FURTHER READING

BOB (ed), *The International Struggle for New Human Rights* (University of Pennsylvania Press, 2009).

COOMANS (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia, 2006).

INTERNATIONAL COMMMISSION OF JURISTS, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights* (Geneva, 2008).

NOWAK, *Introduction to the International Human Rights Regime* (Martinus Nijhoff, 2003).

OHCHR, *Report on the Right to the Truth*, A/HRC/12/19 (21 August 2009).

SEIDERMAN, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia, 2001).

TOMUSCHAT, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2008).

9

EQUALITY AND NON-DISCRIMINATION

Daniel Moeckli

SUMMARY

The international human rights system is founded on the idea that all human beings have the same set of fundamental rights. Accordingly, almost all general human rights instruments guarantee the right to equality and non-discrimination, and several specialized treaties provide protection against particular forms of discrimination. International human rights law prohibits discrimination in treatment (direct discrimination) as well as in outcome (indirect discrimination), regardless of whether it is intended or unintended. Yet it also acknowledges that it may sometimes be justified to classify people: differences in treatment or outcome are permissible as long as they pursue a legitimate aim in a proportionate manner. Indeed, the right to equality may *require* states to treat people differently in order to overcome historical patterns of disadvantage and achieve real equality.

1 INTRODUCTION

The notion that all human beings are equal and therefore deserve to be treated equally has a powerful intuitive appeal. It is one of the central ideals of the Enlightenment and at the heart of liberal theories of the state.[1] The US Declaration of Independence of 1776 famously proclaimed that 'all men are created equal', and today virtually every liberal democratic state guarantees equality in its constitution. The principle of equality and non-discrimination has gained a similarly important status in international law. It is included in the key human rights instruments and the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, describes it as 'a fundamental rule of international human rights law'.[2]

[1] See Chapter 1, above. [2] A/CONF.157/23 (25 June 1993) para 15.

What this fundamental rule entails in practice, however, is difficult to establish. For, of course, no two human beings are equal in the sense that they are identical. We might be able to say that two people are equal in respect of some measurable characteristic ('they both weigh 82 kilograms'), but they will always be different in some other respects (income, political opinion, and so on). In order to apply the principle of equality we first need to define the relevant criterion in respect of which people should be judged to be alike or different. And even when two persons can be said to be alike, it might still be questionable whether they should always be treated equally. Furthermore, we need to decide what kind of equality we seek to achieve. Do we mean by equality that people should be treated identically? Or that they should be given the same opportunities? Or that they should be placed in the same position? Equality can be formulated in different ways, and deciding which concept of equality to use is not a question of logic but a political choice. In this sense, equality is an 'empty idea'[3]—it does not answer the questions of who are equals and what constitutes equal treatment. External values, not derivable from the concept of equality, are necessary to answer these questions.

The challenge, therefore, is to give substance to the abstract notion of equality by translating it into concrete legal formulations that make clear which forms of unequal treatment are legitimate because they are based on morally acceptable criteria and which ones are wrongful. This chapter explains how this challenge has been addressed in international human rights law.

Section 2 discusses what, in general terms, equality and non-discrimination can be interpreted to mean. Section 3 gives an overview of the different norms guaranteeing equality and non-discrimination in international human rights law. Section 4 explains the concepts of direct and indirect discrimination. Section 5 considers the requirements for a difference in treatment to be justified under international human rights law. Section 6 sets out the different sorts of obligations that the right to equality imposes on states, in particular their duty to take positive action to ensure everyone can enjoy this right.

2 THE MEANING OF EQUALITY AND NON-DISCRIMINATION

The terms 'equality' and 'non-discrimination' have often been used interchangeably and described as the positive and negative statement of the same principle: whereas the maxim of equality requires that equals be treated equally, the prohibition of discrimination precludes differential treatment on unreasonable grounds.[4] In recent years, however, there has been an increased emphasis on the positive

[3] Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard LR* 537.

[4] eg OC-4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACtHR Series A No 4 (1984), Separate Opinion of Rodolfo E Piza, J, para 10 ('… it appears clear that the

formulation. This shift in terminology highlights that equality implies not only a negative obligation not to discriminate, but also a duty to recognize differences between people and to take positive action to achieve real equality. Thus, whereas 'non-discrimination' corresponds to the more limited concept of *formal equality*, usage of the term 'equality' stresses the need for a more positive approach aimed at *substantive equality*.

2.1 FORMAL EQUALITY

Formal equality refers to Aristotle's classical maxim according to which equals must be treated equally or, more precisely, likes must be treated alike.[5] This notion of equality as consistency focuses on the process rather than the outcome: equality is achieved if individuals in a comparable situation are treated equally, regardless of the result. The values underpinning formal equality are the liberal ideals of state neutrality and individualism, that is, the notion that the state should not give preference to any one group and that people should be treated exclusively on their individual merits and regardless of group membership.

However, as noted above, this idea of equality raises the question of when two cases can be said to be alike. It is inevitable that laws and government action classify persons into groups that are treated differently. Under a progressive taxation system, for example, people are treated differently according to their income. In states with a juvenile justice system, people are treated differently according to their age. These distinctions are generally seen as perfectly legitimate because they are based on morally acceptable grounds. Accordingly, at least in common language, the word 'discrimination' also has a positive connotation ('to discriminate between right and wrong'). But which differences in treatment are legitimate and which ones are not? The principle that likes should be treated alike does not, by itself, answer this question.

There are a number of other problems with the concept of equality as consistency.[6] First, since it is not concerned with the outcome, it does not matter whether two parties are treated equally well or equally badly. Thus, it is compatible with this understanding of equality that a city closes all its swimming pools rather than open its 'whites only' pools to black people ('levelling down').[7] Second, inconsistent treatment can only be demonstrated if the complainant can find a comparably situated person who has been treated more favourably. Yet for a woman in a low-paid position, for instance, it may be difficult to find a man doing the same job. Third, treating people apparently consistently regardless of their differing backgrounds may have a disparate impact on particular groups. A law which, in the famous words of Anatole France,

concepts of equality and non-discrimination are reciprocal, like the two faces of one same institution. Equality is the positive face of non-discrimination. Discrimination is the negative face of equality').

[5] Aristotle, *The Nicomachean Ethics of Aristotle* (1911) Book V3, paras 1131a–1131b.

[6] See Fredman, *Discrimination Law* (OUP, 2002) 7–11.

[7] See *Palmer v Thompson* 403 US 217 (1971).

'forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread' will in fact entrench inequality.[8]

2.2 SUBSTANTIVE EQUALITY

Proponents of a substantive conception of equality recognize that a merely formal notion of equality as procedural fairness can in fact perpetuate existing patterns of disadvantage. Drawing on values such as human dignity, distributive justice, and equal participation, they argue that equality must go beyond consistent treatment of likes. There are two main variants of substantive equality: equality of opportunity and equality of results.

According to the notion of equality of opportunity, true equality can only be achieved if people are not only treated equally but are also given the same opportunities. Like competitors in a race, everyone should be able to begin from the same starting point. Equality of opportunity requires the removal of barriers to the advancement of disadvantaged groups, such as upper age limits for employment that may disadvantage women with childcare responsibilities. According to a broader, substantive understanding of the concept, it may also require positive measures such as training. But equality of opportunity does not aim to achieve equality of outcome. Once the race has started, everyone is treated the same. Thus, while equality of opportunity is to some extent about redressing past discrimination, it also stresses individual merit.

Equality of results goes further than this and aims to achieve an equal distribution of social goods such as education, employment, healthcare, and political representation. It recognizes that removing barriers does not guarantee that disadvantaged groups will in fact be able to take advantage of available opportunities. Abolishing upper age limits, for example, does not, by itself, ensure that more women with childcare responsibilities will be able to apply for the respective jobs. Equality of results can be understood and achieved in different ways. In its strongest form, it explicitly aims to increase the representation of disadvantaged groups in educational institutions, employment, or public office through preferential treatment and quota systems.

These differing conceptions of equality find their reflection in different forms of legal regulation. Formal equality forms the conceptual basis of the requirement of equality before the law and prohibitions of direct discrimination, whereas prohibitions of indirect discrimination are supported by a substantive notion of equality (see Section 4, below for the distinction between direct and indirect discrimination). 'Affirmative action' programmes (see Section 6, below) can be justified on the basis of a substantive notion of equality, but they are incompatible with a formal conception of equality as consistency. In any jurisdiction, a range of regulations that reflect different conceptions of equality will be found; no legal system relies exclusively on simply one approach to equality.

[8] France, *Le Lys Rouge* (Calmann-Lévy, 1894) ch 7.

3 EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL LAW

The right to equality and non-discrimination gives concrete expression to the basic idea on which the whole international human rights system is founded: that all human beings, regardless of their status or membership of a particular group, are entitled to a set of rights. Since it underlies all other human rights, equality is often described not only as a 'right' but also as a 'principle'. The foundational significance of equality is reflected in the fact that it is proclaimed in the very first article of the Universal Declaration of Human Rights (UDHR): 'All human beings are born free and equal in dignity and rights'.

This section first gives an overview of the different sources of the right to equality and non-discrimination in international law. Next, it considers the scope of these norms: do they guarantee equality and non-discrimination only in the context of other human rights or across the board? Finally, the prohibited grounds of distinction are explored: which groups are protected against discrimination?

3.1 SOURCES

Article 1(3) of the UN Charter makes it clear that one of the basic purposes of the UN is the promotion of the equal guarantee of human rights for all without any distinction. Numerous instruments aimed at the realization of this notion have been adopted under the auspices of the UN. The general human rights instruments guarantee the right to equality and non-discrimination in several of their provisions: the UDHR in Articles 1, 2(1), and 7; the International Covenant on Civil and Political Rights (ICCPR) in Articles 2, 3, and 26; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Articles 2(2) and 3. As far as the specialized human rights treaties are concerned, at least three of them are specifically devoted to addressing certain forms of discrimination: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). The Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) at least partly pursue the same objective and contain explicit provisions on equality and non-discrimination.[9] The only international human rights treaties without explicit non-discrimination clauses are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Convention for the Protection of All Persons from Enforced Disappearance.

[9] CRC, Arts 2 and 28; ICRMW, Arts 1(1), 7, 18, 25, 27, 28, 30, 43, 45, 54, 55, and 70.

The right to equality and non-discrimination is also guaranteed by all major regional human rights instruments: the African Charter on Human and Peoples' Rights (ACHPR) (Articles 2, 3, 18(3)–(4), and 28), the American Convention on Human Rights (ACHR) (Articles 1 and 24), the American Declaration of the Rights and Duties of Man (Article II), the Arab Charter on Human Rights (Articles 2, 9, and 35), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 14 and Protocol No 12), and the Charter of Fundamental Rights of the European Union (Articles 20, 21(1), and 23). In addition, a range of specialized regional treaties, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, provide protection against particular forms of discrimination.

Finally, it is now widely acknowledged that, at the very least, the right to non-discrimination on the grounds of race, sex, and religion binds all states, irrespective of their ratification of human rights treaties, because it has become part of customary international law.[10] The Inter-American Court of Human Rights has gone further than this and held that also the guarantee against discrimination on other grounds, including language, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth, or any other status, forms part of general international law and, indeed, is a norm of *jus cogens* that cannot be set aside by treaty or acquiescence.[11]

3.2 SCOPE: SUBORDINATE AND AUTONOMOUS NORMS

Non-discrimination provisions can be subdivided into subordinate and autonomous (or free-standing) norms. *Subordinate norms* prohibit discrimination only in the enjoyment of the rights and freedoms otherwise set forth in the respective instrument. An example of a subordinate norm is Article 2(1) ICCPR, which states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Other subordinate norms include Article 2(1) UDHR, Article 2(2) ICESCR, Article 2(1) CRC, Article 7 ICRMW, Article 1 ACHR, Article 2 ACHPR, and Article 14 ECHR.[12] As the ECHR does not contain an autonomous norm in addition to its subordinate

[10] For race, see eg *South-West Africa Cases (Second Phase)* [1966] ICJ Rep 6, 293 and 299–300 (Tanaka, J dissenting); *Barcelona Traction (Second Phase)* [1970] ICJ Rep 3, 32. For the other grounds, see Shaw, *International Law* (CUP, 2008) 287 and references cited there.

[11] OC/18, *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR Series A No 18 (2003) paras 100–1 and 173.4.

[12] ECHR, Art 14 reads: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

provision in Article 14, the jurisprudence of the European Court of Human Rights interpreting it is of particular importance. According to the European Court, in order to invoke Article 14, an applicant must show that the facts of the case fall 'within the ambit' of another substantive Convention right.[13] However, there is no need to show that there has been *a violation* of that Convention right. A measure that in itself is in conformity with the requirements of a given ECHR right, but is of a discriminatory nature, will violate that right *when read in conjunction with Article 14*. For example, it does not as such amount to a violation of Article 6 ECHR (the right to a fair trial) if a state fails to establish a system of appeals. However, when a state does establish such a system, then this is a matter falling within the ambit of Article 6, and there is a violation of that article read in conjunction with Article 14 if, without a legitimate reason, certain persons are given the right to appeal while others are denied it.

Article 7 UDHR, Article 26 ICCPR, Articles 2 and 5 ICERD, Article 24 ACHR, and Article 3 ACHPR, on the other hand, are *autonomous norms*: they guarantee non-discrimination not only in the context of other rights but in general. For example, Article 26 ICCPR provides:

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

The UN Human Rights Committee elaborated on the scope of this provision in *Broeks v The Netherlands*.[14] Mrs Broeks had been denied unemployment benefits on the basis of legislation that provided that married women could only claim benefits if they could prove that they were 'breadwinners'—a requirement that did not apply to married men. The Netherlands argued that Mrs Broeks could not rely on Article 26 ICCPR as it could only be invoked in the sphere of civil and political rights; Mrs Broeks' complaint, however, related to the right to social security, which was specifically provided for under the ICESCR. The Human Rights Committee rejected the government's argument, holding that it did not matter whether a particular subject matter is covered by the ICCPR or some other international instrument. It stressed that 'Article 26 does not merely duplicate the guarantees already provided for in Article 2' but instead 'prohibits discrimination in law or in practice in any field regulated and protected by public authorities'.[15] The Committee confirmed this finding in its General Comment 18.[16] Thus, states parties to the ICCPR have a general obligation neither to enact legislation with a discriminatory content nor to apply laws in a discriminatory way.

As noted above, the ECHR only contains a subordinate non-discrimination guarantee. This gap is partially addressed by Protocol No 12 to the ECHR. The Protocol,

[13] *Rasmussen v Denmark* (1984) 7 EHRR 371, para 29.

[14] CCPR/C/29/D/172/1984 (9 April 1987).

[15] Ibid, para 12.3.

[16] HRC, General Comment 18, HRI/GEN/1/Rev. 9 (Vol I) 195, para 12.

which entered into force in 2005 but has not been widely ratified so far, contains a non-discrimination guarantee that is not limited to the enjoyment of Convention rights.[17] However, this guarantee is still narrower than the general right to equality before the law and equal protection of the law under Article 26 ICCPR in that it only applies to the enjoyment of rights set forth by (national) law.

3.3 PROHIBITED GROUNDS OF DISTINCTION

Which grounds of distinction are unacceptable and should therefore be prohibited? There is no straightforward answer to this question as, depending on one's moral and political views, any criterion may be regarded as either relevant or irrelevant. There is certainly broad consensus today that normally a person's inherent characteristics such as race, colour, or sex are not acceptable criteria for differential treatment. In addition, grounds such as membership of a particular group, holding certain beliefs, and national or social origin are outlawed by most human rights treaties. But as is evident from a comparison between the ICCPR, adopted in 1966, and the ICRMW, adopted in 1990, what is seen as unacceptable can change over time: the ICRMW has considerably expanded the list of prohibited grounds by adding the criteria of conviction, ethnic origin, nationality, age, economic position, and marital status. Today, further criteria, including disability[18] and sexual orientation and gender identity,[19] would have to be added.

Equality and non-discrimination norms vary widely in their approaches to defining the prohibited grounds of distinction. A first type of norm provides for a *general guarantee of equality*, without specifying any particular prohibited grounds. Article 24 ACHR, for instance, simply states: 'All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.' Such norms leave it to the relevant body to decide which distinctions are acceptable and which ones are not.

A second category of norms uses a diametrically opposed approach: these norms contain an *exhaustive list* of prohibited grounds. The CEDAW, for instance, prohibits only distinctions based on 'sex' (Article 1), the ICERD those based on 'race, colour, descent, or national or ethnic origin' (Article 1(1)), and the CRPD those based on 'disability' (Articles 1 and 5). Article 2(2) ICESCR, Article 2(1) CRC, and Article 1 ACHR contain lists that are much longer but still fixed (in the case of the ICESCR, 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status').

[17] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art 1 ('(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1').

[18] See ICPRD.

[19] See Chapter 15, below.

Steering a middle course between these two extremes, there is a third category of norms which contain a list of prohibited grounds but one that is *open-ended*. For instance, Article 14 ECHR (as well as its Protocol No 12) prohibit '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'. Similarly, Article 2(1) UDHR, Articles 1(1) and 7 ICRMW, and Article 2 ACHPR provide for non-discrimination 'without distinction of *any* kind, *such as* …' As a consequence, even distinctions made on grounds that are not explicitly listed may engage these provisions. The European Court of Human Rights sometimes does not even find it necessary to state the particular ground of distinction involved when considering a case under Article 14 ECHR.[20]

The text of Article 26 ICCPR ('discrimination on *any* ground *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status') suggests that this provision is also open-ended. Nevertheless, the Human Rights Committee has often been at pains to fit a particular distinction within one of the listed grounds, be it the specific ones or the broad rubric of 'other status'. Thus, it has found that the reference to 'sex' also includes 'sexual orientation'[21] and that 'other status' covers grounds such as nationality,[22] age,[23] and marital status.[24] But it has never clarified how it decides whether a difference in treatment comes within the reference to 'other status'. Its efforts to apply one of the listed grounds suggest that the Committee regards the list of Article 26 as exhaustive and it has accordingly stated that an applicant is required to show that the difference in treatment was based on one of the enumerated grounds.[25]

4 DIRECT AND INDIRECT DISCRIMINATION

At the heart of all non-discrimination norms is the formal equality requirement that likes should be treated alike. It is therefore clear that international human rights law prohibits direct discrimination (Section 4.1). But human right bodies and courts have acknowledged that the requirement of consistent treatment is not sufficient to achieve true equality: not only discriminatory treatment but also a discriminatory outcome (indirect discrimination) is prohibited (Section 4.2). Finally, it is important to note that international human rights law prohibits both intended and unintended discrimination (Section 4.3).

Whether there has been a difference in treatment or result is the first question that a court needs to assess when considering a discrimination claim under international

[20] See eg *Rasmussen v Denmark*, n 13, para 34.

[21] *Toonen v Australia*, CCPR/C/50/D/488/1992 (31 March 1994) para 8.7.

[22] *Gueye v France*, CCPR/C/35/D/196/1985 (3 April 1989) para 9.4.

[23] *Schmitz-de-Jong v The Netherlands*, CCPR/C/72/D/855/1999 (16 July 2001).

[24] *Danning v The Netherlands*, CCPR/C/OP/2 (9 April 1987).

[25] *BdB v The Netherlands*, CCPR/C/35/D/273/1988 (2 May 1989) para 6.7.

human rights law. Once a prima facie case of direct or indirect discrimination has been made out, the court must decide whether there is a justification for the difference in treatment or outcome. This second element of the test is discussed in Section 5 below.

4.1 DIRECT DISCRIMINATION

Direct discrimination occurs when a person, *on account of one or more of the prohibited grounds*, is treated less favourably than someone else in comparable circumstances. Thus, the complainant must show, first, that others have been treated better because they do not share the relevant characteristic or status and, second, that these others are in a comparable, or, in the terminology of the European Court of Human Rights, 'analogous'[26] or 'relevantly similar',[27] situation. In practice, international human rights bodies often tend to merge the comparability test with the test as to whether there is an objective justification for the difference in treatment, explained in Section 5 below.

A classic example of direct discrimination is when members of a certain ethnic group are denied access to a public facility, such as a swimming pool, which is open to everyone else. But most cases of direct discrimination are not as straightforward as this. More often, direct discrimination occurs covertly: the 'discriminator' will not admit that the difference in treatment was based on a prohibited ground, making it difficult for the complainant to provide sufficient evidence. Furthermore, as explained above, it may not always be easy to identify a person who is in a comparable situation. How can a woman establish pay discrimination when there are no men doing the same job?

4.2 INDIRECT DISCRIMINATION

Indirect discrimination occurs when a practice, rule, or requirement that is outwardly '*neutral*', that is, not based on one of the prohibited grounds of distinction, has a disproportionate impact on particular groups defined by reference to one of these grounds. Thus, although there is no difference in treatment, due to structural biases, treating unequals equally leads to unequal results.

The concept of indirect discrimination has its origins in US and European Community (EC) law but has now also found its way into the jurisprudence of international and regional human rights bodies. The Human Rights Committee recognized the possibility of indirect discrimination, albeit without explicitly referring to the concept, for the first time in *Singh Bhinder v Canada*.[28] The case concerned a Sikh who was dismissed from his employment with the Canadian Railway because he refused to comply with a legal requirement that safety headgear be worn at work, as his

[26] *Lithgow v UK* (1986) 8 EHRR 329, para 177.
[27] *Fredin v Sweden* (1991) 13 EHRR 784, para 60.
[28] CCPR/C/37/D/208/1986 (9 November 1989).

religion required him to wear only a turban. The Committee found that the legislation may amount to de facto discrimination: although it was neutral in that it applied to all persons without distinction, it disproportionately affected persons of the Sikh religion. (There was nevertheless no violation of Article 26 ICCPR as the safety headgear requirement was based on reasonable and objective grounds.) But only much later, in *Althammer v Austria*, a case concerning the abolition of household benefits that affected retired persons to a greater extent than active employees, did the Committee expressly refer to the concept of 'indirect discrimination':

> The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionally affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[29]

Similarly, it was only in 2007 that the European Court of Human Rights, in its groundbreaking ruling in *DH and others v Czech Republic*, came up with an explicit definition of 'indirect discrimination'. Several Roma children had complained that the manner in which statutory rules governing assignment to schools were applied in practice resulted in the placement of a disproportionate number of Roma pupils in 'special schools' for children with 'mental deficiencies'. Referring to the definition of 'indirect discrimination' in EC law, the Grand Chamber of the European Court stated:

> The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.... In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC and the definition provided by ECRI [the European Commission against Racism and Intolerance], such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent.[30]

The African Commission on Human and Peoples' Rights seems also to have recognized the concept of indirect discrimination when it found a violation of Articles 2 and 3 ACHPR in a case where legal remedies, even though guaranteed to everyone by law, were in practice 'only... available to the wealthy and those that can afford the services of private counsel'.[31]

4.3 DISCRIMINATORY INTENTION

In some legal systems, such as the USA, complainants need to show a discriminatory intention or purpose to establish discrimination.[32] There is no such requirement under

[29] CCPR/C/78/D/998/2001 (8 August 2003) para 10.2.
[30] App no 57325/00, Judgment of 13 November 2007, para 184.
[31] *Purohit and Moore v The Gambia*, Communication No 241/2001, 16th Activity Report (2002) paras 53–4.
[32] The leading case is *Washington v Davis* 426 US 229 (1976).

international human rights law, the reason why someone has been treated less favourably is irrelevant.

That both intended and unintended discrimination are prohibited under international law is apparent from the explicit definitions of discrimination contained in some of the human rights treaties. The ICERD defines discrimination as any distinction based on one of the listed grounds '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'.[33] The CEDAW definition is almost identical.[34] The Human Rights Committee, in its General Comment on non-discrimination, has adopted the same definition for the purposes of the ICCPR[35] and has made it clear in its jurisprudence that discriminatory intention is not a necessary element of discrimination.[36] Equally, the European Court of Human Rights has indicated that discrimination under Article 14 ECHR may also relate to the *effects* of state measures.[37]

As is illustrated by the rulings in *Althammer* and *DH* described above, indirect discrimination is often equated with unintended discrimination. Conversely, it is normally assumed that where there is direct discrimination, there is a discriminatory intention. Although it is true that these concepts will often correlate, this is not always the case. There may be cases of direct discrimination—for example, the exclusion of pregnant women and mothers from certain types of work—where the intention is to protect the respective groups rather than to discriminate against them. On the other hand, a 'neutral' criterion such as a literacy test for job applicants may well be used as a pretext for excluding certain ethnic groups, amounting to intended indirect discrimination.

5 JUSTIFIED AND UNJUSTIFIED DISTINCTIONS

Once it is established that there has been a difference in treatment or outcome, the next question that needs to be answered is whether there is a justification for it. As explained above, it is to some extent inevitable that states classify people into different groups. The crucial question is whether there are objective and reasonable criteria for these distinctions. This section first explains the relevant test under international human rights law. Next, it explores what standard of review human rights bodies or courts apply to carry out this test. Finally, it considers matters concerning evidence and proof.

[33] Art 1(1) (emphasis added). [34] Art 1. [35] n 16, para 7.
[36] See eg *Simunek et al. v The Czech Republic*, CCPR/C/54/D/516/1992 (19 July 1995) para 11.7; *Adam v The Czech Republic*, CCPR/C/57/D/586/1994 (23 July 1996) para 12.7.
[37] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case) (No 2)* (1968) 1 EHRR 252, para 10.

5.1 THE JUSTIFICATION TEST

The Human Rights Committee, in its General Comment on non-discrimination, has stressed that, for the purposes of the ICCPR, 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'[38] But it is in the jurisprudence of the European Court of Human Rights that the criteria for distinguishing between justified and unjustified distinction have been most clearly articulated. The Court interpreted Article 14 ECHR for the first time in the *Belgian Linguistics Case* and has since repeatedly confirmed those conclusions:

> [T]he Court, following the principles which may be extracted from the legal practice of a large number of democratic states, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[39]

This two-limb test, requiring that any difference in treatment must (1) pursue a legitimate aim and (2) be proportionate, is very similar to the test used in the context of other rights to assess the permissibility of limitations, described in Chapter 6, above. The test formulated by the European Court has been adopted, explicitly or implicitly, by most other human rights bodies. While the Human Rights Committee had originally failed to provide a clear and consistent explanation of what it means by 'reasonable and objective criteria', it has recently increasingly started to interpret these terms as requiring a legitimate aim and proportionality.[40] The Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights have embraced the same approach,[41] as has the Inter-American Court of Human Rights.[42]

In terms of what exactly this test involves, its first limb will not usually be very difficult for states to meet: most distinctions can be argued to pursue some aim that qualifies as legitimate, for example the protection of public order or tailoring the education system to children's differing learning capabilities. More difficult to satisfy is the second element of the test, the proportionality requirement. This requirement reflects the basic notion that a fair balance ought to be struck between the interests of the community and respect for individual rights. A wide range of factors may need to be considered to assess proportionality, including the suitability of a distinction to achieve

[38] n 16, para 13. [39] n 37, para 10. [40] eg *Gillot v France*, A/57/40 (15 July 2002) para 13.2.
[41] CERD, Concluding observations: Australia, CERD/C/AUS/CO/14 (14 April 2005) para 24; CESCR, General Comment 20, E/C.12/GC/20, para 13.
[42] *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, n 4, paras 56–7.

the aim pursued, the availability of alternative means, and the question of whether the disadvantage suffered by the affected individuals or groups is excessive in relation to the aim. Whilst this assessment inevitably turns on the specific facts of a given case, international human rights bodies have been consistent in their characterization of certain reasons as not sufficient to justify differential treatment; these include, among others, mere administrative inconvenience,[43] existence of a longstanding tradition,[44] prevailing views in society,[45] or convictions of the local population.[46]

5.2 STANDARD OF REVIEW

The stringency with which human rights courts or bodies review the existence of a justification will vary according to a number of factors.

Most importantly, certain grounds of distinction are generally regarded as inherently suspect and therefore require particularly strict scrutiny. The grounds attracting the greatest degree of attention and most likely to be declared unjustified are race, ethnicity, sex, and religion. That *race* is among these 'suspect classifications' is indicated by the general acceptance of the prohibition of racial discrimination as forming part of customary international law, the widespread ratification of the ICERD, and the finding of the European Commission of Human Rights, later endorsed by the Court, that 'a special importance should be attached to discrimination based on race' and that it may amount to degrading treatment.[47] The Inter-American Commission on Human Rights also applies a strict standard of scrutiny to distinctions based on race.[48]

With regard to the related notion of *ethnicity*, the European Court has stressed 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 in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[49] That distinctions based on *sex* are particularly suspect is underlined by the wealth of international treaties addressing the problem of sexual discrimination, including the CEDAW.[50] The Inter-American Commission has stated that distinctions based on sex 'necessarily give rise to heightened scrutiny'[51] and the European Court has observed that 'very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the [ECHR]'.[52] Finally, the suspect nature of distinctions based on *religion* can be concluded from the unanimous adoption by the General Assembly of the

43 *Gueye v France*, n 22, para 9.5.
44 *Müller and Engelhard v Namibia*, CCPR/C/74/D/919/2000 (26 March 2002) para 6.8.
45 *Broeks v The Netherlands*, n 14.
46 *Inze v Austria* (1988) 10 EHRR 394, para 44.
47 *East African Asians v UK* (1973) 3 EHRR 76, paras 207–8; *Cyprus v Turkey*, App no 25781/94, Judgment of 10 May 2001, para 306.
48 Case 11.625, *María Eugenia Morales de Sierra v Guatemala*, IACommHR Report No 4/01 (19 January 2001) para 36.
49 *Timishev v Russia*, App nos 55762/00 and 55974/00, Judgment of 13 December 2005, para 58.
50 See Chapter 16, below.
51 *María Eugenia Morales de Sierra v Guatemala*, n 48, para 36.
52 *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471, para 78.

Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief[53] and the European Court's finding that '[n]otwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable'.[54]

As far as other grounds of distinction are concerned, it is difficult to discern a consistent approach in international case law. The Human Rights Committee, for instance, has indicated that any distinction based on one of the grounds explicitly listed in Article 26 ICCPR 'places a heavy burden on the State party to explain the reason for the differentiation',[55] but that does not seem to mean that differential treatment on grounds other than race, sex, and religion are subject to the same intense scrutiny. The European Court, on the other hand, has suggested that also distinctions based on nationality and illegitimacy should be treated as inherently suspect.[56] Lists of suspect classifications are, in any event, not fixed but can change as international law on these matters develops. Given the recent emergence of new international norms against discrimination on grounds such as disability,[57] sexual orientation,[58] and age,[59] it seems likely that these classifications will soon be regarded as suspect, if they are not already regarded as such.

Apart from the ground of distinction, the intensity of review may also depend on a number of other factors. For example, most courts and human rights bodies tend to apply a lenient standard as far as matters of social or economic policy are concerned,[60] whereas classifications affecting fundamental individual interests entail particularly strict scrutiny.[61] Furthermore, it will generally be more difficult for states to justify direct rather than indirect discrimination. The Declaration of Principles on Equality, an important but non-binding document signed by numerous human rights and equality experts, states that 'direct discrimination may be permitted only very exceptionally'.[62]

5.3 EVIDENCE AND PROOF

According to established human rights jurisprudence, it is up to the individual complaining of discrimination to establish a difference in treatment or outcome, the ground of distinction, and the existence of comparably situated groups. Having done

53 GA Res 36/55 (25 November 1981).
54 *Hoffmann v Austria* (1993) 17 EHRR 293, para 36.
55 *Müller and Engelhard v Namibia*, n 44, para 6.7.
56 See *Gaygusuz v Austria* (1996) 23 EHRR 364, para 42 and *Inze v Austria*, n 46, para 41, respectively.
57 See the CRPD.
58 See Chapter 15, below.
59 See UN Principles for Older Persons, GA Res 46/91 (16 December 1991).
60 See eg *Oulajin and Kaiss v The Netherlands*, CCPR/C/46/D/406/1990 and 426/1990 (23 October 1992), individual opinion submitted by Committee members Herndl, Müllerson, N'Diaye, and Sadi, and *James v UK* (1986) 8 EHRR 123, para 46 (stating that 'the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one').
61 See eg *Dudgeon v UK* (1981) 4 EHRR 149, para 52.
62 Equal Rights Trust, Declaration of Principles on Equality, available at <http://www.equalrightstrust.org/endorse/index.htm>, Principle 5.

so, the burden of proof shifts to the state to show that there is a justification for the distinction.[63]

In cases of alleged indirect discrimination, however, complainants may find it very difficult to prove that a neutral measure has a disproportionate impact on particular groups. Therefore, the European Court of Human Rights has held that less strict evidential rules should apply in these cases: 'statistics which appear on critical examination to be reliable and significant' may be sufficient prima facie evidence of indirect discrimination.[64] Thus, in *DH*, even though the statistical figures submitted by the applicants were contentious, the Court still thought that they revealed a dominant trend and thus accepted them as sufficient to establish a presumption of disproportionate numbers of Roma children being placed in 'special schools'. As a consequence, the burden of proof shifted to the government to show that there was a justification for the disparate impact of the legislation.[65]

DH demonstrates that statistical evidence may be of decisive importance to the outcome of cases of alleged indirect discrimination. Yet often the data required to establish a presumption that a measure has a discriminatory effect can, unlike in *DH*, only be collected by state authorities. The UN treaty bodies therefore regularly stress in their concluding observations that states have a duty to collect and analyse relevant statistical data, disaggregated by grounds of distinction.[66] Such a duty to gather information has also been included in the Declaration of Principles on Equality.[67]

6 POSITIVE ACTION

As with any other human right, the right to equality and non-discrimination entails state obligations of different types.[68] The *obligation to respect* requires states to refrain from any discriminatory action and to ensure that all their laws and practices comply with the right to non-discrimination. The *obligation to protect* imposes a duty on states to prevent discrimination by non-state actors. According to the consistent jurisprudence of the UN treaty bodies, this means that states must introduce comprehensive legislation prohibiting discrimination in fields such as employment, education, healthcare, housing, and the provision of goods and services. This conclusion is supported by various provisions in the respective human rights treaties themselves. Article 2(d) ICERD, for example, explicitly states that '[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'; the CEDAW contains a parallel provision in Article 2(e); and most treaties are scattered with norms requiring states to prohibit particular actions of private parties that are discriminatory or may

63 Ibid, Principle 21. For the ECHR, see *Timishev v Russia*, n 49, para 57.
64 *DH v Czech Republic*, n 30, para 188. 65 Ibid, paras 191–5.
66 See eg CEDAW Committee, Report on twenty-ninth session, A/58/38 (part II), para 134 (Brazil).
67 Declaration of Principles on Equality, n 62, Principle 24. 68 See Chapter 6, above.

contribute to discrimination, such as racial hate speech (Article 20 ICCPR, Article 4 ICERD, Article 13(5) ACHR), trafficking in women and exploitation of prostitution of women (Article 6 CEDAW), or racial discrimination with regard to employment, housing, or education (Article 5(e) ICERD).

However, an exclusively prohibitory approach is severely limited in that it focuses on discrimination understood as individual, isolated events that can be remedied through penalizing the perpetrators and compensating the victims. In fact discrimination is often the consequence of deeply embedded patterns of disadvantage and exclusion that can only be addressed through changes to social and institutional structures. Accordingly, it is now well established in international human rights law that it is not sufficient for states to have anti-discrimination legislation in place. Instead, they also have an *obligation to promote, guarantee, and secure* equality by taking proactive steps to eliminate structural patterns of disadvantage and to further social inclusion.[69] This obligation, often referred to as the duty to take 'positive action', may cover a huge variety of legislative, administrative, and policy measures, ranging from the restructuring of institutions to the provision of 'reasonable accommodation'[70] for individuals in particular circumstances, from educational campaigns to the use of public procurement to promote equality, and from the 'mainstreaming'[71] of equality issues in public policy to encouraging participation of affected groups in relevant decision-making processes.

One important aspect of 'positive action' are 'affirmative action programmes' or, as they are generally called in international law, *special measures of protection*. These are 'measures ... aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality'.[72] In their strongest form, such special measures involve the preferential treatment of members of a previously disadvantaged group over others in the allocation of jobs, university places, and other benefits (often referred to as 'positive' or 'reverse discrimination'). For example, when two equally qualified persons apply for a job, priority is given to the female applicant, or a certain number of university places are reserved for racial minorities.

Although such preferential treatment is clearly incompatible with a formal notion of equality, international human rights law permits it, thus recognizing that it may be

69 See eg ICERD, Arts 2(1)(e), 2(2), and 7; HRC, General Comment 4, HRI/GEN/1/Rev. 9 (Vol I) 175, para 2; HRC, General Comment 18, n 16, paras 5 and 10; CEDAW, Arts 3 and 5; CERD, General Recommendation XXIX, HRI/GEN/1/Rev. 9 (Vol II) 296, paras 5, 6, 8, 9, 17, 33–5; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Arts 2(1)(d), 2(2), 3–24.
70 For a definition of 'reasonable accommodation', see CRPD, Art 2.
71 For 'gender mainstreaming', that is, the integration of a gender perspective in all legislation and public policies, see Report of the Fourth World Conference on Women, A/Conf.177/20 (1995), strategic objective H.2. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa contains, in Art 2(1)(c), an explicit obligation of gender mainstreaming. See further Chapter 16, below.
72 Progress report on the concept and practice of affirmative action by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/15 (26 June 2001) para 7.

legitimate to prioritize the achievement of substantive equality over the requirement of consistent treatment. Article 1(4) ICERD, for example, provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The CEDAW contains a similar provision in Article 4(1). For purposes of the ICCPR, the Human Rights Committee has made it clear that special measures are permissible as long as they meet the general justification test described above, that is, as long as they pursue a legitimate aim in a proportionate manner.[73] Proportionality in this context means, among other things, that the preferential treatment must be introduced for the benefit of genuinely disadvantaged groups, be temporary and cease once the objectives have been achieved, and not result in the maintenance of separate rights for different groups.

Not only does international human rights law permit, but to some extent it even *requires*, states to adopt special measures of protection. As the Human Rights Committee's General Comment on non-discrimination states:

> [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.[74]

That states may need to adopt special measures has also been highlighted by the Committee on Economic, Social and Cultural Rights.[75] As far as racial groups and women are concerned, the duty follows from Article 2(2) ICERD and Article 3 CEDAW, respectively. At the regional level, the Inter-American Court of Human Rights has observed that 'States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons',[76] while the European Court has stressed that 'a failure to attempt to correct inequality through different treatment' may amount to a violation of the right to non-discrimination.[77]

[73] eg *Stalla Costa v Uruguay*, CCPR/C/30/D/198/1985 (9 July 1987) para 10; *Jacobs v Belgium*, CCPR/C/81/D/943/2000 (7 July 2004) para 9.5.

[74] n 16, para 10.

[75] eg CESCR, General Comment 16, HRI/GEN/1/Rev. 9 (Vol I) 113, paras 15 and 35.

[76] *Juridical Condition and Rights of the Undocumented Migrants*, n 11, para 104.

[77] *Stec and Others v UK*, App nos 65731/01 and 65900/01, Judgment of 12 April 2006, para 51.

7 CONCLUSION

The concept of equality and non-discrimination in international human rights law has evolved significantly since the adoption of the UDHR. Detailed legal standards have been drawn up and human rights bodies and courts have developed a rich jurisprudence, giving concrete substance to the notion of equality. Nevertheless, considerable gaps, inconsistencies, and uncertainties remain: the concept of indirect discrimination was developed in other jurisdictions and has only very recently been acknowledged by international human rights bodies; details of the justification test, such as the applicable standard of review and evidentiary rules, need further elaboration; and, as far as implementation at the national level is concerned, numerous states do not yet have comprehensive legislation to combat discrimination.

The most important challenge, however, is to ensure that every human being is in fact able to enjoy her or his right to equality. In a world in which the average income of the richest 20 per cent is about 50 times that of the bottom 20 per cent and the 500 richest people earn more than the poorest 416 million,[78] equal rights remain an unfulfilled promise for large sections of the population. Recent developments in international human rights law are evidence of a growing recognition that, while prohibitions of discrimination play a crucial role in achieving equality, states also have an obligation to proactively tackle structural patterns of disadvantage—in other words, that formal and substantive approaches to equality need to be combined. One key component of such a proactive strategy must be to ensure that all people can participate on an equal basis in all areas of economic, social, and political life, including in the very decisions on how equality should be realized.

FURTHER READING

ARNARDÓTTIR, *Equality and Non-discrimination under the European Convention on Human Rights* (Martinus Nijhoff, 2003).

BAYEFSKY, 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 *HRLJ* 1.

CHOUDHURY, 'Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights' [2003] *EHRLR* 24.

FREDMAN (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001).

——*Discrimination Law* (Oxford University Press, 2002).

LERNER, *Group Rights and Discrimination in International Law* (Martinus Nijhoff, 2003).

MCCRUDDEN (ed), *Anti-Discrimination Law* (Ashgate, 2004).

MCKEAN, *Equality and Discrimination under International Law* (Clarendon Press, 1983).

VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005).

[78] UN Development Programme, *Human Development Report 2005*, 36–7.