can be components of conduct giving rise to ground-based harassment, a proscribed act within the law on the prohibition of discrimination.

Expression and communication also play other roles in anti-discrimination law, including, potentially, as evidence of intention or motive, as well as in cases concerning an instruction to discriminate.

States must prohibit incitement to violence, discrimination and hostility or hatred on all grounds recognized under international law, including, but not limited to, age, disability, gender expression and gender identity, nationality, race or ethnicity, religion, sex, sex characteristics and sexual orientation.

International law also requires that States condemn all propaganda and all organizations that are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or that attempt to justify or promote racial hatred and discrimination in any form.

Prohibition does not necessarily mean criminalization. States should distinguish between expression that requires criminalization, expression that requires civil or administrative penalties and expression that merits other forms of response. States should also ensure that the application of measures to combat hate speech does not result in any form of discrimination against any person or group.

Courts at national and regional levels have ruled on cases involving hate speech under the law on the prohibition of discrimination. Regional tribunals have found that States have violated the right to non-discrimination in cases in which minorities and other marginalized persons or groups have been exposed to hate speech and the response by the public authorities has been inadequate.

Hate speech should, inter alia, be addressed with positive interventions: education, awareness-raising, support for victims to enable counter-speech and the dissemination of positive narratives, including through public information campaigns with positive messaging celebrating diversity.

## K. Promoting equality, inclusion and diversity

States' international treaty obligations commit them not simply to prohibiting discrimination in law, but to eliminating it in fact. Taking positive, proactive measures to tackle the cultural and social drivers of discrimination are indispensable elements of these obligations. This requires a comprehensive programme of action, required and underpinned by enforceable duties and obligations within anti-discrimination legislation. Duties binding on a State include the adoption of proactive measures to combat prejudice, stereotypes and stigma including, but not necessarily limited to:

- The empowerment and participation of rights holders.
- Measures to promote diversity, inclusion and equal representation in institutions.
- Measures to challenge prejudice, stereotypes and stigma and to promote diversity, inclusion and equality through education.
- Informing public perceptions through the media, both mainstream media and social media, and wider awareness-raising efforts.
- Training individuals, including public officials, and groups in all areas of life in equality and non-discrimination law and principles, as well as in the situation and experiences of rights holders.

If States are to fulfil their obligations and honour their commitments to eliminating discrimination and ensuring equality of participation, their efforts should encompass and go beyond combating prejudice, stereotypes and stigma. The focus should be not only on countering negative social forces, but on actively promoting equal, diverse and inclusive societies.

## L. Conclusion

Inevitably, the guide focuses in large part on negative proscriptions – on States’ duties to prohibit, prevent and enforce. These measures are absolutely necessary and essential if States are to fulfil their obligations to respect, protect and fulfil the right to non-discrimination. However, the adoption of such laws represents not an end but a beginning – not a ceiling, but a floor from which to build. Ultimately, States will only realize the rights to equality and non-discrimination by adopting comprehensive anti-discrimination laws and using these laws as a platform, or foundation, for a system-wide effort to promote and achieve an equal, diverse and inclusive society.

# INTRODUCTION

Inequality impairs human dignity, causes and perpetuates poverty and limits the enjoyment of human rights.

Inequality is a barrier to participation in economic, social and political life. It restricts the life chances of people and serves to oppress and marginalize entire communities. Beyond the experience of those directly affected, unequal societies are more likely to be beset by health and social problems ranging from higher levels of incarceration, violence and other social problems, to lower levels of social mobility.<sup>1</sup> Inequality undermines social cohesion and fosters conflict. It exacerbates the exclusion of minorities and other marginalized groups. Above all, it embeds unfairness, with powerful negative consequences for people and communities.

In 2015, 193 States came together to affirm the 2030 Agenda for Sustainable Development. In so doing, they pledged that “no one will be left behind” in this new global effort to eradicate poverty, secure human rights and protect the planet.<sup>2</sup> This statement reflected the recognition that sustainable development can only be achieved by addressing inequality, a fact reinforced by Goal 10 of the Sustainable Development Goals on reducing inequality within and between States, Goal 5 on gender equality and the large number of other goals and targets focused on equality of access, participation and outcome.

This central status of equality in the 2030 Agenda echoes its primary position within the Universal Declaration of Human Rights, adopted in 1948. Born out of the horrors of the Holocaust and the atrocities of the Second World War, which witnessed the extermination of “millions of Jews, hundreds of thousands of Roma and Sinti people, people with disabilities, homosexuals, prisoners of war, political dissidents and members of Resistance networks”,<sup>3</sup> the Universal Declaration of Human Rights places the rights to equality and non-discrimination at the heart of the human rights system. Article 1 affirms that “all human beings are born free and equal in dignity and rights”. Article 2 makes clear that human rights should be afforded to everyone “without distinction of any kind”.

These two global declarations, proclaimed more than 65 years apart, demonstrate States’ recognition that efforts to create just, inclusive and peaceful societies, to eliminate poverty and to ensure enjoyment of human rights all require a focus addressing inequality.

## Inequality and the right to non-discrimination

Inequality takes many forms and has myriad causes – economic, social, political and cultural. As such, creating a world in which all can and do participate equally requires a coordinated, collaborative and comprehensive approach. The elimination of discrimination is a key part of this puzzle: there can be no equality in situations in which persons and groups are treated unfavourably or subjected to disadvantages on the basis of their status, beliefs or identity. Indeed, this has been widely and consistently recognized by States, through their adoption of international human rights instruments that place the right to non-discrimination at their heart.

The adoption of comprehensive anti-discrimination laws – laws that have the purpose and effect of prohibiting all forms of discrimination – is an essential step in the effort to realize the right to non-discrimination. Without the enactment of laws that prohibit all forms of discrimination on the basis of all grounds recognized in international law and in all areas of life regulated by law, provide for the effective enforcement of the right and mandate positive action measures to address historic or structural discrimination, States will be unable to give effect to the right to non-discrimination. It is only by ensuring the effectiveness and enjoyment of the right to non-discrimination that States will realize their ambitions to combat inequality.

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<sup>1</sup> See, for example, Richard Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (London, Allen Lane, 2009).

<sup>2</sup> General Assembly resolution 70/1.

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights, “75 years after Auschwitz – Holocaust education and remembrance for global justice”, statement by Michelle Bachelet, United Nations High Commissioner for Human Rights, 27 January 2020.

## Purpose of the present guide

The purpose of this guide is to provide legislators and advocates with guidance on the development of comprehensive anti-discrimination laws. It seeks to consolidate and synthesize international legal standards – as set out in the United Nations human rights conventions and the binding interpretations of these conventions by the relevant bodies – and to provide clear, accessible guidance on the necessary scope and content of these laws if States are to meet their international obligations. It also brings together good practice examples from across the globe, in an effort to exemplify these standards and elaborate the elements of law necessary to ensure their effectiveness.

Inevitably, in taking this approach, the guide contains a discussion of States’ obligations and duties and the requirements of international law. These obligations themselves derive from instruments of international law that States chose to develop and adopt, in recognition of the need to eliminate discrimination in order to achieve their ambition of tackling inequality. The central object and purpose of these international legal instruments is to create societies in which all can participate equally. Thus, while framing the adoption of comprehensive anti-discrimination law as an obligation, the aim in the guide is also to provide a map for States seeking to meet their ambitions and commitments as regards achieving an equal world.

## Right to non-discrimination in international law

Following the adoption of the Universal Declaration of Human Rights, a range of binding international human rights instruments were adopted, with the prohibition of discrimination being a central feature throughout. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination in the enjoyment of all of the rights that they guarantee, while the former also provides a free-standing, autonomous right to non-discrimination and the right of all persons to equal recognition before the law, and equal protection and benefit of the law.

Beyond those two conventions, the right to non-discrimination is central to each of the other international human rights treaties. Specific conventions have been adopted on the elimination of racial discrimination and discrimination against women and on the rights of persons with disabilities, while treaties ranging in focus from the prohibition of torture to the rights of the child each contain non-discrimination provisions. Indeed, the rights to equality and non-discrimination have been recognized as “the cornerstones of all human rights”,<sup>4</sup> sitting at the absolute core of the human rights protections enjoyed by minorities and other marginalized or stigmatized groups.

## Evolving understandings of the rights to equality and non-discrimination

In the early years of international human rights practice, the rights to equality and non-discrimination were understood as tantamount to a right to be treated equally. At the heart of this understanding was the notion of comparison – that individuals should not be treated differently when compared with others in a similar situation, on the basis of certain important characteristics or “grounds”. All individuals, it was understood, should be treated alike, irrespective of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Over time, as new human rights instruments were adopted, and international practice was influenced by developments at the national level, understandings of the rights to equality and non-discrimination have evolved. In essence, States have elaborated and codified the elements of law necessary to give effect to their central, overarching commitment to eliminate all forms of discrimination. While it is beyond the scope of this publication to trace these developments in detail, a brief discussion of some key trends serves to demonstrate why and how both States and international bodies have concluded that it is only through the adoption of

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<sup>4</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 4.

comprehensive anti-discrimination laws, and their effective enforcement and implementation, that the rights to equality and non-discrimination can be effectively guaranteed.

First, the personal scope of the right to non-discrimination has been clarified, as States have recognized that discrimination on the basis of “other status” covers many characteristics omitted from the short list of characteristics included by name in the first international treaties. The early human rights instruments listed only a small number of specified grounds, omitting age, disability and sexual orientation, among others. As States have recognized that unfavourable treatment arising on the basis of these and other grounds is as serious and as harmful as such treatment arising on those grounds listed in the first instruments, so a broader list of grounds has been codified into law. Reflecting this, human rights treaty bodies have recognized a growing number of grounds as forms of “other status”: in 2021, the list of grounds recognized in international law numbered more than 20. In the process, the treaty bodies have reinforced and reiterated the need for an open-ended and inclusive approach to recognizing grounds of discrimination – the progressive recognition of additional grounds over the decades underlines the need to keep the list open. A further development is the recognition that acts based on the perception that a person possesses a particular characteristic, or on the basis of association with those who do, also constitute discrimination, irrespective of the actual status of the person concerned. In parallel, human rights bodies have increasingly recognized States’ obligations to prohibit intersectional discrimination – that is, discrimination which occurs because of the interaction between two or more different characteristics – something that can only be achieved through comprehensive anti-discrimination laws.

Second, different forms of discrimination have been defined and expressly prohibited, as States have recognized that the initial interpretation of the right – as a right to be treated in the same way – failed to effectively address all forms of discrimination. In particular, there has been a recognition that treating people with different needs and characteristics equally can give rise to discrimination. As such, additional forms of discrimination have been codified into law at both the national and international levels. The concept of indirect discrimination – which arises when the application of universal rules has a disproportionate negative impact on those with a particular characteristic – is long-established in international law. In a separate development, international law has recognized a right to reasonable accommodation – adjustments necessary to enable persons with disabilities or other particular groups to participate on an equal basis – as an essential element of the right to non-discrimination. These and other developments reflect a progression from a narrow interpretation of the right to non-discrimination, focused upon the prohibition of differences in treatment, to an inclusive model, which seeks equal participation by recognizing and accommodating difference.

Third, States developed new measures of remedy to address the full range of harms arising from discrimination and established the necessary procedural safeguards to ensure the effectiveness of anti-discrimination laws. These measures have been codified at the international level. At the domestic level, challenges experienced in the application, implementation and enforcement of anti-discrimination laws have led to the development of new standards in the areas of remedy for discrimination and access to justice for those exposed to discrimination. Human rights bodies have provided guidance on the measures that States should incorporate into their laws in order to ensure equal and effective access to courts, to ban and redress victimization and to adapt rules regulating evidence and proof to ensure effectiveness of the right to non-discrimination. In situations in which such a claim is successful, the notion of remedy has been expanded to incorporate measures designed to address the institutional and societal aspects of discrimination.

Fourth, there has been a growing recognition of the necessity and scope of positive, proactive measures to ensure non-discrimination in the enjoyment of rights and equality of participation in all areas of life. This is built on a recognition that eliminating discrimination alone will not address all status- or identity-based inequalities, many of which are deeply rooted in social and economic structures or arise as a result of historic patterns of discrimination. Positive action – often referred to as special measures or temporary special measures – involves targeted, preferential measures designed to address such inequalities. While the earliest human rights instruments recognized that States might adopt such targeted measures designed to redress disadvantage and increase equality for certain persons and groups, it has subsequently been established that such measures are not simply permissible but required. More broadly, since the turn of the century, there has been a growing recognition that achieving substantive equality requires a holistic, and comprehensive



approach, which extends beyond the prohibition of discrimination, and includes the adoption of a wide range of other proactive measures.

A fifth key area concerns the role of the law in addressing the social forces – prejudice, stereotypes and stigma – that underpin and drive many manifestations of discrimination. On the one hand, international law has always recognized that discrimination can be both intentional and unintentional. Accordingly, definitions of discrimination focus on the causal link between a person’s characteristic(s) and the harm that they have experienced, rather than on assessing the motivation of the discriminating party. On the other hand, international law recognizes obligations on the State to address the root causes of discrimination, through obligations to take measures to combat prejudice, stereotypes, stigma and other social or cultural practices and patterns of behaviour that undermine equality. As in other areas, while these obligations are recognized in the earliest human rights instruments, in recent years, the international human rights system has paid increasing attention to the role of prejudice, stereotypes and stigma, and has developed clear standards for States. Ultimately, there is increasing recognition that international human rights law requires the positive: the celebration of diversity.

Each of these developments reflects growing awareness of the full range of ways in which discrimination occurs and increasing understanding of how different forms of discrimination cause and compound inequality. Each reflects a recognition that protecting and fulfilling the right to non-discrimination requires the codification of legal concepts and definitions, procedures and rules, rights and obligations, in ways that necessitate specific legislation. As a result, in the decades since the millennium, a growing and accelerating consensus has emerged that States can only fully and effectively eliminate all forms of discrimination through the adoption, enforcement and implementation of comprehensive anti-discrimination laws.

## Minority rights and the prohibition of discrimination

The right to non-discrimination is central to the enjoyment of minority rights and, as such, the enactment of comprehensive anti-discrimination legislation<sup>5</sup> is an essential step in their realization.

In its most recent resolution on the rights of persons belonging to national or ethnic, religious and linguistic minorities, the Human Rights Council asserted, *inter alia*:

**the need to strengthen efforts to meet the goal of the full realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, including by addressing their economic and social conditions and marginalization, and to end any type of discrimination against them,**

...

**Emphasizing the importance of recognizing and addressing multiple, aggravated and intersecting forms of discrimination against persons belonging to national or ethnic, religious and linguistic minorities and the compounded negative impact on the enjoyment of their rights.**<sup>6</sup>

The right to non-discrimination sits at the heart of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). The United Nations human rights treaty bodies have consistently called upon States to guarantee minorities the full enjoyment of all human rights without discrimination, while in the universal periodic review and other mechanisms, States have consistently urged their peers to strengthen minority rights and minority inclusion. Speaking at the forty-third session of the Human Rights Council, the Government of Austria – the sponsor of the Human Rights Council minorities mandate – placed the right to non-discrimination at the centre of the protection of minorities.

These statements all reflect the fact that ethnic, religious and linguistic minorities frequently experience discrimination in areas of life ranging from access to education to participation in public life, and from employment to housing and health care. There are various elements of minority rights that have historically

<sup>5</sup> Throughout the guide, the terms “comprehensive anti-discrimination legislation” and “comprehensive anti-discrimination law” are used interchangeably.

<sup>6</sup> Human Rights Council resolution 43/8, eighth and tenth preambular paragraphs.



been understood as falling outside the right to non-discrimination. However, as with any human right, these rights cannot be realized without effective protection from discrimination. Indeed, more broadly, the rights of minorities to enjoy their own culture, to profess and practise their own religion or to use their own language can all be understood as specific manifestations and applications of the rights to equal protection of the law and to non-discrimination.

The realization of the right to non-discrimination entails protection for groups not traditionally considered minorities. Nevertheless, as noted above, there is now a clear recognition that the complexity and richness of the human personality necessitates an intersectional approach to the realization of minority rights and indeed all rights. It is for this reason that Minority Rights Group International – an organization focused on securing the rights of ethnic, religious and linguistic minorities and indigenous people – has noted that: “In order to reach the most excluded groups, we have to understand how discrimination intersects on different axes of identity – for example, gender, sexuality, age, race, religion and disability. These are not experienced independently of one another, but together compound the experience of discrimination in the lived reality of a particular individual.”<sup>7</sup> It follows from this and similar observations that in situations in which anti-discrimination laws do not provide comprehensive protection, minorities, among others, will be denied effective protection and remedy.

Beyond the need to realize the rights of minorities themselves, global attention to ensuring non-discrimination and equality for minorities is grounded in, among other things, the awareness that structural discrimination against minorities can give rise to humanity’s darkest forces, including war and genocide. It is also reflective of the long-standing but now increasingly urgent focus on addressing the social forces that underpin and drive patterns of discrimination.

Thus, while the adoption and implementation of comprehensive anti-discrimination laws is not a sufficient condition for the realization of minority rights, it is a necessary – indeed essential – element of an effective system of protection.

## Impact of comprehensive anti-discrimination laws

The enactment, enforcement and implementation of comprehensive anti-discrimination laws is essential if States are to address and eliminate all forms of discrimination and to ensure the enjoyment of minority rights. Since 2000, an increasing number of States – from South Africa to the Republic of Moldova and from the Plurinational State of Bolivia to the United Kingdom of Great Britain and Northern Ireland – have adopted comprehensive anti-discrimination laws. In so doing, these States have brought their national laws into compliance with their international legal obligations.

However, the adoption of such laws signifies much more than this. It indicates a recognition that the law should reflect shared values of dignity, inclusion and diversity, that it should provide effective protection from harm and that it is only by addressing discrimination that States can create more equal societies.

The vindication of these laws is above all that they translate abstract commitments to equality into legally enforceable rights, equipping those exposed to discrimination and associated disadvantage with the tools to challenge such treatment and receive remedy. One case study demonstrates this remarkable transformation in practice: in 2016, a little more than two decades after its establishment, Unia – the federal equality body of Belgium – reported that it had received 5,619 reports of discrimination, leading it to open 1,907 case files covering discrimination on a range of grounds, including race, disability and religion or belief. It also published comprehensive assessments identifying significant inequalities in the Belgian education system, in particular as concerned social background, gender, disability or sexual orientation of pupils.<sup>8</sup> There are no indications that Belgium has more or less discrimination than any other society; rather, the data demonstrate the operation of a system working to respond to and address the discrimination people feel that they have experienced in

<sup>7</sup> Nicole Girard, “Reaching the most marginalized: an intersectional approach to minority rights”, Minority Rights Group International. Available at <https://minorityrights.org/fifty/report/intersectional-approach>.

<sup>8</sup> See [www.unia.be/en/publications-statistics/publications/unias-work-expressed-in-figures-for-2016](http://www.unia.be/en/publications-statistics/publications/unias-work-expressed-in-figures-for-2016).

the course of their daily lives, and an administration that has taken seriously these problems and established legal means to address them.

Thus, done correctly, comprehensive anti-discrimination laws offer people a practical and tangible framework for taking action to vindicate their rights when they believe that these have been violated. Throughout the world, in situations in which States have adopted such laws, it has increased the ability of those affected by discrimination to seek and secure remedy. For example, in July 2004, a court in Sofia issued the first decision under the country's comprehensive anti-discrimination law, which had entered into force in January that year. The court ordered a company to pay non-material damages equivalent to \$300 dollars to the complainant, Sevda Nedkova Nanova, a Roma woman from Sofia. The court found that Ms. Nanova had been subjected to direct discrimination when an assistant at the company's sock shop had refused to serve her and had forced her to leave the shop, in the process calling her humiliating racial epithets.<sup>9</sup> Beyond the damages awarded to Ms. Nanova, the decision sent an important signal that discrimination was prohibited and would be subject to sanction under the new law.

Other examples abound. In the Republic of Moldova, the Council on the Prevention and Elimination of Discrimination and Ensuring Equality, established under the country's 2012 comprehensive anti-discrimination law, has ruled in favour of linguistic minorities on a number of occasions, including by ordering public bodies to publish their websites in Romanian and Russian.<sup>10</sup> In South Africa, one of the first States to adopt a comprehensive anti-discrimination law, a 25-year-old women from a township outside Durban used the law to challenge and overturn a ban on women wearing trousers imposed by an edict of community leaders.<sup>11</sup> Beyond the positive impact on individuals and communities arising from litigation and the decisions of courts, comprehensive anti-discrimination laws benefit minorities and other marginalized communities in myriad other ways. In the Plurinational State of Bolivia, for example, the enactment of comprehensive anti-discrimination law has resulted in increased political participation by indigenous peoples and the redistribution of land among other improvements,<sup>12</sup> while in the United Kingdom, equality duties under the Equality Act 2010 have caused local authorities to act to identify and eliminate barriers to educational attainment for children from minority ethnic and religious communities.<sup>13</sup>

In addition to the clear and direct benefits for individual people and communities, the adoption and implementation of comprehensive anti-discrimination laws has created opportunities to advance inclusion of minorities and marginalized groups, foster diversity and representation, and ensure equal participation for those at risk of being left behind. Indeed, while the enforcement of such legislation typically focuses on sanctioning and remedying specific acts of discrimination, such enforcement can also contribute positively to challenging stereotypes. The implementation of anti-discrimination laws can enable the public at large to learn about the challenges faced by persons who experience discrimination. As such laws become a vivid part of the national legal order, they can help to end discourses of powerlessness and vulnerability, by supporting stigmatized and excluded people and groups to act against unequal treatment. Ultimately, continuous and widespread enforcement will lead to changes in policy and practice, removing barriers and increasing participation for marginalized or stigmatized persons and groups, and so increasing diversity, understanding and tolerance. Thus, in country after country worldwide, the adoption and effective implementation of comprehensive anti-discrimination laws has led to genuine social change and advances in a culture of peace, mutual respect and understanding.

<sup>9</sup> For further discussion of the case, see Bulgarian Helsinki Committee, "Sofia City Court convicts company of ethnic discrimination against Roma" (2004).

<sup>10</sup> See, for example, Council on the Prevention and Elimination of Discrimination and Ensuring Equality of the Republic of Moldova, Case No. 36/218, Decision, 2 August 2018 (available at [http://egalitate.md/wp-content/uploads/2016/04/Decizie\\_constatare\\_36\\_2018.pdf](http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_36_2018.pdf)); and Case No. 37/18, Decision, 23 August 2018 (available at [http://egalitate.md/wp-content/uploads/2016/04/Decizie\\_constatare\\_37\\_2018.pdf](http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_37_2018.pdf)).

<sup>11</sup> Emily N. Keehn, "The equality courts as a tool for gender transformation", 2010. Available at [https://escholarship.org/content/qt1ms61553/qt1ms61553\\_noSplash\\_a09f8d08d80f6b092e02247da12ca35e.pdf](https://escholarship.org/content/qt1ms61553/qt1ms61553_noSplash_a09f8d08d80f6b092e02247da12ca35e.pdf).

<sup>12</sup> Comunidad de Derechos Humanos and Equal Rights Trust, *Balance de la Implementación de la Ley Contra el Racismo y Toda Forma de Discriminación: Ley No. 045* (La Paz, 2020).

<sup>13</sup> See, for example, a case study on Tower Hamlets by the Equality and Human Rights Commission. See [www.equalityhumanrights.com/en/advice-and-guidance/individual-benefits](http://www.equalityhumanrights.com/en/advice-and-guidance/individual-benefits).

## Anti-discrimination laws in a changing world

While States' commitment to realizing the right to non-discrimination is decades old, the coronavirus disease (COVID-19) pandemic has cast a harsh new light on the problems of inequality and discrimination and given renewed urgency to efforts to address them. The pandemic has revealed deep inequalities within our societies, as State responses in the delivery of health care, in the implementation of lockdown measures and in policies designed to mitigate economic impacts have had disproportionate and discriminatory impacts.<sup>14</sup> The Frontier Dialogue on addressing structural racial and ethnicity-based discrimination through COVID-19 recovery plans, for example, found that where disaggregated data were available, they showed that rates of COVID-19 morbidity and mortality were significantly higher among ethnic groups experiencing discrimination. It cited data from countries such as the United States of America, which revealed that the disparate effect of the virus on African Americans was in part a function of structural discrimination and inequalities, including their disproportionate role as frontline essential workers, lower access to health insurance, poorer health service coverage in certain geographical areas and unconscious bias among health providers.<sup>15</sup> Elsewhere, studies by civil society organizations have identified myriad discriminatory impacts arising from responses to the pandemic, ranging from the disproportionate impacts of layoffs on women workers in Paraguay,<sup>16</sup> to failures to accommodate the needs of children with disabilities and speakers of minority languages in remote education programmes in Kyrgyzstan.<sup>17</sup>

The pandemic is not the only significant change that underlines the need for a renewed focus on addressing discrimination. Technological developments ranging from the dramatic advances in the speed and availability of information online to the increasing use of artificial intelligence and machine learning pose new discriminatory risks and threats. The human rights impacts of climate change are already disproportionately affecting minority communities and other marginalized persons and groups, as a result of both historic inequalities and contemporary discriminatory policies and practices. What is more, while some of the discriminatory impacts of these trends – and States' responses to them – are already in evidence, the full range of potentially discriminatory impacts remains to be seen.

These and other developments give new urgency to decades-long efforts to protect and realize the right to non-discrimination and demonstrate the need for States to use equality impact assessment to identify and eliminate the discriminatory impacts of their laws, policies and practices. They reinforce the need for the enactment and implementation of comprehensive anti-discrimination laws.

Ultimately, while inequality manifests itself in different ways and arises as a result of different social, economic and political forces, any effort to address inequality requires the elimination of discrimination. Societies that fail to address discrimination – effectively and comprehensively – will never be equal and so will continue to experience the individual and social harms of inequality. Thus, if we aspire to create societies in which all are free and equal in dignity and rights, and where no one is left behind, the adoption of comprehensive anti-discrimination laws is, simply, a necessity.

The present guide is designed to assist anyone setting out on this road to greater equality.

<sup>14</sup> Equal Rights Trust and others, "Call to action: addressing discrimination and inequality in the global response to COVID-19" (2020). Available at [www.equalrightstrust.org/sites/default/files/images/COVIDResponse.pdf](http://www.equalrightstrust.org/sites/default/files/images/COVIDResponse.pdf).

<sup>15</sup> International Labour Organization, *Addendum to the 2020 General Survey: Promoting Employment and Decent Work in a Changing Landscape* (Geneva, 2021), para. 226.

<sup>16</sup> Kuña Roga and Central Unitaria de Trabajadores (Paraguay), March 2021 (on file with the Equal Rights Trust).

<sup>17</sup> Institute for Youth Development of Kyrgyzstan, March 2021 (on file with the Equal Rights Trust).

## I. METHODOLOGY, SCOPE AND LIMITATIONS

The present guide was developed through a partnership between the Office of the United Nations High Commissioner for Human Rights (OHCHR), the institutional expression of a global commitment to human rights, and the Equal Rights Trust, the leading international civil society organization supporting those working to secure the adoption and implementation of equality laws. Together, the partners brought extensive knowledge and expertise on international standards on equality and non-discrimination and experience in the development and adoption of anti-discrimination laws. At the same time, the partnership allowed for engagement with an extensive array of State and non-State actors, experts and activists with experience in this area of law, from across the globe.

The creation of the guide involved research into international legal standards on the rights to equality and non-discrimination and equality, combined with broad consultation with both Governments and non-governmental organizations to identify relevant practice at the national level. The research, consultation and drafting of the guide were carried out by a small joint team from the Equal Rights Trust and the OHCHR Indigenous Peoples and Minorities Section.

### A. Research process and methodology

The production of the guide involved four research processes. First, staff from the Equal Rights Trust and OHCHR carried out legal research to identify relevant international legal standards on equality and non-discrimination. This involved exhaustive consideration of the relevant international human rights instruments, the interpretation of these instruments by the United Nations treaty bodies in their general comments, concluding observations and individual communications, and analysis and commentary on these standards by academics, non-governmental organizations, national human rights institutions and others. Research on the regional human rights systems in Africa, Europe and the Americas was carried out by Equal Rights Trust Fellows and individual experts working on a pro bono basis. OHCHR thematic sections and field offices contributed to all aspects of the development of the guide. The research, analysis and drafting process began in the first half of 2020 and continued until the first quarter of 2021, in parallel with calls for evidence and consultation.

Second, and in parallel with this first activity, the partners issued calls for evidence. In mid-2020, OHCHR distributed a note verbale to States Members of the United Nations, requesting sample provisions from national anti-discrimination laws and examples of good practice. It also opened a public call for evidence, to gather inputs from civil society and the wider public. This call was distributed through OHCHR field presences and its Global Network of Minority Fellows, and to the Equal Rights Trust's network of partner equality defenders around the world. In parallel, the Equal Rights Trust engaged expert contributors from selected national jurisdictions with comprehensive anti-discrimination laws to provide examples and inputs. As a result of these outreach efforts, the guide's drafters received submissions from States, civil society organizations, international non-governmental organizations and grass-roots organizations worldwide, sharing views on best practices, exemplary legal provisions, dilemmas and concerns in the area of anti-discrimination and equality law.

Third, the partners convened four online global consultations to discuss key themes, issues and problems identified in the research process. In November 2020, three online webinar consultations were convened, covering the following subjects:

- Elements and scope of the right to be protected from all forms of discrimination, including “forms of discrimination: proscribed acts and omissions” (session 1) and “the right to effective remedy” (session 2).
- Governance and the right to be protected from all forms of discrimination, including “positive action” (session 3) and “equality bodies: a global idea?” (session 4).
- Minority protection, particular groups and other issues of particular application, including “minority protection, particular groups and other issues of particular application” (session 5) and an open session (no predetermined theme) (session 6).

In February 2021, the project partners followed up these consultations with a webinar specifically dedicated to the “nexus of expression and action: hate speech, incitement and anti-discrimination legislation”.

Fourth, drafts of the guide were submitted to experts for verification and validation. In the first quarter of 2021, a complete draft of the guide was issued for review and validation to more than 50 experts from academia, civil society – including, in particular, the leading international organizations working with and on behalf of different groups exposed to discrimination – and OHCHR itself. In parallel with this process, the guide was scrutinized in detail by the independent Advisory Committee (see below). Following validation, the research team considered all feedback, input and proposals, adjusting the text as necessary to ensure its accuracy and completeness.

## B. Oversight and guidance

The development of the guide was overseen by two expert committees, an independent Advisory Committee and the OHCHR Publications Committee.

From the outset of the development of the guide, an independent Advisory Committee was established. The Advisory Committee comprised 13 leading experts in anti-discrimination and equality law, including, among others, three former United Nations Special Rapporteurs, a number of leading academic experts in comparative equality laws and experienced litigators, judges and representatives of independent equality bodies. In addition to their individual expertise, the Advisory Committee members were engaged with a view to ensuring a diversity of expertise, experience, thought and guidance. The Advisory Committee was gender-balanced and included recognized experts on the law on discrimination against women, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons and minorities, among others. It included experienced advocates, academics and activists and individuals with experience in government, non-governmental and intergovernmental settings. The Advisory Committee members represented a range of different legal systems and traditions, from every global region.

The Advisory Committee provided expert guidance to the partners throughout, helping to ensure the relevance, utility and validity of the guide. The Advisory Committee was involved in guiding work during the inception, development, consultation and validation stages of the process and was available for consultation throughout. The Advisory Committee met on multiple occasions and provided regular guidance throughout the process of research and drafting. In addition to providing suggestions at the developmental stage of the guide, Advisory Committee members reviewed the guide as it was being drafted. Once a complete draft of the guide had been produced, in early 2021, the Advisory Committee convened for a multi-day meeting to review and comment on the draft in detail, while also providing extensive input in writing.

In addition, the OHCHR Publications Committee was extensively involved in the development of the guide. In addition to approving an initial concept note, the Publications Committee delegated an expert for regular consultation on the development of the guide. In accordance with its procedures, the Publications Committee also appointed peer reviewers to review the manuscript, following the processes of validation, verification and review by the Advisory Committee. The suggestions of the expert peer reviewers have been incorporated in the final draft of the guide.

## C. Approach

The deeply and broadly consultative and collaborative approach taken by the partners at every stage in the development of the guide reflects a recognition of a number of basic facts in this area of law. First, there is a truly global community of practitioners working in every country of the world on issues of equality and non-discrimination. International law has both informed and been informed by developments at the national and regional levels, and it was thus important to engage with the widest possible range of partners at the national, regional and international levels.

Second, the diversity of the world's legal systems and traditions has meant that, although the legal questions at issue here are matters of common public concern, on a number of questions, there have been divergent views to be weighed carefully and harmonized. In other words, while international law is clear and unequivocal on the obligation of States to eliminate comprehensively all forms of discrimination, those interpreting it often do so in different ways.

Ultimately, the quality of the guide has benefited enormously from the time and effort taken to engage experts, practitioners, affected groups, Governments and others in its development.

## D. Scope and limitations

The purpose of the present publication is to provide those working to develop anti-discrimination laws with a guide setting out clearly the requirements of such a legal instrument and offering practical examples on how this has been done in a broad range of contexts worldwide. In the course of this, inevitably, the drafters have included discussion of the conceptual, legal and normative underpinnings of such laws, relying on international law and internationally authoritative guidance.

It is also important to set out what the guide is not.

First, although jurisprudence is cited throughout the guide, this is for the sole purpose of illustrating how certain concepts in anti-discrimination law have evolved and their meaning interpreted. The present publication is not a guide to litigation or adjudication.

Second, there is a vibrant global discussion of how equality law might develop in the future and a dedicated community of academics, activists and practitioners engaged in thinking about this subject. While the expertise of a number of these persons has been crucial to the development of the guide, the present publication does not strive to contribute to this discussion, insofar as it is not future-oriented. The material presented in the guide should be construed as constituting the law as it currently stands. The guide does not discuss how international law may or may not evolve in the future; indeed, at a number of points, the drafters have excluded speculative or aspirational material.

Finally, while the authors sought to draft a guide based on experiences of developing and enacting anti-discrimination laws worldwide, the resources brought to this endeavour are, ultimately, finite: it cannot be claimed that all relevant laws, legal commentary, experiences, traditions or dilemmas have been included here. While the drafters have sought to be comprehensive in their discussion of international law and its application – in order to give those drafting legislation a clear view of the relevant obligations and requirements – in respect of evidence from national laws, the guide should be taken as exemplary, not exhaustive.

## II. HOW TO USE THE GUIDE

The guide has been designed, developed and drafted with a view to its utility: it is intended, as far as possible, to provide clear, concise and comprehensive guidance to those involved in the development of comprehensive anti-discrimination laws, in the most accessible way possible.

### A. Structure of the guide

To the greatest extent possible, the guide is designed as a linear, explanatory journey. The executive summary of the guide is designed to function both as a summary of the material contained in the body of the publication and as a reiteration of States' core international law obligations in respect of the enactment of anti-discrimination law. The principles set out in the executive summary are a synthesis of the international legal standards discussed at length in the rest of the guide and have been designed to act as a stand-alone set of core principles for the development of comprehensive anti-discrimination laws.



In part one of the guide, the drafters provide a detailed explanation of the international normative framework underpinning the requirement to adopt comprehensive anti-discrimination law. In addition to setting out States' obligations under international law to enact, enforce and implement comprehensive anti-discrimination law, part one includes a discussion of the growing consensus expressed by States at the regional and national levels.

In part two of the guide, the drafters discuss the necessary content of anti-discrimination laws, if they are to be comprehensive and thus to align with international legal standards. This part is organized into sections covering each area of anti-discrimination legislation. The first three sections cover the content of the right to non-discrimination – including discussion of the personal scope, forms of prohibited conduct, material scope and justifications and exceptions – positive action and equality duties. The guide then includes sections considering the right to effective remedy; access to justice and enforcement; the mandates, functions and powers of specialized equality bodies; and States' broader obligations regarding implementation, such as the development of equality policies and strategies and the use of equality impact assessment.

In part three, the drafters examine the particular application of the right to non-discrimination in the context of minority rights protection, noting both the centrality of the right to the enjoyment of minority rights and the complex issues that arise at various points of intersection.

In part four, the drafters examine two discrete issues connected with the development of comprehensive anti-discrimination law: discriminatory violence and hate crime; and hate speech and incitement.

The guide concludes with a section examining the role of anti-discrimination laws in meeting States' obligations to address the root causes of discrimination and promote diversity.

## B. Structure of the sections

Each part of the guide is split into sections, each of which examines a specific element or component of anti-discrimination law. Each section contains a discussion of the relevant legal concept, beginning with a focus on the relevant international legal standard as set out in the human rights treaties, before discussing its interpretation or elaboration through the work of the United Nations treaty bodies. The sections then consider regional and – to the extent necessary – national standards and interpretations.

Each section begins with a summary box that synthesizes the relevant legal principles as established in international law. These summary boxes aim to provide guidance for those drafting anti-discrimination legislation on what needs to be included in law in the area in question. The text of the summary boxes is compiled in the executive summary, which is designed to act as stand-alone guidance on the necessary content of comprehensive anti-discrimination law.

**Section summaries are provided in boxes like this one.**

As the aim of the drafters is that the guide should, above all, be practical, sections include illustrative boxes with examples and case studies, specific or complex issues in international law, together with the aforementioned section summaries. For convenience, these are colour-coded, as follows:

**Green-coloured boxes provide examples from national practice, primarily in the form of provisions from national anti-discrimination laws. These are provided with the aim of providing those involved in the development of anti-discrimination laws with best practice provisions that can be adopted or adapted.**

**Sand-coloured boxes provide examples of regional or international practice, law, jurisprudence or commentary.**

Red-coloured boxes examine specific issues in anti-discrimination law. These boxes are included when it is important to examine a particular issue in order to provide a complete picture of the law in this area, but the matter at issue is not one that requires specific or additional codification in comprehensive anti-discrimination law. Thus, for example, the role of intent in discrimination law, questions of discrimination against non-citizens and discussion of comparators are all included in a red text box.





## **PART ONE:**

# **STATE OBLIGATIONS TO ENACT COMPREHENSIVE ANTI-DISCRIMINATION LAW**

The rights to equality and non-discrimination are fundamental components of international human rights law.

As understanding of these rights has developed through the work of the United Nations human rights treaty bodies, it has been recognized that effective protection from discrimination requires the adoption of comprehensive anti-discrimination legislation. At the turn of the millennium, only a handful of States around the world had adopted such legislation. The past two decades has witnessed significant progress in this regard, as an increasing number of States – from different regions of the world, and from different legal traditions – have recognized the benefits of a holistic and comprehensive approach to tackling inequality and have sought to give effect to their international law obligations. In the present chapter, the drafters chart this development.

## I. CONSENSUS ON THE NEED TO ADOPT COMPREHENSIVE ANTI-DISCRIMINATION LAW

### A. The international human rights law framework

The right to non-discrimination – together with equality before the law and equal protection of the law – is “a basic and general principle relating to the protection of human rights”<sup>18</sup> and a “fundamental component” of international human rights law that gives rise to “immediate and cross-cutting” obligations.<sup>19</sup> The right has a dual status: individuals have both a right to be free from discrimination in the enjoyment of all other human rights and a “free-standing” right to non-discrimination in areas that are regulated by law but not the subject of another human right.

States parties to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have accepted obligations to respect and ensure the civil, political, economic, social and cultural rights provided in those treaties without discrimination.<sup>20</sup> These provisions are supplemented by article 3 of each Covenant, which guarantees the equal enjoyment of rights by men and women. In addition to these guarantees, article 16 of the International Covenant on Civil and Political Rights provides that: “Everyone shall have the right to recognition everywhere as a person before the law.” Article 26 of that Covenant further provides that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” The Human Rights Committee has clarified that this article provides an “autonomous right” that “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.<sup>21</sup>

In addition to the Covenants, specific instruments have been adopted with the aim of eliminating discrimination on particular grounds. The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities all have the elimination of discrimination at their core. Each of these instruments defines discrimination, sets out legislative, policy and practical obligations on the State for the implementation of the right to non-discrimination and delineates obligations of non-discrimination in different areas of life.

The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities are based on the premise of equality before the law and equal protection of the law and each recognizes these as specific rights.<sup>22</sup> Indeed, each of these Conventions can be seen as elaborating the meaning of the specific legal requirements to ensure equal recognition and protection for the persons and groups in

<sup>18</sup> Human Rights Committee, general comment No. 18 (1989), para. 1.

<sup>19</sup> See, in particular, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 2 and 7.

<sup>20</sup> International Covenant on Civil and Political Rights, art. 2 (1); and International Covenant on Economic, Social and Cultural Rights, art. 2 (2).

<sup>21</sup> Human Rights Committee, general comment No. 18 (1989), para. 12.

<sup>22</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 5; Convention on the Elimination of All Forms of Discrimination against Women, art. 15; and Convention on the Rights of Persons with Disabilities, art. 12.

focus and individual members of these groups.<sup>23</sup> There is also increasing recognition of a right to equal legal capacity, as an inherent component of States' obligations to ensure equality before the law or equal protection of the law. In this respect, the Committee on the Rights of Persons with Disabilities has noted that "there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited".<sup>24</sup>

Beyond these treaties, guarantees of equality and non-discrimination may be found in a range of international instruments. States parties to the Convention on the Rights of the Child are required to "respect and ensure" the rights set forth in the Convention "without discrimination of any kind"<sup>25</sup> and a similar obligation is provided in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>26</sup> The General Assembly has opened discussion of a possible specific human rights instrument on the rights of older persons,<sup>27</sup> which is expected to include a similarly robust commitment to non-discrimination.

States have also accepted non-discrimination obligations in discrete areas of life, such as employment and education, and as concerns particular groups, such as indigenous peoples, through their ratification of International Labour Organization (ILO) conventions<sup>28</sup> and the Convention against Discrimination in Education.<sup>29</sup>

## B. Obligations to respect, protect and fulfil

By ratifying human rights instruments, States assume an immediate obligation to take all measures – administrative, legislative and judicial – necessary to give effect to and fulfil the rights that they provide. Treaty ratification gives rise to three separate, but interrelated, obligations on the State: to respect, to protect and to fulfil the rights provided therein.<sup>30</sup> Understanding of the "respect, protect and fulfil" framework has been developed through the work of the treaty bodies and others, which have applied the framework, *inter alia*, in respect of the right to non-discrimination.<sup>31</sup>

As the Committee on the Elimination of Discrimination against Women has noted, the obligation to respect is a negative obligation, which requires that States refrain from discrimination in law, policy or practice.<sup>32</sup> It can be viewed as entailing two primary components. First, States undertake to refrain from engaging in discriminatory acts or adopting, implementing, or pursuing policies that are discriminatory in purpose or

<sup>23</sup> Although the existence of such a specific international legal instrument is in no way a precondition for State action to ensure equal recognition and protection for all, which is an immediate obligation, emanating directly from the International Covenant on Civil and Political Rights.

<sup>24</sup> Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014), para. 5.

<sup>25</sup> Convention on the Rights of the Child, art. 2 (1).

<sup>26</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 1 (1).

<sup>27</sup> Information about the Open-ended Working Group on Ageing is available at <https://social.un.org/ageing-working-group>.

<sup>28</sup> See, in particular, Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and Indigenous and Tribal Peoples Convention 1989 (No. 169). In 2019, the Violence and Harassment Convention, 2019 (No. 190) was adopted. At the time of writing the Convention has been ratified by 10 States. It entered into force in June 2021.

<sup>29</sup> Convention against Discrimination in Education, adopted in 1960.

<sup>30</sup> See, for instance, Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017), para. 10; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 9; Committee on the Elimination of Racial Discrimination, "Statement on the coronavirus (COVID-19) pandemic and its implications under the International Convention on the Elimination of All Forms of Racial Discrimination" (2020), p. 2; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 30. The Human Rights Committee has articulated the obligations of States under article 2 (1) of the Covenant in terms of the negative obligation to refrain from discrimination and the positive obligation to adopt protective measures. In its general comment No. 18 (1989), the Committee makes clear that fulfilment of the rights to equality and non-discrimination requires positive action. See, respectively, Human Rights Committee, general comment No. 31 (2004), paras. 6 and 8; and general comment No. 18 (1989), para. 10.

<sup>31</sup> See, for instance, Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 30; and Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 9.

<sup>32</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 9. See also Human Rights Committee, general comment No. 31 (2004), paras. 6 and 8.

effect.<sup>33</sup> Second, States undertake to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating” discrimination.<sup>34</sup>

The obligation to protect is an obligation to protect against discrimination by all other entities, including private actors. It requires the adoption of specific legal and policy measures, including legislation. Article 26 of the International Covenant on Civil and Political Rights contains an explicit obligation to adopt anti-discrimination legislation, requiring that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination”. More broadly, under article 2 (2) of the same treaty, States undertake to “take the necessary steps ... to adopt such laws or other measures as may be necessary to give effect” to established Covenant rights, including the right to non-discrimination, while article 2 (1) of the International Covenant on Economic, Social and Cultural Rights creates a parallel obligation. Similar obligations are established through article 2 (1) (d) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 2 (a) of the Convention on the Elimination of All Forms of Discrimination against Women and article 4 (1) of the Convention on the Rights of Persons with Disabilities. As discussed further below, interpretations of these, and other, human rights instruments since at least the year 2000 have clarified that the obligation to protect entails the adoption of anti-discrimination legislation that is comprehensive in nature.<sup>35</sup>

The obligation to fulfil requires States to eliminate discrimination in practice and to ensure the effective enjoyment of the rights to equality and non-discrimination. As the Committee on Economic, Social and Cultural Rights has stated: “In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination ... is eliminated.”<sup>36</sup> That Committee and other treaty bodies have set out a range of measures that States must implement in order to meet their obligations to fulfil the right to non-discrimination, including the development and implementation of policies, plans and strategies; data collection and analysis; public reporting; public education, training and awareness-raising; and the establishment of institutions.<sup>37</sup> Notably, this obligation gives rise to an obligation to adopt positive action – also known as affirmative action, or temporary special measures – designed to address historic disadvantage and ensure that everybody can participate on an equal basis.<sup>38</sup> International law also imposes obligations on States to achieve equality by challenging prejudice, stereotypes and other drivers of discrimination.<sup>39</sup>

<sup>33</sup> See, for instance, International Convention on the Elimination of All Forms of Racial Discrimination, art. 2 (1); Convention on the Elimination of All Forms of Discrimination against Women, art. 2 (d); and Convention on the Rights of Persons with Disabilities, art. 4 (1) (b).

<sup>34</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 2 (1) (c). See also International Convention on the Elimination of All Forms of Discrimination against Women, art. 2; Convention on the Rights of Persons with Disabilities, art. 4 (1) (b); and Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. 4 (2).

<sup>35</sup> See, for instance, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 37; Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 22; CCPR/C/KOR/CO/4, paras. 12–13; CERD/C/KGZ/CO/8-10, para. 11; CEDAW/C/KAZ/CO/5, para. 12 (a); CRC/C/COD/CO/3-5, para. 15; CMW/C/LBY/CO/1, para. 29 (a); Inter-American Convention against All Forms of Discrimination and Intolerance, art. 7; Inter-American Commission on Human Rights, *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas* (OEA/Ser.L/V/II.170, Doc. 184) (2018), para. 94; Parliamentary Assembly of the Council of Europe, resolution 1844 (2011) on the Declaration of Principles on Equality and activities of the Council of Europe; African Commission on Human and Peoples’ Rights, “Concluding observations and recommendations on the 8th to 11th periodic report of the Republic of Kenya” (2016), para. 55.

<sup>36</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 36.

<sup>37</sup> *Ibid.*, paras. 36, 38–39 and 41.

<sup>38</sup> See, for instance, Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 9.

<sup>39</sup> See, in particular, chapter I of part six of the present guide.

## C. United Nations human rights instruments and their interpretation

Over the last two decades, an international consensus has developed that, in order to discharge their obligations to respect, protect and fulfil the right to non-discrimination, States must adopt specific, comprehensive anti-discrimination legislation. This is reflected in the authoritative interpretation of human rights instruments by mechanisms both within and beyond the United Nations system.

Article 26 of the International Covenant on Civil and Political Rights creates an explicit requirement for States to legislate to prohibit discrimination. In its general comment No. 18 (1989) on non-discrimination, the Human Rights Committee provided important clarifications on the interpretation of the right, although it did not fully elaborate the nature or scope of States' obligations. In the time since, the Committee has repeatedly held that the adoption of comprehensive anti-discrimination legislation is necessary to give effect to the right to non-discrimination: since 2010, the Committee has made 47 explicit recommendations for the adoption of comprehensive anti-discrimination law to 45 States across all regions of the globe. This includes 15 recommendations to States in Africa,<sup>40</sup> 7 recommendations to States in the Americas,<sup>41</sup> 18 recommendations to States in Asia,<sup>42</sup> 6 recommendations to European States;<sup>43</sup> and 1 recommendation to Australia.<sup>44</sup>

In 2009, the Committee on Economic, Social and Cultural Rights published its general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, in which the Committee emphasized that: "Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2 [prohibition of discrimination]."<sup>45</sup> In the same general comment, the Committee elaborated the comprehensive nature of the right to non-discrimination, setting out, *inter alia*, that compliance with article 2 (2) requires States to provide protection from direct and indirect discrimination and harassment on the basis of an extensive and open-ended list of characteristics.<sup>46</sup> The Committee has since made a range of relevant recommendations to States for the adoption of comprehensive anti-discrimination law, in line with their non-discrimination obligations arising under article 2 (2) of the Covenant.<sup>47</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities each contain explicit provisions requiring States to adopt legislation prohibiting discrimination on the grounds that are the subject of those instruments.<sup>48</sup> In recent years, each of the relevant treaty bodies

<sup>40</sup> CCPR/C/DZA/CO/4, paras. 19–20; CCPR/C/AGO/CO/2, para. 14; CCPR/C/CPV/CO/1/Add.1, paras. 9–10; CCPR/C/CMR/CO/5, para. 14; CCPR/C/CAF/CO/3, paras. 11–12; CCPR/C/COD/CO/4, paras. 13–14; CCPR/C/GNQ/CO/1, para. 25; CCPR/C/GMB/CO/2, paras. 11–12; CCPR/C/LBR/CO/1, paras. 16–17; CCPR/C/MDG/CO/4, paras. 15–16; CCPR/C/NER/CO/2, para. 19; CCPR/C/NGA/CO/2, paras. 16–17; CCPR/C/SEN/CO/5, para. 11; CCPR/C/SDN/CO/4, para. 11; and CCPR/C/SDN/CO/5, paras. 14–16.

<sup>41</sup> CCPR/C/BLZ/CO/1/Add.1, paras. 11–13; CCPR/C/DMA/COAR/1, paras. 15–17 and 48; CCPR/C/SLV/CO/7, paras. 9–10; CCPR/C/JAM/CO/4, paras. 15–16; CCPR/C/PRY/CO/3, para. 9; CCPR/C/PRY/CO/4, paras. 14–15; and CCPR/C/VEN/CO/4, para. 8.

<sup>42</sup> CCPR/C/BHR/CO/1, paras. 15–16; CCPR/C/BGD/CO/1, para. 12; CCPR/C/CHN-HKG/CO/3, para. 19; CCPR/C/IRQ/CO/5, paras. 11–12; CCPR/C/JPN/CO/6, para. 11; CCPR/C/JOR/CO/5, paras. 8–9; CCPR/C/KGZ/CO/2, para. 8; CCPR/C/LAO/CO/1, paras. 15–16; CCPR/C/LBN/CO/3, paras. 11–12; CCPR/C/MNG/CO/6, paras. 9–10; CCPR/C/PAK/CO/1, para. 12; CCPR/C/PHL/CO/4, para. 10; CCPR/C/KOR/CO/4, paras. 12–13; CCPR/C/TJK/CO/3, paras. 13–14; CCPR/C/TUR/CO/1, para. 8; CCPR/C/TKM/CO/2, paras. 6–7; CCPR/C/UZB/CO/5, paras. 8–9; and CCPR/C/VNM/CO/3, para. 14.

<sup>43</sup> CCPR/C/BLR/CO/5, paras. 15–16; CCPR/C/CZE/CO/4, para. 10; CCPR/C/ISL/CO/5, para. 6; CCPR/C/ITA/CO/6, paras. 8–9; CCPR/C/SMR/CO/3, paras. 8–9; and CCPR/C/CHE/CO/4, paras. 16–17.

<sup>44</sup> CCPR/C/AUS/CO/6, paras. 17–18.

<sup>45</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 37.

<sup>46</sup> *Ibid.*, paras. 7, 10, and 18–35.

<sup>47</sup> For recent examples, see E/C.12/GIN/CO/1, para. 19 (a); E/C.12/DNK/CO/6, para. 22; E/C.12/ISR/CO/4, para. 19; and E/C.12/KAZ/CO/2, para. 11 (a).

<sup>48</sup> Article 2 (d) of the International Convention on the Elimination of All Forms of Racial Discrimination requires each State party to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization". Article 2 (a) of the Convention on the Elimination of All Forms of Discrimination against Women calls on States: "To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle". Article 4 (1) (a) of the Convention on the Rights of Persons with Disabilities requires States: "To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention."

has clarified that the elimination of “all forms of discrimination” under the Conventions necessitates the prohibition of intersectional discrimination.<sup>49</sup> As such, the obligation to enact anti-discrimination legislation under these instruments is properly understood as requiring the adoption of comprehensive anti-discrimination law and the treaty bodies have made relevant recommendations to this effect.<sup>50</sup>

Since 2010, the Committee on the Elimination of Racial Discrimination has addressed recommendations for the adoption of comprehensive anti-discrimination legislation to at least 12 States, including Belize, Iceland, Iraq, Israel, Kazakhstan, Kyrgyzstan, Latvia, Pakistan, the Russian Federation, Viet Nam, Zambia and the State of Palestine.<sup>51</sup> For example, in 2018, the Committee recommended that Kyrgyzstan: “adopt comprehensive anti-discrimination legislation that ... [d]efines direct and indirect discrimination, includes all grounds of discrimination, and prohibits all forms of racial discrimination”.<sup>52</sup>

In its general recommendation No. 28 (2011), the Committee on the Elimination of Discrimination against Women noted that article 2 of the Convention established an obligation to “enact legislation that prohibits discrimination in all fields of women’s lives under the Convention”, clarifying that such legislation must prohibit both direct and indirect discrimination, apply to both public and private actors, provide for effective remedy and – crucially – “legally recognize such intersecting forms of discrimination ... and prohibit them”.<sup>53</sup>

The Committee on the Rights of Persons with Disabilities has also issued guidance on the rights to equality and non-discrimination. Reflecting the position developed by treaty bodies earlier, in its general comment No. 6 (2018), the Committee stated clearly that the Convention created an “obligation to enact specific and comprehensive anti-discrimination legislation”.<sup>54</sup> The Committee went on to elaborate the personal and material scope of such legislation, the forms of prohibited conduct and the measures required to ensure the effective enforcement and implementation of the rights.<sup>55</sup> The Committee situates this obligation as a necessary means to give effect to the inclusive model of equality, which it elaborates as follows:

**Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality.**<sup>56</sup>

In other areas of international law, the ILO Committee of Experts on the Application of Conventions and Recommendations has repeatedly recommended the enactment of comprehensive anti-discrimination legislation.<sup>57</sup> Such law, according to the Committee, may be necessary to address persisting patterns of discrimination in employment even in those States in which constitutional equality guarantees, or non-discrimination provisions in general employment legislation, have already been adopted.<sup>58</sup>

<sup>49</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 7; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 18; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 19 and 21–22.

<sup>50</sup> See, for instance, CERD/C/KGZ/CO/8-10, para. 11; CEDAW/C/KAZ/CO/5, para. 12 (a); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 22.

<sup>51</sup> CERD/C/BLZ/CO/1, para. 7; CERD/C/ISL/CO/19-20, para. 12; CERD/C/IRQ/CO/22-25, para. 10; CERD/C/ISR/CO/17-19, para. 12; CERD/C/KAZ/CO/6-7, para. 6; CERD/C/KGZ/CO/8-10, para. 11; CERD/C/LVA/CO/6-12, paras. 12–13; CERD/C/PAK/CO/21-23, paras. 9–10; CERD/C/RUS/CO/20-22, para. 7; CERD/C/RUS/CO/23-24, para. 9; CERD/C/VNM/CO/10-14, para. 7; CERD/C/ZMB/CO/17-19, paras. 11 (d) and 12 (b); CERD/C/PSE/CO/1-2, para. 12 (a).

<sup>52</sup> CERD/C/KGZ/CO/8-10, para. 11.

<sup>53</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), paras. 31 and 18. See also paras. 9–10, 13, 16–17, 32 and 34–36.

<sup>54</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 22.

<sup>55</sup> *Ibid.*, paras. 12–73.

<sup>56</sup> *Ibid.*, para. 11.

<sup>57</sup> ILO, “Report of the Committee of Experts on the Application of Conventions and Recommendations”, Report III (Part 1A) (Geneva, 2009), para. 109. Available at [www.ilo.org/public/libdoc/ilo/P/09661/09661\(2009-98-1A\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf).

<sup>58</sup> *Ibid.*



## II. CHARTER BODIES AND OTHER INTERNATIONAL PROCESSES

The consensus on the need to adopt comprehensive anti-discrimination legislation is also visible outside treaty-based processes. United Nations special procedure mandate holders have increasingly called for the adoption of comprehensive anti-discrimination legislation to improve protection for people and groups at risk of discrimination. Through the universal periodic review mechanism of the Human Rights Council, States from all regions of the world have made,<sup>59</sup> received<sup>60</sup> and accepted<sup>61</sup> recommendations for the adoption of comprehensive anti-discrimination legislation. At the same time, the links between anti-discrimination law and the achievement of related social goals – such as sustainable development – have become more clearly understood and States have demonstrated their commitment to legislative protection for the rights to non-discrimination and equality through other international processes.

### A. United Nations special procedure mandate holders

Since 2010, a range of special procedure mandate holders have made recommendations to States on the adoption of comprehensive anti-discrimination law, as part of their thematic reports<sup>62</sup> and country visits.<sup>63</sup> For example, following a visit in 2013 to Panama, the Working Group of Experts on People of African Descent called on the country to “enact comprehensive anti-discrimination legislation which prohibits discrimination on all grounds”. Such legislation, according to the Working Group, “should provide for effective enforcement mechanisms and the availability of remedies.”<sup>64</sup> More recently, in 2020, the Special Rapporteur on freedom of religion or belief called on all States to “adopt comprehensive anti-discrimination legislation, prohibiting direct and indirect discrimination, harassment and failure to make reasonable accommodation”.<sup>65</sup> Such legislation should prohibit discrimination “on the basis of religion and all other grounds recognized in international law and in all areas of life regulated by law”.<sup>66</sup>

### B. Universal periodic review

In recent years, an increasing number of States have made and received recommendations to adopt, amend or implement comprehensive anti-discrimination law through their peer-to-peer interactions. At the time of the thirty-fifth session of the Working Group on the Universal Periodic Review, during the third cycle of the universal periodic review, specific recommendations for the passage of comprehensive anti-discrimination law had been made by 46 States across East, South and West Africa; North, South and Central America and the

<sup>59</sup> See, for example, the recommendations of Australia, Bangladesh, Denmark, Ghana and Honduras (below).

<sup>60</sup> See, for example, Angola (A/HRC/43/11, para. 146.64); the Dominican Republic (A/HRC/41/16, para. 94.54); Fiji (A/HRC/43/8, para. 140.25); Japan (A/HRC/37/15, para. 161.65); and Spain (A/HRC/44/7, para. 150.25).

<sup>61</sup> See, for example, the reports of the Working Group on the Universal Periodic Review and supporting addenda relating to the third cycle reviews of Costa Rica (A/HRC/42/12, paras. 111.12 and 111.20, and A/HRC/42/12/Add.1, para. 10), Gabon (A/HRC/37/6, para. 118.62), the Republic of Korea (A/HRC/37/11/Add.1, para. 15) and Sweden (A/HRC/44/12, para. 156.91 and A/HRC/44/12/Add.1, para. 4).

<sup>62</sup> A/68/293, para. 76; A/HRC/36/43, para. 61 (e); A/HRC/42/38, paras. 147–148; and A/75/385, para. 80 (d).

<sup>63</sup> See, for example, A/HRC/19/56/Add.1, para. 90; A/HRC/24/52/Add.2, para. 105 (a); A/HRC/37/56/Add.2, para. 46; A/HRC/38/43/Add.1, paras. 63 and 78 (d); A/HRC/41/42/Add.2, para. 78 (b); A/HRC/42/38/Add.1, para. 73; A/HRC/41/34/Add.1, para. 100 (k); and A/HRC/40/61/Add.2, para. 105 (a).

<sup>64</sup> A/HRC/24/52/Add.2, para. 105 (a).

<sup>65</sup> A/75/385, para. 80 (d).

<sup>66</sup> Ibid.

Caribbean; South and West Asia; Europe; and Australia and New Zealand.<sup>67</sup> Those recommendations were accepted by States from diverse legal, social and geographic contexts, ranging from Gabon<sup>68</sup> to the Republic of Korea.<sup>69</sup>

## C. Other international processes

Beyond the core United Nations human rights conventions, since the turn of the millennium, States have demonstrated growing concern for the need to enact comprehensive anti-discrimination laws through other international commitments.

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001 devoted extensive attention to the need to address intersectional discrimination. The Durban Declaration noted that victims of racism and racial discrimination “can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status”.<sup>70</sup> The Durban Review Conference, convened in 2009, expressed concern at “the increased instances of multiple or aggravated forms of discrimination” before urging States “to adopt or strengthen ... measures to eradicate multiple ... discrimination, in particular by adopting or improving ... legislation to address these phenomena”.<sup>71</sup>

States have also recognized the centrality of the rights to equality and non-discrimination to the achievement of sustainable development. The commitment to “leave no one behind” in the 2030 Agenda – accompanied by both a specific goal on reducing inequality and targets requiring equality in many other areas of development – reflect an acknowledgment of the role and relevance of equality and non-discrimination to any conception of sustainable development.<sup>72</sup> Notably, target 10.3 of the Sustainable Development Goals explicitly calls on States to “ensure equal opportunity and reduce inequalities of outcome, including by ... promoting appropriate legislation, policies and action in this regard”.<sup>73</sup> This target makes the adoption of comprehensive equality laws a functional necessity within the Sustainable Development Goals framework: properly understood, the requirement to adopt “appropriate legislation” to “ensure equal opportunity and reduce inequalities of outcome” necessitates the adoption of comprehensive equality legislation,<sup>74</sup> including positive action measures. In addition, targets in both Goals 5 and 16 explicitly require the adoption of anti-discrimination legislation.<sup>75</sup> In guidelines on the subject drafted by the Special Rapporteur on the right to development in 2019, the

<sup>67</sup> Afghanistan (A/HRC/42/12, para. 111.12), Albania (A/HRC/37/11, para. 132.32), Australia (A/HRC/44/4, para. 140.48), Bangladesh (A/HRC/37/11, para. 132.28), Barbados (A/HRC/44/12, para. 156.91), Belgium (A/HRC/43/6, para. 127.48), Botswana (A/HRC/37/11, para. 132.37), Brazil (A/HRC/43/6, para. 127.51), Canada (A/HRC/44/9, para. 144.26), Chile (A/HRC/43/10, para. 139.47), Colombia (A/HRC/37/11, para. 132.36), Côte d'Ivoire (A/HRC/37/13, para. 152.83), Czechia (A/HRC/44/10, para. 153.59), Denmark (A/HRC/44/4, para. 140.209), France (A/HRC/37/11, para. 132.44), Georgia (A/HRC/37/11, para. 132.31), Germany (A/HRC/37/15, para. 161.63), Ghana (A/HRC/43/11, para. 146.64), Haiti (A/HRC/37/15, para. 161.64), Honduras (A/HRC/43/10, para. 139.53), Iceland (A/HRC/43/13, para. 123.4), India (A/HRC/37/12, para. 148.34), Iraq (A/HRC/37/15, para. 161.66), Ireland (A/HRC/41/15, para. 139.36), Italy (A/HRC/37/11, para. 132.62), Kenya (A/HRC/37/15, para. 161.67), Madagascar (A/HRC/40/13 and Corr.1, para. 78.23), Mexico (A/HRC/44/10, para. 153.52), Montenegro (A/HRC/39/3, para. 115.2), the Netherlands (A/HRC/37/15, para. 161.59), New Zealand (A/HRC/44/8, para. 111.29), Nicaragua (A/HRC/37/11, para. 132.33), Norway (A/HRC/44/9, para. 144.25), Portugal (A/HRC/43/8, para. 140.23), Senegal (A/HRC/38/16, para. 108.32), Sierra Leone (A/HRC/37/12, para. 148.32), Slovakia (A/HRC/44/10, para. 153.54), Slovenia (A/HRC/43/8, para. 140.25), Spain (A/HRC/37/11, para. 132.29), Sweden (A/HRC/44/14, para. 45.74), Turkey (A/HRC/37/11, para. 132.34), Ukraine (A/HRC/38/16, para. 108.31), United States of America (A/HRC/38/9, para. 105.122), Uruguay (A/HRC/44/10, para. 153.57), Venezuela (Bolivarian Republic of) (A/HRC/37/12, para. 148.31) and State of Palestine (A/HRC/37/11, para. 132.35).

<sup>68</sup> A/HRC/37/6, para. 118.62.

<sup>69</sup> A/HRC/37/11, paras. 132.27–132.29, 132.34–132.35, 132.37–132.40, 132.42 and 132.64–132.65; and A/HRC/37/11/Add.1, paras. 15–16.

<sup>70</sup> Durban Declaration, para. 2.

<sup>71</sup> Outcome Document of the Durban Review Conference, para. 85.

<sup>72</sup> In particular, the achievement of Goals 10 and 16. As discussed elsewhere, equality law provides a means to accelerate progress towards achieving Goals 1, 2, 3 and 4, by providing a legal framework to challenge discriminatory development barriers. See Equal Rights Trust, “No one left behind: an equal rights approach to sustainable development”, submission to the Special Rapporteur on the right to development concerning good practices in respect of the practical implementation of the right to development (London, 2018).

<sup>73</sup> Target 10.3 of the Sustainable Development Goals.

<sup>74</sup> A/HRC/42/38, paras. 147–148.

<sup>75</sup> In particular, target 5.c requires States to “adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality”, while target 16.b requires States to “promote and enforce non-discriminatory laws and policies”.



adoption of comprehensive anti-discrimination law was recognized as being necessary “to achieve a number of the Sustainable Development Goals and related targets”.<sup>76</sup>

### III. REGIONAL AND NATIONAL LAW DEVELOPMENTS

At the regional level, the value of comprehensive anti-discrimination legislation has been recognized by supranational normative bodies, including those with adjudicating powers. Regional human rights bodies in Africa, the Americas and Europe have all concluded that States parties to the human rights instruments in those regions have an obligation to enact comprehensive anti-discrimination laws. At the national level, anti-discrimination laws have been adopted that – although in some cases imperfect – seek ostensibly to provide comprehensive levels of protection, thus demonstrating a clear consensus among States on the need for comprehensive anti-discrimination legislation. On each continent, further legislative reform efforts are currently under way, as the push towards the adoption of comprehensive anti-discrimination law has grown into a truly global movement.

#### A. Africa

Article 2 of the African Charter on Human and Peoples’ Rights provides that: “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 any status.” Article 1 of the Charter requires States to “recognize the rights, duties and freedoms enshrined in [the] Charter and ... to adopt legislative or other measures to give effect to them”. The prohibition of discrimination enshrined in article 2 is recaptured in the preamble to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Under article 2 of the Protocol, States are required to take all “appropriate legislative, institutional and other measures” to combat discrimination against women.

In 2010, the African Commission on Human and Peoples’ Rights adopted its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, which emphasize States’ obligations to “recognise and take steps to combat intersectional discrimination based on a combination of (but not limited to) the following grounds: sex/gender, race, ethnicity, language, religion, political and other opinion, sexuality, national or social origin, property, birth, age, disability, marital, refugee, migrant and/or other status”.<sup>77</sup> Consistent with this guidance, the Commission has recommended that States adopt “comprehensive equality and non-discrimination law”.<sup>78</sup> In view of the recommendations of the Commission, several States in Africa are in the process of reviewing their legislative frameworks on equality.<sup>79</sup> In some countries, such as Kenya, the possibility of adopting comprehensive anti-discrimination law has been considered as part of these processes.<sup>80</sup>

<sup>76</sup> A/HRC/42/38, paras. 147–148.

<sup>77</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para. 38.

<sup>78</sup> African Commission on Human and Peoples’ Rights, “Concluding observations and recommendations on the 8th to 11th periodic report of the Republic of Kenya” (2016), para. 55 (ii).

<sup>79</sup> See, for instance, CCPR/C/KEN/4, para. 170. See also discussion of Tunisia, below.

<sup>80</sup> Indeed, in 2017, the delegation of Kenya to the Committee on the Elimination of Discrimination against Women indicated that comprehensive anti-discrimination legislation was being reviewed by the Kenya Law Reform Commission. See OHCHR, “Committee on the Elimination of Discrimination against Women considers the report of Kenya”, 2 November 2017.

## **SOUTH AFRICA: PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT**

In 2000, South Africa passed the Promotion of Equality and Prevention of Unfair Discrimination Act. The Act represents one of the earliest attempts to enact comprehensive anti-discrimination legislation, and has provided a basis for several laws, discrimination concepts and best practices to follow.

Section 1 of the Act contains definitions. There, equality is defined to include “the full and equal enjoyment of rights and freedoms as contemplated in the Constitution”, including “de jure and de facto equality and also equality in terms of outcome”. Discrimination is defined to include “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”.

The prohibited grounds of discrimination are listed under section 1 of the Act to include (explicitly) “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status.” Additionally, as discussed elsewhere in the present guide, the law sets out a test for the identification of new grounds of discrimination.<sup>81</sup>

Section 5 of the Act makes clear that its provisions bind “the State and all persons” although discrimination in the employment context is regulated separately by the Employment Equity Act.<sup>82</sup> Section 6 of the Act contains a provision on the general prohibition of discrimination, which is established on the basis of all those grounds set out above. Sections 7 to 9 of the Act provide particular examples of the application of this prohibition on the grounds of race, gender and disability. For instance, section 8 of the Act clarifies that gender-based violence falls within the ban on gender-based discrimination. Under section 9, disability discrimination is defined to include the contravention of established accessibility standards.

Sections 10 to 12 of the Act prohibit hate speech, harassment and the “dissemination and publication of information that unfairly discriminates”, respectively. In 2019, the Supreme Court of Appeal held that the definition of hate speech contained in section 10 was overbroad and thus unconstitutional.<sup>83</sup> The Court made an order requiring that Parliament amend the relevant provision within 18 months. The case was subsequently appealed to the Constitutional Court, which partially upheld the finding in its 2021 judgment.<sup>84</sup>

Violations of the Act may be challenged by bringing a case to an equality court, which consist of high courts and magistrates courts, in accordance with section 16 of the Act. The powers of equality courts are set out under section 21 of the Act and include broad powers to make orders. Section 13 of the Act sets out specific rules regulating the shifting of the burden of proof in discrimination cases, while section 20 establishes broad rules of standing, which permit, inter alia, public interest litigation.<sup>85</sup>

<sup>81</sup> See further discussion on this point in section I.A.1(a) of part two of the present guide.

<sup>82</sup> Employment Equity Act, 1998 (Act No. 55).

<sup>83</sup> Supreme Court of Appeal, *Qwelane v. South African Human Rights Commission and Another* (686/2018) [2019] ZASCA 167; [2020] 1 All SA 325 (SCA); 2020 (2) SA 124 (SCA); and 2020 (3) BCLR 334 (SCA) (29 November 2019).

<sup>84</sup> In particular, the Court found that the use of the word “hurtful” in section 10 (1) (a) was overbroad and to that extent inconsistent with the Constitution. The operation of the declaration of unconstitutionality was suspended for two years, to afford Parliament sufficient time to amend the relevant part of the section. See *Qwelane v. South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) (31 July 2021).

<sup>85</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, sect. 20 (1) (d).

## B. The Americas

Article 2 of the American Convention on Human Rights establishes an obligation to adopt all “legislative or other measures as may be necessary to give effect to those rights or freedoms” protected by it. Article 1 (1) of the Convention establishes a general obligation to “respect the rights and freedoms recognized herein ... without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”. Article 24 establishes the right to equal protection before the law and the entitlement, “without discrimination, to equal protection of the law”. As established by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, these articles, taken together, entail positive *erga omnes* obligations of the State to undertake all necessary measures (including enacting legislation) to ensure the effective and equal exercise of the rights and freedoms established in the Convention.<sup>86</sup> The Commission has identified a clear obligation to “adopt anti-discrimination legislation”,<sup>87</sup> citing a growing consensus in this area.<sup>88</sup> To be effective, such legislative measures “must be comprehensive” and must cover both “formal and substantive, de jure and de facto,” discrimination.<sup>89</sup>

The Inter-American Convention against All Forms of Discrimination and Intolerance was adopted in 2013 and came into force in February 2020. Under article 7, “States Parties undertake to adopt legislation that clearly defines and prohibits discrimination and intolerance, applicable to all public authorities as well as to all individuals or natural and legal persons, both in the public and in the private sectors.” The Convention supplements and builds upon a range of ground-specific instruments, which impose specific (and complementary) obligations to adopt laws and policies designed to eliminate discrimination against women, ethnic and racial minorities, persons with disabilities and older persons.<sup>90</sup> At the time of writing, 12 States from North, Central and South America have signed the Convention.<sup>91</sup> Pursuant to their regional and international law obligations, a range of States across the Americas have adopted anti-discrimination legislation that ostensibly seeks to provide comprehensive protection; prohibiting discrimination according to an open list of grounds in diverse areas of life.<sup>92</sup>

### CHILE: THE LAW ESTABLISHING MEASURES AGAINST DISCRIMINATION

In 2012, the National Congress of Chile passed Law No. 20.609 establishing measures against discrimination. A draft of the Law was first introduced by the President of the Chamber of Deputies in 2005. The passage of the bill was accelerated in 2012 following the discriminatory killing of 24-year-old Daniel Zamudio, who was viciously assaulted and tortured by a group of alleged neo-Nazis in a Santiago park.<sup>93</sup>

<sup>86</sup> See, for instance, Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*, Judgment, 24 February 2012, para. 279; Inter-American Commission on Human Rights, *San Miguel Sosa and others v. Venezuela*, Case 12.923, Report No. 75/15, Merits, 28 October 2015, para. 144; and Inter-American Court of Human Rights, *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, Judgment, 29 May 2014, para. 199.

<sup>87</sup> Inter-American Commission on Human Rights, *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas*, para. 82. See also Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* (OEA/Ser.L/V/II, Doc.36/15 Rev.2) (2015), p. 270 (recommendations, para. 25).

<sup>88</sup> Inter-American Commission on Human Rights, *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas*, paras. 82–84.

<sup>89</sup> *Ibid.*, para. 94.

<sup>90</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, art. 7; Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, art. 7; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, art. 3 (1); and Inter-American Convention on Protecting the Human Rights of Older Persons, arts. 4–5.

<sup>91</sup> Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Ecuador, Haiti, Mexico, Panama, Peru and Uruguay.

<sup>92</sup> See, illustratively, the Plurinational State of Bolivia, Law against Racism and All Forms of Discrimination, 2010 (Law No. 45); and Mexico, Federal Law to Prevent and Eliminate Discrimination, 2003.

<sup>93</sup> See [www.bcn.cl/historiadelaley/historia-de-la-ley/vista-expandida/4516](http://www.bcn.cl/historiadelaley/historia-de-la-ley/vista-expandida/4516).

The Law establishes a judicial mechanism allowing for the effective reestablishment of the rule of law whenever an act of arbitrary discrimination is committed. Article 1 sets out the material scope of the law, which obligates each of the organs of the State administration, within the scope of its competence. Article 1 further establishes a positive obligation for State bodies to develop and implement policies designed to guarantee to all persons the right to be free from discrimination.

Discrimination is defined under article 2 as any distinction, exclusion or restriction that lacks reasonable justification, made by State agents or individuals, that causes deprivation, disturbance or a threat as regards the legitimate exercise of the fundamental rights established in the constitution or in the international treaties on human rights ratified by Chile that are in force. Article 2 establishes an open list of grounds to prohibit discrimination on the basis of race or ethnicity, nationality, socioeconomic situation, language, ideology or political opinion, religion or belief, union membership or participation, sex, sexual orientation, gender identity and marital status, among other characteristics.

Article 2 further adds that differentiation may be justified by the legitimate exercise of another fundamental right with reference to a number of specific constitutional clauses.

## C. Europe

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) prohibits discrimination in respect of other Convention rights. The European Court of Human Rights has interpreted this to encompass a prohibition on treating similar things differently and different things similarly.<sup>94</sup> This provision is supplemented by article 1 of Protocol No. 12 to the Convention, which provides a free-standing right to non-discrimination. To date, 20 States have ratified Protocol No. 12. Ratification of the Convention is a prerequisite for membership of the Council of Europe and thus all 47 Council of Europe member States are bound by the requirements of article 14.<sup>95</sup> A number of States have also ratified the European Social Charter or the revised Charter and are thus also bound by the non-discrimination requirements of these treaties.<sup>96</sup>

The European Union has made bringing national equality legislation into line with the equal treatment directives an obligation for all European Union member States, as well as in association and membership negotiations with States seeking closer relations with it. Together, the directives extend protection from discrimination to individuals on the basis of their age, disability, gender, racial or ethnic origin, religion or belief, and sexual orientation in employment and also on the basis of racial or ethnic origin in the areas of education; social protection, including social security and health care; and the provision of goods and services, including housing.<sup>97</sup> Since 2008, a draft horizontal directive has been pending with the European Council.<sup>98</sup> In addition to the directives, chapter III of the Charter of Fundamental Rights of the European Union imposes supplementary obligations on States in the application of European Union law, which may be used to extend the list of prohibited grounds of discrimination<sup>99</sup> and the level of protection afforded in practice.<sup>100</sup>

<sup>94</sup> European Court of Human Rights, *Thlimmenos v. Greece*, Application No. 34369/97, Judgment, 6 April 2000.

<sup>95</sup> Additionally, in 2011, the Parliamentary Assembly of the Council of Europe adopted resolution 1844 (2011) on the Declaration of Principles on Equality and activities of the Council of Europe, which calls on member States to adopt comprehensive anti-discrimination law.

<sup>96</sup> European Social Charter, third preambular paragraph; and European Social Charter (Revised), part V, art. E.

<sup>97</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>98</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. For further information, see European Network of Equality Bodies (EQUINET), “Advancing the EU legal framework for equality and its implementation”, 9 November 2020.

<sup>99</sup> Charter of Fundamental Rights of the European Union, art. 21 (1).

<sup>100</sup> See, for instance, Court of Justice of the European Union, *Blanka Soukupová v. Ministerstvo zemědělství*, Case C-401/11, Judgment, 11 April 2013. See also European Union Agency for Fundamental Rights, *Applying the Charter of Fundamental Rights of the European Union in Law and Policymaking at National Level: Guidance* (Luxembourg, Publications Office of the European Union, 2020), pp. 29–30.

The European Union has helped to drive a process of equality law reform across the continent, as member States and States seeking accession bring their legislation into line with the equal treatment directives: in 2009, through the adoption of the Anti-Discrimination Act, Czechia became the last of the 27 European Union member States to adopt legislation to implement the requirements of the directives.<sup>101</sup> Additionally, between 2008 and 2015, nine States on the continent – first Croatia, then Bosnia and Herzegovina, Serbia, Albania, Montenegro, North Macedonia, Ukraine, the Republic of Moldova and finally Georgia – adopted comprehensive (or nearly comprehensive) anti-discrimination laws.<sup>102</sup>

## NORTH MACEDONIA: LAW ON PREVENTION AND PROTECTION AGAINST DISCRIMINATION

One of the most recent pieces of equality legislation in Europe is the Law on Prevention and Protection against Discrimination enacted in May 2019 by North Macedonia; it replaced earlier legislation. On 14 May 2020, approximately one year after coming into force, the Law was struck down by the Constitutional Court for procedural reasons – having been adopted without the majority required by article 75 of the Constitution. On 27 October 2020, the Law was readopted by Parliament, entering into force three days later, following its publication in the *Official Gazette*.<sup>103</sup>

Article 3 sets out the material scope of the Law, which applies to “all natural and legal entities”, in a non-exhaustive list of areas of life. Under article 3 (2) and (3) all “State authorities, bodies of local self-government, legal entities with public authorities and all other legal and natural entities” are placed under an obligation “to take measures or actions for [the] promotion and advancement of equality and prevention of discrimination”. Article 3 (4) of the Law further details the obligations of entities involved in data collection and processing.

Article 4 contains a glossary of terms. Here, equality is defined as “the principle under which all people have equal rights”. Discrimination based on association and perception, and multiple and intersectional discrimination are also defined, alongside other key terminology, such as “reasonable accommodation”.

Article 5 sets out the personal scope of law: prohibiting “any discrimination based on race, skin colour, national or ethnic origin, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, nationality, social background, education, religion or religious belief, political conviction, other beliefs, disability, age, family or marital status, property status, health status, personal capacity and social status, or any other grounds”.

Discrimination is defined under article 6 as “any distinction, exclusion, restriction or preference based on any discriminatory grounds, whether by doing or not, aimed at or resulting in preventing, restricting, recognising, enjoying or exercising the rights and freedoms of any person or group on an equal basis with the others”. This includes forms of direct and indirect discrimination, incitement and instruction to discriminate, harassment (including sexual harassment), victimization and segregation, which are defined, respectively, under articles 8–12 of the Law. It also includes, in article 6, denial of reasonable accommodation and accessibility measures.

Positive action, adopted “with the sole purpose to eliminate unequal enjoyment of human rights and freedoms until the de facto equality of any person or group is achieved”, shall not be deemed to constitute discrimination provided that the requirements of article 7 are met. This provision contains an exception to the non-discrimination framework: differential treatment based on a particular ground may be permissible in situations in which it constitutes a “genuine and determining occupational requirement”, provided

<sup>101</sup> Equal Rights Trust, “Czech Republic becomes last EU State to adopt anti-discrimination law”, 25 June 2009.

<sup>102</sup> Croatia, Anti-Discrimination Act, 2008; Bosnia and Herzegovina, Law on Prohibition of Discrimination, 2009; Serbia, Law on the Prohibition of Discrimination, 2009; Albania, Law No. 10 221 on Protection from Discrimination, 2010; North Macedonia, Law on Prevention and Protection against Discrimination, 2010 (replaced in October 2020); Republic of Moldova, Law on Equality, 2012; Ukraine, Law on Principles of Prevention and Combating Discrimination in Ukraine, 2012; Georgia, Law on the Elimination of All Forms of Discrimination, 2014; and Montenegro, Law on Prohibition of Discrimination, 2014.

<sup>103</sup> See also European Network of Legal Experts in Gender Equality and Non-Discrimination, “Flash report: North Macedonia”, 1 December 2020. Available at [www.equalitylaw.eu/downloads/5306-north-macedonia-anti-discrimination-law-re-adopted-by-parliament-following-annulment-by-the-constitutional-court-89-kb](http://www.equalitylaw.eu/downloads/5306-north-macedonia-anti-discrimination-law-re-adopted-by-parliament-following-annulment-by-the-constitutional-court-89-kb).



that “the goal is legitimate and the requirement does not exceed the level required for its realisation” (art. 7 (3) (2)).

Chapter III of the Law concerns the Commission for Protection against Discrimination, which is established under article 14 as a legal entity and “an autonomous and independent body”. Articles 15–22 set out the institutional mandate and requirements of the Commission, including its budget, composition, and rules regulating the appointment, dismissal and removal of members. Chapter IV of the Law sets out the procedure for bringing applications before the Commission, including rules regulating the burden of proof. It includes details of the powers of the Commission to collect data and inspect documents and premises.

Chapter V of the Law concerns court protection. Under article 32, any individual who has experienced discrimination is afforded the right to “file an application before the competent civil court”. Actions for protection against discrimination of public interest (*actio popularis*) are permitted under article 35, while article 40 establishes the right of interested third parties to intervene in cases before the courts. Article 37 regulates the burden of proof in discrimination cases, which shifts to the defendant once a *prima facie* case of discrimination has been presented. Article 38 provides that the rules of evidence in discrimination cases should follow the Code of Civil Procedure. The use of “statistical data and/or data obtained through situation testing” is explicitly permitted under this provision. Article 39 exempts individuals initiating a discrimination claim from paying court fees, which shall be borne by the State.

Finally, chapter VI sets out the penalties for violations of the Law and chapter VII contains transitional and final provisions.

## D. Other national law developments

While progress towards the adoption of comprehensive anti-discrimination legislation has been more limited in other regions of the world, there are clear indications that States are increasingly participating in and driving the growing international consensus on the need for such law.

Equality law reform efforts are ongoing in several jurisdictions. In 2018, for instance, Tunisia adopted legislation prohibiting all forms of racial discrimination, and a bill prohibiting discrimination on a broader range of grounds has recently been proposed by a group of Members of Parliament.<sup>104</sup> In Bangladesh, a draft act on the elimination of discrimination has been proposed by the National Human Rights Commission<sup>105</sup> and is currently with the Ministry of Law, Justice and Parliamentary Affairs for review.<sup>106</sup> In 2020, Hong Kong, China passed the Discrimination Legislation (Miscellaneous Amendments) Ordinance, which expanded the scope of protection against discrimination provided under its (ground-specific) equality ordinances.<sup>107</sup> In Australia, conversations relating to the consolidation of the State’s federal equality instruments<sup>108</sup> into a single equality act have been ongoing since at least 2011<sup>109</sup> and the Australian Human Rights Commission has recently led discussions on further reform of federal anti-discrimination law.<sup>110</sup> In Argentina, a coalition of civil society organizations is working to promote the adoption of a national comprehensive anti-discrimination law, following success in securing a law in Buenos Aires (Law No. 5261) in 2015.

<sup>104</sup> CCPR/C/TUN/CO/6, paras. 15–16.

<sup>105</sup> Muhammed Yeasin, “NHRC sends draft to govt”, *Independent* (Dhaka), 21 April 2018. Available at [www.theindependentbd.com/post/146679](http://www.theindependentbd.com/post/146679).

<sup>106</sup> Solidarity Group for Bangladesh, “Human rights in Bangladesh: a mid-term assessment of implementation during the UPR 3rd cycle” (2020). Available at [www.ohchr.org/Documents/HRBodies/UPR/NGOsMidTermReports/JointSubmissionSolidarityGroup\\_Bangladesh.pdf](http://www.ohchr.org/Documents/HRBodies/UPR/NGOsMidTermReports/JointSubmissionSolidarityGroup_Bangladesh.pdf).

<sup>107</sup> Sex Discrimination Ordinance, 1995; Disability Discrimination Ordinance, 1995; Family Status Discrimination Ordinance, 1997; and Race Discrimination Ordinance, 2008.

<sup>108</sup> Racial Discrimination Act, 1975; Sex Discrimination Act, 1984; Disability Discrimination Act, 1992; and Age Discrimination Act, 2004.

<sup>109</sup> See, for instance, Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law* (Sydney, 2011).

<sup>110</sup> Australian Human Rights Commission, “Free and equal: an Australian conversation on human rights – discussion paper: priorities for federal discrimination law reform” (Sydney, 2019).

In 2021, executive and legislative bodies in the Philippines<sup>111</sup> and Armenia<sup>112</sup> were actively considering the adoption of comprehensive anti-discrimination law, while draft legislation, developed and advocated principally by civil society, was drawn up in multiple countries, including (but not limited to) the Dominican Republic, India, Kyrgyzstan and Paraguay.

### INDIA: ANTI-DISCRIMINATION AND EQUALITY BILL

In 2017, Shashi Tharoor, Member of Parliament and a former Under-Secretary-General of the United Nations, submitted draft comprehensive anti-discrimination legislation, entitled the “Anti-Discrimination and Equality Bill, 2016”, as a private member’s bill to the Parliament of India.<sup>113</sup> The Bill, which built upon previous legislative initiatives,<sup>114</sup> was the first tangible articulation of comprehensive anti-discrimination law in India. Although the Bill lapsed, further work is being carried out by civil society in this area and there remains space for future legislative developments.

The Bill as drafted is divided into five chapters. Chapter II establishes the personal scope of the law, the forms of prohibited conduct and positive duties. Chapter III provides for the establishment of a central equality commission, its mandate, resourcing and powers. Chapter IV contains provisions relating to remedy for acts of discrimination, while chapter V contains miscellaneous provisions regulating, inter alia, the burden of proof in discrimination cases and legal standing to bring a claim, which extends to an “aggrieved person” (an individual who has experienced discrimination), a close relative (where the aggrieved person has died), an organization representing aggrieved persons with their prior consent or any aggrieved person when acting on behalf of a group of aggrieved individuals.<sup>115</sup>

Section 3 contains an explicit list of protected characteristics, which includes the grounds of “caste, race, ethnicity, descent, sex, gender identity, pregnancy, sexual orientation, religion and belief, tribe, disability, linguistic identity, HIV status, nationality, marital status, food preference, skin tone, place of residence, place of birth or age”. The Bill additionally prohibits discrimination on the basis of “any other characteristic which,—

- (a) is either outside a person’s effective control, or constitutes a fundamental choice, or both; and
- (b) defines at least one group that suffers or is in danger of suffering widespread and substantial disadvantage, when compared with other groups defined by the same characteristic”.<sup>116</sup>

Discrimination would further be prohibited on the basis of a combination of any of the above characteristics.<sup>117</sup> Under section 4, the term “protected group” is defined to include any “persons who are (correctly or incorrectly) perceived to be members of that group and persons who are associated with the members of that group and may or may not possess any formal recognition, social cohesion or a distinct cultural identity”.

Sections 6 to 12 identify forms of prohibited conduct, which includes direct discrimination, indirect discrimination, harassment, boycott, segregation, discriminatory violence and victimization. Sections 14–16 establish “anti-discrimination”, “diversification” and “due regard” duties; the latter of which requires “all public authorities while making a rule, regulation, policy or strategic decision [to] give due regard to [the need to eliminate] all forms of discrimination to promote equality and diversity”. Under section 33, any breach of these duties may result in the making of an “appropriate order, declaration,

<sup>111</sup> See, for instance, Commission on Human Rights, “Position paper on the Comprehensive Anti-Discrimination Bill at the House of Representatives, 18th Congress” (Quezon City, 2020). Available at [http://chr.gov.ph/wp-content/uploads/2020/11/SIGNED-Position-Paper\\_CADB\\_House-copy.pdf](http://chr.gov.ph/wp-content/uploads/2020/11/SIGNED-Position-Paper_CADB_House-copy.pdf).

<sup>112</sup> CCPR/C/ARM/RQ/3, paras. 9–10.

<sup>113</sup> Anti-Discrimination and Equality Bill, 2016. Available at <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/2991.pdf>.

<sup>114</sup> Including a draft law on an equal opportunity commission, which was published in a 2008 report by the Expert Group to examine and determine the structure and functions of an equal opportunity commission (Menon Committee), *Equal Opportunity Commission: What, Why and How?* (New Delhi, 2008). Available at [www.minorityaffairs.gov.in/sites/default/files/eoc\\_wwh.pdf](http://www.minorityaffairs.gov.in/sites/default/files/eoc_wwh.pdf).

<sup>115</sup> Anti-Discrimination and Equality Bill, 2016, sect. 37.

<sup>116</sup> *Ibid.*, sect. 3.

<sup>117</sup> *Ibid.*, sect. 3 (iii).

injunction, relief or award” by the State Equality Commission to remedy the harm caused. Remedies may include, inter alia, orders to refrain from discriminating or to amend the discriminatory practice; the payment of damages; public apologies and guarantees of non-repetition; the adoption of diversification measures; diversity training; and structural measures to avoid future rights violations.

## IV. CONCLUSION

Thus, at every level – from the United Nations treaty bodies to individual national legislatures and from the universal periodic review to the Sustainable Development Goals – there is now an understanding that States must – to meet their obligation to eliminate all forms of discrimination – adopt comprehensive anti-discrimination laws. The subsequent chapters of the present guide set out the necessary content of such laws, if they are to comply with international law and provide comprehensive and effective protection.





## **PART TWO:**

# **CONTENT OF COMPREHENSIVE ANTI-DISCRIMINATION LAW**

## I. RIGHTS TO EQUALITY AND NON-DISCRIMINATION

This part of the present guide deals with the substantive elements of anti-discrimination law – how the law should define and guarantee the rights to equality and non-discrimination.

First, it discusses the necessary definition and scope of the right to non-discrimination. In order to comply with international law, comprehensive anti-discrimination laws should define and prohibit all forms of discrimination, arising on the basis of all grounds recognized under international law and in all areas of life regulated by law. Section A examines the requirements of international law in each of these respects and defines the necessary elements of anti-discrimination law in respect of the personal scope, the forms of prohibited conduct and the material scope, before examining how the law should deal with the justification of otherwise discriminatory acts.

States do not meet their international legal obligations by simply defining and prohibiting discrimination: they must also, among other things, adopt positive measures designed to accelerate progress towards equality for those subjected to historic disadvantage or otherwise unable to participate on an equal basis. Thus, section B examines States' obligations in respect of positive action and how these should be effected through anti-discrimination law.

Finally, section C examines equality duties. It considers both States' duty to ensure accessibility, on an equal basis, to the physical environment, transport, infrastructure, services and information and communications and statutory duties included in anti-discrimination law through which States can give effect to their obligations to respect, protect and fulfil the rights to equality and non-discrimination.

In each case, the sections review international legal standards and the authoritative interpretations of the relevant United Nations treaty bodies, in order to establish the necessary elements of comprehensive anti-discrimination law.

### A. Prohibition of discrimination

Comprehensive anti-discrimination laws must define and prohibit discrimination.

Neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights defines “discrimination”, but a definition is included in the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that “‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. This definition is repeated in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women and article 2 of the Convention on the Rights of Persons with Disabilities, with the replacement of references to “race, colour, descent or national or ethnic origin”, with “sex” and “disability”, respectively, and the omission of the word “preference”.<sup>118</sup> In its general comment No. 18, the Human Rights Committee adopted the definition used in the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women almost verbatim, modifying it only insofar as required to expand the personal scope to “any ground”.<sup>119</sup> The Committee on Economic, Social and Cultural Rights took a similar approach

<sup>118</sup> It should be noted that the definition in the Convention on the Rights of Persons with Disabilities includes, in article 2, an additional sentence, as follows: “It includes all forms of discrimination, including denial of reasonable accommodation.” The definition of “intolerance and discrimination based on religion or belief” in article 2 (2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is also similar to the definition used in the International Convention on the Elimination of All Forms of Racial Discrimination, including its reference to “preference”, see Heiner Bielefeldt and Michael Wiener, “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief” (2021), p. 3. Available at [https://legal.un.org/avl/pdf/ha/ga\\_36-55/ga\\_36-55\\_e.pdf](https://legal.un.org/avl/pdf/ha/ga_36-55/ga_36-55_e.pdf).

<sup>119</sup> Human Rights Committee, general comment No. 18 (1989), paras. 6–7.

in its general comment No. 20 (2009), inserting the phrase “or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination” after the word “preference”.<sup>120</sup>

As the consistent references to “purpose or effect” in these definitions indicate, it is well established that discrimination occurs both when a person is treated differently from someone in a relevantly similar situation or treated equally to a group of persons placed in a relevantly different situation.<sup>121</sup>

## DEFINING DISCRIMINATION

Based on the practice and comments of the United Nations treaty bodies, discrimination may be defined as: any distinction, exclusion, or restriction based on one or more protected grounds that has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms or preventing equal participation in any area of life regulated by law. The prohibition of discrimination includes all forms of discrimination, including ground-based harassment and denial of reasonable accommodation.

As the definition implies, the question of comparison has, historically, been central to understandings of discrimination. In the most basic sense, a person or community experiencing discrimination can be understood to be suffering disadvantage in comparison to others. A question in the adjudication of many discrimination cases therefore has been “compared with what” real or hypothetical “comparator” the discrimination has occurred. As examined below, as understanding of discrimination has developed, it is now recognized that discrimination may simply give rise to a detriment, without any clear comparator, and indeed in respect of some forms of discrimination, comparison is not part of the legal definition. As will be examined below, while comparison can be useful for understanding how discrimination occurs and its consequences, failure to identify a comparator should never be a decisive factor in the consideration of cases.

## MEXICO: ARTICLE 1 (III) OF THE FEDERAL LAW TO PREVENT AND ELIMINATE DISCRIMINATION

For the purposes of this law, discrimination shall be construed as any distinction, exclusion, restriction or preference that, by way of action or omission, with or without intention, is not objective, rational or proportional and has as its object or results in hindering, restricting, preventing, undermining or annulling the recognition, enjoyment or exercise of human rights and freedoms, when it is based on one or more of the following grounds ....

Thus, as the consensus around the main aspects of the definition underlines, the right to non-discrimination is concerned with protecting individuals from differential treatment or impacts that arise in connection with a personal “characteristic” or “ground of discrimination” and that impair their equal enjoyment of life. Following from this, the right to non-discrimination can be understood as having four dimensions, each of which corresponds to a simple question:

- The personal scope of the right: who is protected?
- The conduct that is prohibited by the right: from what are people protected?
- The material scope of the right: where are people protected and who bears the duty?
- The potential justification of the conduct: why is some differentiation permitted?

<sup>120</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7.

<sup>121</sup> See, for example, Committee on the Rights of Persons with Disabilities, *Domina and Bendtsen v. Denmark* (CRPD/C/20/D/39/2017), para. 8.3, applying the standard established in European Court of Human Rights, *Thlimmenos v. Greece*, para. 44.

This section discusses the development of these concepts and provides practical guidance for policymakers and civil society working towards the adoption of comprehensive anti-discrimination legislation on what should be incorporated into such laws to ensure compliance with international human rights law.

## 1. Personal scope of the right to non-discrimination

The right to non-discrimination centres on protection from harm that arises in connection with a status, identity, characteristic or belief – collectively referred to as “grounds” of discrimination.<sup>122</sup> This section discusses these grounds, before turning to the different relationships between them and the ways in which people can be exposed to discrimination.

### (a) Proscribed grounds

#### SUMMARY

- Anti-discrimination legislation should prohibit discrimination on the basis of an extensive and open-ended list of characteristics.
- Discrimination must be prohibited on the basis of age; birth; civil, family or carer status; colour; descent, including caste; disability; economic status; ethnicity; gender expression; gender identity; genetic or other predisposition towards illness; health status; indigenous origin; language; marital status; maternity or paternity status; migrant status; minority status; national origin; nationality; place of residence; political or other opinion; pregnancy; property; race; refugee or asylum status; religion or belief; sex; sex characteristics; sexual orientation; social origin; social situation; or any other status.
- Discrimination should also be prohibited on the basis of such additional characteristics as require protection in a given society.
- Anti-discrimination legislation should permit the inclusion of additional grounds of discrimination to those explicitly listed, by prohibiting discrimination arising on the basis of “any other status”.

Since the adoption of the Universal Declaration of Human Rights in 1948, the understanding of the grounds upon which discrimination should be prohibited has evolved. In particular, States and international bodies have recognized that the prohibition of discrimination on “any other ground” includes an extensive range of characteristics not explicitly listed in the earliest instruments. Among other things, a large number of grounds that were not explicitly listed in those instruments – including age, disability, gender identity, health status and sexual orientation (among others) – have been recognized as equivalent to those that were listed and so have been incorporated within the list of recognized protected grounds.

The Universal Declaration of Human Rights, adopted in 1948, states that everyone is entitled to the rights that it sets forth “without distinction of any kind, such as race, colour, sex, language, religion [or belief],<sup>123</sup> political or other opinion, national or social origin, property, birth or other status”.<sup>124</sup> The Universal Declaration served as a template for the prohibition of discrimination under articles 2 (1) and 26 of the International Covenant on Civil and Political Rights and article 2 (2) of the International Covenant on Economic, Social and Cultural

<sup>122</sup> It should be noted that article 26 of the International Covenant on Civil and Political Rights recognizes the right to equality before the law and equal protection of the law and several national constitutions recognize a right to equal protection, which provide guarantees of equality that do not reference grounds of discrimination, allowing courts to take an expansive approach to the question of protected characteristics.

<sup>123</sup> While article 2 of the Universal Declaration of Human Rights uses the term “religion”, article 18 (on the right to freedom of thought, conscience and religion) refers to “religion or belief”. Articles 2 (1) and 18 of the International Covenant on Civil and Political Rights use similar language. In their commentary, human rights treaty bodies have made clear that the prohibition of discrimination applies on the basis of a person’s “religion or belief” (including, the non-profession of any religion or belief). This is made explicit on the face of article 1 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which uses the term “religion or conviction”. See, illustratively, Human Rights Committee, general comment No. 22 (1993), paras. 2, 10 and 11; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 22; and Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 18.

<sup>124</sup> Universal Declaration of Human Rights, art. 2.

Rights, which both use the same list of grounds.<sup>125</sup> The International Convention on the Elimination of All Forms of Racial Discrimination, adopted in 1965, additionally recognizes “descent” and “ethnic origin” as forms of racial discrimination prohibited by the Convention.<sup>126</sup>

Subsequent treaties have recognized an increasing range of grounds. Under the Convention on the Elimination of All Forms of Discrimination against Women, discrimination based on marital status, pregnancy and maternity (or paternity) status<sup>127</sup> is prohibited.<sup>128</sup> Article 2 (1) of the Convention on the Rights of the Child explicitly recognizes disability as a ground of discrimination, a position substantially re-enforced through the adoption of the Convention on the Rights of Persons with Disabilities in 2006.<sup>129</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in 1990, captures many of these developments, restating a majority of the grounds listed above and further recognizing age, economic position<sup>130</sup> and nationality as protected.<sup>131</sup>

In addition to providing an explicit list of grounds, many of the core human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, also prohibit discrimination on the basis of “other status”.<sup>132</sup> Several regional human rights instruments contain similarly worded provisions.<sup>133</sup> The term “other status” indicates that the list of grounds set out in the Covenants is illustrative, rather than comprehensive; allowing new grounds to be recognized as understanding of discrimination evolves.<sup>134</sup>

## IDENTIFICATION OF ADDITIONAL GROUNDS OF DISCRIMINATION: INTERNATIONAL, REGIONAL AND NATIONAL PRACTICE

In its general comment No. 20 (2009), the Committee on Economic, Social and Cultural Rights highlighted the importance of “a flexible approach” to the understanding of the term “other status.” According to the Committee:

**The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.**<sup>135</sup>

<sup>125</sup> Article 1 of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), contains a similar, albeit reduced, list of grounds.

<sup>126</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (1).

<sup>127</sup> In this publication, we use the term “maternity or paternity status”, reflecting the phrasing adopted by the Committee on the Rights of Persons with Disabilities in its general comment No. 6 (2018). In its concluding observations, the Committee on the Elimination of Discrimination against Women has urged States to ensure equal maternity and paternity leave as a means to address gender inequality and women’s exclusion from the marketplace. See, for example, CEDAW/C/PRK/CO/2-4, paras. 35–36.

<sup>128</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 11 (2).

<sup>129</sup> Convention on the Rights of Persons with Disabilities, art. 4 (1).

<sup>130</sup> Referred to as “economic situation” in general comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights and “economic status” in general comment No. 6 (2018) of the Committee on the Rights of Persons with Disabilities. The term “economic status” is used in the present publication.

<sup>131</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 1 (1). The Convention also prohibits discrimination on the basis of “conviction”, a ground that is contiguous with the characteristic of religion or belief protected under a number of other international instruments.

<sup>132</sup> International Covenant on Civil and Political Rights, arts. 2 (1) and 26; and International Covenant on Economic, Social and Cultural Rights, art. 2 (2). See also International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 1 (1); and Convention on the Rights of the Child, art. 2 (1).

<sup>133</sup> Article 2 of the African Charter on Human and Peoples’ Rights, article 14 of the European Convention on Human Rights and article 1 (1) of Protocol No. 12 thereto also prohibit discrimination on the basis of “other status”. Each instrument uses the phrase “such as” to indicate that the list of grounds is illustrative rather than exhaustive. This is also true of article 21 (1) of the Charter of Fundamental Rights of the European Union, which does not use the term “other status”. Article 1 (1) of the American Convention on Human Rights prohibits discrimination on the basis of a set list of grounds “or any other social condition”. Article 1 (1) of the Inter-American Convention against All Forms of Discrimination and Intolerance drops the word “social” to prohibit discrimination based on “any other condition”.

<sup>134</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 27.

<sup>135</sup> Ibid.

The European Court of Human Rights has indicated that the term “other status” should be given “a wide meaning”,<sup>136</sup> and should not be limited to characteristics “which are personal in the sense that they are innate or inherent”.<sup>137</sup> Likewise, the Inter-American Commission on Human Rights has recommended that the term “any other social condition” established under article 1 (1) of the American Convention on Human Rights be construed broadly and “interpreted in the context of the most favourable option for the human being and in light of the evolution of fundamental rights in contemporary international law”.<sup>138</sup>

### **SOUTH AFRICA: THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT**

The Promotion of Equality and Prevention of Unfair Discrimination Act of South Africa provides a test for identifying additional grounds of discrimination. In addition to those grounds expressly listed under the legislation, the term “prohibited grounds” is taken to include “any other ground where discrimination based on that other ground[:] (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on [an explicitly listed] ground”.<sup>139</sup> As one of the earliest comprehensive equality laws, the South African model has proven influential and has informed the development of subsequent best practice approaches.<sup>140</sup> Through their consideration of individual communications, general comments and concluding observations, the human rights treaty bodies have identified a broad range of personal characteristics as forms of “other status”. This includes, inter alia, the grounds of sexual orientation,<sup>141</sup> gender identity<sup>142</sup> and – in recognition of the particular harms affecting intersex persons<sup>143</sup> – sex characteristics.<sup>144</sup> Developments in these areas have been largely captured at the regional level,<sup>145</sup> as well as in national legislation adopted pursuant to States’ human rights obligations.<sup>146</sup>

The Committee on Economic, Social and Cultural Rights and the Committee on the Rights of Persons with Disabilities have issued general comments on equality and non-discrimination, which reflect developments at the international level and provide a (non-exhaustive) list of grounds that have come to be recognized

<sup>136</sup> European Court of Human Rights, *Carson and others v. the United Kingdom*, Application No. 42184/05, Judgment, 16 March 2010, para. 70.

<sup>137</sup> European Court of Human Rights, *Clift v. the United Kingdom*, Application No. 7205/07, Judgment, 13 July 2010, paras. 56–59.

<sup>138</sup> Inter-American Commission on Human Rights, *Duque v. Colombia*, Case 12.841, Report No. 5/14, Merits, 2 April 2014, para. 64.

<sup>139</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, sect. 1.

<sup>140</sup> Equal Rights Trust, Declaration of Principles on Equality, principle 5; and Parliamentary Assembly of the Council of Europe, resolution 1844 (2011) on the Declaration of Principles on Equality and activities of the Council of Europe, para. 10.

<sup>141</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 32; CRC/C/BLR/CO/5-6, para. 15 (a); Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 18; CRPD/C/IND/CO/1, para. 19 (b); Committee against Torture, general comment No. 2 (2007), para. 21; CERD/C/KGZ/CO/8-10, para. 16; CMW/C/LKA/CO/2, para. 27 (c); and Human Rights Committee, *Young v. Australia* (CCPR/C/78/D/941/2000), para. 10.4.

<sup>142</sup> See, for example, E/C.12/UKR/CO/7, paras. 10–11; CCPR/C/UZB/CO/5, paras. 10–11; Committee on the Elimination of Racial Discrimination, general recommendation No. 36 (2020), paras. 18 and 60; CEDAW/C/NZL/CO/8, para. 12 (a); CRPD/C/MMR/CO/1, para. 12; CMW/C/LKA/CO/2, para. 27 (c); CRC/C/LVA/CO/3-5, para. 27 (c); and CAT/C/UZB/CO/5, para. 64.

<sup>143</sup> Member States, United Nations entities, regional mechanisms and civil society organizations use different terms to describe the ground of discrimination on the basis of which intersex persons face human rights violations, including “sex characteristics”, “intersex status” and “bodily diversity”. In the present guide, the term generally used is “sex characteristics”.

<sup>144</sup> See, for example, E/C.12/ECU/CO/4, paras. 25–26; CRC/C/LVA/CO/3-5, para. 27 (c); CEDAW/C/NZL/CO/8, para. 12 (a); CRPD/C/IND/CO/1, para. 19 (b); CAT/C/BLR/CO/5, para. 30 (b); CERD/C/ARG/CO/21-23, para. 36; CMW/C/GTM/CO/2, paras. 26 (a) and 27 (d); and CCPR/C/TUN/CO/6, paras. 19–20.

<sup>145</sup> For instance, in relation to the ground of sexual orientation, see African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication No. 245/02, Decision, 11–15 May 2006, para. 169; Inter-American Court of Human Rights, *Atala Rizzo and Daughters v. Chile*, Case, Judgment, 24 February 2012; and European Court of Human Rights, *S.L. v. Austria*, Application No. 45330/99, 2003, para. 37. For further discussion on this point, see African Commission on Human and Peoples’ Rights and others, *Ending Violence and Other Human Rights Violations based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights, and United Nations* (Pretoria, Pretoria University Law Press, 2016). Available at [www.ohchr.org/Documents/Issues/Discrimination/Endingviolence\\_ACHPR\\_IACHR\\_UN\\_SOGI\\_dialogue\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf).

<sup>146</sup> See, for instance, Malta, Gender Identity, Gender Expression and Sex Characteristics Act, 2015.



in international law. This list includes – in addition to those explicitly listed characteristics set out above – family (or carer) status,<sup>147</sup> gender identity,<sup>148</sup> health status, place of residence, sexual orientation,<sup>149</sup> social situation, civil status, gender expression,<sup>150</sup> genetic or other predisposition towards illness, indigenous origin, migrant status, national minority status, sex characteristics<sup>151</sup> and refugee or asylum status.<sup>152</sup> In the course of adjudicating cases, treaty bodies have recognized other grounds, based on national law, such as “ancestry”.<sup>153</sup>

Some treaty bodies have considered particular grounds of discrimination together. In its general comment No. 20 (2009), for example, the Committee on Economic, Social and Cultural Rights discusses discrimination on the grounds of ethnic origin as a form of race discrimination; discrimination on the basis of gender and pregnancy as aspects of sex-based discrimination; trade union and political party membership as forms of political or other opinion; refugee, asylum seeker, migrant, trafficking status and statelessness under the heading of nationality; and descent-based discrimination under the ground of birth.<sup>154</sup>

Different language may also be used by the treaty bodies to describe related concepts – often signifying a development in understanding of the most appropriate terminology<sup>155</sup> or of the different facets of related grounds. Thus, for instance, in its general comment No. 6 (2018), the Committee on the Rights of Persons with Disabilities distinguishes the grounds of gender identity and gender expression,<sup>156</sup> reflecting best practice in this area.<sup>157</sup> It should be noted, however, that there are often overlaps and intersections between characteristics and it is important that any clarification of terms does not result in an absence of protection.

To meet their international law obligations, when adopting comprehensive anti-discrimination legislation, States must ensure that the right to non-discrimination is respected, protected and fulfilled.<sup>158</sup> This means that all individuals who are exposed to discrimination on one or more of the grounds recognized in international law are provided legal avenues to enforce their rights and secure redress.<sup>159</sup> Additionally, national legislators should seek to list any further characteristics that require protection in their society to ensure that the right to non-discrimination is made realizable to all.<sup>160</sup> In this regard, several States have recognized grounds of

<sup>147</sup> In its general comment No. 6 (2018), the Committee on the Rights of Persons with Disabilities uses the term “career status” rather than carer status, although an examination of the preceding draft of the general comment (which uses the term “carer”) and the location of the word “career” within the phrase “family or career status” indicates that this is a typographical error. In the present guide, reference is made to the ground of “family or carer status” rather than “career status”.

<sup>148</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 32; E/C.12/UKR/CO/7, paras. 10–11; Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), para. 4; CRPD/C/MMR/CO/1, para. 12 (a); and CRPD/C/IND/CO/1, para. 19 (b).

<sup>149</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 32. See also Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 21 and 33; and CRPD/C/IND/CO/1, para. 19 (b).

<sup>150</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), paras. 23 and 40; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 21.

<sup>151</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), paras. 2, 23, and 30; E/C.12/NLD/CO/6, paras. 18–19; CRPD/C/IND/CO/1, para. 19 (b); and the discussion of sex characteristics, above.

<sup>152</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 18–35; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 21.

<sup>153</sup> Human Rights Committee, *Ross v. Canada* (CCPR/C/70/D/736/1997), ground based on New Brunswick statute and as adjudicated at the Supreme Court of Canada.

<sup>154</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 19–20, 23, 26, 30 and 32.

<sup>155</sup> See, for example, discussion of the term “socioeconomic disadvantage”, in Equal Rights Trust, *Learning Inequality: Using Equality Law to Tackle Barriers to Primary Education for Out-of-School Children* (London, 2017) pp. 32–35.

<sup>156</sup> “Gender identity” is defined in the Yogyakarta Principles as “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth”. The Yogyakarta Principles (plus 10) define “gender expression” as “each person’s presentation of the person’s gender through physical appearance ... and mannerisms, speech, behavioural patterns, names and personal references”. While historically discussed together, an individual’s gender expression “may or may not conform to a person’s gender identity”.

<sup>157</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 21 and 34; CEDAW/C/NZL/CO/8, para. 11 (a) and 12 (a); CCPR/C/SLV/CO/7, para. 9; Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), paras. 23 and 40; and CRC/C/SWE/CO/5, para. 15.

<sup>158</sup> See section I.B of part one of the present guide.

<sup>159</sup> See further chapter II of part two of the present guide.

<sup>160</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 27.

discrimination not explicitly listed above – ranging from “caste” to “HIV/AIDS status” – in their national legal frameworks.<sup>161</sup>

*Grounds of discrimination recognized under international law*

The box below lists all of those grounds that have been explicitly recognized as grounds of discrimination under international law, either through inclusion in one or more of the instruments or the interpretation thereof by the competent treaty bodies. It includes those characteristics that are explicitly included in the text of the non-discrimination provisions of the core international human rights treaties, as well as those named in general comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights and general comment No. 6 (2018) of the Committee on the Rights of Persons with Disabilities. Together, these general comments capture many of the developments in the recognition of grounds in international law; however, they are not fully reflective of international standards and some grounds of discrimination – such as albinism – are omitted, despite clear recognition of their protected status.<sup>162</sup> In this connection, it should be emphasized that the box is not intended to provide a comprehensive picture of all grounds of discrimination recognized under international law. The fact that a particular characteristic is not explicitly listed within the non-discrimination provisions of a treaty should not be taken to indicate an absence of protection<sup>163</sup> and it is important that “other status” provisions are interpreted broadly to ensure that the right to non-discrimination is afforded to all.

**GROUPS OF DISCRIMINATION RECOGNIZED UNDER INTERNATIONAL LAW**

Age

Birth

Civil, family or carer status

Colour

Descent, including caste

Disability

Economic status

Ethnicity

Gender expression

Gender identity

Genetic or other predisposition towards illness

Health status

Indigenous origin

Language

Marital status

Maternity or paternity status

Migrant status

Minority status

National origin

Nationality

Place of residence

Political or other opinion

Pregnancy

Property

Race

Refugee or asylum status

Religion or belief

Sex

Sex characteristics

Sexual orientation

Social origin

Social situation

In addition, under international law, States must maintain an “open-ended” list of grounds, including by prohibiting discrimination on the basis of “other status”.

<sup>161</sup> See, for example, Constitution of India, art. 15 (1), in respect of caste-based discrimination; and Constitution of Burundi, art. 22, in respect of HIV/AIDS status. Each of these grounds has also been recognized in international law, although they are often considered under other headings such as “descent” or “health status”. See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 26 and 33.

<sup>162</sup> However, this ground is sometimes considered under other headings such as colour or disability. See E/C.12/GIN/CO/1, para. 18; CCPR/C/AGO/CO/2, paras. 13–14; CEDAW/C/ETH/CO/8, para. 21; CERD/C/ZMB/CO/17-19, paras. 29–30; and CRPD/C/SEN/CO/1, paras. 7–8.

<sup>163</sup> Indeed, as noted above, within general comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights, several grounds recognized by other treaty bodies have been subsumed under single headings. The ground of “birth”, for instance, covers discrimination based on descent and caste-based discrimination. Statelessness is considered a form of nationality-based discrimination. See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 26 and 30.



## DISCRIMINATION AGAINST NON-CITIZENS

The international human rights treaties guarantee rights to “everyone”, without regard to citizenship, in keeping with the global commitment that all persons are born equal in dignity and in rights. The Human Rights Committee has noted that all of the rights of the International Covenant on Civil and Political Rights must be guaranteed without discrimination between citizens and non-citizens and has emphasized that non-citizens benefit from the provisions of article 2 of the Covenant.<sup>164</sup> In its consideration of several individual complaints, the Committee has further held that the prohibition of discrimination in article 26 of the Covenant includes differentiation between nationals and non-nationals.<sup>165</sup> Similarly, the Committee on Economic, Social and Cultural Rights has stated that nationality is a protected ground falling within “other status” in article 2 (2) of the International Covenant on Economic, Social and Cultural Rights. It has also emphasized that the rights protected by the Covenant “apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation”.<sup>166</sup>

The Committee on the Elimination of Racial Discrimination has explored in detail the measures required of States to ensure that non-citizens are not subjected to any form of discrimination. These include the general principles that: (a) the “legal provisions of States parties must not discriminate against any particular nationality”; (b) international law “must be construed so as to avoid undermining the basic prohibition of discrimination”; (c) States have positive obligations to “prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. ... States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law”; and (d) any “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation ... are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.<sup>167</sup>

Tribunals such as the European Court of Human Rights have deemed States in violation of the ban on discrimination in cases concerning, for example, the exclusion of foreign nationals from unemployment benefits or requiring non-nationals without permanent residence to pay secondary school fees.<sup>168</sup> The Court has also held States to be in violation of the ban on racial discrimination in citizenship procedures.<sup>169</sup> In cases concerning the collective expulsion of aliens, the Court has held States to an even more stringent standard of proof than in other cases of discrimination.<sup>170</sup>

It flows from the above that in most – if not all – areas of economic, social and cultural life, discrimination on the basis of nationality is banned on the same basis as any other ground of discrimination. Compliance with international human rights law requires that, in situations in which exceptions relating to nationality are included in national law, they must be narrowly defined. Moreover, it stems from the general prohibition of discrimination that non-nationals should also be afforded protection from discrimination in areas including immigration, deportation, citizenship and other aspects of border control on the basis of all other protected characteristics, including (but not limited to) sex, sexual orientation, gender identity, disability or – as noted by the Committee on the Elimination of Racial Discrimination in its general recommendation No. 30 (2004) – race, colour, descent, national or ethnic origin.<sup>171</sup>

<sup>164</sup> Human Rights Committee, general comment No. 15 (1986), para. 2.

<sup>165</sup> See, for instance, Human Rights Committee, *Gueye et al. v. France*, communication No. 1966/1983; *Adam v. Czech Republic*, communication No. 586/1994; and *Karakurt v. Austria*, communication No. 965/2000.

<sup>166</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 30.

<sup>167</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004), paras. 1–4.

<sup>168</sup> European Court of Human Rights, *Gaygusuz v. Austria*, Application No. 17371/90, Judgment, 16 September 1996; and *Ponomaryovi v. Bulgaria*, Application No. 5335/05, Judgment, 21 June 2011.

<sup>169</sup> European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016. See also European Commission of Human Rights, *East African Asians v. the United Kingdom*, Application Nos. 4403/70–4419/70 and others, Report, 14 December 1973.

<sup>170</sup> “The Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.” European Court of Human Rights, *Çonka v. Belgium*, Application No. 51564/99, Judgment, 5 February 2002, para. 61.

<sup>171</sup> See, in the context of immigration, Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004), para. 9.

## (b) Discrimination based on association and perception

**SUMMARY**

- **Anti-discrimination legislation should prohibit discrimination on the basis of perception and association, defined as follows:**
  - **Discrimination based on perception occurs when persons are disadvantaged on the basis of a perception – whether accurate or not – that they possess a protected characteristic.**
  - **Discrimination based on association occurs when persons are disadvantaged on the basis of their association with another person or persons possessing a protected characteristic.**

Discrimination does not only occur against individuals who possess a particular characteristic, status or identity. Individuals may also experience discrimination due to a perception that they belong to a group sharing a protected characteristic or because of their association with a person or group possessing such a characteristic. Discrimination based on perception occurs when persons are disadvantaged on the basis of a perception – whether accurate or not – that they possess a protected characteristic. Discrimination based on association occurs when persons are disadvantaged on the basis of their association with another person or persons possessing a protected characteristic.

**KOSOVO:<sup>172</sup> LAW ON PROTECTION FROM DISCRIMINATION, 2015***Article 4*

**1.7. Discrimination based on association – is deemed discrimination on the grounds set out in Article 1 of this Law, targeting people who do not belong to a particular group but are third parties that are associated with those groups;**

...

**1.9. Discrimination based on perception – is considered discrimination on the grounds set out in Article 1 of this law, targeting people who do not belong to a particular group but are third parties that are perceived to belong to those groups.**

The Committee on Economic, Social and Cultural Rights has noted that membership of a protected group includes “association with a group characterized by one of the prohibited grounds” and “perception by others that an individual is part of such a group”.<sup>173</sup> Similarly, in its interpretation of the relevant convention, the Committee on the Rights of Persons with Disabilities has noted that the prohibition of discrimination extends to those “who are presumed to have a disability, as well as those who are associated with a person with a disability”.<sup>174</sup> Other treaty bodies have also addressed discrimination based on perception in their concluding observations.<sup>175</sup>

Cases handled by courts at the regional level have required these bodies to engage with the problems of discrimination on the basis of perception and discrimination by association, allowing them to elaborate on the nature of the protection. The Inter-American Court of Human Rights has held that the American Convention

<sup>172</sup> References to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

<sup>173</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 16.

<sup>174</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 20. Through its general comments, the Committee has addressed the treatment of persons with disabilities based on their “actual or perceived impairment” in many areas of life, including in respect of equal legal capacity, deprivations of liberty and inclusive education. See Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014), para. 13; general comment No. 3 (2016), para. 52; and general comment No. 4 (2016), para. 6.

<sup>175</sup> See, for example, in respect of sexual orientation: CCPR/C/ZAF/CO/1, paras. 20–21; CCPR/C/SEN/CO/5, para. 15 (c); CCPR/C/MAR/CO/6, para. 12; CRC/C/IRN/CO/3–4, para. 31; and CAT/C/SEN/CO/4, para. 36 (b). See also in respect of health status: CMW/C/LKA/CO/2, para. 27 (c).

on Human Rights prohibits discrimination arising on the basis of the “perception that others have of [an individual’s] relationship with a social sector or group, regardless of whether this corresponds to the reality or to the self-identification of the victim”.<sup>176</sup> Such discrimination, according to the Court, has the purpose or effect of reducing individuals: “to the single characteristic attributed to [them], without taking other personal conditions into consideration. This reduction of the identity results in a differentiated treatment and thus, in the violation of the victim’s rights.”<sup>177</sup> The Court has previously cited the Committee on Economic, Social and Cultural Rights as regards the prohibition of discrimination based on perception and association with approval<sup>178</sup> and has implicitly recognized that discrimination based on the association of an individual with a person belonging to a protected group is prohibited.<sup>179</sup>

In the European Union, understanding of these concepts has been developed through the cases *Coleman v. Attridge Law* and *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*. In the former case, the Court of Justice of the European Union found that a woman who had been treated unfavourably because of her son’s disability had been subject to discrimination. According to the Court, limiting the application of the employment equality directive to persons possessing a protected characteristic (in this case disability) would be to “deprive th[e] directive of an important element of its effectiveness”.<sup>180</sup> Applying this reasoning, in *CHEZ*, the Court found that the race equality directive extended to “persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds”. The case concerned Anelia Nikolova, a non-Roma woman with a business in a Roma neighbourhood, in which electrical metering was different to that in predominantly non-Roma neighbourhoods. Ruling in the case, the Court held that the applicant must demonstrate that discrimination had occurred in respect of a ground set out in the directive; membership of a particular group was not required.<sup>181</sup> Accordingly, Ms. Nikolova had suffered discrimination on grounds of racial or ethnic origin, regardless of the fact that she did not belong to the group in question. This approach has similarly been applied at national level.<sup>182</sup>

To varying extents, both the European Court of Human Rights<sup>183</sup> and the African Commission on Human and Peoples’ Rights have each recognized acts of discrimination based on perception or association as prohibited.<sup>184</sup>

<sup>176</sup> Inter-American Court of Human Rights, Advisory Opinion OC-24/17, 24 November 2017, para. 79. See also Inter-American Court of Human Rights, *Perozo et al. v. Venezuela*, Judgment, 28 January 2009, para. 380; and *Ríos et al. v. Venezuela*, Judgment, 28 January 2009, para. 349.

<sup>177</sup> Inter-American Court of Human Rights, *Flor Freire v. Ecuador*, Judgment, 31 August 2016, para. 120.

<sup>178</sup> *Ibid.*, para. 121.

<sup>179</sup> Inter-American Court of Human Rights, *Gonzales Lluy et al. v. Ecuador*, Judgment, 1 September 2015, paras. 214–216.

<sup>180</sup> Court of Justice of the European Union, *Coleman v. Attridge Law*, Case C-303/06, Judgment, 17 July 2008, para. 51.

<sup>181</sup> Court of Justice of the European Union, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, Case C-83/14, Judgment, 16 July 2015, para. 56.

<sup>182</sup> See, for example, Hungary, Criminal Code, 2012, sect. 216.

<sup>183</sup> In *Guberina v. Croatia*, the Court stated clearly that the article 14 prohibition of discrimination under the European Convention on Human Rights “covers instances in which an individual is treated less favourably on the basis of another person’s status or protected characteristics”. The Court has also identified “discrimination on account of one’s actual or perceived ethnicity” as a form of racial discrimination. See, respectively, European Court of Human Rights, *Guberina v. Croatia*, Application No. 23682/13, Judgment, 22 March 2016, para. 78; and *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, Judgment, 13 December 2005, para. 56.

<sup>184</sup> For instance, in a resolution adopted in 2014, the African Commission on Human and Peoples’ Rights expressed concern regarding violence and discrimination against individuals due to their “actual or imputed sexual orientation or gender identity”. Under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, discrimination on the basis of association with a person with disabilities is prohibited (art. 5 (2) (c)). See African Commission on Human and Peoples’ Rights, resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (ACHPR/Res.275(LV)2014).

## (c) Intersectionality and multiple discrimination

**SUMMARY**

- **Anti-discrimination legislation should prohibit multiple discrimination by recognizing that discrimination may occur on the basis of more than one protected ground. Multiple discrimination can be “cumulative” or “intersectional” in nature:**
  - Cumulative discrimination takes place when discrimination occurs on two or more, separate, grounds.
  - Intersectional discrimination takes place when discrimination occurs based on a combination of grounds that interact with each other in a way that produces distinct and specific discrimination.
- **To ensure comprehensive protection, anti-discrimination legislation should ensure that cumulative and intersectional discrimination are explicitly prohibited.**

In recent decades, there has been growing recognition that discrimination can – and frequently does – occur on the basis of multiple grounds, often interacting with each other in complex ways. As a result, a clear consensus has emerged among the United Nations human rights treaty bodies that effective protection of the right to non-discrimination requires prohibition of multiple discrimination – that is, discrimination on more than one ground. The term “multiple discrimination” can be understood as referring to two distinct phenomena:

- “Cumulative” discrimination occurs when an individual experiences discrimination based on two or more, separate, grounds. While this can and does result in compound disadvantage, laws that prohibit discrimination on the basis of single grounds can provide a means to challenge these distinct and separate acts of discrimination.
- “Intersectional” discrimination occurs when an individual experiences discrimination based on a combination of grounds that interact with each other in a way that results in a particular harm. Such a case might occur, for example, in a situation in which a television station adopts a policy of terminating the employment of women presenters once they reach the age of 45. Men in the same age bracket are not affected by the policy; nor are younger women. In this case, the discrimination experienced arises not due to age or gender alone, but due to the interaction or fusion of these grounds. In such cases, individuals possessing only one of the characteristics at issue would not experience discrimination – it is only because of the combined, intersectional impact that the harm occurs. As such, where laws do not recognize intersectional discrimination, there can be a gap in protection.

The Committee on Economic, Social and Cultural Rights has clarified that the prohibition of discrimination under article 2 (2) of the Covenant includes both cumulative and intersectional discrimination.<sup>185</sup> The Human Rights Committee has increasingly applied the concept of multiple or intersectional discrimination to its assessment of State obligations under the Covenant<sup>186</sup> and has recommended that States prohibit all forms of multiple and intersectional discrimination through the adoption of comprehensive equality law.<sup>187</sup> These recommendations are mirrored in the practice of the Committee on the Elimination of Racial Discrimination,<sup>188</sup> the Committee on the Elimination of Discrimination against Women<sup>189</sup> and the Committee on the Rights of

<sup>185</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 17 and 27.

<sup>186</sup> See, for example, CCPR/C/MRT/CO/2, paras. 14–17.

<sup>187</sup> See, for example, CCPR/C/ITA/CO/6, para. 9; and CCPR/C/AUS/CO/6, para. 18.

<sup>188</sup> The Committee on the Elimination of Racial Discrimination has set out that: “The principle of enjoyment of human rights on an equal footing is integral to the Convention’s prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The ‘grounds’ of discrimination are extended in practice by the notion of ‘intersectionality’ whereby the Committee addresses situations of double or multiple discrimination”. See Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 7.

<sup>189</sup> The Committee on the Elimination of Discrimination against Women has noted that “discrimination of women based on sex and gender is inextricably linked with other factors” and that the concept of intersectionality is essential to “understanding the scope of the general obligations of States parties contained in article 2” of the Convention. See Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 18. See also Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 12.

Persons with Disabilities,<sup>190</sup> each of which has acknowledged that a recognition of multiple discrimination is essential to the fulfilment of State obligations to equality and non-discrimination under their respective treaties.

## MULTIPLE DISCRIMINATION AND THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

At its thirty-sixth ordinary session in 2004, the African Commission on Human and Peoples' Rights adopted a resolution on economic, social and cultural rights in Africa.<sup>191</sup> The Commission called for the establishment of a working group to develop a set of principles and guidelines on economic, social and cultural rights in Africa. The final guidelines were officially launched at the Commission's fiftieth session,<sup>192</sup> with the aim of "assist[ing] State parties to comply with their obligations under the African Charter".<sup>193</sup> Among other things, the Guidelines clearly recognize States' obligations to eliminate forms of multiple and intersectional discrimination, which are defined as follows: "Intersectional or multiple discrimination occurs when a person is subjected to discrimination on more than one ground at the same time, e.g. race and gender."<sup>194</sup>

At the regional level, the concept of multiple discrimination is most developed in the Americas, where the Inter-American Commission on Human Rights and the Court of Human Rights have addressed intersectionality in a line of cases concerning issues such as sexual violence against indigenous women.<sup>195</sup> The Court has pointed to multiple discrimination that is not merely the result of the confluence of multiple factors, but rather of the particular intersection of different factors that give rise to specific, qualitatively distinct forms of discrimination.<sup>196</sup> For instance, in *Gonzales Lluy et al. v. Ecuador*, a girl living with HIV/AIDS had been subjected to various forms of harm, including denial of access to health care and expulsion from school, due to her health condition. The Court found that various factors, such as her health condition, her gender and her socioeconomic background, had resulted in the creation of a "specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different".<sup>197</sup>

The African Commission on Human and Peoples' Rights has recently articulated States' obligations to "recognise and take steps to combat intersectional discrimination based on a combination of ... grounds".<sup>198</sup> The jurisprudence of the European Court of Human Rights on this issue is less developed, although the intersecting aspects of an individual's identity have been cited in cases when making a finding of discrimination.<sup>199</sup>

<sup>190</sup> Article 6 of the Convention on the Rights of Persons with Disabilities expressly recognizes that women and girls with disabilities may be subject to multiple discrimination. The Committee on the Rights of Persons with Disabilities has noted that this provision is only illustrative and that the prohibition of multiple and intersectional discrimination is a cross-cutting obligation under the Convention. See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 19 and 36.

<sup>191</sup> African Commission on Human and Peoples' Rights, resolution 73 on economic, social and cultural rights in Africa (ACHPR/Res.73(XXXVI)04).

<sup>192</sup> African Commission on Human and Peoples' Rights, "Final communiqué of the 50th ordinary session of the African Commission on Human and Peoples' Rights" (Banjul, 2011).

<sup>193</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, preamble.

<sup>194</sup> Ibid., paras. 1 (l) and 38.

<sup>195</sup> See, for example, Inter-American Commission on Human Rights, *González Pérez v. Mexico*, Case 11.565, Report No. 53/01, 4 April 2001; Inter-American Court of Human Rights, *Fernández Ortega et al. v. Mexico*, Judgment, 30 August 2010, para. 185; and Inter-American Court of Human Rights, *Rosendo Cantú et al. v. Mexico*, Judgment, 31 August 2010.

<sup>196</sup> Inter-American Court of Human Rights, *Gonzales Lluy et al. v. Ecuador*, Judgment, 1 September 2015, para. 290, and Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 11; *I.V. v. Bolivia*, Judgment, 30 November 2016, para. 247; *Ramírez Escobar et al. v. Guatemala*, Judgment, 9 March 2018, paras. 276 and 304.

<sup>197</sup> Inter-American Court of Human Rights, *Gonzales Lluy et al. v. Ecuador*, Judgment, 1 September 2015, para. 290.

<sup>198</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 38.

<sup>199</sup> For instance, in *B.S. v. Spain*, the Court held that "decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute", thus resulting in a violation of article 14, in conjunction with the procedural limb of article 3, of the Convention. See European Court of Human Rights, *B.S. v. Spain*, Application No. 47159/08, Judgment, 24 July 2012, para. 62. See also, in respect of age and gender, *Carvalho Pinto de Sousa Morais v. Portugal*, Application No. 17484/15, Judgment, 25 July 2017.



## 2. Forms of discrimination

Both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women explicitly require States to eliminate “all forms of discrimination”, and this same formulation has been used repeatedly by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of Persons with Disabilities in their engagements with States regarding their non-discrimination obligations.<sup>200</sup> However, with the partial exception of the Committee on the Rights of Persons with Disabilities,<sup>201</sup> the core United Nations human rights instruments do not discuss the different forms of discrimination. Rather, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities define discrimination as any distinction, exclusion or restriction (or preference) on the basis of a protected ground that has the “purpose or effect” of preventing the equal enjoyment of human rights.<sup>202</sup> As noted above, this definition has been adopted by both the Human Rights Committee<sup>203</sup> and the Committee on Economic, Social and Cultural Rights.<sup>204</sup>

### GEORGIA: LAW ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION

#### Article 2

##### 1. Any form of discrimination is prohibited in Georgia. ...

In its general comment No. 6 (2018), the Committee on the Rights of Persons with Disabilities identifies four “main” forms of discrimination recognized in international human rights practice. This includes: (a) direct discrimination; (b) indirect discrimination; (c) denial of reasonable accommodation; and (d) harassment (on the basis of a protected ground).<sup>205</sup> With some nuances, each of these concepts has been recognized as prohibited conduct falling within the scope of the right to non-discrimination provided under the other international human rights treaties.<sup>206</sup> In addition to this list, the present guide discusses segregation and victimization as forms of prohibited conduct recognized in international law.<sup>207</sup> Some divergences in approach within and

<sup>200</sup> Notably, both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women are drafted in view of the need to eliminate “all forms of discrimination” against their respective beneficiary groups. The Committee on the Rights of Persons with Disabilities has noted that the “duty to prohibit ‘all discrimination’” under the Convention “includes all forms of discrimination”. In their reviews of State performance under the treaties, the treaty bodies have further recommended the adoption of comprehensive anti-discrimination legislation that, inter alia, prohibits “all forms of discrimination”. See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18; CCPR/C/LBR/CO/1, para. 17 (a); E/C.12/CPV/CO/1, para. 17; CRC/C/PSE/CO/1, para. 21; and CMW/C/LBY/CO/1, para. 29 (a).

<sup>201</sup> The Convention defines the denial of “reasonable accommodation” as a form of discrimination. See Convention on the Rights of Persons with Disabilities, art. 2.

<sup>202</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (1); Convention on the Elimination of All Forms of Discrimination against Women, art. 1; and Convention on the Rights of Persons with Disabilities, art. 2. The International Convention on the Elimination of All Forms of Racial Discrimination includes the additional term “preference”. As discussed in section I.B.3 of part two of the present guide, the Committee on the Elimination of All Forms of Racial Discrimination has sought to distinguish “special measures”, which may involve preferential treatment, from “unjustifiable preferences”. Only the latter constitutes a form of prohibited racial discrimination as defined by the Convention. Article 1 (a) of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) uses similar language to the International Convention on the Elimination of All Forms of Racial Discrimination, although the term “restriction” is omitted. See Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 7.

<sup>203</sup> Human Rights Committee, general comment No. 18 (1989), paras. 6–7.

<sup>204</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7.

<sup>205</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18.

<sup>206</sup> See, in particular, the discussion of denial of reasonable accommodation in section I.A.2(d) of part two of the present guide, which is most frequently discussed as a form of ground-specific (disability) discrimination.

<sup>207</sup> As discussed in section I.A.2(f) of part two of the present guide, while victimization is clearly recognized as a form of prohibited conduct, it is not always treated as a distinct form of discrimination. In international law, victimization has frequently been discussed as part of States’ obligations to ensure access to justice.

between human rights mechanisms may be noted in respect of these concepts and when applied to concrete cases, there may be some areas of overlap between them.<sup>208</sup> These nuances are discussed below.

Over time, as understanding of discrimination concepts and the experiences of discriminated groups develops, new forms of discrimination may be identified, which require legal sanction.<sup>209</sup> In all cases, it is important that comprehensive anti-discrimination law provides effective protection from all forms of discrimination. This requires, at a minimum, ensuring that all individuals who experience any of the types of prohibited conduct described in this section are provided with appropriate legal mechanisms to assert and vindicate their rights.<sup>210</sup>

## (a) Direct discrimination

### SUMMARY

- Direct discrimination involves treating persons less favourably or subjecting them to a detriment because of their protected characteristics. The prohibition of direct discrimination includes acts or omissions. Direct discrimination can be committed intentionally or unintentionally and may be overt or covert. Anti-discrimination legislation should prohibit direct discrimination. Direct discrimination occurs when a person is treated less favourably than another person is, has been or would be treated in a comparable situation on the basis of one or more protected grounds; or when a person is subjected to a detriment on the basis of one or more grounds of discrimination.

Direct discrimination is what many people understand when the word “discrimination” is used in general discourse: treating someone less favourably because of a particular characteristic or characteristics. Examples include an employer refusing to hire someone because of their ethnicity or a restaurant refusing someone entry because of their sexual orientation. While these examples both involve “overt” (open and transparent) unfavourable treatment explicitly related to a particular characteristic, direct discrimination can also be covert or done under a pretext.<sup>211</sup> Moreover, direct discrimination does not require motive or intent: the discriminating party does not need to act with the intention (or even the knowledge) to cause harm or disadvantage – what is relevant is the causal link between the harm and the characteristic.

### DISCRIMINATION AND THE REQUIREMENT OF INTENT

Under international human rights law, conduct is prohibited in situations in which it has the “purpose or effect” of impairing the equal enjoyment of rights.<sup>212</sup> While the words “purpose” and “effect” are sometimes equated – respectively – with “direct” and “indirect” discrimination, the terms are not synonymous, albeit that they may cover many of the same forms of conduct<sup>213</sup> and, when taken together, may provide co-extensive protection to that covered by direct and indirect discrimination.

Direct discrimination may occur without an express purpose or intention to discriminate. For example, the Inter-American Commission on Human Rights has commented on the practice of lesbian, gay, bisexual and transgender inmates being placed into lengthy periods of solitary confinement, with the purported justification of “safeguarding” them from a risk of violence. Such practices, according to the

<sup>208</sup> See, in particular, discussion in part two of the present guide on the overlap between reasonable accommodation and indirect discrimination (sect. I.A.2(d)) and the treatment of segregation (sect. I.A.2(e)).

<sup>209</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), paras. 8 and 15.

<sup>210</sup> See further chapter III of part two of the present guide, which sets out those procedural guarantees necessary to ensure effective implementation of anti-discrimination law.

<sup>211</sup> See, for example, European Court of Human Rights, *Oršuš and others v. Croatia*, Application No. 15766/03, Judgment, 16 March 2010.

<sup>212</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 1; Convention on the Rights of Persons with Disabilities, art. 2; Human Rights Committee, general comment No. 18 (1989), paras. 6–7; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7.

<sup>213</sup> See, for example, Human Rights Committee, *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2; and Committee on the Elimination of Racial Discrimination, *L.R. et al. v. Slovak Republic* (CERD/C/66/D/31/2003), para. 10.4.

Commission, may constitute discrimination, “even where the intent is to protect LGBT persons deprived of liberty”.<sup>214</sup>

The term “effect” has been interpreted by human rights treaty bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities and the Human Rights Committee, as prohibiting discrimination without the need to identify a discriminatory motive or intent.<sup>215</sup> The Committee on the Rights of Persons with Disabilities makes the point explicitly in its general comment No. 6 (2018), noting – in its definition of direct discrimination – that: “The motive or intention of the discriminating party is not relevant to a determination of whether discrimination has occurred.”<sup>216</sup> In the 2016 case of *Gabre Gabaroum v. France*, the Committee on the Elimination of Racial Discrimination reached a similar conclusion, emphasizing that “presumed victims of racial discrimination are not required to show that there was discriminatory intent against them”.<sup>217</sup>

As elaborated below, the requirement of intent is clearly absent in indirect discrimination cases and, in this connection, the Committee on the Elimination of Racial Discrimination has criticized States whose laws fail to meet the requirements of the Convention.<sup>218</sup>

Regional human rights bodies, including the European Court of Human Rights,<sup>219</sup> the Court of Justice of the European Union,<sup>220</sup> the African Commission on Human and Peoples’ Rights<sup>221</sup> and the Inter-American Commission on Human Rights have each held that the intent of a party is irrelevant to a finding of discrimination.<sup>222</sup>

### GUYANA: INTENT UNDER ARTICLE 4 (3) OF THE PREVENTION OF DISCRIMINATION ACT, 1997

“Any act or omission or any practice or policy that directly or indirectly results in discrimination against a person on the grounds referred to in subsection (2), is an act of discrimination regardless of whether the person responsible for the act or omission or the practice or policy intended to discriminate.”

<sup>214</sup> Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, para. 160.

<sup>215</sup> Committee on the Elimination of Racial Discrimination, *V.S. v. Slovakia* (CERD/C/88/D/56/2014), para. 7.4; Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (a); and Human Rights Committee, *Simunek et al. v. the Czech Republic* (CCPR/C/54/D/516/1992), para. 11.7.

<sup>216</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (a).

<sup>217</sup> Committee on the Elimination of Racial Discrimination, *Gabre Gabaroum v. France* (CERD/C/89/D/52/2012), para. 7.2. While the case was decided using the language of “discriminatory effect”, it was – in practice – a case concerning direct racial discrimination in employment.

<sup>218</sup> See, for example, CERD/C/USA/CO/7-9, para. 5.

<sup>219</sup> European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016, paras. 91 and 103, and the Concurring Opinion of Judge Pinto de Albuquerque, para. 7, identifying as a potential exception to this rule, the adoption of positive action measures designed to eliminate de facto discrimination.

<sup>220</sup> In one case decided by the Court, public statements were made by the director of a company indicating that migrant workers would not be considered for a job because “customers were reluctant to give them access to their private residences”. The Court did not consider the intent of the director (which it was argued was motivated by a desire to retain customers, rather than an intent to discriminate) a relevant consideration, making a finding of discrimination. See Court of Justice of the European Union, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07, Judgment, 10 July 2008, para. 16.

<sup>221</sup> African Commission on Human and Peoples’ Rights, *Open Society Justice Initiative v. Côte d’Ivoire*, communication No. 318/06, Decision, February 2016, para. 144.

<sup>222</sup> Inter-American Commission on Human Rights, *Tide Méndez et al. v. Dominican Republic*, Case 12.271, Report No. 64/12, 29 March 2012, para. 158.



While the core United Nations human rights instruments do not make explicit use of the terms direct and indirect discrimination, human rights treaty bodies have consistently recognized both as forms of prohibited conduct falling within the scope of the right to non-discrimination.<sup>223</sup>

In its general comment No. 20 (2009), the Committee on Economic, Social and Cultural Rights noted that both direct and indirect discrimination fall within the scope of article 2 (2) going on to define direct discrimination as the situation in which “an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground”.<sup>224</sup> A similar definition has been adopted by the Committee on the Rights of Persons with Disabilities.<sup>225</sup> The Committee on the Elimination of Discrimination against Women has used a slightly more expansive formulation, omitting reference to less favourable treatment and noting simply that “direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences”.<sup>226</sup> Neither the Committee on the Elimination of Racial Discrimination nor the Human Rights Committee have attempted to define direct or indirect discrimination in their general comments,<sup>227</sup> although both Committees have recognized the concepts<sup>228</sup> and have urged States to adopt comprehensive equality legislation prohibiting all forms of direct and indirect discrimination.<sup>229</sup>

Regional human rights mechanisms have tended to approach direct discrimination cases through the broad discrimination prohibition, from which indirect discrimination has been identified and differentiated as a discrete form of prohibited conduct.<sup>230</sup> Differential or unfavourable treatment, related to one or more prohibited grounds, nonetheless remains central to these definitions.<sup>231</sup>

<sup>223</sup> See, illustratively, CCPR/C/UZB/CO/5, para. 9 (a); CERD/C/PSE/CO/1-2, para. 12 (a); E/C.12/GIN/CO/1, para. 19 (a); CEDAW/C/QAT/CO/2, para. 14 (b); CRPD/C/IND/CO/1, para. 13 (a); CRC/C/BLR/CO/5-6, para. 15 (a); and CMW/C/MOZ/CO/1, para. 28. See, relatedly, ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination Based on Race, Colour and National Extraction (2018), in which the Committee calls for the adoption of “comprehensive legislation containing explicit provisions defining and prohibiting ... direct and indirect discrimination”.

<sup>224</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 10 (a).

<sup>225</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18.

<sup>226</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 16.

<sup>227</sup> Although the Committee on the Elimination of Racial Discrimination does explicitly reference “direct and indirect discrimination” as a heading (namely, B) in its general recommendation No. 32 (2009).

<sup>228</sup> Human Rights Committee, *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2; and Committee on the Elimination of Racial Discrimination, *L.R. et al. v. Slovak Republic* (CERD/C/66/D/31/2003), para. 10.4.

<sup>229</sup> See, for example, CCPR/C/UZB/CO/5, para. 9 (a); and CERD/C/PSE/CO/1-2, para. 12 (a).

<sup>230</sup> Thus, for instance, in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (para. 82 (i)), the African Commission on Human and Peoples’ Rights calls on States to “ensure no direct or indirect discrimination in social security schemes on any of the prohibited grounds of discrimination”, but only “indirect discrimination” is defined in paragraph 1. See, similarly, Inter-American Commission on Human Rights, *Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*, Case 12.361, Report No. 85/10, 14 July 2010, paras. 120–125; and Inter-American Convention against All Forms of Discrimination and Intolerance, art. 1 (1)–(2). The European Court of Human Rights defines discrimination broadly to include any “difference in the treatment of persons in analogous, or relevantly similar, situations” that is “based on an identifiable characteristic”. Such a difference in treatment may amount to indirect discrimination in situations in which it takes “the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group”. See, respectively, European Court of Human Rights, *Carson and others v. the United Kingdom*, Application No. 42184/05, Judgment, 16 March 2010, para. 61; and European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016, para. 103.

<sup>231</sup> The general definition of discrimination typically refers to distinctions, exclusions or restrictions. See, for example, Inter-American Convention against All Forms of Discrimination and Intolerance, art. 1 (1). See also African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para. 19; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 2 (2); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 2 (2); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 2 (a)–(b); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 2 (1) (a) and (2); and European Court of Human Rights, *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007, para. 184. See also European Committee of Social Rights, *Equal Rights Trust v. Bulgaria*, Complaint No. 121/2016, Decision on the Merits, 16 October 2018, para. 87.

## DIRECT DISCRIMINATION UNDER EUROPEAN UNION LAW

Direct discrimination is defined under the European Union equal treatment directives as the situation “where one person is treated less favourably than another is, has been or would be treated in a comparable situation [on a prohibited ground]”.<sup>232</sup> In *Feryn*, the Court of Justice of the European Union found that the statement of an employer declaring that it would “not recruit employees of a certain ethnic or racial origin” constituted direct discrimination for the purposes of article 2 (2) (a) of the race equality directive. According to the Court, “direct discrimination is not dependant on the identification of a complainant who claims to have been the victim”.<sup>233</sup> In this context, the statements of an employer indicating that they would not employ persons of a certain ethnic origin were discriminatory in themselves.<sup>234</sup>

Whether there has been a difference in treatment is a question of fact, often evidenced through the use of a comparator – a real or hypothetical person in a similar situation to the claimant who does not have the characteristic at issue.<sup>235</sup> However, it may not always be possible to identify a comparator and there is no requirement to identify a comparator in order to establish that discrimination has occurred.

### (b) Indirect discrimination

#### SUMMARY

- Indirect discrimination involves the application of rules that appear neutral but that have disproportionate negative impacts on those who share a particular characteristic.
- Anti-discrimination legislation should prohibit indirect discrimination. Indirect discrimination occurs when a provision, criterion or practice has or would have a disproportionate negative impact on persons having a status or a characteristic associated with one or more grounds of discrimination.

Indirect discrimination occurs when the application of a rule or practice has or would have a less favourable impact on those who share a particular characteristic. Indirect discrimination involves rules, policies or practices that appear neutral and universal – they apply to everyone equally and they do not reference a particular characteristic – but that have disproportionate impacts on those who share a particular characteristic. Examples would include a job advertisement for firefighters that specifies a height requirement that may affect women disproportionately (who are on average shorter than men) or school uniform rules that prohibit head or face coverings and so would disadvantage observant Jewish or Sikh boys and Orthodox Jewish or Muslim girls, as well as some Roma or other minority girls, respectively.

Thus, while direct discrimination involves different, less favourable treatment on the basis of a particular characteristic, indirect discrimination involves identical treatment, but with different and less favourable impacts. There is often confusion about the difference between direct and indirect discrimination. It is important to note that the difference is not one of severity. Both direct and indirect discrimination can have

<sup>232</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 2 (2) (a); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 2 (2) (a); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 2 (a); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 2 (1) (a).

<sup>233</sup> Court of Justice of the European Union, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07, Judgment, 10 July 2008, para. 25. See, relatedly, Committee on the Elimination of Racial Discrimination, *Koptova v. Slovak Republic*, communication No. 13/1998, para. 8.2, in which the Committee cited its earlier view that Anna Koptova was a “victim” under article 14 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination since she belonged to the group of the population (Roma) directly targeted by discriminatory resolutions enacted by the State.

<sup>234</sup> Court of Justice of the European Union, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07, Judgment, 10 July 2008, para. 34. See, relatedly, Court of Justice of the European Union, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, Case C-81/12, Judgment, 25 April 2013; and *NH v. Associazione Avvocatura per i diritti LGBTI*, Case C-507/18, Judgment, 23 April 2020.

<sup>235</sup> See section I.A.2(b) of this part on comparators.

serious and lasting impacts. Nor is the difference between the concepts concerned with intent or the extent to which the discriminating party is open about their motives. As discussed above, direct discrimination can be both intentional and unintentional<sup>236</sup> and can be both overt (open and transparent) and covert (hidden).<sup>237</sup>

Indirect discrimination is well established as a form of discrimination under international and regional law. The Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities have each recognized the need to prohibit indirect discrimination in order to ensure the full enjoyment of the right to non-discrimination adopting a broadly consistent definition.<sup>238</sup> In each case, this definition centres on an apparently neutral law, policy or practice that has a disproportionate negative impact on the rights of individuals belonging to a protected group.<sup>239</sup> As noted previously, both the Committee on the Elimination of Racial Discrimination and the Human Rights Committee define discrimination as “any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of all rights and freedoms”.<sup>240</sup> Both the Human Rights Committee and the Committee on the Elimination of Racial Discrimination have recognized States’ obligations to eliminate forms of direct and indirect discrimination.<sup>241</sup> The African,<sup>242</sup> Inter-American,<sup>243</sup> European Union<sup>244</sup> and the European Court of Human Rights<sup>245</sup> human rights systems have all adopted similar definitions of indirect discrimination to those used by the international bodies, with little divergence in approach.

#### ARTICLE 1 (2) OF THE INTER-AMERICAN CONVENTION AGAINST ALL FORMS OF DISCRIMINATION AND INTOLERANCE

“Indirect discrimination shall be taken to occur, in any realm of public and private life, when a seemingly neutral provision, criterion, or practice has the capacity to entail a particular disadvantage for persons belonging to a specific group, or puts them at a disadvantage, unless said provision, criterion, or practice has some reasonable and legitimate objective or justification under international human rights law.”

<sup>236</sup> As noted above, intent may be lacking in cases of direct discrimination, while in some circumstances a prima facie neutral law may be adopted with the clear intention of discriminating against a protected group. See, for example, Committee on the Elimination of Racial Discrimination, *L.R. et al. v. Slovak Republic* (CERD/C/66/D/31/2003), para. 10.5.

<sup>237</sup> See the discussion of intent in section I.A.2(a) of part two of the present guide.

<sup>238</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 7 and 10; Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (b); and Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 16.

<sup>239</sup> In its interpretation of article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, for instance, the Committee on Economic, Social and Cultural Rights has defined indirect discrimination as “laws, policies or practices which appear neutral at face value, but have a disproportionate impact ... as distinguished by prohibited grounds of discrimination”. A similar definition is adopted by the Committee on the Rights of Persons with Disabilities. See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 10 (b); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (b).

<sup>240</sup> Human Rights Committee, general comment No. 18 (1989), para. 7.

<sup>241</sup> CCPR/C/UZB/CO/5, para. 9 (a); and CERD/C/PSE/CO/1-2, para. 12 (a). See, relatedly, ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination Based on Race, Colour and National Extraction (2018), in which the Committee calls for the adoption of “comprehensive legislation containing explicit provisions defining and prohibiting ... direct and indirect discrimination”.

<sup>242</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para. 1 (m).

<sup>243</sup> See, for example, Inter-American Court of Human Rights, *Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*, Case 12.361, Report No. 85/10, 14 July 2010, paras. 123 and 125. See also Inter-American Convention against All Forms of Discrimination and Intolerance, art. 1 (2).

<sup>244</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 2 (2) (b); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 2 (2) (b); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 2 (b); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 2 (1) (b).

<sup>245</sup> European Court of Human Rights, *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007, para. 184. The European Committee on Social Rights has adopted a distinctive approach in its definition of indirect discrimination. According to the Committee: “such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all”. See European Committee on Social Rights, *Equal Rights Trust v. Bulgaria*, Complaint No. 121/2016, Decision on the Merits, 16 October 2018, para. 87.

As discussed in section I.A.4 of part two, below, rules, policies or practices that produce differential impacts may be justified in situations in which they are established based on objective and reasonable criteria and are a proportionate means of achieving a legitimate aim.<sup>246</sup>

## COMPARATORS

One means to establish whether direct discrimination has occurred is to show that the complainant has been treated less favourably than another person or group of persons in a relevantly similar situation. Similarly, one means to establish indirect discrimination is to demonstrate that a group of persons sharing a particular characteristic has experienced a disproportionate impact from the application of a rule, when compared with another group. In such cases, the other person or group of persons with whom the applicant is compared is referred to as the “comparator”.

The use of a comparators is a common – but by no means necessary – means to establish whether discrimination has occurred. International law recognizes that discrimination can be established without reference to a comparator; it need only be established that a complainant has experienced a detriment connected to a ground of discrimination. In addition, it is not necessary that the comparator be real; there is broad consensus that a comparator may be hypothetical.

The use of comparators has been explored in the jurisprudence of the European Court of Human Rights. The Court has held in a number of cases that the question for the adjudicator is whether there is a difference in treatment of “persons in an analogous or relevantly similar situation”,<sup>247</sup> indicating that the requirement to demonstrate an analogous position does not require that the comparator groups be identical. It has also held that applicants should be able to demonstrate that, having regard to the particular nature of their complaints, they were in a relevantly similar situation to others treated differently.<sup>248</sup> Elements that characterize different situations and determine their comparability must be assessed in light of the subject matter and purpose of the measure that makes the distinction in question.<sup>249</sup> In other words, the analysis of the question of whether two persons or groups are in a comparable situation for the purposes of assessing differential treatment and discrimination is both specific and contextual.<sup>250</sup> In its jurisprudence on the question, the United Kingdom House of Lords has stated that “unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification”.<sup>251</sup>

Comparators are only one means to establish that direct or indirect discrimination has occurred. The Committee on Economic, Social and Cultural Rights and the Committee on the Rights of Persons with Disabilities have both noted that discrimination can include “detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation”.<sup>252</sup> This principle is fundamentally important, as establishing a comparator – actual or hypothetical – can be difficult for

<sup>246</sup> See in particular section I.A.4(b) of part two of the present guide.

<sup>247</sup> European Court of Human Rights, *Molla Sali v. Greece*, Application No. 20452/14, Judgment, 19 December 2018, para. 133; *Fábián v. Hungary*, Application No. 78117/13, Judgment, 5 September 2017, para. 113; *Khamtokhu and Aksenchik v. Russia*, Application Nos. 60367/08 and 961/11, Judgment, 24 January 2017, para. 64; *X and others v. Austria*, Application No. 19010/07, Judgment, 19 February 2013, para. 98; *Konstantin Markin v. Russia*, Application No. 30078/06, Judgment, 22 March 2012, para. 125; *Burden v. the United Kingdom*, Application No. 13378/08, Judgment, 29 April 2008, para. 60; *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007, para. 175; *Zarb Adami v. Malta*, Application No. 17209/02, Judgment, 20 June 2006, para. 71; and *Kafkaris v. Cyprus*, Application No. 21906/04, 12 February 2008, para. 160.

<sup>248</sup> European Court of Human Rights, *Fábián v. Hungary*, Application No. 78117/13, Judgment, 5 September 2017, para. 113; and *Clift v. the United Kingdom*, Application No. 7205/07, 13 July 2010, para. 66.

<sup>249</sup> European Court of Human Rights, *Fábián v. Hungary*, Application No. 78117/13, Judgment, 5 September 2017, para. 121.

<sup>250</sup> For further reading on the approach of the European Court of Human Rights to the use of comparators, see European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of Discrimination* (Strasbourg, 2021), paras. 52–61. For an overview of the approach of the Court of Justice of the European Union to comparators, including exceptions to the rule, see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (Luxembourg, Publications Office of the European Union, 2018), pp. 44–49.

<sup>251</sup> *Al (Serbia) v. Secretary of State for the Home Department* [2008] UKHL 42, remarks made by Baroness Hale of Richmond.

<sup>252</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 10 (a); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (a).

victims of discrimination<sup>253</sup> and often detrimental to their claim. Thus, in cases of direct and indirect discrimination, it is illegitimate to dismiss a claim based on the absence of a comparator.

Use of a comparator is not necessary – and indeed is inappropriate – in considering claims of harassment, failure to make reasonable accommodation or victimization, concepts that are discussed below.

### (c) Ground-based harassment

#### SUMMARY

- Anti-discrimination legislation should prohibit harassment. Ground-based harassment occurs when unwanted conduct related to any ground of discrimination takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- Harassment may be committed intentionally or unintentionally.
- Sexual harassment is a discrete form of harm that entails conduct that is sexual in nature. The duty to prohibit sexual harassment forms a specific parallel obligation of States. Where the prohibition of sexual harassment is set out in anti-discrimination legislation, it should be defined separately and sit alongside a prohibition of ground-based harassment.

Ground-based harassment is a form of discrimination that occurs when an individual experiences unwanted conduct, related to a ground of discrimination, that violates dignity and creates an intimidating, hostile, degrading, humiliating or offensive environment, or that has this purpose, even if unsuccessful. A broad range of acts may fall within this definition, including an individual's words, actions and other behaviour.<sup>254</sup> As with other forms of discrimination, intent or motivation is not necessary to prove harassment – it is sufficient that the conduct in question has the effect of violating dignity and of creating a hostile environment.<sup>255</sup>

Ground-based harassment may also occur in situations in which an individual or group is deliberately excluded or targeted on the basis of a protected characteristic. In India, for example, anti-discrimination activists have highlighted concerns about the practice of social exclusion or economic boycott of individuals by a particular community, on the basis of caste, religion or ethnicity.

In some jurisdictions, there is a discrete, separate criminal offence of harassment that is not part of anti-discrimination law.<sup>256</sup> Such offences cover, for example, abuse, bullying, unwanted touching or other behaviour that makes a person feel distressed or threatened, but that is unrelated to a ground of discrimination. The law governing such offences falls outside the scope of the present guide.

The Committee on Economic, Social and Cultural Rights has stated that harassment is a form of discrimination within the meaning of article 2 (2) of the International Covenant on Economic, Social and Cultural Rights,<sup>257</sup> while the Committee on the Rights of Persons with Disabilities has identified it as one of the “four main forms” of discrimination prohibited under the relevant Convention.<sup>258</sup> Other treaty bodies have also recognized harassment as a form of prohibited conduct in their assessments of State implementation of the

<sup>253</sup> See, for instance, in the context of pregnancy, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 10 (a); and, relatedly, Court of Justice of the European Union, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88, Judgment, 8 November 1990.

<sup>254</sup> See, for example, Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (d).

<sup>255</sup> See the discussion of intent in section I.A.2(a) of part two of the present guide.

<sup>256</sup> See, for example, United Kingdom, Protection from Harassment Act, 1997.

<sup>257</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7.

<sup>258</sup> Defined as “unwanted conduct related to disability or other prohibited grounds [which] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. Other “main forms” of discrimination identified are direct discrimination, indirect discrimination and failure to provide reasonable accommodation. See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (d).



right to non-discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights.<sup>259</sup> Sexual harassment is a discrete but related form of harm, which has an autonomous definition in international law.

## SEXUAL HARASSMENT

Under European Union legislation, harassment (which may occur on the basis of an individual's sex, as well as other grounds) and sexual harassment are defined separately as discrete forms of harm. While both offences include conduct that violates human dignity and has the effect of creating “an intimidating, hostile, degrading, humiliating or offensive environment”,<sup>260</sup> sexual harassment relates specifically to conduct that is sexual in nature and need not be related to a protected characteristic.<sup>261</sup>

Examples of sexual harassment include sexual remarks, the display of pornographic or sexually explicit materials, as well as forms of sexual contact, that may constitute separate offences under the criminal law.<sup>262</sup> In their recent concluding observations, both the Committee on Economic, Social and Cultural Rights and the Human Rights Committees have called on States to prohibit sexual harassment in their national legal frameworks.<sup>263</sup> These bans should sit alongside, and in addition to, prohibitions of ground-based harassment, as defined in this section.<sup>264</sup>

To differing extents, each of the regional human rights systems has recognized harassment as a form of prohibited conduct. Harassment is explicitly prohibited in the European Union equal treatment directives.<sup>265</sup> In its guidance on the right to non-discrimination, the European Court of Human Rights has identified harassment “as [a] particular manifestatio[n] of direct discrimination”.<sup>266</sup> While the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights have primarily discussed harassment in the context of sexual harassment,<sup>267</sup> both have applied the principle in respect of a broader list of grounds.<sup>268</sup> In particular, the African Commission on Human and Peoples' Rights has noted that: “Harassment may amount to discrimination on account of race, colour, religion, national origin, age, sex/gender, sexual

<sup>259</sup> See, for example, CCPR/C/BLR/CO/5, para. 19; CERD/C/ITA/CO/19-20, para. 25; and CEDAW/C/JPN/CO/7-8, paras. 12 (e) and 13 (c). The ILO Committee of Experts on the Application of Conventions and Recommendations has similarly noted that the ban on discrimination under article 1 (1) (a) of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), covers “discrimination-based harassment”. See ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination Based on Race, Colour and National Extraction (2018).

<sup>260</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), arts. 2 (1) (c)–(d).

<sup>261</sup> *Ibid.*, art. 2 (1) (d).

<sup>262</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992), para. 18.

<sup>263</sup> See, for example, CCPR/C/JAM/CO/4, para. 24; and E/C.12/TKM/CO/2, para. 21 (f).

<sup>264</sup> Committee on Economic, Social and Cultural Rights, general comment No. 23 (2016), para. 48.

<sup>265</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 2 (3); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 2 (3); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, arts. 2 (c) and 4 (3); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), arts. 2 (1) (c) and (2) (a). Additionally, Directives 2004/113/EC, art. 2 (d), and 2006/54/EC, art. 2 (1) (d), define sexual harassment separately to include “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature [which] occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”.

<sup>266</sup> European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of Discrimination*, para. 30.

<sup>267</sup> Inter-American Commission on Human Rights, *Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean* (OEA/Ser.L/V/II, Doc.233/19) (2019); African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, para. 59 (k).

<sup>268</sup> For instance, the Inter-American Commission on Human Rights has condemned acts of harassment committed against lesbian, gay, bisexual, transgender and intersex persons, calling on States to “adopt and enforce effective measures to prevent discrimination” against such persons “in public and in private educational institutions”. See Inter-American Commission on Human Rights, “The IACHR is concerned about violence and discrimination against LGBTI persons in the context of education and family settings”, 22 November 2013.

orientation, disability, or other status.”<sup>269</sup> The Commission has further called on States to “enact and enforce laws and introduce implementing measures” to address forms of workplace harassment.<sup>270</sup>

### ARMENIA: GROUND-BASED HARASSMENT UNDER THE DRAFT LAW ON ENSURING EQUALITY

Article 5 (1) (6) of the draft law of Armenia on ensuring equality defines harassment as: “unwanted treatment against a person on grounds of one or more protected characteristics or in association with them, with the effect or purpose of creating an unfriendly, hostile, offensive, humiliating or negative atmosphere for that person”.

### HARASSMENT UNDER THE INTERNATIONAL LABOUR ORGANIZATION VIOLENCE AND HARASSMENT CONVENTION, 2019 (NO. 190)

In 2019, ILO adopted the Violence and Harassment Convention, 2019 (No. 190). Under article 1 (1) of the Convention, the term “violence and harassment” is defined to include “a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm”. While it is notable that this definition established a higher threshold for harassment than that used by the treaty bodies, it is nonetheless a welcome strengthening of standards by ILO. It is also notable that the definition includes forms of sex-based harassment and sexual harassment.<sup>271</sup>

Under article 6 of the Convention, States undertake to “adopt laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation”, including for those “persons belonging to one or more vulnerable groups or groups in situations of vulnerability that are disproportionately affected by violence and harassment in the world of work”. Under article 7, States further undertake to define violence and harassment in their national legal frameworks.

Ground-based harassment is frequently prohibited in the area of employment. For instance, section 7 (5) of the Employment and Labour Relations Act, 2004, of the United Republic of Tanzania provides that: “Harassment of an employee shall be a form of discrimination and shall be prohibited on any one, or combination, of the grounds prescribed in subsection (4).”

However, the material scope of the ban on discrimination in international law extends beyond the employment sector to include all areas of life regulated by law,<sup>272</sup> and treaty bodies have recognized States’ obligations to prohibit harassment in various areas of life, such as education<sup>273</sup> and health care.<sup>274</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations has recognized the value of a comprehensive approach to tackling discrimination, noting that “in most cases comprehensive anti-discrimination legislation is needed to ensure the effective application of the [Discrimination (Employment and Occupation)] Convention”.<sup>275</sup>

In situations in which harassment has been defined by international and regional bodies, the definition contains the same central elements: unwanted conduct related to a prohibited ground that takes place “with the purpose

<sup>269</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para. 59 (k).

<sup>270</sup> Ibid.

<sup>271</sup> See also ILO Violence and Harassment Recommendation 2019 (No. 206).

<sup>272</sup> See section I.A.3 of part two of the present guide.

<sup>273</sup> See, for instance, in respect of the racial harassment of Roma students. See Committee on the Elimination of Racial Discrimination, general recommendation No. 27 (2000), para. 20.

<sup>274</sup> For instance, in the exercise of the right to sexual and reproductive health. See Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), para. 31.

<sup>275</sup> ILO, “Report of the Committee of Experts on the Application of Conventions and Recommendations”, Report III (Part 1A), para. 109.

or effect” of “violating the dignity of a person” and of “creating an intimidating, hostile, degrading, humiliating or offensive environment”.<sup>276</sup> The Committee on Economic, Social and Cultural Rights has urged States to “define harassment broadly” within their anti-discrimination laws, “with explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity and intersex status”.<sup>277</sup>

#### (d) Denial of reasonable accommodation

##### SUMMARY

- **Denial of reasonable accommodation** is a form of discrimination that should be prohibited in anti-discrimination law. It should be defined as follows:

Reasonable accommodation means necessary and appropriate modifications or adjustments or support, not imposing a disproportionate or undue burden, to ensure the enjoyment or exercise on an equal basis with others of human rights and fundamental freedoms and equal participation in any area of life regulated by law. Denial of reasonable accommodation is a form of discrimination.

To ensure that all individuals are able to participate in society on an equal basis, modifications or adjustments to rules, practices, means of communication, and physical or other infrastructure may be required. Such adjustments are known as “reasonable accommodation”. Failure to provide reasonable accommodation in a particular case – in situations in which such adjustments do not impose a “disproportionate or undue burden” – is recognized as a form of discrimination in international law.

##### PHILIPPINES: REASONABLE ACCOMMODATION ON THE BASIS OF DISABILITY UNDER THE DRAFT COMPREHENSIVE ANTI-DISCRIMINATION ACT

###### Section 3 (u)

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

Denial of reasonable accommodation is included as a form of disability discrimination under article 2 of the Convention on the Rights of Persons with Disabilities<sup>278</sup> and has been recognized as such by treaty bodies, including the Committee on Economic, Social and Cultural Rights,<sup>279</sup> the Human Rights Committee<sup>280</sup> and the Committee on the Elimination of Discrimination against Women.<sup>281</sup> In its recent case law, the Inter-American Court of Human Rights has found a violation of the right to non-discrimination under article 1 (1) of the American Convention on Human Rights due to a denial of reasonable accommodation and accessibility

<sup>276</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (d); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 2 (3); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 2 (3); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 2 (c); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 2 (1) (c).

<sup>277</sup> Committee on Economic, Social and Cultural Rights, general comment No. 23 (2016), para. 48.

<sup>278</sup> See also Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 17 and 18 (c).

<sup>279</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 28.

<sup>280</sup> See, for example, CCPR/C/BGR/CO/4, para. 17.

<sup>281</sup> See, for example, in the context of the right to education, Committee on the Elimination of Discrimination against Women, general recommendation No. 36 (2017), para. 46 (f).



measures to persons with disabilities.<sup>282</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa provides that “discrimination on the basis of disability” includes denial of reasonable accommodation.<sup>283</sup> In its concluding observations, the African Commission on Human and Peoples’ Rights has made relevant recommendations to States.<sup>284</sup> The European Court of Human Rights recognizes the provision of reasonable accommodation as forming part of the right to non-discrimination on the grounds of disability,<sup>285</sup> while under European Union law, the duty to accommodate has been conceived as a part of the principle of equal treatment.<sup>286</sup>

## DEVELOPMENTS IN UNDERSTANDING OF THE CONCEPT OF REASONABLE ACCOMMODATION

While the duty to accommodate is most commonly invoked in the framework of disability discrimination, the concept has also been applied in respect of other grounds. In Canada, for example, the courts have recognized a legal duty to provide reasonable accommodation (inter alia) in respect of age, ethnic and racial origin, sex and gender.<sup>287</sup>

Following amendments made to the Human Rights Code of Ontario in 2012,<sup>288</sup> the Ontario Human Rights Commission has clarified that the duty to accommodate also extends to the grounds of gender identity and gender expression.<sup>289</sup> All accommodations provided must be “appropriate”, by ensuring: (a) respect for dignity; (b) individualization; (c) integration and full participation; and (d) inclusive design. Applying these principles, the Commission gives the following example:

A fitness club member is in the process of transitioning to identifying publicly as a woman. She no longer feels it’s appropriate or safe to use the men’s change room but is not yet comfortable using the women’s change room. The club manager explores interim solutions with her, such as a privacy curtain or partition in the women’s or men’s shower and change areas, or access to private staff space.

The club is also looking at more universally inclusive options for the future such as building an accessible privacy stall in each change room, and/or a universal single-user gender-neutral washroom with a shower and space for changing.<sup>290</sup>

The Special Rapporteur on freedom of religion or belief has written extensively on the importance of reasonable accommodation for the realization of the right to freedom of religion, noting that: “Policies of eliminating discrimination cannot be fully effective unless they also contemplate measures of reasonable accommodation.”<sup>291</sup> In this context, reasonable accommodation is framed as a means to eliminate the indirectly discriminatory impact of a neutral policy or measure.<sup>292</sup> Thus, for example, adaptations to

<sup>282</sup> Inter-American Court of Human Rights, *Chinchilla Sandoval v. Guatemala*, Judgment, 29 February 2016, paras. 215 and 219. See also the Separate Opinion of Judge Roberto F. Caldas.

<sup>283</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, art. 1.

<sup>284</sup> See, for example, African Commission on Human and Peoples’ Rights, “Concluding observations and recommendations on the initial and combined periodic report of the Republic of Malawi on the implementation of the African Charter on Human and Peoples’ Rights (1995–2013)” (Banjul, 2015), para. 132.

<sup>285</sup> European Court of Human Rights, *Çam v. Turkey*, Application No. 51500/08, Judgment, 23 February 2016, paras. 65, 67 and 69.

<sup>286</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 5.

<sup>287</sup> For a more detailed discussion on this point, see Emmanuelle Bribosia and Isabelle Rorive (European Network of Legal Experts in the Non-Discrimination Field), *Reasonable Accommodation Beyond Disability in Europe?* (Luxembourg, Publications Office of the European Union, 2013), pp. 14–19, and the references cited therein.

<sup>288</sup> Ontario, Canada, Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012. Similar amendments were made to the Human Rights Act of Canada in 2017, which applies in respect of federally regulated activities. See Canadian Human Rights Act, 1985.

<sup>289</sup> Ontario Human Rights Commission, *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression* (Ontario, 2014), sect. 8.

<sup>290</sup> Ibid., sect. 8.2.5.

<sup>291</sup> A/69/261, para. 71.

<sup>292</sup> Ibid., para. 70.

working hours to accommodate days of observance, or to uniform requirements to reflect religious dress, may be required to eliminate discrimination and ensure equal participation in employment.<sup>293</sup>

It has been argued elsewhere that the justification test applied in discrimination cases, which requires an assessment of the necessity of a measure, and the identification of less restrictive means to achieve a legitimate aim, may imply a general duty to accommodate difference on a broad range of grounds.<sup>294</sup>

Article 2 of the Convention on the Rights of Persons with Disabilities defines “reasonable accommodation” as any “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.<sup>295</sup> A similar definition has been used by the European Court of Human Rights<sup>296</sup> and in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, though in this latter instance, the qualification “not imposing a disproportionate or undue burden” is omitted.<sup>297</sup>

### FAILURE TO ENSURE ACCESSIBILITY

The duty to ensure accessibility is provided under article 9 of the Convention on the Rights of Persons with Disabilities, which provides that States: “shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public”.

The Committee on the Rights of Persons with Disabilities has distinguished “reasonable accommodation duties” from “accessibility duties”.<sup>298</sup> Whereas reasonable accommodation is provided at an individual level,<sup>299</sup> “accessibility duties relate to groups and must be implemented gradually but unconditionally”.<sup>300</sup> Thus, accessibility is predominantly invoked as a duty and responsibility of the State.<sup>301</sup> Accessibility duties are discussed in more detail in section I.C.1 of part two of the present guide, on equality duties.

Nevertheless, the Committee on the Rights of Persons with Disabilities has clarified that, in certain circumstances, denial of accessibility can constitute a form of discrimination. The Committee has identified two situations in which a failure to ensure accessibility should be considered as a prohibited act of discrimination: (a) “where the service or facility was established after relevant accessibility standards were introduced”; and (b) “where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation”.<sup>302</sup>

The Committee on the Rights of Persons with Disabilities has noted that the right to reasonable accommodation is an immediate requirement,<sup>303</sup> and applies “in situations where a potential duty bearer should have realized that the person in question had a disability that might require accommodations”.<sup>304</sup> The term “reasonable”

<sup>293</sup> Ibid., para. 46. The United States Equal Employment Opportunity Commission’s *Compliance Manual on Religious Discrimination* provides several examples of denial of reasonable accommodation that – absent undue hardship – may give rise to a case of religious discrimination under Title VII of the Civil Rights Act of 1964. This includes, inter alia, refusal to accommodate dress or grooming standards; refusal to allow an unoccupied room to be used as a prayer facility; and refusal to accommodate religious holidays.

<sup>294</sup> Bribosia and Rorive, *Reasonable Accommodation Beyond Disability in Europe?*, p. 22.

<sup>295</sup> For further discussion of justifications in the area of non-discrimination law, see section I.A.4 of this part.

<sup>296</sup> European Court of Human Rights, *Çam v. Turkey*, Application No. 51500/08, Judgment, 23 February 2016, para. 65.

<sup>297</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, art. 1.

<sup>298</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 24.

<sup>299</sup> Ibid., 24 (b).

<sup>300</sup> Ibid., para. 41 (a).

<sup>301</sup> Ibid., para. 40.

<sup>302</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 31.

<sup>303</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 24 (b).

<sup>304</sup> Ibid.

refers to the “relevance, appropriateness and effectiveness” of a measure to its stated goal of ensuring equal participation,<sup>305</sup> rather than the cost or feasibility of making a requested accommodation. This assessment – of whether an accommodation imposes a “disproportionate or undue burden” – is a second stage of the analysis,<sup>306</sup> focusing on whether failure to accommodate can be justified, as discussed further in section I.A.4(a) of part two of the present guide.

## (e) Segregation

### SUMMARY

- Comprehensive anti-discrimination legislation must prohibit segregation. It should be defined as follows:  
Segregation occurs when persons sharing a particular ground are, without their full, free and informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment. There can be no consent for racial segregation.

Although the term “segregation” is not explicitly defined in any of the core United Nations human rights treaties, it has been widely recognized as a grave form of discrimination, which occurs when individuals sharing a particular characteristic are coercively separated and provided different access to institutions, goods, services or rights compared with another group or to the general population. Segregation generally – though not always – implies some degree of forced or compelled separation, isolation or exclusion. In practice, coercion or compulsion in this context means the absence of full, free and informed consent of the person or group involved. Full, free and informed consent must itself be secured without a coercive environment and consent may be withdrawn at any time.

While segregation is often considered in spatial terms it may also involve legal, policy or customary measures designed to enforce other forms of separation. Thus, for example, in the famous case of *Loving v. Virginia*, the Supreme Court of the United States ruled that laws banning interracial marriage – and so enforcing racial segregation in family relations – violated constitutional equality, equal protection and non-discrimination guarantees.<sup>307</sup>

The ban on segregation was developed primarily in the context of racial segregation and it is clearly established that segregation is prohibited on this basis and related grounds, including caste.<sup>308</sup> There is also now a broad recognition that segregation is a form of prohibited conduct that can arise in respect of various grounds of discrimination or on multiple or intersectional grounds. In addition to racial discrimination, United Nations human rights mechanisms have raised segregation-related concerns with respect to the grounds of age,<sup>309</sup> disability,<sup>310</sup> gender identity and gender expression,<sup>311</sup> sex<sup>312</sup> and sexual orientation.<sup>313</sup> The Independent Expert

<sup>305</sup> Ibid., para. 25 (a).

<sup>306</sup> Ibid., para. 25 (b).

<sup>307</sup> *Loving v. Virginia*, 388 U.S. 1, 1967.

<sup>308</sup> On grounds of descent, including caste, see, in particular, Committee on the Elimination of Racial Discrimination, general recommendation No. 29 (2002), paras. (a) and (n)–(q).

<sup>309</sup> See, inter alia, A/HRC/39/50, as well as A/HRC/30/43. In its general comment No. 6 (1995), the Committee on Economic, Social and Cultural Rights recalled principle 7 of the United Nations Principles for Older Persons (General Assembly resolution 46/91, annex), namely that: “Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations” (para. 39 of the general comment).

<sup>310</sup> See, for example, A/71/314, para. 6; CRPD/C/HUN/CO/1, para. 33; Committee on the Rights of Persons with Disabilities, general comment No. 5 (2017), in particular para. 16 (c); Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 56 and 64; Committee on the Rights of Persons with Disabilities, general comment No. 4 (2016), paras. 11 and 13; CRPD/C/TUR/CO/1, para. 48 (a); CRPD/C/IND/CO/1, paras. 6 (b) and 50 (a); CRPD/C/IRQ/CO/1, para. 43 (a); CRC/C/PSE/CO/1, para. 54 (b); CRC/C/MDA/CO/4-5, para. 29 (c); CRC/C/QAT/CO/3-4, para. 29 (c); CRC/C/BRA/CO/2-4, para. 51; CERD/C/CZE/CO/12-13, para. 17; CCPR/C/AZE/CO/4, para. 10; E/C.12/MEX/CO/5-6, paras. 65 (e) and 66 (e); E/C.12/VNM/CO/2-4, para. 15; and CEDAW/C/AUL/CO/7, para. 38.

<sup>311</sup> See, for example, CAT/C/BLR/CO/5, paras. 29–30. See also OHCHR, *Living Free & Equal: What States are Doing to Tackle Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People* (New York and Geneva, 2016), p. 42.

<sup>312</sup> See, for example, CEDAW/C/KOR/CO/8, paras. 30–31; and CEDAW/C/EST/CO/5-6, para. 29; and CEDAW/C/SVK/CO/5-6, paras. 20, 28 and 30.

<sup>313</sup> See CAT/C/BLR/CO/5, paras. 29–30. See also OHCHR, *Living Free & Equal*, p. 42.

on the enjoyment of all human rights by older persons, for instance, has stated that spatial planning should “facilitate the participation of older persons ... and avoid segregation”.<sup>314</sup> The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has recommended that States review and update “gender-based policies on the use of public space, and of policies guiding access to segregated spaces such as sanitation facilities and locker rooms”.<sup>315</sup>

### SEGREGATION IN THE UNITED STATES

Legal challenge to forced separation based on race was a central issue for the United States civil rights movement. There, legal doctrine – affirmed in particular in the 1896 Supreme Court case *Plessy v. Ferguson*, allowed so-called “separate but equal” provisions:

A statute which implies merely a legal distinction between the white and colored races ... has no tendency to destroy the legal equality of the two races.<sup>316</sup>

Nearly 60 years later, this discriminatory precedent was overturned in the landmark case of *Brown v. Board of Education of Topeka* (1954), which concerned racial segregation in public education. The question addressed by the Court in *Brown* was: “does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”<sup>317</sup> The Court held: “we believe that it does”,<sup>318</sup> continuing that “in the field of public education, the doctrine of ‘separate but equal’ has no place”.<sup>319</sup>

The Court held that “separate educational facilities are inherently unequal” and the plaintiffs were, “by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”<sup>320</sup>

Segregation is explicitly prohibited under article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination, under which States “particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction”.<sup>321</sup> The Committee on Economic, Social and Cultural Rights, in its general comment No. 20 (2009), noted that, under article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, States “must adopt an active approach to eliminating ... segregation”.<sup>322</sup> The Convention on the Rights of Persons with Disabilities uses the word “segregation” explicitly in article 19 on independent living and article 23 on children with disabilities.<sup>323</sup> More broadly, article 3 lists “inclusion” as one of eight “general principles” of the Convention;<sup>324</sup> pursuant to this, the Committee on the Rights of Persons with Disabilities has stated that “the right to non-discrimination includes the right not to be segregated”<sup>325</sup> and has stated that segregation in areas such as employment and education violates the general obligations of States parties relating to non-discrimination and equality.<sup>326</sup>

<sup>314</sup> A/HRC/39/50, para. 30. The General Assembly has mandated the Open-ended Working Group on Ageing to consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures. See General Assembly resolution 65/182, para. 28.

<sup>315</sup> A/74/181, paras. 7 and 101 (e).

<sup>316</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896), p. 543.

<sup>317</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), p. 493.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*, p. 495.

<sup>320</sup> *Ibid.*

<sup>321</sup> In addition to this provision, apartheid is a crime for the purposes of international criminal law. The crime of apartheid is defined in the Rome Statute as “inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups”. Rome Statute of the International Criminal Court, art. 7 (2) (h).

<sup>322</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 39.

<sup>323</sup> Convention on the Rights of Persons with Disabilities, arts. 19 (b) and 23 (3).

<sup>324</sup> *Ibid.*, art. 3 (c).

<sup>325</sup> Committee on the Rights of Persons with Disabilities, general comment No. 4 (2016), para. 13.

<sup>326</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 30, 64, 67 (a) and 73 (c).

The Committee on the Elimination of Racial Discrimination has elaborated State obligations under article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination. It has held that segregation can occur “without any initiative or direct involvement by the public authorities”<sup>327</sup> and noted that States have positive obligations to end segregation arising under previous Governments.<sup>328</sup> It has recommended that States should: monitor trends that give rise to segregation and work to eradicate the consequences of segregation; undertake to prevent, prohibit and eliminate segregation; “secure for everyone the right of access on an equal and non-discriminatory basis to any place or service intended for use by the general public”; and “take steps to promote mixed communities”.<sup>329</sup>

As noted, article 19 (b) of the Convention on the Rights of Persons with Disabilities provides that States should ensure that persons with disabilities have access to support services “necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community”. Article 23 (3) of the Convention provides that States must “prevent concealment, abandonment, neglect and segregation of children with disabilities”. More broadly, the Committee on the Rights of Persons with Disabilities has found that segregation constitutes a violation of various provisions of the Convention. Thus, the Committee has noted that segregation is a form of violence, abuse and other cruel and degrading punishment, as prohibited by articles 15 and 16.<sup>330</sup> The Committee has also stated that segregated models of education contravene both article 5 and article 24 of the Convention<sup>331</sup> and has consistently expressed its concern about segregation in education in its periodic reviews of States.<sup>332</sup> The Committee has expressed concern at segregated employment arrangements, such as the practice of so-called “sheltered workshops”.<sup>333</sup> The Special Rapporteur on the rights of persons with disabilities has also noted that “segregated facilities and/or the lack of support, including support services” pose “additional challenges” in access to essential services such as health care and education.<sup>334</sup>

## SEGREGATION OF PERSONS WITH DISABILITIES

In its inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, the Committee on the Rights of Persons with Disabilities was asked to investigate whether the country’s institutional arrangements for persons with disabilities – and in particular for persons with intellectual or psychosocial disabilities – violated provisions of the Convention. The complaint focused in particular on allegations of violations of article 19 of the Convention on the Rights of Persons with Disabilities guaranteeing the right to live independently and be included in the community. The complaint noted facts, including that, in 2018, 98,539 persons had been institutionalized, of whom 24,553 were persons with disabilities. As of the end of 2018, a total of 54,959 persons with disabilities were under guardianship, of whom 48,945 were disenfranchised of their voting rights. In a report on the inquiry made public in September 2020, the Committee found “grave violations of rights under the Convention, and considers that the system of guardianship and institutionalization profoundly affect the lives of a substantial number of persons with disabilities, particularly discriminating against persons with intellectual or psychosocial disabilities and perpetuating segregation and isolation from society”.<sup>335</sup>

<sup>327</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 19 (1995), para. 4.

<sup>328</sup> *Ibid.*, para. 2.

<sup>329</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 29 (2002), paras. (p)–(q).

<sup>330</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 56.

<sup>331</sup> *Ibid.*, para. 64.

<sup>332</sup> CRPD/C/TUR/CO/1, para. 48; and CRPD/C/IND/CO/1, para. 50.

<sup>333</sup> Thus, for example, “models and practices of service provision, especially in rural and remote areas, continue to segregate persons with disabilities through sheltered employment, segregated education and limited access to social housing” (CRPD/C/HUN/IR/1 and Corr.1, para. 101 (j)). See also CRPD/C/CAN/CO/1, para. 47; CRPD/C/SVK/CO/1, paras. 73–74; CRPD/C/SRB/CO/1, paras. 55–56; CRPD/C/BIH/CO/1, paras. 47–48; CRPD/C/AUT/CO/1, para. 44; and CRPD/C/BOL/CO/1, paras. 61–62. In its general comment No. 6 (2018), the Committee urged States to: “Facilitate the transition away from segregated work environments for persons with disabilities and support their engagement in the open labour market, and in the meantime also ensure the immediate applicability of labour rights to those settings.” See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 67 (a). See also Committee on Economic, Social and Cultural Rights, general comment No. 18 (2006), para. 17.

<sup>334</sup> A/71/314, para. 6.

<sup>335</sup> CRPD/C/HUN/IR/1 and Corr.1, para. 107.



At the regional level, “segregation” has been defined by the European Commission against Racism and Intolerance as: “the act by which a (natural or legal) person separates other persons on the basis of one of the enumerated grounds without an objective and reasonable justification”.<sup>336</sup> In *Mental Disability Advocacy Center (MDAC) v. Belgium*, the European Committee of Social Rights held that article 15 (1) of the revised European Social Charter requires “an effective remedy” for those found to have been “unlawfully excluded or segregated” in education.<sup>337</sup> Segregation is also an explicitly proscribed act under various instruments of the Inter-American System. For instance, article 7 of the Inter-American Convention on Protecting the Human Rights of Older Persons requires States to ensure that “older persons progressively have access to a range of in-home, residential, and other community-support services, including personal assistance necessary to support living and inclusion in the community and to prevent their isolation or segregation from the community”. Recitals to the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance and to the Inter-American Convention against All Forms of Discrimination and Intolerance state that “the individual and collective experience of discrimination and intolerance must be taken into account to combat segregation and marginalization” based on various protected grounds. The Inter-American Commission on Human Rights has also expressed concern regarding the segregation of transgender persons in prisons and immigration detention centres, as well as on grounds of disability.<sup>338</sup> The African Commission on Human and Peoples’ Rights has called for an end to gender-based segregation in the context of schooling and vocational training.<sup>339</sup>

### RACIAL SEGREGATION OF ROMA

The racial segregation of Roma, in particular in the fields of education, employment, health care, housing and spatial planning, has been a particular focus of European and international human rights bodies for the past three decades. In its general recommendation No. 27 (2000), the Committee on the Elimination of Racial Discrimination urged an end to segregation of Roma, in particular in the areas of education and housing.

In the case of *L.R. et al. v. Slovak Republic*, the actions of the municipality of Dobšiná were challenged before the Committee on the Elimination of Racial Discrimination. Specifically, the municipality had taken a decision to build social housing for local Roma who were living in extremely substandard slum conditions on the edge of town. After a petition by approximately 2,700 local non-Roma inhabitants against the plan, the municipality reversed its decision and decided not to build the social housing. The Committee ruled that Slovakia had violated multiple provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, including as concerns discrimination in housing and the right to an effective remedy.<sup>340</sup> In the case of *Koptova v. Slovakia*, the Committee on the Elimination of Racial Discrimination ruled that banning entry to Roma into several municipalities violated provisions of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>341</sup>

The segregation of Roma in education has been a matter of extensive litigation in recent years, with major judgments in national courts, as well as at the European Court of Human Rights, in cases concerning Bulgaria, Czechia, Greece, Hungary, Romania and Slovakia. The first landmark judgment, delivered in 2007, *D.H. and others v. the Czech Republic*,<sup>342</sup> concerned a State policy to segregate Roma children by

<sup>336</sup> Council of Europe, European Commission against Racism and Intolerance, general policy recommendation No. 7 on national legislation to combat racism and racial discrimination (CRI(2003)8 Rev.), 2002, para. 16.

<sup>337</sup> European Committee of Social Rights, *Mental Disability Advocacy Center (MDAC) v. Belgium*, Complaint No. 109/2014, Decision, 16 October 2017, para. 84.

<sup>338</sup> Inter-American Commission on Human Rights, “IACHR expresses concern about violence and discrimination against LGBT persons deprived of liberty”, Press Release No. 053/15, 21 May 2015. Available at [www.oas.org/en/iachr/media\\_center/PReleases/2015/053.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/053.asp).

<sup>339</sup> African Commission on Human and Peoples’ Rights, “Joint Statement on the International Day of the Girl Child”, 11 October 2013. Available at [www.achpr.org/pressrelease/detail?id=242](http://www.achpr.org/pressrelease/detail?id=242). See also African Committee of Experts on the Rights and Welfare of the Child, general comment on article 30 of the African Charter on the Rights and Welfare of the Child, 2013, para. 28: “Punishment by close confinement or segregation should not be applied to pregnant women, women with infants and breastfeeding mothers in prison.”

<sup>340</sup> Committee on the Elimination of Racial Discrimination, *L.R. et al. v. Slovak Republic*, communication No. 31/2003.

<sup>341</sup> Committee on the Elimination of Racial Discrimination, *Koptova v. Slovak Republic*, communication No. 13/1998.

<sup>342</sup> European Court of Human Rights, *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007.

placing them in schools that were meant for children with what were termed “mild mental disabilities”.<sup>343</sup> Courts at European and national level have subsequently struck down practices such as tolerating the complete exclusion of Roma from schooling, pretextual placement of Roma in separate classes for reason of inadequate language ability, failure to overcome legacies of past segregation and establishing private schooling arrangements for the purposes of maintaining separate schooling on grounds of ethnicity.

International law provides for the possibility of some justifications for separation on grounds of sex, religion or belief, or language, particularly in the field of education.<sup>344</sup> However, authorities may not undertake racial discrimination under cover of pretextual arguments based on a purported need remedially to strengthen language ability;<sup>345</sup> separation based on language is understood as allowed in cases in which instruction is in different languages.<sup>346</sup>

## (f) Victimization or retaliation

### SUMMARY

- Anti-discrimination legislation should prohibit victimization.
- Victimization occurs when persons experience adverse treatment or consequences as a result of their involvement in a complaint of discrimination or proceedings aimed at enforcing equality provisions.

Victimization – in some jurisdictions referred to as retaliation or reprisal – occurs when persons experience adverse treatment or consequences as a result of their involvement in a complaint of discrimination or proceedings aimed at enforcing equality provisions.<sup>347</sup> This includes formal and informal complaints and legal or other proceedings brought by a victim or victims of discrimination, as well as those initiated by another person.<sup>348</sup> The term “victimization” used in the present guide refers to this specific form of harm in anti-discrimination law and should not be confused with the common use of the term to refer to disempowerment of persons exposed to discrimination.

As with other forms of differential treatment, intent is irrelevant for a finding of victimization.<sup>349</sup> There are no valid justifications for a well-founded claim of victimization.<sup>350</sup>

<sup>343</sup> The operation of such schools is itself contrary to article 24 of the Convention on the Rights of Persons with Disabilities.

<sup>344</sup> For instance, the Convention against Discrimination in Education sets out, in article 2, the following situations that shall not constitute discrimination within the definition of the term given in article 1 of the Convention:

- (a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;
- (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;
- (c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

<sup>345</sup> See, for example, European Court of Human Rights, *Oršuš and others v. Croatia*, Application No. 15766/03, Judgment, 16 March 2010.

<sup>346</sup> A/HRC/43/47, paras. 41 and 44; A/HRC/10/11/Add.1, paras. 4, 10 and 27; CCPR/C/MKD/CO/2, para. 19; CRC/C/KGZ/CO/3-4, para. 59; and CRC/C/15/Add.191, para. 75 (b).

<sup>347</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (i).

<sup>348</sup> This can be inferred from the prohibition of discrimination based on association, discussed in section I.A.1(b) of this part, and indeed is the practice in many European countries. See Isabelle Chopin and Catharina Germaine (for the European Network of Legal Experts in Gender Equality and Non-Discrimination), *A Comparative Analysis of Non-Discrimination Law in Europe*, 2019 (Luxembourg, Publications Office of the European Union, 2020), pp. 96–99.

<sup>349</sup> See the discussion of intent in section I.A.2(a) of this part.

<sup>350</sup> In particular, due to the lack of a legitimate aim. See further, the discussion of justification in section I.A.4 of this part.



## KYRGYZSTAN: ARTICLE 1 (8) OF THE DRAFT LAW ON ENSURING THE RIGHT TO EQUALITY AND PROTECTION AGAINST DISCRIMINATION

Victimization is a form of discrimination, expressed in the form of adverse consequences, adverse treatment of a person or a group of persons who have reported or intend to voluntarily report discrimination; witnessed discrimination; did not obey instructions to apply discrimination or otherwise participated in proceedings in cases of discrimination; or informed the public about discrimination.

To varying extents, human rights treaty bodies have recognized the obligation to address victimization, usually, as part of the broader requirement to ensure access to justice. In this connection, the Committee on the Elimination of Discrimination against Women has affirmed States' obligations to protect women "from threats, harassment and other forms of harm before, during and after legal proceedings".<sup>351</sup> Similarly, in its concluding observations, the Human Rights Committee has urged States to "facilitate complaints from women victims of discrimination at work and take appropriate measures to protect them from reprisals".<sup>352</sup> The Committee on the Elimination of Racial Discrimination has also expressed concern about victims of racial discrimination being discouraged from bringing complaints due to "fear of reprisals", recommending that States take "all steps necessary" to ensure access to justice, including through the adoption of anti-discrimination law.<sup>353</sup> More broadly, the Committee on Economic, Social and Cultural Rights has noted the obligation of States to take measures to protect all individuals – including human rights defenders and labour activists, and their legal representatives – from acts of "intimidation" or "reprisals" for bringing cases concerning violations of economic, social and cultural rights.<sup>354</sup> The Committee on the Rights of Persons with Disabilities has gone the furthest in articulating the prohibition of victimization,<sup>355</sup> largely mirroring the wording of the European Union equal treatment directives, which define victimization as "adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment".<sup>356</sup>

The obligation to ensure protection from victimization is also made clear on the face of the recent ILO Violence and Harassment Convention, 2019 (No. 190), which requires States to prevent "retaliation against complainants, victims, witnesses and whistle-blowers".<sup>357</sup>

### 3. Material scope of the right to non-discrimination

#### SUMMARY

- Anti-discrimination legislation should guarantee the equal enjoyment of all rights protected under international and national law, without discrimination.
- The prohibition of discrimination applies in all areas of life regulated by law. The duty to refrain from discrimination applies to all persons, including (but not limited to) public authorities and private entities.

<sup>351</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 18 (g).

<sup>352</sup> CCPR/C/MUS/CO/5, para. 12.

<sup>353</sup> CERD/C/KGZ/CO/8-10, para. 14.

<sup>354</sup> Applying this reasoning in a discrimination context, the Committee has urged States to ensure the protection of victims of sexual harassment, including through the "explicit prohibition of reprisals" in national workplace harassment policies. See, respectively, E/C.12/VNM/CO/2-4, para. 9; E/C.12/CHN/CO/2, para. 38; and general comment No. 23 (2016), para. 48.

<sup>355</sup> Albeit, without using the term "victimization" explicitly. See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (i).

<sup>356</sup> The Committee on the Rights of Persons with Disabilities uses the shorter phrase "ensuring compliance with equality provisions". See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (i). See also Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 9; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 11; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 10; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 24.

<sup>357</sup> Art. 10 (b) (iv).

The material scope of anti-discrimination legislation is determined by its twofold function: first, the right to non-discrimination is applicable in respect of all other human rights;<sup>358</sup> second, there is a free-standing right to non-discrimination that applies in relation to all areas of activity regulated by law.<sup>359</sup> The reach of anti-discrimination law extends to both the public and private spheres and entails obligations related to the actions of private actors.<sup>360</sup>

## **SOUTH AFRICA: PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT**

### *Section 5*

“(1) This Act binds the State and all persons.”

### **(a) Non-discrimination in the enjoyment of human rights**

Non-discrimination in the enjoyment of rights is a defining principle of human rights law.<sup>361</sup> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination in respect of the civil, cultural, economic, political and social rights set out within the respective Covenants.<sup>362</sup> Similar prohibitions are found in many regional human rights instruments.<sup>363</sup> Moreover, while the material scope of both the Convention on the Rights of Persons with Disabilities and the Convention on the Elimination of All Forms of Discrimination against Women extends beyond the equal enjoyment of human rights, both also contain an explicit obligation to guarantee the exercise and enjoyment of human rights without discrimination.<sup>364</sup>

## **THE EQUAL ENJOYMENT OF RIGHTS UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**

In some contrast to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – which state that all of the rights contained therein should be guaranteed without discrimination – and the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities – which include detailed provisions on State obligations to ensure non-discrimination in areas such as work, education and health care, the International Convention on the Elimination of All Forms of Racial Discrimination includes a single article – article 5 – which contains a list of rights that States should guarantee without discrimination. Article 5 provides that:

<sup>358</sup> See, for example, International Covenant on Civil and Political Rights, art. 2 (1); and International Covenant on Economic, Social and Cultural Rights, art. 2 (2). See also Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 1 (1); and Convention on the Rights of the Child, art. 2 (1).

<sup>359</sup> See, for example, International Covenant on Civil and Political Rights, art. 26; and Human Rights Committee, general comment No. 18 (1989), para. 12. See also Convention on the Rights of Persons with Disabilities, art. 5; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 13.

<sup>360</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 11 and 37; Human Rights Committee, general comment No. 31 (2004), para. 8; Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 13 and 73 (c) and (h); Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 9; and Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), paras. 9–10, 13 and 17.

<sup>361</sup> As embodied in the statement that: “All human beings are born free and equal in dignity and rights.” See Universal Declaration of Human Rights, art. 1. See also Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 2; and Human Rights Committee, general comment No. 18 (1989), para. 1.

<sup>362</sup> International Covenant on Civil and Political Rights, art. 2 (1); and International Covenant on Economic, Social and Cultural Rights, art. 2 (2). See also International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 1 (1); and Convention on the Rights of the Child, art. 2 (1).

<sup>363</sup> See, for example, European Convention on Human Rights, art. 14; American Convention on Human Rights, art. 1 (1); and African Charter on Human and Peoples’ Rights, art. 2.

<sup>364</sup> See, in particular, Convention on the Rights of Persons with Disabilities, arts. 2 and 4 (1); and Convention on the Elimination of All Forms of Discrimination against Women, art. 2.

States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;
  - (vi) The right to inherit;
  - (vii) The right to freedom of thought, conscience and religion;
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
  - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  - (ii) The right to form and join trade unions;
  - (iii) The right to housing;
  - (iv) The right to public health, medical care, social security and social services;
  - (v) The right to education and training;
  - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

The Committee on the Elimination of Racial Discrimination has noted that: “The list of human rights to which [the principle of non-discrimination] applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party.”<sup>365</sup> In practice, as noted elsewhere, the list of rights to which the right to non-discrimination has been applied by the Committee is extensive.<sup>366</sup>

<sup>365</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 9. In a similar regard, the Committee on the Elimination of Discrimination against Women has noted that the list of areas of rights covered by the relevant Convention is non-exhaustive and extends, inter alia, to any “domestic or any other field”. Further to this understanding, States parties are required to “enact legislation that prohibits discrimination in all fields of women's lives under the Convention”. See Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), paras. 4, 7 and 31.

<sup>366</sup> For instance, based on an assessment of practice under the International Convention on the Elimination of All Forms of Racial Discrimination, Patrick Thornberry identifies the following rights: “language rights, the right to a name and identity rights writ large; participation rights widened beyond the ‘political’ sphere; reproductive rights; the right to family life; the right to food; a battery of rights associated with refugees and asylum-seekers including non-refoulement, the right to asylum, and the right to appeal against denials of refugee status; economic, social and cultural rights including the right to an adequate standard of living, the right to water, and the right to register the births of children”. See Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford, Oxford University Press, 2018), pp. 394–395.

## (b) Non-discrimination as a free-standing right

Article 26 of the International Covenant on Civil and Political Rights provides a free-standing right to non-discrimination that extends beyond the requirement to ensure equality in the enjoyment of other human rights, to prohibit discrimination “in law or in fact in any field regulated and protected by public authorities.”<sup>367</sup> The material scope of the right to non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities is similarly expansive and, like the Human Rights Committee, the Committee on the Rights of Persons with Disabilities has interpreted it as establishing an “autonomous right” to non-discrimination.<sup>368</sup> Likewise, article 15 of the Convention on the Elimination of All Forms of Discrimination against Women has been interpreted to encompass “obligations for States parties to ensure that women enjoy substantive equality with men in all areas of the law”.<sup>369</sup> More broadly, the Committee on the Elimination of Discrimination against Women has noted that the Convention requires States to “enact legislation that prohibits discrimination in all fields of women’s lives”.<sup>370</sup> While the International Convention on the Elimination of All Forms of Racial Discrimination is less explicit in this regard, in its recent communications, the Committee on the Elimination of Racial Discrimination has recommended the adoption of comprehensive anti-discrimination legislation that covers “all fields of law and public life in accordance with article 1 (1) of the Convention.”<sup>371</sup>

Many regional human rights instruments adopt a similar two-track approach to that set out in the International Covenant on Civil and Political Rights, prohibiting discrimination in respect of established Convention rights,<sup>372</sup> and in respect of all other areas of life regulated by law, through an autonomous equality provision.<sup>373</sup> The Inter-American Commission on Human Rights, for example, has clarified that the equal protection clause under article 24 of the American Convention on Human Rights applies to all national laws and their implementation.<sup>374</sup> The African Commission on Human and Peoples’ Rights has noted that “Article 3 of the African Charter contains a general guarantee of equality which supplements the ban on discrimination provided for in Article 2.”<sup>375</sup> For article 3 to apply, any “inequality alleged by the Complainant should follow from the ‘law’”.<sup>376</sup> This does not require the existence of a discriminatory law per se; rather, article 3 of the Charter prohibits inequality arising from the unequal application of a State’s legal framework.<sup>377</sup>

The European Convention on Human Rights is somewhat of an outlier in that, unlike its regional counterparts, it does not provide for a free-standing right to non-discrimination. Article 14 of the Convention prohibits discrimination in “the enjoyment of the rights and freedoms set out in [the] Convention”. However, while the material scope of article 14 is more limited than the provisions in most international and regional instruments, its field of application has gradually expanded through the judgments of the European Court of Human Rights. Importantly, the Court has held that it is not necessary to demonstrate a violation of another Convention right to find a violation of article 14. It is sufficient that such discrimination falls “within the general scope of

<sup>367</sup> Human Rights Committee, general comment No. 18 (1989), para. 12.

<sup>368</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 13.

<sup>369</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), paras. 6 and 22.

<sup>370</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 31.

<sup>371</sup> CERD/C/RUS/CO/23-24, para. 10.

<sup>372</sup> See, for example, African Charter on Human and Peoples’ Rights, art. 2; American Convention on Human Rights, art. 1 (1); and European Convention on Human Rights, art. 14.

<sup>373</sup> See, for example, African Charter on Human and Peoples’ Rights, art. 3; American Convention on Human Rights, art. 24; and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.

<sup>374</sup> Inter-American Court of Human Rights, *Duque v. Colombia*, Judgment, 26 February 2016, para. 94.

<sup>375</sup> African Commission on Human and Peoples’ Rights, *Bissangou v. Republic of Congo*, communication No. 253/2002, Decision, 15–29 November 2006, para. 70.

<sup>376</sup> *Ibid.*, para. 71.

<sup>377</sup> *Ibid.* See also African Commission on Human and Peoples’ Rights, *Purohit and Moore v. the Gambia*, communication No. 241/01, Decision, 15–29 May 2003, para. 49, in which the Commission distinguishes between articles 2 and 3 of the African Charter as follows: “Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country.”

any Article of the Convention”.<sup>378</sup> To this extent, article 14 “is autonomous”.<sup>379</sup> The Court has clarified that article 14 also extends “to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide”.<sup>380</sup> Applying these principles, broad areas of life have been identified as falling within the scope of article 14, including (illustratively): adoption procedures,<sup>381</sup> family life,<sup>382</sup> housing,<sup>383</sup> insurance cover,<sup>384</sup> pensions,<sup>385</sup> procedures for acquiring citizenship,<sup>386</sup> provisions for the legal recognition of partnerships,<sup>387</sup> social security measures<sup>388</sup> and the investigation of bias-motivated crimes.<sup>389</sup> It is also noteworthy that article 1 of Protocol No. 12 to the Convention establishes a right to non-discrimination in respect of all areas of life, though the Protocol requires separate ratification by parties to the Convention.<sup>390</sup>

## 4. Justifications

### SUMMARY

- Any provision, criterion or practice adopted pursuant to a legitimate aim that is appropriate, necessary and proportionate to that aim will not give rise to a finding of discrimination. Direct discrimination may be justified only very exceptionally.

In some instances, it may be both necessary and appropriate to differentiate between groups or to implement a policy or practice that has the effect of disadvantaging one group more than others. As such, international law recognizes the potential for justification in discrimination cases, though it is notable that the potential for conduct that is otherwise discriminatory to be justified varies significantly dependent on the form of discrimination and the ground.

While none of the core United Nations human rights treaties establish an explicit justification test – with some small divergences in approach and wording, detailed further below – a large degree of consensus in this area has emerged. Whether a distinction amounts to discrimination will depend on whether it pursues a legitimate aim and can be justified by reference to reasonable and objective criteria. This, in turn, requires an assessment of the proportionality of a measure or adopted practice. As noted below, this justification test operates differently in respect of direct or indirect discrimination and is not applicable in cases of harassment or victimization.

<sup>378</sup> European Court of Human Rights, *Carson and others v. the United Kingdom*, Application No. 42184/05, Judgment, 16 March 2010, para. 63.

<sup>379</sup> European Court of Human Rights, *Sidabras and Džiautas v. Lithuania*, Applications Nos. 55480/00 and 59330/00, Judgment, 27 July 2004, para. 38.

<sup>380</sup> European Court of Human Rights, *Fábián v. Hungary*, Application No. 78117/13, Judgment, 5 September 2017, para. 112.

<sup>381</sup> See, for example, European Court of Human Rights, *A.H. and others v. Russia*, Application No. 6033/13 and 15 other applications, Judgment, 17 January 2017 (rectified 12 December 2017); *E.B. v. France*, Application No. 43546/02, Judgment, 22 January 2008; and *X and others v. Austria*, Application No. 19010/07, Judgment, 19 February 2013.

<sup>382</sup> European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016.

<sup>383</sup> European Court of Human Rights, *Moldovan and others v. Romania*, Application Nos. 41138/98 and 64320/01, Judgment No. 2, 12 July 2005; and European Court of Human Rights, *Vrountou v. Cyprus*, Application No. 33631/06, Judgment, 13 October 2015.

<sup>384</sup> European Court of Human Rights, *P.B. and J.S. v. Austria*, Application No. 18984/02, Judgment, 22 July 2010.

<sup>385</sup> European Court of Human Rights, *Willis v. the United Kingdom*, Application No. 36042/97, Judgment, 11 June 2002; *Muñoz Díaz v. Spain*, Application No. 49151/07, Judgment, 8 December 2009; *Andrejeva v. Latvia*, Application No. 55707/00, Judgment, 18 February 2009; *Gaygusuz v. Austria*, Application No. 17371/90, Judgment, 16 September 1996; and *Koua Poirrez v. France*, Application No. 40892/98, Judgment, 30 September 2003.

<sup>386</sup> European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016.

<sup>387</sup> European Court of Human Rights, *Oliari and others v. Italy*, Application Nos. 18766/11 and 36030/11, Judgment, 21 July 2015; *Pajić v. Croatia*, Application No. 68453/13, Judgment, 23 February 2016; *X and others v. Austria*, Application No. 19010/07, Judgment, 19 February 2013; and *Vallianatos and others v. Greece*, Application Nos. 29381/09 and 32684/09, Judgment, 7 November 2013.

<sup>388</sup> European Court of Human Rights, *Gaygusuz v. Austria*, No. 17371/90, Judgment, 16 September 1996.

<sup>389</sup> European Court of Human Rights, *Identoba and others v. Georgia*, Application No. 73235/12, Judgment, 12 May 2015, para. 65; *M.C. and A.C. v. Romania*, Application No. 12060/12, Judgment, 12 April 2016, para. 113; *Nachova and others v. Bulgaria*, Application No. 43577/98, Judgment, 6 July 2005, para. 160; 97 *Members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, Application No. 71156/01, Judgment, 3 May 2007, paras. 138–142; *R.B. v. Hungary*, Application No. 64602/12, Judgment, 12 April 2016, paras. 80 and 84; and *Bayev and others v. Russia*, Application Nos. 67667/09, 44092/12 and 56717/12, Judgment, 20 June 2017, paras. 81–84.

<sup>390</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4.



## (a) International and regional law

The Human Rights Committee has observed that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant”.<sup>391</sup> As confirmed by the Committee in individual cases, the objective and reasonable justification test entails a proportionality assessment.<sup>392</sup> With some nuances, the Committee on the Elimination of Racial Discrimination,<sup>393</sup> the Committee on Economic, Social and Cultural Rights<sup>394</sup> and the Committee on the Rights of Persons with Disabilities,<sup>395</sup> alongside the primary regional human rights mechanisms,<sup>396</sup> have each adopted this framework model. While the Committee on the Elimination of Discrimination against Women has not addressed the topic of justification in its general recommendations, individual members have expressed support for a general justification test under the relevant Convention.<sup>397</sup>

At the international level, the justification test has been cited most frequently in respect of indirect discrimination;<sup>398</sup> although the reference to “differential treatment”<sup>399</sup> indicates its equal applicability in direct discrimination cases.<sup>400</sup> Indeed, both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have applied the test in this manner.<sup>401</sup> In practice, however, direct discrimination is rarely justified and direct discrimination on the basis of certain characteristics, such as race and ethnicity, can never be justified.<sup>402</sup> By contrast, neutral policies and practices that are *prima facie* indirectly discriminatory often do serve legitimate aims, although the means employed are not always proportionate; and less restrictive measures may be identified to remove any potential discriminatory impact.

<sup>391</sup> Human Rights Committee, general comment No. 18 (1989), para. 13.

<sup>392</sup> See, for instance, Human Rights Committee, *Yaker v. France* (CCPR/C/123/D/2747/2016), paras. 8.15–8.17.

<sup>393</sup> See, for instance, Committee on the Elimination of Racial Discrimination, general recommendation No. 14 (1993), para. 2; general recommendation No. 30 (2005), para. 4; and general recommendation No. 32 (2009), para. 8. Although the general recommendations of the Committee on the Elimination of Racial Discrimination do not tend to use the term “objective and reasonable justification”, the Committee has identified proportionality and legitimate aim as central components of the justification test. The Committee has also referenced “objective criteria” and “reasonable justification” in related contexts. See, for instance, the Committee’s “common elements” of racial profiling (general recommendation No. 36 (2020), para. 13).

<sup>394</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13.

<sup>395</sup> In *Domina and Bendtsen v. Denmark*, the Committee on the Rights of Persons with Disabilities references the “objective and reasonable justification” test without further elaborating its requirements. In *Noble v. Australia*, the Committee acknowledged the relevance of the proportionality and legitimacy of measures adopted, while evaluating the difference in treatment within a “reasonableness” framework. In *V.F.C. v. Spain*, the Committee found that, while measures adopted by the State party pursued a legitimate aim, they were, nonetheless, discriminatory. See, respectively, Committee on the Rights of Persons with Disabilities, *Domina and Bendtsen v. Denmark* (CRPD/C/20/D/39/2017), para. 8.3; *Noble v. Australia* (CRPD/C/16/D/7/2012), paras. 8.2–8.3; and *V.F.C. v. Spain* (CRPD/C/21/D/34/2015), para. 8.10.

<sup>396</sup> See, for instance, African Commission on Human and Peoples’ Rights, *Good v. Republic of Botswana*, communication No. 313/05, Decision, 12–26 May 2010, para. 219; Inter-American Commission on Human Rights, *Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/01, 19 January 2001, para. 31; and European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016, para. 90.

<sup>397</sup> Committee on the Elimination of Discrimination against Women, *G.D. and S.F. v. France* (CEDAW/C/44/D/12/2007), para. 12.15.

<sup>398</sup> See, for instance, Human Rights Committee, *Yaker v. France* (CCPR/C/123/D/2747/2016); Committee on Economic, Social and Cultural Rights, *Trujillo Calero v. Ecuador* (E/C.12/63/D/10/2015); Committee on the Rights of Persons with Disabilities, *Domina and Bendtsen v. Denmark* (CRPD/C/20/D/39/2017); and CERD/C/CHE/CO/7-9, para. 16.

<sup>399</sup> Human Rights Committee, general comment No. 18 (1989), para. 13; Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 8; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13; Committee on the Rights of Persons with Disabilities, *Domina and Bendtsen v. Denmark* (CRPD/C/20/D/39/2017), para. 8.3; African Commission on Human and Peoples’ Rights, *Good v. Republic of Botswana*, communication No. 313/05, Decision, 12–26 May 2010, para. 219; and European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016, para. 90. The Inter-American Commission tends to refer to unjustified “distinctions”, but the term “differential treatment” has also been used. See Inter-American Commission on Human Rights, *San Miguel Sosa and others v. Venezuela*, Case 12.923, Report No. 75/15, Merits, 28 October 2015, para. 169.

<sup>400</sup> See the discussion of direct discrimination in section I.A.2(a) of this part.

<sup>401</sup> See, illustratively, Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005), para. 12; and Human Rights Committee, *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010), para. 10.6. Likewise, the European Court of Human Rights has made clear that the justification test applies in respect of direct and indirect discrimination. See, for instance, European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment, 24 May 2016, paras. 90–91.

<sup>402</sup> See, for instance, European Court of Human Rights, *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007, para. 176, in which the European Court of Human Rights noted that “racial discrimination is a particularly invidious kind of discrimination”, holding that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified”.

On account of its definition, harassment is never justified, because conduct that violates dignity or creates a hostile environment based on a protected characteristic is never pursuant to a legitimate aim;<sup>403</sup> for similar reasons, victimization cannot be justified. Matters related to incitement to discrimination – which can also not be justified – are dealt with below. As explained in further detail below, under the Convention on the Rights of Persons with Disabilities, the respective Committee has established a specific test to be applied in cases concerning the provision (or denial) of reasonable accommodation.

### **JUSTIFICATION AND REASONABLE ACCOMMODATION UNDER THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

The Committee on the Rights of Persons with Disabilities has given detailed guidance on the justification test to be applied in cases concerning reasonable accommodation.<sup>404</sup> The term “reasonable”, according to the Committee, is not linked to the duty to provide accommodations, but rather relates to the “relevance, appropriateness and effectiveness” of an accommodation.<sup>405</sup> Phrased differently, the concept of “reasonableness” involves an assessment of whether a measure meets (or is capable of meeting) its intended purpose of ensuring equal participation.<sup>406</sup>

A reasonable accommodation must not impose a “disproportionate or undue burden” on the accommodating party.<sup>407</sup> The “undue burden” test involves a proportionality assessment, which seeks to balance the desirability of ensuring the equal enjoyment of a right (for instance, to political participation) with the burden or impact of making an accommodation on the accommodating party.<sup>408</sup> Factors that may be considered as part of this assessment include, inter alia, “financial costs, resources available (including public subsidies), the size of the accommodating party (in its entirety), the effect of the modification on the institution or the enterprise, third-party benefits, negative impacts on other persons and reasonable health and safety requirements”.<sup>409</sup>

The Committee distinguishes “reasonable accommodation” from “procedural accommodation”.<sup>410</sup> Procedural accommodations are those “necessary and appropriate modifications and adjustments in the context of access to justice ... needed in a particular case” to ensure equal participation.<sup>411</sup> While denial of a reasonable accommodation is capable of justification through application of the undue burden test, denial of a procedural accommodation – such as the provision of sign language interpretation for a deaf person in legal proceedings – cannot be justified, on account of the relationship between the accommodation and its role in achieving access to justice.<sup>412</sup>

<sup>403</sup> See the definition of harassment in section I.A.2(c) of part two of the present guide.

<sup>404</sup> While the Committee’s jurisprudence is specific to disability discrimination, a similar test could be applied to other grounds of discrimination. As discussed in section I.A.2(d) of this part, the concept of “reasonable accommodation” has been applied in respect of a diverse range of grounds at the international and national level, including religion or belief and gender identity.

<sup>405</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 25 (a).

<sup>406</sup> Ibid.

<sup>407</sup> Ibid., para. 25 (b).

<sup>408</sup> Ibid., para. 26 (d).

<sup>409</sup> Ibid., para. 26 (e).

<sup>410</sup> Ibid., para. 25 (d).

<sup>411</sup> Special Rapporteur on the rights of persons with disabilities, the Committee on the Rights of Persons with Disabilities and the Special Envoy of the Secretary-General of the United Nations on Disability and Accessibility, “International Principles and Guidelines on Access to Justice for Persons with Disabilities” (Geneva, 2020), p. 9.

<sup>412</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 25 (d), and 51.



The approach to justification under the European Union equal treatment directives is perhaps the most distinct among international and regional instruments: under the directives, direct discrimination cannot be justified.<sup>413</sup> Instead, a series of limited exceptions to the anti-discrimination law framework are established, which permit differential treatment only when the criteria set out under the directives are met. These include some narrow, ground-specific, exceptions, established on the basis of age, and religion or belief; and a broader exception covering “genuine occupational requirements”, which may be applied to all grounds listed under the directives (and applies to both direct and indirect discrimination).<sup>414</sup> In practice, this approach serves to limit the areas in which (otherwise) directly discriminatory measures may be adopted. In situations in which a policy or measure falls within the scope of an exception under national law, it must still be shown to be necessary and proportionate to its aim.<sup>415</sup>

## (b) Legitimate aim and assessment of proportionality

The Human Rights Committee has consistently held that for an aim to be legitimate it must be established “under the Covenant”.<sup>416</sup> The Committee on Economic, Social and Cultural Rights has used the same wording,<sup>417</sup> while also noting that legitimate aims should be “solely for the purpose of promoting the general welfare in a democratic society”<sup>418</sup> and “compatible with the nature of the Covenant rights”.<sup>419</sup> Likewise, the Committee on the Elimination of Racial Discrimination has commented that legitimate aims must be assessed “in the light of the objectives and purposes of the Convention”.<sup>420</sup>

Treaty bodies have not issued further guidance in this area; however, in its practice, the Human Rights Committee has recognized a broad range of policy objectives as legitimate, including, inter alia, the protection of the welfare of minors, the protection of public order and safety, crime prevention, controlling illegal immigration and avoiding overlaps in the allocation of social security benefits.<sup>421</sup> A similarly expansive approach has been adopted by the European Court of Human Rights.<sup>422</sup>

While not dealt with explicitly at the international level, at the domestic level, courts have found an extensive range of policies and practices applied by private entities to constitute legitimate aims, particularly in the context of considering cases of indirect discrimination. Legitimate aims might include, for example, ensuring the profitability of the business, ensuring the effective management of resources or protecting the reputation

<sup>413</sup> Notably, the definition of indirect discrimination under the directives provides that a “provision, criterion or practice [may be] objectively justified by a legitimate aim [provided that] the means of achieving that aim are appropriate and necessary”. This clause is absent in the definition of direct discrimination. See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 2 (2) (b); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 2 (2) (b) (i); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 2 (b); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 2 (1) (b).

<sup>414</sup> For further discussion of justification under the equal treatment directives, see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law*, pp. 91–108; and Chopin and Germaine, *A Comparative Approach to Non-Discrimination Law in Europe*, 2019, pp. 68–80. The ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) adopts a materially similar approach to justifications and exceptions in the area of employment. Under article 1 (2) of the Convention “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”.

<sup>415</sup> See, for instance, Court of Justice of the European Union, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, Judgment, 17 April 2018, paras. 66–68. In this respect, commentators have noted that “the justification test on objective grounds under the [European Convention on Human Rights] and the justification test under the exceptions from non-discrimination directives are very similar”. See, for instance, European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law*, p. 92.

<sup>416</sup> See, for instance, Human Rights Committee, general comment No. 18 (1989), para. 13; *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010), para. 10.6; and *Yaker v. France* (CCPR/C/123/D/2747/2016), para. 8.14.

<sup>417</sup> Committee on Economic, Social and Cultural Rights, *López Rodríguez v. Spain* (E/C.12/57/D/1/2013), para. 14.1.

<sup>418</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13. See, relatedly, Inter-American Commission on Human Rights, *Undocumented Workers v. United States of America*, Case 12.834, Report No. 50/16, 30 November 2016, para. 74.

<sup>419</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13.

<sup>420</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 8.

<sup>421</sup> However, in the majority of the relevant cases, the differential treatment was not justified. See, illustratively, Human Rights Committee, *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010), para. 10.8; *Yaker v. France* (CCPR/C/123/D/2747/2016), para. 8.7; *Williams Leecraft v. Spain* (CCPR/C/96/D/1493/2006), para. 7.2; and *Vos v. Netherlands*, communication No. 218/1986, para. 12.

<sup>422</sup> See, for instance, European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of Discrimination*, pp. 18–19.

of the entity in question; the key question in determining whether policies that pursue such aims are justifiable is whether the means to achieve the aims are strictly necessary and proportionate.

This general position is subject to two important qualifications. First, an aim that is itself discriminatory or based on discriminatory stereotypes – for instance, relating to a woman’s “reproductive function” – is not legitimate.<sup>423</sup> This condition can be read into the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights: the elimination of discrimination is central to the “object and purposes” of each of those instruments.<sup>424</sup> Thus, for example, the Human Rights Committee has noted that – while identity checks may serve a legitimate purpose – they must not “be carried out in such a way as to target only persons with specific physical or ethnic characteristics”.<sup>425</sup> Relatedly, “traditional, historical, religious or cultural attitudes” must not be “used to justify violations of women’s right to equality before the law”.<sup>426</sup> The Committee on Economic, Social and Cultural Rights has noted that a refusal to hire women based on stereotypical assumptions constitutes discrimination.<sup>427</sup> Similar jurisprudence exists at the regional level.<sup>428</sup> In this regard, it is clear that the intent of an individual is not relevant to a finding of discrimination, and deferring to a client’s discriminatory preferences will not constitute a legitimate aim.<sup>429</sup> Second, measures adopted must be appropriate: evidence must be provided to demonstrate that an adopted measure is in fact capable of meeting its intended aim.<sup>430</sup>

It must additionally be demonstrated that any measure adopted is proportionate to the aim pursued. A legitimate aim that is pursued by means that are not proportionate cannot be justified. Broadly, this requires that the harm caused by such a measure does not outweigh the benefit of achieving its objective. It also requires an assessment of whether the measure exceeds what is necessary to achieve the purpose. Thus, for instance, in *Yaker v. France*, the Human Rights Committee found that a de facto prohibition on the full-face veil could not be justified on public security grounds on account of “its considerable impact on the author as a woman”.<sup>431</sup>

<sup>423</sup> See, for instance, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 20; and Committee on the Elimination of Discrimination against Women, *Medvedeva v. Russia* (CEDAW/C/63/D/60/2013), para. 11.3.

<sup>424</sup> Indeed, this is self-evident on the face of the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination, which focus on the elimination of “all forms of discrimination”. The Committee on Economic, Social and Cultural Rights has noted that the right to non-discrimination is “essential to the exercise and enjoyment of economic, social and cultural rights”, while the Committee on the Rights of Persons with Disabilities has described the rights to equality and non-discrimination as lying “at the heart of the Convention”. On account of its object and purposes, the Human Rights Committee has stressed that reservations to article 2 (1) of the Covenant are not permissible. See, respectively, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 2; Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 4–5 and 7; and Human Rights Committee, general comment No. 24 (1994), para. 9. See also Committee on the Elimination of Discrimination against Women, “Statements on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women” (A/53/38/Rev.1, pp. 47–50), paras. 6 and 16.

<sup>425</sup> Human Rights Committee, *Williams LeCraft v. Spain* (CCPR/C/96/D/1493/2006), para. 7.2. For further discussion on this topic, see Committee on the Elimination of Racial Discrimination, general recommendation No. 36 (2020).

<sup>426</sup> Human Rights Committee, general comment No. 28 (2000), para. 5. Relatedly, in *Müller and Engelhard v. Namibia*, the Committee held that “long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant”. See Human Rights Committee, *Müller and Engelhard v. Namibia* (CCPR/C/74/D/919/2000), para. 6.8.

<sup>427</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 20. See also Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005), para. 11.

<sup>428</sup> For instance, the European Court of Human Rights has emphasized that “references to traditions, general assumptions or prevailing social attitudes in a particular country” are insufficient to justify an otherwise discriminatory measure. See European Court of Human Rights, *Konstantin Markin v. Russia*, Application No. 30078/06, Judgment, 22 March 2012, para. 127. In *Morales de Sierra v. Guatemala*, the Inter-American Commission held that the “gender-based distinctions” that had been upheld “as a matter of domestic law essentially on the basis of ... respect for traditional Guatemalan values, and ... the need to protect women in their capacity as wives and mothers” could not be justified. See Inter-American Commission on Human Rights, *Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/01, 19 January 2001, paras. 31, 37 and 39, at 37.

<sup>429</sup> See, for example, Court of Justice of the European Union, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07, Judgment, 10 July 2008. See also the discussion of intent in section I.A.2(b) of part two of the present guide.

<sup>430</sup> See, for instance, Human Rights Committee, *Yaker v. France* (CCPR/C/123/D/2747/2016), paras. 8.7 and 8.15; Human Rights Committee, *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010), para. 10.6; African Commission on Human and Peoples’ Rights, *Good v. Republic of Botswana*, communication No. 313/05, Decision, 12–26 May 2010, para. 224; Court of Justice of the European Union, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, Judgment, 17 April 2018, para. 66; and European Court of Human Rights, *Konstantin Markin v. Russia*, Application No. 30078/06, Judgment, 22 March 2012, para. 144.

<sup>431</sup> Human Rights Committee, *Yaker v. France* (CCPR/C/123/D/2747/2016), para. 8.8.

In the same case, the Committee also held that the measures adopted by France were not “necessary”<sup>432</sup> as less restrictive means could have been implemented by the State.<sup>433</sup> The condition of necessity can be seen as implicit within the proportionality assessment: if the same aim can be achieved through the adoption of different measures that do not involve creating a distinction between groups, or do so in a less harmful way, then the means employed are not proportionate.<sup>434</sup>

## B. Positive action

### SUMMARY

- The right to equality requires the adoption of positive action.
- Positive action includes any targeted legislative, administrative or policy measures to reduce or overcome inequality and realize equality. Such measures should be time-limited, subject to regular review and proportionate to their purpose of advancing or achieving equality.
- The adoption of positive action measures is required by international human rights law. Anti-discrimination law should require and provide for positive action measures in situations in which substantive inequalities are identified. It should also permit the development, adoption and implementation of positive action measures and programmes by State and private entities in situations in which a particular need is identified.
- Positive action measures should pursue the purpose of advancing or achieving equality and must not be justified by reference to discriminatory criteria or stereotypes.
- Positive action should not lead to the maintenance of unequal or separate standards. To this end, positive action measures adopted should be time-limited, subject to regular review and discontinued when the purposes of equality are achieved. Time-limited should not be interpreted to mean necessarily short in duration.

The obligation on States to adopt and implement positive action measures is firmly established in international human rights law.<sup>435</sup> Positive action, also referred to variously as “affirmative action”,<sup>436</sup> “temporary special measures”<sup>437</sup> or “specific measures”,<sup>438</sup> is an umbrella term that refers to measures required to accelerate or

<sup>432</sup> Ibid., para. 8.17.

<sup>433</sup> Ibid., para. 8.8.

<sup>434</sup> See, illustratively, Court of Justice of the European Union, *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, Case C-528/13, Judgment, 29 April 2015, para. 58; and *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, Case C-83/14, Judgment, 16 July 2015, para. 128.

<sup>435</sup> International Convention on the Elimination of All Forms of Racial Discrimination, arts. 1 (4) and 2 (2); Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), paras. 11 and 14; Convention on the Elimination of All Forms of Discrimination against Women, art. 4 (1); Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 24; Convention on the Rights of Persons with Disabilities, arts. 5 (4) and 27 (1) (h); Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 16; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9; Human Rights Committee, general comment No. 18 (1989), para. 10; and Human Rights Committee, general comment No. 28 (2000), para. 3.

<sup>436</sup> See, for example, Human Rights Committee, general comment No. 18 (1989), para. 10. See also Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), endnote 4: “The term ‘affirmative action’ is used in the United States of America and in a number of United Nations documents”.

<sup>437</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 4 (1). The Committee on the Elimination of Discrimination against Women has noted that: “The term ‘special’, though being in conformity with human rights discourse, also needs to be carefully explained. Its use sometimes casts women and other groups who are subject to discrimination as weak, vulnerable and in need of extra or ‘special’ measures in order to participate or compete in society. However, the real meaning of ‘special’ in the formulation of article 4, paragraph 1, is that the measures are designed to serve a specific goal.” Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 21.

<sup>438</sup> Convention on the Rights of Persons with Disabilities, art. 5 (4).

achieve equality for groups that have been or are subject to discrimination or disadvantage. Treaty bodies have advised strongly against calling such measures “positive discrimination”.<sup>439</sup>

While a wide range of different measures may qualify as positive action, all positive action involves targeted measures to overcome inequality; or, as the Committee on the Rights of Persons with Disabilities has put it: “adopting or maintaining certain advantages in favour of an underrepresented or marginalized group”.<sup>440</sup> As noted below, positive action measures are sometimes seen as remedial of past or ongoing systemic harm,<sup>441</sup> and thus may be at least partly derived from the obligation to ensure an effective remedy. That said, the obligation to implement positive action measures arises in situations in which substantive inequalities are identified, irrespective of any evidence of past or present discrimination.

An argument has been advanced that “positive action” should be understood broadly, as including all proactive initiatives taken to achieve progress towards equality and eliminate discrimination.<sup>442</sup> However, the settled view is that – distinct from general measures to promote equality and combat discrimination – positive action entails targeted treatment aimed at correcting disadvantage for particular identified people and groups.<sup>443</sup> Because such measures involve treating people and groups who share particular characteristics differently, treaty bodies have provided guidance on how to distinguish positive action from unjustified differentiation (discrimination) and have set out standards to regulate its application.

To meet States’ international law obligations, comprehensive anti-discrimination law should both require the adoption of positive action in situations in which substantive inequalities exist and permit State and private actors to develop and implement such measures where a need is identified. While anti-discrimination laws should both require and permit positive action, the detail of such measures may be set out in other law and policy documents.

### **POSITIVE ACTION MEASURES: ENSURING WOMEN’S PARTICIPATION IN DECISION-MAKING IN RWANDA**

In 2018, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) noted that Rwanda had made “incredible progress” in ensuring women’s participation in decision-making as a result of a number of special measures taken by the State.<sup>444</sup>

The journey to increased participation began with the country’s 2003 Constitution. Article 9 (4) of the 2003 Constitution mandated that women should be granted at least 30 per cent of posts in decision-making organs, while article 76 required that 24 of the 80 seats in the Chamber of Deputies were reserved for women, elected by a special electoral college system composed of voters from local women’s councils and district councils. On 19 June 2010, Rwanda enacted Law No. 27/2010, which requires that at least 30 per cent of candidates for parliamentary elections on the lists of political parties be women.<sup>445</sup>

In its concluding observations in 2017, the Committee on the Elimination of Discrimination against Women welcomed the State’s “leading role regarding the participation of women in Parliament, having

<sup>439</sup> The Committee on the Elimination of Racial Discrimination has noted that the phrase “positive discrimination” is, in the context of international human rights law, a contradiction in terms and so should be avoided. See Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 12.

<sup>440</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28.

<sup>441</sup> For instance, the Inter-American Commission on Human Rights has recognized that the implementation of gender quotas to increase the political participation of women in government are part of other measures that seek to tackle historical systemic barriers that women face in accessing their right to political participation. See further: Inter-American Commission on Human Rights, *The Road to Substantive Democracy: Women’s Political Participation in the Americas* (OEA/Ser.L/V/II, Doc. 79) (2011), paras. 62 and 82.

<sup>442</sup> For further discussion on this point, see Chantal Davies, *Research Report 123: Exploring Positive Action as a Tool to Address Under-Representation in Apprenticeships* (Manchester, Equality and Human Rights Commission, 2019), pp. 26–28, and the materials cited therein.

<sup>443</sup> See, for example, Human Rights Committee, general comment No. 18 (1989), para. 10 (“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”); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28 (“specific measures ... entail adopting or maintaining certain advantages in favour of an underrepresented or marginalized group” in order to achieve equality).

<sup>444</sup> UN-Women, “Revisiting Rwanda five years after record-breaking parliamentary elections”, 13 August 2018.

<sup>445</sup> CEDAW/C/RWA/CO/7-9, para. 4 (i).

the largest female representation worldwide, as well as the relatively high representation of women in decision-making positions, including among provincial governors and in the judiciary”.<sup>446</sup>

In its national report submitted as part of the third cycle of the universal periodic review in 2020, Rwanda affirmed that: “Women’s empowerment and participation in decision making is mainly captured by the ratios of women in parliament, ministerial positions, and other positions in various structures of governance both in public, private, and civil society entities.”<sup>447</sup> It highlighted the impact of the measures taken in ensuring women’s participation in decision-making: in 2020, women’s representation in the cabinet reached 52 per cent compared with 36.8 per cent in 2014.<sup>448</sup> Added to which, in the ongoing parliamentary term of 2018–2023, women parliamentarians stand at 61.2 per cent in the lower chamber and 38 per cent in the Senate.<sup>449</sup> At decentralized levels, women’s share in leadership positions as district mayors improved from 16.7 per cent to 30 per cent and 45.6 per cent in district councils between 2016 and 2018.<sup>450</sup> It further noted that it was monitoring the progress of women’s representation in the private sector and that efforts would continue to “increase women’s representation in managerial positions”.<sup>451</sup>

## 1. Obligation to adopt positive action measures

Article 1 (4) of the International Convention on the Elimination of All Forms of Racial Discrimination provides for the adoption of “special measures” by States in order to ensure the equal enjoyment of rights and freedoms. Similar provisions are contained in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities.<sup>452</sup> The Human Rights Committee has noted that States may be required to “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.<sup>453</sup> Similarly, the Committee on Economic, Social and Cultural Rights has emphasized that article 2 (2) of the International Covenant on Economic, Social and Cultural Rights gives rise to an obligation to “adopt special measures to attenuate or suppress conditions that perpetuate discrimination”.<sup>454</sup>

There is a clear consensus among the treaty bodies that positive action is required, rather than simply permissible. As noted, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have stated that positive action measures are required in situations of substantive inequality.<sup>455</sup> Article 2 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination provides that States “shall, when the circumstances so warrant, take ... special and concrete measures” for the purposes of ensuring equal enjoyment of rights and freedoms” and in its discussion of the relevant provision, the Committee on the Elimination of Racial Discrimination refers to an “obligation” to take special measures.<sup>456</sup> The Committee on the Elimination of Discrimination against Women has stated that “States parties are obliged to adopt and implement temporary special measures”.<sup>457</sup> Most recently, in 2018, the Committee on the Rights of Persons with Disabilities stated clearly that “States parties must take positive actions”.<sup>458</sup>

<sup>446</sup> Ibid., para. 30.

<sup>447</sup> A/HRC/WG.6/37/RWA/1, para. 51.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid., para. 52.

<sup>452</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 4 (1); and Convention on the Rights of Persons with Disabilities, art. 5 (4). See also Convention on the Rights of Persons with Disabilities, art. 27 (1) (h), according to which States commit to “promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures”.

<sup>453</sup> Human Rights Committee, general comment No. 18 (1989), para. 10.

<sup>454</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9.

<sup>455</sup> Human Rights Committee, general comment No. 18 (1989), para. 10; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9, which provides that “in order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures”.

<sup>456</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), paras. 11 and 14.

<sup>457</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 24.

<sup>458</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 16.



At the regional level, positive action obligations are recognized in both the African and Inter-American human rights systems. Both the Protocols to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and on the Rights of Persons with Disabilities in Africa include mandatory positive action provisions, though the Protocol on the Rights of Women limits the requirement to the areas of education and political participation.<sup>459</sup> The Inter-American Commission on Human Rights has concluded that States “must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals”<sup>460</sup> in order to fulfil their obligations under the American Convention on Human Rights, while the Inter-American Convention on the Elimination of All Forms of Discrimination and Intolerance provides that States “undertake to adopt the special policies and affirmative actions needed to ensure the enjoyment or exercise of rights and fundamental freedoms”.<sup>461</sup> The Council of Europe Framework Convention for the Protection of National Minorities requires that States “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”.<sup>462</sup>

Both the Committee on the Elimination of Discrimination against Women and the Committee on the Elimination of Racial Discrimination have noted that, in order to give effect to their obligations, States should include provisions on special measures in their national legal systems.<sup>463</sup> The Committee on the Elimination of Discrimination against Women has also noted that legislation “can give guidance on the type of temporary special measures that should be applied to achieve a stated goal, or goals, in given areas”.<sup>464</sup> However, both bodies have also noted that positive action measures can be adopted or implemented through non-legislative means, such as policy directives, programmes and guidelines.<sup>465</sup>

## 2. Purpose and scope of positive action measures

There is broad consensus among the treaty bodies that positive action includes any measures taken for the purpose of advancing equality for a group exposed to discrimination.

### (a) The objectives of positive action

The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities define special measures as “necessary in order to ensure ... equal enjoyment or exercise” of rights,<sup>466</sup> “aimed at accelerating de facto equality”<sup>467</sup> and “necessary to accelerate or achieve de facto equality”,<sup>468</sup> respectively. The Committee on the Elimination of Racial Discrimination has emphasized that “special measures are not an exception to the principle of non-discrimination but are integral to its meaning” and to the goal of advancing “effective equality”.<sup>469</sup> The Committee on the Rights of Persons with Disabilities has defined positive action measures in similar terms, noting that they “entail adopting or maintaining certain

<sup>459</sup> See, for instance, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), arts. 2 (d), 9 (1) and 12 (2), which mandate the adoption of positive action in respect of political participation and education; and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, art. 5 (2) (b), which requires that State parties “take steps to ensure that specific measures, as appropriate, are provided to persons with disabilities in order to eliminate discrimination and such measures shall not be considered discrimination”.

<sup>460</sup> Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas* (OEA/Ser.L/V/II, Doc. 62) (2011), para. 232.

<sup>461</sup> Inter-American Convention against All Forms of Discrimination and Intolerance, art. 5.

<sup>462</sup> Council of Europe Framework Convention for the Protection of National Minorities, art. 4 (2). European Union law places slightly less stringent requirements on European Union member States (see, for example, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 7; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 5; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 6; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 3).

<sup>463</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 30; and Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 13.

<sup>464</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 31.

<sup>465</sup> Ibid., para. 32; and Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 13.

<sup>466</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (4).

<sup>467</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 4 (1).

<sup>468</sup> Convention on the Rights of Persons with Disabilities, art. 5 (4).

<sup>469</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 20.

advantages in favour of an underrepresented or marginalized group” in order to achieve equality.<sup>470</sup> A similar approach to defining the purpose of positive action has been adopted at the regional level.<sup>471</sup>

In defining and clarifying the purpose of temporary measures, the treaty bodies have highlighted the need to distinguish such measures from what has been termed the “general positive obligation ... to secure human rights and fundamental freedoms on a non-discriminatory basis”.<sup>472</sup> The Committee on the Elimination of Discrimination against Women has noted that “not all measures that potentially are, or will be, favourable to women are temporary special measures” and underlined the fact that general measures to guarantee non-discrimination and the equal enjoyment of rights “cannot be called temporary special measures”.<sup>473</sup> In more specific terms, the Committee on the Elimination of Racial Discrimination has noted that “specific rights pertaining to certain categories of person” – such as the rights to profess a culture, practise religion or use a language – are not special measures but “permanent rights”.<sup>474</sup> In similar terms, the Committee on the Rights of Persons with Disabilities has underlined the need to distinguish special measures from reasonable accommodation, which it notes is a non-discrimination duty.<sup>475</sup>

Given the focus on accelerating progress towards equality for disadvantaged people and groups, positive action measures frequently have a remedial aspect, focused on correcting and compensating for the effects of past discrimination. Indeed, positive action measures can be an important element of ensuring effective remedy.<sup>476</sup> However, the treaty bodies have been keen to stress that the positive action obligation is not only remedial in nature and that it arises “irrespective of any proof of past discrimination”.<sup>477</sup> Thus, for example, the Committee on the Elimination of Racial Discrimination has recognized that, while temporary special measures have the purpose of “alleviating and remedying disparities”, including disparities that arise from past discrimination, it is “not necessary to prove ‘historic’ discrimination in order to validate a programme of special measures”.<sup>478</sup> The Committee on the Elimination of Discrimination against Women has taken a similar position, noting that States have a proactive obligation “to improve the position of women to one of de facto or substantive equality”, without reference to proof of past discrimination.<sup>479</sup>

## (b) Scope

The treaty bodies have repeatedly emphasized the wide range of measures that could fall within the scope of special measures. The Committee on the Elimination of Racial Discrimination has noted that the term includes the “full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as

<sup>470</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28.

<sup>471</sup> Positive action in the European equal treatment directives may be adopted “with a view to ensuring full equality in practice”. See, for instance, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 7. See also Court of Justice of the European Union, *Kalanke v. Freie Hansestadt Bremen*, Case C-450/93, Judgment, 17 October 1995, para. 18. In the European regional human rights order, the Framework Convention for the Protection of National Minorities has set out a more stringent standard, establishing, under article 4 (2), that: “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.” The Inter-American Commission has situated positive action within the need to “redress *de facto* discrimination” and to “reduce historical inequalities produced by prejudices and patterns of discrimination and exclusion”. See Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas*, paras. 237–239. Under article 5 (2) (b) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, specific measures adopted by States must aim to “eliminate discrimination” against persons with disabilities.

<sup>472</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 14. See also Human Rights Committee, general comment No. 18 (1989), para. 10; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9; Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), paras. 19–20; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 16–17 and 22.

<sup>473</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 19.

<sup>474</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 15.

<sup>475</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 23.

<sup>476</sup> See further section II.D of part two of the present guide.

<sup>477</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 18; and Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 22.

<sup>478</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 22.

<sup>479</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 18.



employment, housing, education, culture and participation in public life”.<sup>480</sup> The Committee on the Elimination of Discrimination against Women has noted that article 4 (1) of the relevant Convention “encompasses a wide variety” of measures, going on to list “outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems” in a non-exhaustive list of examples.<sup>481</sup> The Committee on the Rights of Persons with Disabilities takes a similarly expansive approach.<sup>482</sup>

The treaty bodies have clarified that, while positive action encompasses a broad range of potential measures, those measures must be designed with a clear objective, on the basis of demonstrated need and with the involvement of affected groups. The Committee on the Elimination of Racial Discrimination has noted that States should develop “goal-directed programmes which have the objective of alleviating and remedying disparities”.<sup>483</sup> The Committee on the Elimination of Discrimination against Women has noted that measures should be “designed to serve a specific goal”, noting that the “choice of a particular ‘measure’ will depend on the context ... and on the specific goal it aims to achieve”.<sup>484</sup>

The Committee on the Elimination of Racial Discrimination has noted that “measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned”, and noted that this entails obligations of both data collection and analysis, and consultation.<sup>485</sup> Similarly, the Committee on the Elimination of Discrimination against Women has noted that women should “have a role in the design, implementation and evaluation of such programmes” and emphasized the need for the use of sex disaggregated data.<sup>486</sup> The Committee on the Rights of Persons with Disabilities has noted that “States parties must consult closely with and actively involve” persons with disabilities<sup>487</sup> and that “data and its analysis are of paramount importance for developing effective ... equality measures”.<sup>488</sup>

### **AFFIRMATIVE ACTION POLICIES IN HIGHER EDUCATION IN BRAZIL**

In its report on its visit to Brazil in 2013, the United Nations Working Group of Experts on People of African Descent described how Brazil had been “a regional leader in affirmative action policies in employment and education for Afro-Brazilians and other marginalized groups”.<sup>489</sup>

In 2003, Decree No. 4886 created the National Policy for the Promotion of Racial Equality in Brazil, which provided for affirmative action for persons from these groups. Pursuant to the Policy, since 2004, quotas have been in operation in some universities, which have enabled greater access to higher education.<sup>490</sup>

Following a number of legal challenges that claimed that affirmative action policies in higher education constituted discrimination, on 26 April 2012, the Federal Supreme Court of Brazil unanimously ruled that the use of racial quotas in education was constitutional.<sup>491</sup>

On 29 August 2012, the Quota Law (Law No. 12.711) was adopted. Under the law, 50 per cent of the vacancies in federal universities and technical further education institutions “are reserved for students

<sup>480</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 13.

<sup>481</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 22.

<sup>482</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28.

<sup>483</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 22.

<sup>484</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), paras. 21–22.

<sup>485</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 16.

<sup>486</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), paras. 34–35.

<sup>487</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 29.

<sup>488</sup> *Ibid.*, para. 34.

<sup>489</sup> A/HRC/27/68/Add.1, para. 25.

<sup>490</sup> *Ibid.*, para. 27.

<sup>491</sup> Federal Supreme Court of Brazil, “STF declared the constitutionality of the quota system at the University of Brasília”, 26 April 2012. Available at [www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque\\_en\\_us&idConteudo=207138](http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=207138).

coming from secondary public schools, with the distribution of vacancies among Afro-Brazilians and indigenous people based on the proportion of such groups in the community”.<sup>492</sup>

In its report, the Working Group of Experts on People of African Descent expressed the hope that, with the adoption of the Quota Law, “future research will be able to show more positive data on the implementation of higher education quotas; they are certainly necessary, as a first step, to change the structural institutional racism”.<sup>493</sup>

Subsequent research provided early indications of the impact of affirmative action policies in ensuring access to higher education: in its 2017 national report for the third cycle of the universal periodic review, Brazil reported that the number of vacancies allocated to Afro-Brazilians in higher education had grown from 37,100 in 2013 to 82,800 in 2015.<sup>494</sup>

### 3. Principles for the operation of positive action

Positive action entails preferential treatment based on a protected characteristic.<sup>495</sup> As the Committee on the Elimination of Racial Discrimination has noted, this creates a potential conflict, given that the International Convention on the Elimination of All Forms of Racial Discrimination (and, by interpretation, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) defines discrimination as “any distinction, exclusion, restriction or preference”.<sup>496</sup> There is thus a need, as the Committee has put it, to “distinguish ‘special measures’ from unjustifiable preferences”.<sup>497</sup>

In order to distinguish special measures from unjustifiable preferences, the United Nations human rights bodies have developed criteria for the operation of positive action.<sup>498</sup> The Committee on the Elimination of Racial Discrimination, for example, has noted that special measures should be (a) appropriate to the situation to be remedied, (b) legitimate, (c) necessary in a democratic society, (d) respectful of the principles of fairness and proportionality and (e) temporary,<sup>499</sup> a position echoed by the Inter-American Commission on Human Rights.<sup>500</sup>

Taking the position of the different bodies together, three broad principles can be derived. First, positive action must pursue the purpose of advancing or achieving equality. Second, positive action should not lead to the “maintenance of unequal or separate standards”.<sup>501</sup> To this end, positive action measures should be time-limited, subject to regular review and discontinued when the purposes of equality are achieved.<sup>502</sup> Third, positive action measures should be necessary in a democratic society and proportionate to the aim pursued.

<sup>492</sup> A/HRC/WG.6/27/BRA/1, para. 53; and A/HRC/27/68/Add.1, paras. 16 and 40.

<sup>493</sup> A/HRC/27/68/Add.1, para. 43.

<sup>494</sup> A/HRC/WG.6/27/BRA/1, para. 53.

<sup>495</sup> See, for example, Human Rights Committee, general comment No. 18 (1989), para. 10 (“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”); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28: “specific measures ... entail adopting or maintaining certain advantages in favour of an underrepresented or marginalized group” in order to achieve equality.

<sup>496</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), paras. 7–8.

<sup>497</sup> *Ibid.*, paras. 16–18.

<sup>498</sup> See, for instance, Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 24; Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 16; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 28–29.

<sup>499</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 16.

<sup>500</sup> The Inter-American Commission has identified several minimum requirements for the adoption of “affirmative action measures” (referred to here as positive action). According to the Commission, such measures must: “i) be appropriate as regards the situation to be remedied; ii) be legitimate; iii) be necessary in a democratic society; iv) respect the principles of justice and proportionality; v) be temporary; vi) be designed and implemented in case of need; and vii) be based on a realistic assessment of the situation of the affected individuals and community.” See Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas*, para. 240.

<sup>501</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 4 (1).

<sup>502</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 20; and Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 27.

### (a) Purpose

Primarily, it is the purpose of positive action measures that both necessitates and justifies targeted measures and thus distinguishes these measures from direct discrimination:<sup>503</sup> the anticipated result of positive action is increased equality, while the result of discrimination is increased inequality.

Thus, as the Committee on the Elimination of Racial Discrimination has noted, “special measures do not amount to discrimination when taken for the ‘sole purpose’ of ensuring equal enjoyment of human rights and fundamental freedoms”.<sup>504</sup> The Committee has noted that this “motivation should be ... apparent” from the measures themselves, the arguments used to justify them, and the instruments to give effect to them. It has further clarified that: “The reference to ‘sole purpose’ limits the scope of acceptable motivations for special measures within the terms of the Convention.”<sup>505</sup> The Committee on the Elimination of Discrimination against Women has stated that special measures “should aim to accelerate the equal participation of women”, reiterating that “such measures ... do not discriminate against men”.<sup>506</sup> The Committee on the Rights of Persons with Disabilities has noted simply that: “Specific measures not to be regarded as discrimination are positive or affirmative measures that aim to accelerate or achieve de facto equality of persons with disabilities.”<sup>507</sup> The Human Rights Committee has clarified that preferential measures will be legitimate “as long as such action is needed to correct discrimination in fact”,<sup>508</sup> a position echoed by the Committee on Economic, Social and Cultural Rights.<sup>509</sup>

Positive action measures must not serve to undermine equality, nor be justified by reference to discriminatory criteria or stereotypes. Measures taken with the stated purpose of “protecting” certain groups based on stereotypes – such as rules precluding women from holding certain jobs (on the basis that women need to be “protected” from carrying out such work), rules barring persons with disabilities from working at all (because disqualified from the workforce by legal provisions entitling them to social support), or automatic rules striking older persons from eligibility for insurance or driving licences – are not positive action measures but directly discriminatory policies. Thus, in *Medvedeva v. Russian Federation*, the Committee on the Elimination of Discrimination against Women firmly rejected arguments that ostensibly “protective” measures based on gender stereotypes – in that case regulations that prevented women from carrying out certain jobs considered to be dangerous or harmful – were special measures, instead finding them directly discriminatory.<sup>510</sup> The Committee on the Rights of Persons with Disabilities has noted that positive action measures “must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discrimination”.<sup>511</sup>

### (b) Time-limited and subject to review

As positive action measures involve differential treatment based on a ground of discrimination, it is essential that such measures are in place only for as long as required to redress an existing inequality; the maintenance of such measures beyond this point would constitute direct discrimination. Both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women state that positive action measures must not lead to the maintenance of unequal or separate standards.<sup>512</sup> As the Committee on the Elimination of Racial Discrimination has set out, this limitation is “functional” and means that “the measures should cease to be applied when the objectives

<sup>503</sup> See, for example, Human Rights Committee, general comment No. 18 (1989), para. 10: “as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant”.

<sup>504</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 21.

<sup>505</sup> Ibid.

<sup>506</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 18.

<sup>507</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28.

<sup>508</sup> Human Rights Committee, general comment No. 18 (1989), para. 10.

<sup>509</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9: “Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved.”

<sup>510</sup> Committee on the Elimination of Discrimination against Women, *Medvedeva v. Russian Federation* (CEDAW/C/63/D/60/2013), para. 11.3.

<sup>511</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 29. See further discussion on this point in section I.A.4(b) of part two of the present guide.

<sup>512</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 4 (1); and International Convention on the Elimination of All Forms of Racial Discrimination, art. 2 (2).

for which they were employed – the equality goals – have been sustainably achieved”,<sup>513</sup> a position which is echoed almost verbatim by both the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights.<sup>514</sup>

There is clear consensus that “temporary” does not equate to “short”: the Committee on the Elimination of Racial Discrimination has noted that the length of time will vary in light of objectives, means and results, while the Committee on the Elimination of Discrimination against Women has stated that measures may be required for “a long period of time”.<sup>515</sup> They share the position that measures should be discontinued when the results have been achieved and sustained, not on the basis of a “predetermined passage of time”.<sup>516</sup> In its general comment No. 6 (2018), the Committee on the Rights of Persons with Disabilities has indicated that de facto “permanent measures” may be required in certain circumstances, “depending on context and circumstances, including by virtue of a particular impairment or the structural barriers of society”.<sup>517</sup>

Given the need to ensure that positive action measures cease when the equality objective has been achieved, but not before – and to ensure that measures are enhanced if ineffective in practice – all measures adopted should be subject to regular review and monitoring. The Committee on the Elimination of Racial Discrimination, for example, has underlined the need “for a continuing, system of monitoring [of] application and results using, as appropriate, quantitative and qualitative methods of appraisal”, as well as the need to consider the consequences of “abrupt withdrawal of special measures” for the subject groups.<sup>518</sup> The Committee on the Elimination of Discrimination against Women has stressed the importance of participation, consultation and the use of data in assessing the progress and effectiveness of special measures.<sup>519</sup>

### (c) Proportionality

Finally, as the Committee on Economic, Social and Cultural Rights has noted, positive action measures should be a “reasonable, objective and proportional means” to reduce inequality,<sup>520</sup> a position that is largely echoed by the other treaty bodies. Thus, the Committee on the Elimination of Racial Discrimination has noted that special measures should be legitimate, necessary in a democratic society and should “respect the principles of fairness and proportionality”,<sup>521</sup> while the Committee on the Elimination of Discrimination against Women has stated that States should adopt special measures “if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of ... substantive equality”.<sup>522</sup>

It should be noted that “necessity” in this context does not entail a strict necessity test – designed to assess whether alternative, less restrictive measures could be taken – but rather an assessment of whether the measures are “necessary in a democratic society” to meet the aim of reducing inequality. Thus, the Committee on the Elimination of Racial Discrimination has noted that measures should be “designed and implemented on the basis of need”, based on “a realistic appraisal of the current situation of the individuals and communities concerned”.<sup>523</sup>

In a similar vein, an assessment of the proportionality of positive action measures should focus on the extent to which the stated purpose – accelerating progress towards equality – is achieved. Application of the proportionality test requires balancing an aim – in this case addressing historic disadvantage or accelerating progress towards equality – against any harm that may be caused in pursuing this aim. As some authors have

<sup>513</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 27.

<sup>514</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 20; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9.

<sup>515</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 20; and Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 27.

<sup>516</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 20.

<sup>517</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 28.

<sup>518</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 35.

<sup>519</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), paras. 34–35.

<sup>520</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 9.

<sup>521</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 16.

<sup>522</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 24.

<sup>523</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 16.

noted, this is a fine balance and has led to some interesting case law – in the European Union, for example.<sup>524</sup> However, as the Human Rights Committee has indicated, the objective of temporary special measures weighs heavily in this assessment: “as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant”.<sup>525</sup>

#### 4. Positive action under comprehensive anti-discrimination law

Different States have adopted different approaches to positive action under national anti-discrimination legislation. In some countries, detailed guidance is provided on those specific forms of positive action necessary to make progress towards equality, whereas in other countries, this detail is left to other laws and policies. Both of these approaches may work, although it remains important that any specific measures adopted are subject to regular review and that the effectiveness of measures is routinely evaluated. What is most important, to be effective, is that comprehensive anti-discrimination legislation clearly both permits and articulates the requirement for the adoption of positive action.

An array of positive action measures have been adopted in States pursuant to their international equality obligations, ranging from the awarding of bursaries or special scholarships to promote equal access and participation in education; to the introduction of quotas, the development of special workplace training programmes and the reservation of places on workplace management courses for members of a discriminated group. What is required in any given circumstance is context specific and must be determined following consultation with a diverse cross section of members of the beneficiary group to which the measure applies.<sup>526</sup> Consultation should be carried out in such a way as to ensure the meaningful engagement of all members of affected communities, with particular attention paid to the inclusion of women and girls.

##### **KOSOVO: ARTICLE 6 OF THE LAW ON GENDER EQUALITY**

1. Public institutions shall take temporary special measures in order to accelerate the realization of actual equality between women and men in areas where inequities exist.
2. Special measures could include:
  - 2.1. quotas to achieve equal representation of women and men;
  - 2.2. support programs to increase participation of less represented sex in decision making and public life;
  - 2.3. economic empowerment and steps to improve the position of women or men in the field of labour improvement of equality in education, health, culture and allocation and/or reallocation of resources;
  - 2.4. preferential treatment, recruitment, hiring and promotion, and other measures in each area where inequalities exist.
- ...
6. [It does] not constitute gender discrimination when public institutions take special measures, including legal provisions, aimed at accelerating the deployment of actual equality between women and men. These measures should cease to exist once they achieve gender equality objectives, for which are created.

<sup>524</sup> For a discussion of European Union approaches in the context of employment, see Goran Selanec and Linda Senden, *Positive Action Measures to Ensure Full Equality in Practice Between Men and Women, Including on Company Boards* (Luxembourg, Publications Office of the European Union, 2013), pp. 9–13.

<sup>525</sup> Human Rights Committee, general comment No. 18 (1989), para. 10.

<sup>526</sup> See, for instance, Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 29; and Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 18.

7. Legislative, executive, judicial bodies at all levels and other public institutions shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved.
8. Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies.

## C. Equality duties

Alongside ensuring the comprehensive and effective prohibition of all forms of discrimination and requiring and mandating positive action to address substantive inequalities, States have other, proactive duties to eliminate discrimination and ensure equality of participation. Notably, article 9 of the Convention on the Rights of Persons with Disabilities establishes a duty to ensure accessibility to the environment, transportation, services, facilities and information and communications for persons with disabilities. The adoption of this standard has led to growing understanding that obligations to ensure equality of access for persons exposed to discrimination on the basis of other grounds are inherent in the rights established by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, among others. In a separate development, an increasing number of States have adopted statutory equality duties – a legal framework through which consideration of the rights to equality and non-discrimination is integrated into decision-making processes – as a means to ensure compliance with their international law obligations.

### 1. Accessibility

#### SUMMARY

- Accessibility is a proactive, systemic duty that requires the adoption and implementation of measures necessary to ensure equal access to the physical environment, to transportation, to information and communications, to places of work, education and health care and to other facilities and services open or provided to the public. The State is obliged to ensure accessibility in all spheres of life. Failure to comply with accessibility standards is a form of prohibited conduct. It is an *ex ante* duty, which exists irrespective of an individual request for access; it is an unconditional duty, in that failure to comply cannot be excused by reference to the burden on the provider.
- Anti-discrimination laws should establish duties on both State and private actors to identify and remove barriers that prevent equality of access. They should also establish a duty on the State to develop, promulgate and monitor the implementation of minimum standards and guidelines on accessibility.
- Failure to comply with accessibility standards is a form of discrimination and should therefore be prohibited under comprehensive anti-discrimination law.

Article 9 of the Convention on the Rights of Persons with Disabilities establishes a duty on States parties to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, transportation, information and communications, and facilities and services open or provided to the public. Article 9 includes both a negative duty to identify and remove barriers that prevent equal access and a positive duty to proactively ensure accessibility. Article 9 (1) establishes that States have an obligation to identify and eliminate obstacles and barriers in areas including, but not limited to, buildings, roads, transportation and other facilities, and information, communications and other services. Article 9 (2) requires that States take a range of proactive measures, including developing, promulgating and monitoring the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public and ensuring that “private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities”.



The Committee on the Rights of Persons with Disabilities has elaborated at length on the content of the obligation established under article 9. In its general comment No. 2 (2014), the Committee notes that accessibility is intrinsically related to the prohibition of discrimination, stating that:

**As long as goods, products and services are open or provided to the public, they must be accessible to all .... Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity. This approach stems from the prohibition against discrimination; denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity.<sup>527</sup>**

As noted below, in its jurisprudence, the Committee on the Rights of Persons with Disabilities has found States in violation of the relevant Convention for failing to comply with its provisions in the area of accessibility.

The Committee on the Rights of Persons with Disabilities draws a distinction between States' immediate obligation to ensure access to newly designed objects, infrastructure, goods, products and services and the obligation to remove barriers to those that already exist.<sup>528</sup> The Committee further clarifies that accessibility is an *ex ante* duty, which does not require an individual request of access, and an unconditional duty, in that failure to ensure access cannot be excused by reference to the burden on the provider; in both these respects, accessibility is distinguished from reasonable accommodation.<sup>529</sup> In its more recent general comment No. 6 (2018), the Committee distinguishes between the “proactive, systemic duty” to ensure accessibility and the “individualized reactive duty” to make reasonable accommodation.<sup>530</sup>

The proactive and systemic nature of the duty to ensure accessibility in turn entails obligations to establish definite time frames, allocate adequate resources, prescribe the duties of different authorities, establish effective monitoring mechanisms and provide sanctions for those who fail to implement accessibility standards.<sup>531</sup> Through these measures, States should ensure that barriers are removed in a “continuous and systematic way, gradually yet steadily”.<sup>532</sup> States are obligated to adopt, monitor and promulgate accessibility standards, in consultation with persons with disabilities, and following comprehensive reviews of existing laws; legislation should provide for the mandatory application of accessibility standards and sanctions for those failing to apply them.<sup>533</sup>

### **NYUSTI AND TAKÁCS V. HUNGARY<sup>534</sup>**

Two Hungarian nationals with visual impairments filed a complaint before the Committee on the Rights of Persons with Disabilities, arguing that Hungary had failed to ensure accessible banking services for persons with visual impairments, contrary to article 9 (2) (b) of the Convention. Specifically, the claimants argued that OTP Bank, of which they were both paying clients, had failed to provide automatic teller machines (ATMs), which lacked braille keyboards, audio instructions and voice assistance or other mechanisms to ensure accessibility for those with visual impairments.

The Committee found that, while the State had taken measures to enhance the accessibility of the automatic teller machines provided by OTP and other institutions, “none of these measures have ensured ... accessibility” and that, as such, it had failed to comply with its obligations under article 9 (2) (b). It recommended that the State take measures at both the individual and general levels. In respect of the complainants, the Committee noted the obligation of the State to remedy their lack of accessibility and to provide adequate compensation. At the general level, it noted that the State had an obligation to ensure non-recurrence, including by (a) “establishing minimum standards for the accessibility of banking

<sup>527</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 13.

<sup>528</sup> *Ibid.*, para. 24.

<sup>529</sup> *Ibid.*, para. 25.

<sup>530</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 24.

<sup>531</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 25.

<sup>532</sup> *Ibid.*, para. 27.

<sup>533</sup> *Ibid.*, para. 28.

<sup>534</sup> Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (CRPD/C/9/D/1/2010), paras. 9.6 and 10 (2) (a)–(c).



services”, including “a legislative framework with concrete, enforceable and time-bound benchmarks”; (b) “providing for appropriate and regular training on the scope of the Convention”; (c) “ensuring that its legislation and the manner in which it is applied ... does not have the purpose or effect of impairing or nullifying the ... exercise of any right for persons with disabilities on an equal basis with others”.

Beyond the Committee on the Rights of Persons with Disabilities, many other treaty bodies have also recognized an obligation to ensure accessibility for persons with disabilities.<sup>535</sup> Accessibility duties have also been recognized at the regional level. Article 15 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa establishes a right to “barrier free access to the physical environment, transportation, information, including communications technologies and systems, and other facilities and services open or provided to the public” and requires that States take “reasonable and progressive” measures to facilitate the full enjoyment of this right. In 2019, the European Accessibility Act was passed, establishing European Union-wide minimum accessibility standards for products and services developed from 2025 onwards.<sup>536</sup>

### Accessibility on other grounds

In its general comment No. 2 (2014), the Committee on the Rights of Persons with Disabilities explained that “accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access” established, *inter alia*, under article 25 (c) of the International Covenant on Civil and Political Rights. The Committee also drew a parallel to the obligation to ensure equal access to any place or service intended for use by the general public, which is provided for in article 5 (f) of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>537</sup> while acknowledging the difference between denial of access on the basis of prejudice and denial that is the result of physical or other pre-existing barriers.

In both respects, the position of the Committee on the Rights of Persons with Disabilities reflects the fact that States have obligations to ensure non-discrimination in the enjoyment of all other human rights and in all areas of life regulated by law, and that this obligation in turn entails rights of access. Thus, for example, in its general comment No. 14 (2000) on the right to the highest attainable standard of health, the Committee on Economic, Social and Cultural Rights recognized that the right to health contained, among its “essential elements”, a right of accessibility: “health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party”.<sup>538</sup> The Committee states that accessibility has four dimensions: non-discrimination; physical accessibility; economic accessibility (affordability); and information accessibility.<sup>539</sup> The Human Rights Committee has noted that States have an obligation to ensure the accessibility of public administration services; in its concluding observations on Israel, the Committee found that the State should “make its public administration services fully accessible to all linguistic minorities and to ensure that full accessibility in all official languages, including Arabic, is provided”.<sup>540</sup> In a similar vein, the Committee on the Elimination of Discrimination against Women has noted that “to meet the criterion of non-discrimination, education must be accessible, in both law and practice, to all girls and women”.<sup>541</sup>

Thus, while the Convention on the Rights of Persons with Disabilities is the only United Nations human rights instrument to explicitly articulate a duty of accessibility, it is clear that obligations to ensure equal and non-discriminatory access to human rights and to goods and services available to the public is implicit throughout the international human rights law framework. In order to meet their obligations to ensure non-discrimination in the enjoyment of rights and access to goods and services, States are required to amend or

<sup>535</sup> See, for example, CCPR/C/GIN/CO/3, para. 18; E/C.12/DNK/CO/6, para. 22; CEDAW/C/SUR/CO/4-6, para. 47; CERD/C/CAN/CO/21-23, para. 26; and CRC/C/TUV/CO/2-5, para. 38 (e).

<sup>536</sup> Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

<sup>537</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 4.

<sup>538</sup> Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 12 (b) (footnote omitted).

<sup>539</sup> *Ibid.*

<sup>540</sup> CCPR/C/ISR/CO/3, para. 23.

<sup>541</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 36 (2017), para. 20.

remove discriminatory laws, policies and practices and remove barriers that prevent access; and adopt and implement proactive accessibility standards.

## 2. Statutory equality duties

### SUMMARY

- Equality duties offer an effective and necessary means to operationalize the rights to equality and non-discrimination and ensure their integration into the work of public authorities and other duty bearers. Equality duties enable States to meet their obligations to respect, protect and fulfil the rights to equality and non-discrimination.
- In national practice, States have adopted a diverse range of equality duties, which may be divided into three principal categories: (a) preventative duties, which seek to avert acts of discrimination before they occur; (b) institutional duties, which seek to promote equality in the work of public and private sector organizations; and (c) mainstreaming duties, which seek to integrate and centralize equality planning in the fields of public decision-making.

In an increasing number of countries, statutory equality duties have been established as a means to give effect to States' equality and non-discrimination obligations. These duties seek to ensure social and institutional change by providing a legal framework through which the rights to equality and non-discrimination can be integrated in decision-making processes and internalized by duty bearers. Several different models of statutory equality duty have been adopted, each of which focuses on eliminating discrimination and the achievement of substantive equality.<sup>542</sup> Thus, equality duties play a dual role – enabling States to meet their obligation to refrain from discrimination, while also providing a mechanism through which the right to equality can be operationalized and so supporting the adoption of positive action measures.

Statutory equality duties impose an obligation on relevant duty bearers to follow a particular decision-making process or adopt a procedure aimed at mainstreaming the rights to equality and non-discrimination. These duties may differ greatly, both in respect of their aims, outcomes and mechanics of operation. In some countries, such as the United Kingdom, equality duties are couched in broad terms, requiring that public bodies have “due regard to the need to ... eliminate discrimination”, “advance equality of opportunity” and “foster good relations between persons” when carrying out their activities.<sup>543</sup> In other countries, a specific set of measures, such as the adoption of an equality plan or the collection of disaggregated data in areas such as employment or education, may be required.

The obligations imposed by equality duties are procedural in nature and are enforceable in the absence of an individual victim of discrimination. In this sense, these duties mark a shift from a “reactive” model of anti-discrimination law, which aims to remedy individual rights violations, to a proactive “compliance-based” model, under which the failure to fulfil a procedural obligation to adopt or follow a legislated policy requirement may itself give rise to a legal claim.<sup>544</sup> These two systems are mutually supportive and can be reaffirming. In some countries, such as Sweden, for instance, non-performance of a statutory equality duty may serve to support a discrimination claim by giving rise to an inference of discrimination.<sup>545</sup>

In 2016, Equinet, the European Network of Equality Bodies, published a study on the use of statutory equality duties in Europe that proposed a typology of equality duties with three main categories: (a) preventative duties, aimed at preventing acts of discrimination; (b) institutional duties, aimed at promoting the right to equality

<sup>542</sup> See, broadly, Niall Crowley, *Making Europe More Equal: A Legal Duty?* (Brussels, Equinet, 2016). Available at [www.archive.equineteurope.org/IMG/pdf/positiveequality\\_duties-finalweb.pdf](http://www.archive.equineteurope.org/IMG/pdf/positiveequality_duties-finalweb.pdf).

<sup>543</sup> Equality Act, 2010, sect. 149 (1).

<sup>544</sup> Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge, United Kingdom, Cambridge University Press, 2016), chap. 8 (positive action).

<sup>545</sup> Submission by Stockholm University/Equality Ombudsman of Sweden.

in the work of public and private sector organizations; and (c) mainstreaming duties, aimed at centralizing equality in the decision-making processes of public authorities.<sup>546</sup> While it is beyond the scope of the present guide to discuss these categories at length, an introduction to each of the basic models, and their scope of application, is set out below. A compendium of good practices in this area was published in 2022.<sup>547</sup>

### (a) Preventative duties

Preventative duties require duty bearers to adopt measures aimed at preventing acts of discrimination from occurring. These duties are often articulated in broad terms, for instance, requiring that an employer “take measures” to prevent discrimination in the workplace, but are sometimes expressed more concretely, such as a condition that an organization adopt a workplace harassment policy or publish data relating to equal pay.<sup>548</sup> While preventative duties are closely tied to the immediate obligation to refrain from discrimination,<sup>549</sup> they differ from non-discrimination provisions in that breach occurs due to a failure to follow the relevant procedure and so it is not necessary to establish evidence of a rights violation. In this respect, preventative duties are useful in challenging structural forms of discrimination, particularly in those areas in which individuals may be discouraged from bringing cases, such as the employment sector.

### (b) Institutional duties

Institutional equality duties involve the imposition of an obligation on private organizations (alongside public sector bodies) to review their internal policies, procedures and practices, and integrate equality planning into their modes of work. In this way, institutional duties may help facilitate the conditions necessary to challenge those entrenched institutional norms that lead to discrimination and perpetuate inequality.<sup>550</sup> Institutional equality duties are defined by Equinet as “statutory duties on organisations to promote equality for employees or for people accessing their services”.<sup>551</sup> These duties typically apply in the fields of employment and education, but may also apply in a broader range of areas of life. Institutional duties can encompass a wide range of the proactive implementation measures discussed elsewhere in the present guide, including the preparation of equality action plans (which may include strategies for training, and awareness-raising on equality), the collection of disaggregated data to inform equality planning and measures to increase diversity.

The Committee on Economic, Social and Cultural Rights has stated that “public and private institutions should be required to develop plans of action to address non-discrimination”.<sup>552</sup> Pursuant to this principle, in many national jurisdictions, positive statutory duties have been placed on employers, local authorities or other bodies to be planned and systematic in advancing equality and combating discrimination. Some equality bodies have been accorded roles to support and enforce such duties, which have proven to be key in addressing systemic discrimination and in moving towards the achievement of full equality in practice.

## NORTHERN IRELAND: EQUALITY DUTIES UNDER THE FAIR EMPLOYMENT AND TREATMENT ORDER

The Fair Employment and Treatment (Northern Ireland) Order was adopted in 1998, consolidating and expanding earlier legislation. Under the Order, employers with more than 10 employees are required to monitor the community composition of their workforce (defined under the law as the “Protestant community, or the Roman Catholic community”) and submit annual returns to the Equality Commission for Northern Ireland. If, during this process, an employer identifies gaps in the proportionate representation of its workforce, it must take remedial action to address the imbalance. Article 55 of the Order requires employers to carry out a full review of their relevant employment policies and practices (for instance, relating

<sup>546</sup> Crowley, *Making Europe More Equal*, pp. 8–9.

<sup>547</sup> Equinet, “Compendium of good practices on equality mainstreaming: the use of equality duties and equality impact assessments” (Brussels, 2021).

<sup>548</sup> Ibid., pp. 16–21. See also Committee on Economic, Social and Cultural Rights, general comment No. 23 (2016), paras. 48 and 62.

<sup>549</sup> For further discussion of this framework, see section I.B of part one of the present guide.

<sup>550</sup> Crowley, *Making Europe More Equal*, pp. 10–11.

<sup>551</sup> Ibid., p. 8.

<sup>552</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 38.

to recruitment and promotion) at least every three years. To ensure “fair participation in employment”, employers are empowered to take “affirmative action” and may be required to implement positive action measures by the Equality Commission, which may issue sanctions for non-compliance.

The Order has proved to be a significant driver of change in terms of equality in employment in the Northern Ireland workforce. In 2004, an evaluation of the fair employment framework in Northern Ireland<sup>553</sup> found evidence of:

- (a) A substantial improvement in the employment profile of Catholics;
- (b) A considerable increase in the numbers of people working in integrated workplaces, in contrast to continuing segregation in public housing;
- (c) Employers indicating that strong legislation has helped change practices and evidence suggesting that affirmative action agreements have helped to redress workplace underrepresentation.<sup>554</sup>

Equality engagement under the Order has also worked to strengthen diversity and correct internal obstacles to inclusion and advancement for women, minorities, persons with disabilities, persons living with HIV/AIDS, non-citizens and others.

In conceptual terms, such orders supplement the existing “fire alarm” (i.e. dependent on a complaint from a victim) system of response to discrimination, with an additional “police patrol” (i.e. regular review of equality and diversity issues in individual companies) system. Experience indicates that, for the purposes of tackling the exclusion of stigmatized or marginalized groups, both “fire alarm” and “police patrol” control systems are needed.<sup>555</sup> As a result of the success of the model, other countries have also included similar powers in national comprehensive anti-discrimination laws and have extended powers to the supervision of diversity in local authorities.<sup>556</sup>

### (c) Mainstreaming duties

Mainstreaming duties regulate the actions of public authorities and aim to integrate equality planning into all levels of public decision-making, including in the development of “legislation, budgets, policy and programmes”.<sup>557</sup> Both the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities have recognized an obligation on States to mainstream equality considerations into the policy process.<sup>558</sup>

<sup>553</sup> Robert D. Osborne and Ian Shuttleworth, eds., *Fair Employment in Northern Ireland, A Generation On* (Belfast, Blackstaff Press, 2004).

<sup>554</sup> Ibid.

<sup>555</sup> On “police patrol” and “fire alarm” administrative oversight mechanisms in the area of equality law, see Ayelet Shachar, “Privatizing diversity: a cautionary tale from religious arbitration in family law”, *Theoretical Inquiries in Law*, vol. 9, No. 2 (2008).

<sup>556</sup> See, for example, Act CXXV of Hungary of 2003 on equal treatment and the promotion of equal opportunities, as amended. Section 14 (1) (a) of the law stipulates in the list of its tasks that the Commissioner for Fundamental Rights “shall carry out an investigation, on the basis of an application, as to whether or not employers who were required to do so adopted an equal opportunities plan, and take a decision based on the investigation”. Section 17/A (6) of the Act (about the legal consequences of violation) stipulates that: “If the Authority establishes that an employer who was required to adopt an equal opportunities plan failed to do so, it shall invite the employer to rectify the omission, and it may apply the legal consequences specified in paragraph (1) c) to e) while applying paragraphs (3) to (4) accordingly.” Available at [https://njt.hu/translation/J2003T0125P\\_20210301\\_FIN.PDF](https://njt.hu/translation/J2003T0125P_20210301_FIN.PDF).

<sup>557</sup> Crowley, *Making Europe More Equal*, p. 30.

<sup>558</sup> In both its general recommendations and concluding observations, the Committee on the Elimination of Discrimination against Women has recognized States’ gender mainstreaming obligations. See, for instance, Committee on the Elimination of Discrimination against Women, general recommendation No. 24 (1999), para. 31 (a); and CEDAW/C/BGR/CO/8, para. 14 (a). See also Convention on the Rights of Persons with Disabilities, art. 4 (1) (c); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 14–15.

**INDIA: EQUALITY DUTIES UNDER THE ANTI-DISCRIMINATION AND EQUALITY BILL**

Sections 14–16 of the Anti-Discrimination and Equality Bill of India<sup>559</sup> establish three duties that duty bearers identified under the Act are required to fulfil, which are (a) an anti-discrimination duty; (b) a diversification duty; and (c) a due regard duty.

The anti-discrimination duty is detailed under section 14 of the Bill. This duty would require relevant duty bearers to refrain from discrimination, and “institute a readily accessible, independent and well-publicized formal complaints mechanism” in accordance with guidance issued by the Central Equality Commission (the establishment of which is foreseen under chapter III).

The diversification duty, which is detailed under section 15, would require: “Every public authority, landlord or housing society managing over fifty residential units, secondary or tertiary educational institutions, private person performing public functions and employers with more than one hundred employees [to] calculate, publish and report their Diversity Index to State Equality Commission, in a form prescribed by the Central Equality Commission.”

Persons and bodies bound by the diversification duty would be required to take “measures to progressively realize diversification in all aspects of their work” and the discharge of their responsibilities. Public authorities would further be required to conduct “regular training sessions for their personnel to sensitize them [to] the importance of equality, anti-discrimination and diversity, and to educate them for carrying out the purposes of this Act”.

The due regard duty is set out under section 16 and provides that: “All public authorities while making a rule, regulation, policy or strategic decision shall give due regard to [eliminate] all forms of discrimination to promote equality and diversity.”

Remedies for breach of the anti-discrimination, diversification and due regard duties are set out under section 33 and may include “any appropriate order, declaration, injunction, relief or award”. These may include, inter alia, an order for damages (and the payment of exemplary damages for cases of aggravated discrimination), an order to apologize and ensure non-repetition and an order to undergo training.

Equinet identifies four approaches to mainstreaming duties adopted in Europe: (a) an “equality plan approach”, which requires the analysis of the different “situations and experiences of discrimination and inequality and defining objectives, targets, and measures to address these”; (b) a “coordination approach”, which requires institutional collaboration between government departments, inter alia, to develop a comprehensive equality strategy; (c) a process approach, which involves mainstreaming equality within “existing public sector processes”, for instance, relating to public procurement; and (d) an “equality impact assessment approach”.<sup>560</sup> This last approach – which is followed in, for example, Belgium, Estonia, Finland, Great Britain and Northern Ireland<sup>561</sup> – is discussed in more detail below, given the wider role of equality impact assessment in States meeting their international law obligations.

**VICTORIA (AUSTRALIA): GENDER EQUALITY ACT**

The Gender Equality Act of Victoria (Australia) was adopted in 2020 and came into force on 31 March 2021. It applies to public sector bodies and has two main functions.

First, the Act imposes a positive duty on organizations to mainstream gender equality in developing policies and programmes and delivering public services (sect. 7). The duty requires organizations to (a) consider and promote gender equality; and (b) take necessary and proportionate action towards achieving gender equality. While this duty is not directly enforceable, it is the first of its kind in Australia.

Second, the Act establishes a review, reporting, monitoring and enforcement process to advance gender equality in employment in public sector bodies, with an emphasis on intersectional equality. This process

<sup>559</sup> For further discussion of the Bill and its legislative background, see section III.D of part one of the present guide.

<sup>560</sup> Crowley, *Making Europe More Equal*, pp. 30–40.

<sup>561</sup> Ibid., p. 30.

rests on requirements to carry out workforce gender audits, to adopt gender equality plans based on the audits, which must be updated every four years, to make “reasonable and material progress” in relation to the gender equality plan and to report publicly every two years on progress against the plan to the Public Sector Gender Equality Commissioner, who has powers to issue compliance notices and accept enforceable undertakings if progress is not made. The gender equality indicators in the Act include: gender composition at all levels of the workforce; gender composition of governing bodies; equal remuneration for work of equal or comparable value; sexual harassment; recruitment and promotion practices; availability and utilization of terms, conditions and practices relating to family violence, leave, flexible working arrangements and working arrangements supporting employees with family or caring responsibilities; gendered segregation within the workplace; and any matters added by regulation.

### 3. Ensuring the effectiveness of equality duties

States retain a large degree of discretion in the means through which they decide to implement their proactive equality obligations and, as discussed above, a range of different models have been adopted at the national level, through the development of statutory equality duties that seek to systematize and operationalize their application. In situations in which statutory equality duties are adopted, it is clear from the practice of United Nations treaty bodies and special procedures that they should meet some core minimum requirements. In particular, these duties should cover intersecting forms of discrimination,<sup>562</sup> should be applied uniformly across public bodies,<sup>563</sup> in multiple areas of life<sup>564</sup> and should be accompanied by statutory guidance to aid implementation.<sup>565</sup> In situations in which equality duties have been adopted by States, it is important that they are subject to clear legal enforcement mechanisms to ensure their efficacy.<sup>566</sup>

<sup>562</sup> See, for instance, CEDAW/C/GBR/CO/8, para. 16 (c).

<sup>563</sup> Ibid., para. 16 (b).

<sup>564</sup> On her visit to the United Kingdom, for instance, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance recommended that the public sector equality duty be applied in “all necessary contexts, including in the context of immigration functions” (A/HRC/41/54/Add.2, para. 74 (d)).

<sup>565</sup> CEDAW/C/GBR/CO/7, para. 17.

<sup>566</sup> Crowley, *Making Europe More Equal*, p. 46.





## II. REMEDY

### SUMMARY

- Anti-discrimination laws should provide for effective remedy for discrimination. Remedy includes, but is not limited to: sanctions for those found responsible for discrimination; reparations, including recognition, compensation and restitution for victims of discrimination; and institutional and societal measures designed to address the social causes and consequences of discrimination.
- Anti-discrimination laws should provide for sanctions for discrimination that are effective, dissuasive and proportionate.
- Anti-discrimination laws should provide for recognition and reparation for victims of discrimination, including in the form of compensation, restitution and rehabilitation. Reparations should be victim focused and equality sensitive.
- Anti-discrimination laws should empower courts and bodies with responsibility for determining cases of discrimination to order such institutional or societal measures as are appropriate to correct, deter and prevent discrimination and to ensure non-repetition.
- In situations in which national laws specify types of remedies for victims of discrimination, such lists of possible remedies should not be exhaustive; courts and other adjudicating bodies should have discretion and scope to fashion remedies that are appropriate in type, scope and order to the harm at issue in any particular case.

States do not meet their obligation to provide protection from discrimination by simply prohibiting discrimination in law. They must also ensure that the right to non-discrimination is effective in practice. One essential element in securing this effectiveness is ensuring that violations of the right are remedied, sanctions are applied, victims are provided with recognition, recompense and restitution, and measures are taken to ensure non-repetition.

The right to effective remedy for discrimination encompasses a number of elements. First, effective remedy entails bringing perpetrators to justice and ensuring the application of effective sanctions. Second, it requires equality-sensitive reparations in the form of compensation for material and non-material damage, together with such measures of restitution and rehabilitation as are required to restore victims to the situations that they would have enjoyed had the discrimination not occurred. Equality-sensitive reparations are those that “take into account pre-existing ... relations and power imbalances” between different groups “to ensure a fair assessment of the harm inflicted” and “equal access to – and benefits from – reparation”.<sup>567</sup> Included within reparation is the essential element of recognition of harm, including, where relevant, due public recognition. Third, effective remedy requires the adoption and implementation of measures that go beyond addressing and correcting the harm to a complainant and instead focus on remedying and addressing the causes and consequences of historic, structural or systemic discrimination. These three different elements of remedy can be understood as victim-centred, perpetrator-focused and societally directed, respectively.

The third group of remedies can be understood as including both institutional remedies and societal remedies. Institutional remedies are those that mandate the elimination of discriminatory laws, policies or practices and require such organizational or structural reforms or changes as are necessary to rectify discrimination and prevent repetition. Societal remedies include education and sensitization programmes, public memorials and apologies and other measures designed to remedy past disadvantage, address the root causes of discrimination, expose, discuss and address prejudices, stereotypes and stigma, and build solidarity with affected persons and groups. Remedies of this nature reflect the importance of non-repetition as an essential element of effective

<sup>567</sup> Secretary-General, “Guidance note of the Secretary-General: reparations for conflict-related sexual violence” (2014), pp. 4–5. Available at [www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf](http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf). See also Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015).

remedy. They also reflect the fact that discrimination has pernicious and far-reaching effects on society and that it can be both the cause and the consequence of negative social forces, such as ableism, ageism, homophobia, racism, sexism, transphobia and xenophobia, which result in harms at the individual, community and societal level.

It is firmly established that persons whose rights have been violated are entitled to an effective remedy. Thus, for example, the International Convention on the Elimination of All Forms of Racial Discrimination includes, under article 6, an explicit right to effective remedy for racial discrimination. In its general recommendation No. 26 (2000), the Committee on the Elimination of Racial Discrimination affirmed that that included both punishment for those responsible for discrimination, as well as pecuniary and moral damage.<sup>568</sup> The International Covenant on Civil and Political Rights includes a specific obligation on States to ensure remedy for any violation of Covenant rights, and the Human Rights Committee has emphasized that States must ensure that survivors of discrimination have accessible and effective remedies to vindicate their rights,<sup>569</sup> including the right to non-discrimination. The Committee on Economic, Social and Cultural Rights has stated that institutions dealing with discrimination should be empowered to provide effective remedies, including “compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies”.<sup>570</sup> The Committee on the Elimination of Discrimination against Women has made similar recommendations,<sup>571</sup> noting States’ obligations to “provide and enforce appropriate, timely remedies for discrimination” and “ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered”.<sup>572</sup> The Committee on the Rights of Persons with Disabilities has emphasized that sanctions for breach of the right to non-discrimination must be “effective, proportionate and dissuasive”.<sup>573</sup>

The Human Rights Committee, in its general comment No. 31 (2004), which deals with States’ general legal obligations under the International Covenant on Civil and Political Rights, has noted that “reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations”.<sup>574</sup> The Committee has further noted that “in general, the purposes of the Covenant would be defeated without an obligation ... to take measures to prevent a recurrence of a violation”, going on to note its own repeated calls for “measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question”.<sup>575</sup> The Committee’s recommendations in this respect are aligned with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which lists five elements of “full and effective reparation”: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>576</sup>

In line with the Human Rights Committee’s approach, the Committee on the Elimination of Discrimination against Women has noted that remedy includes restitution, compensation, rehabilitation and “measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition”,<sup>577</sup> a position largely echoed by the Committee on Economic, Social and Cultural Rights.<sup>578</sup> The Committee on the Rights of Persons with Disabilities has noted that in situations in which discrimination is of systemic nature, the mere granting

<sup>568</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 26 (2000), para. 2.

<sup>569</sup> International Covenant on Civil and Political Rights, art. 2 (3); and Human Rights Committee, general comment No. 31 (2004), para. 15.

<sup>570</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>571</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 32.

<sup>572</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 19 (a) and (b).

<sup>573</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 31 (f).

<sup>574</sup> Human Rights Committee, general comment No. 31 (2004), para. 16.

<sup>575</sup> *Ibid.*, para. 17.

<sup>576</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex), paras. 15–22, at para. 18. The Basic Principles and Guidelines have been cited with approval by the Committee on Economic, Social and Cultural Rights, which has noted that they “provide useful indications as to the obligations that follow for States from the general obligation to provide access to effective remedies”. See Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017), para. 40.

<sup>577</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 32.

<sup>578</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

of compensation to victims may not have any real effect in terms of changing the approach and that States should also implement “forward-looking, non-pecuniary remedies” in their legislation.<sup>579</sup>

## A. Remedies in different branches of law

Historically, legal orders in many jurisdictions included prohibitions on discrimination in the constitution and in criminal law. As understanding of the field of anti-discrimination law has developed, it has become increasingly recognized that, if States are to ensure effective remedy – particularly if they are to discharge the obligation to ensure compensation and restitution for claimants – prohibitions on discrimination should be provided in the civil or administrative branches of law. Clear exceptions arise in respect of discriminatory violence and other criminal acts with a bias motive, which should be the subject of specific criminal sanction; these areas of law are discussed in part four. States with advanced, well-developed bans on discrimination elaborated in the national system provide relevant and appropriate remedies in administrative, civil (including particular domains, such as labour and media law) and criminal law.

The use of civil law remedies has been presented as starting from the premise that discrimination is an infringement of personal rights and, as such, civil remedies are frequently deemed the appropriate framework for relief and redress.<sup>580</sup> Conversely, some countries have chosen to sanction discrimination as a criminal offence, in an apparent effort to reflect the impact of discrimination in “affecting not only the dignity of the victim but also in eroding the social fabric”.<sup>581</sup> However, a comparative study on the effectiveness of different approaches to remedy and sanction in Europe found significant limitations of the criminal law in practice.<sup>582</sup>

More broadly, while the Committee on the Elimination of Racial Discrimination has held that criminal penalties may be important in providing effective remedy for certain forms of racial discrimination,<sup>583</sup> it is increasingly acknowledged that civil and administrative law provide the most effective remedies and sanctions for direct and indirect discrimination and failure to make reasonable accommodation.<sup>584</sup> Indeed, criminal law provides both an inappropriate and an inadequate means to remedy these forms of discrimination, for a number of reasons:

- **No need for intent or malicious motive.** First, a finding of discrimination does not necessitate malicious motive or intent to discriminate.<sup>585</sup> As discussed in section I.A.2(a) of this part, discrimination may be both intentional or unintentional or may occur because of the maintenance of rules, policies or procedures that – despite pursuing a legitimate aim – have a disproportionate impact on those sharing a particular characteristic (see sect. I.A.2(b)). Criminal prosecution for discrimination in cases in which discrimination is unintentional or indirect will be disproportionate and unjustified.

<sup>579</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 22.

<sup>580</sup> As noted by Romanița Iordache and Iustina Ionescu: “Civil remedies are victim-focused and include remedies of a personal nature that benefit the victim of discrimination by bringing discrimination to an end, restoring the *status quo antes* and ensuring compensation and damages for harm incurred as well as for future loss of earnings. They might also include the victim’s reinstatement in his or her position prior to discrimination in cases of discrimination in employment.” See Romanița Iordache and Iustina Ionescu, “Discrimination and its sanctions – symbolic vs. effective remedies in European anti-discrimination law”, *European Anti-Discrimination Law Review*, No. 19 (2014), p. 13.

<sup>581</sup> Iordache and Ionescu, “Discrimination and its sanctions”, p. 15. See therein for examples from within the European Union.

<sup>582</sup> Ibid., p. 17. “The comparative survey ... [found] limitations of the punitive mechanisms put in place: limited standing for initiating a criminal or administrative case and limited powers of the authorities mandated to respond to discrimination. The research also shows that the administrative remedies provided for are often inadequate or are available only for particular forms of discrimination”.

<sup>583</sup> Committee on the Elimination of Racial Discrimination, *Lacko v. Slovak Republic* (CERD/C/59/D/11/1998).

<sup>584</sup> The approach to harassment is more complicated: in some jurisdictions, harassment is prohibited both in civil and criminal law. In the United Kingdom, for example, both the Equality Act, 2010, and the Protection from Harassment Act, 1997, prohibit harassment. Section 26 (1) of the Equality Act states: “A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.” While the Protection from Harassment Act does not define harassment, it has been interpreted as covering the same forms of harm.

<sup>585</sup> See also Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (a); and Human Rights Committee, general comment No. 18 (1989), para. 7.

- **Standard of proof.** In many legal systems, the criminal standard of proof involves proving the facts beyond reasonable doubt.<sup>586</sup> This standard of proof is much higher than the balance of probabilities standard commonly used in civil proceedings. As discussed in section III.B of this part, the standard of proof required by criminal law is not appropriate in discrimination cases, given the difficulty for the claimant in accessing the evidence necessary to meet the “beyond reasonable doubt” standard.
- **Rules of evidence and transfer of the burden of proof.** As discussed in detail in section III.B.1 of this part, in order to ensure the effectiveness of the right to non-discrimination, anti-discrimination laws must provide for the “shift” or “transfer” of the burden of proof in discrimination cases. This reflects the fact that, in many cases, claimants will not have access to the evidence required to establish whether discrimination has occurred. The presumption of innocence in criminal law is a well-established and important principle that is incompatible with a shift in the burden of proof.<sup>587</sup>
- **Incompatibility with an open-ended list of grounds.** As noted in section I.A.1(a) of this part, comprehensive anti-discrimination law within the domains of civil and administrative law should prohibit discrimination on the basis of any “other status”. However, in criminal law – in which the consequences for a perpetrator are more severe – the requirement of foreseeability makes the use of such an open-ended list inappropriate.
- **Difficulties in affording all aspects of effective remedy for victims in criminal law.** In general terms, the purpose of criminal law is to punish the perpetrator of an offence and to recognize the social harm caused by their actions, rather than to compensate the victim for the harm caused by a particular offence. In the context of discrimination claims, while criminal law offers the possibility of dissuasive sanction, it will frequently fail to provide effective remedy to victims. As the Committee on the Elimination of Racial Discrimination noted in *B.J. v. Denmark*, for example, acts of discrimination “may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator”.<sup>588</sup>

Thus, international best practice provides that, in order to ensure effective remedy and redress for manifestations of direct and indirect discrimination in most areas of life within the scope of comprehensive anti-discrimination legislation, sanctions should be included in civil and administrative law. Positive reform efforts by States will result in an enrichment of all relevant domains of law.

## B. Sanction: bringing perpetrators to justice

Ensuring effective remedy for discrimination unequivocally requires bringing to justice those responsible and punishing the act of discrimination, as a means of both specific and general deterrence. Indeed, each of the human rights treaty bodies have explicitly referred to the need to ensure sanction for those responsible for discrimination.<sup>589</sup> As noted above, the Committee on the Rights of Persons with Disabilities has emphasized that sanctions should be “effective, proportionate and dissuasive”.<sup>590</sup>

In systems where discrimination is a matter of civil or administrative law, sanctions will take the form of monetary fines or similar penalties. Indeed, in some jurisdictions, awards of compensation to claimants – itself a necessary element of victim-focused remedy – is considered a form of sanction. The question of what level of monetary fine is sufficient to meet the criteria of being “effective, proportionate and dissuasive” is a contextual one. In some jurisdictions, levels of damages have grown over time,<sup>591</sup> as awareness of discrimination

<sup>586</sup> Human Rights Committee, general comment No. 32 (2007), para. 30.

<sup>587</sup> See, inter alia, International Covenant on Civil and Political Rights, art. 14 (2); and Human Rights Committee, general comment No. 32 (2007), para. 30.

<sup>588</sup> Committee on the Elimination of Racial Discrimination, *B.J. v. Denmark* (CERD/C/56/D/17/1999), para. 6.3.

<sup>589</sup> See, for example, Human Rights Committee, general comment No. 31 (2004), paras. 16 and 18; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), paras. 17 and 33; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 31 (f).

<sup>590</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 31 (f).

<sup>591</sup> For example, in the United States, in the mid-1970s, “settlements in discrimination cases involving the payment of several dollars ... were generally considered substantial victories. However, by 1990, the Fair Housing Council of Greater Washington (FHCGW) had secured more than a dozen of settlements or verdicts of over \$20,000 each, and recoveries in several cases have exceeded \$100,000” (footnotes omitted). See Fitsum Alemu, “Testing to prove racial discrimination: methodology and application in Hungary”, European Roma Rights Centre, 3 October 2000. Available at [www.errc.org/roma-rights-journal/testing-to-prove-racial-discrimination-methodology-and-application-in-hungary](http://www.errc.org/roma-rights-journal/testing-to-prove-racial-discrimination-methodology-and-application-in-hungary).

has grown. In other jurisdictions, anti-discrimination laws specify the range of fines to be issued in cases of a finding of discrimination. In some cases, this has led to concerns that the upper limits of possible fines may not be sufficiently high to be “dissuasive”.<sup>592</sup> Moreover, in some countries, there is a documented phenomenon of large companies or other service providers “paying a discrimination licence”, that is, being willing to leave discrimination problems unaddressed in practice and simply paying fines in individual cases, if these are insufficiently high. Treaty bodies have expressed concern regarding the low levels of fines for discrimination in States’ national laws and made relevant recommendations.<sup>593</sup> These statements reflect the fact that, if States are to discharge their obligation to provide effective remedy, it is essential that anti-discrimination law provides for a proportionate approach to determining the level of fines.

### **SANCTIONS IN THE COURT OF JUSTICE OF THE EUROPEAN UNION: THE MARSHALL CASE<sup>594</sup>**

Helen Marshall was employed by the Southampton and South West Hampshire Area Health Authority. In 1980, she was fired, for the sole reason that she had passed the age of 60, the age at which she was eligible for a State pension. The pension qualifying age for men was 65.

Ms. Marshall argued before the domestic court that the dismissal was contrary to the European Union Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. She sought appropriate compensation on the basis of her loss of earnings. The domestic tribunals ruled in favour of Ms. Marshall. However, according to the Sex Discrimination Act, the maximum damages that could be awarded in any discrimination case was 6,250 pounds. Ms Marshall appealed.

Article 6 of the Directive requires that member States provide a remedy. The Court of Justice of the European Union ruled that “the interpretation of Article 6 ... must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed *a priori* or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result” of the passage of time until the sum awarded is paid.<sup>595</sup>

Some jurisdictions deal with discrimination as a matter of administrative law, in which it is effectively treated as a misdemeanour. In addition to fines, administrative sanctions may include warnings, disciplinary measures or similar measures. Alongside courts, administrative sanctions can be issued by administrative bodies such as specialized equality bodies and entities with powers in relation to labour, education, consumer protection, the media or other specific domains.<sup>596</sup> In situations in which national legislators have enabled equality bodies with the power to sanction perpetrators – a matter treated below in section IV.C.3 of this part – these are usually within administrative law.

As noted, some jurisdictions criminalize discrimination, with the effect that sanctions include – in addition to fines and penalties – deprivation of liberty. However, for the reasons set out above, the application of penal sanctions for cases of discrimination that do not involve violence or hate crimes is disproportionate and likely to be ineffective for a number of practical reasons.

<sup>592</sup> Isabelle Chopin, Carmine Conte and Edith Chambrier (for the European Network of Legal Experts in Gender Equality and Non-Discrimination), *A Comparative Analysis of Non-Discrimination Law in Europe 2018* (Luxembourg, Publications Office of the European Union, 2019), pp. 114–119.

<sup>593</sup> See, for example, CRPD/C/RUS/CO/1, para. 13; and CCPR/C/GEO/CO/4, para. 6.

<sup>594</sup> Court of Justice of the European Union, *Marshall v. Southampton and South West Hampshire Area Health Authority*, Case C-271/91, Judgment, 2 August 1993.

<sup>595</sup> *Ibid.*, para. 32.

<sup>596</sup> Iordache and Ionescu, “Discrimination and its sanctions”.



## C. Reparation: recognition, compensation and restitution

As set out above, it is well established that victims of discrimination are entitled to reparation. Indeed, as the Human Rights Committee has noted, without reparation to those whose Covenant rights have been violated, “the obligation to provide an effective remedy ... is not discharged”.<sup>597</sup> Reparation can be understood as including at least three elements: recognition, compensation and restitution.

As a starting point, reparation begins with the public act of recognizing human rights harm. It may also require recognizing and rendering visible certain categories of people as well as their individual or collective experiences of suffering.<sup>598</sup> Recognition is of particular importance for victims of human rights violations. Dinah Shelton notes that: “This recognition importantly serves to indicate that society understands and acknowledges the pain and humiliation experienced by victims, as well as their sense of injustice.”<sup>599</sup> In addition to constituting a clear and public acknowledgment of harmful wrongdoings by perpetrators and of the discrimination suffered by certain individuals or groups, recognition has the potential to restore victims’ dignity and to enable their rehabilitation. At the regional level, the Inter-American Court of Human Rights has advanced the incorporation of victims’ demands for recognition in the determination of the scope of reparation measures.<sup>600</sup> For instance, in various cases, the Court has ordered States to acknowledge culpability publicly; apologize to victims and family members; publish selections from its judgments in the official government journal or in other media of national circulation (e.g. radio or newspaper); and build memorials and/or organize commemorations in honour of the victims.<sup>601</sup>

Reparation also includes financial compensation for both material and non-material harm. The Human Rights Committee has stated that reparation for violation of the rights protected by the International Covenant on Civil and Political Rights “entails appropriate compensation”.<sup>602</sup> The Committee on Economic, Social and Cultural Rights has taken a similar position.<sup>603</sup> As with fines, it is necessary to ensure the availability of a sufficiently broad range of levels of possible compensation or damages, such that the criteria of “effective, proportionate and dissuasive” are met. The Committee on the Elimination of Racial Discrimination has held that victims of discrimination are entitled to financial compensation above and beyond basic financial damage, noting that “courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate”.<sup>604</sup> The Committee on the Elimination of Discrimination against Women has noted that States should ensure the availability of compensation, which may be provided in the form of “money, goods or services”.<sup>605</sup>

<sup>597</sup> Human Rights Committee, general comment No. 31 (2004), para. 16.

<sup>598</sup> Peter J. Dixon, “Reparations and the politics of recognition”, in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Christian De Vos, Sara Kendall and Carsten Stahn, eds. (Cambridge, United Kingdom, Cambridge University Press, 2015).

<sup>599</sup> Dinah Shelton, *Remedies in International Human Rights Law*, 3rd edition (Oxford, Oxford University Press, 2005), p. 14 (footnotes omitted).

<sup>600</sup> See, for example, Inter-American Court of Human Rights, *Río Negro Massacres v. Guatemala*, Judgment, 4 September 2012. The *Río Negro Massacres* case constitutes an interesting example of recognition, as the Inter-American Court of Human Rights requested the public acknowledgment of the massacres committed against the Maya Achi communities by Guatemala (paras. 276–278) and the creation of a museum in honour of the victims of the internal armed conflict (paras. 279–280), among other reparation measures.

<sup>601</sup> Thomas M. Antkowiak, “An emerging mandate for international courts: victim centered remedies and restorative justice”, *Stanford Journal of International Law*, vol. 47, No. 2 (2011). As noted by Thomas Antkowiak, public apologies by a State first occurred in 2004 during the hearings for the cases of *Plan de Sánchez Massacre v. Guatemala* and *Molina-Theissen v. Guatemala*.

<sup>602</sup> Human Rights Committee, general comment No. 31 (2004), para. 16.

<sup>603</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>604</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 26 (2000), para. 2.

<sup>605</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 19 (b). See also, Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 32.

### COMPENSATION IN THAILAND: THE ROLE OF THE COMMITTEE ON CONSIDERATION OF UNFAIR GENDER DISCRIMINATION

In Thailand, the Committee on Consideration of Unfair Gender Discrimination (WorLorPor Committee) has powers to establish temporary measures for protection or mitigation, issue orders and submit complaints to the Ombudsman, among other powers. Remedies include compensation, paid in cash or in kind, for “loss of income during the period of inability to work” or for “loss of commercial opportunity”; compensation “for expenses on medical care including physical and mental rehabilitation”; and “compensation and remedy in other forms or characteristics”.<sup>606</sup>

Beyond appropriate compensation for both financial loss and other harms, effective remedy for discrimination requires restitution – measures designed to “restore the victim to the original situation”.<sup>607</sup> Such measures would include reinstatement to a job or other position, or provision of a good or service denied as a result of discrimination, for example. The Human Rights Committee<sup>608</sup> and the Committee on Economic, Social and Cultural Rights<sup>609</sup> have both noted that reparation entails obligations of restitution and rehabilitation. The Committee on the Elimination of Racial Discrimination has recognized a similar obligation, noting in *L.R. et al. v. Slovak Republic*, for example, that effective remedy under article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination requires that the State “take measures to ensure that the petitioners are placed in the same position that they were in” prior to a discriminatory decision by the local authorities.<sup>610</sup> The Committee on the Elimination of Discrimination against Women has noted that the relevant Convention creates obligations of “restitution, rehabilitation and reinstatement”.<sup>611</sup>

These elements of reparation should be guided by an overarching victim-centred approach. Generally, Thomas Antkowiak notes that a victim-centred approach is critical to ensure that reparation measures are adjusted to the specific needs, concerns and rights of victims of human rights violations.<sup>612</sup> Victim-centred reparation measures have a greater potential to allow for recovery and healing at the individual and community levels, in line with the restorative justice model.<sup>613</sup> In addition, it is essential that reparations are equality sensitive, reflecting the specific situation of those exposed to discrimination and involving victims in the determination of what would be appropriate remedy.

## D. Institutional and societal remedies

In addition to the application of effective, proportionate and dissuasive sanction for perpetrators and the provision of adequate and appropriate reparation for the individual victim of discrimination, effective remedy may require measures that address the wider social and institutional impacts of discrimination. Such remedies – described as “forward-looking” or transformative by some authors – “indicate commitment to tackling the pervasive effects of discrimination”.<sup>614</sup>

The Human Rights Committee has noted that reparation under article 2 (3) of the International Covenant on Civil and Political Rights includes “measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices”, noting further that “the purposes of the Covenant would be defeated without an obligation ... to take measures to prevent a recurrence of a violation”.<sup>615</sup> The Committee on Economic, Social and Cultural Rights has noted that effective remedy for

<sup>606</sup> Gender Equality Act, B.E. 2558 (2015), sect. 26.

<sup>607</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 19.

<sup>608</sup> Human Rights Committee, general comment No. 31 (2004), para. 16.

<sup>609</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>610</sup> Committee on the Elimination of Racial Discrimination, *L.R. et al. v. Slovak Republic* (CERD/C/66/D/31/2003), para. 12.

<sup>611</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 32.

<sup>612</sup> See, for example, Thomas M. Antkowiak, “An emerging mandate for international courts”.

<sup>613</sup> Shelton, *Remedies in International Human Rights Law*, chap. I, especially pp. 22–27.

<sup>614</sup> Iordache and Ionescu, “Discrimination and its sanctions”, pp. 18–19.

<sup>615</sup> Human Rights Committee, general comment No. 31 (2004), paras. 16–17.

discrimination includes “guarantees of non-repetition and public apologies”.<sup>616</sup> The Committee on the Rights of Persons with Disabilities has elaborated that “where the discrimination is of a systemic nature, the mere granting of compensation to an individual may not have any real effect in terms of changing the approach. ... States parties should also implement ‘forward-looking, non-pecuniary remedies’”.<sup>617</sup> In its jurisprudence under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women has repeatedly recommended that, in addition to measures designed to address the needs of complainants, States adopt systemic measures such as reviewing and strengthening laws and providing training for relevant professionals.<sup>618</sup> In practice, remedies in this area can be usefully considered as either institutional – focused on correcting, deterring and preventing discrimination within institutions found liable for discrimination – or societal – focused on addressing the social causes and consequences of discrimination.

## 1. Institutional remedies

Institutional remedies focus on correcting and reforming the structural, organizational and policy conditions that resulted in the discrimination. These measures range from court orders to repeal or amend discriminatory policies or to adopt equality policies through to requirements to provide training and courses on sensitization for members of staff. Tribunals in Ireland have made orders creating obligations such as: “reviewing recruitment policies, diversity auditing, adopting diversity policies or non-discrimination codes, or a duty to organise equality training”.<sup>619</sup> In South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act provides that equality courts established by the Act may make orders including – but not limited to – “an order restraining unfair discriminatory practices or directing that specific steps be taken to stop” discrimination; “an order requiring the respondent to undergo an audit of specific policies or practices”; or “an appropriate order ... to suspend or revoke the licence of a person”.<sup>620</sup> Elsewhere, a comparative study on approaches to remedy and sanction in Europe found examples of States that provide powers such as the withdrawal or temporary suspension of authorizations or licences,<sup>621</sup> withdrawal of State funds or exclusion from public procurement tenders<sup>622</sup> and confiscation orders.<sup>623</sup> As these examples indicate, institutional remedies include corrective, deterrent and preventative components.

### STRUCTURAL INJUNCTIONS IN CANADA AND COLOMBIA

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, the claimants sought an institutional remedy: an order that French language facilities and programmes be provided at the secondary school level. The establishment and operation of French-language education was required by section 23 of the Canadian Charter of Rights and Freedoms, but this had not been complied with by the government of Nova Scotia, which had failed to prioritize the obligation. The Supreme Court upheld an initial trial judge’s order that the province was in violation and must make “best efforts” to provide the relevant educational programme by specified dates. It ordered not only that the French-language minority in Nova Scotia be provided with homogenous educational facilities in specific regions for specific grades by specific times but also that the government officials use their best efforts to comply with this order and that the court would retain jurisdiction to hear reports from the Government on compliance with the order.<sup>624</sup>

<sup>616</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>617</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 22.

<sup>618</sup> See, for example, Committee on the Elimination of Discrimination against Women, *O.G. v. Russian Federation* (CEDAW/C/68/D/91/2015), para. 9 (b); *E.S. and S.C. v. United Republic of Tanzania* (CEDAW/C/60/D/48/2013), para. 9 (b); and *L.C. v. Peru* (CEDAW/C/50/D/22/2009), para. 9.2.

<sup>619</sup> Iordache and Ionescu, “Discrimination and its sanctions”, p. 19 (footnote omitted).

<sup>620</sup> South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act, sect. 21 (2).

<sup>621</sup> This includes Czechia, Germany, Hungary, Ireland, North Macedonia, Portugal and Romania. See Iordache and Ionescu, “Discrimination and its sanctions”, p. 19.

<sup>622</sup> Ibid. For example, Italy.

<sup>623</sup> Ibid. For example, Czechia and Portugal.

<sup>624</sup> Supreme Court of Canada, *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] SCC 62.

In 2004, the Constitutional Court of Colombia delivered a historic judgment protecting the rights of people subjected to forced displacement.<sup>625</sup> Having delivered 17 previous judgments addressing individual and general issues concerning the precarious situation of persons subjected to forced displacement, the Court, in its 2004 judgment, declared an unconstitutional state of affairs ordering the State to adopt a public policy to overcome the situation, acknowledging the violation of several human rights including the right to non-discrimination. Moreover, the Court established that it would retain jurisdiction to hear reports from the Government on compliance with the order, through annual public hearings.

## 2. Societal remedies

Societal remedies are those remedies that are directed to: address the root causes of discrimination through enforcement of measures designed to challenge prejudice, stereotypes and stigma; challenge public prejudice or deter future discrimination by exposing the discriminatory policy of a perpetrator's actions; or build understanding and solidarity with minorities and other potential victims and victim groups. Such remedies include, for example, an order of public apology or other form of public memorialization or establishment in the public record. The aforementioned Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide a non-exhaustive list of such measures, which include: “verification of the facts and full and public disclosure of the truth”; “an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim”; “public apology, including acknowledgement of the facts and acceptance of responsibility”; and “commemorations and tributes to the victims”.<sup>626</sup>

### SOCIETAL REMEDIES IN HUNGARY

In 2003, the National Radio and Television Board of Hungary ruled that the television station TV2 had gravely violated the equal dignity of Roma in Hungary when, on 30 March, 2003, it aired *My Big Fat Gypsy Wedding*, a satire based on the 2002 film *My Big Fat Greek Wedding*. The TV2 programme depicted Roma not attending school, stealing cars, fighting and expressing pride in their ignorance. The Minister of Education at the time, Bálint Magyar, expressed the opinion that the programme “played on latent anti-Roma feelings in Hungary”. As a result of the ruling, TV2 was obliged to suspend its broadcasting for half an hour during a prime time evening broadcast and instead show a summary of the ruling. TV2 management declined to appeal the ruling and, in addition to implementing the formal sanction, TV2 broadcast a debate both before and after the 30-minute suspension of broadcasting about the situation of Roma in Hungary.<sup>627</sup>

A second strand of societal remedies are those that have an institutional and social character – specifically those requiring public authorities to amend or repeal discriminatory laws, policies and practices and to implement positive action programmes. In South Africa, for example, equality courts are empowered to issue “an order for the implementation of special measures to address ... discrimination, hate speech or harassment”.<sup>628</sup>

As this latter class of remedy illustrates, there are clear links between societal remedies and States' positive action obligations. However, as discussed in section I.B of this part, it is important to distinguish the two: on the one hand, courts may order positive action as a remedy in a specific case; and, on the other hand, States have an immediate obligation to implement positive action in situations in which substantive inequalities exist, which does not require a finding of discrimination. Similarly, institutional and societal remedies overlap,

<sup>625</sup> Constitutional Court of Colombia, Judgment T-025, 2004. Available at [www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm](http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm).

<sup>626</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 22 (b)–(e) and (g).

<sup>627</sup> European Roma Rights Centre, “Hungarian Television station sanctioned for broadcasting a defamatory program”, 29 October 2003. Available at [www.errc.org/roma-rights-journal/hungarian-television-station-sanctioned-for-broadcasting-a-defamatory-program](http://www.errc.org/roma-rights-journal/hungarian-television-station-sanctioned-for-broadcasting-a-defamatory-program).

<sup>628</sup> South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act, sect. 21 (2) (h).

inevitably, with the measures that States may initiate pursuant to their proactive obligations to tackle stigma, prejudice and the root causes of discrimination and with measures mandated by equality duties. Again, however, it is important to distinguish these concepts and address them separately in law, given the proactive nature of these obligations and the reactive nature of remedy. Essentially, while courts should be empowered to order proactive, forward-looking measures as they consider appropriate, States do not discharge their positive obligations by empowering courts to provide such remedies.

Finally, remedy provided under national law in cases of violation of anti-discrimination law should not be prescriptive or exhaustive. Given the multiplicity of types, causes and manifestations of discrimination, States should avoid providing an exhaustive list of potential remedies or prescribing particular remedies for particular cases, but should instead ensure that adjudicators have sufficient latitude to provide effective remedies at both the institutional and societal levels. As such, any list or specifications of remedies should be an open-ended list and include the possibility of “other, relevant” remedies.







### III. JUSTICE AND ENFORCEMENT

#### SUMMARY

- For the right to non-discrimination to be practical and effective, individuals exposed to discrimination must be ensured access to justice.
- Effective access to justice consists of justiciability, availability, accessibility, quality and accountability.
- To meet these requirements States should establish and maintain well-resourced, independent and impartial judicial and other enforcement bodies to deal with discrimination complaints throughout their territory, including in rural areas.
- Such bodies must be of good quality, equality-sensitive, accountable, responsive to user needs and participatory.
- Barriers to equal participation must be identified and removed, including through accessibility measures and procedural accommodations.
- Legal aid and support should be provided wherever necessary to ensure that the right to non-discrimination is realizable for all individuals and groups whose rights have been violated.
- An inclusive approach should be taken to rules regulating legal standing and the participation of interested third parties.
- Anti-discrimination legislation should ensure that, in proceedings before a court or other competent authority in which a litigant provides facts from which it may be presumed that there has been discrimination (a *prima facie* case), it shall be for the respondent to prove that there has been no violation of the right to non-discrimination.
- Anti-discrimination legislation should ensure that there are no barriers to the admissibility of evidence that could establish discrimination.
- States should ensure that individuals can submit complaints of discrimination to the United Nations treaty bodies by ratifying the relevant optional protocols and making the necessary declarations under the relevant international human rights instruments. States should ensure that anti-discrimination legislation identifies complaints to the treaty bodies as a specific means of securing remedy.

For the rights to equality and non-discrimination to be effective they must be enforced. This requires the adoption of a wide range of legal and practical measures designed to ensure, and remove barriers to, justice and enable victims to secure remedy. While these measures may be detailed in separate laws, policies, institutions or structures, the effectiveness of comprehensive anti-discrimination legislation is dependent on their application and, as such, the necessary standards must be codified in law – whether in such laws or in separate laws.

This part of the present guide examines the requirements of enforcement and access to justice in cases in which rights to equality or non-discrimination are alleged to have been violated. As part of an effective enforcement system, practical measures must be put in place to ensure the accessibility, availability, justiciability and quality of justice for survivors of discrimination and ensure their full and active participation in the justice process, without stigmatization or victimization. Adaptations to rules of evidence and legal provisions regulating the burden of proof are required to remove barriers to justice for persons and groups who have experienced discrimination. This chapter also contains a discussion of matters specific to vindicating the rights to equality and non-discrimination in judicial or other procedures, including legal standing.

## A. Access to justice and legal procedure

To ensure effective remedy, States must guarantee and ensure access to justice for victims of discrimination. This duty is well established in international law<sup>629</sup> and is made explicit in article 13 of the Convention on the Rights of Persons with Disabilities, which requires States parties to “ensure effective access to justice for persons with disabilities on an equal basis with others”. The Committee on the Elimination of Discrimination against Women has affirmed that access to justice is “essential to the realization of all the rights under the Convention”.<sup>630</sup> Other treaty bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights and the Human Rights Committees, have recognized the duty to ensure access to justice as an implicit requirement of their founding rights instruments.<sup>631</sup>

### 1. Requirements of access to justice

In 2015, the Committee on the Elimination of Discrimination against Women issued its general recommendation No. 33, in which it identified six interrelated and essential components necessary to ensure access to justice.<sup>632</sup> These components are: justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems.<sup>633</sup> While differences in prevailing legal, social, cultural, political and economic conditions will necessitate a differentiated application of these features in the national context, the basic elements of the approach are of universal relevance and of immediate application to comprehensive anti-discrimination legislation.

#### (a) Availability and justiciability

Effective enforcement of the right to non-discrimination requires the adoption of judicial and administrative mechanisms to ensure that all individuals are able to legally enforce their rights.<sup>634</sup> Courts, tribunals, ombudspersons and national human rights institutions have all – in one State or another, and to a greater or lesser extent – assumed responsibility for enforcement.<sup>635</sup> As discussed further in section IV.C.3 of part two of the present guide, in some countries, specialized equality bodies have also been granted enforcement powers as part of their institutional mandate.<sup>636</sup> Whatever form such institutions take, they must be effective in ensuring access to justice.

Bodies charged with the enforcement of the rights to equality and non-discrimination must be affordable, adequately maintained and well funded.<sup>637</sup> These bodies should be established throughout the State, in urban, rural and remote areas, and be made available to all persons.<sup>638</sup> The Committee on Economic, Social and Cultural Rights has stressed that enjoyment of the right to non-discrimination “should not be [made] conditional on, or determined by, a person’s current or former place of residence”.<sup>639</sup> This applies, *inter alia*,

<sup>629</sup> See, for instance, Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 31 (b) and 73 (h); Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 1; E/C.12/NPL/CO/3, para. 11 (f); CCPR/C/SVK/CO/4, para. 11; and CERD/C/POL/CO/22-24, para. 8 (b).

<sup>630</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 1.

<sup>631</sup> See, respectively, and in varying contexts, Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005), paras. 6–9; Human Rights Committee, general comment No. 32 (2007), para. 11; and Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017), paras. 40 and 51–52. Most frequently, access to justice is discussed by the Committees in the context of remedy, which is discussed in chapter II of part two of the present guide.

<sup>632</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 14.

<sup>633</sup> *Ibid.* For the discussion of remedy see chapter II of part two of the present guide.

<sup>634</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 14 (a). See also International Covenant on Civil and Political Rights, art. 2 (3) (b); International Convention on the Elimination of All Forms of Racial Discrimination, art. 6; Convention on the Elimination of All Forms of Discrimination against Women art. 2 (c); Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (h); Human Rights Committee, general comment No. 31 (2004), para. 15; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>635</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>636</sup> See section IV.C.3 of part two of the present guide. For a discussion on the role of such bodies in ensuring access to justice in the European context, see European Union Agency for Fundamental Rights, *Access to Justice in Cases of Discrimination in the EU: Steps to Further Equality* (Luxembourg, Publications Office of the European Union, 2012).

<sup>637</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 14 (b).

<sup>638</sup> *Ibid.*, para. 16 (a).

<sup>639</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 34.

to individuals living in a “formal or an informal settlement”, individuals who are “internally displaced” and those leading a nomadic lifestyle.<sup>640</sup> The obligation also extends to non-citizens residing within a State.<sup>641</sup>

Changes may be required to the national legal system to ensure that the rights to equality and non-discrimination are enforceable in practice. As set out by the Committee on the Elimination of Discrimination against Women, and discussed in further detail below, this includes the adaptation of rules regulating evidence and proof in discrimination cases;<sup>642</sup> and the relaxation of legal standing requirements, to allow the participation of interested third parties.<sup>643</sup> It also necessitates protection from victimization – measures necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with non-discrimination provisions.<sup>644</sup> This requirement was most recently confirmed at the international level by the Committee on the Rights of Persons with Disabilities in its general comment No. 6 (2018), which underlines that comprehensive anti-discrimination law must ensure that persons subjected to discrimination are not victimized when seeking redress and remedy.<sup>645</sup> As set out in section I.A.2(f) of part two of the present guide, protection from victimization should also be integrated in comprehensive equality law as a form of prohibited conduct.

Ensuring equality before the law and equal and effective access to justice for those exposed to discrimination requires States to abolish laws, procedures and practices that directly or indirectly discriminate in this area, including those that “accord inferior status” to the testimony of women or groups exposed to discrimination<sup>646</sup> or deny those exposed to discrimination the capacity to testify on an equal basis with others. The Committee on the Rights of Persons with Disabilities has noted that States must “give the same weight to complaints and statements from persons with disabilities as they would to non-disabled persons”.<sup>647</sup> Courts in some States are making progress in overturning discriminatory provisions in rules of evidence based on stereotypes; for example, in *R. v. D.A.I.*, the Supreme Court of Canada overturned provisions of the Evidence Act, which excluded persons with intellectual disabilities from testifying if they could not explain the meaning of concepts such as promise, truth and falsehood, whereas no other category of witness was required to meet that standard.<sup>648</sup>

One problem sometimes identified in the functioning of anti-discrimination laws is that of an excess of procedures. For example, in some jurisdictions, it is necessary to complete processes related to fines or other forms of punishment before initiating a request for damages or other forms of financial compensation, and this second request may even have to be presented to an entirely different court or authority. Such procedures can constitute an obstacle to those seeking remedy and thus violate States’ obligations to ensure access to justice. To guarantee their effectiveness, legal procedures must be made meaningfully available and accessible to all.

## (b) Quality and accountability

Justice systems must be accountable and of good quality.<sup>649</sup> The Committee on the Elimination of Discrimination against Women has noted that “all components of the system [should] adhere to international standards of competence [and] efficiency”. These systems should be “gender-sensitive”, “contextualized, dynamic, participatory”, responsive to the needs of users, and properly enforced and monitored to ensure that the

<sup>640</sup> Ibid.

<sup>641</sup> See, for instance, Human Rights Committee, general comment No. 15 (1986), paras. 1–2; Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2005), paras. 18–24; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 30. See further section I.A.1(a) of part two of the present guide.

<sup>642</sup> See, for instance, Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 15 (g).

<sup>643</sup> Ibid., para. 15 (h).

<sup>644</sup> Ibid., para. 18 (g).

<sup>645</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (i).

<sup>646</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 25 (a) (iv).

<sup>647</sup> Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014), para. 39.

<sup>648</sup> Supreme Court of Canada, *R. v. D.A.I.*, 2012 SCC 5.

<sup>649</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), paras. 14 (d) and (f), 18 and 20.

objectives of justice are being achieved.<sup>650</sup> States should establish safeguards to prevent revictimization of claimants in discrimination cases.<sup>651</sup>

To guarantee access to justice, it is necessary to ensure the adherence of all actors involved in the investigation and determination of cases concerning discrimination to the principles of independence and impartiality. In this regard, the Human Rights Committee has underlined that mechanisms in place to investigate human rights violations should be “independent and impartial bodies”.<sup>652</sup> Similarly, the Committee on Economic, Social and Cultural Rights has noted that institutions empowered to adjudicate or investigate discrimination complaints should do so “promptly, impartially, and independently”.<sup>653</sup> The Committee on the Elimination of Discrimination against Women has made similar observations.<sup>654</sup>

Beyond independence and impartiality, States should ensure that the judiciary (and others involved in the determination of discrimination cases) have sufficient knowledge and understanding to ensure high quality in the administration of justice. States have positive obligations to train the judiciary and others involved in the administration of justice.<sup>655</sup> This would include, for example, training on eliminating gender stereotyping<sup>656</sup> and other forms of prejudice and stigma by the judiciary. These obligations are discussed further in part six of the present guide.

### (c) Accessibility, procedural accommodations and legal aid

Justice systems must be accessible to those exposed to discrimination. In its general recommendation No. 33 (2015), the Committee on the Elimination of Discrimination against Women identifies several measures that are necessary to ensure accessibility, including: (a) the provision of legal assistance and removal of economic barriers for users (discussed in respect of legal aid below); (b) the removal of linguistic barriers through the provision of translators and interpreters, and availability of assistance for persons who cannot read or write; (c) outreach, education and the production of legal resources on justice mechanisms, which should be made available in various formats and community languages; (d) the development of information and communications technology, while ensuring its widespread availability; (e) the removal of physical and environmental barriers to participation; and (f) the establishment of “justice access centres” to provide legal aid and support and facilitate access to justice through the provision of basic services such as childcare.<sup>657</sup>

Several of these measures respond directly to States’ obligations to respect the right to non-discrimination in access to justice. For instance, translation and interpretation services may be necessary to ensure the participation of linguistic minorities in court proceedings. The Committee on the Rights of Persons with Disabilities has referred to measures of this type as “procedural accommodations”.<sup>658</sup>

In 2020, the Special Rapporteur on the rights of persons with disabilities, the Committee on the Rights of Persons with Disabilities and the Special Envoy of the Secretary-General of the United Nations on Disability and Accessibility co-published the “International Principles and Guidelines on Access to Justice for Persons with

<sup>650</sup> Ibid., para. 14 (d) and (f).

<sup>651</sup> Ibid., para. 51 (c). For resources relevant to the needs of persons exposed to discrimination, particularly in the context of hate crimes, see Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, “Understanding the needs of hate crime victims” (Warsaw, 2020); and European Union Agency for Fundamental Rights, *Ensuring Justice for Hate Crime Victims: Professional Perspectives* (Luxembourg, Publications Office of the European Union, 2016).

<sup>652</sup> Human Rights Committee, general comment No. 31 (2004), para. 15.

<sup>653</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>654</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), paras. 14 (d), 15 (d), 18 (a), 20 (a) and 54.

<sup>655</sup> See, for example, Convention on the Rights of Persons with Disabilities, art. 13 (2); and Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 64 (a).

<sup>656</sup> See, for example, Simone Cusack, “Eliminating judicial stereotyping: equal access to justice for women in gender-based violence cases” (2014) ([www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc](http://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc)); OHCHR, “Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights” (2018) ([www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes_EN.pdf)); and OHCHR, “Gender stereotyping and the judiciary” (2020) ([www.ohchr.org/Documents/Publications/GenderStereotyping\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GenderStereotyping_EN.pdf)).

<sup>657</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 17.

<sup>658</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 25 (d). See also the discussion of justifications in section I.A.4 of part two of the present guide.

Disabilities”, which expand upon States’ obligations in this area.<sup>659</sup> Principle 3 of the Principles and Guidelines elaborates the duty to make procedural accommodations. Such accommodations should be “individualized”, “gender and age-appropriate” and “encompass all the necessary and appropriate modifications and adjustments needed in a particular case”.<sup>660</sup> The duty to make procedural accommodations is immediate, and – unlike reasonable accommodation – failure to make such accommodations cannot be justified by reference to “the concept of disproportionality” or undue burden.<sup>661</sup> Principle 2 of the Principles and Guidelines reiterates the importance of ensuring that justice institutions are accessible.<sup>662</sup> “To guarantee equal access to justice and non-discrimination, States must ensure that the facilities and services used in legal systems are built, developed and provided on the basis of the principles of universal design.”<sup>663</sup> This requires the adoption of relevant laws, policies and practices, as well as adequate financial resourcing.<sup>664</sup>

### *Provision and availability of legal aid*

In many jurisdictions, there are significant costs associated with legal action, which may have the effect of discouraging victims of rights violations from instigating claims. States have positive obligations to ensure equal access to justice, which include obligations to provide legal aid. The Human Rights Committee has noted that: “While article 14 [of the International Covenant on Civil and Political Rights] explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it ... [and] in some cases, they may even be obliged to do so.”<sup>665</sup> The Committee has further emphasized that “the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14”.<sup>666</sup> The Committee on the Elimination of Discrimination against Women has stated that legal aid should be provided “as necessary” to ensure “affordable, accessible and timely remedies”.<sup>667</sup> More broadly, in their concluding observations, human rights treaty bodies have repeatedly called for the provision of legal aid to people experiencing discrimination.<sup>668</sup> This should include both financial assistance to secure effective legal representation and exemption from court fees and other costs associated with legal proceedings, such as the costs of appointing expert witnesses.

International bodies have identified criteria for determining the availability of legal aid, focusing on the financial resources of the claimant.<sup>669</sup> The Committee on the Rights of Persons with Disabilities has noted that financial assistance may be “subject to statutory tests of means and merits” where appropriate.<sup>670</sup> If States adopt a means test, they must ensure that the right to non-discrimination remains practical and effective, and the decision to refuse individual financial assistance should not have the effect of impeding access to justice in practice. Developing this point, the Committee has emphasized that the threshold for receiving legal aid should be low<sup>671</sup> and that it should be “locally available”.<sup>672</sup>

In some circumstances, it is possible that the denial of legal aid may itself give rise to a discrimination claim, owing to its disproportionate impact on members of a protected group. Socioeconomic disadvantage has

<sup>659</sup> International Principles and Guidelines on Access to Justice for Persons with Disabilities.

<sup>660</sup> *Ibid.*, guideline 3.1.

<sup>661</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 25 (d).

<sup>662</sup> International Principles and Guidelines on Access to Justice for Persons with Disabilities, principle 2.

<sup>663</sup> *Ibid.*, guideline 2.1. For further detail on States’ accessibility obligations, see section I.C.1 of part two of the present guide. See also Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014).

<sup>664</sup> International Principles and Guidelines on Access to Justice for Persons with Disabilities, guideline 2.1.

<sup>665</sup> Human Rights Committee, general comment No. 32 (2007), para. 10.

<sup>666</sup> *Ibid.*, para. 11.

<sup>667</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 34.

<sup>668</sup> See, illustratively, CEDAW/C/ERI/CO/6, paras. 25–26; E/C.12/BGR/CO/6, paras. 12–13; CRPD/C/HTI/CO/1, paras. 24–25; CCPR/C/CZE/CO/2, para. 16; and CERD/C/KEN/CO/5-7, para. 16 (b).

<sup>669</sup> See, for instance, Human Rights Committee, general comment No. 32 (2007), para. 10; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 49 and 52 (d).

<sup>670</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 52 (d).

<sup>671</sup> *Ibid.*, para. 49.

<sup>672</sup> *Ibid.*, para. 49 (c).



been recognized as both “a cause and consequence” of discrimination,<sup>673</sup> and – it follows – persons who have experienced discrimination are often among the least likely in society to possess the financial resources needed to bring a discrimination claim or to afford legal support. OHCHR, for instance, has noted that persons with disabilities “number disproportionately among the world’s poor and face challenges in affording legal advice and representation”.<sup>674</sup> Special procedure mandate holders have noted similar patterns at the national level.<sup>675</sup> Some treaty bodies have also recognized socioeconomic status as a distinct ground of discrimination falling within “other status”,<sup>676</sup> and cases challenging the denial of legal aid on related grounds have been brought before regional human rights tribunals.<sup>677</sup>

#### (d) Standing

Treaty bodies have increasingly recommended that an inclusive approach be taken to national rules regulating legal standing and the participation of interested third parties in discrimination claims.<sup>678</sup> Although the specific details of rules on standing will depend on the national legal system, to guarantee access to justice for victims of discrimination, such rules should ensure that associations, organizations and other legal entities that have a legitimate interest in the rights to equality and non-discrimination may bring a claim on behalf or in support of persons subjected to discrimination, with their approval or on their behalf, in any judicial or administrative proceedings.

### VICTIMHOOD AND STANDING: EQUAL LEGAL CAPACITY

Certain groups in society are denied legal standing due to provisions allowing the transfer of decision-making powers to another person or institution. This is particularly the case for persons with intellectual or psychosocial disabilities, though discriminatory denial of legal capacity can also occur on other grounds or on a combination of them. Understanding of the requirement of equal legal capacity has developed significantly in recent years, in large consequence as a result of the Convention on the Rights of Persons with Disabilities.

Article 12 of the Convention on the Rights of Persons with Disabilities requires States to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Under article 12 (3), State parties “shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Such measures, under article 12 (4), should include “appropriate and effective safeguards to prevent abuse ... [that] are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body”.

<sup>673</sup> See, for instance, OHCHR, “Guiding principles on extreme poverty and human rights” (Geneva, 2012), para. 18.

<sup>674</sup> A/HRC/37/25, para. 40.

<sup>675</sup> In a visit to the United Kingdom in 2018, for example, the Special Rapporteur on extreme poverty and human rights noted that: “Women, racial and ethnic minorities, children, single parents, persons with disabilities and members of other historically marginalized groups face disproportionately higher risks of poverty.” See A/HRC/41/39/Add.1, para. 67.

<sup>676</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 35, in which the Committee uses the term “economic and social situation”.

<sup>677</sup> See, for example, European Court of Human Rights, *Airey v. Ireland*, Application No. 6289/73, Judgment, 9 October 1979. The Court has also found violations of the right to non-discrimination in cases concerning the denial of legal aid to non-nationals. See, for example, European Court of Human Rights, *Anakomba Yula v. Belgium*, Application No. 45413/07, Judgment, 10 March 2009.

<sup>678</sup> The Committee on the Rights of Persons with Disabilities, for instance, has noted that actions in the public interest (*actio popularis*) are an important means of ensuring participation in the justice system, which is necessary to ensure access to justice. The Committee on the Elimination of Discrimination against Women has called on States to “ensure that rules on standing allow groups and civil society organizations with an interest in a given case to lodge petitions and participate in the proceedings.” Similar recommendations have been made in the regional forums. For example, the Parliamentary Assembly of the Council of Europe has recommended the removal of “legal obstacles to legal standing, notably by allowing courts to accept the submission of third-party interventions and equality bodies to represent individuals in legal proceedings in certain cases”. In respect of its own application procedure, the African Commission on Human and Peoples’ Rights has stressed the importance of *actio popularis* in enabling justice. See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 53; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 16 (c); Parliamentary Assembly of the Council of Europe resolution 2054 (2015) on equality and non-discrimination in access to justice, para. 5.4; and African Commission on Human and Peoples’ Rights, *Article 19 v. State of Eritrea*, communication No. 275/2003, Decision, 16–30 May 2007, para. 65.

In its general comment No. 1 (2014), the Committee on the Rights of Persons with Disabilities elaborated the meaning of article 12, stating that: “In order to fully recognize ‘universal legal capacity’, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.”<sup>679</sup> The Committee has emphasized that this requirement applies in respect of legal standing and other aspects of court procedure (such as the giving of evidence) that may be applicable in discrimination cases.<sup>680</sup> In this regard, the Committee has recommended that States abolish the model of “substitute decision-making” and replace it with a “supported decision-making” alternative, which recognizes the inherent dignity of the individual and is consistent with the concept of equality before the law.<sup>681</sup>

A number of States have acted on these legal requirements and still more are currently in the process of reforming law and practice in this area.<sup>682</sup> For example, in 2018, the Special Rapporteur on the rights of persons with disabilities welcomed legal reforms in Peru as a “milestone” and “an example for all States to follow”.<sup>683</sup> Prior to the reforms, judges had the power to declare persons with intellectual or psychosocial disabilities incompetent to take care of themselves or their property and to impose a guardian, under the country’s civil code. The reforms corrected this position, removing restrictions on the rights of persons with disabilities and providing support to them to take their own decisions.<sup>684</sup>

Broad standing ensures that others can support persons subjected to discrimination to bring a claim in cases in which they may not be able to do so alone or may not wish to do so. It ensures access to justice in situations in which the victims of discrimination are collectives, such as religious communities or indigenous groups. Jurisprudence has also recognized that members of minority groups have standing to challenge incitement directed not at them personally but at a wider group of which they are part.<sup>685</sup> There is also increasing recognition that representative groups, such as civil society organizations, should have standing to challenge discrimination.<sup>686</sup> These actors may have the necessary knowledge, expertise and funding that will support persons subjected to discrimination. In instances in which such actors bring cases, members of affected communities should be consulted and engaged in the process and due consideration should be given to their views.

## B. Evidence and proof

Discrimination often reflects a power imbalance between parties and the existence of facts that lie – in whole or in part – within the exclusive knowledge of the discriminating actor. The application of the ordinary rules of procedure in such cases, which would place the burden of proving discrimination to an established legal standard (often, on a balance of probabilities) on the discriminated party, is recognized frequently to produce unfair outcomes. Legal rules related to evidence and proof must therefore be adapted to ensure that victims of discrimination are able to obtain redress and enforce their rights. International, regional and national laws governing the right to non-discrimination have evolved a number of modes to enhance the fairness of the procedure to meet this objective. These include provisions for “shifting” the burden of proof, as well as legal

<sup>679</sup> Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014), para. 25.

<sup>680</sup> See, for instance, Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 49; and general comment No. 1 (2014), paras. 13–14. See also A/HRC/37/25, paras. 4 and 33–34.

<sup>681</sup> Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014), paras. 26–29.

<sup>682</sup> In a report drafted in 2017, the Special Rapporteur on the rights of persons with disabilities identified law reform processes to advance equal legal capacity in practice in at least 32 countries: Argentina, Australia (New South Wales, Northern Territory and Victoria), Austria, Belgium, Bulgaria, Canada (Alberta), Colombia, Costa Rica, Czechia, Denmark, Georgia, Germany, Hungary, Ireland, Israel, India, Kenya, Latvia, Lithuania, Malta, Marshall Islands, Netherlands, Peru, Portugal, Republic of Moldova, Romania, Russian Federation, Spain (Catalonia), Switzerland, United Kingdom (Northern Ireland), United States (Texas) and Zambia. See A/HRC/37/56, para. 38.

<sup>683</sup> Special Rapporteur on the rights of persons with disabilities, “Peru: milestone disability reforms lead the way for other States, says UN expert”, 4 September 2018. Available at [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23501&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23501&LangID=E).

<sup>684</sup> Ibid.

<sup>685</sup> See, for example, Committee on the Elimination of Racial Discrimination, *Koptova v. Slovak Republic*, communication No. 13/1998, as well as European Court of Human Rights, *Behar and Gutman v. Bulgaria*, Application No. 29335/13, Judgment, 16 February 2021, paras. 44–48.

<sup>686</sup> See, for instance, Committee on the Elimination of Discrimination against Women, *Promo-LEX v. Republic of Moldova* (CEDAW/C/76/D/105/2016), paras. 6.1–6.10.

standards on legitimate types of evidence to establish a discrimination claim (and, in particular, on the role of testing and statistical data). The current section examines these issues.

## 1. Burden of proof

Traditionally, in adversarial systems, individuals bringing legal action must prove that their rights have been violated. The onus, or burden, of proving the claim generally rests with the claimant. In discrimination cases, however, this can be problematic. The person alleged to have discriminated against the claimant is often more powerful, both in terms of resources and access to information. For example, proving that dismissal was discriminatory will require access to documentation and other information held by the employer; the employee will be unlikely to have access to the evidence necessary to proceed and so to require them to produce such evidence would undermine access to justice.

A consensus has been reached on the need to depart from the traditional rules of evidence in discrimination cases. In its general comment No. 20 (2009), the Committee on Economic, Social and Cultural Rights stated that: “Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.”<sup>687</sup> More recently, the Committee on the Rights of Persons with Disabilities, in its general comment No. 6 (2018), stated that there was a need to shift the burden of proof in civil proceedings from the claimant to the respondent in cases in which the claimant established a *prima facie* case that discrimination had occurred.<sup>688</sup>

### **CROATIA: THE BURDEN OF PROOF UNDER ARTICLE 20 OF THE ANTI-DISCRIMINATION ACT**

- (1) If a party in court or other proceedings claims that his/her right to equal treatment pursuant to provisions of this Act has been violated, he/she shall make it plausible that discrimination has taken place. In this case, it shall be for the respondent to prove that there has been no discrimination.
- (2) The provision of paragraph 1 of this Article shall not apply to misdemeanour and criminal proceedings.

The requirement for a “shifted” burden of proof is crucial for the effectiveness of civil and administrative law provisions that prohibit discrimination. The establishment of a *prima facie* case operates as a legal presumption that, once established, may be rebutted through the presentation of evidence indicating that (a) there was no difference in treatment or impact based on a protected ground; or (b) the provision, criterion or practice applied in the case in question was objectively and reasonably justified.<sup>689</sup>

<sup>687</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>688</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), paras. 26 (g) and 73 (i). See also Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2005), para. 24; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), para. 15 (g); Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40; and CCPR/C/CZE/CO/4, para. 9.

<sup>689</sup> Under the European Union equal treatment directives, the justification test only applies in cases of indirect discrimination. See further the discussion of justifications and exceptions in section I.A.4(a) of part two of the present guide.

## APPLYING THE BURDEN OF PROOF REVERSAL PRINCIPLE: DRAWING AN INFERENCE

The determination of whether the claimant has established a *prima facie* case requires the adjudicator to draw inferences from the material presented. Drawing inferences is crucial for nearly all direct discrimination cases, with the exception of those rare cases in which a discriminating party states explicitly that their decision is based on a person's protected characteristic. In a notable judgment in the United Kingdom, the House of Lords ruled that: "Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."<sup>690</sup> The House of Lords reinstated the ruling of an employment tribunal that an applicant had been denied appointment to a job because he had brought a number of previous race discrimination claims against the employer, drawing inferences from the fact that the applicant had received a "plainly ridiculous and unrealistically low" score for articulacy in his interview. Inferences of discrimination are also relevant in addressing forms of structural discrimination for which access to evidence can be limited<sup>691</sup> and, indeed, the European Court of Human Rights has relied on inferences in a range of cases in which the collection of evidence would pose challenges to applicants.<sup>692</sup> The Committee on the Elimination of Racial Discrimination has found States parties in violation of the right to effective remedy for discrimination in situations in which domestic courts did not draw proper inferences from material presented by people alleging discrimination.<sup>693</sup>

In some countries, specific provisions on the burden of proof are set out within comprehensive anti-discrimination law, whereas in others, these rules are defined in other legislation. In some States, regulations have been adopted that govern the permissible forms of evidence in discrimination cases. In others, extrajudicial guidance documents on evidence and proof assist the courts in the application of the procedural discrimination law framework. Each of these approaches will be compliant with States' obligations, provided that rules regulating the shift in the burden of proof are clearly established, well understood by legal practitioners and accessible to members of the public.

## 2. Exceptions to the rule

The presumption of innocence in criminal law is a well-established and important principle that is not compatible with a shift in the burden of proof (see sect. II.A of part two of the present guide).<sup>694</sup> Moreover, the transfer of the burden of proof may not be appropriate in inquisitorial systems, in which the court or prosecutor is responsible for investigating the facts of the case.<sup>695</sup> In such systems, it is, nonetheless, essential that the right to non-discrimination remains realizable – a fact emphasized by domestic courts in civil law systems, which have recognized the inherent difficulties relating to proof in discrimination cases.

<sup>690</sup> United Kingdom, House of Lords, *Swiggs and others v. Nagarajan* [1999] UKHL 36; [2000] 1 AC 501; [1999] 4 All ER 65; and [1999] 3 WLR 425 (15 July 1999).

<sup>691</sup> Building upon this point, the European Court of Human Rights has indicated that demonstration of large-scale structural bias may be sufficient to establish a *prima facie* case of discrimination. See, for instance, *Volodina v. Russia*, Application No. 41261/17, 9 July 2019, paras. 112–114.

<sup>692</sup> See, for instance, *Čonka v. Belgium*, an asylum case concerning collective expulsion. The European Court of Human Rights found a violation of article 4 of Protocol No. 4 to the Convention, on the basis that "the procedure followed does not enable [the Court] to eliminate all doubt that the expulsion might have been collective" – an inference that was supported by reference to a number of objective factors, including the treatment of the applicants and the statements of the political authorities. See *Čonka v. Belgium*, Application No. 51564/99, Judgment, 5 February 2002, paras. 61–63.

<sup>693</sup> Committee on the Elimination of Racial Discrimination, *Zapescu v. Moldova* (CERD/C/103/D/60/2016), paras. 8.5–8.10.

<sup>694</sup> See, *inter alia*, International Covenant on Civil and Political Rights, art. 14 (2); and Human Rights Committee, general comment No. 32 (2007), para. 30.

<sup>695</sup> This is made clear under the European Union equal treatment directives. See Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), art. 19 (3); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, art. 9 (5); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 8 (5); and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 10 (5).

### BURDEN OF PROOF: APPROACH OF THE COUNCIL OF STATE IN FRANCE

In a 2009 case, the supreme administrative court of France, the Council of State,<sup>696</sup> set out the procedure regulating the burden of proof in discrimination cases. As the French system is inquisitorial by nature, the claimant could not rely on European Union law requiring a shift of the burden of proof in *prima facie* discrimination cases,<sup>697</sup> in her claim challenging a decision taken by the Ministry of Justice. However, the court recognized that, in the inquisitorial system, the administrative judge's responsibility, generally, was to see that the parties provided all the elements to establish their cases. In discrimination cases, this responsibility must be exercised by taking into account the difficulties of proof inherent in this area. Consequently, in the court's judgment, while it is up to the complainant to submit to the judge the elements of fact likely to give rise to a presumption that the principle of equality has been infringed by a given administrative decision, it is incumbent on the defendant to produce those elements of fact that make it possible to establish that the contested decision was based on objective elements unrelated to any discrimination.

## 3. Evidence

Approaches to the admissibility and use of evidence in discrimination cases will depend on the procedural rules of the national legal system. Such rules must not obstruct access to justice for victims of discrimination and must not conflict with the principle that the right to non-discrimination must be made practical and effective. An extensive range of sources and materials have been relied upon to evidence patterns of discrimination at the regional level, including statistical evidence,<sup>698</sup> evidence from testing<sup>699</sup> and reports of human rights organizations, special procedures of the Human Rights Council and the periodic reports of treaty bodies.<sup>700</sup> The European Court of Human Rights has indicated that there are no "procedural barriers to the admissibility of evidence"<sup>701</sup> under the European Convention on Human Rights, and both the European and Inter-American Courts have demonstrated a willingness to take into account broader contextual evidence of systemic discrimination in finding a violation of the right to non-discrimination under their respective Conventions.<sup>702</sup>

<sup>696</sup> France, Council of State, Case No. 298348, Decision, 30 October 2009. Available at [www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000021219388](http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000021219388) (in French). For a useful summary of the case, see Council of State, "Les grandes décisions du Conseil d'État", 30 October 2018. Available at [www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-assemblee-30-octobre-2009-mme-perreux](http://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-assemblee-30-octobre-2009-mme-perreux) (in French).

<sup>697</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 10.

<sup>698</sup> It is settled law in a number of jurisdictions that claimants may rely on statistical evidence and that national courts take such evidence into account in situations in which it is valid and significant. See, for instance, European Court of Human Rights, *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007, paras. 187–188, in which the Court noted that, in relation to indirect discrimination, in particular, statistics "which appear on critical examination to be reliable and significant" were sufficient to constitute the *prima facie* evidence the claimant was required to produce. For further discussion, see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law*, pp. 242–248. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence (*ibid.*).

<sup>699</sup> In an expanding number of jurisdictions, testing is a court-recognized technique used to establish discrimination. Testing has been used by government authorities, equality bodies, national human rights institutions and non-governmental organizations to uncover, document and establish patterns or practices of discrimination. Testers pose "as bona fide job or home seekers" or seek services such as in restaurants, hotels or taxis, for example. In the process of the test, "testing team partners are sent at closely spaced intervals to seek information about a job, an apartment or the availability of a certain service" (footnote omitted). See Fitsum Alemu, "Testing to prove racial discrimination: methodology and application in Hungary", European Roma Rights Centre, 3 October 2000, and the examples of national law practice cited therein. Available at [www.errc.org/roma-rights-journal/testing-to-prove-racial-discrimination-methodology-and-application-in-hungary](http://www.errc.org/roma-rights-journal/testing-to-prove-racial-discrimination-methodology-and-application-in-hungary).

<sup>700</sup> See, for instance, European Court of Human Rights, *Volodina v. Russia*, Application No. 41261/17, Judgment, 9 July 2019.

<sup>701</sup> European Court of Human Rights, *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007, para. 178.

<sup>702</sup> See, for instance, European Court of Human Rights, *Carvalho Pinto de Sousa Morais v. Portugal*, Application No. 17484/15, Judgment, 25 July 2017, para. 54; and Inter-American Court of Human Rights, *Case of the Yean and Bosico Children v. the Dominican Republic*, Judgment, 8 September 2005, paras. 168–170.



## C. International justice mechanisms

In addition to providing effective sanction, individual reparation and institutional and societal remedies within their domestic legal frameworks, ensuring effective remedy requires States to enable those exposed to discrimination to complain directly to the treaty bodies.

Indeed, in numerous cases, survivors have only secured recognition and remedy for the discrimination that they have experienced when they have turned to the international level, following the exhaustion of domestic remedies. In addition to providing remedy for particular cases, the findings of the treaty bodies in the consideration of individual complaints have played a key role in advancing reform on equality at the national level and in developing understanding of the scope and substance of the right to non-discrimination at the international level.

Thus, in order to ensure the availability of a comprehensive set of remedies – and thus to meet their international obligations – States should take the necessary steps to ensure that individuals can submit complaints to the treaty bodies. This requires States to either ratify an optional protocol or make a specific declaration under the relevant instrument. If such steps have not already been taken, they should be taken at the same time as the adoption of comprehensive anti-discrimination laws. Indeed, in order to ensure effective access to justice, States should ensure that anti-discrimination legislation identifies submitting a complaint to the treaty bodies as a specific means of securing remedy and sets out the necessary steps to access such bodies.

### 1. Individual complaints mechanisms

It is beyond the scope of the present guide to describe the full range of international justice mechanisms available for the consideration of human rights violations; instead, this section briefly summarizes the system of individual complaints before those bodies that engage most frequently with the rights to non-discrimination and equality.

The Human Rights Committee has the power to consider individual communications alleging violations of the rights provided in the International Covenant on Civil and Political Rights by States that are party to the first Optional Protocol to the Covenant. The Committee can consider complaints including discrimination in respect of any of the civil and political rights guaranteed in the Covenant (under article 2) or discrimination in any area of life regulated by law, as set out under article 26.

The Committee on Economic, Social and Cultural Rights may consider individual communications relating to States parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. It can consider complaints alleging discrimination in respect of any of the economic, social and cultural rights guaranteed by the Covenant, including in the fields of education, employment, health and health care – including sexual and reproductive health and rights – housing and shelter, access to water and sanitation, access to food and clothing, and social security and social assistance.

In addition to these mechanisms, complaints mechanisms are established under treaties dedicated specifically to addressing discrimination or protecting the rights of particular groups. The Committee on the Elimination of Racial Discrimination may consider individual petitions alleging violations by States parties that have made a declaration under article 14 of the relevant Convention. The Committee on the Elimination of Discrimination against Women may consider individual communications alleging violations of the relevant Convention by States parties to the Optional Protocol to the Convention. Similarly, the Committee on the Rights of Persons with Disabilities may consider individual communications alleging violations of the relevant Convention by States parties to the Optional Protocol thereto. If a State has ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, the Committee on the Rights of the Child may consider communications alleging violations of the Convention or its Optional Protocols. Other complaints procedures exist concerning torture, the rights of migrant workers, and in the context of enforced disappearances, but these fall beyond the scope of the present guide.



## ADVANCING SYSTEMIC EQUALITY REFORM THROUGH INTERNATIONAL HUMAN RIGHTS COMMUNICATIONS MECHANISMS

### *A. S. v. HUNGARY*

A. S. was a Roma woman in Hungary who was subjected to contraceptive sterilization without her free and informed consent. As a result, she was no longer able to bear children and experienced the trauma of a coercive intervention in a highly intimate area of her life. Ms. A. S. brought her case before Hungarian courts, but these did not rule in her favour, according very wide deference to the acts of doctors. Ms. A. S. therefore submitted a complaint to the Committee on the Elimination of Discrimination against Women.

Ruling on the case, the Committee on the Elimination of Discrimination against Women identified violations of articles 10 (h) (requirement to eliminate discrimination in education), 12 (requirement to eliminate discrimination in health care) and 16 (1) (e) (requirement to eliminate discrimination in marriage and family relations) of the relevant Convention. It held that Hungary should provide appropriate compensation to Ms. A. S. “commensurate with the gravity of the violations of her rights” and recommended a number of general measures to ensure non-repetition of the acts, including:

- Take further measures to ensure that the relevant provisions of the Convention and the pertinent paragraphs of the Committee’s general recommendations Nos. 19, 21 and 24 in relation to women’s reproductive health and rights are known and adhered to by all relevant personnel in public and private health centres, including hospitals and clinics.
- Review domestic legislation on the principle of informed consent in cases of sterilization and ensure its conformity with international human rights and medical standards ...
- Monitor public and private health centres, including hospitals and clinics, which perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach.

... publish the Committee’s views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.<sup>703</sup>

As a result of the decision, Hungary adopted a number of amendments to domestic law and policy, and provided monetary compensation to Ms. A. S.

## 2. Complainants, respondents and procedure

Complaints can be made to a Committee against a State that is a party to the treaty in question and has accepted the Committee’s competence to examine individual complaints, either through ratification of the relevant optional protocol or by making a declaration (in the case of Committee on the Elimination of Racial Discrimination). Prior to a complaint being filed, all domestic remedies must have been exhausted.

Complaints can be made by any person who considers themselves to have been the subject of discrimination or another right guaranteed by the relevant instrument. Complaints may be brought by third parties, provided the individual subjects of the complaint have given their written consent. In certain cases, a third party may bring a case without such consent, for example, in a situation in which a person is in prison without access to the outside world or is a victim of enforced disappearance. In such cases, the author of the complaint should state clearly why such consent cannot be provided.

The treaty bodies have detailed rules for the filing of complaints and procedures for their consideration, which can be found on the relevant OHCHR web pages.<sup>704</sup>

<sup>703</sup> Committee on the Elimination of Discrimination against Women, *A. S. v. Hungary*, communication No. 4/2004, paras. 11.5–11.6.

<sup>704</sup> See, for example, [www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx](http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx).





## IV. EQUALITY BODIES

### SUMMARY

- Anti-discrimination law should provide for the establishment of specialized equality bodies.
- Equality bodies should be independent and insulated from the risk of interference by political and other actors.
- Equality bodies should possess the necessary resources, staff and experience to fully implement their mandates.
- Equality bodies should be gender-balanced, reflective of the diversity of society and inclusive of those persons and groups that are marginalized in society. The appointments process should be transparent and provide for public involvement.
- Equality bodies should be given the appropriate functions and powers to effectively discharge their mandates.
- Equality bodies should be properly mandated and empowered to fulfil the following functions:
  - To promote equality and prevent discrimination.
  - To provide support to persons exposed to discrimination and intolerance and to pursue litigation on their behalf.
- Equality bodies may also be mandated to consider complaints of discrimination and make decisions and determinations. In situations in which equality bodies have decision-making authority, they should be properly empowered to ensure effective access to justice and to provide both remedy and sanction.
- Equality bodies should be required to report publicly on their work on a periodic basis and in media that are accessible to all. States should support the work of equality bodies and take measures to ensure their effectiveness.

Recent decades have witnessed an increasing global trend for the creation of independent, specialized equality bodies. Equality bodies are public authorities established to support the enforcement and implementation of anti-discrimination law. These bodies share an essential function in promoting the right to non-discrimination and protecting individuals from harm. In many jurisdictions, equality bodies also play an important role in addressing structural inequalities: supporting the adoption of positive action measures and the implementation of statutory equality duties. The need for equality bodies thus emanates directly from States' obligations to respect, protect and fulfil the rights to equality and non-discrimination.<sup>705</sup> A specific obligation to establish equality bodies has also been identified by the treaty bodies.

Through the discharge of their equality mandate, national equality bodies play an essential role in working to identify and eliminate discriminatory practices, and are often responsible for coordinating the delivery of implementation measures, in accordance with States' broader equality and non-discrimination obligations. In some jurisdictions, equality bodies also possess a direct enforcement function, receiving and deciding upon individual complaints of discrimination.

As discussed in further detail in this section, consensus on the necessary institutional requirements for equality bodies has emerged in international law. States have been allowed comparatively more freedom to determine the mandate, functions and powers of such bodies; however, to meet their international law obligations, institutions established under national law must be both independent and effective. In situations in which equality bodies have been afforded the necessary institutional guarantees to ensure their effective operation and provided with the functions and powers needed to successfully discharge their mandates, these bodies have proven instrumental in tackling discrimination and eliminating inequalities in accordance with States' international law obligations.

<sup>705</sup> For further discussion of these obligations, see section I.B of part one of the present guide.

## A. Equality bodies and international law

With one exception, none of the core United Nations human rights instruments include an explicit obligation to establish independent equality bodies, and the term “equality body” is used infrequently at the international level. However, in the interpretation of their respective Conventions, the treaty bodies have referred variously to the need for “national commissions”, “appropriate bodies”, “independent monitoring institutions” and “independent mechanisms”, thus demonstrating a specific obligation to establish equality bodies.<sup>706</sup>

In their recent concluding observations, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have each recommended the establishment of independent mechanisms and institutions designed to address forms of discrimination;<sup>707</sup> and have commented on the core requirements of such bodies in situations in which they have been established.<sup>708</sup> The Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women have noted that States should establish such bodies as an aspect of the obligation to ensure effective protection and fulfilment of the right to non-discrimination. Thus, in its general recommendation No. 17 (1993), the Committee on the Elimination of Racial Discrimination “*recommends* that States parties establish national commissions or other appropriate bodies ... to promote respect for human rights without any discrimination”.<sup>709</sup> In its general recommendation No. 28 (2010), the Committee on the Elimination of Discrimination against Women noted that States should “ensure that independent monitoring institutions, such as national human rights institutes or independent women’s commissions, are established or that existing national institutes receive a mandate to promote and protect the rights guaranteed under the Convention”.<sup>710</sup>

The Convention on the Rights of Persons with Disabilities makes the obligation to establish independent mechanisms, such as equality bodies, explicit. Under article 33 (2) of the Convention, States are required, “in accordance with their legal and administrative systems”, to “maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention”.<sup>711</sup>

The establishment of equality bodies has also increasingly formed a part of the recommendations of special procedure mandate holders.<sup>712</sup> Thus, for instance, the Independent Expert on the enjoyment of all human rights by older persons has recommended that States establish “an independent national equality body to monitor and report on discrimination issues ... promote equality and deal with complaints of discrimination in an expeditious manner”.<sup>713</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has also recently explored the role of equality bodies in addressing racial discrimination as part of the thematic mandate.<sup>714</sup>

While international law provides significant discretion to States on the form, structure and mandate of equality bodies, good practice has developed at the regional level, particularly in Europe. Since 2000, European Union law has placed a legal requirement on European Union member States and candidate countries to create

<sup>706</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993), para. 1; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 28; Convention on the Rights of Persons with Disabilities, art. 33 (2); and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>707</sup> For instance, in its recent concluding observations, the Committee on Economic, Social and Cultural Rights has recommended the establishment of “institutional mechanisms” to combat discrimination against Roma, and the designation of a body in Belgium “responsible for addressing complaints of language discrimination”. In its concluding observations on Tunisia, the Human Rights Committee called for the establishment of a “national commission to combat racial discrimination”; while in its concluding observations on Greece, the Committee recommended the adoption of an “independent monitoring and reporting system” to ensure the right to non-discrimination for persons with disabilities. See, respectively, E/C.12/UKR/CO/7, para. 15 (b); E/C.12/BEL/CO/5, para. 19; CCPR/C/TUN/CO/6, para. 18 (b); and CCPR/C/GRC/CO/2, para. 10.

<sup>708</sup> See, for instance, E/C.12/BGR/CO/6, para. 5; and CCPR/C/MDA/CO/3, paras. 7–8.

<sup>709</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993), para. 1.

<sup>710</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 28.

<sup>711</sup> Convention on the Rights of Persons with Disabilities, art. 33 (2).

<sup>712</sup> See, for instance, A/HRC/42/43/Add.2, para. 93; A/HRC/36/48/Add.2, para. 87; A/HRC/30/56/Add.1, para. 111; and A/71/301, para. 15.

<sup>713</sup> A/HRC/42/43/Add.2, para. 93.

<sup>714</sup> A/71/301, para. 78.

independent equality bodies.<sup>715</sup> In December 2017, the Council of Europe issued guidance to its member States on the creation of such bodies, their form and functions,<sup>716</sup> while the European Union has also issued a recommendation on standards for equality bodies.<sup>717</sup> Between these documents and the recommendations of the treaty bodies, some essential requirements can be identified for the proper functioning of equality bodies. These can be divided into two categories: (a) institutional requirements; and (b) mandates, functions and powers.

## B. Institutional requirements for equality bodies

Between them, treaty bodies have identified certain institutional requirements that must be met to ensure that equality bodies can carry out their functions effectively. In particular, such bodies must be: (a) independent; (b) adequately resourced; (c) inclusive, participatory and representative of diversity in society; and (d) accessible. The guidance of the European Commission against Racism and Intolerance and the European Commission, alongside the 2016 report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, build on these requirements, providing further detail on the measures necessary to ensure that equality bodies can effectively discharge their mandates.

### 1. Independence

Equality bodies should be independent and insulated from the risk of interference by political and other actors. The Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have noted States' obligations to ensure that equality bodies are genuinely independent.<sup>718</sup> To ensure their functional independence, the Committee on the Rights of Persons with Disabilities has noted that equality bodies should be separated "from the executive branch of the State party" and "have members appointed in a public, democratic, transparent and participatory manner".<sup>719</sup> In a similar regard, in its guidance, the European Commission against Racism and Intolerance stresses the need for equality bodies to possess "both *de jure* and *de facto* independence" and to "be separate legal entities placed outside the executive and legislature".<sup>720</sup> To ensure their independence, the European Commission against Racism and Intolerance recommends that equality bodies are established by constitutional provision or legislation, and this legal basis should both affirm their independence and "establish the conditions to ensure this independence".<sup>721</sup>

In practice, the transparency and integrity of the process for appointing and removing members of equality bodies, together with the experience, qualifications and independence of those appointed, have proved to be essential in ensuring the effectiveness and independence of such bodies.<sup>722</sup> Essential elements of the appointments process include an open and public process, with sufficient time, information and opportunity for public and media discussion of the candidates and their qualifications.

Article 33 of the Convention on the Rights of Persons with Disabilities and general recommendation No. 17 (1993) of the Committee on the Elimination of Racial Discrimination both call on States to take into account the principles relating to the status of national institutions for the promotion and protection of human rights (the

<sup>715</sup> See, for instance, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 13 (1).

<sup>716</sup> Council of Europe, European Commission against Racism and Intolerance, "ECRI general policy recommendation No. 2: equality bodies to combat racism and intolerance at national level" (Strasbourg, 2018).

<sup>717</sup> Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies.

<sup>718</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993), para. 1; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 28; Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (m); Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40; and CCPR/C/GEO/CO/4, para. 6.

<sup>719</sup> Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities, annexed to the Committee's rules of procedure (CRPD/C/1/Rev.1, annex), para. 15.

<sup>720</sup> Council of Europe, European Commission against Racism and Intolerance, "ECRI general policy recommendation No. 2", para. 2.

<sup>721</sup> Ibid.

<sup>722</sup> See, for example, Niall Crowley (for the European Network of Legal Experts in Gender Equality and Non-Discrimination), *Equality Bodies Making a Difference* (Luxembourg, Publications Office of the European Union, 2018), pp. 89–101.



Paris Principles) when establishing equality bodies.<sup>723</sup> Similar recommendations have been made by other treaty bodies<sup>724</sup> and special procedure mandate holders.<sup>725</sup> The Paris Principles provide international benchmarks against which national human rights institutions can be accredited by the Global Alliance of National Human Rights Institutions. Although national human rights institutions are functionally different to equality bodies,<sup>726</sup> possessing a much broader human rights mandate (although some multi-mandate institutions exist),<sup>727</sup> these principles provide a useful framework for assessing the independence of equality bodies.

The Paris Principles set out six main criteria against which independence can be measured: (a) mandate and competence; (b) autonomy from government; (c) independence guaranteed by statute or constitution; (d) pluralism; (e) adequate resources; and (f) adequate investigatory powers. Some of these criteria are discussed in further detail below. In its guidance, the European Commission against Racism and Intolerance develops this list, making several concrete recommendations, inter alia, relating to the appointment, selection and tenure of staff; human resources management; procurement and office administration; the development and publication of materials; and financial controls and internal governance and accountability measures.<sup>728</sup> While it is beyond the scope of the present guide to examine these criteria in detail, good practice in this area, particularly in the European sphere, has been detailed extensively elsewhere.<sup>729</sup>

## 2. Adequate resourcing

In its general comment No. 6 (2018), the Committee on the Rights of Persons with Disabilities emphasizes the importance of ensuring that equality bodies established under the Convention are “adequately resourced to address discrimination”.<sup>730</sup> Similarly, in its guidance on article 33 (2), the Committee has called on States to ensure that such bodies “have sufficient funding and technical and skilled human resources” and “autonomy in the management of their budget”.<sup>731</sup> In its concluding observations, the Human Rights Committee has observed that equality bodies should be provided with “the financial and human resources necessary to carry out their mandates effectively and independently”.<sup>732</sup> The Committee on Economic, Social and Cultural Rights has made similar observations.<sup>733</sup>

Both the guidance of the European Commission against Racism and Intolerance and the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance highlight the importance of ensuring the appropriate human and financial resourcing of equality bodies. Underresourcing in some jurisdictions has detrimentally affected the ability of equality bodies to discharge their mandates.<sup>734</sup> In view of this concern, the Special Rapporteur has recommended that all States ensure that equality bodies “are given the appropriate mandates and resources, both human and financial, to be able to carry out their functions to their full potential”.<sup>735</sup>

<sup>723</sup> Convention on the Rights of Persons with Disabilities, art. 33 (2); and Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993), para. 1.

<sup>724</sup> See, for instance, E/C.12/BGR/CO/6, para. 5; and CCPR/C/MDA/CO/3, para. 8.

<sup>725</sup> A/71/301, para. 86.

<sup>726</sup> Indeed, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has called on States “to distinguish [an equality body] from the general national human rights institution”. See A/71/301, para. 86.

<sup>727</sup> For further discussion on this point, see Crowley, *Equality Bodies Making a Difference*, pp. 45–56.

<sup>728</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, paras. 23–36. See also Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, recommendation 1.2.1. In addition to this list, recommendation 1.2.1 (2) urges States to adopt measures aimed at preventing any conflicts of interest involving the staff, leadership or board members of equality bodies.

<sup>729</sup> See, for instance, Crowley, *Equality Bodies Making a Difference*, pp. 89–101.

<sup>730</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (m).

<sup>731</sup> Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities, para. 15.

<sup>732</sup> CCPR/C/MDA/CO/3, para. 8.

<sup>733</sup> E/C.12/BGR/CO/6, para. 5.

<sup>734</sup> See, for instance, A/71/301, para. 47.

<sup>735</sup> *Ibid.*, para. 88.

Similar guidance is provided at the European level. In its recommendation from 2018, the European Commission calls on States to ensure the effective resourcing of equality bodies, noting that: “Resources can only be considered adequate if they allow equality bodies to carry out each of their equality functions effectively, within reasonable time and within the deadlines established by national law.”<sup>736</sup>

Paragraph 2 of general policy recommendation No. 2 of the European Commission against Racism and Intolerance provides that equality bodies should “have the necessary competences, powers and resources to make a real impact”, both in terms of carrying out policy functions, as well as in assistance to victims and undertaking measures to combat systemic discrimination.<sup>737</sup> It goes on to suggest several measures designed to ensure that equality bodies have the resources necessary to execute their mandates.<sup>738</sup> These include the provision of “sufficient staff and funds”, the establishment of an independent budget and introduction of legal controls to ensure that this budget is protected (including against any possible reduction by the executive), monitored and expanded when required to meet the needs of the equality body.<sup>739</sup>

### 3. Inclusion, participation and ensuring diversity

To be effective, specialized equality bodies should reflect the diversity of society and include those persons and groups that are marginalized therein. International human rights treaty law requires the inclusion of minorities in structures established to monitor its implementation, as well as adequate gender balance.<sup>740</sup> The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities sets out, in article 2, that “persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life”<sup>741</sup> and that “persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level”. The Committee on Economic, Social and Cultural Rights has articulated the right of public participation in decision-making processes by “individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds”.<sup>742</sup>

In its guidance, the European Commission against Racism and Intolerance recommends that: “The leadership, advisory bodies, senior management, and staff of equality bodies should, as far as possible, reflect the diversity of society at large and be gender balanced.”<sup>743</sup> Analogously, when submitting applications for so-called A status accreditation as a national human rights institution, such institutions are expected to demonstrate that their founding law “requires a diverse composition of members; ... representation of women; representation of ethnic or minority groups (e.g. indigenous, religious minorities, etc); [and] representation of particular groups (e.g. people with a disability, etc)”.<sup>744</sup> These rules are directly applicable to both national human rights institutions and equality bodies.<sup>745</sup>

Equality bodies should seek the direct participation of persons and groups exposed to discrimination and engage with civil society organizations and human rights defenders, including those representing women, minority groups or other groups.<sup>746</sup> The Committee on the Rights of Persons with Disabilities has made this point in its guidance, noting that independent mechanisms established under article 33 (2) of the Convention “should ensure the full involvement and participation of persons with disabilities and their representative

<sup>736</sup> Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, recommendation 1.2.2 (1).

<sup>737</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 2.

<sup>738</sup> Ibid., para. 28.

<sup>739</sup> Ibid. See also Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, recommendation 1.2.2.

<sup>740</sup> For example, article 18 (2) of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment sets out that, in establishing national preventive mechanisms against torture, States shall “strive for a gender balance and the adequate representation of ethnic and minority groups in the country”.

<sup>741</sup> See also Beirut Declaration and its 18 Commitments on Faith for Rights (A/HRC/40/58, annexes I and II), commitment VI.

<sup>742</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 36.

<sup>743</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 38.

<sup>744</sup> Template of the Statement of Compliance with the Paris Principles, sect. 3.1 (footnote omitted).

<sup>745</sup> See, for instance, Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), paras. 54 and 60 (a).

<sup>746</sup> See discussion of the importance of participation and engagement in respect of States’ implementation obligations in section V.D of part two of the present guide.

organizations in all areas of its work”.<sup>747</sup> Such participation must be effective<sup>748</sup> and “meaningful”,<sup>749</sup> and take place “at all the stages of the monitoring process”.<sup>750</sup>

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has emphasized the importance of “engagement and partnership with civil society organizations working on issues of non-discrimination and equality”.<sup>751</sup> Such organizations play a crucial role in monitoring, reporting and awareness-raising on discrimination and can support the discharge of these functions by equality bodies.<sup>752</sup> In their guidance, the European Commission and the European Commission against Racism and Intolerance also highlight the importance of participation by civil society organizations, alongside the engagement of other key stakeholders, including discriminated groups, and the relevant institutions of government.<sup>753</sup> It is incumbent upon equality bodies to put in place the necessary mechanisms to facilitate participation.<sup>754</sup>

### PARTICIPATION OF MINORITIES IN EQUALITY BODIES

Since the 2000s, the Equality Ombudsman of Sweden has played a catalytic role in leading public discussion to advance understanding of historic discrimination against Roma. It has done so through a range of methods, including strengthening information-gathering, creating consultative platforms for Roma inclusion in the work of the Equality Ombudsman so that Roma community leaders could participate in work to challenge discrimination against Roma, as well as by taking legal action to challenge cases of discrimination. In 2004, “the then Office of the Ombudsman against Ethnic Discrimination stressed that discrimination against Roma was serious and that there was a lack of awareness of the State’s historical responsibility for much of this discrimination”.<sup>755</sup> In a report from 2011, the Equality Ombudsman noted: “The discrimination and structural obstacles that anti-Gypsyism represents in one area of society have an impact on rights in other areas and thus have consequences for society as a whole. Discrimination of Roma in the housing market is affecting Roma children’s chances of uninterrupted school attendance, which also affects their chances of an education on equal terms. This in turn affects their chances of entering the labour market.”<sup>756</sup> In 2014, these long-term efforts bore fruit with the publication of a major government study, acknowledging deep, long-term exclusion and discrimination of Roma in Sweden.<sup>757</sup>

## 4. Access to equality bodies

As discussed further in sections I.C.1 and I.A.2(d) of part two of the present guide, accessibility forms an essential element of the rights to equality and non-discrimination.<sup>758</sup> In its general comment No. 2 (2014), the Committee on the Rights of Persons with Disabilities emphasized the role of independent mechanisms, including equality bodies, in ensuring the adoption of accessibility standards and monitoring their application.<sup>759</sup>

<sup>747</sup> Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities, para. 20.

<sup>748</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (m).

<sup>749</sup> Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities, para. 20.

<sup>750</sup> Ibid.

<sup>751</sup> A/71/301, paras. 10 and 46.

<sup>752</sup> Ibid., para. 46.

<sup>753</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 37; and Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, recommendation 1.3.

<sup>754</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 37.

<sup>755</sup> Sweden, Ministry of Culture, *The Dark Unknown History: White Paper on Abuses and Rights Violations against Roma in the 20th Century* (Stockholm, 2015), p. 15.

<sup>756</sup> Ibid., p. 16.

<sup>757</sup> Ibid.

<sup>758</sup> See further sections I.C.1 and I.A.2(d) of part two of the present guide.

<sup>759</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), paras. 24, 33 and 48.

In addition to this role, it is clear that equality bodies must themselves be made accessible.<sup>760</sup> In its guidance, the European Commission against Racism and Intolerance makes several recommendations in this regard that follow the guidance of the Committee on the Rights of Persons with Disabilities, tailoring it for specific focus as concerns the accessibility of equality bodies. These include recommendations regarding: providing accessible premises, online, email and telephone services, and flexibility in meeting the time constraints of those seeking access to the services of the body; carrying out local outreach initiatives and establishing local and regional offices for conducting the work of the body; being present with groups experiencing discrimination and intolerance at key moments and building sustained links with them; allowing the possibility for persons exposed to discrimination or intolerance to contact and engage with the equality body in a confidential way and in a language in which they are proficient, to have face-to-face contact and to submit complaints orally, online or in written form, with a minimum of admissibility conditions; making adjustments to their premises, services, procedures and practices to take account of all forms of disability; and making use of the Easy Read format in publications, in particular those providing information on rights and remedies, and translating selected publications into all languages commonly used in the country; making the functions and services of the equality body free of charge to complainants and respondents; and taking steps to publicize these provisions for accessibility and to make them available.<sup>761</sup>

## C. Mandates, functions and powers of equality bodies

While there is broad consensus that States are required to establish specialized equality bodies and that certain institutional requirements must be met to safeguard their independence and ensure their efficacy, there is no clear consensus at the international level as regards the required functions and powers of such institutions.

The Committee on the Rights of Persons with Disabilities has stated that the mandate of equality bodies should be “appropriately and sufficiently broadly defined to encompass the promotion, protection and monitoring of all rights enshrined in the Convention”.<sup>762</sup> The Committee has further indicated that such bodies should be “empowered and entrusted with a wide range of responsibilities”.<sup>763</sup> In its consideration of the topic, the Committee on the Elimination of Racial Discrimination has recommended that States establish institutions for the following purposes:

- (a) To promote respect for human rights without any discrimination ...;
- (b) To review government policy ...;
- (c) To monitor legislative compliance ...;
- (d) To educate the public about the obligations of States parties under the Convention;
- (e) To assist the Government in the preparation of reports submitted to the Committee on the Elimination of Racial Discrimination.<sup>764</sup>

Neither the Committee on the Elimination of Racial Discrimination, nor the Committee on the Rights of Persons with Disabilities have further elaborated the required forms, functions, mandates or responsibilities of equality bodies, and it is clear that States possess a significant degree of discretion in this regard. In its guidance, the European Commission against Racism and Intolerance establishes three principal functions that an equality body may support: (a) a promotion and prevention function; (b) a support and litigation function; and (c) a decision-making function.<sup>765</sup> Each of these functions is discussed in further detail below.

<sup>760</sup> See, for example, Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 40; and Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, recommendation 1.2.3.

<sup>761</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 40.

<sup>762</sup> Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities, para. 15.

<sup>763</sup> Ibid.

<sup>764</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993), para. 1.

<sup>765</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 4. See also A/71/301, paras. 25–37; and Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, recommendation 1.1.2.

## **KENYA: THE NATIONAL GENDER AND EQUALITY COMMISSION OF KENYA**

The National Gender and Equality Commission of Kenya is a multi-ground equality body that was established pursuant to the National Gender and Equality Commission Act, 2011.

The mandate of the Commission is detailed under section 8 of the Act and entails both promotion and prevention, and support and litigation functions, as follows:

The functions of the Commission shall be to—

- (a) promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution;
- (b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- (c) act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities, and children;
- (d) co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof;
- (e) monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;
- (f) investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned;
- (g) work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws;
- (h) co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination;
- (i) conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the Constitution;
- (j) receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination;
- (k) work with the National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaborations in the protection and promotion of rights related to the principle of equality and freedom from discrimination;
- (l) prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act;
- (m) conduct audits on the status of special interest groups including minorities, marginalised groups, persons with disability, women, youth and children;
- (n) establish, consistent with data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups;
- (o) perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination; and

- (p) perform such other functions as may be prescribed by the Constitution and any other written law.

Section 9 of the Act provides that “the Commission shall consist of a chairperson and four other members”. Requirements for membership of the Commission, and procedures for the appointment, tenure and removal of members and staff, are set out in sections 10–23.

The general powers of the Commission are established under section 26 of the Act, while section 27 confers certain court powers upon the Commission to aid in the discharge of its mandate. Together, these provisions permit the Commission broad powers of adjudication and the right to issue summonses, require statements under oath, obtain reports, enter into premises (with the permission of the court), conduct interviews, carry out audits, hold hearings and compel the attendance of individuals. The investigatory powers of the Commission are detailed under section 28 of the Act and include powers to “summon and enforce the attendance of any person for examination” and to requisition and compel the production of documents.

The Commission possesses a (non-binding) decision-making function. Under section 32 of the Act, persons who have experienced discrimination (or, in certain circumstances, persons acting with their consent and on their behalf) may lodge official complaints. Subject to the limitation of jurisdiction detailed in section 30 and exceptions to the rule established under section 34, the Commission will investigate the complaint and take one of a number of actions detailed under section 41. This includes recommending “to the complainant a course of ... judicial redress” and – in cases disclosing a breach of the criminal law – referring the matter to the Director of Public Prosecutions or other relevant authority.

Under section 29 (2) of the Act, the Commission is required to “resolve any matter brought before it by conciliation, mediation or negotiation”. Where this does not result in a resolution of the case, the Commission may also issue a report and address recommendations to the person, body or organization responsible for the act of discrimination. The details of this procedure are set out under section 42 of the Act. The report of the Commission must set out “the findings of the investigation and any recommendations made”, including recommendations for remedial action to address the harm caused. The Commission may require the relevant actor to produce a report detailing the steps taken to implement its recommendations and – in the event of non-compliance – may submit a report to Parliament.

## 1. Promotion and prevention

The promotion of equality and prevention of discrimination forms a central and defining function of all equality bodies. In its guidance, the European Commission against Racism and Intolerance highlights 15 specific competences equality bodies should possess in order to effectively carry out this function.<sup>766</sup>

### PROMOTION AND PREVENTION

According to the European Commission Against Racism and Intolerance, the promotion and prevention function of equality bodies should include the competences to:

- a. Promote and achieve equality, prevent and eliminate discrimination and intolerance, and promote diversity and good relations between the different groups in society.
- b. Build a continuous dialogue with groups experiencing discrimination and intolerance and their representative organisations, and with organisations working more generally on human rights and equality issues.
- c. Conduct inquiries on their own initiative into all matters falling under their mandate, addressing both individual and structural discrimination, and make and publish recommendations.
- d. Conduct and commission research on any issue falling under their mandate.

<sup>766</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 13.



- e. Build across society awareness, knowledge, valuing of and respect for equality, diversity, equal treatment legislation, non-discrimination and mutual understanding.
- f. Build, among groups experiencing discrimination and intolerance, knowledge about the rights and remedies established under the equal treatment legislation, capacity to exercise these rights, and trust in the equality bodies.
- g. Develop standards and provide information, advice, guidance and support to individuals and institutions in the public and private sectors on good practice for promoting and achieving equality and preventing discrimination and intolerance.
- h. Promote and support the use of positive action to remedy inequality in the public and private sectors.
- i. Support the implementation of the general duty on all authorities to promote equality and prevent discrimination in carrying out their functions ..., establish standards for its implementation and, where appropriate, enforce them.
- j. Take part in the consultation procedures for new policy, legislation and executive acts, monitor existing policy, legislation and executive acts and make recommendations for the modification or introduction of policy, legislation or executive acts.
- k. Promote and contribute to the training of key groups in relation to equality and non-discrimination.
- l. Monitor the implementation of their recommendations.
- m. Track decisions made by courts and other decision-making bodies.
- n. Promote and support the ratification of relevant international treaties and the implementation and dissemination of such treaties and of the relevant standards, case law and reports emanating from intergovernmental organisations; take part in the proceedings of and with relevant intergovernmental organizations, take their recommendations into account and monitor their implementation.
- o. Cooperate with and support organisations with similar objectives to those of the equality body. Develop shared understanding on key issues in relation to equality and conclude cooperation agreements with such organisations.<sup>767</sup>

As set out in chapter V of part two and chapter II of part six of the present guide, many of these competences are directly linked to States' proactive equality and implementation obligations.<sup>768</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has stressed the crucial role equality bodies may play in this respect: awareness-raising and sensitizing rights holders;<sup>769</sup> and gathering and publishing monitoring data and statistics, which may support the development and implementation of policies and help evidence patterns of discrimination capable of giving rise to an inference of discrimination in concrete cases.<sup>770</sup> To ensure that equality bodies can fulfil their promotion and prevention mandate effectively, it is important that barriers to data collection be identified and addressed, and the existence, availability and work of equality bodies be well publicized among potential users.<sup>771</sup>

To ensure their effectiveness, the European Commission against Racism and Intolerance concludes that equality bodies should have "powers to obtain evidence and information".<sup>772</sup> This should include powers to: (a) "require the production of files, documents and other material for inspection, examination and making copies thereof"; (b) "conduct on-site inspections"; (c) "question persons"; and (d) "apply for an enforceable

<sup>767</sup> Ibid.

<sup>768</sup> In particular, relating to the development of equality policies and strategies; awareness-raising, education and training on equality; monitoring of equality and non-discrimination; and consultation.

<sup>769</sup> A/71/301, paras. 30–34.

<sup>770</sup> Ibid., paras. 35–37.

<sup>771</sup> Ibid., paras. 12 and 48–52.

<sup>772</sup> Council of Europe, European Commission against Racism and Intolerance, "ECRI general policy recommendation No. 2", para. 21.

court order or impose administrative fines” for non-compliance.<sup>773</sup> To the extent that equality bodies fulfil investigatory functions, mechanisms must be in place to ensure that complaints are investigated “promptly, impartially, and independently”.<sup>774</sup>

## 2. Support and litigation

Alongside promotion and prevention, many equality bodies also possess a support and litigation function. In its guidance, the European Commission against Racism and Intolerance lists six competences that are necessary to support this function.

### SUPPORT AND LITIGATION

According to the European Commission against Racism and Intolerance, the support and litigation function of equality bodies should include the competences to:

- a. Receive complaints and provide personal support and legal advice and assistance to people exposed to discrimination or intolerance, in order to secure their rights before institutions, adjudicatory bodies and the courts.
- b. Have recourse to conciliation procedures when appropriate.
- c. Represent, with their consent, people exposed to discrimination or intolerance before institutions, adjudicatory bodies, and the courts.
- d. Bring cases of individual and structural discrimination or intolerance in the equality body’s own name before institutions, adjudicatory bodies and the courts.
- e. Intervene as *amicus curiae*, third party or expert before institutions, adjudicatory bodies, and the courts.
- f. Monitor the execution of decisions of institutions, adjudicatory bodies, and the courts dealing with equality, discrimination and intolerance.<sup>775</sup>

The European Commission against Racism and Intolerance states that “equality bodies should have the right to choose, based on published criteria established by them, the cases they take up for representation and strategic litigation”.<sup>776</sup> Furthermore, “States should ensure that there is a system by which people exposed to discrimination or intolerance do not have to bear court and administrative fees or representation fees, in particular in cases of structural discrimination and where their cases are taken up for strategic litigation”.<sup>777</sup>

## 3. Decision-making and enforcement

While all equality bodies will perform some combination of promotion, prevention, litigation and support functions, in some countries, these bodies have also been afforded special decision-making and enforcement responsibilities. Broadly, decision-making bodies can be divided into two categories: those that issue binding decisions and those that make (non-binding) recommendations.

According to the guidance of the European Commission against Racism and Intolerance, bodies of the first type should be granted powers to remedy discrimination and prevent future occurrences, including through the imposition of “effective, proportionate and dissuasive sanctions”, including fines and compensation.<sup>778</sup> These bodies must be able to “ensure the execution and implementation of their decisions”, which should be

<sup>773</sup> Ibid.

<sup>774</sup> See, for instance, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 40.

<sup>775</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 14.

<sup>776</sup> Ibid., para. 15.

<sup>777</sup> Ibid., para. 16.

<sup>778</sup> Ibid., para. 17 (c).

published and made publicly available.<sup>779</sup> Decisions should be made on the basis of national law and should follow established procedural rules applicable in discrimination cases, including rules regulating the shift in the burden of proof.<sup>780</sup>

In situations in which equality bodies are assigned this type of enforcement function, they are required to meet the stringent standards established for such bodies under international law, which are set out in section III.A.1(a) of part two of the present guide,<sup>781</sup> and should be subject to appeal to the courts. To avoid any conflicts of interest that may result in denial of justice, in situations in which the enforcement functions of an equality body sit alongside powers to investigate and litigate cases on discrimination, it is important that “each function is provided by a different unit or by different staff”.<sup>782</sup> These units must each meet the institutional guarantees necessary to discharge their mandates.<sup>783</sup> In particular, they must be functionally independent and provided with adequate human and financial resourcing.<sup>784</sup>

### CASEWORK: AN EXAMPLE FROM THE REPUBLIC OF MOLDOVA

In their casework, equality bodies have been instrumental in ensuring that victims of discrimination receive due legal remedy. They have also been key in ending systematic discriminatory practices. For example, in its decision of 9 September 2014, the Council on Preventing and Combating Discrimination and Ensuring Equality of the Republic of Moldova ruled on Case 110/2014, in which a woman had been refused enrolment in a vocational retraining programme to learn manicure and pedicure skills, on grounds that her status as a person with a disability precluded her from carrying out such work. Such an approach was not in accordance with the Convention on the Rights of Persons with Disabilities, which the Republic of Moldova had recently ratified, and in particular the guarantee of equality and non-discrimination for persons with disabilities, including in the field of work. The Council ruled that excluding a person from vocational training on grounds of disability was discriminatory. The decision brought about a heightened understanding of the legal requirement to ensure the right to non-discrimination for persons with disabilities and thus has been crucial for advancing positive reform at the national level.

In situations in which the decisions of equality bodies are non-binding in nature, it is particularly important that victims retain a judicial avenue to enforce their legal rights.<sup>785</sup> National legal frameworks should never preclude the possibility for individuals to bring a claim before a court, irrespective of the availability of an equality body with decision-making powers.<sup>786</sup> Additionally, mechanisms must be in place to ensure that recommendations are duly considered and implemented by government and other relevant duty bearers.<sup>787</sup>

<sup>779</sup> Ibid., para. 17 (d).

<sup>780</sup> Ibid, para. 17 (a).

<sup>781</sup> See section III.A.1(a) of part two of the present guide.

<sup>782</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 11.

<sup>783</sup> Ibid. See further section IV.B of this part.

<sup>784</sup> Ibid. See, in particular, sections IV.B.1 and IV.B.2.

<sup>785</sup> See, broadly, section III.A of part two of the present guide.

<sup>786</sup> Indeed, the Committee on Economic, Social and Cultural Rights has noted that “there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant” (footnote omitted). See Committee on Economic, Social and Cultural Rights, general comment No. 9 (1998), para. 9.

<sup>787</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 36.

**MONITORING AND OVERSIGHT: EXAMPLES FROM DENMARK AND THAILAND**

As concerns monitoring and oversight of the implementation of ordered measures, equality bodies should be empowered to order respondents to report to them on the measures taken within a specified time limit or, following the issuing of an order, have the power to monitor and supervise compliance. In the event of a failure to observe an order, equality bodies should have powers to issue a fine for non-compliance. For example, if decisions made by the Board of Equal Treatment of Denmark are not complied with, the Board, at the request and on behalf of the complainant, must bring the matter before the civil courts.<sup>788</sup> Some equality bodies have been provided with even more stringent powers to address non-compliance: in Thailand, any person violating the orders of the Committee on Consideration of Unfair Gender Discrimination is subject to imprisonment for a maximum period of six months, or a fine of up to 20,000 baht, or both.

**D. Ensuring the effectiveness of equality bodies**

The establishment of equality bodies is essential to meeting States' obligations to respect, protect and fulfil the rights to equality and non-discrimination.<sup>789</sup> Indeed, it is difficult to find jurisdictions that have made significant progress in implementing the rights to equality and non-discrimination without having established and adequately resourced an independent institution to oversee implementation, provide expertise and assist victims.

Different models of equality body have been established at the national level, which may be more suited to some contexts than others. While States possess some flexibility in determining the mandate, functions and powers of the institutions that they establish under national law, equality bodies must be effective in advancing the protection of the rights to equality and non-discrimination. This requires that each of those institutional guarantees of independence, adequate resourcing, accessibility, reflectiveness and participation be met. It also requires that the body be appropriately mandated and empowered.

Consistent with States' international law obligations, the work of equality bodies – either singularly or as a whole – should cover all grounds, forms and manifestations of discrimination, in all areas of life regulated by law, including both the public and private sector.<sup>790</sup> In some countries multi-mandate bodies – usually a human rights ombudsperson or national human rights institution – have been established with a dual equality and human rights mandate. To ensure their effectiveness, it is important that the equality mandate of such institutions is well defined and that each of the institutional requirements set out above is guaranteed.<sup>791</sup> Measures must also be put in place to ensure “appropriate and close cooperation between” different entities established under national law.<sup>792</sup>

When provided with sufficient funding, clear mandates and institutional guarantees to ensure their independence, equality bodies have proven extremely effective in practice. Equality bodies themselves play an important role in ensuring the effective discharge of their mandates – by engaging in strategic planning, target setting, and establishing indicators and benchmarks to monitor the outputs of their work and the achievement of their goals.<sup>793</sup> It is important that States support these processes and work to ensure the effectiveness of their institutions. On this point, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has called on States to “identify the challenges faced by [equality] bodies and provide the support necessary for the work carried out by them”.<sup>794</sup>

<sup>788</sup> Similar mechanisms are provided in the case of the Defender of Rights in France, the National Non-Discrimination and Equality Tribunal in Finland and the Equality Ombudsman in Sweden.

<sup>789</sup> See section I.B of part one of the present guide.

<sup>790</sup> See further section I.A of part two of the present guide. See also Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 4. Relatedly, see A/71/301, paras. 6 and 8.

<sup>791</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, paras. 7–9.

<sup>792</sup> Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities, para. 14.

<sup>793</sup> Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 2”, para. 33.

<sup>794</sup> A/71/301, para. 12.



## V. IMPLEMENTATION OBLIGATIONS

### SUMMARY

- Equality impact assessment is an essential tool in the implementation and enforcement of the right to non-discrimination.
- Equality impact assessment requires pre-emptive, consultative and data-driven assessments of laws, policies and decisions in order to ensure that they do not discriminate directly or indirectly and to identify how the particular needs of discriminated persons and groups may be accommodated and advanced.
- To be effective, impact assessment must take place before a policy is introduced and be carried out in consultation with members of any potentially affected communities in all their diversity. The results of the assessment should be made public and result in meaningful policy changes.

Each of the core United Nations human rights treaties requires States to take the steps necessary to give effect to the rights that they protect, including the right to non-discrimination.<sup>795</sup> States parties to both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, for example, commit to “pursue by all appropriate means and without delay a policy of eliminating” discrimination.<sup>796</sup> Thus, alongside the removal of discriminatory laws and policies, and the establishment and enforcement of a protective legal framework, international law requires the adoption of proactive measures for the implementation of the rights to equality and non-discrimination.

Implementation measures form part of a comprehensive programme of action, which includes positive action, designed to eliminate discrimination and achieve equality in practice.<sup>797</sup> As discussed elsewhere in the present guide, implementation measures may be overseen by independent equality bodies and may be realized through the adoption of statutory equality duties.<sup>798</sup>

A clear consensus can be identified from the practice and comments of the human rights treaty bodies on the existence of discrete implementation obligations, derived from the overarching obligation to ensure the effectiveness of the right to non-discrimination and to make progress towards equality. As set out in section I.B of part one of the present guide, States have an immediate obligation to repeal or amend laws, policies and practices that discriminate and to ensure comprehensive and effective protection from discrimination.<sup>799</sup> Beyond these obligations, States’ implementation obligations include:

- The obligation to combat prejudice and to advance the celebration of human diversity. This obligation – which should be codified in anti-discrimination legislation but which requires a much wider range of activity than can be achieved through law alone – is discussed in part six of the present guide.
- The obligation to develop and implement equality policies and strategies.
- The obligation to use equality impact assessment.
- The obligation to monitor equality by collecting, analysing and publishing disaggregated data.

<sup>795</sup> See, for instance, International Covenant on Civil and Political Rights, art. 2; International Covenant on Economic, Social and Cultural Rights, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 2; Convention on the Rights of Persons with Disabilities, art. 4; and Convention on the Rights of the Child, art. 2.

<sup>796</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 2; and Convention on the Elimination of All Forms of Discrimination against Women, art. 2.

<sup>797</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 36.

<sup>798</sup> See section I.C.2 of part two of the present guide.

<sup>799</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 2 (1) (c); International Convention on the Elimination of All Forms of Discrimination against Women, art. 2; and Convention on the Rights of Persons with Disabilities, art. 4 (1) (b).



- The obligation to consult and ensure the participation of affected groups in all policy, strategies, monitoring, research and positive action initiatives.

It should be noted that not all of these measures should be – or indeed could be – fully implemented or included within a comprehensive anti-discrimination law. Some measures of implementation require States to adopt policies or practices that cannot be detailed in legislation, while others entail fiscal or economic measures that are dynamic in nature. Thus, while international law is clear that States must ensure the effective implementation of the rights to equality and non-discrimination, the principal instruments for the most part leave the design of such measures to national discretion.<sup>800</sup>

Nevertheless, it is important that States ensure that their anti-discrimination legislation requires the adoption of implementation measures and provides the framework for their operation.

## A. Equality policies and strategies

States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities all make an overarching commitment to “undertake to pursue by all appropriate means and without delay a policy” of eliminating discrimination.<sup>801</sup> As clarified by the Committee on the Elimination of Discrimination against Women, the “policy” commitment here is understood as State policy in its broadest sense, requiring the “adoption of a comprehensive range of measures”, ranging from the adoption of constitutional guarantees of non-discrimination to the repeal of discriminatory legislation.<sup>802</sup> However, the Committee on the Elimination of Discrimination against Women stresses that, as an essential element of this broad, overarching policy commitment, States should adopt “comprehensive action plans ... which provide a framework for the practical realization of the principle of formal and substantive equality of women and men”.<sup>803</sup>

The statements of the Committee on the Elimination of Discrimination against Women reflect the clear international consensus that States are required to develop, adopt and implement equality and non-discrimination policies, action plans and strategies. The duty can be viewed as entailing two aspects.

First, States must adopt specific strategies focused on the achievement of equality and non-discrimination. The Committee on Economic, Social and Cultural Rights has commented that States “should ensure that strategies, policies, and plans of action, are in place and implemented in order to address both formal and substantive discrimination by public and private actors”.<sup>804</sup> The Committee on the Elimination of Discrimination against Women has, as noted, recognized that States should adopt comprehensive action plans for the realization of equality between men and women.<sup>805</sup> Similarly, the Committee on the Rights of Persons with Disabilities has emphasized that full implementation of the right to non-discrimination necessitates the development “in close consultation with organizations of persons with disabilities ... and other relevant stakeholders ... an equality policy and strategy that is inclusive and accessible to all persons with disabilities”.<sup>806</sup>

Second, States should integrate equality and non-discrimination planning into their broader policy development programmes. For example, in addition to requiring the adoption of specific equality and non-discrimination

<sup>800</sup> See, for example, the Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 23: “This obligation to use means or a certain way of conduct gives a State party a great deal of flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework and that can respond to the particular obstacles and resistance to the elimination of discrimination against women existing in that State party.”

<sup>801</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 2 (1); and Convention on the Elimination of All Forms of Discrimination against Women, art. 2. Article 4 of the Convention on the Rights of Persons with Disabilities sets out States’ general obligations thereunder, which include the adoption of “all appropriate measures” and a specific obligation “to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes”.

<sup>802</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 24.

<sup>803</sup> Ibid.

<sup>804</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 38.

<sup>805</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 24.

<sup>806</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (j).

policies, the Committee on Economic, Social and Cultural Rights has recommended to States that “economic policies such as budgetary allocations and measures to stimulate economic growth” should be designed such that they ensure the effective enjoyment of rights without discrimination.<sup>807</sup> The Committee on the Elimination of Discrimination against Women has noted that States should ensure that measures designed to eliminate discrimination are “linked to mainstream governmental budgetary processes in order to ensure that all aspects of the policy are adequately funded”.<sup>808</sup> Under the Committee on the Rights of Persons with Disabilities, States are required to “take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes”.<sup>809</sup>

While States parties have “a great deal of flexibility” in the development of policies,<sup>810</sup> a State must “be able to justify the appropriateness of the particular means it has chosen and demonstrate whether it will achieve the intended effect and result”.<sup>811</sup> There is, therefore, a requirement to ensure that measures are effective, and the process for the development of equality plans and strategies and implementation should be consultative and participatory.<sup>812</sup>

## B. Equality impact assessment

While not explicitly required by international human rights instruments, equality impact assessment is increasingly understood as an essential tool in the elimination of discrimination<sup>813</sup> and thus a necessary means for States to discharge their international law obligations. Equality impact assessment involves a pre-emptive, consultative and data-driven assessment of a law, policy or decision in order to ensure that they do not discriminate directly or indirectly and to identify how the particular needs of discriminated persons and groups may be accommodated and advanced. Thus, the obligation to carry out equality impact assessment forms part of States’ duty to respect the right to non-discrimination by refraining from discrimination in law, policy and practice. In practice, however, equality impact assessment can also have a broader range of positive impacts, by allowing States to identify and adopt policy responses that remove structural barriers to equal participation and promote equality more broadly.

The use of human rights impact assessment has grown in recent years and human rights bodies have recommended its application in diverse areas, including in respect of the environment, business,<sup>814</sup> and the rights of indigenous peoples<sup>815</sup> and children.<sup>816</sup> In a recent report, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance identified the specific use of equality impact assessment as a “prerequisite” for the design of digital technologies.<sup>817</sup> The Convention on the Rights of Persons with Disabilities includes, under article 4, a requirement for States parties to “take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes”.<sup>818</sup> The Committee on the Elimination of Discrimination against Women has noted that, in order to meet their obligations under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, States “must immediately assess the de jure and de facto situation of women and take concrete steps to formulate and implement a policy” to eliminate discrimination.<sup>819</sup> In its general comment No. 20 (2009), the Committee on Economic, Social and Cultural Rights repeatedly references States’ obligations to ensure

<sup>807</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 38.

<sup>808</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 28.

<sup>809</sup> Convention on the Rights of Persons with Disabilities, art. 4 (1) (c).

<sup>810</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 23.

<sup>811</sup> Ibid.

<sup>812</sup> Ibid., paras. 27–28; Convention on the Rights of Persons with Disabilities, art. 4 (3); and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 73 (j).

<sup>813</sup> See, for example, A/HRC/44/57, para. 56; and A/75/258, para. 89.

<sup>814</sup> See, for instance, Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017), para. 13.

<sup>815</sup> Ibid., para. 17.

<sup>816</sup> See, for instance, Committee on the Rights of the Child, general comment No. 5 (2003), para. 45; and general comment No. 14 (2013), para. 99.

<sup>817</sup> A/HRC/44/57, para. 56.

<sup>818</sup> Convention on the Rights of Persons with Disabilities, art. 4 (1) (c).

<sup>819</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 24.

that economic and other policies do not result in discriminatory denial or limitation of economic, social or cultural rights,<sup>820</sup> an obligation that clearly entails some element of assessment.

Indeed, the Committee on Economic, Social and Cultural Rights' discussion of non-discrimination obligations illustrates both the utility and the necessity of equality impact assessment. The Committee has noted that there is a "strong presumption" against the adoption of "retrogressive measures"<sup>821</sup> in the Covenant and stated that in situations in which such measures are envisioned, "the State party has the burden of proving their necessity".<sup>822</sup> Retrogressive measures must not "disproportionately affect disadvantaged and marginalized individuals and groups" or be "applied in an otherwise discriminatory manner".<sup>823</sup>

United Nations human rights treaty bodies and special procedure mandate holders have provided guidance to ensure the proper application and effective implementation of equality impact assessment. First, impact assessment should seek to assess (and eliminate) any discriminatory impacts of a policy on members of a protected group.<sup>824</sup> In situations in which discriminatory impacts are identified, policies should be adapted to meet the needs of such groups and should not exacerbate inequalities. Second, to ensure their effectiveness, such assessment should be made mandatory, rather than optional.<sup>825</sup> Third, in line with the recognition that the right to non-discrimination gives rise to "an immediate and cross-cutting obligation" on States,<sup>826</sup> the duty to carry out an equality impact assessment is an *ex ante* duty, meaning that assessment must be conducted before a policy is adopted.<sup>827</sup> It remains important, however, that equality impact assessment is also integrated into policy implementation and monitoring to avoid unforeseen or emergent discriminatory impacts and to ensure that any proactive measures are working as intended. Third, the assessment should be conducted in consultation with members of those groups to which the policy may apply.<sup>828</sup> The results should be made publicly available and "result in meaningful changes to policy proposals".<sup>829</sup>

### LEGISLATION IN PRACTICE: THE PUBLIC SECTOR EQUALITY DUTY AND EQUALITY IMPACT ASSESSMENT IN THE UNITED KINGDOM

The public sector equality duty was introduced in the Equality Act, 2010, which brought together, harmonized and expanded protection afforded under a number of earlier, specific, equality instruments. The duty requires thinking around equality to be mainstreamed across public decision-making by requiring public authorities to have "due regard" to the need to eliminate discrimination, advance equality of opportunity and foster good relations between discriminated groups and others in society.

Specifically, section 149 (1) of the Act provides:

- (1) A public authority must, in the exercise of its functions, have due regard to the need to:
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

<sup>820</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 38.

<sup>821</sup> Committee on Economic, Social and Cultural Rights, general comment No. 25 (2020), para. 24.

<sup>822</sup> Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), para. 38.

<sup>823</sup> Ibid.

<sup>824</sup> See, for instance, A/HRC/41/54/Add.2, para. 15.

<sup>825</sup> Ibid., paras. 15 and 74 (c). See also A/HRC/44/57, para. 56.

<sup>826</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7; and Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 12. See also A/HRC/26/29, para. 19.

<sup>827</sup> See, for instance, A/75/258, para. 89 (c). See also the Committee on the Rights of the Child; which has distinguished child-rights impact assessments from child-rights impact evaluations. Both are required under the Convention, however, the former is an *ex ante* duty (i.e. it is required before any policies are adopted), while the latter is an *ex post* duty (i.e. it applies after the policy has been adopted, to evaluate its impact). See Committee on the Rights of the Child, general comment No. 5 (2003), para. 45; and general comment No. 14 (2013), para. 99.

<sup>828</sup> A/HRC/44/57, para. 56; and A/75/258, para. 89.

<sup>829</sup> A/HRC/41/54/Add.2, para. 34.

- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The term “due regard” is explained under section 149 (3) of the Act, as requiring public authorities to have due regard to the need to “remove or minimise disadvantages” experienced by individuals belonging to a protected group, to “take steps to meet the needs” of such persons and to “encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low”. Under section 149 (5), public authorities must have due regard to the need to “tackle prejudice” and “promote understanding”. Section 149 (6) recognizes explicitly that compliance with the duty “may involve treating some persons more favourably than others”, thereby permitting the adoption of positive action (to the extent that such measures are consistent with other parts of the Act).

The meaning of the term “due regard” has been further clarified by the courts. In the case of *R (Brown) v. Secretary of State for Work and Pensions*,<sup>830</sup> Lord Justice Aikens delivered what have come to be known as the Brown Principles, which establish six key criteria for operation of the public sector equality duty as follows: (a) public authorities “must be made aware of their duty to have ‘due regard’ to the identified goals”; (b) the “duty must be fulfilled before and at the time that a particular policy” that may impact a protected group is being considered; (c) “the duty must be exercised in substance, with rigour and with an open mind”; (d) the duty cannot be delegated; (e) “the duty is a continuing one”; and (f) public authorities ought to keep “adequate record[s]” demonstrating that they have considered their “equality duties and pondered relevant questions”.<sup>831</sup>

To demonstrate compliance with the public sector equality duty, and to instrumentalize approaches, many public authorities carry out equality impact assessment. While this is not mandatory in England (unlike in Wales and Scotland), as discussed above, it is required in practice.

## C. Monitoring and data

States parties are obligated to monitor the implementation and effectiveness of their measures to eliminate discrimination. Treaty bodies, in their engagement with States through the periodic reporting process, repeatedly and consistently stress the need to collect and report disaggregated data on the participation of groups exposed to discrimination in different areas of life.<sup>832</sup> In its general recommendation No. 24 (1999), the Committee on the Elimination of Racial Discrimination stated that “it is essential that States parties provide as far as possible the Committee with information on the presence within their territory of [different] groups”.<sup>833</sup> The Committee on the Elimination of Discrimination against Women has similarly held that States should “create and continuously improve statistical databases and the analysis of all forms of discrimination against women ... and against women belonging to specific vulnerable groups in particular”.<sup>834</sup>

In addition to this international reporting obligation, the Committee on the Elimination of Discrimination against Women has stressed the need for monitoring and data collection to ensure the effective implementation of anti-discrimination laws at the national level, noting that States should “establish indicators, benchmarks and timelines” and “mechanisms that collect relevant sex-disaggregated data, enable effective monitoring, facilitate continuing evaluation and allow for the revision or supplementation of existing measures and the identification of any new measures”.<sup>835</sup> The Committee on Economic, Social and Cultural Rights has specified that having taken “concrete, deliberate and targeted measures” to eliminate discrimination, States “should

<sup>830</sup> *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin).

<sup>831</sup> *Ibid.*, paras. 90–92 and 94–96.

<sup>832</sup> See, for instance, CCPR/C/BEL/CO/6, para. 16 (c); E/C.12/FRA/CO/4, para. 17; CEDAW/C/BGR/CO/8, para. 46; CERD/C/KHM/CO/14-17, para. 6; and CRPD/C/IRQ/CO/1, para. 60 (c).

<sup>833</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 24 (1999), para. 1.

<sup>834</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 10.

<sup>835</sup> *Ibid.*, para. 28.

regularly assess whether the measures chosen are effective in practice”, noting that such “monitoring should assess both the steps taken and the results achieved in the elimination of discrimination”.<sup>836</sup>

The Convention on the Rights of Persons with Disabilities establishes an explicit obligation to collect data, stipulating, under article 31, that States commit to “collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the ... Convention”. It goes on to establish that this information should be disaggregated and that it should be used to “help assess the implementation of States Parties’ obligations under the ... Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights”. In its general recommendation No. 6 (2018), the Committee on the Rights of Persons with Disabilities provided direction on the implementation of this obligation, noting that data “must be disaggregated on the basis of disability and of intersectional categories” and “provide information on all forms of discrimination”. It noted that the data to be collected should be “broad” and that the design, collection and analysis of data should be participatory.<sup>837</sup> At a more practical level, OHCHR, in collaboration with a number of States, experts, United Nations entities, development actors and non-governmental organizations, and with support from the European Union, has developed the Bridging the Gap project, which has developed a set of indicators for measuring implementation of the Convention.<sup>838</sup>

Data gathered should be made public in forms readily accessible to the general public to inform both policymaking and the wider discussions on equality, non-discrimination, other human rights, and the effectiveness of measures to respect, protect and fulfil these rights.<sup>839</sup> However, data publication should not heighten stigma or pose risks to people.<sup>840</sup>

## D. Consultation, engagement and participation

Each of the treaty bodies that has engaged with States’ obligations to implement the right to non-discrimination has emphasized the importance of consultation, engagement and participation.

The duty to ensure equal participation relates directly to the empowerment of rights holders. The International Convention on the Elimination of All Forms of Racial Discrimination, under article 2 (1) (e), for instance, obliges States parties to “encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division”. Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women similarly requires States to “take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right ... to participate in non-governmental organizations and associations concerned with the public and political life of the country”. In its general comments, the Committee on the Rights of Persons with Disabilities

<sup>836</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 36 and 41.

<sup>837</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 71.

<sup>838</sup> See OHCHR, “Human rights indicators on the Convention on the Rights of Persons with Disabilities” and “Data sources guidance” in *Promoting the Rights of Persons with Disabilities through the Sustainable Development Goals: A Resource Package* (advance version, 2021, available at [www.ohchr.org/en/disabilities/sdg-crpd-resource-package](http://www.ohchr.org/en/disabilities/sdg-crpd-resource-package); publication forthcoming in 2023).

<sup>839</sup> “Capacities and partnerships should be developed to enable States to meet their obligation to collect and publish data disaggregated by grounds of discrimination recognized in international human rights law. ... Where possible, data should be published in a format that permits identification and analysis of multiple and intersecting disparities and discrimination. Individuals may experience discrimination and inequality along multiple axes (for example, gender and disability). Analysing data at the subgroup level allows for understanding of multiple and intersecting inequalities. Qualitative indicators and contextual information, including the legal, institutional or cultural status of affected populations, are also essential to enhance understanding and contextualization of data collected within a [human rights-based approach to data].” See OHCHR, “A human rights-based approach to data: leaving no one behind in the 2030 Agenda for Sustainable Development” (Geneva, 2018), pp. 7–8. Available at [www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf](http://www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf).

<sup>840</sup> “In some cases, it may be necessary for logistical, political or other reasons to use demographic characteristics to identify a particular population. For example, if a particular ethnic minority is not recognised by the State but is understood to reside exclusively in one location. In this case, data about an individual’s place of residence may be thought to denote, ipso facto, their ethnicity. Where data is used in this way to identify particular groups, data collectors should ensure that their handling and publishing of that data does not imply self-identification where disclosure of personal information relating to ethnic identity has not occurred. Data should be accurately described to make clear that the parameters established for a particular group have been set according to place of residence, in this example, and not the self-identification of group members. ... Data should not be published or publicly accessible in a manner that permits identification of individual data subjects, either directly or indirectly. Access to information must be balanced with the rights to privacy and data protection.” Ibid., pp. 13–19, at pp. 13 and 16.

has set out in detail equal participation as a cross-cutting issue of the relevant Convention.<sup>841</sup> The Special Rapporteur on the rights of persons with disabilities has stated that: “The active participation of persons with disabilities in decision-making is a requirement of the human rights model of disability.”<sup>842</sup>

This obligation to consult and engage those exposed to discrimination applies to the development of all discrimination laws and policies. For example, in commenting on the selection of measures to eliminate discrimination, the Committee on Economic, Social and Cultural Rights has noted that “individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes”.<sup>843</sup> Similarly, the Committee on the Elimination of Discrimination against Women has recommended that States “ensure that women are able to participate actively in the development, implementation and monitoring” of their overarching policy to eliminate discrimination; noting further that “resources must be devoted to ensuring that human rights and women’s non-governmental organizations are well-informed, adequately consulted and generally able to play an active role in the initial and subsequent development of the policy”.<sup>844</sup> These requirements reflect long-standing principles of international human rights law, as articulated, for example, in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 2 of which states that “persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level”.

As in other areas, both the Convention on the Rights of Persons with Disabilities and its corresponding Committee articulate the current best practice, reflecting the Convention’s overarching focus on ensuring full participation for persons with disabilities in all areas of life. Article 4 (3) of the Convention provides that States should closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies, while article 33 (3) provides that persons with disabilities should be involved and participate in the monitoring of the Convention’s implementation. As discussed above, the Committee has noted expressly that both the development of policies and strategies and the monitoring and implementation of the Convention must be carried out with the participation of persons with disabilities. The Committee has also noted the particular importance of close consultation with and active involvement of civil society organizations, with a particular view to ensuring representation of the “vast diversity in society” and the need to tackle intersectional discrimination.<sup>845</sup>

<sup>841</sup> Committee on the Rights of Persons with Disabilities, general comment No. 7 (2018).

<sup>842</sup> A/HRC/43/41, para. 46.

<sup>843</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 36.

<sup>844</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 27.

<sup>845</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 33.





### **PART THREE:**

## **PROTECTING MINORITY RIGHTS**

## SUMMARY

- The realization of the rights of national, ethnic, religious and linguistic minorities necessitates effective protection and fulfilment of the right to non-discrimination. As such, the enactment, enforcement and implementation of comprehensive anti-discrimination law is essential if States are to fulfil their obligations to respect, protect and fulfil the rights of minorities.
- The ban on discrimination inheres within minority rights. States must ensure that all aspects of the right to non-discrimination are effective in their efforts to guarantee minority rights. This includes ensuring that laws, policies and practices do not discriminate directly or indirectly against members of minority communities enjoying their culture, professing or practising their religion or using their language. It also includes ensuring measures to respect and secure the communal enjoyment of culture, the practise of religion and the use of language do not result in discrimination on the basis of gender, sex, sexual orientation or other grounds.
- The rights of minorities to non-discrimination and equality cannot be effectively realized without a broad range of minority rights guarantees being effective and realized in practice. These include recognition, genuine participation and consultation in all matters of relevance to the community.
- Indigenous peoples enjoy explicit rights under international human rights law going beyond those set out as core requirements for minorities.

## I. MINORITY RIGHTS AND THE BAN ON DISCRIMINATION

Comprehensive anti-discrimination law is a central, essential element in the realization of the human rights of minorities. The enactment and enforcement of such laws is a necessary – but not sufficient – condition for the enjoyment of minority rights; there are specific aspects of the rights of ethnic, religious and linguistic minorities that go beyond the scope and requirements of anti-discrimination law; equally, comprehensive anti-discrimination laws provide protection for all, not only for members of minority communities. Nevertheless, it is widely recognized that minority rights cannot be realized in the absence of laws providing comprehensive and effective protection from discrimination.

In its most recent resolution on the rights of persons belonging to national or ethnic, religious and linguistic minorities, the Human Rights Council highlighted the link between the rights of minorities and the right to non-discrimination, emphasizing, *inter alia*:

**the need to strengthen efforts to meet the goal of the full realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, including by addressing their economic and social conditions and marginalization, and to end any type of discrimination against them,**

...

**... the importance of recognizing and addressing multiple, aggravated and intersecting forms of discrimination against persons belonging to national or ethnic, religious and linguistic minorities and the compounded negative impact on the enjoyment of their rights,<sup>846</sup>**

In diverse contexts and areas of life, treaty bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities, the Committee against Torture, the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, have called upon

<sup>846</sup> Human Rights Council resolution 43/8, preamble.

States to guarantee minorities the full enjoyment of Covenant and Convention rights without discrimination.<sup>847</sup> ILO conventions also recognize the need to address discrimination and stereotypes against ethnic, linguistic and religious minorities.<sup>848</sup> Speaking at the forty-third session of the Human Rights Council, the Government of Austria – the sponsor of the Human Rights Council minorities mandate – emphasized that the ban on discrimination was at the centre of the protection of minorities.

Discrimination on the basis of ethnicity, religion and language is prohibited in both Covenants and other provisions of international law, and yet patterns of discrimination on these grounds persist to this day, with members of minorities frequently being the victims. As such, ensuring the equal enjoyment of human rights by minorities necessitates effective protection from discrimination.

The majority of discrimination questions faced by minorities will be no different to those concerning discrimination on any other ground. For example, in cases of direct discrimination in which an employer does not hire persons on grounds of their ethnicities or religions, the legal steps, considerations or issues in those cases are unlikely to be different from those in cases concerning discrimination on grounds of sex, sexual orientation or any other protected grounds. Thus, many applications of anti-discrimination law to the protection of minorities have arisen in connection with cases of discrimination in access to employment, education, health care, goods and services, and other areas of life regulated by law, in cases that mirror those brought on other grounds.

As such, the legacy globally of more than a century of litigating cases challenging discrimination on the grounds of ethnicity has resulted in an extensive body of jurisprudence, which is beyond the scope of the present guide to summarize, but which has played out primarily in sectors such as education, employment, health care, housing, social assistance and social security; access to services available to the public, including public transport, taxi services, restaurants, clubs, discotheques, museums, libraries and swimming pools; political rights, such as the right to vote and stand for public office; and the ban on discrimination in the justice system, including as concerns the actions of police and other security services, as well as the requirement to investigate effectively and uncover bias and animus in crime. In effect, anti-discrimination law as implemented in this area for the most part follows broadly the contours of the rights set out at article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, as detailed in the sections above.

That said, as the Human Rights Committee has set out, the International Covenant on Civil and Political Rights distinguishes the minority rights protections guaranteed by article 27 from the guarantees of non-discrimination and equal protection provided by articles 2 (1) and 26 of the Covenant.<sup>849</sup> Article 27 provides that:

**In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.**

As the Human Rights Committee notes: “The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language.”<sup>850</sup> While all persons are entitled to non-discrimination, the right established under article 27 “is distinct from, and additional to”<sup>851</sup> this right and indeed all other rights. Article 27 creates specific rights of communal practice that complement, but are discrete from, the rights under articles 2 (1) and 26.

<sup>847</sup> For instance, in its general comment No. 21 (2009), the Committee on Economic, Social and Cultural Rights addresses the particular rights of minorities to cultural life, which should be afforded to all on a non-discriminatory basis. See Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009), paras. 21–24 and 32–33. See also CEDAW/C/DNK/CO/8, para. 34; CERD/C/ISR/CO/17-19, para. 35; CRPD/C/NOR/CO/1, para. 7; CAT/C/SWE/CO/6-7, para. 15; CRC/C/AUT/CO/5-6, para. 17; and CMW/C/LBY/CO/1, para. 29.

<sup>848</sup> In particular – although not exclusively – based on the provisions of the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Employment Policy Convention, 1964 (No. 122). See General Assembly resolution 74/165. See also ILO, “ILO normative work concerning ethnic, linguistic and religious minorities”, on file with OHCHR.

<sup>849</sup> Human Rights Committee, general comment No. 23 (1994), para. 4.

<sup>850</sup> Ibid., para. 5.1.

<sup>851</sup> Ibid., para. 1.

The rights in article 27 are further elaborated in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly in its resolution 47/135 of 18 December 1992. In the Declaration, the General Assembly reaffirms, inter alia, that: “Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.”<sup>852</sup> It further affirms the rights of minorities “to participate effectively in cultural, religious, social, economic and public life”; “to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live”; and “to establish and maintain their own associations”; as well as several other guarantees, particularly in a cross-border context.<sup>853</sup>

While these rights are distinct from the right to non-discrimination, their realization nonetheless relies upon comprehensive and effective protection from discrimination. States must ensure that laws, policies and practices do not discriminate, directly or indirectly, against ethnic, religious and linguistic minorities exercising their culture; transmitting, honouring and publicly memorializing their history; professing their religion or belief in community with others; or using their language in community with others. Similarly, States must ensure effective protection from discrimination by private actors that would interfere with the exercise and enjoyment of these rights.<sup>854</sup>

This said, the realization of minority rights can – in practice – be in tension with the rights of persons within and outside the minority community to non-discrimination. In various countries and contexts, legislators have struggled to appropriately balance minority rights and related guarantees, on the one hand, with the right to non-discrimination, on the other. One such area concerns States’ obligations to eliminate gender-based discrimination and realize the rights of minority communities. A number of other legal questions have also arisen, including as concerns attempts to justify discrimination by reference to the religious or cultural beliefs of the discriminating party. Some of these questions have been expressed as the contrasting possibilities available to States for demands to be included, as opposed to requests to “opt out” from inclusive systems.<sup>855</sup> The United Nations treaty bodies have consistently recognized that measures taken for the realization of minority rights cannot result in discrimination against women or girls, or on other grounds.<sup>856</sup> Even so, some genuine tensions remain. For example, as noted below, the meaning of equal access to education in a minority language context is not fully settled.

One core issue concerns who is protected in these two neighbouring legal regimes. Minority rights – aligned with other aspects of international human rights law – guarantee that a person has a right of personal self-identification and self-determination. Anti-discrimination law, by contrast, is agnostic as to the identity of the person concerned, as evidenced above in the section on discrimination based on association and perception. To illustrate the point: the first case adjudicated under the strengthened hate crime provisions of 1996 in Hungary concerned neo-Nazis who beat up a man who announced himself to them as Jewish, after he heard them shouting antisemitic slogans.<sup>857</sup> The victim was in fact not Jewish, and had only claimed to be Jewish in order to express his opposition to the racist views expressed. The Hungarian authorities prosecuted the perpetrators for bias-motivated criminal acts and – correctly – did not probe the question of the identity of the victim. The question at issue was not the identity of the victim, but rather the perception of the perpetrators that he was Jewish.

This section of the present guide examines some of these questions that arise at the intersection of the right to non-discrimination and the rights of minorities. It is not intended as a comprehensive exploration of all

<sup>852</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2.

<sup>853</sup> Ibid.

<sup>854</sup> See further section I.A.3 of part two of the present guide.

<sup>855</sup> Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge, United Kingdom, Cambridge University Press, 2001).

<sup>856</sup> See, for example, Human Rights Committee, general comment No. 28 (2000), para. 32; and Human Rights Committee, *Lovelace v. Canada*, communication No. 24/1977.

<sup>857</sup> Nemzeti és Etnikai Kisebbségi Jogvédő Iroda (NEKI), Tamas H. Case 1997, <https://www.neki.hu/archivum-feher-fuzet/>, also summarized at: [https://magyararancs.hu/belpol/perek\\_szelojobboldaliak\\_ellen\\_itelet\\_is\\_meg\\_nem\\_is-61981?fbclid=IwAR2kxIEkPDVj\\_syl5\\_ulZRU8utBPKJy1gwh1rMJ6CxnAxyIbvCAjoxDu8YE](https://magyararancs.hu/belpol/perek_szelojobboldaliak_ellen_itelet_is_meg_nem_is-61981?fbclid=IwAR2kxIEkPDVj_syl5_ulZRU8utBPKJy1gwh1rMJ6CxnAxyIbvCAjoxDu8YE).

aspects of minority rights, but instead aims to explore aspects of particular application of anti-discrimination law to the rights of minorities and particular dilemmas arising in this respect. The primary aim is to assist those involved in developing anti-discrimination laws to understand the application of the right to non-discrimination in a minority rights context.

## A. Minority rights under international law

As noted above, article 27 of the International Covenant on Civil and Political Rights sets out that persons belonging to ethnic, religious or linguistic minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. Article 30 of the Convention on the Rights of the Child provides similar guarantees, including “persons of indigenous origin” in addition to ethnic, religious or linguistic minorities. Regional human rights treaties also make explicit provision for minority rights.<sup>858</sup>

The Human Rights Committee, in its general comment No. 23 (1994), has set out a number of elements of the rights established under article 27 of the International Covenant on Civil and Political Rights. In particular, it has noted that:

**Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.**<sup>859</sup>

The Committee has noted that these positive measures “must respect the provisions of articles [2 (1)] and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population”. Going further, the Committee has noted that positive measures to ensure the community enjoyment of minority rights will be a legitimate differentiation for the purposes of the right to non-discrimination, to the extent that they “are aimed at correcting conditions which prevent or impair the enjoyment of the rights” and are based on reasonable and objective criteria.<sup>860</sup> More broadly, the Committee has noted that “none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent” with other Covenant rights.<sup>861</sup>

The Committee has further noted that article 27 places States under an “obligation to ensure that the existence and the exercise of this right are protected against their denial or violation”, including by both State and private actors.<sup>862</sup>

Furthermore, the Committee has noted 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”. This necessitates not only “positive legal measures of protection” but also “measures to ensure the effective participation of members of minority communities in decisions which affect them”.<sup>863</sup>

Read in its entirety, general comment No. 23 (1994) makes clear that the Human Rights Committee regards the minority rights provision under article 27 of the International Covenant on Civil and Political Rights as having at its heart the rights to equality and non-discrimination.

<sup>858</sup> The Council of Europe system includes two treaties explicitly dedicated to minorities: the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. Under article 4 of the Inter-American Convention against All Forms of Discrimination and Intolerance, “States undertake to prevent, eliminate, prohibit, and punish ... any discriminatory restriction on the enjoyment of the human rights enshrined in applicable international and regional instruments and in the jurisprudence of international and regional human rights courts, particularly those applicable to minorities or groups that are in vulnerable situations and subject to discrimination”.

<sup>859</sup> Human Rights Committee, general comment No. 23 (1994), para. 6.2.

<sup>860</sup> Ibid.

<sup>861</sup> Ibid., para. 8.

<sup>862</sup> Ibid., para. 6.1.

<sup>863</sup> Ibid., para. 7.

In addition to the guarantees provided under article 27 of the International Covenant on Civil and Political Rights, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that:

- States shall protect the existence and identity (national or ethnic, cultural, religious and linguistic) of minorities (art. 1).
- Persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language, in private and in public, freely and without interference or any form of discrimination; they also have rights to participate effectively in cultural, religious, social, economic and public life; to participate effectively in decisions at the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live; and to establish and maintain their own associations (art. 2).
- These rights may be exercised individually and in community with other members of the group and without discrimination (art. 3).
- States shall take measures – including proactive measures – to ensure the full and effective exercise of rights by minorities and to create favourable conditions for the development and expression of culture, language, religion, tradition and customs (art. 4).

Article 8 (3) of the Declaration provides that measures taken to further its aims shall not be considered *prima facie* contrary to the principle of equality. Indeed, the commentary to the Declaration sets out that minority protection is based on four requirements: protection of the existence of minorities; non-exclusion; non-discrimination; and non-assimilation of the groups concerned.<sup>864</sup>

## B. Who are minorities?

The term “minorities”, refers to members of the four categories set out in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: national, ethnic, religious and linguistic minorities. In its general comment No. 23 (1994), the Human Rights Committee sets out that “the persons designed to be protected” under article 27 “are those who belong to a group and who share in common a culture, a religion and/or a language”.<sup>865</sup> There is no universally accepted definition of minorities. Indeed, an “absence of consistency in understanding who is a minority”, as the Special Rapporteur on minority issues notes, “is a recurring stumbling block to the full and effective realization of the human rights of minorities”.<sup>866</sup> However, certain core principles are generally accepted.

The first core principle is that “the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria”.<sup>867</sup> Thus, the existence of a minority group is a matter of fact, not of law nor official policy or decision.

A further core principle is the fact that minority definitions cannot be limited to citizens nor to permanent residents.<sup>868</sup> The Human Rights Committee has held that minorities are to be understood as within a State as a whole and not within a particular province.<sup>869</sup> The Working Group on Minorities to the Declaration has set out that the Declaration benefits from a scope as wide as that of article 27 of the International Covenant on Civil and Political Rights and its application extends to minorities regardless of citizenship.<sup>870</sup> This approach

<sup>864</sup> E/CN.4/Sub.2/AC.5/2005/2, para. 23.

<sup>865</sup> Human Rights Committee, general comment No. 23 (1994), para. 5.1.

<sup>866</sup> Special Rapporteur on minority issues, “Concept of a minority: mandate definition”, OHCHR, 2021. Available at [www.ohchr.org/EN/Issues/Minorities/SRMinorities/Pages/ConceptMinority.aspx](http://www.ohchr.org/EN/Issues/Minorities/SRMinorities/Pages/ConceptMinority.aspx).

<sup>867</sup> Human Rights Committee, general comment No. 23 (1994), para. 5.2.

<sup>868</sup> *Ibid.*, paras. 5.1–5.2. See also A/74/160, para. 59.

<sup>869</sup> Human Rights Committee, *Ballantyne et al. v. Canada*, communications Nos. 359/1989 and 385/1989.

<sup>870</sup> E/CN.4/Sub.2/AC.5/2005/2, para. 9.



is also applied by the bodies of the Council of Europe and the Organization for Security and Cooperation in Europe specifically dedicated to minority protection.<sup>871</sup>

In Europe, the approach taken to the definition of minorities has followed three broad principles: (a) emphasis on the identification of minorities as a matter of fact, rather than law; (b) recognition that the existence of minorities is understood to be a matter requiring assessment against both objective and subjective criteria;<sup>872</sup> and (c) resistance to a single stringent or binding definition, in the context of an awareness of risk to the human rights of minorities arising from potentially narrow definitions.<sup>873</sup> In the work of both the Council of Europe and the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, the latter approach has been termed “pragmatic”.<sup>874</sup>

A further core principle is set out in the “Guidance note of the Secretary-General on racial discrimination and protection of minorities”, in which the Secretary-General recognized that the focus should be on the most marginalized:

**While in most cases minorities are in a non-dominant position, ... there are great differences between the experiences and positions of minorities. Whereas some minorities are systematically marginalized and excluded from decision-making and receive little or no support to improve their situation, others play an important role in [the] economy, [S]tate structures and other contexts. Such diversity can also be present within minority communities. ... In considering such differences, which vary over time, the UN system should pay particular attention to those who are economically, politically and/or socially most marginalized and whose rights are particularly at risk.**<sup>875</sup>

There has been debate as to whether the term “minorities” refers to groups that make up less than 50 per cent of the national or local population. Gay McDougall, the first Independent Expert on minority issues, worked extensively to decouple the definition of minorities from numerical quantum, and included under the definition communities such as people of African descent in Brazil, that is persons who may be in the majority of the population, but are systematically marginalized. In her interpretation of the Declaration, the Independent Expert stressed “four broad areas of concern relating to minorities globally”:

**(a) the protection of a minority’s survival, through combating violence against them and preventing genocide; (b) the protection and promotion of the cultural identity of minority groups and the right of national, ethnic, religious or linguistic groups to enjoy their collective identity and to reject forced assimilation; (c) the guarantee of the rights to non-discrimination and equality, including ending structural or systemic discrimination and the promotion of affirmative action when required; and (d) the guarantee of the right to effective participation of members of minorities in public life, especially with regard to decisions that affect them.**<sup>876</sup>

<sup>871</sup> In particular as relates to the Council of Europe’s Framework Convention for the Protection of National Minorities (1995) and the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe.

<sup>872</sup> See also Human Rights Committee, general comment No. 23 (1994).

<sup>873</sup> European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities* (Strasbourg, 2017). Available at [www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2018\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2018)002-e).

<sup>874</sup> “There is no generally accepted definition of the concept of a ‘minority’. Some elements thereof have certainly been identified as, for example, the standard if not universal classification of minorities into three groups: ethnic minorities, linguistic minorities, and religious minorities; any of these three criteria may be present or, more often, they may be in part cumulative. This (in part) threefold characterisation is adopted in article 27 of the International Covenant on Civil and Political Rights and mentioned in Section 5.1 of the general comment [...] of 6 April 1994. [...] However, no generally accepted definition of minorities has been formulated in any international legal instruments or doctrine to date. While some authors have attempted to bear upon the question, others have preferred not to, considering either that such a definition is impossible or that it in any case serves no purpose. Thus the CSCE High Commissioner for National Minorities acts in a pragmatic manner, and without formulating any definition, wherever he deems that a question affecting minorities exists.” Ibid., p. 4, citing the report on the replies to the questionnaire on the rights of minorities, in European Commission for Democracy through Law (Venice Commission), *The Protection of Minorities*, Collection Science and Technique of Democracy, No. 9 (Strasbourg, 1994).

<sup>875</sup> Secretary-General, “Guidance note of the Secretary-General on racial discrimination and protection of minorities” (2013), paras. 18–19. Available at [www.ohchr.org/documents/Issues/Minorities/GuidanceNoteRacialDiscriminationMinorities.pdf](http://www.ohchr.org/documents/Issues/Minorities/GuidanceNoteRacialDiscriminationMinorities.pdf).

<sup>876</sup> A/HRC/10/11/Add.2, para. 3.

The current Special Rapporteur on minority issues has sought to re-establish or reinvigorate earlier understandings, whereby a minority refers to a group that is smaller in number than the majority population(s).<sup>877</sup>

A primary consideration in minority questions is the self-identification of the person concerned. There is no requirement under international law that a person self-identify as a single minority. Persons should be enabled to self-identify as a member of multiple ethnic, religious or linguistic minorities and to have these legally recognized. For example, as concerns ethnicity, in its guidance for States in conducting population censuses, the Economic Commission for Europe has stated: “ethnicity has necessarily a subjective dimension and some ethnic groups are very small”, meaning that information on ethnicity should be “based on the free self-declaration of a person” and “respondents should be free to indicate more than one ethnic affiliation or a combination of ethnic affiliations if they wish so”.<sup>878</sup> In addition, aspects of identity are changeable and must be officially recognizable as such, provided changes are done on the basis of free and informed consent.<sup>879</sup> Individual self-identification is a matter by right of individual self-determination.<sup>880</sup>

Understandings of the rights of minorities continue to evolve. For example, the Special Rapporteur on minority issues has recently recalled that linguistic minorities include users of sign languages.<sup>881</sup> On another front, the Special Rapporteur stated that, as concerns religious or belief minorities: “This category includes a wide range of religious, non-religious, non-theistic and other beliefs, such as unrecognized and non-traditional religions or beliefs, including animists, atheists, agnostics, humanists, ‘new religions’, etc.”<sup>882</sup> Reflection on human rights-based understandings of the definition of minorities is particularly appropriate in the context of leaving no one behind.<sup>883</sup>

<sup>877</sup> “One of the main objective criteria for determining whether a group is a minority in a State is a numerical one. A minority in the territory of a State means it is not the majority. Objectively, that means that an ethnic, religious or linguistic group makes up less than half the population of a country.” See Special Rapporteur on minority issues, “Concept of a minority: mandate definition”. The Special Rapporteur has explained this return to definitional matters as grounded in strengthening the human rights protection of minorities: “The absence of consistency in understanding who is a minority is a recurring stumbling block to the full and effective realization of the rights of minorities. Different United Nations entities may contradict one another because they consider different groups of persons as constituting a minority, and diverge from the practices of colleagues in other entities. States Members of the United Nations hesitate to engage on matters relating to minorities since they do not know who is a minority and what that entails. In some countries, there may be even the assumption that the absence of a ‘definition’ means it is left to each State to determine freely who is or is not a minority. In most of these situations, the uncertainty leads to restrictive approaches: in many situations, persons are deemed to be ‘undeserving’ because they are not ‘traditional’ minorities, not citizens or not sufficiently ‘dominated’. The end result is that some minorities are excluded because they are not the ‘right kind’ of minority according to different parties. ... Instead of providing flexibility, openness and the possibility of progress, the absence of common points of reference as to what constitutes a minority has led to a curtailment of who can lay claim to minority protection.” See A/74/160, paras. 21–22.

<sup>878</sup> Economic Commission for Europe, *Conference of European Statisticians: Recommendations for the 2010 Censuses of Population and Housing* (New York and Geneva, 2006), paras. 425–426.

<sup>879</sup> In the case of *Ciubotaru v. Moldova*, Application No. 27138/04, Judgment, 27 April 2010, the European Court of Human Rights examined the refusal by the authorities of the Republic of Moldova to record the ethnic identity (“Romanian”) declared by the applicant, when dealing with his application to replace his Soviet identity card with a Moldovan identity card, on the ground that his parents were not recorded as “ethnic Romanians” on their birth and marriage certificates. The Court found the Republic of Moldova to be in violation of article 8 (right to respect for private and family life) of the European Convention on Human Rights, because the applicant could not gain effective access to his personal documents and have them changed to reflect his individual self-identification.

<sup>880</sup> On individual self-determination in a human rights context see, for example, A/HRC/22/53; OHCHR, *Living Free & Equal*, pp. 47–48; and OHCHR and others, “Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement” (Geneva, WHO, 2014), p. 7. The term “individual self-determination” should not be confused with the right to self-determination enjoyed by peoples as set out in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>881</sup> OHCHR, “UN human rights expert calls for recognition of rights of users of sign languages as minorities”, 22 September 2020. Available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26278&LangID=E](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26278&LangID=E).

<sup>882</sup> A/75/211, para. 76 (b). See also Beirut Declaration and its 18 Commitments on Faith for Rights (notably, commitment II, which refers to theistic, non-theistic, atheistic or other believers, and commitment VI on the rights of all persons belonging to minorities).

<sup>883</sup> See further United Nations Sustainable Development Group, *Leaving No One Behind: A UNSDG Operational Guide for UN Country Teams – Interim Draft* (2019). Available at <https://unsdg.un.org/sites/default/files/Interim-Draft-Operational-Guide-on-LNOB-for-UNCTs.pdf>.

## II. GROUPS EXPOSED TO RACIAL DISCRIMINATION AND ASSOCIATED HARMS

The United Nations system has named a number of particular groups facing racial discrimination or related forms of intolerance or exclusion globally. However, for a number of reasons, any list of groups recognized in this way will only ever be partial; indeed, problems of denial, obstruction and absence of political consensus mean that some of those most at risk of discrimination are not recognized at the international level. It is undoubtedly the case that the identification (or not) of particular groups exposed to human rights abuse or in need of protection is influenced by geopolitics. The problem of racism, racial discrimination and the treatment of particular ethnic groups has also been affected by the problem of denial, a matter which affects human rights questions more broadly.<sup>884</sup>

In addition, it is frequently the case that naming in the international system may lag behind the self-identification of particular groups or may fail to fully reflect the richness and self-empowerment of groups taking ownership of their group personality and common history, often in the course of liberation movements. Nevertheless, the United Nations system has named a number of particular groups exposed to discrimination on the basis of race or ethnicity, often in the course of expressing serious human rights concern or to signal a requirement of recognition or protection.

A first and most obvious category of persons affected by racial discrimination are ethnic minorities, that is one of the four categories named explicitly in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

The International Decade for People of African Descent is currently ongoing and the United Nations has established a dedicated Working Group of Experts on People of African Descent.<sup>885</sup> The killing of George Floyd, the Black Lives Matter movement and the global solidarity movements arising from these events have led to renewed and increased focus on problems of racial injustice against people of African descent. This gave rise, among other things, to Human Rights Council resolution 43/1 on the promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers, in which the Council requested, *inter alia*, a report on the subject from the United Nations High Commissioner for Human Rights.

In the report, published in June 2021,<sup>886</sup> the High Commissioner sets out a Four-point Agenda towards Transformative Change for Racial Justice and Equality, with a global vision for (a) dismantling systemic racism, (b) pursuing justice, ending impunity and building trust, (c) listening to people of African descent and acting upon their concerns, and (d) providing redress by confronting past legacies, taking special measures and delivering reparatory justice. Pursuant to the report, the Human Rights Council adopted resolution 47/21 by consensus, establishing a new international independent expert mechanism to advance racial justice and equality in the context of law enforcement. In July 2021, the General Assembly established the Permanent Forum of People of African Descent to serve as a consultative mechanism for people of African descent and other stakeholders, and as an advisory body to the Human Rights Council. These two new mechanisms further strengthen the existing United Nations architecture established to counter racism, combat racial discrimination and to strengthen the rights and protection of minorities.

Roma, Sinti, Travellers and people self-identifying as or stigmatized as “Gypsies” or related groups were explicitly named in the Durban Declaration and Programme of Action adopted at the close of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001.<sup>887</sup> Discrimination against Roma was the subject of a specific general recommendation of the Committee on the

<sup>884</sup> On the problem of denial, see Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (London, Polity Press, 2000).

<sup>885</sup> The web page of the Working Group is [www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx](http://www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx). See also Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas*.

<sup>886</sup> A/HRC/47/53.

<sup>887</sup> Durban Declaration, para. 68.

Elimination of Racial Discrimination in 2000,<sup>888</sup> as well as Human Rights Council resolution 26/4, in which the Council recognized that Roma had, for centuries, faced widespread and enduring human rights violations, discrimination, rejection, social exclusion and marginalization all over the world and in all areas of life, and in which it named a specific form of racism faced by Roma: anti-Gypsyism.<sup>889</sup>

In the 2010s and 2020s, and particularly in the context of the COVID-19 pandemic, United Nations entities, including the Secretary-General, have expressed concerns at discrimination against persons of Asian descent, and at bias-motivated attacks and other forms of exclusion against these diverse categories of people and communities.<sup>890</sup>

Persons affected by caste- or descent-based discrimination are also the subject of particular concern. Caste-based discrimination is the subject of a specific general recommendation by the Committee on the Elimination of Racial Discrimination.<sup>891</sup>

The United Nations system has also recognized persons with albinism as a group experiencing racial discrimination, among other intersecting factors, which is relevant, among other things, as regards protection under the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>892</sup>

### REFUGEES, STATELESS PERSONS AND MIGRANTS

Refugees and stateless persons are not necessarily ethnic, religious or linguistic minorities. However, they may be minorities either from within the communities from which they come and/or in their country of exile.

Individuals may flee their homeland for a variety of reasons, including for reasons of discrimination on various grounds. In many cases, refugee and stateless communities are also minority groups in the countries in which they settle. Similarly, migrants may be members of the majority ethnic group in the country to which they migrate, although migrants and their descendants frequently constitute ethnic minority communities.

As noted above, States have obligations to ensure the enjoyment of human rights by everyone on their territory, irrespective of citizenship; as such, non-citizens have the right to non-discrimination on the basis of their race or ethnicity (and indeed all other grounds), on the same basis as citizens.<sup>893</sup> Similarly, in situations in which refugees, stateless persons, migrant workers and their descendants constitute a minority community, they should be afforded the rights guaranteed by article 27 of the International Covenant on Civil and Political Rights and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Indeed, as the Human Rights Committee has stated: “migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of [minority] rights”.<sup>894</sup>

In addition to these rights, however, each of these non-citizen groups is the subject of a dedicated, equality-based protection regime at the international level, which recognizes specific rights existing alongside the human rights guaranteed to all and any rights that may be enjoyed as minorities. The Convention relating to the Status of Refugees, adopted in 1951, defines what constitutes a refugee and establishes the rights of refugees. The Office of the United Nations High Commissioner for Refugees works to protect and realize these rights and to safeguard refugees more broadly. In addition, it has a mandate to protect stateless

<sup>888</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 27 (2000).

<sup>889</sup> See also A/HRC/29/24.

<sup>890</sup> UN News, “UN chief ‘profoundly concerned’ over rise in violence against Asians”, 22 March 2021. Available at <https://news.un.org/en/story/2021/03/1088002>.

<sup>891</sup> Committee on the Elimination of Racial Discrimination, general comment No. 29 (2002). OHCHR has published a toolkit on tackling descent-based discrimination, which is available at [www.ohchr.org/Documents/Issues/Minorities/GuidanceToolDiscrimination.pdf](http://www.ohchr.org/Documents/Issues/Minorities/GuidanceToolDiscrimination.pdf).

<sup>892</sup> See, for instance, A/74/190 and Corr.1, para. 5. The web page of the Independent Expert on the rights of persons with albinism is available at [www.ohchr.org/EN/Issues/Albinism/Pages/IEAlbinism.aspx](http://www.ohchr.org/EN/Issues/Albinism/Pages/IEAlbinism.aspx).

<sup>893</sup> See, for example, Human Rights Committee, general comment No. 15 (1986), para. 2. See also the discussion of discrimination against non-citizens above, in section I.A.1(a) of part two of the present guide.

<sup>894</sup> Human Rights Committee, general comment No. 23 (1994), para. 5.2.

persons, who are also the subject of two international instruments – the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. It also has a mandate to protect internally displaced persons, as it “exists to protect and assist everyone who has been affected by forced displacement”.<sup>895</sup>

The International Organization for Migration, originally not a part of the United Nations system, has recently been included in the United Nations family.<sup>896</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in 1990, guarantees a range of rights, including the right to non-discrimination.

On 13 September 2016, in the context of profound global concern, the General Assembly adopted the New York Declaration for Refugees and Migrants. In the Declaration, the General Assembly strongly condemns “acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis of religion or belief”. It recalls that: “Diversity enriches every society and contributes to social cohesion. Demonizing refugees or migrants offends profoundly against the values of dignity and equality for every human being, to which we have committed ourselves.”<sup>897</sup> Undertaking “commitments that apply to both refugees and migrants”, the General Assembly commits to address the needs of “all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants”.<sup>898</sup> It further commits to tackle the multiple and intersecting forms of discrimination against refugee and migrant women and girls.<sup>899</sup> On the basis of the New York Declaration and acting on its commitments, in December 2018, the General Assembly adopted the global compact on refugees<sup>900</sup> and the Global Compact for Safe, Orderly and Regular Migration.<sup>901</sup>

Some religious groups may also be considered to be the subject of ethnic or racial discrimination or related forms of intolerance. The most widely recognized examples of this phenomenon are Jews and Muslims, through antisemitism and Islamophobia or anti-Muslim hatred. The history of antisemitism, for example, is strongly affiliated with the history of racism more broadly. Particular identities may fall on the line between religion and ethnicity. The United Nations system has dedicated specific attention to both antisemitism<sup>902</sup> and Islamophobia/anti-Muslim hatred.<sup>903</sup> More recently, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has spoken widely on ethnic profiling based on suspicion of religious affiliation, in particular as concerns Muslims.<sup>904</sup> In some contexts, Christians, Buddhists and others may also face discrimination, persecution or attack.<sup>905</sup>

As with the other groups listed here, indigenous peoples enjoy protection in international law under the right to non-discrimination on the basis of race and/or ethnicity,<sup>906</sup> as well as benefiting from the minority rights

<sup>895</sup> United Nations High Commissioner for Refugees, “Internally displaced people”. Available at [www.unhcr.org/uk/internally-displaced-people.html](http://www.unhcr.org/uk/internally-displaced-people.html).

<sup>896</sup> For further information, see International Organization for Migration, “IOM history”. Available at [www.iom.int/iom-history](http://www.iom.int/iom-history).

<sup>897</sup> General Assembly 71/1, para. 14.

<sup>898</sup> Ibid., paras. 21 and 23.

<sup>899</sup> Ibid., para. 31.

<sup>900</sup> A/73/12 (Part II).

<sup>901</sup> General Assembly resolution 73/195.

<sup>902</sup> See, for example, A/74/358.

<sup>903</sup> See, for example, A/74/195; A/74/215; A/HRC/43/28; and A/HRC/46/30.

<sup>904</sup> See, for example, A/HRC/29/46.

<sup>905</sup> See, for example, A/74/195; A/74/215; A/HRC/43/28; [www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action\\_plan\\_on\\_hate\\_speech\\_EN.pdf](http://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_EN.pdf); and UN News, “UN strongly condemns terrorist attack in Egypt”, 26 May 2017. Available at <https://news.un.org/en/story/2017/05/558232-un-strongly-condemns-terrorist-attack-egypt>.

<sup>906</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997).



protections afforded by article 27 of the International Covenant on Civil and Political Rights.<sup>907</sup> Indigenous peoples are also the subject of a specific international human rights instrument, the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007, which recognizes, among other things, the right to self-determination and self-identification.<sup>908</sup> Multiple United Nations mechanisms issue guidance and recommendations as concerns the rights of indigenous peoples, including the United Nations Expert Mechanism on the Rights of Indigenous Peoples,<sup>909</sup> the Permanent Forum on Indigenous Issues and the Special Rapporteur on the rights of indigenous peoples.<sup>910</sup> It is important to note that many people who self-identify as indigenous peoples oppose categorization as a minority for reasons that include both their unique identity as first and original occupants of land and the comparatively weaker international rights framework for minorities.<sup>911</sup> A discussion of the rights of indigenous peoples is provided below.

Beyond the identification of at-risk groups at the global and regional level, the United Nations system has in various contexts named groups of concern in particular countries or contexts. The Mayan Ixil peoples of Guatemala,<sup>912</sup> the Rohingya and other minorities in Myanmar,<sup>913</sup> Yazidis in Iraq and Syria,<sup>914</sup> Uighurs in China,<sup>915</sup> Baha'is and other named minorities in the Islamic Republic of Iran,<sup>916</sup> Ahmadis in Pakistan,<sup>917</sup> and Darfuris in Sudan,<sup>918</sup> for example, have been the subject of great international concern. The situation of Russian-speaking minorities in the Baltic States has also been named as a cause for concern.<sup>919</sup> The United Nations established a dedicated agency focused on the rights of Palestinians in 1949, a group that has been the subject of serious international human rights concern for decades.<sup>920</sup>

In its review of States' compliance with and implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination identified groups that it considered at particular risk of racial discrimination in a given State or context.<sup>921</sup> Particular groups requiring attention in national contexts may also be named by other human rights treaty bodies and United Nations mechanisms. However, such lists are not exhaustive, for a number of reasons, and it is important to recognize that non-inclusion of a group may be a consequence of denial, stigma or risk that is so pervasive that communities are unable or unwilling to be named.

<sup>907</sup> Human Rights Committee, general comment No. 23 (1994), paras. 3.2 and 7.

<sup>908</sup> See also African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012, Judgment, 26 May 2017, paras. 107–108; and Inter-American Commission on Human Rights, *Indigenous Peoples, Communities of African Descent, Extractive Industries* (OEA/Ser.L/V/II, Doc. 47/15) (2015).

<sup>909</sup> The web page of the Expert Mechanism on the Rights of Indigenous Peoples is available at [www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx](http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx).

<sup>910</sup> The web page of the Special Rapporteur on the rights of indigenous peoples is available at [www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx](http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx).

<sup>911</sup> For example, the United Nations Declaration on the Rights of Indigenous Peoples sets out rights to self-determination, autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (art. 4) and establishes that “no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return” (art. 10). See further African Commission on Human and Peoples' Rights, “Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples” (2007).

<sup>912</sup> UN News, “Guatemala: UN rights chief welcomes ‘historic’ genocide conviction of former military leader”, 13 May 2013. Available at <https://news.un.org/en/story/2013/05/439412-guatemala-un-rights-chief-welcomes-historic-genocide-conviction-former-military>.

<sup>913</sup> See, for example, CRPD/C/MMR/CO/1, paras. 31–32.

<sup>914</sup> CEDAW/C/IRQ/CO/7, paras. 19–21; and CRC/C/SYR/CO/5, paras. 19–20.

<sup>915</sup> CERD/C/CHN/CO/14-17, paras. 36–42.

<sup>916</sup> CCPR/C/IRN/CO/3, para. 24.

<sup>917</sup> CCPR/C/PAK/CO/1, para. 33.

<sup>918</sup> Giving rise to the African Union-United Nations Hybrid Operation in Darfur (<https://unamid.unmissions.org/about-unamid-0>).

<sup>919</sup> See, for example, A/HRC/7/23, para. 66.

<sup>920</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East ([www.unrwa.org](http://www.unrwa.org)).

<sup>921</sup> Thus, for example, in its most recent review of Japan, the Committee on the Elimination of Racial Discrimination expressed particular concern at the situation of the Ainu people, Ryukyu/Okinawa peoples, Burakumin, Koreans, comfort women, Muslims of foreign origin, migrants, foreigners and non-citizens, as well as at “intersecting forms of discrimination and violence against women”. See CERD/C/JPN/CO/10-11.



## A. Racial discrimination: *jus cogens*, particularly invidious harm, and the problem of denial

In addition to its prohibition under various international human rights treaties, the prohibition of racial discrimination constitutes an *erga omnes* obligation under international law, as made clear by the International Court of Justice as early as 1970.<sup>922</sup> Indeed, the prohibition of racial discrimination is deemed potentially to be *jus cogens* or a peremptory norm of international law.<sup>923</sup> In the *Barcelona Traction* case, the International Court of Justice stated that *erga omnes* obligations “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.<sup>924</sup> Moreover, racism and racial discrimination are recognized not only as issues of human rights concern, but as potential root causes of inter- and intra-State conflict.<sup>925</sup>

In regional jurisprudence, the African Commission on Human Rights and Peoples’ Rights has recognized that racial discrimination is a violation of “the very spirit of the African Charter and of the letter of its article 2”.<sup>926</sup> The Commission affirmed that the “general tone of the Charter abhors racial discrimination”.<sup>927</sup> Furthermore, the Commission highlights that Africa’s long history of being subjected to racial discrimination would strongly suggest that States parties to the Charter will work for elimination of all forms of racial discrimination.<sup>928</sup>

The European Court of Human Rights regularly sets out that that “racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”<sup>929</sup> The Court has also ruled on a number of occasions that racial discrimination is a sufficiently severe form of harm that it can rise to the level of degrading treatment.<sup>930</sup>

The European Committee of Social Rights has imported the concept of an “aggravated responsibility” from the Inter-American system into the jurisprudence of the European Social Charter, as concerns racial discrimination, in situations in which this involves the active, invigorated involvement of the authorities: “The Committee considers that statements by public actors such as those reported in the complaint create a discriminatory atmosphere which is the expression of a policy-making based on ethnic disparity instead of on ethnic stability. Thus, it holds that the racist misleading propaganda against migrant Roma and Sinti indirectly allowed or directly emanating from the Italian authorities constitutes an aggravated violation of the Revised Charter.”<sup>931</sup>

The Inter-American Court of Human Rights has recognized that racial discrimination “infringes the equality and dignity inherent in all human beings, and has been unanimously condemned by the international community

<sup>922</sup> International Court of Justice, *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, at p. 32, paras. 33–34.

<sup>923</sup> A/CN.4/727, paras. 91–101.

<sup>924</sup> International Court of Justice, *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, at p. 32, para. 34.

<sup>925</sup> Durban Declaration, para. 20.

<sup>926</sup> African Commission on Human and Peoples’ Rights, *Malawi African Association and others v. Mauritania*, communication No. 54/91 and others, Decision, 11 May 2000, para. 131.

<sup>927</sup> African Commission on Human and Peoples’ Rights, “Guidelines for national periodic reports” (1989), part V.

<sup>928</sup> Ibid.

<sup>929</sup> European Court of Human Rights, *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, Judgment, 13 December 2005, para. 56.

<sup>930</sup> See, for example, European Court of Human Rights, *Cyprus v. Turkey*, Application No. 25781/94, Judgment, 10 May 2001, with reference in particular to the approach taken by the previously existing European Commission on Human Rights, namely that “differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when different treatment on some other ground would raise no such question” (European Commission on Human Rights, *East African Asians v. the United Kingdom*, Applications Nos. 4403/70–4419/70 and others, Decision, 14 December 1973, para. 207).

<sup>931</sup> European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Decision on the Merits, 25 June 2010, para. 139.

and is expressly prohibited under article 1(1) of the American Convention”.<sup>932</sup> The Inter-American Commission on Human Rights has also held that racial discrimination manifests itself repeatedly “in everyday interpersonal relations”, permeating all social behaviour, personal as well as institutional.<sup>933</sup>

There is one further aspect of the ban on racial discrimination that merits comment here; States’ denial that racial discrimination exists – particularly systemic discrimination – even in relatively open and evident cases of such discrimination. The United Nations network on racial discrimination and protection of minorities has described this problem as follows:

**While in the first half of the 20th century, the exclusion of minorities and other groups affected by racial discrimination was done more-or-less openly, today there are few if any governments in the world which pursue policies celebratory of the exclusion and discrimination of such groups. In the most common scenario, Governments deny that racial discrimination exists. This is the case in even scenarios of flagrant systematic abuse. In many contexts, Governments blame marginalized groups for their own exclusion. This problem extends to the most granular level, in which even in glaring cases of discrimination, parties deny the discrimination or provide elaborate justifications for obvious unequal treatment.**<sup>934</sup>

The problem of denial of racial discrimination has posed – and continues to pose – particular obstacles to addressing it.<sup>935</sup>

## B. Community, autonomy, equality and non-discrimination and harmful practices

Article 27 of the International Covenant on Civil and Political Rights provides that ethnic minorities have the right “in community with the other members of their group, to enjoy their own culture”. Legislation and jurisprudence at regional and national levels have developed the content of this collective aspect of minority rights and its interaction with the right to non-discrimination.

For example, the Inter-American Court of Human Rights has elaborated protection of collective property rights extending to Afrodescendent populations as indicated by its jurisprudence in the *Moiwana Community v. Suriname* case.<sup>936</sup> Indeed, this reflects the fact that the Court has progressively elaborated further on the protection of Afrodescendent communities and their status as tribal peoples.<sup>937</sup>

The European Court of Human Rights has held that there is “a positive obligation imposed on the Contracting States ... to facilitate the Gypsy way of life”<sup>938</sup> and that “the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs”.<sup>939</sup> In the case of *Muñoz Díaz v. Spain*, the Court held that Spain had violated the right to non-discrimination when a Roma woman had been refused a widow’s pension because she had never been formally recognized as married before the Spanish civil authorities. She contended that her marriage under Roma traditions to her now-deceased husband had been treated by the Spanish authorities as “a *more uxorio* relationship – a mere *de facto* marital relationship”.<sup>940</sup> The Court ruled

<sup>932</sup> Inter-American Court of Human Rights, *Río Negro Massacres v. Guatemala*, Case No. 12.649, Report No. 87/10, 30 November 2010, para. 357. See also Inter-American Commission on Human Rights, *Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano and Their Members v. Panama*, Case 12.354, Report No. 125/12, 13 November 2012, paras. 286–288.

<sup>933</sup> Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas* (OEA/Ser.L/V/II, Doc. 68) (2007), para. 196.

<sup>934</sup> United Nations network on racial discrimination and protection of minorities, “Inputs into Secretary General’s call to action follow-up: agenda for protection” (2021), pp. 3–4. Available at [www.ohchr.org/Documents/Issues/Minorities/UN\\_Network\\_Racial\\_Discrimination\\_Minority\\_Rights.pdf](http://www.ohchr.org/Documents/Issues/Minorities/UN_Network_Racial_Discrimination_Minority_Rights.pdf).

<sup>935</sup> The problem of denial in a human rights context is explored in detail in Cohen, *States of Denial: Knowing About Atrocities and Suffering*.

<sup>936</sup> Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, Judgment, 15 June 2005, paras. 86 and 133.

<sup>937</sup> Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment, 28 November 2007, paras. 84–86.

<sup>938</sup> European Court of Human Rights, *Chapman v. United Kingdom*, Application No. 27238/95, Judgment, 18 January 2001, para. 96.

<sup>939</sup> Particular wording in this instance from European Court of Human Rights, *D.H. and others v. the Czech Republic*, Application No. 57325/00, Judgment, 13 November 2007, para. 181.

<sup>940</sup> European Court of Human Rights, *Muñoz Díaz v. Spain*, Application No. 49151/07, Judgment, 8 December 2009, para. 51.

that the applicant “was married ... according to the rites and traditions of the Roma community”, noting that they had six children together and lived together until Mr. Muñoz Díaz passed away.<sup>941</sup> The Court ruled that, as such, the denial by the Spanish authorities of a widow’s pension to Ms. Muñoz Díaz constituted discrimination:

**The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim’s claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by entering into a civil marriage – would render article 14 devoid of substance.<sup>942</sup>**

In cases concerning Roma/Gypsies, the European Court of Human Rights has also broadly affirmed that, in situations in which Governments establish in national law minority rights protection regimes, protections included there – such as protection from eviction – cannot be lesser than those provided for other forms of housing.<sup>943</sup>

## RECOGNITION OF THE KRISS ROMA IN COLOMBIA

In 2018, the Ministries of the Interior and Justice and Law of Colombia completed, together with representatives of the country’s Roma communities, the process of creating a protocol for the recognition of the Kriss Roma and recommendations for access to justice (within the framework of Decree 2957 of 2010). Dissemination of and awareness-raising about the contents of the protocol began in 2019, in particular among justice officials in which *Kumpaňy* Roma have a presence. These measures were accompanied by efforts to ensure the implementation of its recommendations, carried out with the support of the Mission to Support the Peace Process of the Organization of American States.<sup>944</sup>

A decisive moment in the understanding of minority rights requirements occurred in the early 1980s when the Human Rights Committee held that equality obligations were inherent in minority and indigenous rights, and hence that arrangements for minority or indigenous community self-governance should be implemented in line with States’ obligations to ensure non-discrimination. In the landmark case of *Lovelace v. Canada*, the Human Rights Committee ruled, in effect, that gender equality requirements inhered in article 27 of the International Covenant on Civil and Political Rights on minority rights guarantees. The case concerned a First Nations woman named Sandra Lovelace, who found that, after her divorce from a non-aboriginal man and her effort to return to the Tobique Reserve, she and her children had lost their status as First Nations people, depriving them of access to housing, education and health care. A First Nations man in a similar situation would not have been similarly deprived of his status or entitlements. The Government of Canada endeavoured to argue that First Nations communities, including the one at issue, enjoyed autonomous status governed by treaty, precluding the possibility of override from the federal level. The Human Rights Committee held that article 27 of the International Covenant on Civil and Political Rights had been violated.<sup>945</sup> In its subsequent guidance in general comment No. 28 (2000), the Committee explained as follows:

**The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. States should report on any legislation or administrative practices related to membership in a minority community that might constitute an infringement of the equal rights of women under the Covenant (communication No. 24/1977, *Lovelace v. Canada*, Views adopted July 1981) and on measures taken or envisaged to ensure the equal right of men and women to enjoy all civil and political rights in the Covenant. Likewise, States should report on measures taken to discharge their**

<sup>941</sup> Ibid., para. 52.

<sup>942</sup> Ibid., para. 70.

<sup>943</sup> European Court of Human Rights, *Connors v. the United Kingdom*, Application No. 66746/01, Judgment, 27 May 2004.

<sup>944</sup> Example provided by Government of Colombia, responding to a note verbale by OHCHR calling for inputs to the present guide.

<sup>945</sup> Human Rights Committee, *Lovelace v. Canada*, communication No. 24/1977.

responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women. In their reports, States parties should pay attention to the contribution made by women to the cultural life of their communities.<sup>946</sup>

## RECOGNITION AND IMPLEMENTATION OF INDIGENOUS RIGHTS FRAMEWORK IN CANADA

In February 2018, the Prime Minister of Canada announced that the Government would develop a framework for recognition and implementation of indigenous rights, consisting of both legislation and policy. The framework was designed to support indigenous peoples' rights as recognized and affirmed in section 35 of the Constitution Act, 1982, while also aligning with the articles of the United Nations Declaration on the Rights of Indigenous Peoples. The Government's approach proclaimed a commitment to effecting a "shift from a sovereign-to-subjects rights-based approach to a nation-to-nation inherent jurisdictional approach".<sup>947</sup> The Government recognized indigenous self-government as part of the country's emerging system of cooperative federalism. Relationships (nation-to-nation, government-to-government, and Inuit-Crown), including treaty relationships, therefore include:

- developing mechanisms and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework;
- involving Indigenous peoples in the effective decision-making and governance of our shared home;
- putting in place effective mechanisms to support the transition away from colonial systems of administration and governance, including, where it currently applies, governance and administration under the Indian Act; and
- ensuring, based on recognition of rights, the space for the operation of Indigenous jurisdictions and laws.<sup>948</sup>

Aspects of the country's previous efforts in this regard have been the subject of criticism, in particular, for not sufficiently safeguarding gender equality, including the rights of women and girls, especially as concerns gender-based violence.<sup>949</sup>

As the Human Rights Committee's statement makes clear, it is illegitimate for States to decline to act on responsibilities to protect in cases of harmful practices within minority or indigenous communities, based on the logic that such communities – and their right to community autonomy – renders them separate and hermetically sealed jurisdictions, exempt from the application of other human rights. Indeed, Governments worldwide have had to grapple practically with how to ensure gender equality, the rights of the child, and the rights of minorities within minorities and other aspects, while at the same time respecting minority and indigenous rights requirements.<sup>950</sup>

Other treaty bodies have engaged with similar questions, largely adopting positions harmonized with the Human Rights Committee's position articulated in general comment No. 28 (2000). These questions implicate both the role of public authorities vis-à-vis minority and indigenous communities, but also as concerns parallel "customary" legal systems operating in majority religious or traditional settings. In a statement to commemorate the twenty-fifth anniversary of the adoption of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women

<sup>946</sup> Human Rights Committee, general comment No. 28 (2000), para. 32.

<sup>947</sup> Centre for International Governance Innovation, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws: Special Report* (Ontario, 2018), p. 100. Available at [www.cigionline.org/static/documents/documents/UNDRIP%20Fall%202018%20lowres.pdf](http://www.cigionline.org/static/documents/documents/UNDRIP%20Fall%202018%20lowres.pdf).

<sup>948</sup> Government of Canada, "Principles respecting the Government of Canada's relationship with indigenous peoples" (Ottawa, 2018), p. 9. Available at [www.justice.gc.ca/eng/csj-sjc/principles-principes.html](http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html).

<sup>949</sup> Emma LaRocque, "Re-examining culturally appropriate models in criminal justice", in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, Michael Asch, ed. (Vancouver, UBC Press, 1997).

<sup>950</sup> For extensive exploration of these questions, see International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Versoix, 2009).

observed that: “The co-existence of multiple legal systems, with customary and religious laws governing personal status and private life and prevailing over positive law and even constitutional provisions of equality, remains a source of great concern.”<sup>951</sup> For example, in its 2010 review of Fiji, the Committee on the Elimination of Discrimination against Women expressed its concern “about the cultural practice of reconciliation and forgiveness ceremonies such as *bulubulu*, forced on victims of violence so that they remain in abusive and violent relationships”.<sup>952</sup> It called upon the State to implement a “comprehensive strategy, including the review and formulation of legislation and the establishment of goals and timetables, to modify or eliminate stereotypes, patriarchal attitudes and cultural practices that discriminate against women, in conformity with articles 2(f) and 5(a) of the Convention”.<sup>953</sup>

The Committee on the Elimination of Discrimination against Women has issued, with the Committee on the Rights of the Child, a joint general recommendation/comment on harmful practices, in which they promoted the central guiding idea that:

**the effective prevention and elimination of harmful practices require the establishment of a well-defined, rights-based and locally relevant holistic strategy that includes supportive legal and policy measures, including social measures that are combined with a commensurate political commitment and accountability at all levels. ... Such a holistic strategy must be mainstreamed and coordinated both vertically and horizontally and integrated into national efforts to prevent and address all forms of harmful practices. Horizontal coordination requires organization across sectors, including education, health, justice, social welfare, law enforcement, immigration and asylum, and communications and media. Similarly, vertical coordination requires organization between actors at the local, regional and national levels and with traditional and religious authorities. To facilitate the process, consideration should be given to delegating responsibility for the work to an existing or specifically established high-level entity, in cooperation with all relevant stakeholders.**<sup>954</sup>

Harmful practices are not matters unique to minority communities. However, it is essential that in giving effect to their obligations to ensure that minorities have the right to enjoy their own culture in community, including through measures that may grant autonomy, States ensure that safeguards are in place to guarantee that all aspects of the right of everyone to equality and non-discrimination are effective.

While implementing such measures, State authorities should “take all appropriate measures to ensure that stigma and discrimination are not perpetuated against the victims and/or practising immigrant or minority communities”.<sup>955</sup> The Special Rapporteur on violence against women, its causes and consequences has noted that: “Human rights such as the equal dignity of human beings resonate in all the cultural traditions of the world. In that sense, there is sufficient basis in every cultural tradition to foster and promote the value of human rights.”<sup>956</sup>

<sup>951</sup> Committee on the Elimination of Discrimination against Women, “Statement to commemorate the twenty-fifth anniversary of the adoption of the Convention on the Elimination of All Forms of Discrimination against Women”, 13 October 2004. Available at [www.un.org/womenwatch/daw/cedaw/cedaw25anniversary/cedaw25-CEDAW.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw25anniversary/cedaw25-CEDAW.pdf).

<sup>952</sup> CEDAW/C/FJI/CO/4, para. 20.

<sup>953</sup> Ibid., para. 21. In addition, “the Committee is concerned that, thus far, the State party has not taken effective and systematic action to modify or eliminate stereotypes and cultural practices harmful and/or demeaning to women.” Ibid., para. 20.

<sup>954</sup> Joint general recommendation No. 31 of Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019), paras. 33–34.

<sup>955</sup> Ibid., para. 81 (c).

<sup>956</sup> E/CN.4/2003/75, para. 62.



### III. RELIGIOUS OR BELIEF MINORITIES AND DISCRIMINATION

Religious or belief minorities include “a wide range of religious, non-religious, non-theistic and other beliefs, such as unrecognized and non-traditional religions or beliefs, including animists, atheists, agnostics, humanists, ‘new religions’, etc.”<sup>957</sup> Religious or belief minorities include non-believers, in accordance with the International Covenant on Civil and Political Rights’ rejection of all forms of coercion in the context of thought, conscience, religion or belief.<sup>958</sup> The rights of these groups are covered by the mandate of the Special Rapporteur on minority issues,<sup>959</sup> while issues regarding freedom of religion or belief are included within the mandate of the Special Rapporteur on freedom of religion or belief.<sup>960</sup>

As with ethnic and linguistic minorities, the majority of discrimination faced by religious minorities will be no different to that concerning any other ground.<sup>961</sup> For example, in cases of direct discrimination in which landlords refuse to let property to persons on the grounds of their religions, the legal steps, considerations or issues in those cases will not be different from those in cases of discrimination on grounds of sexual orientation or age.

That said, questions of discrimination against religious minorities (and by religious minorities) may involve matters relating to how to balance effective exercise of the rights set out in article 18 of the International Covenant on Civil and Political Rights – the right to freedom of thought, conscience and religion – with the right to non-discrimination. The rights guaranteed in article 18 are frequently understood as being enjoyed “in community with” others.

In practice, adjudication has clarified a number of aspects of these areas of law, while others remain unclear, or differ from jurisdiction to jurisdiction. The present subsection contains an examination of some aspects of these questions. However, it does not contain a comprehensive summary of international law regarding the right to freedom of religion or belief.<sup>962</sup> The sole aim is to cover issues concerning the balance between freedom of religion or belief, on the one hand, and equality and non-discrimination, on the other, with a particular focus on religious minorities. Attention is paid, first, to equality and non-discrimination in the exercise of freedom of religion or belief; second, discrimination on the basis of religion or belief in other areas of life; and, third, discrimination on the basis of other characteristics in situations in which religion is a pretext.

#### A. Equality and non-discrimination in the exercise of freedom of religion or belief

Citing the practice of the Human Rights Committee, the Special Rapporteur on freedom of religion and belief has noted that the duty binding on a State as concerns the right to freedom of religion or belief involves:

**both negative obligations, like refraining from perpetuating discriminatory acts, and positive duties, such as the obligation to protect against third-party infringements, including incitement to religious hatred. States are also obliged to ensure that individuals belonging to minorities are able to practise**

<sup>957</sup> A/75/211, para. 76 (b). See paras. 51–59 and 76 therein for a discussion of this term.

<sup>958</sup> Article 18 (2) of the International Covenant on Civil and Political Rights sets out that: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Although the term conscience does not occur in this sentence, it is clearly included as the moral corollary of a person’s religion or belief. The strict rejection of coercion necessitates respect for an internal sphere of personal freedom in questions of thought, conscience, religion or belief, which must receive unconditional legal protection: “within the ambit of freedom of religion or belief, the *forum internum*, namely, the internal dimension of a person’s religious or belief-related conviction, enjoys absolute protection. ... As pointed out by the Human Rights Committee, the *forum internum* also covers everyone’s freedom to have or adopt a religion or belief of one’s choice and this freedom is protected unconditionally.” See A/67/303, para. 19.

<sup>959</sup> See [www.ohchr.org/en/issues/minorities/srminorities/pages/srminorityissuesindex.aspx](http://www.ohchr.org/en/issues/minorities/srminorities/pages/srminorityissuesindex.aspx).

<sup>960</sup> See [www.ohchr.org/en/issues/freedomreligion/pages/freedomreligionindex.aspx](http://www.ohchr.org/en/issues/freedomreligion/pages/freedomreligionindex.aspx).

<sup>961</sup> Nazila Ghanea, “Are religious minorities really minorities?”, *Oxford Journal of Law and Religion*, vol. 1, No. 1 (2012). Available at <https://doi.org/10.1093/ojlr/rwr029>.

<sup>962</sup> For a detailed summary of international law on freedom of religion or belief, see Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford, Oxford University Press, 2016).



**their religions or beliefs or receive public support in the same manner as adherents to a State religion.**<sup>963</sup>

Other positive duties include satisfying all obligations stipulated by article 27 of the Covenant and by the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which requires States to “take measures to create favourable conditions” that enable persons belonging to minorities to “express their characteristics”.<sup>964</sup>

The passages that follow concern States’ obligation to ensure equal enjoyment of the right to freedom of religion or belief, and questions of discriminatory infringement or denial of freedom of religion or belief. This includes the question of whether establishing a State religion gives rise to discrimination concerns as relates to religion or belief minorities, as well as equality and non-discrimination in the area of establishing religious or belief communities, and ensuring equal abilities to practise freely. Given the focus of the present guide on equality and non-discrimination, the present section does not treat in detail all aspects of the right to freedom of religion or belief.

## 1. State religion and religious and belief minorities

Complex questions arise with respect to the rights of religious or belief minorities in situations in which a State establishes an official religion or provides a majority religion with legal or political primacy. The Human Rights Committee, in its general comment No. 22 (1993), has set out that:

**The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor result in any discrimination against adherents of other religions or non-believers.**<sup>965</sup>

Other positive duties, including the requirement to take measures to create favourable conditions for minorities to express their characteristics, have been noted above.

The Beirut Declaration and its 18 Commitments on Faith for Rights explicitly refer to preventing the use of the notion of “State religion” or “doctrinal secularism” to discriminate against individuals or groups or reduce “the space for religious or belief pluralism in practice”.<sup>966</sup>

The African Commission on Human and Peoples’ Rights held, in *Amnesty International and others v. Sudan*, that full respect for freedom of religion in a particular State could not be applied “in such a way as to cause discrimination and distress to others”.<sup>967</sup> The Commission also held that it was “fundamentally unjust that religious laws should be applied against non-adherents of the religion”. In the same case, the Committee noted that: “Tribunals that apply only *Shari’a* are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they so wish.”<sup>968</sup> Moreover, the Commission identified other discriminatory behaviours against Christians, including coercion to convert to Islam, the expulsion of missionaries and unequal food distribution in prisons.<sup>969</sup>

<sup>963</sup> See A/HRC/37/49, para. 29. In the case of *Waldman v. Canada*, the Human Rights Committee held that “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. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author’s religious denomination is based on such criteria. Consequently, there has been a violation of the author’s rights under article 26 of the Covenant to equal and effective protection against discrimination.” See Human Rights Committee, *Waldman v. Canada* (CCPR/C/67/D/694/1996), para. 10.6.

<sup>964</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 4 (2).

<sup>965</sup> Human Rights Committee, general comment No. 22 (1993), para. 9.

<sup>966</sup> A/HRC/40/58, annex II, commitment IV. See also A/HRC/37/49, paras. 28–29; and OHCHR, *#Faith4Rights Toolkit* (2021), module 4. Available at [www.ohchr.org/Documents/Press/faith4rights-toolkit.pdf](http://www.ohchr.org/Documents/Press/faith4rights-toolkit.pdf).

<sup>967</sup> African Commission on Human and Peoples’ Rights, *Amnesty International and others v. Sudan*, communications Nos. 48/90, 50/91, 52/91 and 89/93, Decision, 15 November 1999, para. 72.

<sup>968</sup> *Ibid.*, para. 73.

<sup>969</sup> *Ibid.*, paras. 74–76.

## 2. Equal recognition of minority religious or belief communities and their members

In many States, requirements related to the acquisition of legal status or registration of religious or belief communities discriminate either directly or indirectly against smaller groups. In some cases, denial of the legitimacy of minority religious or belief communities has extreme consequences, including the death penalty.<sup>970</sup>

The Special Rapporteur on freedom of religion or belief has set out that:

**Registration of religious or belief communities by the State should be enacted in a spirit and manner of servicing the human right to freedom of religion or belief. Therefore, the registration process should be quick, transparent and non-discriminatory. It should not depend on extensive formal requirements in terms of the number or the time a particular religious group has existed, nor should it put an undue burden on communities applying for registration status.**<sup>971</sup>

Religious community registration processes should “ensure equal access and non-discriminatory treatment in the application procedure for all religious communities that wish to register”.<sup>972</sup> Registration should not be compulsory, namely it should not be a precondition for practising one’s religion, but only for the acquisition of a legal personality and related benefits. Furthermore, “no religious or belief group should be allowed to decide about the registration of another religious or belief group”.<sup>973</sup>

### GUIDANCE OF THE SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF

The Special Rapporteur on freedom of religion or belief has stated that fulfilment of States’ obligations to ensure freedom of religion or belief and non-discrimination requires that:

- (a) States should systematically ground any activities in the area of religion or belief in a clear understanding of the due respect for every person’s freedom of religion or belief as a universal human right based on the inherent dignity of all members of the human family;
- (b) States should refrain from exercising pressure on religious or belief groups whose members prefer not to be registered as legal entities under domestic law;
- (c) States should instruct members of law enforcement and other State agencies that religious activities of non-registered religious or belief communities are not illegal, as the status of freedom of religion or belief prevails over any acts of State registration;
- (d) States should offer appropriate options and procedures for religious or belief communities to achieve a status of legal personality if they so wish. Administrative procedures for obtaining such a status should be enacted in a spirit of servicing the full enjoyment of freedom of religion or belief for everyone and should thus be quick, transparent, fair, inclusive and non-discriminatory;
- (e) All registration decisions must be based on clearly defined formal elements of law and in conformity with international law. Registration should neither depend on extensive formal requirements in terms of the number of members and the time a particular community has existed, nor should it depend on the review of the substantive content of the belief, the structure of the community and methods of appointment of the clergy;
- (f) States should ensure that no religious community has, de jure or de facto, the possibility to exercise a “veto” or otherwise influence the decision to register or not to register another religious or belief group;

<sup>970</sup> Thus, for example, in its 2017 review of Pakistan, the Human Rights Committee expressed concern regarding hate crimes against religious minorities and of “blasphemy laws ... that carry severe penalties, including the mandatory death penalty”, which “reportedly have a discriminatory effect, particularly on Ahmadi persons”. Similarly, the Committee has expressed concern at the treatment of Baha’is, Christians and Sunni Muslims in the Islamic Republic of Iran, including that convicted male apostates (i.e. converts from Islam) face the death penalty. See, respectively, CCPR/C/PAK/CO/1, paras. 33–34; and CCPR/C/IRN/CO/3, paras. 23–26.

<sup>971</sup> A/HRC/19/60/Add.2, para. 82.

<sup>972</sup> A/HRC/13/40/Add.3, para. 21.

<sup>973</sup> A/HRC/19/60/Add.2, para. 82.

- (g) States have to provide effective legal remedies for individuals or groups complaining about the denial or arbitrary delay of registration as a legal personality;
- (h) States should refrain from arbitrarily stripping certain religious or belief communities of legal status positions they had possessed before as an instrument of exercising control or marginalizing groups deemed not to fit into the cultural make-up of the country;
- (i) When offering a privileged legal status position for certain religious or belief communities or other groups, such a specific status should be accorded in strict conformity with the principle of non-discrimination and should fully respect the right to freedom of religion or belief of all human beings;
- (j) Any specific status positions given by the State to certain religious or belief communities or other groups should never be instrumentalized for purposes of national identity politics, as this may have detrimental effects on the situation of individuals from minority communities.<sup>974</sup>

The Human Rights Committee has deemed the denial of registration of particular religious communities to be discriminatory, in particular in situations in which there is a pattern and practice of allowing the registration of other types of religious community<sup>975</sup> and has found States parties in violation of the International Covenant on Civil and Political Rights as a result of arbitrary or discriminatory refusal to recognize or register religious communities.<sup>976</sup> It has also deemed denial of the establishment of entities of a given religion unlawful and found States parties in violation of the Covenant for maintaining systems that preclude the opportunity to challenge decisions denying community registration.<sup>977</sup> The Special Rapporteur on freedom of religion or belief has noted that, in addition to explicit refusals to recognize certain religious communities, there may also be indirect discriminatory criteria obstructing community establishment and recognition, such as requirements related to citizenship or having a certain number of members, lengthy waiting periods or criteria requiring full-time clergy,<sup>978</sup> which will disproportionately affect minority groups.

The Inter-American Commission on Human Rights has acknowledged that the prohibition of certain religious groups infringes the right to freedom of religion, as illustrated by the ban introduced by the Government of Argentina against Jehovah's Witnesses in 1976.<sup>979</sup> The Commission has identified discriminatory practices against Jehovah's Witnesses in several States, such as Paraguay, where the Government forcibly dissolved their legal personality in 1979.<sup>980</sup> The Commission has also noted that States have an obligation to enforce policies designed to control groups that commit discriminatory acts, promote religious hatred, carry out acts of religious persecution or obstruct the exercise of religious rights.<sup>981</sup>

The European Court of Human Rights has deemed that the unequal treatment of different religious or faith communities violates the European Convention on Human Rights.<sup>982</sup> In the jurisprudence of the Court, "States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs",<sup>983</sup> the role of the State being "to safeguard the possibility of pluralism".<sup>984</sup> The Court has found States parties in violation of the provisions of the Convention in cases of arbitrary or discriminatory refusal

<sup>974</sup> A/HRC/19/60, para. 73.

<sup>975</sup> See, for instance, Human Rights Committee, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka* (CCPR/C/85/D/1249/2004), para. 7.4.

<sup>976</sup> See, for example, Human Rights Committee, *Malakhovsky and Pikul v. Belarus* (CCPR/C/84/D/1207/2003).

<sup>977</sup> Human Rights Committee, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka* (CCPR/C/85/D/1249/2004).

<sup>978</sup> See, for example, A/HRC/19/60/Add.2.

<sup>979</sup> Inter-American Commission on Human Rights, *Jehovah's Witnesses v. Argentina*, Case 2137, Resolution, 18 November 1978.

<sup>980</sup> Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights: 1979–1980* (1980), chap. V, sect. B, para. 10.

<sup>981</sup> *Ibid.*, chap. V, sect. D, para. 4; and Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2008* (2009), chap. VI, paras. 364–367.

<sup>982</sup> European Court of Human Rights, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, Application No. 40825/98, Judgment, 31 July 2008.

<sup>983</sup> European Court of Human Rights, *Lautsi and others v. Italy*, Application No. 30814/06, Judgment, 18 March 2011, para. 60.

<sup>984</sup> *Ibid.*, para. 62.

to register or otherwise recognize religious communities.<sup>985</sup> It has also deemed unlawful legislative changes leading to effective non-registration or deregistration of religious communities.<sup>986</sup>

In its guide on article 9 of the European Convention on Human Rights, the Council of Europe summarizes the jurisprudence of the European Court of Human Rights in this area, noting that “the refusal to recognise the *legal personality* of a religious community or to grant it such personality constitutes interference with the exercise of the rights secured under Article 9, in their external and collective dimension, in respect of the community itself but also of its members”.<sup>987</sup> In addition, “the authorities’ refusal to register a group directly affects both the group itself and its presidents, founders or individual members”.<sup>988</sup> In its jurisprudence, the Court has further interpreted article 9 in light of article 11, finding that “a refusal by the domestic authorities to grant legal-entity status to an association of individuals amounts to an interference with the applicants’ exercise of their right to freedom of association”.<sup>989</sup> In various cases, the Court has considered that mere tolerance by the State of the activities of a non-recognized religious organization is not “a substitute for recognition, which alone is capable of conferring rights on those concerned”.<sup>990</sup> The Court has ruled that the express authorization of the activities of non-recognized religious groups by relevant legislation is “insufficient if domestic law reserves a whole series of rights essential for conducting religious activities for registered organisations with legal personality”.<sup>991</sup> As concerns the waiting time for the authorities to consider an application by a religious group or organization for conferment of legal personality, the Court considers that States have an obligation to keep this process “reasonably short” for the purposes of article 9 of the Convention.<sup>992</sup>

In this regard, adjudication has treated religious groups to a certain extent differently from ethnic groups. In cases concerning religious communities, the victim may be both an individual member of the community or the community per se. In cases concerning discrimination against ethnic minorities, it is unlikely that the group per se would be deemed the victim, unless the case concerned very extreme harms, such as genocide.

## B. Discrimination on the basis of religion or belief in other areas of life

All forms of discrimination – including both direct and indirect discrimination – on the basis of religion or belief in areas such as education, employment, housing, health care or in the realization of other civil, cultural, economic, political or social rights are prohibited under international law. Many cases of direct discrimination on the basis of religion or belief raise no particular questions of law outside of the standard rules banning discrimination detailed above and are thus not explored here. Rather, in the current subsection there is a focus on certain questions that arise specifically when considering discrimination on the basis of religion or belief, including: (a) the extent to which clothing and other physical expressions of religion or belief can constitute legitimate grounds for different treatment; (b) the limits to which religious or belief communities are allowed

<sup>985</sup> See, for example, European Court of Human Rights, *Jehovah’s Witnesses of Moscow and others v. Russia*, Application No. 302/02, Judgment, 10 June 2010.

<sup>986</sup> European Court of Human Rights, *Magyar Keresztény Mennonita Egyház and others v. Hungary*, Application No. 70945/11 and others, Judgment, 8 April 2014.

<sup>987</sup> European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion* (Strasbourg, 2021), para. 163. This principle is well established in the jurisprudence of the European Court of Human Rights, see, for example, European Court of Human Rights, *Metropolitan Church of Bessarabia and others v. Moldova*, Application No. 45701/99, Judgment, 13 December 2001, para. 105.

<sup>988</sup> European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion*, para. 163.

<sup>989</sup> European Court of Human Rights, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, Application No. 40825/98, Judgment, 31 July 2008, para. 62. See also European Court of Human Rights, *Genov v. Bulgaria*, Application No. 40524/08, Judgment, 23 March 2017, para. 35.

<sup>990</sup> European Court of Human Rights, *İzzettin Doğan and others v. Turkey*, Application No. 62649/10, Judgment, 26 April 2016, para. 127; and European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion*, para. 165.

<sup>991</sup> European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion*, para. 165.

<sup>992</sup> European Court of Human Rights, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, Application No. 40825/98, Judgment, 31 July 2008, para. 79; European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion*, para. 168.

to apply preferences for co-religionists in areas such as employment or housing; (c) reasonable accommodation on grounds of religion or belief; and (d) opting out of health care on doctrinal grounds.

## 1. Religious clothing, symbols and the public sphere

At both the international and regional levels, cases have arisen concerning religious clothing or other overt personal religious expressions (jewellery, head or hair coverings etc.) from a broad range of groups, including Christians, Jews, Muslims and Sikhs, to name only some. In the main, United Nations human rights bodies and mechanisms have tended to regard restrictions on the public display of religious symbols as more problematic than a number of adjudicators at national level. The European Court of Human Rights has similarly accepted restrictions on clothing – or has declined to hear cases – in scenarios in which United Nations bodies have both heard cases and indeed deemed States’ practices discriminatory. It is also a feature of this jurisprudence that courts have weighed different considerations depending on the domain at issue (employment, education, health care etc.).

In situations in which dress codes, uniform rules or other standards related to personal appearance conflict with religious practice or other physical manifestations of religious belief, they are *prima facie* indirectly discriminatory. As a result, whether the application of such rules can be justified is subjected to an objectivity and reasonableness test.<sup>993</sup> For example, in joined cases concerning practising Christians prevented from wearing religious symbols at work, the European Court of Human Rights ruled that a ban by British Airways based ostensibly on the need to ensure a uniform corporate image was not justified, while a similar ban by a hospital, based on public health considerations, was a legitimate and justified intrusion into the rights of the person concerned.<sup>994</sup>

In the field of education, the Human Rights Committee has found restrictions on similarly unobtrusive symbols worn by students<sup>995</sup> to be a violation of the International Covenant on Civil and Political Rights. However, the European Court of Human Rights has taken a more restrictive approach to the scope accorded to teachers to wear religious clothing.<sup>996</sup> Central, however, remains the principle that it is not legitimate to allow some forms of religious expression (i.e. those of a majority religion), while banning those of a religious minority.<sup>997</sup> The Special Rapporteur on freedom of religion or belief has developed a set of “aggravating or neutral” indicators, which may be used to assess the legitimacy “from a human rights law perspective [of] restrictions and prohibitions on wearing religious symbols”. The application of restrictions by State authorities “in a discriminatory manner, or with a discriminatory purpose, e.g. by arbitrarily targeting certain communities or groups, such as women” is listed as an aggravating indicator, which is incompatible with international human rights standards.<sup>998</sup>

Another set of questions examined by national, regional and international courts concerns the right of persons to wear religious hair coverings in different settings. In a noteworthy case brought by a Sikh man from France, the European Court of Human Rights ruled that it would not decide on the merits of a case concerning the application of a ban on head coverings in photographic identity documents because the issue fell within the State’s margin of appreciation.<sup>999</sup> A similar case was then submitted to the Human Rights Committee, which both heard the case and ruled that France had violated the International Covenant on Civil and Political Rights by banning the measure.<sup>1000</sup>

<sup>993</sup> On this test more broadly, see section I.A.4 of part two of the present guide.

<sup>994</sup> European Court of Human Rights, *Eweida and others v. the United Kingdom*, Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment, 15 January 2013. The Constitutional Court of Colombia has held that students could not be forced to wear trousers due to their religion. See Constitutional Court of Colombia, Case T-832/11, Judgment, 3 November 2011. Available at [www.corteconstitucional.gov.co/relatoria/2011/T-832-11.htm](http://www.corteconstitucional.gov.co/relatoria/2011/T-832-11.htm).

<sup>995</sup> See, for example, Human Rights Committee, *Türkan v. Turkey* (CCPR/C/123/D/2274/2013).

<sup>996</sup> See, for example, European Court of Human Rights, *Dahlab v. Switzerland*, Application No. 42393/98, Decision on Admissibility, 15 February 2001.

<sup>997</sup> E/CN.4/2006/5, para. 55.

<sup>998</sup> *Ibid.*, para. 55 (a).

<sup>999</sup> European Court of Human Rights, *Mann Singh v. France* Application No. 24479/07, Decision on Admissibility, 13 November 2008.

<sup>1000</sup> Human Rights Committee, *Mann Singh v. France* (CCPR/C/108/D/1928/2010). See also discussion of the case in Heiner Bielefeldt and Michael Wiener, *Religious Freedom Under Scrutiny* (Philadelphia, University of Pennsylvania Press, 2019), pp. 156 et seq.



Matters relating to religious dress have proven a challenging subject for courts all over the world. In a widely publicized judgment delivered in 2014, the European Court of Human Rights considered whether French legislation that introduced criminal sanctions for the concealment of the face in public areas (the so-called burqa ban) was compatible with articles 9 and 14 of the European Convention.<sup>1001</sup> While noting that the ban had the effect of limiting the right to manifest religion, the Court held that the ban was justifiable. The aim of “living together” was legitimate under the Convention, and the ban was both a necessary and proportionate means of achieving that aim, falling within the State’s margin of appreciation.<sup>1002</sup> In 2018, the legitimacy of the ban was examined again, this time by the Human Rights Committee in the case of *Yaker v. France*.<sup>1003</sup> In contrast to the decision of the European Court of Human Rights, the Committee found a violation of articles 18 (freedom of religion) and 26 (non-discrimination and equality before the law) of the International Covenant on Civil and Political Rights.<sup>1004</sup> According to the Committee, the concept of “living together” was a “very vague and abstract” notion, and the French authorities had not demonstrated a rational link between the concept and the protection of the rights and freedoms of others.<sup>1005</sup> Even if the authorities had done so, the State had not demonstrated that criminal sanctions were necessary or proportionate.<sup>1006</sup> While the law was facially neutral, in that it did not explicitly target any particular religious group, it had a disproportionate impact on the enjoyment of rights by Muslim women. On this basis, the Committee held that the measures were indirectly discriminatory, ordering France to review its legislation to eliminate the discriminatory impact and provide reparations to the victim.<sup>1007</sup>

Other treaty bodies have examined the need to consider bans on religious hair or face coverings from the perspective of the equal enjoyment of rights, such as the right to privacy, to freedom of expression and to take part in the conduct of public affairs and the rights of minorities. The Committee on the Elimination of Discrimination against Women has expressed concerns in its concluding observations about the lack of information on the impact of the ban on wearing headscarves on women and girls and required that States monitor and assess this impact, in particular in relation to their access to education and employment.<sup>1008</sup> The Committee on the Rights of the Child similarly has expressed concerns about rules prohibiting the wearing of headscarves by women and girls in government offices and in schools and universities.<sup>1009</sup>

OHCHR has issued guidance in this area, as follows:

**While, as repeatedly stated, nobody should be forced to wear a religious symbol, the arguments disregarding women’s voices concerning decisions to wear the veil, particularly the full-face covering veil, are considered by some as ignoring women’s agency and capacity to consent. Some argue that when dictated by social pressure, choice is not free. However, this argument could dangerously be extended to policing women’s bodies and dictating by law what women should or should not, inter alia, wear. While it is reasonable to state that the existing patriarchal system may lead women and girls to conform to societal expectations, even when they limit their freedom or perpetuate harmful stereotypes, it is questionable whether legal bans or restrictions, punishing the woman herself, would be the most appropriate response or whether they, instead, further marginalize and perpetuate discrimination.**<sup>1010</sup>

Citing the Special Rapporteur on freedom of religion or belief, OHCHR has further noted that:

**limitations should neither be intended nor lead to explicit discrimination or camouflaged differentiation depending on the religion or belief involved. In the cases analysed, even when restrictions seem neutral, in practice they disproportionately affect Muslim women. More research would be needed**

<sup>1001</sup> European Court of Human Rights, *S.A.S. v. France*, Application No. 43835/11, Judgment, 1 July 2014.

<sup>1002</sup> *Ibid.*, paras. 157–159.

<sup>1003</sup> Human Rights Committee, *Yaker v. France* (CCPR/C/123/D/2747/2016).

<sup>1004</sup> *Ibid.*, para. 9.

<sup>1005</sup> *Ibid.*, para. 8.10.

<sup>1006</sup> *Ibid.*, para. 8.11.

<sup>1007</sup> *Ibid.*, para. 10.

<sup>1008</sup> See, for example, CEDAW/C/BEL/CO/7, paras. 18–19; and CEDAW/C/TUR/CO/6, paras. 16–17.

<sup>1009</sup> See, for example, CRC/C/TUN/CO/3, paras. 36–37.

<sup>1010</sup> OHCHR, “Human rights of women wearing the veil in Western Europe” (2019), p. 29.



on the extent of existing limitations on other symbols and how these impact other individuals/communities. The experiences of Muslim women wearing the headscarf, beyond the case law, seem to show widespread instances of discrimination, as well as exposure to violence. Given the situation, States should be mindful of how restrictions on the wearing of the veil can further stigmatize Muslim women and prevent them from seeking redress. Moreover, some narratives surrounding debates on the wearing of the headscarf can perpetuate stereotypical, biased perceptions about the Muslim faith and the role of women.<sup>1011</sup>

Questions arise about whether acceptance of complete body coverings is consistent with States' positive obligation under the Convention on the Elimination of All forms of Discrimination against Women to end traditional practices leading to the subordination of women.<sup>1012</sup> Thus, for example, the Special Rapporteur on freedom of religion or belief has noted that: "Special attention should be paid to the protection of women's rights, in particular in the context of wearing the full head-to-toe veil."<sup>1013</sup> Similar questions have arisen over the full-face veil.<sup>1014</sup>

Successive Special Rapporteurs on freedom of religion or belief have stressed the importance of safeguarding both the positive freedom to voluntarily display religious symbols and also the negative freedom from being forced to display religious symbols. Thus, for example, the Special Rapporteur noted that a "negative" side of freedom of religion or belief – the right not to be pressured, especially by the State or in State institutions, to participate in religious practices – "does not mean a right to be free from any confrontation with religious symbols or other manifestations of religious faith or practice in the public domain". Such an approach "would clearly run counter to the human right to publicly manifest one's religion or belief, either individually or in community with others".<sup>1015</sup> Rather, "the purpose of the 'negative' side of freedom of religion or belief is to make sure that no one is exposed to any pressure, especially by the State, to confess or practice a religion or belief against one's own convictions".<sup>1016</sup>

## 2. Religious or belief communities as duty bearers

A further area explored in jurisprudence has been the question of whether religious or belief communities may themselves differentiate on the basis of religion or belief when acting in the role of employer or housing or health-care provider. In the area of employment, it is established that religious or belief communities or institutions affiliated with them may only preferentially hire co-religionists to positions with explicit doctrinal or dogmatic content. There can be no discrimination for positions lacking religious or doctrinal content.

### **CLARIFYING THE LIMITS OF RELIGIOUS AUTONOMY: *EGENBERGER V. EVANGELISCHES WERK FÜR DIAKONIE UND ENTWICKLUNG EV***

The question of whether religious organizations may hire only co-religionists has been repeatedly the subject of legal challenge in Germany. Germany has a number of large charitable organizations constituting a significant segment of the workforce, many of which enjoy significant State funding. Jobs in these organizations frequently have minimal if any religious content. In 2018, one legal challenge against these organizations' practice of refusing to employ persons who are not co-believers reached the Court of Justice of the European Union.

In 2012, Vera Egenberger applied for a job at Evangelisches Werk für Diakonie und Entwicklung, a charitable organization with a religious affiliation. The job had no religious doctrinal content, but

<sup>1011</sup> Ibid., p. 30. See also E/CN.4/2006/5, para. 55.

<sup>1012</sup> Article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women states: "States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

<sup>1013</sup> A/65/207, para. 34.

<sup>1014</sup> OHCHR, "Human rights of women wearing the veil in Western Europe", p. 8.

<sup>1015</sup> A/HRC/19/60/Add.1, para. 31.

<sup>1016</sup> Ibid.

rather was a consultancy position to write a report for a United Nations body, a position for which she was qualified. The job had been advertised stipulating that the candidate should be a member of a Protestant church. Ms. Egenberger was shortlisted but not invited to a job interview. Evangelisches Werk für Diakonie und Entwicklung ultimately rejected Ms. Egenberger's application for the position.

Ms. Egenberger challenged the refusal before German courts, alleging that the selection process and related treatment was not compatible with the prohibition of discrimination on the basis of religion or belief and referred to the German General Law on equal treatment and the European Union Directive prohibiting discrimination in employment on grounds of religion or belief.<sup>1017</sup> Evangelisches Werk für Diakonie und Entwicklung argued, inter alia, that religion was a legitimate occupational requirement, notwithstanding the lack of religious content relating to the position in question. The Berlin Labour Court held that Ms. Egenberger had been subject to discrimination but limited the compensation awarded in the case. The case was then referred to the Court of Justice of the European Union.

In April 2018, the Court of Justice of the European Union ruled in favour of Ms. Egenberger, holding, inter alia, that any religion or belief requirement must be proportionate. The self-perception of an organization is not sufficient in this regard.<sup>1018</sup>

### 3. Reasonable accommodation and religious practice

Depending on the given religious or belief doctrine or practice – as well as the beliefs of the individual believer or practitioner – some religions or beliefs may include rules or practices that necessitate reasonable accommodation, particularly – although not exclusively – in the employment, education and health fields. Similarly, again depending on the community in question, its doctrine and the particular beliefs of the individual, a person may be entitled to “opt out” of certain practices. No discrimination should follow such practices. Failure to accommodate requests that do not result in discrimination against others will constitute discrimination.

In a 2014 report to the Human Rights Council, the Special Rapporteur on freedom of religion or belief advocated to extend the provisions of reasonable accommodation – developed primarily within the ban on discrimination based on disability – to religious or belief minorities:

**At the level of specific institutions, a culture of trustful and respectful communication is needed in order to identify the specific needs of persons belonging to religious or belief minorities. ... The enshrinement of the principle of reasonable accommodation in the Convention on the Rights of Persons with Disabilities should serve as an entry point for discussing the role of similar measures in other areas of combating discrimination, including on the grounds of religion or belief. Policies of eliminating discrimination cannot be fully effective unless they also contemplate measures of reasonable accommodation.**<sup>1019</sup>

The Special Rapporteur recommended that States should “provide diversity training and advisory services for public and private employers concerning religious tolerance and non-discrimination in the workplace. This should include advice as regards policies of reasonable accommodation of religious and belief diversity in the workplace.”<sup>1020</sup> Furthermore, policymakers, legislators and judges should treat claims of reasonable accommodation as an important part of combating discrimination based on religion or belief. Employers and others should be “encouraged to develop policies of reasonable accommodation of religious or belief diversity at the workplace in order to prevent or rectify situations of ... discrimination and to promote diversity and inclusion”.<sup>1021</sup> Moreover, “national human rights institutions should develop training programmes and an advisory function in this field.”<sup>1022</sup>

<sup>1017</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>1018</sup> Court of Justice of the European Union, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, Judgment, 17 April 2018.

<sup>1019</sup> A/69/261, paras. 70–71.

<sup>1020</sup> Ibid., para. 77.

<sup>1021</sup> Ibid., para. 81.

<sup>1022</sup> Ibid., para. 86.

## REASONABLE ACCOMMODATION FOR RELIGION OR BELIEF IN CANADA

In the so-called *Simpson-Sears* case, an employee became a member of the Seventh-Day Adventist Church and began observing strictly the Sabbath from sundown on Friday to sundown on Saturday. She thus informed her employer that she could no longer work on Saturdays, giving rise to a dispute. Ruling in the case, the Supreme Court of Canada focused on the interpretation and application of Canadian anti-discrimination legislation. The Court found indirect discrimination and deemed that a corresponding duty of reasonable accommodation arose, done without imposing “undue hardship” on the employer or other accommodating entity.<sup>1023</sup>

A high-level 2008 report set out the conditions for understanding the “undue hardship” doctrine under Canadian law in cases concerning reasonable accommodation – termed here personalization – in medical contexts:

1. A request for the personalization of care must not run counter to clinical judgment, best practices and the professional code of ethics and must be evaluated in light of clinical urgency.
2. A request for personalization must not run counter to safety rules, e.g. the prevention of infection, risk management, and so on.
3. A request for personalization must not engender undue costs or costs that exceed organizational limits from a human, physical and financial standpoint.
4. A request for personalization must not be harmful to the rights and freedoms of other users and interveners.<sup>1024</sup>

## 4. Opting out in the field of health

A related matter concerns opting out of health procedures. Certain religious minorities have doctrinal requirements not to take part in certain health procedures, including blood transfusion, vaccination, surgery and, in some cases, any form of mainstream medicine.

In a case concerning the refusal by the Russian Federation to register a Jehovah’s Witnesses community, the European Court of Human Rights recognized, in deeming the ban discriminatory and therefore illegal, that:

**the refusal of potentially life-saving medical treatment on religious grounds is a problem of considerable legal complexity, involving as it does a conflict between the State’s interest in protecting the lives and health of its citizens and the individual’s right to personal autonomy in the sphere of physical integrity and religious beliefs.**<sup>1025</sup>

Nevertheless, in overturning the ban on the Jehovah’s Witnesses community, the Court held:

**The ability to conduct one’s life in a manner of one’s own choosing includes the opportunity to pursue activities perceived to be of a physically harmful or dangerous nature for the individual concerned. In the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment ... would interfere with his or her right to physical integrity and impinge on the rights protected under Article 8 of the Convention ... The freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-determination and personal autonomy. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or treatment or, by the same token, to have a blood transfusion. However, for this freedom to be meaningful, patients must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others. Many established jurisdictions have examined the**

<sup>1023</sup> Supreme Court of Canada, *Ontario Human Rights Commission and O’Malley (Vincent) v. Simpsons-Sears* [1985] 2 SCR 536.

<sup>1024</sup> Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation – Abridged Report* (Quebec, Government of Quebec, 2008), pp. 52–53. Available at <https://red.pucp.edu.pe/ridei/wp-content/uploads/biblioteca/buildingthefutureGerardBouchardcharlestaylor.pdf>.

<sup>1025</sup> European Court of Human Rights, *Jehovah’s Witnesses of Moscow and others v. Russia*, Application No. 302/02, Judgment, 10 June 2010, para. 134.

cases of Jehovah's Witnesses who had refused a blood transfusion and found that, although the public interest in preserving the life or health of a patient was undoubtedly legitimate and very strong, it had to yield to the patient's stronger interest in directing the course of his or her own life ... It was emphasised that free choice and self-determination were themselves fundamental constituents of life and that, absent any indication of the need to protect third parties – for example, mandatory vaccination during an epidemic, the State must abstain from interfering with the individual freedom of choice in the sphere of health care, for such interference can only lessen and not enhance the value of life.<sup>1026</sup>

## C. Discrimination on the basis of other characteristics in situations in which religion is a pretext

It is established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other characteristics.<sup>1027</sup> Successive Special Rapporteurs on freedom of religion or belief have set out that women's right to non-discrimination takes priority over "intolerant beliefs that are used to justify gender discrimination"<sup>1028</sup> and that freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls.<sup>1029</sup> The Special Rapporteur rejected "any claim that religious beliefs can be invoked as a legitimate 'justification' for violence or discrimination against women and girls or against people on the basis of their sexual orientation or gender identity. International law is clear that the manifestation of religion or belief may be limited by States, in full conformity with the criteria outlined in article 18 (3) of the International Covenant on Civil and Political Rights, to protect the fundamental rights of others, including the right to non-discrimination and equality, a principle upon which all human rights, including the right to freedom of religion or belief, depends."<sup>1030</sup>

### 1. Conscientious objection and its limits

Conscientious objection to military service – frequently for reasons of religion or belief – is arguably among the earliest forms of dissent. Although the Human Rights Committee's affirmation of a right of conscientious objection to military service as a component of article 18 of the International Covenant on Civil and Political Rights has evolved over time,<sup>1031</sup> the Committee has affirmed unequivocally that there should be no discrimination against conscientious objectors.<sup>1032</sup> Both treaty bodies and regional human rights bodies

<sup>1026</sup> Ibid., paras. 135–136. In the instant case, the Court declined to rule on the question of article 14 discrimination, holding that no separate matters arose as concerned the ban on discrimination and the rights of freedom of thought, conscience and religion (art. 9) and peaceful public assembly (art. 11), where the Court identified violations.

<sup>1027</sup> The Human Rights Committee has noted that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Accordingly, "such limitations must be understood in the light of universality of human rights and the principle of non-discrimination". See Human Rights Committee, general comment No. 22 (1993), para. 8; and general comment No. 34 (2011), para. 32.

<sup>1028</sup> A/65/207, para. 69. See also A/68/268; and A/HRC/22/51.

<sup>1029</sup> A/68/290, para. 30; and A/75/385.

<sup>1030</sup> A/HRC/43/48, para. 69.

<sup>1031</sup> Bielefeldt, Ghanea and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, in particular chap. 1.3.11 on conscientious objection.

<sup>1032</sup> "Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service." See Human Rights Committee, general comment No. 22 (1993), para. 11. In the inter-American system, the Inter-American Commission on Human Rights has ruled on a number of cases concerning Jehovah's witnesses and legitimate limitations of the right. The Commission has found that prosecuting members of that religion for refusing to swear oaths of allegiance, recognize the State and its symbols and to serve in the military is a violation of the right (see, for example, Inter-American Commission on Human Rights, *Jehovah's Witnesses v. Argentina*, Case 2.137, Resolution, 18 November 1978).

recognize the right to refuse, on the grounds of conscience, to do compulsory military service and instead to carry out a genuinely civilian alternative service.<sup>1033</sup>

Since 2000, attempts have been made to invoke and apply conscientious objection beyond the area of military service, with efforts made to enable the right of medical practitioners or other public officials to refuse to carry out duties inconsistent with their personal beliefs, including performing abortions, certifying divorces and performing marriage or civil registration proceedings for lesbian or gay partners.<sup>1034</sup> In some jurisdictions, litigation has extended to refusing services such as providing wedding cakes for gay or lesbian weddings, as well as legal challenges to requirements that employer-provided health insurance include contraception. These legal challenges have enabled examination of the interface of the right to freedom of religion or belief, on the one hand, and the right to non-discrimination, on the other.<sup>1035</sup>

A series of cases before the Supreme Court of the United Kingdom have examined the extent to which those providing services to the public can refuse to serve LGBTIQ+ persons on the basis of their religion or belief, providing a useful delineation of the issues that arise in such cases. In *Bull and another v. Hall and another*, the Supreme Court considered an appeal by the owners of a bed and breakfast hotel, who had been found to have discriminated against a gay couple by refusing to provide the double room that they had booked.<sup>1036</sup> The appellants stipulated that “out of a deep regard for marriage” double rooms were to be let only to “heterosexual married couples”. The Supreme Court unanimously agreed that the appellants had unlawfully discriminated against the respondents and dismissed the appeal, noting, inter alia, that the appellant’s motivation for discriminating was not relevant and that to permit a class of persons to discriminate on grounds of sexual orientation would be to create a class of persons who are exempt from anti-discrimination legislation. In *Ladele v. London Borough of Islington*, the applicant, Lillian Ladele, argued that she had been discriminated against by her employer, the London Borough of Islington, because it had required her to officiate at same-sex civil partnership ceremonies, refusing her request to allow her not to do so, on the basis of her Christian beliefs.<sup>1037</sup> The Supreme Court found against Ms. Ladele, noting that the London Borough of Islington had pursued a legitimate aim, that performing civil partnership ceremonies is a secular task and that Ms. Ladele’s job duties did not prevent her from practising her faith as she wished. In a more recent case from Northern Ireland, the Supreme Court considered whether a bakery had unlawfully discriminated by refusing to bake a cake with the words “Support Gay Marriage” on it.<sup>1038</sup> The Supreme Court held that the bakery had not discriminated, finding that it would have refused to bake a cake with that slogan for any customer, not only for the applicant or for other lesbian, gay and bisexual persons. Thus, the Court distinguished the case from its earlier jurisprudence. The case has now been submitted to the European Court of Human Rights. What these cases make clear is that, in situations in which services are provided to the public, they must be provided without discrimination on the basis of sexual orientation (and other grounds), irrespective of the religious beliefs of the service provider.

In his 2020 thematic report on gender-based violence and discrimination in the name of religion or belief, the Special Rapporteur on freedom of religion or belief stated that:

**One area of particular concern regarding accommodations to national law for religious beliefs is the use of conscientious objection by health-care providers and institutions unwilling to perform**

<sup>1033</sup> For a summary of standards, see Laurel Townhead, “International standards on conscientious objection to military service”, revised edition (Geneva, Quaker United Nations Office, 2021). Available at [www.quano.org/sites/default/files/resources/QUNO%20Conscientious%20Objection%20-%20International%20Standards\\_Revised%202021\\_FINAL.pdf](http://www.quano.org/sites/default/files/resources/QUNO%20Conscientious%20Objection%20-%20International%20Standards_Revised%202021_FINAL.pdf).

<sup>1034</sup> See, for example, in the context of medical care, Council of Europe Parliamentary Assembly resolution 1763 (2010) on the right to conscientious objection in lawful medical care.

<sup>1035</sup> The Special Rapporteur on freedom of religion or belief has stated that: “the abstractly antagonistic misconstruction of the relationship between freedom of religion or belief and equality between men and women fails to do justice to the life situation of many millions of individuals whose specific needs, wishes, claims, experiences and vulnerabilities fall into the intersection of both human rights, a problem disproportionately affecting women from religious minorities. The Special Rapporteur therefore emphasizes the significance of upholding a holistic perspective in conformity with the formula coined at the World Conference on Human Rights that ‘[a]ll human rights are universal, indivisible and interdependent and interrelated’. Based on this holistic perspective, which deserves to be defended even in complicated and tense situations, he formulates a number of practical recommendations addressed to States and other stakeholders.” See A/68/290, p. 2. See also Michael Wiener, “Freedom of religion or belief and sexuality: tracing the evolution of the UN Special Rapporteur’s mandate practice over thirty years”, *Oxford Journal of Law and Religion*, vol. 6, No. 2 (2017).

<sup>1036</sup> Supreme Court of the United Kingdom, *Bull and another v. Hall and another* [2013] UKSC 73.

<sup>1037</sup> United Kingdom Court of Appeal, *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357 CA.

<sup>1038</sup> Supreme Court of the United Kingdom, *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49.



abortions or provide access to contraception on religious grounds. In Uruguay, for example, women can elect to have an abortion, but in certain regions up to 87 per cent of medical providers refuse to perform abortions. Participants in the Special Rapporteur's consultations from countries such as Kenya, Poland and the United States noted that the invocation of "conscience clauses" provided in law had made access to legal abortion effectively unavailable to women in significant parts of the country. The Special Rapporteur notes that the Human Rights Committee has expressed concern about this phenomenon, in addition to the absence of effective referral mechanisms for accessing legal abortion medical services as a result of the exercise of conscientious objection.<sup>1039</sup> The Special Rapporteur recalls that the Human Rights Committee has called on States to ensure that women have access to legal abortion notwithstanding conscientious objection by medical practitioners, which it has referred to as a "barrier" to access (CCPR/C/POL/CO/7, paras. 23–24; and CCPR/C/COL/CO/7, paras. 20–21), and has suggested that conscientious objection should only be permitted, if at all, for individual medical providers.<sup>1040</sup> The Special Rapporteur was presented with additional information about gender-based discrimination by private persons refusing to provide medical or other services to women, girls and LGBT+ persons and who cited religious objections for doing so. At the consultations in the United States, for example, it was noted that individuals had refused to provide services to LGBT+ persons, including in the areas of family planning and prenatal care, infertility treatment, adoption, housing,<sup>1041</sup> lodging, employment and commercial services. ... Moreover, ... legal exemptions to anti-discrimination measures on the grounds of religious commitments were being increasingly accommodated. Participants in the consultations on the Americas noted, for example, that those outcomes had resulted in the termination of pregnant employees for being unmarried; the denial of insurance coverage for legal reproductive health services; refusals to discharge prescriptions for contraception and the impeding of the ability to obtain legal abortion services, and the denial of health services and treatment to LGBT+ persons.<sup>1042</sup>

## 2. Family and personal status law: marriage, divorce, inheritance and burial

Tensions between traditional, religious or communal rules, on the one hand, and the right to non-discrimination, on the other, have manifested themselves in a number of areas, in particular in marriage and family law. In cases in which communities assert a purported right to discriminate with reference to communal rules, these efforts have been overruled, either by courts or by administrators.

Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women sets out that:

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Some States have endeavoured to make reservations in respect of article 15 when ratifying the Convention on the Elimination of All Forms of Discrimination against Women. States have similarly made reservations in

<sup>1039</sup> Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), paras. 14, 43 and 60; Committee on the Rights of the Child, general comment No. 15 (2013), para. 69; and A/HRC/32/44.

<sup>1040</sup> Human Rights Committee, general comment No. 36 (2019), para. 8.

<sup>1041</sup> On the human rights obligations of private businesses that provide services traditionally provided by the public sector, see Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017), para. 21.

<sup>1042</sup> A/HRC/43/48, paras. 43–44. OHCHR has noted that: "States must organize their health system to ensure that women are not prevented from accessing health services by health professionals' exercise of conscientious objection." See OHCHR, "Information series on sexual and reproductive health and rights: abortion" (2020). Available at [www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_Abortion\\_WEB.pdf](http://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf).



respect of article 16 of the Convention, which prohibits discrimination against women in all matters relating to marriage and family relations. However, the Committee on the Elimination of Discrimination against Women has consistently held that such reservations are illegitimate, as they are incompatible with the object and purpose of the treaty, in contravention of the Vienna Convention on the Law of Treaties.<sup>1043</sup>

Several cases in Canada have explored the role of equality and non-discrimination law in understanding communal rules. In a case that reached the Supreme Court of Canada, an Orthodox Jewish woman petitioned the legal system because her Orthodox Jewish husband had over a significant period of time declined to provide her with a “get”, a certification of divorce issued in the Orthodox Jewish community. The non-provision of the “get” left the woman effectively in a state of social limbo, with significant impacts on her ability to build a social life with dignity following her separation from her husband. Under Orthodox Jewish law, only the husband can provide a “get”. In a final, binding judgment, the Supreme Court ruled that the facts as presented violated Canadian equality law.<sup>1044</sup>

### 3. Harmful practices

Harmful traditional practices, including female genital mutilation, are illegal under international human rights law. As noted above, articles 2 (f) and 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women specify that States have a responsibility to end cultural practices leading to inequality between men and women. Exceptions are not allowed for religion or belief or any other communities, both for reasons of the ban on cruel or degrading treatment as set out under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as due to the ban on discrimination against women, as set out, *inter alia*, under the Convention on the Elimination of All Forms of Discrimination against Women.<sup>1045</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa similarly proscribes such acts.

In its general comment No. 28 (2000), the Human Rights Committee held that “States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights”<sup>1046</sup> and called on States to report on how they were addressing cultural or religious practices within minority communities that affected the rights of women: “The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.”<sup>1047</sup>

In recent times, some States have seen movements aiming to ban male circumcision. While the human rights law issues in this matter are not yet clear, it is evident that the scope of questions is somewhat different to those involved as concerns female genital mutilation. In reporting on the visit to Denmark, where a discussion was taking place about possibly banning male circumcision, the Special Rapporteur on freedom of religion or belief stopped short of explicitly opposing such a ban, but instead focused on the manner in which public discussion had heightened negative discourse – particularly on the Internet – against Jews and Muslims and alarm in those communities triggered by the proposals.<sup>1048</sup>

<sup>1043</sup> A/53/38/Rev.1, paras. 1–25.

<sup>1044</sup> Ayelet Shachar, “Privatizing diversity: a cautionary tale from religious arbitration in family law”, *Theoretical Inquiries in Law*, vol. 9, No. 2 (2008).

<sup>1045</sup> In its most recent general comment on violence against women, the Committee on the Elimination of Discrimination against Women summarized that: “Gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices.” The Committee refers in this regard to relevant reports of special procedure mandate holders, as well as the concluding observations of human rights treaty bodies, such as the Committee against Torture and the Human Rights Committee. See Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017), para. 16, and the citations included therein. See also A/HRC/31/57; and A/HRC/7/3, para. 36.

<sup>1046</sup> Human Rights Committee, general comment No. 28 (2000), para. 5.

<sup>1047</sup> *Ibid.*, para. 32.

<sup>1048</sup> A/HRC/34/50/Add.1, paras. 24–26. Denmark has not, as at the time of writing, adopted such a ban.

As noted above, in 2011, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child adopted detailed guidance on ending harmful practices, including aspects of these questions related to minorities, and in particular the need to avoid stigmatizing them.<sup>1049</sup>

## IV. LANGUAGE, LINGUISTIC MINORITIES, DISCRIMINATION, EQUALITY AND INCLUSION

Articles 2 and 26 of the International Covenant on Civil and Political Rights, article 2 of the International Covenant on Economic, Social and Cultural Rights and article 2 of the Convention on the Rights of the Child all prohibit discrimination on the basis of language. Article 27 of the International Covenant on Civil and Political Rights makes specific provision for the rights of linguistic minorities and also identifies language as means for identifying “those who belong to a group” sharing a common culture.<sup>1050</sup> In particular, as concerns linguistic minorities, the Human Rights Committee has elaborated that:

**The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19.<sup>1051</sup>**

The Human Rights Committee has also held that positive measures by States “may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language ... in community with the other members of the group”.<sup>1052</sup>

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities reaffirms that linguistic minorities have the right “to use their own language, in private and in public, freely and without interference or any form of discrimination”; “to participate effectively in cultural, religious, social, economic and public life”; “to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live”; “to establish and maintain their own associations”; and “to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties”.<sup>1053</sup>

Guidance on access to public services in minority languages has been elaborated in a number of areas, as well as affirmed in cases adjudicated at the supranational level, such as:

- The right to vote and participate in electoral services through the provision of these services in minority languages where minorities are concentrated in sufficient numbers.<sup>1054</sup>
- The right to education in, and teaching of, minority languages.<sup>1055</sup>
- The right to access government services in minority languages in general, where appropriate.<sup>1056</sup>

<sup>1049</sup> Joint general recommendation No. 31 of Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019).

<sup>1050</sup> Human Rights Committee, general comment No. 23 (1994), para. 5.1.

<sup>1051</sup> Ibid., para. 5.3.

<sup>1052</sup> Ibid., para. 6.2.

<sup>1053</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2.

<sup>1054</sup> See, for example, High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, “The Lund recommendations on the effective participation of national minorities in public life and explanatory note” (The Hague, 1999). Available at [www.osce.org/files/f/documents/0/9/32240.pdf](http://www.osce.org/files/f/documents/0/9/32240.pdf).

<sup>1055</sup> Human Rights Committee, *Mavlonov and Sa'di v. Uzbekistan* (CCPR/C/95/D/1334/2004).

<sup>1056</sup> Human Rights Committee, *Diergaardt et al. v. Namibia* (CCPR/C/69/D/760/1997).

- The right to the free use of minority languages in the broadcast, print and electronic media, including in public sector media, with sufficient and proportionate space.<sup>1057</sup>
- The right to use one’s own name in one’s language in official documents.<sup>1058</sup>
- The right to use minority languages in official or administrative proceedings.<sup>1059</sup>

The Special Rapporteur on minority issues has set out that, in order to meet their human rights obligations involving language, State authorities must:

- **respect the integral place of language rights as human rights;**
- **recognize and promote tolerance, cultural and linguistic diversity, and mutual respect, understanding and cooperation among all segments of society;**
- **put in place legislation and policies that address linguistic rights and prescribe a clear framework for their implementation;**
- **implement their human rights obligations by generally following the proportionality principle in the use of or support for different languages by state authorities, and the principle of linguistic freedom for private parties;**
- **integrate the concept of *active offer* as an integral part of public services to acknowledge a state’s obligation to respect and provide for language rights, so that those using minority languages do not have to specifically request such services but can easily access them when the need arises;**
- **put in place effective complaint mechanisms before judicial, administrative and executive bodies to address and redress linguistic rights issues.**<sup>1060</sup>

Pursuant to the international human rights norms and standards summarized above, as well as certain additional specific provisions concerning minority languages,<sup>1061</sup> some States have adopted particular legal provisions to establish national laws on the right to use minority languages.<sup>1062</sup>

As with the other grounds of discrimination discussed in the present chapter, States’ anti-discrimination laws should prohibit discrimination on the basis of language.

<sup>1057</sup> Human Rights Committee, *Ballantyne et al. v. Canada*, communications Nos. 359/1989 and 385/1989. See also Special Rapporteur on minority issues, “Language rights of linguistic minorities: a practical guide for implementation” (Geneva, OHCHR, 2017), pp. 31–34.

<sup>1058</sup> Human Rights Committee, *Raihan v. Latvia* (CCPR/C/100/D/1621/2007).

<sup>1059</sup> Human Rights Committee, *Diergaardt et al. v. Namibia* (CCPR/C/69/D/760/1997).

<sup>1060</sup> Special Rapporteur on minority issues, “Language rights of linguistic minorities: a practical guide for implementation”, pp. 5–6, which was developed on the basis of a report by the Independent Expert on minority issues in 2012 (A/HRC/22/49). The Special Rapporteur notes that these standards have been further elaborated in a variety of guiding documents and international standards, such as in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the three principles of language and education (UNESCO), the various recommendations of the Forum on Minority Issues on implementing the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, thematic commentary No. 3 by the Council of Europe’s Advisory Committee on the Framework Convention for the Protection of National Minorities, and the Oslo recommendations regarding the linguistic rights of national minorities (Organization for Security and Cooperation in Europe).

<sup>1061</sup> See, for example, article 17 (d) of the Convention on the Rights of the Child, under which States undertake to: “Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.”

<sup>1062</sup> See, for example, article 6 of Constitution of Italy, which states: “The Republic safeguards by means of appropriate measures linguistic minorities.” Such a constitutional provision has been supplemented by regional legislation aimed at providing incentives to promote local languages and cultures based on a regulatory framework established in Laws Nos. 482/1999 and 38/2001.

**HURST V. STATE OF QUEENSLAND**<sup>1063</sup>

Tiahna Hurst was a child who was “severely to profoundly” deaf who had developed sign language skills in Auslan (an indigenous Australian sign language) but was not able to utilize that language in the educational arrangements made for her by the State of Queensland, because the authorities were only willing to provide sign language support for her in English. Ms. Hurst contended that this requirement constituted indirect discrimination under the Disability Discrimination Act, 1992.

In court proceedings, Education Queensland acknowledged that it was obliged to make special provision for the education of persons with hearing impairments.<sup>1064</sup> The State of Queensland submitted, however, that Ms. Hurst could be taught in English and still maintain parity with her hearing peers.

On appeal, the Federal Court of Australia ruled that the denial of teaching in Auslan had a detrimental effect on Ms. Hurst and that she might ultimately be denied the opportunity to achieve her full potential. The Court held that a person with a hearing impairment would suffer a serious disadvantage if denied support of the kind requested. It thus ruled that the Disability Discrimination Act had been contravened.<sup>1065</sup>

Questions of language rights and discrimination raise a number of issues in practice. For example, there are areas of life in which it may be justified to differentiate on the basis of language (employment in public authorities, for example), with the effect that language is one of the grounds on which direct discrimination is more likely to be permissible than discrimination on other grounds. A further example of the complexities of discrimination in this area is that many linguistic minorities are also ethnic minorities, with the effect that linguistic differentiation may result in indirect discrimination on the basis of ethnicity.

One consistent area of concern is the question of education in minority languages. In some situations, the forced closure of minority language schools has been deemed to violate regional human rights law, as has non-provision of minority language education.<sup>1066</sup> However, in other cases, the maintenance of separate language schools has been found to result in de facto racial segregation: the European Court of Human Rights has ruled on at least one case in which separate facilities were provided pretextually on the basis of language in order to segregate on ethnic grounds.<sup>1067</sup>

In some scenarios, these arrangements can also create problems of non-integration. In practice, in some contexts, the maintenance of separate language schools at primary and secondary levels has resulted in significant emigration of minorities to pursue their studies at the tertiary level, often resulting in their permanent departure. In some cases, the maintenance of separate school facilities for different ethnolinguistic groups has been seen to exacerbate intercommunal tensions, in particular when this takes place in segregated environments.

There has been a move across the board towards the promotion of multilingual education, at least in part in an effort to resolve these tensions, but more importantly as part of efforts to ensure vibrant societies embracing diversity. Thus, for example, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has set out the following position on striking the balance:

1. UNESCO supports *mother tongue instruction* as a means of improving educational quality by building upon the knowledge and experience of the learners and teachers.

<sup>1063</sup> Federal Court of Australia, *Hurst v. State of Queensland* [2006] FCAFC 100 (28 July 2006).

<sup>1064</sup> It formulated a policy to that effect, which was entitled “Total Communication Policy”. The Total Communication Policy treated signed English as the preferred method of instruction for the development of communication and literacy skills. It was Education Queensland’s requirement that Ms. Hurst was taught in English (including signed English).

<sup>1065</sup> However, the Court stressed that the judgment did not establish that educational authorities must make provision for Auslan teaching or interpreting for any child who is deaf who desires it, or that Auslan is better than signed English as a method of teaching children who are deaf, or that an educational authority necessarily acts unreasonably if it declines to provide Auslan assistance. It regretted what it saw as the attempt to politicize the case by various interest groups.

<sup>1066</sup> European Court of Human Rights, respectively, *Catan and others v. Moldova and Russia*, Applications Nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012; and *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”*, Applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, Judgment (Merits), 23 July 1968.

<sup>1067</sup> European Court of Human Rights, *Oršuš and others v. Croatia*, Application No. 15766/03, Judgment, 16 March 2010.

2. UNESCO supports *bilingual* and/or *multilingual education* at all levels of education as a means of promoting both social and gender equality and as a key element of linguistically diverse societies.
3. UNESCO supports language as an essential component of *inter-cultural education* in order to encourage understanding between different population groups and ensure respect for fundamental rights.<sup>1068</sup>

The High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, in considering education in minority languages, has called for a balanced approach involving both protected minority rights and access to State or official languages.<sup>1069</sup> The High Commissioner has further held in this regard: “Multilingualism, and especially learning the language of persons with whom one interacts regularly, is collectively enriching and a tool for enhancing mutual understanding and tolerance.”<sup>1070</sup> In particular, in the field of education, the High Commissioner recommends:

States should respect the right of persons belonging to minorities to be taught their language or to receive instruction in this language, as appropriate, especially in areas inhabited by them traditionally or in substantial numbers. States should complement this by developing integrated and multilingual education systems at all levels designed to provide equal access, opportunities and educational outcomes for all pupils, regardless of their majority or minority background. Such integrated education should also include teaching all pupils about the diversity in their society.<sup>1071</sup>

Good practices include the establishment of multilingual teaching environments in which all children – including children from majority communities – receive education in both minority and majority languages.<sup>1072</sup>

## TEACHING AND LEARNING IN AND OF MINORITY LANGUAGES IN SLOVENIA

In its fourth opinion on the situation of minorities in Slovenia, the Council of Europe’s Advisory Committee on the Framework Convention for the Protection of National Minorities noted the following issues as concerns teaching and learning in and of minority languages, which elaborate some of the challenges in this area:

80. The languages of the Italian and Hungarian national minorities continue to be taught in the current framework of the education system. Concerns were expressed by the minority representatives, and acknowledged by the government, that, in practice, teachers lack the language skills needed for teaching in the minority language, due to inadequate training. According to the state report, several training projects to improve language knowledge and teaching methodology have been funded by the Ministry for Education, Science and Sport, with the support of European funds, with a view to remedying this problem. The self-governing communities have been in charge of the projects, which are meant to involve 150 teachers for the period 2016–2020. In addition, draft amendments to the legislation on education for the Italian and Hungarian minorities ... include the obligation for teachers to pass professional examinations also in the minority language. Finally, teachers from neighbouring countries can

<sup>1068</sup> UNESCO, “Education in a multilingual world: UNESCO education position paper” (Paris, 2003), p. 30. Available at <https://unesdoc.unesco.org/ark:/48223/pf0000129728>.

<sup>1069</sup> “While States have an obligation to protect and promote minority languages and the right of persons belonging to minorities to learn and use them, minorities share with the majorities the responsibility to participate in the cultural, social and economic life and in the public affairs of their wider society. This participation implies, for instance, that persons belonging to minorities should acquire adequate knowledge of the State or official language(s).” See High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, *The Ljubljana Guidelines on Integration of Diverse Societies* (The Hague, 2021), p. 52. Available at [www.osce.org/files/f/documents/0/9/96883.pdf](http://www.osce.org/files/f/documents/0/9/96883.pdf).

<sup>1070</sup> Ibid., p. 54.

<sup>1071</sup> Ibid., p. 55.

<sup>1072</sup> For example, the *Komşu* (neighbour) kindergarten, a private initiative enjoying State-funding in Kreuzberg, Berlin, had, as of the late 2000s, 125 children enrolled. Approximately, one third were Turkish, one third German and one third children from mixed relationships or marriages. In addition, approximately, half of the staff were Turkish-speakers. Each class/group included one Turkish-speaking and one German-speaking staff member. The *Komşu* was reportedly popular among various segments of the local community and places were much sought after. See Lucy Hottmann, “Turkish language provision in Berlin”, dissertation submitted to the University of Manchester (unpublished), 2008, p. 33.

also be hired temporarily to teach in schools. Persons belonging to the two national minorities and living outside the self-governing areas have the right to language education as an extra-curricular activity when the minimum of a five-student threshold is reached. While, according to information provided by the Office of National Minorities, in 2016, no such class was organised, Italian was taught as a foreign language outside of the ethnically mixed area to approximately 1 000 primary school pupils and 5 200 upper-secondary school students. The government was of the opinion that these classes were also attended by members of the Italian community.

81. Romani is taught within the framework of “Roma culture” as an optional subject in the 7th to the 9th grade of primary education, which is however offered in a limited number of schools because of the lack of qualified teachers and, reportedly, a lack of interest from Roma children, as well as through extracurricular activities, workshops and seminars. Romani classes are also organised in the Roma settlement kindergartens. Teaching is carried out by Roma assistants, whose qualifications are progressively improving to the required level for teaching. However, the Advisory Committee understands that the process of teaching Romani is also slowed down by the ongoing standardisation of the language. Whereas the authorities refer publicly to three languages, the Advisory Committee understands that there are several varieties of the Romani language in use; it remains unclear what progress has been made in the standardisation process and if that undertaking has been accepted by the Roma. A welcome development is, however, the publication of the ombudsperson’s leaflets in different Romani languages.
82. Finally, the Advisory Committee welcomes the fact that there is a system in place to ensure teaching of the first language of the new national communities and immigrants, with co-funding offered by the Ministry for Education, Science and Sport. In 2015-16, however, only 465 children attended these classes with co-funding of EUR 14 850 from the central authorities and combined support from other successor States of Yugoslavia for the relevant languages. Standard German is also offered as a foreign language in mainstream education, while the Gottscheer language, which is at risk of extinction, is taught on a voluntary basis for a small number of hours. In addition, there is uncertainty about whether teaching of the Gottscheer language will continue to be guaranteed under the agreement with Austria on culture ....

#### *Recommendations*

83. The Advisory Committee calls on the authorities to pursue their efforts to promote high-quality minority language training for teachers in Italian and Hungarian. They should also support the development of teaching materials in the different Romani languages, in close co-operation with Roma community representatives, as well as increase teaching in these languages.
84. In consultation with representatives of the other minority communities, they should also promote and ensure adequate conditions for the teaching and learning of other minority languages taking into consideration the needs and interests of the potential beneficiaries.<sup>1073</sup>

The Special Rapporteur on minority issues has set out that, “whatever model or approach is in place in relation to the use of a minority language as a medium of instruction, children must always have an opportunity to effectively learn the official or majority language where they live”.<sup>1074</sup>

The Special Rapporteur on minority issues has recommended that the following principles be generally applied in those countries that provide public education in minority languages:

1. *The principle of proportionality ....*
2. *The principle of active offer, where public education in minority languages is accessible and actively encouraged.*

<sup>1073</sup> Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, “Fourth opinion on Slovenia”, ACFC/OP/IV(2017)003 (2018), paras. 80–84 (footnotes omitted).

<sup>1074</sup> A/HRC/43/47, para. 66.



3. The principle of *inclusiveness*, by which all students are given an opportunity to learn the official language and about inter-cultural understanding.<sup>1075</sup>

In explaining the principle of proportionality, the Special Rapporteur on minority issues sets out that:

It is ... the potential negative impacts, such as disadvantage or exclusion, on individuals rather than languages that are considered in assessing the reasonableness of any language preference in the policies, support or services provided at all levels by state authorities and actions. A basic approach to determining reasonableness is to use as a starting point the principle of proportionality, as far as is practicable given local circumstances, in all language matters related to public services. Issues of disadvantage, exclusion and reasonableness are central to the basis for a proportional approach to the use of minority languages in a state's public services and other activities.<sup>1076</sup>

The Special Rapporteur on minority issues has noted that:

the proportionate use of the language of minorities in education, combined with quality teaching of the official language:

1. Is more cost-effective in the long term.
2. Reduces dropout and repetition rates.
3. Leads to noticeably better academic results, particularly for girls.
4. Improves levels of literacy and fluency in both the mother tongue and the official or majority language.
5. Leads to greater family and community involvement and support.
6. The use of minority languages in a state's administrative and other public activities thus involves fundamental issues of inclusiveness, participation, access, quality and effectiveness.<sup>1077</sup>

In its 2020 resolution on the rights of minorities, focusing in particular on the recommendations of the twelfth session of the Forum on Minority Issues, which addressed issues related to education, language and the human rights of minorities, the Human Rights Council urged States to take a range of measures on these issues, including:

- (a) Taking legislative, policy or practical measures to ensure that persons belonging to minorities have equal access to education of equal quality, delivered in an inclusive environment that fosters greater achievement for all;
- (b) Considering ratifying and acceding and adhering to relevant international and regional human rights instruments that protect and promote the rights of persons belonging to linguistic minorities, including those pertaining to the right to education;
- (c) Providing, wherever possible, persons belonging to minorities with adequate opportunities to learn their own language or to have instruction in their own language, while ensuring that minorities also have access to instruction in official languages;
- (d) Considering minority language education in the implementation of Goal 4 of the Sustainable Development Goals, aimed at ensuring inclusive and equitable quality education and promoting lifelong learning opportunities for all;
- (e) Promoting educational environments that respect linguistic and cultural diversity and freedom from discrimination, stigmatization, hatred and hate speech towards persons belonging to minorities, including through public education and information campaigns and by providing training for educators;

<sup>1075</sup> Special Rapporteur on minority issues, "Language rights of linguistic minorities: a practical guide for implementation", p. 18. See also A/HRC/43/47, para. 47.

<sup>1076</sup> Special Rapporteur on minority issues, "Language rights of linguistic minorities: a practical guide for implementation", p. 13.

<sup>1077</sup> Ibid., p. 14 (footnotes omitted).

- (f) Refraining from the forced assimilation of persons belonging to minorities through, inter alia, the prohibition of education in or the teaching of the mother tongue of minorities;
- (g) Creating a safe and enabling environment for civil society representatives working on the human rights of persons belonging to minorities in language matters and monitoring the implementation of States' obligations towards ensuring access to, education in and the teaching of minority languages;
- (h) Promoting access of persons belonging to minorities to administrative, legal and health services by considering offering them also in minority languages;
- (i) Ensuring that education is provided in sign language for the deaf community where this is practicable;
- (j) Developing and financing programmes for the development and training of minority language teachers, and promoting such programmes among minority communities;
- (k) Allocating the resources necessary to promote access to education in and the teaching of minority languages;
- (l) Ensuring that educational curricula do not include materials that stereotype minorities, including women and girls belonging to minorities, on the basis of their ethnicity or their gender;
- (m) Taking all measures necessary to ensure access to minority language education and teaching for women and girls of minority communities, where applicable, considering the multiple and intersecting forms of discrimination, marginalization and exclusion to which they are often subjected because of their gender and minority status.<sup>1078</sup>

Issues surrounding the language rights of minorities have proven sufficiently complex that the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe has provided particular guidance on aspects of these issues.<sup>1079</sup> Throughout this and other guidance, the High Commissioner

stresses the importance of the following elements in achieving good governance and promoting integration:

- recognizing, protecting, and promoting the identity of persons belonging to minorities
- allowing minorities the opportunity to participate effectively in public life, including the political decision-making processes
- providing minorities with access to a fair share of public goods, including economic opportunity
- sensitivity to the linguistic and educational needs of minorities, which are closely connected with the right of each individual to develop his/her identity.<sup>1080</sup>

## V. GENUINE AND EFFECTIVE MINORITY PARTICIPATION AND THE BAN ON DISCRIMINATION

Article 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities sets out obligations and requirements regarding minority participation. These include, at article 2 (2), that “persons belonging to minorities have the right to participate effectively in cultural, religious, social,

<sup>1078</sup> Human Rights Council resolution 43/8, para. 6.

<sup>1079</sup> High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, “The Hague recommendations regarding the education rights of national minorities & explanatory note” (The Hague, 1996) ([www.osce.org/hcnm/hague-recommendations](http://www.osce.org/hcnm/hague-recommendations)); “The Oslo recommendations regarding the linguistic rights of national minorities & explanatory note” (The Hague, 1998) ([www.osce.org/hcnm/oslo-recommendations](http://www.osce.org/hcnm/oslo-recommendations)); and, in a move towards stressing both minority rights protection and minority access to mainstream goods, services and inclusion, *The Ljubljana Guidelines on Integration of Diverse Societies*.

<sup>1080</sup> High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, “Pamphlet No. 9 of the UN Guide for Minorities” (2001), p. 10. Available at [www.ohchr.org/Documents/Publications/GuideMinorities9en.pdf](http://www.ohchr.org/Documents/Publications/GuideMinorities9en.pdf).

economic and public life”, as well as, at article 2 (3), that “persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation”. The Human Rights Committee has noted that the enjoyment of the rights guaranteed by article 27 of the International Covenant on Civil and Political 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”.<sup>1081</sup>

Various questions arise at the intersection of the rights to consultation and participation and the right to non-discrimination. Can, for instance, a community agree to racially segregated housing and what is the status of consultations that arrive at such a conclusion? Can a community ask the State not to intervene to protect women and girls from harmful practices, such as child marriage, on the basis of the community right to participation in decisions that affect it?

As the Human Rights Committee has set out, positive measures taken to realize the rights of minorities provided by article 27 of the International Covenant on Civil and Political Rights “must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population”.<sup>1082</sup> More broadly, the Committee has also noted “that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant”.<sup>1083</sup>

Thus, any measures regarding consultation taken by the State – or measures taken pursuant to such consultation – cannot result in discrimination. It is both illegitimate to pose questions that are discriminatory while purporting to carry out “consultation with affected groups” and to agree to discriminatory actions or omissions grounded in the logic of – or with reference to – minority community participation. Similarly invalid are “yes-no” consultations, in which communities “participate” by choosing between several bad options. As noted above, discrimination can be both intentional and unintentional – discrimination is a matter of fact not of motive and, as such, consent obtained through consultation is not a justification for acts that are discriminatory.

Equally, as discussed above, the Human Rights Committee has noted that the rights provided under article 27 “do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law”.<sup>1084</sup> Based on the Committee’s logic in its general comment No. 23 (1994), the same standard is applicable to discrimination on any grounds. As this makes clear, the State cannot acquiesce to discrimination within a minority community on the basis of consultation or participation – to do so would be a failure of its obligation to ensure equal enjoyment of the right to non-discrimination.

## MINORITY RELOCATION AND DISCRIMINATION IN SERBIA

In Serbia, property developers in Belgrade, working with the city authorities, sought the eviction of Roma living in slum housing in prime real estate areas in the city centre. Following civic and international mobilization to stop the evictions, the authorities in Belgrade agreed to a rehousing programme funded by the European Union and bilateral donors. The various programmes, however, placed the relocated Roma in concentrated housing on the outskirts of the city, frequently in tension with local majority communities or with other Roma communities into which the evicted Roma were moved. Consultation with the affected groups avoided offering integrated housing as an option; often it simply raised questions about the prioritization of persons to be moved, in some cases giving rise to internal community conflict.

The specific context was one of very high levels of antipathy towards Roma; as the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context noted: “the disproportionate number of evictions of Roma and

<sup>1081</sup> Human Rights Committee, general comment No. 23 (1994), para. 7.

<sup>1082</sup> Ibid., para. 6.2.

<sup>1083</sup> Ibid., para. 8.

<sup>1084</sup> Human Rights Committee, general comment No. 28 (2000), para. 32.

the authorities' failure to provide basic services or to guarantee legal security of tenure for residents in settlements reflect a stigmatization of and discrimination against Roma".<sup>1085</sup> As a result, the Special Rapporteur commented:

In April 2012, the previous mandate holder issued an urgent appeal with regard to the eviction of approximately 240 households, mainly Roma, from the Belvil settlement in Belgrade. Although they were relocated to four settlements in the outskirts of the city, the living conditions in the temporary resettlement sites (known as "container settlements") failed to meet international standards, the location of the sites was not ideal, no access was given to public services, and residents had not been adequately consulted or provided with information. In its reply to the appeal, the Government pointed out that consultations had indeed been held, families had agreed to an allocation of mobile housing units with the Secretariat for Social Welfare, and that voluntary relocation from the settlement had been conducted without recourse to force. ... The Special Rapporteur points out that, even at the time of resettlement, the temporary arrangements were not compliant with the obligation to ensure adequate housing. The fact that residents continue to inhabit temporary housing more than three years later renders the situation even more problematic, and cannot be regarded as acceptable under international human rights law.<sup>1086</sup>

## VI. RIGHTS OF INDIGENOUS PEOPLES

As noted above, while indigenous peoples are recognized by the Human Rights Committee as falling within the ambit of the provision on minority rights in article 27 of the International Covenant on Civil and Political Rights, the adoption in 2007 of the United Nations Declaration on the Rights of Indigenous Peoples sets indigenous peoples apart from other minorities as a result of the considerably strengthened rights recognized in the Declaration. The Human Rights Committee has subsequently recognized the Declaration as demonstrative of indigenous rights, referencing the Declaration in its analysis of indigenous rights and interpreting article 27 of the Covenant in the light of the Declaration itself.<sup>1087</sup>

The rights protected by the Declaration include collective rights to self-determination (art. 3); autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (art. 4); land rights (noted below); and free, prior and informed consent as "a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities" (arts. 10–11, 19, 28–29 and 32).<sup>1088</sup> These provisions have no analogues in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

The Expert Mechanism on the Rights of Indigenous Peoples has noted that, under the United Nations Declaration on the Rights of Indigenous Peoples, the rights of indigenous peoples are both collective and individual:

**Indigenous peoples have the right to enjoy, as a collective and as individuals, all of the human rights and fundamental freedoms guaranteed in international human rights instruments, equally with all other peoples and individuals. Respect for indigenous peoples' self-determination and their customary land tenure systems necessitates recognition of their collective ownership of lands, territories and resources. ... The institution of individual, as opposed to collective, land rights and the vesting of power over lands customarily owned by indigenous peoples in the State undermine these systems.**<sup>1089</sup>

<sup>1085</sup> A/HRC/31/54/Add.2, para. 44.

<sup>1086</sup> Ibid., paras. 45–46.

<sup>1087</sup> Human Rights Committee, *Sanila-Aikio v. Finland* (CCPR/C/124/D/2668/2015); and *Käkkäläjärvi et al. v. Finland* (CCPR/C/124/D/2950/2017).

<sup>1088</sup> A/HRC/39/62, para. 14.

<sup>1089</sup> A/HRC/45/38, paras. 6–7.

The Expert Mechanism on the Rights of Indigenous Peoples has also noted that collective rights are “at the heart of international and regional jurisprudence”, citing the case law of both the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights.<sup>1090</sup>

In 2020, the Expert Mechanism on the Rights of Indigenous Peoples carried out a comprehensive study on the right to land. It stated that:

**For indigenous peoples, land is not only, or even primarily, an economic asset. It is the defining element of their identity and culture and their relationship to their ancestors and future generations. Access to lands, territories and resources is obtained through community membership, not the free market. For indigenous peoples, land rights are often intergenerational and thus carry an obligation of stewardship for the benefit of present and future members and as the basis for their continued existence as a people.**<sup>1091</sup>

The United Nations Declaration on the Rights of Indigenous Peoples deals extensively with the rights of indigenous peoples with respect to land. Article 25 provides that indigenous people have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands and resources. Article 26 (1) provides that indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied, used or acquired; article 26 (2) provides that indigenous peoples have the right to own, develop, control and use their traditional lands, territories and resources; while article 26 (3) provides that States shall give legal recognition and protection to indigenous peoples’ lands, territories and resources while respecting their customs, traditions and land tenure systems. Article 27 requires States to establish a “fair, independent impartial, open and transparent process”, in cooperation with indigenous peoples, to recognize and adjudicate indigenous peoples’ rights to their lands, territories and resources. Indigenous peoples’ rights to land are also grounded in articles 46 (which provides that the Declaration shall not be interpreted as implying, authorizing or encouraging any action that would “dismember or impair” the territorial integrity of States and that the rights set forth in the Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations) and 22 (requiring particular attention to be paid to the rights of indigenous elders, women, youth, children and persons with disabilities). These rights have been repeatedly recognized in decisions in individual cases by the treaty bodies,<sup>1092</sup> as well as within the African and Inter-American human rights systems.<sup>1093</sup> In addition, they are the subject of extensive jurisprudential recognition by national courts.<sup>1094</sup>

At the regional level, the African Court on Human and Peoples’ Rights, in its 2017 landmark judgment concerning the rights of the Ogiek peoples in Kenya, held that the Ogiek were an indigenous people and, according to the Constitution of Kenya, as such should be afforded special protection.<sup>1095</sup> The Court noted that their “request for recognition as a tribe goes back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933”.<sup>1096</sup> According to domestic law, in Kenya only peoples who had tribal status were given land as “special reserves” or “communal reserves”. The Court accordingly held that, if other groups that are in the same category of communities as the Ogiek – which lead a traditional way of life, with cultural distinctiveness highly dependent on the natural environment – were granted recognition of

<sup>1090</sup> Ibid., para. 7.

<sup>1091</sup> Ibid., para. 5.

<sup>1092</sup> See, for example, Human Rights Committee, *Anton v. Algeria* (CCPR/C/88/D/1424/2005).

<sup>1093</sup> See, for example, African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, communication No. 276/2003, Decision, 11–25 November 2009; Inter-American Court of Human Rights, *Kaliña and Lokono Peoples v. Suriname*, Judgment, 25 November 2015; Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, Judgment, 17 June 2005; Inter-American Court of Human Rights, *Sawhoyamaza Indigenous Community v. Paraguay*, Judgment, 29 March 2006; and Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* (OEA/Ser.L/V/II, Doc. 56/09) (2009).

<sup>1094</sup> See, for example, High Court of Australia, *Northern Territory v. Mr. A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples*, Judgment, 19 June 2019; High Court of Guyana, *Thomas and Arau Village Council v. Attorney General of Guyana and another*, Judgment, 30 April 2009; and Supreme Court of the United States, *Carcieri v. Salazar*, 555 U.S. 379 (2009).

<sup>1095</sup> African Court on Human and Peoples’ Rights, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Application No. 006/2012, Judgment, 26 May 2017.

<sup>1096</sup> Ibid., para. 141.



their status and the resultant rights, the refusal of Kenya to recognize and grant the same rights to the Ogiek violated article 2 of the African Charter on Human and Peoples' Rights (non-discrimination).<sup>1097</sup>

The jurisprudence of the Inter-American Court of Human Rights has similarly affirmed the rights of indigenous peoples. For instance, in the *Awes Tingni* case, the Court held that Nicaragua had failed to adopt adequate domestic legal measures to allow delimitation, demarcation and titling of the communal lands claimed by the Awes Tingni community, nor had it processed the *amparo* remedy filed by members of the community within a reasonable time. As a result, the Court found a violation of the right to judicial protection (article 25 of the American Convention on Human Rights) and of the right to property (art. 21), in connection with the obligation to respect rights without any discrimination (art. 1 (1)).<sup>1098</sup> Similarly, in the *Sawhoyamaya Indigenous Community v. Paraguay* case, the Court observed that a failure to recognize indigenous peoples' collective property rights to their ancestral lands in the same manner as other forms of property constituted a violation of the right to property (art. 21), in connection with the obligation to respect rights without any discrimination (art. 1 (1)).<sup>1099</sup> As the ancestral lands of the Sawhoyamaya community had been expropriated, the Court also found a violation of the right to life (art. 4) because the community members had been deprived of their traditional means of livelihood and forced to live in extreme poverty, without access to basic essential services, including water, food, education and health services.<sup>1100</sup>

### THE CONGO: NATIONAL LAW SECURING THE RIGHTS OF INDIGENOUS PEOPLES

In 2011, the Congo adopted Law No. 5-2011 on the Promotion and Protection of the Rights of Indigenous Peoples.<sup>1101</sup>

The law specifically targets the disadvantaged conditions of indigenous peoples and promotes their collective and individual rights. It prohibits discrimination against indigenous persons (art. 2) and guarantees them a range of civil and political rights, including equal access to justice (art. 10). It affirms the right of indigenous peoples to recourse to their own customs for the resolution of conflicts (art. 11) and provides for recognition of indigenous villages as administrative entities (art. 12).

Specified economic, social and cultural rights are guaranteed: title 6 of the law addresses labour rights and provides for a framework for the protection of the right to work and a number of positive measures to ensure the enjoyment of those rights. Article 27 prohibits any form of discrimination against indigenous peoples, in respect of access to employment, conditions of work, training opportunities, remuneration and social security. The forced labour or enslavement of indigenous peoples is expressly forbidden and punitive measures are imposed for those found in breach of this prohibition (art. 29).

Title 3 of the law recognizes the right of indigenous peoples to maintain their own culture (arts. 13–14), guarantees their intellectual property rights in respect of traditional knowledge, including the right to benefit from the use thereof (art. 15), and provides protection for cultural and spiritual objects and sacred sites (art. 16). Indigenous traditional pharmacopoeias are also protected (art. 24), and any attempt to limit the ability of indigenous peoples to practise their traditional medicine is forbidden, with punitive measures established for breach of this prohibition (art. 25).

Title 4 of the law addresses education and guarantees discrimination-free access to education (art. 17). The State commits to implementing educational programmes that are appropriate to the specific needs and lifestyles of indigenous peoples (art. 19). Article 18 forbids any form of instruction or information that disparages the cultural identities, traditions, history or aspirations of indigenous peoples. Article 21 makes clear that the State must take special measures to ensure that indigenous children benefit from financial assistance at all levels within the education system.

<sup>1097</sup> Ibid., para. 142.

<sup>1098</sup> Inter-American Court of Human Rights, *Mayagna (Sumo) Awes Tingni Community v. Nicaragua*, Judgment, 31 August 2001, paras. 137, 139 and 155.

<sup>1099</sup> Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, 29 March 2006, paras. 120 and 144.

<sup>1100</sup> Ibid., para. 178.

<sup>1101</sup> The following is a summary of A/HRC/18/35/Add.5, paras. 40–48.



Also guaranteed is access on a non-discriminatory basis to health care and all other social services (art. 22). The law stipulates that the centres delivering these services must be adapted to indigenous peoples' needs in the areas in which they live (art. 23 (1)); it provides for the participation of indigenous health-care workers in integrated primary health-care services, and the organization by the State of vaccination programmes and reproductive health-awareness campaigns (art. 23 (2)). The law further provides for the specific health needs of indigenous women and children to be taken into account (art. 23 (3)).

The law also provides protection for the rights of indigenous peoples to lands and resources. It states that indigenous peoples, collectively and individually, have a right to own, possess, access and use the lands and natural resources that they have traditionally used or occupied for their subsistence, pharmacopeia and work (art. 31). The State is obliged to facilitate delimitation of these lands on the basis of indigenous customary rights, and has a duty to ensure legal recognition of the title according to customary rights, even in cases in which indigenous peoples did not previously possess any kind of formal title (art. 32).

Furthermore, the law provides for consultations regarding measures that affect indigenous lands or resources or that entail the creation of protected areas that affect indigenous peoples' ways of life (art. 39). This provision complements article 3 of the law, which prescribes consultation with indigenous peoples before "consideration, formulation or implementation of any legislative, administrative or development programmes or projects that may affect them directly or indirectly". Article 3 also outlines the basic characteristics of the required consultations in terms that generally comport with international standards, and further provides for the procedures for consultation and participation of indigenous peoples established by a Council of Ministers decree. Article 3 (6) states that the consultations must be carried out in good faith, without pressure or threat, and with a view to obtaining the free, prior and informed consent of the concerned indigenous peoples.





## **PART FOUR:**

# **DISCRIMINATORY VIOLENCE AND HATE CRIME**

## SUMMARY

- International human rights law requires explicit recognition of a bias motive in situations in which violent or otherwise criminal acts have been carried out for reasons related to one or more grounds of discrimination.
- Criminal and misdemeanour law should provide for recognition of a bias motive for any crime or misdemeanour animated by any ground recognized under international law. This recognition can be done either by designating specific criminal law provisions related to discriminatory violence or hate crime or by adding qualifying provisions on bias motive to criminal law provisions related to specific criminal acts. If the latter approach is taken, it is important that bias motive is recognized in relation to all possible relevant criminal and misdemeanour acts.
- The list of grounds set out under criminal law must, of necessity be closed (i.e. not include the category “or other, similar status”), because of the requirement of foreseeability in criminal law.

To meet their commitments and international law obligations to eliminate “all forms of discrimination” States must criminalize discriminatory violence and other bias-motivated acts that are criminal in nature. Discriminatory violence and hate crime are treated differently from other forms of discrimination, which are almost always dealt with by way of civil and administrative, rather than criminal, law.<sup>1102</sup> Due to the unique procedural and technical considerations that apply to matters of criminal law, discriminatory violence and hate crime are ordinarily addressed in specific provisions of a State’s criminal law. The prohibition of these acts remains central to States’ obligations to respect, protect and fulfil the right to non-discrimination and ensure effective remedy to victims. Thus, a basic description of these acts and their treatment under international law is provided here.

The term “discriminatory violence” refers to all violent acts that occur based on a person’s protected status. The requirement to criminalize discriminatory violence is firmly established under international law.

This prohibition is made explicit in article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, which requires States to “declare an offence punishable by law ... all acts of violence” against persons on the basis of their race, colour or ethnic origin. Likewise, article 16 (1) of the Convention on the Rights of Persons with Disabilities requires States to take all necessary measures “to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects”. While the Convention on the Elimination of All Forms of Discrimination against Women makes no explicit reference to discriminatory violence, the respective Committee has devoted significant attention to gender-based violence against women, which it has defined as “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men” and so falls within the scope of article 1 of the Convention.<sup>1103</sup> As set out below, the Committee has elaborated on the obligation of States to “ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduce, without delay, or strengthen, legal sanctions commensurate with the gravity of the offence, as well as civil remedies”.<sup>1104</sup>

The right to “security of person” under article 9 (1) of the International Covenant on Civil and Political Rights prohibits all forms of violence, including on discriminatory grounds, such as sexual orientation, gender identity and disability.<sup>1105</sup> The Human Rights Committee has confirmed that the necessary response to such violence

<sup>1102</sup> The Committee on the Elimination of Racial Discrimination has recommended the use of criminal sanctions in some cases. See Committee on the Elimination of Racial Discrimination, *Lacko v. Slovak Republic* (CERD/C/59/D/11/1998).

<sup>1103</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992), paras. 1 and 6; and general recommendation No. 35 (2017), para. 1.

<sup>1104</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017), para. 29 (a).

<sup>1105</sup> Human Rights Committee, general comment No. 35 (2014), para. 9.

includes the “enforcement of criminal laws”.<sup>1106</sup> The Committee on Economic, Social and Cultural Rights has addressed violence as a part of the right to health under article 12 of the Covenant.<sup>1107</sup>

## GENDER-BASED VIOLENCE

Gender-based violence is recognized as a form of discrimination that requires a specific, robust and comprehensive legislative response. In its general recommendation No. 19 (1992), the Committee on the Elimination of Discrimination against Women defines gender-based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately”.<sup>1108</sup> In its subsequent general recommendation No. 35 (2017), the Committee noted that such violence can take “multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty”.<sup>1109</sup>

Under the Convention on the Elimination of All Forms of Discrimination against Women, States are required to take positive measures to eliminate all forms of violence against women and are responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.<sup>1110</sup> Such measures should include the use of criminal sanctions in situations in which the “physical, sexual or psychological integrity” of a woman is violated; alongside civil remedies.<sup>1111</sup> The Committee on the Elimination of Discrimination against Women has deemed a number of States to be in violation of the provisions of the relevant Convention in cases concerning rape,<sup>1112</sup> domestic violence,<sup>1113</sup> coercive sterilization<sup>1114</sup> and other forms of gender-based violence, and it has issued, in all of those decisions, very detailed instructions on remedy. Regional tribunals have followed the Committee’s jurisprudence, *inter alia*, by identifying systemic discrimination in the response by authorities to gender-based violence.<sup>1115</sup>

In recent decades, regional tribunals have, in a range of particular cases and scenarios, identified discrimination in relation to the right to life, the ban on cruel and degrading treatment or punishment, and the right to private and family life in cases concerning bias-motivated violence on grounds of race or ethnicity,<sup>1116</sup> disability,<sup>1117</sup> and sexual orientation or gender identity.<sup>1118</sup>

<sup>1106</sup> Ibid.

<sup>1107</sup> Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), paras. 10, 21, 35 and 51.

<sup>1108</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992), para. 6.

<sup>1109</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017), para. 14 (footnotes omitted).

<sup>1110</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992), paras. 4 and 9; and general recommendation No. 28 (2010), para. 17. See also Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria* (CEDAW/C/49/20/2008), para. 9.3; and *Jallow v. Bulgaria* (CEDAW/C/52/D/32/2011), para. 8.4.

<sup>1111</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017), para. 29 (a).

<sup>1112</sup> Committee on the Elimination of Discrimination against Women, *Vertido v. Philippines* (CEDAW/C/46/D/18/2008).

<sup>1113</sup> Committee on the Elimination of Discrimination against Women, *A.T. v. Hungary*, communication No. 2/2003.

<sup>1114</sup> Committee on the Elimination of Discrimination against Women, *A. S. v. Hungary*, communication No. 4/2004.

<sup>1115</sup> See, for instance, European Court of Human Rights, *Opuz v. Turkey*, Application No. 33401/02, Judgment, 9 June 2009; and *Volodina v. Russia*, Application No. 41261/17, Judgment, 9 July 2019.

<sup>1116</sup> Inter-American Court of Human Rights, *Acosta Martínez et al. v. Argentina*, Judgment, 31 August 2020, paras. 96–103; Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras* (OEA/Ser.L/V/II, Doc. 42/15) (2015), para. 420; European Court of Human Rights, *Kurić and others v. Slovenia*, Application No. 26828/06, Judgment, 26 June 2012, paras. 386–396; European Court of Human Rights, *Stoica v. Romania*, Application No. 42722/02, Judgment, 4 March 2008, para. 117; and African Commission on Human and Peoples’ Rights, *Malawi African Association and others v. Mauritania*, Decision, 11 May 2000, para. 131.

<sup>1117</sup> European Court of Human Rights, *Cînta v. Romania*, Application No. 3891/19, Judgment, 18 February 2020, paras. 43–81; European Court of Human Rights, *Enver Şahin v. Turkey*, Application No. 23065/12, Judgment, 30 January 2018, paras. 67–69; Inter-American Court of Human Rights, *Impact of the Friendly Settlement Procedure* (OEA/Ser.L/V/II, Doc. 45/13) (2013), paras. 204–205; and African Commission on Human and Peoples’ Rights, *Purohit and Moore v. the Gambia*, communication No. 241/2001, Decision, 15–29 May 2003, para. 61.

<sup>1118</sup> European Court of Human Rights, *Sabalić v. Croatia*, Application No. 50231/13, Judgment, 14 January 2021, paras. 115–116; European Court of Human Rights, *X and others v. Austria*, Application No. 19010/07, Judgment, 19 February 2013, paras. 100–115; Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*; and African Commission on Human and Peoples’ Rights, resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (ACHPR/Res.275(LV)2014).

At its most severe, discriminatory violence can amount to torture, or cruel, inhuman or degrading treatment.<sup>1119</sup> This is clear on the face of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which lists discrimination as a recognized purpose under article 1 (1) of the Convention.<sup>1120</sup> Both the Committee against Torture<sup>1121</sup> and regional tribunals<sup>1122</sup> have ruled on cases that they deemed sufficiently severe to meet this high standard, including cases involving racially motivated pogroms against minorities.<sup>1123</sup> Discrimination may also form the basis of crimes prohibited under international humanitarian law and customary international law, such as genocide and crimes against humanity. Given the especially serious nature of these acts, they are subject to a dedicated international legal regime, which is beyond the scope of the present guide.<sup>1124</sup>

### RIGHT TO RECOGNITION OF A BIAS MOTIVE IN DISCRIMINATORY VIOLENCE

On 14 November 2013, Salifou Belemvire, originally from Burkina Faso, was the subject of an unprovoked attack by S.I. while riding on public transport in Chisinau. While Mr. Belemvire was talking on a mobile telephone, S.I. punched him without warning and proceeded to call him a number of racist epithets.

Formal charges of hooliganism under article 287 (1) of the Criminal Code were subsequently filed against S.I. Under Moldovan law, “hooliganism” is defined as action carried out without any form of animus or motivation.

Mr. Belemvire participated in the investigation and legal proceedings first as a victim and subsequently as a recognized injured party. Through his legal representative, he endeavoured repeatedly and at multiple stages of the proceedings to have the prosecutor’s office or courts reclassify the act as one of several crimes that would explicitly recognize the discriminatory character of the assault. He argued before domestic tribunals and before the prosecutor’s office that international law required that racially discriminatory acts be recognized as such. He argued that his right to effective remedy from racial discrimination would not be respected if the criminal conviction did not recognize explicitly that the assault he had suffered had been motivated by racial animus. He further argued, citing regional and international law, that violent racist acts were “particularly invidious” and thus that it was particularly important for society that the discriminatory character of the assault he had suffered be explicitly recognized. These arguments were systematically disregarded by courts and the prosecutor’s office, with the effect that the prosecution continued proceedings under article 287 (1).

On 22 October 2014, the Supreme Court of Justice of the Republic of Moldova rendered the final domestic judgment upholding the lower court’s conviction of S.I. and his sentence of 18 months of imprisonment.

Mr. Belemvire then submitted a complaint to the Committee on the Elimination of Racial Discrimination, in which he contended that the Moldovan authorities had violated a number of his rights under the International Convention on the Elimination of All Forms of Racial Discrimination, by refusing to classify the crime in a manner that would recognize its discriminatory character.

Ruling on the case, the Committee on the Elimination of Racial Discrimination held that article 6 of the relevant Convention on the right to an effective remedy had been violated. The Committee held that the investigation into the crime as conducted by the State party was incomplete without considering the discriminatory motive of the defendant: “The State party should have included that aspect of the crime,

<sup>1119</sup> See, for instance, Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017), para. 16.

<sup>1120</sup> For further discussion on this point, see Equal Rights Trust, *Shouting Through the Walls: Discriminatory Torture and Ill-Treatment – Case Studies from Jordan* (London, 2017), pp. 9–27.

<sup>1121</sup> Committee against Torture, *Calfunao Paillalef v. Switzerland* (CAT/C/68/D/882/2018), paras. 8.3–8.4 and 8.10.

<sup>1122</sup> European Court of Human Rights, *Aghdgomelashvili and Japaridze v. Georgia*, Application No. 7224/11, Judgment, 8 October 2020, paras. 35 and 42–50; Inter-American Court of Human Rights, *Azul Rojas Marín et al. v. Peru*, Judgment, 12 March 2020, paras. 163–167; and African Commission on Human and Peoples’ Rights, general comment No. 4 (2017), para. 13.

<sup>1123</sup> Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia* (CAT/C/29/D/161/2000); and European Court of Human Rights, *Moldovan and others v. Romania*, Application Nos. 41138/98 and 64320/01, Judgment No. 2, 12 July 2005.

<sup>1124</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, “Publications and resources”. Available at [www.un.org/en/genocideprevention/publications-and-resources.shtml](http://www.un.org/en/genocideprevention/publications-and-resources.shtml).



‘since any racially motivated offence undermines social cohesion and society as a whole’ and often inflicts greater individual and societal harm. Furthermore, the State party’s refusal to investigate the racial motive also deprived the petitioner of his right to an ‘effective protection and remedies against the reported act of racial discrimination’.” The Committee recommended that the State party grant Mr. Belemvire adequate compensation for the material and moral injury caused by the violation of the Convention, and further urged that the State party review its policy and procedures concerning the prosecution of cases of alleged racial discrimination or racially motivated violence, in the light of its obligations under the Convention.<sup>1125</sup>

The term “hate crime” applies to forms of behaviour prohibited under the criminal law that are bias motivated. In some understandings, hate crime includes not only acts of discriminatory violence as described above, but also acts such as the destruction of property on racial or other discriminatory grounds. Hate crimes require recognition and remedy under criminal law. The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities have all criticized the absence of comprehensive hate crime prohibitions in the legal frameworks of States.<sup>1126</sup> The Committee on the Elimination of Racial Discrimination has recently ruled that criminal punishment that lacks explicit recognition of a bias motive violates article 6 of the relevant Convention on the right to effective remedy for discrimination.<sup>1127</sup>

States have a positive obligation to explicitly recognize bias motivation of criminal acts on the basis of all grounds of discrimination recognized under international law as set out above. However, the need to ensure foreseeability in the criminal law requires that the list of grounds in criminal law provisions governing hate crimes must be closed (i.e. not include the category “or other, similar status”). This contrasts with the requirement for comprehensive anti-discrimination law to have an open-ended list of grounds.

There is no consensus as to whether it is better for (a) criminal codes to include stand-alone provisions on hate- or bias-motivated criminal acts or, alternately, (b) provisions governing particular criminal acts (assault, murder etc.) to include clauses recognizing that they are aggravated if carried out for reasons of bias or related animus. In some States, recognition of hate- or animus-motivated bias informs the judgment at the point of sentencing. What is beyond question, however, is that States must ensure that bias motivation is taken into account in the penalization of all crimes and misdemeanours and that a finding of such motivation results in an enhanced penalty.<sup>1128</sup>

<sup>1125</sup> Committee on the Elimination of Racial Discrimination, *Belemvire v. Republic of Moldova* (CERD/C/94/D/57/2015), paras. 7.3–10 (footnotes omitted).

<sup>1126</sup> CCPR/C/EST/CO/4, para. 12; CERD/C/QAT/CO/17-21, para. 13; CEDAW/C/SVK/CO/5-6, para. 40; E/C.12/BIH/CO/2, para. 11; and CRPD/C/GBR/CO/1, para. 39 (b).

<sup>1127</sup> Committee on the Elimination of Racial Discrimination, *Belemvire v. Republic of Moldova* (CERD/C/94/D/57/2015), paras. 7.3–8.

<sup>1128</sup> The European Union requires that national criminal law in its member States guarantee that bias is accounted for in relation to all crime. The European Commission has initiated infringement proceedings against member States for failing to do so: “The Belgian and Bulgarian legal frameworks do not ensure that the racist and xenophobic motivation is taken into account by national courts as an aggravating factor for all crime committed, therefore failing to ensure hate crimes are effectively and adequately prosecuted.” See European Commission, “February infringements package: key decisions”, 18 February 2021. Available at [https://ec.europa.eu/commission/presscorner/detail/en/INF\\_21\\_441](https://ec.europa.eu/commission/presscorner/detail/en/INF_21_441).





## **PART FIVE:**

# **DISCRIMINATION AND EXPRESSION**

## SUMMARY

- Expression and communication can be components of conduct giving rise to ground-based harassment, a proscribed act within the law on the prohibition of discrimination.
- Expression and communication also play other roles in anti-discrimination law, including, potentially, as evidence of intention or motive, as well as in cases concerning an instruction to discriminate.
- States must prohibit incitement to violence, discrimination and hostility or hatred on all grounds recognized under international law, including, but not limited to, age, disability, gender expression and gender identity, nationality, race or ethnicity, religion, sex, sex characteristics and sexual orientation.
- International law also requires that States condemn all propaganda and all organizations that are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or that attempt to justify or promote racial hatred and discrimination in any form.
- Prohibition does not necessarily mean criminalization. States should distinguish between expression that requires criminalization, expression that requires civil or administrative penalties and expression that merits other forms of response.
- States should ensure that the application of measures to combat hate speech does not result in any form of discrimination against any person or group.
- Hate speech should, inter alia, be addressed with positive interventions: education, awareness-raising, support for victims to enable counter-speech and the dissemination of positive narratives, including by public information campaigns with positive, diversity-celebratory messaging.

One common area of inquiry by lawmakers and policymakers working on laws prohibiting discrimination concerns the line between rules concerning hate speech, on the one hand, and anti-discrimination law, on the other.

The relationship between the right to non-discrimination and acts of expression is a complex, multifaceted one. As a broad matter, there is a tendency to try to create a categorization involving three purportedly isolated domains: (a) thought; (b) expression; and (c) action. As set out below, the first area – thought – is excluded absolutely from the ambit of the law. What occurs in the mind is absolutely protected. In some conceptions of anti-discrimination law, there is an effort to identify a high wall between the second two elements – i.e. between expression, on the one hand, and action, on the other. In this simplified description, anti-discrimination law covers different treatment or impact (i.e. the third category) and not the second category, i.e. expression. As will be seen, this is an oversimplification. Expression plays a role in a number of areas of anti-discrimination law. The current chapter explores some of these areas and then examines more broadly matters related to hate speech; incitement to hostility, discrimination or violence; and related questions seen through the prism of the right to freedom of expression. These include recent global developments surrounding discussions of hate speech.

In light of this multidimensional relationship between discrimination and expression and the absence of global consensus on many of these issues, there is no attempt in the present guide to draw concrete conclusions. Rather, the aim of this present chapter is to trace some of the legal issues arising in areas in which speech and other forms of expression interact with anti-discrimination law.

The current section examines aspects of these questions.

## I. ASPECTS OF SPEECH AND EXPRESSION DIRECTLY IMPLICATING ANTI-DISCRIMINATION LAW

Speech and other forms of expression interact extensively and in a complex manner with the right to non-discrimination. As discussed in section I.A.2(c) of part two of the present guide on forms of discrimination, in some cases, speech or expression can constitute a key element of prohibited conduct – ground-based harassment.<sup>1129</sup> Many cases of ground-based harassment centre on speech or other forms of expression that have the effect of creating a hostile, degrading or intimidating environment for persons with a particular characteristic, status or identity. As the Committee on the Rights of Persons with Disabilities has noted, harassment is: “a form of discrimination when unwanted conduct related to disability or other prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. It can happen through actions or words that have the effect of perpetuating the difference and oppression of persons with disabilities”.<sup>1130</sup> The Committee has recently put forward the view that harassment should be understood as including cyberbullying and cyberhate.<sup>1131</sup> As concerns ground-based discrimination, any legal response would need to be understood within the material scope of discrimination law set out within section I.A.3 of part two.

Ground-based harassment is only one aspect of the complex relationship between expression and the ban on discrimination. Expression can also provide the means by which other forms of discrimination occur – in the case of instruction to discriminate by those in a position of power, influence or authority. Both harassment and instruction to discriminate are forms of discrimination that must be prohibited by law, with the effect that speech or expression in certain contexts can be prohibited. In the standard case, such acts are treated within civil, administrative or labour law, and are not deemed criminal matters. However, instructions or orders to discriminate resulting in impacts with a high degree of harm may trigger criminal liability.<sup>1132</sup>

Moreover, speech and other forms of expression can play an important role in the adjudication of discrimination cases, including, in particular, as evidence of discriminatory motive or intent. Thus, for example, in its first-ever finding of racial discrimination in a case concerning law enforcement, the European Court of Human Rights relied on witness statements that indicated that military personnel had uttered anti-Roma epithets just after shooting to death two Roma men. While a lower chamber of the Court initially held that that and other evidence was indicative of discrimination, the Court’s Grand Chamber held that there was discrimination in the procedure, but not as substantive matter, namely that the anti-Roma statements and other evidence should have triggered investigation by the national authorities into the possibility that racism or racial discrimination had infected the proceedings.<sup>1133</sup>

Finally, as explored in more detail in the next chapter of the present guide, the focus on incitement and hate speech has tended to obscure States’ positive obligations to combat stereotypes, stigma and prejudice and promote non-discrimination, equality, inclusion and diversity.

<sup>1129</sup> See Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (d). The Committee on the Rights of Persons with Disabilities further notes that: “Particular attention should be paid to persons with disabilities living in segregated places, such as residential institutions, special schools or psychiatric hospitals, where this type of discrimination is more likely to occur and is by nature invisible, and so not likely to be punished. ‘Bullying’ and its online form, cyberbullying and cyberhate, also constitute particularly violent and harmful forms of hate crimes.”

<sup>1130</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 18 (d).

<sup>1131</sup> Ibid.

<sup>1132</sup> See, for example, International Tribunal for the Former Yugoslavia, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016.

<sup>1133</sup> European Court of Human Rights, *Nachova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgment, 6 July 2005. For a similar use of open expression to ground a finding of discrimination in cases brought in the human rights treaty body system, see Committee on the Elimination of Racial Discrimination, *Koptova v. Slovak Republic*, communication No. 13/1998.

## II. HATE SPEECH AND THE BAN ON INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE

In the 2010s and early 2020s, the problem of hate speech – including as a cause, result and driver of discrimination – has been the subject of very high-level attention by the United Nations system. In 2012, at a meeting organized by OHCHR, experts adopted the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hereafter, “Rabat Plan of Action”)<sup>1134</sup> following a lengthy process of global consultation and engagement. More recently, a 2019 mobilization – led by the Secretary-General – led to agreement that United Nations agencies and entities should have strategies and plans of action to address hate speech. The United Nations Strategy and Plan of Action on Hate Speech was developed in response to “a groundswell of xenophobia, racism and intolerance, violent misogyny, anti-Semitism and anti-Muslim hatred”.<sup>1135</sup> The Strategy recognizes that during the previous 75 years, hate speech has been a precursor to atrocity crimes, including genocide, from Rwanda to Bosnia to Cambodia.<sup>1136</sup> The Strategy includes a commitment that United Nations entities should “show solidarity with the victims of hate speech and implement human rights-centred measures aimed at countering retaliatory hate speech and escalation of violence and at empowering the targeted people or communities”. It also notes that they should “promote measures to ensure that the rights of victims are upheld, and that their needs are addressed, including through advocacy for remedies, access to justice and psychological counselling”.<sup>1137</sup> Recommendations under the Plan of Action include: “Encourage the strengthening of the framework of anti-discrimination law to ensure that it complies with international human rights law and standards”.<sup>1138</sup>

Specifically as concerns minorities, in 2021, the Special Rapporteur on minority issues provided, in his annual report to the Human Rights Council, a thematic report on the widespread targeting of minorities through hate speech on social media. In the report, the Special Rapporteur described phenomena, including “the widespread denial or failure of State authorities to recognize or effectively protect minorities against prohibited forms of hate speech”. He emphasized “the responsibility of States, civil society and social media platforms to acknowledge that hate speech is mainly a minority issue and, as a matter of urgency, their duty to take further steps towards the full and effective implementation of the human rights obligations involved”.<sup>1139</sup>

Article 20 (2) of the International Covenant on Civil and Political Rights obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Other provisions of the Covenant provide the basis for the regulation of hate speech on other grounds. Specifically, under article 19 (3), States may restrict freedom of expression, where such limitations are provided by law and necessary for one of six specified purposes, which include the protection of the rights and freedoms of others. As noted in the Rabat Plan of Action, “expression labelled as ‘hate speech’ can be restricted under articles 18 and 19 of the International Covenant on Civil and Political Rights on different grounds”.<sup>1140</sup> Indeed, as set out in more detail below, treaty bodies and special procedures have called on States to take effective action to prohibit hate speech on a range of grounds beyond those listed in article 20.

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination elaborates a more detailed prohibition of hate speech on the basis of race, colour or ethnicity. It commits States to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred”.

<sup>1134</sup> A/HRC/22/17/Add.4, annex, appendix.

<sup>1135</sup> Secretary-General, “Secretary-General’s remarks at the launch of the United Nations Strategy and Plan of Action on Hate Speech [as delivered]”, 18 June 2019. See also United Nations, “United Nations Strategy and Plan of Action on Hate Speech” (2019). Available at [www.un.org/en/genocideprevention/hate-speech-strategy.shtml](http://www.un.org/en/genocideprevention/hate-speech-strategy.shtml).

<sup>1136</sup> Secretary-General, “Secretary-General’s remarks at the launch of the United Nations Strategy and Plan of Action on Hate Speech [as delivered]”.

<sup>1137</sup> United Nations, *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences* (2020), p. 30, commitment 3. Available at [www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech\\_Guidance%20on%20Addressing%20in%20field.pdf](http://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf).

<sup>1138</sup> *Ibid.*, p. 31.

<sup>1139</sup> A/HRC/46/57.

<sup>1140</sup> Rabat Plan of Action, para. 14.



Under article 4, this requirement extends to propaganda promoting “discrimination in any form”. It further commits States to “undertake to adopt immediate and positive measures” in this regard, including as concerns public bodies and private entities.<sup>1141</sup> Specifically, article 4 (a) provides that:

**Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.**

Neither the Convention on the Elimination of All Forms of Discrimination against Women nor the Convention on the Rights of Persons with Disabilities specifically mandates the prohibition of incitement to discrimination, violence or hostility. However, both create specific obligations in respect of combating negative social norms. For example, article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women dedicates extensive attention to the positive obligations of States “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.<sup>1142</sup> These matters implicate speech and other forms of expression and communication, in particular – in this context – misogynistic speech.

The rights set out under article 20 of the International Covenant on Civil and Political Rights are generally deemed to be in a complex relationship with other rights, in particular (although not exclusively) the rights set out under article 19 to hold opinions without interference and to freedom of expression. Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

As concerns the rights to freedom of opinion and expression, freedom of opinion is absolute.<sup>1143</sup> There can be no restriction – legal or otherwise – solely for holding an opinion. Freedom of expression by contrast is not absolute.<sup>1144</sup>

As a result of article 19 (3) of the International Covenant on Civil and Political Rights, the right to freedom of expression is a qualified right, which can be limited on grounds of named restrictions. In interpreting the requirements of article 19 (3), the Human Rights Committee has stated that these restrictions must be construed narrowly and has held that “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself”.<sup>1145</sup> The Committee has noted that “the relation between right and restriction and between norm and exception must not be reversed” and underlined the

<sup>1141</sup> Detailed requirements in this area are set out in Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013).

<sup>1142</sup> The Committee on the Elimination of Discrimination against Women, in its third and most recent general recommendation on gender-based violence against women, has expressed concern, inter alia, at “contemporary forms of violence occurring online and in other digital environments”. The Secretary-General has drawn direct links between misogynistic hate speech and gender-based violence against women, noting that “the use of rape and other forms of sexual violence in Kosovo (former Serbia and Montenegro) in 1999 as weapons of warfare and methods of ethnic cleansing had been preceded by official state propaganda and media accounts that stereotyped Kosovar Albanian women as sexually promiscuous and exploited Serbian fears of Albanian population growth”. See, respectively, Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017), para. 20; and A/61/122/Add.1 and Corr.1, para. 94.

<sup>1143</sup> Human Rights Committee, general comment No. 34 (2011), para. 9. Freedom of thought and conscience and freedom to have or adopt a religion or belief of one’s choice are also protected unconditionally, as is the right of everyone to hold opinions. See Human Rights Committee, general comment No. 22 (1993), para. 3.

<sup>1144</sup> Human Rights Committee, general comment No. 34 (2011), para. 21.

<sup>1145</sup> Ibid.

fact that article 5 (1) of the Covenant provides that: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”<sup>1146</sup>

However, any restrictions of the right to freedom of expression must be provided by law (articulated in a clear manner);<sup>1147</sup> necessary and proportionate;<sup>1148</sup> and adopted to respect the rights or reputation of others, or national security, public order, or public health or morals.<sup>1149</sup> In interpreting the latter requirement, the Human Rights Committee has held that: “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition’. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.”<sup>1150</sup>

Examining the interaction between articles 19 (3) and 20 in particular, the Committee has concluded that the two provisions are “compatible with and complement each other”, stating further that:

The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3. ... What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19. ... It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.<sup>1151</sup>

The Human Rights Committee has upheld States’ action on hate speech, going so far as to condone loss of employment for those inciting hatred, in particular in cases in which there were strong procedural guarantees accorded to the speaker.<sup>1152</sup>

Regional human rights systems have developed approaches for reconciling their approaches to hate speech with freedom of expression requirements. Thus, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have consistently held that “freedom of expression is not absolute” and that “restrictions may be deemed permissible even if the speech in question is political in nature”.<sup>1153</sup> In Europe, where the European Court of Human Rights has repeatedly heard cases in which persons inciting racial or other hatred have appealed to the Court after national authorities took action against them, it has

<sup>1146</sup> Ibid.

<sup>1147</sup> E/CN.4/1995/32, paras. 38–55.

<sup>1148</sup> “Appropriate to achieve their protection function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.” See Human Rights Committee, general comment No. 27 (1999), para. 14; and general comment No. 34 (2011), para. 34.

<sup>1149</sup> A/74/486, para. 6.

<sup>1150</sup> Human Rights Committee, general comment No. 34 (2011), para. 32.

<sup>1151</sup> Ibid., paras. 50–52 (footnote omitted).

<sup>1152</sup> Human Rights Committee, *Ross v. Canada* (CCPR/C/70/D/736/1997).

<sup>1153</sup> Inter-American Court of Human Rights, *Granier et al. v. Venezuela*, Case 12.828, Report No. 112/12, Merits, 9 November 2012, para. 124.

developed doctrines to the effect that it is not possible to rely on the provisions of the European Convention on Human Rights in cases in which the appellant aims to destroy human rights.<sup>1154</sup>

## HATE SPEECH AS DISCRIMINATION: ADDRESSING STATES' RESPONSIBILITY TO PROTECT INDIVIDUALS FROM HOMOPHOBIC HATE SPEECH

In January 2020, the European Court of Human Rights considered the refusal by the Lithuanian authorities to investigate and sanction online hate-speech comments. The case arose after a photograph depicting a same-sex kiss was published on Facebook in Lithuania. Pijus Beizaras and Mangirdas Levickas had received hundreds of hateful online comments. These had been aimed at inciting hatred and violence against lesbian, gay, bisexual and transgender persons in general, as well as personally at the two men.

In December 2014, the National Lesbian, Gay, Bisexual and Transgender Rights Association lodged a complaint with the prosecutor general's office alleging violation of article 170 of the Criminal Code (incitement against any national, racial, ethnic, religious or other group of persons) and article 19 of the Law on the Provision of Information to the Public, which similarly prohibits incitement to hatred or violence in the media.

The domestic courts took decisions not to initiate an investigation. The Klaipėda City District Court, for example, dismissed an appeal by the National Lesbian, Gay, Bisexual and Transgender Rights Association by pointing out that “a picture ‘of two men kissing’ should and must have foreseen that such ‘eccentric behaviour really did not contribute to the social cohesion of those who had different views or to the promotion of tolerance” and “the majority of Lithuanian society very much appreciate[d] traditional family values”.

In its ruling in the case, the European Court of Human Rights held that Lithuania had violated article 14 (prohibition of discrimination) of the Convention taken in conjunction with article 8 (right to respect for private and family life) and that article 13 (right to an effective remedy) had also been violated by the Lithuanian authorities.

In the course of its ruling, the Court recalled an extensive list of principles within its settled case law, including that the “the hallmarks of a ‘democratic society’” include “pluralism, tolerance and broadmindedness”; that “pluralism and democracy are built on genuine recognition of, and respect for, diversity”; and that “criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure .... That being so, it has also held that where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor .... The Court has likewise accepted that criminal-law measures were required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes.”<sup>1155</sup>

<sup>1154</sup> See, for example, the unanimous decision of the European Court of Human Rights in ruling inadmissible a petition by Jean-Marie Le Pen following his criminal conviction by a French court and fine of 10,000 euros for incitement to discrimination, hatred and violence towards a group of persons because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion: “The authorities’ interference with Mr Le Pen’s freedom of expression, in the form of a criminal conviction, had been prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others. The Court reiterated that it attached the highest importance to freedom of expression in the context of political debate in a democratic society, and that freedom of expression applied not only to ‘information’ or ‘ideas’ that were favourably received, but also to those that offended, shocked or disturbed. ... In this case, however, Mr Le Pen’s comments had certainly presented the ‘Muslim community’ as a whole in a disturbing light likely to give rise to feelings of rejection and hostility. He had set the French on the one hand against a community whose religious convictions were explicitly mentioned and whose rapid growth was presented as an already latent threat to the dignity and security of the French people. The reasons given by the domestic courts for convicting the applicant had thus been relevant and sufficient. Nor had the penalty imposed been disproportionate. The Court found that the interference with the applicant’s enjoyment of his right to freedom of expression had been ‘necessary in a democratic society’. His complaint was accordingly rejected.” See European Court of Human Rights, *Le Pen v. France*, Application No. 18788/09, Decision, 20 April 2010 (although the official version of the decision is only available in French, the quotation above appears in a press release issued by the Registrar of the Court). This approach is generally grounded in article 17 of the European Convention on Human Rights, which establishes that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein”.

<sup>1155</sup> European Court of Human Rights, *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, Judgment, 14 January 2020, paras. 106–111.

The Court found that the case law of the Supreme Court of Lithuania, as applied by the prosecutor, whose decision had then been upheld by the domestic courts, had not provided for an effective domestic remedy for complaints alleging homophobic discrimination. The case is an important recent example of tribunals ruling on hate speech on the basis of the law prohibiting discrimination.

Courts at national and regional level have increasingly been ruling on hate speech cases through the prism of the ban on discrimination, including finding States in violation of international law for failing to take adequate action on hate speech. At the national level, for example, courts in Italy have applied legal provisions related to harassment – namely, creating a degrading atmosphere – to anti-migrant radio broadcasts.<sup>1156</sup> In a recent case, also concerning Italy, the Court of Justice of the European Union ruled that statements made by a prominent lawyer on a radio programme, to the effect that his firm would never hire a gay person, amounted to discrimination in the field of employment, notwithstanding the fact that the firm in question was not in fact hiring at the time.<sup>1157</sup> In a string of recent cases concerning hate speech against lesbian, gay, bisexual and transgender persons, antisemitic hate speech and anti-Roma hate speech, the European Court of Human Rights has held that the failure of authorities to effectively intervene in cases concerning, inter alia, online hate speech constitutes discrimination in relation to the right to respect for private and family life.<sup>1158</sup>

## A. Advocacy of national, racial or religious hatred as well as in relation to disability, gender expression and gender identity, sex, sexual orientation, sex characteristics or other grounds

Advocacy of national, racial or religious hatred<sup>1159</sup> that constitutes incitement to discrimination, hostility or violence is proscribed under article 20 of the International Covenant on Civil and Political Rights. In addition, however, the protection of the right to non-discrimination – and to be free from discriminatory violence – necessitates protection from hate speech on other grounds. This approach is consistent with – indeed envisaged by – the recognition in article 19 (3) of the International Covenant on Civil and Political Rights of the fact that freedom of expression may be restricted, by law, where necessary for the protection of the rights of others.<sup>1160</sup> As such, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that: “Given the expansion of protection worldwide, the prohibition of incitement should be understood to apply to the broader categories now covered under international human rights law.”<sup>1161</sup> The treaty bodies have called for States to take effective action to prohibit hate speech on a

<sup>1156</sup> Also, in cases involving former Minister for Integration Cécile Kyenge, Italian courts have ruled that statements by a district councillor on Facebook to “return to the jungle” constituted incitement to racial hatred (Court of Appeal of Trento, Penal Section, *Italy v. Serafini*, Case No. 315/2015, Judgment, 11 October 2015), and that comments on a radio programme by an Italian Member of the European Parliament, including that Ms. Kyenge came from “tribal traditions”, constituted discrimination-based offences (Tribunal of Milan, *Borghesio v. Kyenge*, Judgment, 18 May 2017). The Supreme Court of Italy has stated that statements by municipal councillors against Roma constitute criminal defamation (Supreme Court, Penal Section, Case No. 47894, Judgment, 22 November 2012).

<sup>1157</sup> Court of Justice of the European Union, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, Case C-81/12, Judgment, 25 April 2013; and *NH v. Associazione Avvocatura per i diritti LGBTI*, Case C-507/18, Judgment, 23 April 2020.

<sup>1158</sup> European Court of Human Rights, *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, Judgment, 14 January, 2020; *Behar and Gutman v. Bulgaria*, Application No. 29335/13, Judgment, 16 February 2021; and *Budinova and Chaprazov v. Bulgaria*, Application No. 12567/13, Judgment, 16 February 2021.

<sup>1159</sup> “The terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group” (Rabat Plan of Action, para. 21, footnote 5). The Human Rights Committee has stated, as concerns the International Covenant on Civil and Political Rights that: “Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3. See Human Rights Committee, general comment No. 34 (2011), para. 50. See also A/HRC/40/58, para. 57.

<sup>1160</sup> Human Rights Committee, general comment No. 34 (2011), para. 11.

<sup>1161</sup> A/74/486, paras. 9 and 12.

wide range of grounds, including disability, gender expression, gender identity, sex, sex characteristics and sexual orientation.<sup>1162</sup>

Extensive work has been carried out to provide guidance as to how States are to understand whether and in what circumstances speech or other expression may constitute incitement to violence, discrimination or hatred, resulting in particular in the Rabat Plan of Action.

The Rabat Plan of Action defines the terms “advocacy”, “hatred” and “incitement” with reference to the definitions developed in the Camden Principles on Freedom of Expression and Equality,<sup>1163</sup> a document of international best practice developed by experts on the rights to equality and freedom of expression. Accordingly, it notes that “hatred” and “hostility” refer to “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”; “advocacy” is “to be understood as requiring an intention to promote hatred publicly towards the target group”; and “incitement” refers to “statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups”.<sup>1164</sup> The Rabat Plan of Action further states that: “States should adopt comprehensive anti-discrimination legislation that includes preventative and punitive action to effectively combat incitement to hatred.”<sup>1165</sup>

### THE SIX-PART THRESHOLD TEST OF THE RABAT PLAN OF ACTION

The Rabat Plan of Action notes “that a high threshold be sought for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20”. Accordingly, it establishes a “six-part threshold test ... for expressions considered criminal offences”, which it sets out as follows:

- (a) **Context:** Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;
- (b) **Speaker:** The speaker’s position or status in the society should be considered, specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed;
- (c) **Intent:** Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience;
- (d) **Content and form:** The content of the speech constitutes one of the key foci of the court’s deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;
- (e) **Extent of the speech act:** Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or

<sup>1162</sup> CCPR/C/BIH/CO/3, para. 22; and A/HRC/38/43, para. 93. See also A/74/486; and, as concerns sex and gender, A/HRC/38/47, para. 52. OHCHR, in *Living Free & Equal*, p. 30, sets out that: “States should include sexual orientation, gender identity, gender expression and sex characteristics as protected characteristics in laws against hate crime and hate speech/incitement to hatred or violence.” See also CCPR/C/LTU/CO/4, para. 12 (a); CCPR/C/CZE/CO/4, para. 17; CCPR/C/UKR/CO/7, para. 10; CCPR/C/BLR/CO/5, para. 18; CCPR/C/SEN/CO/5, paras. 14–15; CERD/C/SWE/CO/22-23, paras. 10–11; CEDAW/C/MUS/CO/8, para. 34; CEDAW/C/SUR/CO/4-6, paras. 50–51; and CEDAW/C/FJI/CO/5, para. 52; CAT/C/POL/CO/7, paras. 35–36; CAT/C/RUS/CO/6, paras. 32–33; CRC/C/CRI/CO/5-6, paras. 16–17; and CRC/C/POL/CO/3-4, paras. 16–17.

<sup>1163</sup> Article 19, “The Camden Principles on Freedom of Expression and Equality” (London, 2009). Available at [www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf](http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf).

<sup>1164</sup> Rabat Plan of Action, para. 21, footnote 5.

<sup>1165</sup> *Ibid.*, para. 26.



broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

- (f) **Likelihood, including imminence:** Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.<sup>1166</sup>

The Rabat Plan of Action further sets out that distinctions with regard to domestic sanctions should be made between (a) expression that constitutes a criminal offence; (b) expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; (c) expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.<sup>1167</sup> The Rabat Plan of Action notes with concern that perpetrators of incidents that indeed reach the threshold of article 20 of the International Covenant on Civil and Political Rights are generally not prosecuted, whereas members of minorities are often de facto persecuted, with a chilling effect on others, through the abuse of vague domestic legislation, jurisprudence and policies.<sup>1168</sup>

A focus on prohibition has led, in a number of countries and contexts, to expression that is protected by international human rights law being deemed “hate speech” because it is politically inconvenient or contentious, or because it is not acceptable in the view of the majority. This is a problem that disproportionately affects groups at risk of discrimination and that may be part and parcel of negative treatment affecting minorities. At the same time, there is often denial that hate speech affects specific groups, in particular minorities.<sup>1169</sup> The result is a situation in which “on the one hand, ‘real’ incitement cases are not prosecuted, while on the other hand peaceful critics are persecuted as ‘hate preachers’”.<sup>1170</sup> These are troubling, problematic developments and are part of wider threats to civic space, the consideration of which is beyond the scope of the present guide.<sup>1171</sup>

At the same time, there is growth of court and other adjudicator action against hate speech, due to rapidly rising concerns in this area, not least due to the spread of hate online because of the spread of hate speech by clergy and other religious figures.<sup>1172</sup>

## 1. Assessing context

Certain of the criteria set out under the Rabat threshold test merit comment, in particular as there is international jurisprudence in particular cases or commentary elaborating aspects of their meaning. For example, the Committee on the Elimination of Racial Discrimination has also found States in violation of the relevant Convention in cases concerning offensive public signage. In the case of *Hagan v. Australia*, an

<sup>1166</sup> Ibid., para. 29.

<sup>1167</sup> Ibid., para. 20.

<sup>1168</sup> Ibid., para. 11.

<sup>1169</sup> The Special Rapporteur on minority issues has noted that: “The menace of hate speech affects minorities first and foremost. Whether by omission or not, many actors in the field fail to systematically acknowledge and nominally admit who the main targets are of racism, prejudice, scapegoating and even incitement to violence in social media. By not specifically mentioning minorities, the extent and brutality of hate speech is ignored, even camouflaged in a fog of generalities. In a sense, everyone becomes an accomplice to hate when the main victims remain unnamed. The result is fertile ground to feed intolerance and exclusion, the godparents of hate towards minorities.” See A/HRC/46/57, para. 22.

<sup>1170</sup> OHCHR, “Threshold test on hate speech now available in 32 languages”, 15 May 2020. Available at [www.ohchr.org/EN/NewsEvents/Pages/Hate-speech-threshold-test.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/Hate-speech-threshold-test.aspx).

<sup>1171</sup> United Nations, “United Nations Guidance Note: Protection and Promotion of Civic Space” (2020). Available at [www.ohchr.org/Documents/Issues/CivicSpace/UN\\_Guidance\\_Note.pdf](http://www.ohchr.org/Documents/Issues/CivicSpace/UN_Guidance_Note.pdf).

<sup>1172</sup> United Nations, “Strategy and Plan of Action on Hate Speech”; and OHCHR, *#Faith4Rights Toolkit*, module 7. On human rights and hate speech by clergy, see Tamas Kadar, “Dealing with cases involving hate speech and incitement to discrimination by the clergy” (Strasbourg, Council of Europe Press, 2021).



aboriginal man alleged violations of article 2, in particular, 2 (1) (c), article 4, article 5 (d) (i) and (ix), (e) (vi) and (f), article 6 and article 7 of the Convention, in connection with the name, which is today deemed a serious racial epithet, of the grandstand of an important sporting ground in Toowoomba, Queensland, where he lived, named in honour of a sporting personality of the past. Finding Australia in violation of the Convention, the Committee held that the:

use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.<sup>1173</sup>

In its hate speech toolkit, the civil society organization Article 19 has offered the following guidance on assessing context:

The expression should be considered within the political, economic, and social context in which it was communicated, as this will have a bearing directly on both intent and/or causation. The contextual analysis should take into account, inter alia:

- the existence of conflict in society, for example, recent incidents of violence against the targeted group;
- the existence and history of institutionalised discrimination, for example in law enforcement and the judiciary;
- the legal framework, including the recognition of the targeted group’s protected characteristic in any anti-discrimination provisions or lack thereof;
- the media landscape, for example regular and negative media reports about the targeted group with a lack of alternative sources of information; and
- the political landscape, in particular the proximity of elections and the role of identity politics in that context, as well as the degree to which the views of the targeted group are represented in formal political processes.<sup>1174</sup>

## 2. Distinguishing the speaker

Some adjudicators have drawn distinctions between entities disseminating hate speech. For example, in a case brought before the European Court of Human Rights, Jens Olaf Jersild, a documentary journalist with the Danish Broadcasting Corporation, challenged the legitimacy of the fines that he had received from the authorities in Denmark related to a documentary he had produced and broadcast on national television, in which he interviewed members of a group of young persons in Copenhagen, calling themselves “the Greenjackets”. These interviewees had expressed ideas of racial or ethnic superiority on camera, in addition to confessing to instances of assault on minorities. Based on the television programme, the Danish authorities brought charges against the Greenjackets interviewed by Mr. Jersild. However, with reference to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, they also sanctioned Mr. Jersild for providing the skinheads with a means to widely disseminate hate speech – namely, a prime time television slot – and thus to disseminate ideas of racial or ethnic superiority. Mr. Jersild contested the fines, noting that the role of journalists and the media was to document and call attention to serious issues in society. Ruling in Mr. Jersild’s favour – and overturning the fines – the European Court of Human Rights, inter alia, reaffirmed the particular role of journalists and the media to bring to public attention serious issues in society.<sup>1175</sup> The presence of violent racists in a society would seem to be exemplary in this regard. An approach

<sup>1173</sup> Committee on the Elimination of Racial Discrimination, *Hagan v. Australia* (CERD/C/62/D/26/2002), para. 7.3.

<sup>1174</sup> Article 19, “Hate Speech” Explained: A Toolkit (London, 2015), p. 78 (footnote omitted). Available at [www.article19.org/resources/hate-speech-explained-a-toolkit](http://www.article19.org/resources/hate-speech-explained-a-toolkit). See also A/67/357, para. 45, referring to “audience ... existence of barriers in establishing media outlets, broad and unclear restrictions on content of what may be published or broadcast; absence of criticism of Government or wide-ranging policy debates in the media and other forms of communication; and the absence of broad social condemnation of hateful statements on specific grounds when they are disseminated”.

<sup>1175</sup> European Court of Human Rights, *Jersild v. Denmark*, Application No. 15890/89, Judgment, 23 September 1994.

that takes into account the position of the speaker is embraced by the Court in its judgment in the *Jersild* case, which reflects this key criterion of the Rabat Plan of Action. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has offered the following guidance in this regard, in particular as concerns online hate speech:

Are there categories of users to whom the hate speech rules do not apply? International standards are clear that journalists and others reporting on hate speech should be protected against content restrictions or adverse actions taken against their accounts. Moreover, an application of the context standards of the Rabat Plan of Action would lead to the protection of such content. Politicians, government and military officials and other public figures are another matter. Given their prominence and potential leadership role in inciting behaviour, they should be bound by the same hate speech rules that apply under international standards. In the context of hate speech policies, by default public figures should abide by the same rules as all users. The evaluation of context may lead to a decision to make an exception in some instances, when the content must be protected as, for example, political speech. However, incitement is almost certainly more harmful when uttered by leaders than by other users, and that factor should be part of the evaluation of platform content.<sup>1176</sup>

## B. Disseminating ideas based on racial superiority or hatred

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 4 creates obligations on States that are related to those provided by articles 19 (3) and 20 of the International Covenant on Civil and Political Rights but are discrete and different. Notably, article 4 (a) prohibits the dissemination of ideas based on racial superiority or hatred, rather than the incitement of hatred. As the High Commissioner for Human Rights has noted: “article 4 (a) of [the International Convention on the Elimination of All Forms of Racial Discrimination] prohibits the mere dissemination of ideas based on superiority and racial hatred ... the dissemination of the idea itself is what attracts sanction without any further or requirement about its intent or impact”.<sup>1177</sup> In the same report, the Commissioner noted that: “This may seem a subtle difference but it is significant in determining the scope of the law.”<sup>1178</sup>

Nevertheless, the Committee on the Elimination of Racial Discrimination has pointed to the need for violations to reach the standard of incitement, noting that “public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by

<sup>1176</sup> A/74/486, para. 47 (d). See also Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), para. 15.

<sup>1177</sup> A/HRC/2/6, para. 39.

<sup>1178</sup> Ibid.

law, provided that they clearly constitute incitement to racial, violence or hatred”.<sup>1179</sup> The Human Rights Committee has found that the dissemination of antisemitic ideas<sup>1180</sup> and denial of the Holocaust<sup>1181</sup> should be punished if they reach the threshold of incitement. There is an open and ongoing discussion of possible punishment of dissemination of xenophobic and other hate speech.<sup>1182</sup>

## C. Incitement to commit genocide

Incitement to commit genocide is manifestly illegal as a result of article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide and article 25 (3) of the Rome Statute of the International Criminal Court.<sup>1183</sup> Incitement to genocide is a matter for criminal law.

## D. Incitement to commit terrorist acts

Punishment of incitement to commit terrorist acts is similarly allowed, although this issue falls outside the scope of the present guide.<sup>1184</sup> These can be sanctioned provided that the restriction of freedom of expression is compatible with the requirements set forth in article 19 (3) of the International Covenant on Civil and Political Rights.

## E. Defamation

Speech acts directly targeting an individual such as defamation also fall outside the scope of the present guide. National courts have in the recent period upheld criminal sanctions for defamation in racist hate speech cases.<sup>1185</sup> Under international law, speech and expression can be sanctioned provided that the restriction of freedom of expression is compatible with the requirements set forth in article 19 (3) of the International Covenant on Civil and Political Rights. As a general rule, international human rights law allows only the protection of people from defamation. As noted below, abstract entities, such as ideas, religions or flags, do not enjoy international human rights protection from defamation. In addition, particular space is reserved for criticism of public figures: “comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice”.<sup>1186</sup>

### **BLASPHEMY, “DEFAMATION OF RELIGION” AND INSULTING THE STATE, FLAG OR UNIFORM**

Blasphemy or “defamation of religion” are not hate speech: restrictions may only be imposed if they reach the threshold of incitement to discrimination, hostility or violence.<sup>1187</sup> The Human Rights Committee has stated:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for

<sup>1179</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), para. 14.

<sup>1180</sup> Human Rights Committee, *Ross v. Canada* (CCPR/C/70/D/736/1997).

<sup>1181</sup> Human Rights Committee, *Faurisson v. France* (CCPR/C/58/D/550/1993).

<sup>1182</sup> A/HRC/42/58, para. 108 (a). See also General Assembly resolution 73/262; and Human Rights Council resolution 34/36.

<sup>1183</sup> Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide states: “The following acts shall be punishable: ... (c) Direct and public incitement to commit genocide”. Article 25 (3) of the Rome Statute of the International Criminal Court states that “in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: ... (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; ... (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide”.

<sup>1184</sup> General Assembly resolution 75/291.

<sup>1185</sup> Supreme Court of Italy, Penal Section, Case No. 47894, Judgment, 22 November 2012.

<sup>1186</sup> Human Rights Committee, general comment No. 34 (2011), para. 47.

<sup>1187</sup> *Ibid.*, para. 48. On defamation of religion, see A/62/280, paras. 70–71; and A/HRC/2/3.

instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>1188</sup>

Indeed, central to the legitimacy of these distinctions for the purpose of human rights law is that the law is intended to protect persons and communities from harm, but it does not provide protection against ideas that may cause offence, and entities such as “the State”, “the flag”, “the Prophet” or Christianity, Islam, Judaism or any other religion per se are not protected entities for the purposes of human rights law. In practice, there is a troubling growth worldwide in the use of anti-blasphemy or anti-apostasy laws, in particular targeting religious or belief minorities. In some countries, the punishment for blasphemy or apostasy can be the death penalty.

### III. SANCTIONS FOR INCITEMENT AND OTHER FORMS OF HATE- OR BIAS-BASED EXPRESSION

The Rabat Plan of Action provides that, in discharging their duty to prohibit hate speech, States should distinguish between (a) expression that constitutes a criminal offence; (b) expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; and (c) expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.<sup>1189</sup>

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that hate speech should be addressed through a range of legal and policy measures, noting that the requirement to prohibit hate speech does not equate to an obligation to criminalize and that “only serious and extreme instances of incitement to hatred ... should be criminalized”.<sup>1190</sup> In cases not meeting this threshold, the Special Rapporteur recommends that States adopt civil laws “with the application of diverse remedies, including procedural remedies ... and substantive remedies (for example, reparations that are adequate, prompt and proportionate to the gravity of the expression, which may include restoring reputation, preventing recurrence and providing financial compensation)”.<sup>1191</sup>

Criminal sanctions are the measures of last resort and should be applied only in strictly justifiable situations meeting high and robust thresholds, including the elements provided by the Rabat threshold test: context, speaker, intent, content, extent of the speech, and likelihood or probability of harm occurring.<sup>1192</sup> States should consider civil or administrative sanctions,<sup>1193</sup> which should be preferred over criminal sanction.<sup>1194</sup> Indeed, the Rabat Plan of Action notes that: “States should adopt comprehensive anti-discrimination legislation that includes preventative and punitive action to effectively combat incitement to hatred.”<sup>1195</sup> In practice, although discussion of responses to hate speech often circulates around questions of criminalization, many cases have involved other kinds of sanction or remedy such as being disciplined at or fired from work or disciplined at or expelled from school,<sup>1196</sup> or recommendations to make changes to the names of public infrastructure.<sup>1197</sup>

<sup>1188</sup> Human Rights Committee, general comment No. 34 (2011), para. 48. Similarly, “the Committee notes with concern that the archaic and discriminatory provisions of the Criminal Code which make blasphemy a misdemeanour are still in force on the Isle of Man, and recommends that these be repealed”. See CCPR/C/79/Add.119, para. 15.

<sup>1189</sup> Rabat Plan of Action, para. 20.

<sup>1190</sup> A/67/357, para. 47. The Ad Hoc Committee on the Elaboration of Complementary Standards is working on a protocol to the International Convention on the Elimination of All Forms of Racial Discrimination to secure criminalization of racist and xenophobic acts. See A/HRC/42/58.

<sup>1191</sup> A/67/357, para. 48.

<sup>1192</sup> OHCHR, “Threshold test on hate speech”, 2020. Available at [www.ohchr.org/EN/NewsEvents/Pages/Hate-speech-threshold-test.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/Hate-speech-threshold-test.aspx).

<sup>1193</sup> Rabat Plan of Action, para. 34.

<sup>1194</sup> E/CN.4/2000/63, para. 52; and A/HRC/4/27, paras. 44–57.

<sup>1195</sup> Rabat Plan of Action, para. 26.

<sup>1196</sup> Human Rights Committee, *Ross v. Canada* (CCPR/C/70/D/736/1997).

<sup>1197</sup> Committee on the Elimination of Racial Discrimination, *Hagan v. Australia* (CERD/C/62/D/26/2002), para. 7.3.

In the age of social media, in which hate speech is propagated – and rapidly amplified – on the Internet, legal questions about the limits of the governance of speech are increasingly being applied to address, for example, the obligations of social media companies and Internet service providers to intervene to control or prohibit hate speech.<sup>1198</sup> Since January 2021, Facebook’s Oversight Board has used the Rabat threshold test in several decisions<sup>1199</sup> and explicitly referred to the International Covenant on Civil and Political Rights, general comments by treaty bodies, reports by special procedures and the Guiding Principles on Business and Human Rights.

## IV. NON-LEGAL MEASURES

As a general matter, globally, discussions on combating hate speech have had a strong focus on non-legal measures. Expressions of intolerance, negative stereotyping and stigmatization on grounds of race, colour and ethnicity,<sup>1200</sup> on religion or belief,<sup>1201</sup> sex and gender, sexual orientation,<sup>1202</sup> gender identity,<sup>1203</sup> sex characteristics<sup>1204</sup> and disability and towards particular vulnerable groups, such as migrants, refugees, Roma and others,<sup>1205</sup> should be addressed with positive interventions: education, awareness-raising, support for victims to enable counter speech and the dissemination of positive narratives, including through public information campaigns with positive, diversity messaging.<sup>1206</sup> States should take measures to monitor hate speech and incitement to violence in media and social media and establish independent media monitoring bodies.<sup>1207</sup> These measures have, in fact, a basis in human rights treaty law<sup>1208</sup> and comprise positive obligations on States. Public officials have particular responsibilities to systematically denounce and condemn hate speech publicly.

Regional human rights systems have drawn explicit links between tackling hate speech, freedom of expression and the ban on discrimination. Thus, for example, the Inter-American Commission on Human Rights has noted:

**The Commission and its Office of the Special Rapporteur for Freedom of Expression reaffirm that in order to effectively combat hate speech, a comprehensive and sustained approach that goes beyond legal measures and includes preventive and educational mechanisms should be adopted. As previously stated by the Office of the Special Rapporteur on Freedom of Expression, these types of measures strike at the cultural root of systematic discrimination. As such, they can be valuable instruments in identifying and refuting hate speech and encouraging the development of a society based on the principles of diversity, pluralism and tolerance.**<sup>1209</sup>

It is for these reasons that the detailed guidance on implementing the United Nations Strategy and Plan of Action on Hate Speech stresses that: “Public condemnation of hate speech, accountability for attacks on those exercising their right to freedom of expression, and the expediting of public policy measures on the

<sup>1198</sup> Of particular note in recent years has been the high-level scrutiny of the role of Facebook in inciting hatred of Rohingya in Myanmar. See the report of the detailed findings of the independent international fact-finding mission on Myanmar, including details of the role of Facebook, p. 339 et seq. Available at [www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/reportofthe-myanmar-ffm](http://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/reportofthe-myanmar-ffm).

<sup>1199</sup> See <https://oversightboard.com/decision>.

<sup>1200</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), paras. 29 and 40.

<sup>1201</sup> Human Rights Council resolution 16/18.

<sup>1202</sup> CCPR/C/SVK/CO/4, para. 15.

<sup>1203</sup> Ibid.; CCPR/C/LBN/CO/3, para. 14; CCPR/C/UZB/CO/4, para. 7; CCPR/C/GEO/CO/4, para. 8; and CCPR/C/RUS/CO/7, para. 10.

<sup>1204</sup> CCPR/C/BLZ/CO/1/ADD.1, para. 15; CCPR/C/KOR/CO/4, para. 15; and CCPR/C/LTU/CO/4, para. 12 (a).

<sup>1205</sup> CCPR/C/HUN/CO/6, para. 18; and CERD/C/POL/CO/22-24, para. 22 (e). See also A/HRC/29/24; and Council of Europe, European Commission against Racism and Intolerance, “ECRI general policy recommendation No. 13 on combating antigypsyism and discrimination against Roma”, revised version (Strasbourg, 2020).

<sup>1206</sup> See, in particular, A/74/486, as well as Human Rights Council resolution 16/18.

<sup>1207</sup> Human Rights Council resolution 46/58.

<sup>1208</sup> Including, in particular, although not necessarily limited to: International Convention on the Elimination of All Forms of Racial Discrimination, art. 7; Convention on the Elimination of All Forms of Discrimination against Women, art. 5; and Convention on the Rights of Persons with Disabilities, art. 24.

<sup>1209</sup> Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, para. 248 (footnote omitted).

promotion of diversity may be especially important in the immediate aftermath of an incident of hate speech or incitement, and when tensions are escalating in a society.”<sup>1210</sup>

Such measures can be both remedial – that is, part of a governmental or institutional response to a specific incident or pattern of hate speech – and proactive – that is, directed at challenging prejudice, stigma, stereotypes and other drivers of discrimination. Both remedial and proactive measures have a strong basis in international law.<sup>1211</sup> Indeed, States’ positive obligations to combat stereotypes, stigma and prejudice are the focus of part six of the present guide.

## ADDRESSING THE DISCRIMINATORY IMPACTS OF ALGORITHMIC SYSTEMS

The emerging use of algorithmic systems by both public and private actors has fundamentally altered the way we live our lives. The actual and potential discriminatory and human rights impacts of the use of such technologies are myriad and as such have been the subject of important analyses by the special procedures of the Human Rights Council.<sup>1212</sup>

### Role of algorithmic systems in spreading and fuelling hate speech

Particularly concerning is the role of the use of algorithmic systems in spreading hate speech and incitement to discrimination and violence. In the 2021 thematic report on hate speech, social media and minorities, the Special Rapporteur on minority issues highlighted concerns with the business model of social media platforms, such as Facebook, Google, YouTube and Twitter, which aimed at maximizing profit by designing and using algorithms that enabled advertisers to target audiences with precision.<sup>1213</sup> These systems amplify content to keep users engaged but “they are also echo chambers that are too often narrow sources of information and concentrate bias and prejudices”.<sup>1214</sup> This model has the consequence of diverting individuals towards extreme, often hateful, obsessive content.<sup>1215</sup> The Special Rapporteur referred to evidence that almost two out of three people who joined an extremist group did so because of the recommendations pushed forward by algorithms in social media, and noted that that had been the “driving force behind an explosion of hate, radicalization, dehumanization, scapegoating, incitement to genocide and advocacy of hatred that constitutes incitement to violence, hostility or discrimination against minorities in social media, leading to alarming increases in hate crimes and atrocities”.<sup>1216</sup>

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has also highlighted the reliance on these platforms by neo-Nazi and other white supremacist groups to recruit, raise funds and coordinate.<sup>1217</sup> The use of algorithms has also been shown to contribute and accentuate the hate and harm experienced by groups exposed to discrimination. The Special Rapporteur on minority issues has highlighted examples of social media bots being manipulated into using Islamophobic and white supremacist slurs,<sup>1218</sup> while the independent international fact-finding mission on Myanmar has noted the use of Facebook to exacerbate hate speech against the Rohingya.<sup>1219</sup>

<sup>1210</sup> United Nations, *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences*, pp. 5–6.

<sup>1211</sup> See, for example, discussion of societal and institutional remedies in section II.D of part two of the present guide and discussion in chapter V of part two and chapters I and II of part six of States’ proactive obligations arising under provisions such as the International Convention on the Elimination of All Forms of Racial Discrimination, art. 7; Convention on the Elimination of All Forms of Discrimination against Women, art. 5; and Convention on the Rights of Persons with Disabilities, art. 24.

<sup>1212</sup> A non-exhaustive list of reports by special procedures relevant to new technologies is available at [www.ohchr.org/Documents/HRBodies/SP/List\\_SP\\_Reports\\_NewTech.pdf](http://www.ohchr.org/Documents/HRBodies/SP/List_SP_Reports_NewTech.pdf).

<sup>1213</sup> A/HRC/46/57, paras. 68–69.

<sup>1214</sup> Ibid., para. 68.

<sup>1215</sup> Ibid., para. 69.

<sup>1216</sup> Ibid., para. 70.

<sup>1217</sup> A/HRC/41/55.

<sup>1218</sup> A/HRC/46/57, para. 73.

<sup>1219</sup> A/HRC/42/50, para. 72.



### Wider discriminatory impacts of algorithmic systems and artificial intelligence

The use of algorithmic decision-making and artificial intelligence can lead to discrimination in various ways.<sup>1220</sup> Two well-documented patterns are: (a) the opaque mass collection of personal data and the use of that data to train algorithmic systems in harmful ways; for example, systems used by social media platforms operate by collecting personal data and information about the user and using that information to target content to them; and (b) the use of technologies in ways that lead to discriminatory results if the system “learns” from discriminatory data and reproduces that bias – an effect that is often referred to by data scientists as “garbage in, garbage out”.<sup>1221</sup>

The discriminatory impacts of the second pattern are evident in surveillance and policing. For example, in a 2016 study, the Human Rights Data Analysis Group demonstrated that the use of the predictive policing tool PredPol in Oakland, California, would reinforce racially biased police practices by recommending increased police deployment in areas with higher populations of non-white and low-income residents.<sup>1222</sup> Similarly, a test conducted by the American Civil Liberties Union in July 2018 found that the facial recognition tool Rekognition incorrectly matched 28 Members of Congress, identifying them as persons who had been arrested for a crime.<sup>1223</sup> The false matches were disproportionately of people of colour, including six members of the Congressional Black Caucus.

The examples provided here are at the tip of the iceberg, with a full analysis of the discriminatory impact of the use of algorithms being beyond the scope of the present guide. However, the role of comprehensive anti-discrimination law in addressing these harms is key. It is critical that both private and public actors are bound by legal obligations requiring them to ensure that the use of algorithmic systems does not discriminate, directly or indirectly, and that such systems are not used to exacerbate other forms of prohibited conduct, including harassment and hate speech.

It is also vital that an equal rights approach is adopted in the design and development of such technologies. Specifically, carrying out an equality impact assessment must be a basic requirement for design, roll-out and monitoring of all algorithmic systems. Such an assessment must be substantive and meaningful, incorporating consideration of the actual or potential discriminatory effects of using algorithmic systems through consultation with groups that are at risk of experiencing such effects. The essential need for a “mandatory approach” to equality impact assessment was emphasized by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in the report on racial discrimination and emerging digital technologies submitted by the mandate holder to the Human Rights Council in 2020.<sup>1224</sup>

<sup>1220</sup> See, among others, Frederik Zuiderveen Borgesius, *Discrimination, Artificial Intelligence, and Algorithmic Decision-Making* (Strasbourg, Council of Europe, 2018). Available at <https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73>. See also Solon Barocas and Andrew D. Selbst, “Big data’s disparate impact”, *California Law Review*, vol. 104 (2016).

<sup>1221</sup> Vincent Southerland, “With AI and criminal justice, the devil is in the data”, American Civil Liberties Union, 9 April 2018. Available at [www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data](http://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data).

<sup>1222</sup> Kristian Lum, and William Isaac, “To predict and serve?”, *Significance*, vol. 13, No. 5 (2016). Available at <https://rss.onlinelibrary.wiley.com/doi/epdf/10.1111/j.1740-9713.2016.00960.x>.

<sup>1223</sup> Jacob Snow, “Amazon’s face recognition falsely matched 28 Members of Congress with mugshots”, American Civil Liberties Union, 26 July 2018. Available at [www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28](http://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28). The author noted that 11 of the 28 false matches misidentified people of colour (approximately 39 per cent), including civil rights leader John Lewis and 5 other members of the Congressional Black Caucus. Only 20 per cent of current members of Congress are people of colour, which indicates that false-match rates affected members of colour at a significantly higher rate.

<sup>1224</sup> A/HRC/44/57, para. 56.





## **PART SIX:**

# **PROMOTING DIVERSITY AND EQUALITY: OBLIGATIONS TO ADDRESS THE ROOT CAUSES OF DISCRIMINATION**

The purpose of the present guide is to provide legislators and advocates with clear, accessible guidance on the development of comprehensive anti-discrimination legislation. Its aim is to consolidate and synthesize international legal standards as they relate to the nature, scope and content of such legislation. As demonstrated throughout, the adoption of such laws is essential if States are to comply with their international law obligations to respect, protect and fulfil the right to non-discrimination. However, while absolutely necessary, the enactment and enforcement of comprehensive anti-discrimination laws is not – in itself – sufficient to fulfil these obligations.

Ultimately, the obligation to enact laws is one of means, whereas States' non-discrimination obligations under international law are fundamentally about outcomes: States have committed not merely to prohibit discrimination, but to eliminate it. Under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, States commit to “ensure” or “guarantee” the enjoyment of rights without any discrimination, while parties to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities commit to “eliminate” discrimination. These are obligations of outcome that can only be achieved through a comprehensive programme of action that, in addition to the elimination of discriminatory laws, policies and practices and the enactment and enforcement of laws prohibiting discrimination, requires the adoption and implementation of positive, proactive measures to tackle the root causes of discrimination. Said differently, the adoption of comprehensive anti-discrimination law, while essential and obligatory, is one central element of a larger programme of actions that States must take to give effect to the rights to equality and non-discrimination.

International human rights law defines positive obligations to combat prejudice, stigma and stereotypes and to modify social and cultural norms that cause or perpetuate discrimination. These obligations are explicitly set out in a number of the international human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, and have also been elaborated by the treaty bodies. The Committee on Economic, Social and Cultural Rights, for example, has noted that eliminating discrimination in practice requires States to adopt “the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate ... discrimination”.<sup>1225</sup>

These positive obligations sit in a complex relationship with the duty to enact and implement comprehensive anti-discrimination law. On the one hand, the forms of discrimination prohibited under anti-discrimination laws fall outside the world of attitude, ideology and social norms. As noted in section I.A.2(a) of part two of the present guide, discrimination can be both intentional and unintentional. Thus, while evidence of prejudice, stigma or other bias motive on the part of the discriminating party can be compelling evidence of discrimination, such evidence is not necessary for a finding of discrimination. Even in situations in which it can be demonstrated that discrimination is motivated by prejudice or other feelings of hostility, the law addresses the real-world manifestations of these feelings, focusing on sanctioning and remedying the acts, rather than changing opinions or beliefs. This approach both ensures that the law is appropriately focused on identifying and addressing the harm experienced by victims of discrimination and that it is consistent with the absolute right to freedom of opinion, guaranteed by article 19 (1) of the International Covenant on Civil and Political Rights.

On the other hand, evidence from various jurisdictions demonstrates that the adoption and effective implementation of comprehensive anti-discrimination law itself contributes positively to challenging prejudice and stereotypes. Done correctly, such laws support and advance these goals, among other things by putting law into the hands of victims, enabling them to take action to pursue justice, and thus to expose discrimination and its causes. The enactment of such laws sends important signals to society at large about the value and importance of non-discrimination and the State's readiness to address inequality. In establishing the rights that enable victims to challenge discrimination against them, these laws also establish duties that drive changes in behaviour by public and private institutions. Properly implemented and enforced, anti-discrimination laws lead to changes in policies and practices that remove barriers and enable equal participation, thus increasing representation and so challenging prejudices and stereotypes based on ignorance and exclusion.

<sup>1225</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 8 (b).

However, the law alone will be ineffective without sufficient commitment and engagement to open the polity to all, with equal dignity, in a manner that fosters human understanding, solidarity and respect for difference. States must take action across the full range of law, policy, programming and expenditure. These actions should be required by and enforceable under anti-discrimination law, but legislation will only provide the framework.

Thus, these proactive obligations exist both within and without anti-discrimination law. The obligation to take these measures exists in parallel to the obligation to adopt, enforce and implement legislation – it is an immediate obligation that is not subsumed within or fulfilled by the obligation to legislate, but sits alongside it. Comprehensive anti-discrimination laws can and should require and provide for the adoption of proactive measures to combat prejudice, stigma and stereotypes and to promote diversity. These laws should establish equality impact assessment, equality duties and equality bodies, through which such measures can be identified, designed and implemented. Anti-discrimination laws should also ensure the enforceability of these obligations, enabling legal challenges against the State for failing to implement appropriate, timely and effective measures to address stereotypes, prejudice and stigma.

However, passing legislation that mandates and regulates proactive measures is insufficient: these obligations can only be discharged by a comprehensive programme of policy, funding and practice. While comprehensive anti-discrimination laws should require the development of such proactive measures, States will only fulfil their obligations by taking concrete action.

## I. INTERNATIONAL LAW OBLIGATIONS TO ADDRESS PREJUDICE, STEREOTYPES AND STIGMA

### SUMMARY

- International law establishes explicit proactive obligations on States to address prejudice, stereotypes and stigma. Specific measures recommended include:
  - The empowerment and participation of rights holders.
  - Measures to promote diversity and equal representation in institutions.
  - Measures to challenge prejudice, stereotypes and stigma and to promote diversity, inclusion and equality through education.
  - Informing public perceptions through the media, both mainstream media and social media, and wider awareness-raising efforts.
  - Training individuals, including public officials, and groups in all areas of life in equality and non-discrimination law and principles, as well as in the situation and experiences of rights holders.
- In addition, if States are to fulfil their obligations and honour their commitments to eliminating discrimination and ensuring equality of participation, their efforts should rise above combating prejudice, stereotypes and stigma. Efforts should be made to promote understanding among persons and groups with different characteristics, statuses and beliefs and to demonstrate how more equal and diverse economies and societies benefit all.

The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities establish explicit proactive obligations on States to address prejudice, stereotypes and stigma.

Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination requires States to adopt “immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship”. Article 2 (1) (e) creates a narrower, more specific obligation: States undertake to “encourage, where appropriate, integrationist multiracial organizations and movements and

other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division”.

Article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women requires that States take “all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices”, stereotypes and notions of superiority or inferiority of the sexes. In its jurisprudence concerning gender-based violence against women, the Committee on the Elimination of Discrimination against Women has found States in violation of these obligations.<sup>1226</sup>

### **CHARTING THE LINK BETWEEN SOCIAL FORCES AND DISCRIMINATION: THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

Early recognition of the link between negative social norms and discrimination can be found in the Convention on the Elimination of All Forms of Discrimination against Women, which places a strong emphasis on changing the social roles of women and men as a necessary means to achieving gender equality. As highlighted by OHCHR in its introduction to the Convention explains:

The Convention aims at enlarging our understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women’s enjoyment of their fundamental rights. These forces take shape in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women. Noting this interrelationship, the preamble of the Convention stresses “that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women”. States parties are therefore obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (article 5). And article 10.c. mandates the revision of textbooks, school programmes and teaching methods with a view to eliminating stereotyped concepts in the field of education. Finally, cultural patterns which define the public realm as a man’s world and the domestic sphere as women’s domain are strongly targeted in all of the Convention’s provisions that affirm the equal responsibilities of both sexes in family life and their equal rights with regard to education and employment. Altogether, the Convention provides a comprehensive framework for challenging the various forces that have created and sustained discrimination based upon sex.<sup>1227</sup>

The Convention on the Rights of Persons with Disabilities contains a number of provisions focused on combating prejudice, stereotypes and other drivers of discrimination. Article 24 of the Convention, which establishes the right to lifelong inclusive education, provides that education should be “directed to ... the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity”. Article 8 elaborates States’ awareness-raising obligations under the Convention, including a specific obligation to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life”.<sup>1228</sup> As noted by the Special Rapporteur on the rights of persons with disabilities:

The Convention embraces differences between human beings and underlines the importance of taking the diversity of the human experience into account. Society has traditionally ignored or discounted the difference of disability and thus societal structures have not considered the rights of persons with disabilities. The Convention restores the importance of the human being in the human rights discourse by emphasizing the individual and social aspects of the human experience. In that way,

<sup>1226</sup> See, inter alia, Committee on the Elimination of Discrimination against Women, *A.T. v. Hungary*, communication No. 2/2003.

<sup>1227</sup> See [www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women](http://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women).

<sup>1228</sup> A/HRC/43/27, para. 2.



**the Convention challenges traditional approaches to disability and has the potential to redress the legacy of disempowerment, paternalism and ableism.<sup>1229</sup>**

Beyond these specific provisions, an emphasis on challenging social norms that cause, drive or exacerbate discrimination can be read throughout international human rights law and in relation to all possible protected grounds. Thus, for example, the Committee on Economic, Social and Cultural Rights has noted that States must “adopt an active approach to eliminating systemic discrimination”, which will “usually require a comprehensive approach with a range of laws, policies and programmes”.<sup>1230</sup> In their concluding observations, both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have called on States to adopt measures to challenge prejudice and discriminatory stereotypes affecting a wide range of protected groups.<sup>1231</sup>

These long-standing obligations to tackle the underlying causes of discrimination have been given renewed focus as the international human rights system has paid greater attention to the problem of stigma as a driver of human rights violations. For example, in the 2018 inaugural report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, the mandate holder noted that:

**At the root of the acts of violence and discrimination under examination lies the intent to punish based on preconceived notions of what the victim’s sexual orientation or gender identity should be, with a binary understanding of what constitutes a male and a female ... or the masculine and the feminine, or with stereotypes of gender sexuality ... and a form of gender-based violence, driven by an intention to punish those seen as defying gender norms .... The connected acts are invariably the manifestation of deeply entrenched stigma and prejudice, irrational hatred .... stigma is attached to an identity that is labelled as abnormal and based on a socially constructed process of alienation between “us” and “them”.<sup>1232</sup>**

Other United Nations human rights mandate holders, ranging from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment<sup>1233</sup> to the Special Rapporteur on the human rights to safe drinking water and sanitation,<sup>1234</sup> have noted the role that stigma plays in driving discriminatory violation of human rights. Concern with stigma as a driver of discrimination has also been raised at the regional level by the Court of Justice of the European Union,<sup>1235</sup> for example.

Over time, as understanding of the range of negative social forces which drive discrimination has increased, the United Nations human rights system has identified and drawn attention to a growing range of forms of prejudice and stigma and the measures necessary to combat them. There have, for example, been no fewer than three world conferences against racism. Stigma and prejudice targeted at specific minority communities, such as antisemitism,<sup>1236</sup> Islamophobia or anti-Muslim hatred,<sup>1237</sup> and anti-Gypsyism,<sup>1238</sup> have been the subject of particular attention by the Human Rights Council. UN-Women, the Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women have all addressed the role of sexism

<sup>1229</sup> A/HRC/43/41, para. 40.

<sup>1230</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 39.

<sup>1231</sup> For instance, in 2020, the Human Rights Committee called upon Portugal to “strengthen its efforts to combat intolerance, stereotypes, prejudice and discrimination towards vulnerable and minority groups, including Roma, African descendants, Muslims and lesbian, gay, bisexual and transgender persons”. Relatedly, in its recent concluding observations on Guinea, the Committee on Economic, Social and Cultural Rights recommended the implementation of “awareness-raising campaigns to combat stereotypes about individuals and groups at risk of discrimination, such as persons living with HIV/AIDS and persons with albinism”. See CCPR/C/PRT/CO/5, para. 15 (a); and E/C.12/GIN/CO/1, para. 19 (e).

<sup>1232</sup> A/HRC/38/43, paras. 48–49.

<sup>1233</sup> A/HRC/22/53, paras. 36–38.

<sup>1234</sup> A/HRC/21/42, paras. 36–38. This preoccupation was subsequently taken up by other actors within the human rights system. See, for example, making the link between pathologization, stigma and discrimination: A/HRC/26/28/Add.2; and A/HRC/35/21.

<sup>1235</sup> See, for example, Court of Justice of the European Union, *CHEZ Razpredelenie Bulgaria AD v. Komisija za zashtita ot diskriminatsia*, Case C83/14, Judgment, 16 July 2015, in particular the Opinion of Advocate General Kokott delivered on 12 March 2015.

<sup>1236</sup> A/74/358.

<sup>1237</sup> See, for example, A/74/195; A/74/215; A/HRC/43/28; and United Nations, “United Nations Strategy and Plan of Action on Hate Speech”.

<sup>1238</sup> Human Rights Council resolution 26/4; and A/HRC/29/24.

and gender stereotypes in perpetuating discrimination against women,<sup>1239</sup> as have other treaty bodies. The role of homophobia and transphobia in driving prejudice, discrimination and discriminatory violence against lesbian, gay, bisexual, transgender and intersex persons has received increasingly urgent attention, including through the creation of a dedicated independent expert.<sup>1240</sup> More recently, concepts such as ableism and structural ageism (see text boxes in the present section) are increasingly gaining traction. While each of these phenomena is different, with particular causes and manifestations, they each describe social norms that cause, fuel or exacerbate discrimination and thus addressing each of them falls within the scope of the obligation to eliminate discrimination.

### STRUCTURAL AGEISM

According to the *Global Report on Ageism*, ageism refers to the stereotypes (how we think), prejudice (how we feel) and discrimination (how we act) directed towards people on the basis of their age.<sup>1241</sup>

Studies have found that ageism is widespread in institutions, laws and policies around the world.<sup>1242</sup> The authors of the *Global Report on Ageism* found that one in two people are ageist against older persons, while in Europe one in three people reported having been a target of ageism. Despite its scale, ageism remains largely unknown and is often considered more acceptable than other forms of prejudice.<sup>1243</sup>

In a recent study, OHCHR demonstrates that, although ageism is a driver for many human rights violations, “thus far the international human rights system has failed to provide an explicit binding prohibition of this form of conduct or to provide an effective remedy for it”.<sup>1244</sup> OHCHR also argues that “understanding how ageism structures and leads to disadvantage is central to responding to human rights violations against older persons” and recommends the elaboration of explicit obligations in a new United Nations convention.<sup>1245</sup>

Ageism can intersect and interact with other forms of stereotypes and prejudice, such as ableism, sexism and racism. The Special Rapporteur on the rights of persons with disabilities, for example, has noted that discrimination in older age is not “the mere result of ableist biases” and that ageism was “a distinct form of oppression that affects older persons, including older persons with disabilities”.<sup>1246</sup>

Thus, States have clear, immediate and substantive positive legal obligations to address prejudice, stereotypes, stigma and other drivers of discrimination and to advance positive values of understanding, tolerance, friendship and respect for human rights, fundamental freedoms and human diversity. Addressing prejudice, stereotypes and stigma requires the adoption of a comprehensive range of measures, spanning multiple areas of life, and entailing obligations on both public and private actors. While States possess a degree of discretion in the design of these measures, treaty bodies have identified some specific actions, including public education, awareness-raising and training, which should form a fundamental part of any programme of action. That said, the focus should be on effectiveness and outcome, rather than on the nature of the measures adopted.

<sup>1239</sup> See, for example, Committee on the Elimination of Discrimination against Women, general recommendation No. 36 (2017).

<sup>1240</sup> The web page of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity is available at [www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx](http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx).

<sup>1241</sup> World Health Organization, *Global Report on Ageism* (Geneva, 2021). Available at [www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism](http://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism).

<sup>1242</sup> *Ibid.*, p. vii. See also Israel Doron and Nena Georgantzi, eds., *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* (Cheltenham, Edward Elgar, 2018).

<sup>1243</sup> OHCHR, “Update to the 2012 analytical outcome study on the normative standards in international human rights law in relation to older persons: working paper prepared by the Office of the High Commissioner for Human Rights” (2021). Available at <https://social.un.org/ageing-working-group/documents/elevnth/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>.

<sup>1244</sup> *Ibid.*, para. 47.

<sup>1245</sup> *Ibid.*, para. 41.

<sup>1246</sup> A/74/186, para. 7. See also Mariska van der Horst and Sarah Vickerstaff, “Is part of ageism actually ableism?”, *Ageing and Society* (2021).

## II. SPECIFIC MEASURES

### A. Participation and representation in public life

Both international human rights treaties and the United Nations human rights mechanisms more broadly stress the centrality of the empowerment and participation of rights holders as part of States' legal obligations to eliminate discrimination. This is true not only for reasons of justice and due remedy, but also because ensuring the representation and inclusion of groups exposed to discrimination in public and political life plays an important role in challenging prejudice, stereotypes and stigma. The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities all establish a number of requirements for States in this respect.

Article 2 (1) (e) of the International Convention on the Elimination of All Forms of Racial Discrimination obliges States parties to “encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division”. This duty to support and strengthen civil society movements and activism complements the obligation contained in article 5 (c) to guarantee the equal enjoyment of political rights, which include “in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service”.

Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women establishes a broad obligation on States to eliminate discrimination and ensure to women equality in “the political and public life of the country”. This includes ensuring equality in the right to vote and stand for election and “to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government”. Article 7 (c) requires States to ensure the equal right “to participate in non-governmental organizations and associations concerned with the public and political life of the country”. Article 8 goes further requiring States to “take all appropriate measures” to ensure women’s equal “opportunity to represent their Governments at the international level and to participate in the work of international organizations”. These obligations, taken together, reflect the value of such equal participation not only for those women who participate in public life, but the role that greater visible representation can play in challenging deep-seated prejudices and stereotypes.

The Convention on the Rights of Persons with Disabilities includes several provisions aimed at equal representation of people with disabilities and their representative organizations. Under article 29, States “guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others”. This includes both obligations to ensure non-discrimination in all aspects of political life and an obligation to “promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs”, including through participation in non-governmental organizations and political parties. Article 33 (3) sets out that “civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process” of the implementation of the Convention. Indeed, the participation and inclusion of persons with disabilities and their representative organizations is a central feature of both the Convention and of commitments made throughout the wider human rights system to combat discrimination on grounds of disability. As the Special Rapporteur on the rights of persons with disabilities has noted:

**The active participation of persons with disabilities in decision-making is a requirement of the human rights model of disability. Participation is addressed as a cross-cutting issue in the Convention; it is recognized as a general principle (art. 3 (c)) and as an obligation for consulting and actively involving persons with disabilities in decision-making processes of their concerns (arts. 4 (3) and 33 (3)). Efforts to involve persons with disabilities in decision-making processes are important, not only because they result in better decisions and more efficient outcomes, but also because they promote citizenship, agency and empowerment.<sup>1247</sup>**

<sup>1247</sup> A/HRC/43/41, para. 46.

The Special Rapporteur on the rights of persons with disabilities has additionally noted that – for example, in the context of medical and scientific practice – States should “actively involve and consult with persons with disabilities and their representative organizations in all decision-making processes ... concerning them, including law reform, policy development and research”.<sup>1248</sup>

### TACKLING ABLEISM

In a recent report on the topic of ableism, the Special Rapporteur on the rights of persons with disabilities underlines the importance of recognizing and exposing this phenomenon in addressing the root causes of discrimination:

9. Despite the significant advances in the recognition of the rights of persons with disabilities at international and national levels, the deeply rooted negative perceptions about the value of their lives continue to be a prevalent obstacle in all societies. Those perceptions are engrained in what is known as ableism; a value system that considers certain typical characteristics of body and mind as essential for living a life of value. Based on strict standards of appearance, functioning and behaviour, ableist ways of thinking consider the disability experience as a misfortune that leads to suffering and disadvantage and invariably devalues human life. As a result, it is generally assumed that the quality of life of persons with disabilities is very low, that they have no future to look forward to and that they will never live happy and fulfilling lives.
10. Ableism leads to social prejudice, discrimination against and oppression of persons with disabilities, as it informs legislation, policies and practices. Ableist assumptions lie at the root of discriminatory practices, such as the sterilization of girls and women with disabilities (see A/72/133), the segregation, institutionalization and deprivation of liberty of persons with disabilities in disability-specific facilities and the use of coercion on the basis of “need of treatment” or “risk to self or to others” ....
- ...
15. Over the last 50 years, the disability rights movement has been challenging these deeply rooted negative perceptions, stating that the real problem is the failure of society to eliminate barriers, provide the required support and embrace the disability experience as part of human diversity. However, the claims of persons with disabilities to have their rights recognized are often dismissed and the underlying power imbalance invalidates their lived experiences. Their narratives are considered to be subjective and ill-suited to informing objective decision-making and thus are not given the space to be genuinely weighed or to challenge ableism. Access to the platforms on which discussions are taking place is limited, rendering the disability movement unable to share information on an equal basis with others.<sup>1249</sup>

As these examples illustrate, States not only have obligations to ensure the right, without distinction, to “take part in the conduct of public affairs ... to vote and to be elected ... [and] to have access, on general terms of equality, to public service”, as stipulated in article 25 of the International Covenant on Civil and Political Rights, they also have positive obligations to ensure equal representation of groups exposed to discrimination, both within the formal structures of politics and government, and to support representative civil society organizations.

<sup>1248</sup> Ibid., para. 76 (g).

<sup>1249</sup> Ibid., paras. 9–10 and 15 (footnote omitted). See also A/HRC/40/54; A/HRC/37/56; A/73/161; and A/70/297.

## B. Diversity and equal representation

Beyond specific obligations to promote equal participation in public and political life, the treaty bodies are increasingly attentive to States' obligations to promote diversity and equal representation in institutions. While such matters evidently intersect with obligations to eliminate directly and indirectly discriminatory barriers to participation and positive action obligations, they also have an important role to play in shaping public understanding, by countering stereotypes and prejudice.

To take one example, in its general recommendation No. 36 (2000), the Committee on the Elimination of Racial Discrimination recently recommended that:

**States should ensure that law enforcement agencies develop recruitment, retention and advancement strategies that promote a diverse workforce that reflects the composition of the populations they serve. This could include setting internal quotas and developing a recruitment programme for ethnic minorities. This has the potential to influence the culture of agencies and the attitudes of staff with a view to produce less biased decision-making.**

**... States should ensure that law enforcement agencies regularly evaluate recruitment and promotion policies and, if necessary, undertake temporary special measures to effectively address the underrepresentation of various national or ethnic minority groups origin and of groups experiencing intersecting forms of discrimination based on, inter alia, religion, sex and gender, sexual orientation, disability and age.**<sup>1250</sup>

## C. Education

One central element of the obligation to address negative social norms and promote equality is the duty to challenge prejudice, stigma and stereotypes and promote diversity and equality through education. This obligation intersects with the right to education, as guaranteed in the majority of the core international human rights treaties.

Article 13 (1) of the International Covenant on Economic, Social and Cultural Rights provides that “education ... shall strengthen the respect for human rights and fundamental freedoms [and] ... enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups”. The Committee on Economic, Social and Cultural Rights has set out that: “Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society.”<sup>1251</sup>

Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination establishes an immediate obligation on States to adopt “immediate and effective measures” in fields including teaching and education to combat prejudices that lead to racial discrimination and to promote understanding and tolerance. The Convention on the Rights of Persons with Disabilities sets out an expansive positive obligation, stating that education shall be directed to the “full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity”.<sup>1252</sup>

Article 10 (c) of the Convention on the Elimination of All Forms of Discrimination against Women requires that States ensure the “elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education”, including through the revision of textbooks and school programmes, and adaptation of teaching methods. Article 5 (b) requires that States ensure that family education includes “recognition of the common responsibility of men and women in the upbringing and development of their children”. The Committee on the Elimination of Discrimination against Women has noted separately that States have an obligation arising under article 2 (e) to “promote education and support for the goals of the Convention

<sup>1250</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 36 (2020), paras. 46–47.

<sup>1251</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 38.

<sup>1252</sup> Convention on the Rights of Persons with Disabilities, art. 24 (1) (a).

throughout the education system and in the community”.<sup>1253</sup> The Committee has further noted that “States parties are to adopt measures towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns. The education system is an example of an area for transformation that, once achieved, can accelerate positive change in other areas.” It has recommended on this basis that, inter alia, States develop “non-stereotypical educational curricula, textbooks and teaching materials to eliminate traditional gender stereotypes that reproduce and reinforce gender-based discrimination against girls and women and to promote more balanced, accurate, healthy and positive projections of the images and voices of women and girls”.<sup>1254</sup>

## D. Media and awareness-raising

Beyond the formal education system, States’ duty to eliminate discrimination by addressing social drivers gives rise to obligations to influence public perceptions through the media and wider public education and awareness-raising efforts.

In its general recommendation No. 28 (2010), the Committee on the Elimination of Discrimination against Women noted that, in addition to the specific obligations arising under article 5, States had awareness-raising obligations in connection with the obligation under article 2 to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”.<sup>1255</sup> Specifically, the Committee stated that States should enlist “all media in public education programmes about the equality of women and men, and ensuring in particular that women are aware of their right to equality without discrimination [and] of the measures taken by the State party to implement the Convention”.<sup>1256</sup>

Article 8 of the Convention on the Rights of Persons with Disabilities focuses specifically on awareness-raising. Through this article, States parties commit to raise awareness of, and foster respect for, the rights and dignity of persons with disabilities; combat stereotypes, prejudices and harmful practices; and promote awareness of the capabilities of persons with disabilities. The Convention sets out an illustrative list of awareness-raising measures, including public awareness campaigns and working with both the education system and the media.<sup>1257</sup> The Committee on the Rights of Persons with Disabilities has underlined the importance of awareness-raising, noting that “discrimination cannot be combated without awareness-raising among all sectors of government and society” and stating that any measures adopted pursuant to the Convention “must be accompanied by adequate awareness-raising measures”.<sup>1258</sup>

## E. Training and sensitization

Article 4 (1) (i) of the Convention on the Rights of Persons with Disabilities establishes a specific obligation on States to “promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention”. In its general comment No. 6 (2018), the Committee on the Rights of Persons with Disabilities notes that “training and education should be provided for relevant agencies, such as legal decision makers, service providers or other stakeholders”, noting that such sensitization is essential to ensure that persons with disabilities are able to access goods and services on an equal basis with others.<sup>1259</sup> The Convention also includes explicit provisions on training in articles 8 (awareness-raising), 9 (accessibility), 13 (access to justice), 20 (personal mobility), 24 (education), 25 (health), 26 (habilitation and rehabilitation), 27 (work and employment) and 28 (adequate standard of living and social protection).

<sup>1253</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 36.

<sup>1254</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 36 (2017), paras. 26 and 27 (d).

<sup>1255</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 36.

<sup>1256</sup> Ibid., para. 38 (e).

<sup>1257</sup> Convention on the Rights of Persons with Disabilities, art. 8 (2).

<sup>1258</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 39. See also A/HRC/43/27.

<sup>1259</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018), para. 50.



The Committee on the Elimination of Discrimination against Women has noted that States should carry out “specific education and training programmes about the principles and provisions of the Convention directed to all Government agencies, public officials and, in particular, the legal profession and the judiciary”.<sup>1260</sup>

The Committee on Economic, Social and Cultural Rights has set out that “the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments”.<sup>1261</sup> As this statement indicates, it is particularly important that judges and advocates gain an understanding of the scope and content of international anti-discrimination law in order to avoid misunderstanding, misinterpretation and misapplication of the law.<sup>1262</sup>

In its general recommendation No. 36 (2000), the Committee on the Elimination of Racial Discrimination provided detailed guidance on training obligations. It noted that: “Human rights education and training are vital to ensuring that police officers do not discriminate. National human rights institutions, in cooperation with civil society organizations, can play a central role in training law enforcement officials, in auditing new technological tools that could lead to discrimination and in identifying other risks in practice.”<sup>1263</sup>

Such training should ensure the engagement of “stigmatized groups, including those whose members experience intersecting forms of discrimination”.<sup>1264</sup> Training should aim to “raise awareness among ... officials about the impact of biases on their work and ... demonstrate how to ensure non-discriminatory conduct”<sup>1265</sup> and should be “regularly evaluated and updated to ensure that it has the desired impact”.<sup>1266</sup>

In its most recent resolution on the rights of persons belonging to national or ethnic, religious and linguistic minorities, the Human Rights Council emphasized “the fundamental importance of human rights education, training and learning, dialogue, including intercultural and interfaith dialogue, and interaction among all relevant stakeholders and members of society relating to the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities”.<sup>1267</sup> According to the Council, these elements form “an integral part of the development of society as a whole”, ensuring “the sharing of best practices relating to, inter alia, the promotion of mutual understanding of minority issues, the management of diversity through the recognition of plural identities and the promotion of inclusive, just, tolerant and stable societies and of social cohesion”.<sup>1268</sup>

## F. Enforcement and implementation

As set out above, international human rights instruments set out clear obligations to tackle the root causes and drivers of discrimination. Both these instruments and the treaty bodies have elaborated a non-exhaustive list of policies and actions that States should implement in order to discharge these obligations, ranging from measures to strengthen representation and participation in public life to countering stereotypes and promoting equality through the education system.

Meeting these obligations requires a comprehensive, system-wide response that goes beyond codifying duties into law. Nevertheless, States must ensure that anti-discrimination law both requires and provides for the adoption and implementation of such measures. At a minimum, this requires setting out enforceable obligations

<sup>1260</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 38 (d).

<sup>1261</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 38.

<sup>1262</sup> In one particularly fraught case, multiple judicial and quasi-judicial instances could not decide whether a case concerned discrimination on grounds of nationality or “personal situation” or whether the claim concerned direct or indirect discrimination (Court of Justice of the European Union, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, Case C-83/14, Judgment, 16 July 2015). The case was finally deemed by the Court of Justice of the European Union to be discrimination on grounds of racial or ethnic origin. It deferred to the national court to determine whether the discrimination at issue was direct or indirect.

<sup>1263</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 36 (2020), para. 45.

<sup>1264</sup> *Ibid.*, para. 42.

<sup>1265</sup> *Ibid.*

<sup>1266</sup> *Ibid.* In the same recommendation, the Committee also made recommendations regarding training and human rights education in the area of artificial intelligence and algorithmic discrimination. *Ibid.*, paras. 43–45.

<sup>1267</sup> Human Rights Council resolution 43/8, preamble.

<sup>1268</sup> *Ibid.*

and requirements – within legislation – to combat prejudice and stigma and to counter stereotypes. These general requirements should be complemented by specific duties in the areas of public participation and representation, education, media, training and sensitization.

These obligations should be integrated into and reflected within all other areas of the law establishing duties on State actors. Positive action programmes have an important role to play in tackling prejudice and stereotypes, in particular by enabling rapid progress towards equal representation in areas of public life. Legal provisions detailing positive action obligations should include explicit requirements to address the drivers of discrimination. Statutory equality duties should incorporate duties to identify the root causes and drivers of discrimination and to take effective action to address them, together with general duties to promote equal and diverse representation. Equality impact assessment should incorporate specific requirements to identify and eliminate the impacts of laws and policies that serve to engender, entrench or exacerbate prejudice, stereotypes or stigma.

Elements of anti-discrimination laws focused on institutions should also integrate obligations to tackle prejudice, stereotypes and stigma. Enforcement bodies – whether courts or equality bodies – should be empowered to order societal remedies such as public apologies and memorials and institutional remedies such as training programmes. Equality bodies should have both a mandate and power to promote equality and non-discrimination and to counter social forces that undermine them. This should include specific powers to carry out educational, awareness-raising, training and sensitization programmes.

Crucially, in addition to establishing duties and obligations to address prejudice, stereotypes and stigma, anti-discrimination laws should provide for enforcement action in situations in which the State fails to discharge such duties and to take measures that are appropriate, proportionate and effective. While States' obligations in this area are proactive and should not arise only as a response or remedy to a complaint, the possibility of enforcement is key to ensuring the effectiveness of these duties.

### III. CONCLUSION: PROMOTING EQUALITY AND DIVERSITY

States' international treaty obligations commit them not simply to prohibiting discrimination in law, but to eliminating it in fact. Taking positive, proactive measures to tackle the root causes and drivers of discrimination are essential, indispensable elements of this obligation. This in turn requires a comprehensive programme of action, required and underpinned by enforceable duties and obligations within anti-discrimination laws, as detailed above.

Yet, if States are to fulfil their obligations and honour their commitments to eliminating discrimination and ensuring equality of participation, their efforts should rise above combating prejudice, stereotypes and stigma. The focus should be not only on countering negative social forces, but on actively promoting equal, diverse and inclusive societies. Efforts should be made to promote understanding between people and groups with different characteristics, statuses and beliefs and to demonstrate how more equal and diverse economies and societies benefit all.

Indeed, this speaks to a more fundamental truth. Inevitably, the present guide has focused in large part on negative proscriptions – on States' obligations to prohibit, prevent and enforce. These measures are absolutely necessary and essential if States are to fulfil their obligations to respect, protect and fulfil the rights to non-discrimination. However, the adoption of such laws represents not an end but a beginning.

Ultimately, States will only realize the rights to equality and non-discrimination by adopting comprehensive anti-discrimination laws and using these laws as a platform, or foundation, for a system-wide effort to promote an equal, diverse and inclusive society.





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ISBN 978-92-1-154243-1



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