

Discrimination, Prohibition of

I. Introduction

[1] The principles of equality and non-discrimination are, without doubt, the most foundational elements of the core international human rights → treaties, together with the interconnected principle of → human dignity. In light of the all-encompassing nature of the prohibition of discrimination in international human rights law, the norms on equality and non-discrimination are also considered to form part of → customary international law (Ramcharan [1981]; Dinstein [1985]; Bayefsky [1990]).

[2] It is well established that the principles of equality and non-discrimination represent the point of departure for the enjoyment of all other rights and freedoms. Equality and non-discrimination are essentially two sides of the same coin – ‘affirmative and negative statements of the same principle’

(Ramcharan [1981] at 252). The positive and negative formulations of these norms can be found in the → Universal Declaration of Human Rights (UDHR). Article 1 UDHR enshrines the equality principle in its affirmation that ‘all human beings are born free and equal in dignity and rights’, while Article 2 UDHR sets out the prohibition of discrimination, which requires that everyone is entitled to human rights and fundamental freedoms without distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[3] The prohibition of discrimination is the primary legal tool employed to counteract unjustified unequal treatment. In turn, the wider right to equal treatment generally requires that comparable situations must not be treated differently and that different situations must not be treated in the same manner unless there is an objective justification. This can encompass a range of positive measures, including → positive discrimination and affirmative action.

[4] As the prohibition of non-discrimination and the right to equal treatment underpin the core international and regional human rights treaties, this entry outlines, in the first instance, the sources of the prohibition of discrimination and the right to equal treatment. Secondly, it analyzes the content and scope of the relevant provisions; and, finally, it examines the challenges and trends related to the prohibition of discrimination and the right to equal treatment.

II. Sources of the prohibition of discrimination and the right to equal treatment

[5] One of the purposes of the → United Nations (UN), as enshrined in Articles 1(2), 13(2) and 55(c) of the UN Charter, is to promote and encourage respect for human rights and fundamental freedoms for all individuals without distinction as to race, sex, language or religion. The prohibition of discrimination runs through the UN Charter like ‘a golden thread’ (Humphrey as quoted in Shelton [2009] at 264).

[6] The UDHR underscores the importance of the norms on equality and non-discrimination as cornerstones of the international human rights system. The Declaration enshrines the prohibition of discrimination in Article 2, and Article 7 of the Declaration extends the scope of the requirement of non-discrimination beyond the enjoyment of the rights set out in the UDHR by enshrining the

general principles of equality before the law and equal protection of the law (in the application of the law and in legal proceedings).

[7] The prohibition of discrimination and the right to equal treatment are mirrored in, and underpin, the provisions of the core international human rights treaties, applying in a cross-cutting manner across those treaties. The → International Covenant on Civil and Political Rights (ICCPR) and the → International Covenant on Economic, Social and Cultural Rights (ICESCR), in their respective Article 2, contain a general non-discrimination clause, prohibiting discrimination in the enjoyment of the rights contained in both Covenants on the same list of prohibited grounds as that contained in the UDHR. Furthermore, Article 26 ICCPR sets out the rights to equality before the law and equal protection of the law. The general non-discrimination provisions contained in the ICCPR and ICESCR are complemented by separate provisions, such as Article 7(a)(i) ICESCR and Article 23(4) ICCPR, requiring equal treatment in relation to specific rights and grounds.

[8] Moreover, a number of treaties reaffirm the prohibition of discrimination and the right to equal treatment with regard to specific protected groups. For instance, Articles 1 and 2 of the → International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and of the → Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) require state parties to prohibit discrimination against racial → minorities and → women, respectively. Article 1(4) ICERD and Article 4(1) CEDAW furthermore require state parties to ensure equal treatment by means of adopting affirmative action. Moreover, Article 5 of the → Convention on the Rights of Persons with Disabilities (CRPD) contains a wide-ranging prohibition of discrimination and a right to equal treatment that go beyond the protections provided by human rights law up to that point.

[9] The prohibition of discrimination and the right to equal treatment also underpin the regional human rights treaties in the Inter-American system for the protection of human rights and in the → Council of Europe (CoE). Article 24 of the → American Convention on Human Rights (ACHR) sets forth a right to equal protection of the law, while Articles 1 and 4 of the Inter-American Convention against All Forms of Discrimination and Intolerance contain a general prohibition of discrimination. Furthermore, the core objective of the Inter-American Convention on the Elimination

of All Forms of Discrimination against Persons with Disabilities is to prevent and eradicate all forms of discrimination against → persons with disabilities, while Article 5 of the → Inter-American Convention on Protecting the Human Rights of Older Persons sets out the prohibition of discrimination based on age (→ Older Persons). The regional African human rights system is based, among others, on the → African Charter on Human and Peoples' Rights (AfCHPR or Banjul Charter), which entered into force in October 1986. Article 2 AfCHPR is the key non-discrimination provision, guaranteeing all individuals the enjoyment of the rights and freedoms guaranteed in the 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. That Article is complemented by Article 3 on equality before the law and equal protection of the law. In a well-known case on minority rights, the → African Commission on Human and Peoples' Rights (ACHPR) explained the significance of Article 2 AfCHPR in the following terms: 'Article 2 of the Charter lays down a principle that is essential to the spirit of [the] Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings'. The Commission further noted that the same objective underpins the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic → Minorities, adopted by the General Assembly of the UN (ACHPR, *Malawi African Association and Others v Mauritania* [2000] para 131).

[10] In the Council of Europe, a prohibition of unequal treatment is enshrined in Article 14 of the → European Convention on Human Rights (ECHR), which prohibits discrimination solely with regard to the rights and freedoms set out in the Convention. Article 14 ECHR is an ancillary or accessory provision, meaning that any discrimination claim must also engage another right contained in the ECHR, although this does not mean that another provision of the Convention must be held to have been violated. Article 14 ECHR is complemented by Protocol No 12 to the ECHR, which provides for a general prohibition of discrimination in Article 1 of the Protocol, and by Article E of the Revised → European Social Charter (ESC).

[11] At the → European Union (EU) level, the → Charter of Fundamental Rights (CFR) contains a specific chapter on equality in its Chapter III, with the general prohibition of non-discrimination being contained in Article 21 CFR.

III. Content and scope of the prohibition of discrimination and the right to equal treatment

[12] This section of the entry analyzes the various elements of the prohibition of discrimination and the right to equal treatment, including their personal and material scopes, the definition of discrimination, prohibited grounds of discrimination in human rights law and state obligations.

1. The personal scope of non-discrimination and equal treatment

[13] In general, the core human rights treaties cover *all* individuals within the territory of a state or subject to a state party's jurisdiction. In other words, they cover 'aliens' and citizens alike. However, some human rights treaty clauses permit states to draw distinctions between citizens and non-citizens. Article 2(3) ICESCR, for instance, provides that developing countries may determine the extent to which they guarantee to non-nationals the economic rights recognized in the Covenant. A similar clause is contained in Article 1(2) ICERD, which highlights that the ICERD shall not apply to distinctions, exclusions, restrictions or preferences made by a state party to the Convention between citizens and non-citizens. Notwithstanding this, the CERD Committee has made it clear that Article 1(2) 'must be construed so as to avoid undermining the basic prohibition of discrimination'; hence, it should not be interpreted so as to detract in any way from the rights and freedoms recognized and enunciated in the UDHR, the ICCPR or the ICESCR, in particular (CERD Committee, *GR No 30: Discrimination against Non-Citizens* [2004] para 2). Indeed, the CERD Committee has further stated that 'differential treatment based on citizenship [will] constitute discrimination if the criteria for such differentiation, judged in light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim' (*ibid.*, para 4).

2. The material scope of the principles of non-discrimination and equal treatment

[14] At the international level, the principles of non-discrimination and equal treatment require that like cases be treated in a similar manner. Thus, individuals in the same situation must be treated equally in law and in practice, indicating that there must be a comparator in order to claim a violation of the relevant norms.

[15] International and regional human rights treaty monitoring bodies do not only focus on like cases, however. According to the established case law of the → European Court of Human Rights (ECtHR), Article 14 ECHR may be triggered where states fail to treat differently persons whose situations are significantly different, as outlined (among others) in *Taddeucci and McCall v Italy* ([2016] para 81), in which the ECtHR, in finding a violation of the prohibition of discrimination on the ground of → sexual orientation, acknowledged the indirect discrimination that arose on account of the fact that same-sex couples could not marry under the relevant domestic law. Likewise, the Human Rights Committee (HRCtee) has affirmed that the enjoyment of the rights and freedoms contained in the ICCPR on an equal footing ‘does not mean identical treatment in every instance’ (*GC No 18: Non-Discrimination* [1989] para 8). In other words, when individuals have different characteristics, those characteristics should be taken into account in ensuring the enjoyment of rights and in creating a level playing field. For instance, a public or private employer organizing interviews in which both persons with disabilities and those without disabilities are participating should take into account the impairment of the person with a disability in finalizing the practical details of the interviews.

[16] It is important to note that not every distinction or difference in treatment will amount to discrimination. When there is an objective and reasonable justification (or legitimate aim) for differential treatment, and the means employed are proportionate to the aim sought to be achieved, then differential treatment does not generally amount to prohibited discrimination. These requirements have been set out by several international human rights monitoring bodies, including the ECtHR, in *Marckx v Belgium* ([1979] para 33) and *Abdulaziz, Cabales and Balkandali v United Kingdom* ([1985] para 72); the → Inter-American Court of Human Rights (IACtHR) in its Advisory Opinion No 4 on *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* ([1984] para 57); and the HRCtee in *Jacobs v Belgium* ([2004] para 9.5) and *Broeks v The Netherlands* ([1987] para 8.3). In *Jacobs v Belgium*, for instance, the HRCtee found that there was a reasonable relationship of proportionality between the purpose (being to ensure equality) of a gender clause in national law that required there to be at least four applicants of each sex among the 11 non-justices appointed to the High Council of Justice, the means applied and its modalities, and

one of the principal aims of the law – namely to establish a High Council made up of highly qualified individuals (para 9.5).

[17] The definition of discrimination is fundamental to the definition of equal treatment. Despite the ubiquitous presence of the non-discrimination norm in the core human rights treaties, the instruments comprising the International Bill of Human Rights – the UDHR, the ICCPR and the ICESCR – contain no definition of discrimination. In essence, only a few instruments at the international level set out an explicit definition of that norm. Such a definition can be found in Article 1(1) ICERD, Article 1 CEDAW, Article 2 CRPD, Article 1(1) of the → International Labour Organization (ILO) Convention (No 111) concerning Discrimination in Respect of Employment and Occupation (1958), and Article 1(1) of the → United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education.

[18] Article 1(1) ICERD defines the term ‘racial discrimination’ as:

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.

[19] As is evident from the incorporation of the terms ‘purpose’ and ‘effect’ in Article 1(1) ICERD, both ‘direct discrimination’ and ‘indirect discrimination’ (an effects-based concept that does not require a discriminatory intent to be shown) are included in the definition of discrimination at the international level. This was also confirmed by the CERD Committee in *LR and Others v Slovakia* ([2005] para 10.4).

[20] Direct discrimination occurs when individuals are treated less favourably than others in a similar situation for a reason directly related to a prohibited ground of discrimination, while indirect discrimination occurs when a seemingly neutral legal provision, criterion or practice entails a particular disadvantage for persons belonging to a specific group. The fact that both direct and indirect discrimination are covered by the definition of discrimination at the international level can also be discerned from the text of Article 1 CEDAW and Article 2 CRPD. Notably, Article 1 of the ILO Convention No 111 looks only to the effect of the discriminatory treatment, while the ECHR covers both direct and indirect discrimination. In fact, the

ECHR also covers discrimination by association, namely instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics. This was confirmed by the ECtHR in *Guberina v Croatia* ([2016] para 78), concerning the discriminatory application of taxation rules to a child with a disability and his family; and *Škorjanec v Croatia* ([2017] para 55), which concerned racist hate crime, leading to discrimination by association.

[21] The general wording of the definitions of discrimination in the ICERD and CEDAW are similar to that in Article 2 CRPD, read in conjunction with Article 5 CRPD. However, the wording of those CRPD provisions went 'far beyond the substance of international human rights law' up to that point (Broderick [2015] at 2), in that they affirm that the CRPD prohibits *all* forms of discrimination on the basis of disability, including a denial of reasonable accommodation – that is, individualized modifications and adjustments, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of their rights and freedoms, as long as they do not amount to a disproportionate or undue burden for the duty bearer. Trömel notes that legislation such as the CRPD, in prohibiting discrimination *on the basis of disability*, 'has to put the focus not on whether the person who has been discriminated [against] has or not a (legally certified) disability, but on whether the situation faced by the person is a discriminatory situation based on disability' (Trömel [2009] at 124). The CRPD Committee confirms that the definition of discrimination contained in the CRPD covers many different forms of discrimination, including direct and indirect discrimination, an unjustified denial of reasonable accommodation, and harassment (*GC No 6: Equality and Non-Discrimination* [2018] para 18). Furthermore, the Committee notes that the CRPD's definition of discrimination covers discrimination against individuals who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future, who are presumed to have a disability, as well as those who are associated with a person with a disability (*ibid.*, para 20). This is a very wide understanding of the prohibition of discrimination when compared with the other core human rights treaties.

[22] The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities does not explicitly include an unjustified denial of reasonable

accommodation within its definition of discrimination, although it does contain a prohibition of discrimination on the basis of a past or perceived disability. Interestingly, the CRPD is the only treaty at the UN level explicitly to cover multiple and intersectional discrimination (→ Intersectionality), where discrimination occurs on two or more grounds (see also below at para 48). However, at the regional level both Articles 1(3) and 11 of the Inter-American Convention against All Forms of Discrimination and Intolerance and Article 5 of the Inter-American Convention on Protecting the Human Rights of Older Persons set out an explicit prohibition of, and requirement to address, multiple discrimination. Furthermore, Article 1 of the Inter-American Convention against All Forms of Discrimination and Intolerance covers – in addition to direct and indirect discrimination as well as multiple discrimination – all forms of 'intolerance', which is defined in Article 1(5) of that Convention as 'an action or set of actions or expressions that denote disrespect, rejection, or contempt for the dignity, characteristics, convictions, or opinions of persons for being different or contrary'. In the African regional human rights system, multiple discrimination is not explicitly covered by the → Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa. However 'concern' is expressed in the non-binding Preamble to the Protocol about the multiple forms of discrimination that women and girls with disabilities face.

3. Prohibited grounds of discrimination

[23] The prohibited grounds of discrimination vary depending on the treaty in question. Article 2 UDHR prohibits discrimination on the following ten grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status – the latter term indicating that the provision is open-ended or indeterminate. Article 2 of the ICCPR and ICESCR replicate those grounds.

[24] Articles 1 ICERD and CEDAW – often termed the 'non-discrimination treaties' – set out group-specific prohibitions of discrimination, tailoring the non-discrimination norm to the needs of racial and ethnic minorities, and women, respectively. Articles 2 and 5 CRPD set out similar group-specific provisions, granting equal treatment to all individuals who have 'long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their

full and effective participation in society on an equal basis with others', in accordance with the personal scope of the CRPD contained in Article 1.

[25] At the level of the Inter-American system for the protection of human rights, Article 1(1) ACHR prohibits discrimination on numerous grounds, including economic status. In a similar vein to the UN Covenants, the open-ended nature of the list contained in that provision is reinforced by the phrase 'any other social condition'. In addition, Article 24 ACHR provides for prohibition of discrimination in the application of the law and in legal proceedings. Although this provision does not include a list of prohibited grounds of discrimination, it is generally interpreted with reference to the list of prohibited grounds contained in Article 1(1) ACHR.

[26] Article 1 of the Inter-American Convention against All Forms of Discrimination and Intolerance prohibits discrimination on a very extensive list of grounds, including but not limited to nationality; age; sex; sexual orientation; → gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socio-economic status; educational level; → migrant status, → refugee status, statelessness (→ Stateless Persons) and internally displaced status (→ Internally Displaced Persons (IDPs)); and disability.

[27] Interestingly, the prohibited ground of genetic trait or characteristics is not included explicitly in any of the UN treaties, although Articles 2 and 5 CRPD have been interpreted by the CRPD Committee as including genetic predisposition towards illness under the prohibition of discrimination in the CRPD (*GC No 6: Equality and Non-Discrimination* [2018] para 21). However, the definitions of discrimination in the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities and in Article 1 of the Inter-American Convention against All Forms of Discrimination and Intolerance explicitly cover discrimination on the ground of genetic features, as does the CFR. In addition to the prohibited ground of genetic features, the CFR covers those of sex, race, colour, ethnic or social origin, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

[28] Article 14 ECHR contains an open-ended clause, prohibiting discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth

or other status. Alongside that provision, Protocol No 12 to the ECHR sets out a prohibition of discrimination on the grounds of sex, race, colour, language, religion, national or social origin, or birth, among others. The open-ended nature of these two provisions has been drawn on by the ECtHR to bring a wide range of unjustified distinctions within the protection offered by Article 14 ECHR, and the ECtHR has even affirmed that it is not always necessary to determine on what ground the differential treatment was based (*Rasmussen v Denmark* [1984] para 34).

[29] The Revised European Social Charter provides explicit protection against discrimination based on race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. Furthermore, at the regional level in Africa, Article 2 AfCHPR provides that rights under the Charter must be guaranteed 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.

4. The nature of the prohibition of discrimination: autonomous or subordinate?

[30] The prohibition of discrimination enshrined in human rights instruments is usually subordinate to the rights set out in the particular instrument in question. That is the case for Article 2(1) ICCPR and Article 2(1) of the → Convention on the Rights of the Child (CRC), for example. However, certain human rights instruments provide for protection that is not limited to the rights contained in the instrument in question. For instance, the application of Article 26 ICCPR is not confined to the rights contained in the Covenant. The result of the self-standing nature of Article 26 ICCPR has been applied in individual communications of the HRCtee, such as *Broeks v The Netherlands* (1987). In that decision the HRCtee found a breach of the Covenant on the ground that women were denied social security benefits equal to those granted to men, despite the fact that the ICCPR does not explicitly require states to enact legislation to provide for social security.

[31] At the regional level, Article 3 AfCHPR and Article 24 ACHR both establish free-standing rights to equality before the law and equal protection of the law. Moreover, while Article 14 ECHR is an ancillary provision, as noted above (see para 10) in that its scope of application is limited to facts that fall within the ambit of other

Convention rights, Protocol No 12 to the ECHR sets out a free-standing prohibition of discrimination on a number of grounds, including sex, race, colour, language, religion, national or social origin and birth. This affords protection beyond the rights and freedoms contained in Article 14 ECHR. The broader scope of the protection provided by Protocol No 12 applies in cases where a person is discriminated against (i) in the enjoyment of any right granted under national law; (ii) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law; (iii) by a public authority in the exercise of discretionary power; and (iv) by any other act or omission by a public authority (CoE, *Explanatory Report* [2000] para 22).

5. State obligations under the prohibition of discrimination and the equal treatment norm

[32] It is well established that the requirement to abstain from discrimination in human rights law is an obligation of immediate effect, as confirmed by the UN treaty monitoring bodies (CESCR, *GC No 20: Non-Discrimination* [2009] para 7; → Core Obligations and Progressive Realization). The IACtHR has also addressed the principles of equality and non-discrimination in its advisory opinions. In its Advisory Opinion No 18 on Juridical Conditions and Rights of Undocumented Migrants (2003), for instance, the Inter-American Court ruled that states may not ‘subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals’ (para 11).

[33] The core human rights treaty bodies make a distinction between *de jure* discrimination (discrimination in law) and *de facto* discrimination (discrimination in fact). Those bodies consider the elimination of *de jure* discrimination to be an essential pre-requisite for attaining *de facto* equality (equality in fact). The CEDAW Committee, in particular, has drawn attention to the importance of eliminating *de jure* discrimination.

[34] The ECtHR has also addressed the obligations arising from the prohibition of discrimination under the ECHR. It has confirmed that alongside the negative obligation incumbent on state parties not to discriminate, in certain circumstances Article 14 may imply positive obligations on contracting states (*Pla and Puncernau v Andorra* [2004], para 62; → Negative and Positive Obligations), such as to prevent, stop or punish discrimination. This might entail the effective investigation of offences or the provision of effective remedies.

[35] Nowak contends that ‘the primary significance of protection against discrimination lies in the obligation on States Parties to provide effective protection against discrimination by private parties to those subject to their laws’ (Nowak [2005] at 632; see also Vandenhoe [2005] at 215). Notably, Article 2(1)(d) ICERD requires state parties to bring an end to racial discrimination by any persons or group or organization. In a similar vein, Article 2(e) CEDAW targets discriminatory behaviour by any person, organization or enterprise. Article 4(1)(e) CRPD is modelled closely on Article 2(e) CEDAW.

[36] On the whole, the obligations stemming from the core human rights treaties in international human rights law and the treaties at the regional level not only seek to realize a mere prohibition of discrimination but also to guarantee true equality in practice at all levels of society, among all actors and in all spheres.

6. Equality before the law and equal protection of the law

[37] The right to equality before the law is set out in Articles 14(1) and 26 ICCPR, as well as in Articles 5(a) ICERD and 15 CEDAW. Nowak asserts that the term ‘equality before the law’ in Article 26 ICCPR ‘does not give rise to a claim of whatever nature to substantive equality but instead solely to a formal claim that existing laws be applied in the same manner to all those subject to them’ (Nowak [2005] at 605). In other words, it is aimed exclusively at the application and enforcement of the law. It therefore encompasses a requirement of formal equality, which focuses exclusively on equal treatment in the application and enforcement of laws and rights. Equality before the law essentially means that judges and administrative officials must not act arbitrarily in applying or enforcing laws. This interpretation is consolidated by the Committee on Economic, Social and Cultural Rights (CESCR) in its affirmation that ‘the principle of equality before the law must be respected by administrative agencies, and courts and tribunals, and implies that those authorities must apply the law equally to men and women’ (*GC No 16: Equal Right* [2005] para 9).

[38] In contrast to equality before the law, scholars note that the phrase ‘equal protection of the law’ in the ICCPR is directed at the national legislature, which is bound to protect the right to equality without discrimination, and should not adopt or maintain discriminatory legislative standards (Lester and Joseph [1995] at 566; Nowak

[2005] at 607). The guarantee of equal protection of the law therefore secures *de jure* equality (or equality in law) so that the law itself dispenses rights and benefits equally to all. This has been confirmed by the HRCtee, which maintains that Article 26 ICCPR is concerned 'with the obligations imposed on state parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a state party, it must comply with the requirement of Article 26 ICCPR that its content should not be discriminatory' (*GC No 18: Non-Discrimination* [1989] para 12).

IV. Challenges and trends

1. Challenges

[39] Leaving aside the many difficulties associated with non-discrimination law at the national level, including challenges in satisfying the relevant burden of proof and ensuring enforcement, several challenges are evident regarding the interpretation and application of the non-discrimination and equality norms at the international level.

[40] In the first instance, the precise meaning of certain terms related to the principles of equality and non-discrimination are still unsettled, and this gives rise to interpretation difficulties. In addition, general prohibitions of discrimination can be problematic, because they accord courts and international monitoring bodies broad discretion with regard to their interpretation and application. This has been particularly evident with regard to the ICCPR, as the wording of Article 26 has led the HRCtee to 'deal with a considerable number of discrimination cases that, upon first glance, would not appear to fall within' the ambit of the material scope of the Covenant (Seibert-Fohr [2010] at 8). This was evidenced in *Haraldsson and Sveinsson v Iceland* (2007), in which the HRCtee essentially addressed the question as to whether giving preferential treatment to existing fishing licensees in determining fishing quotas breached the right to equal treatment of new applicants for those licences. By substantially broadening the grounds of 'challengeable discriminatory distinctions' under the ICCPR, the Committee 'opened the door' to challenges to a wide array of socio-economic regulations whenever a complainant can claim membership of 'some sort of identifiable group' (Seibert-Fohr [2010] at 11, 12).

[41] A further challenge regarding the interpretation and application of the non-discrimination norm concerns the term 'other status' in several of the international and regional human rights treaties, as its broad formulation gives rise to a risk that the

treaty monitoring bodies would overreach their competence. In addition, it has been noted that inconsistencies in the definition of (protected) grounds of discrimination are evident, among others, in the jurisprudence of the ECtHR (Gerards [2013] at 103), in the sense that 'from the 1970s onwards, there are two parallel lines of case law, one allowing complaints about almost all differences in treatment, regardless of their grounds, and another allowing only complaints about discrimination based on personal status or personal characteristics' (*ibid.*, at 99).

[42] Furthermore, certain concepts that are included within the non-discrimination norm can give rise to difficulties in application. This is the case with regard to the concept of 'indirect discrimination', as the selection of a suitable actual comparator or a hypothetical comparator can cause difficulties, particularly in claims related to sex or gender equality or age discrimination. For instance, female employees who are employed part-time because of family circumstances or caring responsibilities for an elderly parent and who claim discrimination with regard to access to promotion (which is often based on length of service or having full-term employment) may find it difficult to establish an appropriate comparator (i.e. a male who works part-time).

2. Trends

[43] Two of the principal trends that are evident at the international level with regard to the prohibition of discrimination and the right to equal treatment are (i) the paradigmatic shift from a model of formal equality to that of substantive equality and, later, to an inclusive equality model; and (ii) the prohibition of differential treatment in situations of → intersectionality or multiple disadvantage.

[44] With regard to the first trend, the assessment of a violation of the prohibition of non-discrimination and the right to equal treatment often triggers an evaluation of one or more conceptions of equality. A formal conception of equality is enshrined in the ICCPR and ICESCR (Arnardóttir [2009] at 47; Broderick [2015] at 33). As noted above (at para 37), formal equality focuses exclusively on equal treatment in the application and enforcement of laws and rights. It requires that individuals are treated in the same manner if they are situated in a similar situation, and that laws and policies are formulated in a neutral manner. The formal model of equality is encapsulated in the prohibition of direct discrimination, and does not take account of individual or contextual differences

between marginalized and socially privileged groups. With the adoption of the ICERD and CEDAW, there was a shift towards a more substantive conceptualization of the right to equal treatment, mainly as a result of the incorporation of indirect discrimination and affirmative action in those treaties (Amardóttir [2009]; Broderick [2015] at 33–7).

[45] The inclusion of the duty to reasonably accommodate persons with disabilities within the non-discrimination norm in the CRPD marks a definitive step towards an inclusive equality model (CRPD Committee, *GC No 6: Equality and Non-Discrimination* [2018] para 11) obliging state parties to adopt far-reaching positive measures tailored to the individualized needs of persons with disabilities. According to the CRPD Committee, the inclusive equality model goes beyond a substantive model of equality, by embracing four intertwined dimensions:

(a) a fair redistributive dimension to address socio-economic 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.

(CRPD Committee, *GC No 6: Equality and Non-Discrimination* [2018] para 11)

[46] Notably, the prohibition of discrimination in the CRPD, including the right to reasonable accommodation, applies across all of the civil and political rights, as well as the economic, social and cultural rights contained in the Convention, and it gives rise to an explicit right to positive measures within the non-discrimination norm.

[47] A similar trend is evident, to a certain extent, under the ECHR, as the Strasbourg Court has moved towards a more substantive conceptualization of the prohibition of discrimination in its interpretation of Article 14 ECHR. This can be seen by the inclusion of a right to reasonable accommodation for persons with disabilities in that provision in *Çam v Turkey* (2016) – a case concerning inclusive education for persons with disabilities – and by the incorporation of a prohibition of discrimination by association in Article 14 ECHR in *Škorjanec v Croatia* (2017) and *Guberina v Croatia* (2016).

[48] With regard to the second major trend mentioned above, namely the incorporation of intersectional and multiple disadvantage within the

non-discrimination norm, Article 6 CRPD is the first provision of the core UN human rights treaties that specifically prohibits discrimination on the basis of gender and disability, addressing discrimination against women and girls with disabilities. While Article 6 CRPD refers only to ‘multiple discrimination’, the CRPD Committee has confirmed that it also encompasses a prohibition of intersectional discrimination (*GC No 6: Equality and Non-Discrimination* [2018] para 19). The Committee has distinguished between the two terms, stating that ‘multiple discrimination’ constitutes ‘a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated’, while ‘intersectional discrimination’ refers to ‘a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination’ (*ibid.*, para 19).

[49] Article 7 CRPD (on children with disabilities) and the Preamble to the CRPD (para (p)), which acknowledges the ‘difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination’, also demonstrate an intersectional approach to discrimination.

[50] As shown above (at para 22), multiple discrimination was already included in certain treaties in the Inter-American system for the protection of human rights before the adoption of the CRPD at the UN level.

V. Conclusion

[51] The opening words of Article 1 UDHR, namely that all human beings are born free and equal in dignity and rights, demonstrate clearly that the prohibition of discrimination and the right to equal treatment underpin the international human rights law system. The treaty monitoring bodies confirm this. The HRCtee, for instance, asserts that ‘non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights’ (*GC No 18: Non-Discrimination* [1989] para 1).

[52] The interpretation and application of the equality and non-discrimination norms in the UN and regional human rights treaties by the respective treaty monitoring bodies have seen numerous developments over the past decades. Notwithstanding some progressive trends, challenges

remain and, if the prohibition of discrimination and the right to equal treatment are to be effective, it is important that a coherent body of jurisprudence emerges from the treaty monitoring bodies and international courts.

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