THE RIGHT TO NON-DISCRIMINATION

Brochure prepared by

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INTRODUCTION

The creation of the United Nations and the adoption of the *Universal Declaration of Human Rights* opened the way to the democratization of societies. With the codification of human rights, there was much progress, in particular in the legislative sphere, even if the practical implementation of this legislation is still not a reality for everybody everywhere in the world.

Non-discrimination, with its counterpart equality, has a special place among the human rights provisions, considering that all human rights (civil, political, economic, social and cultural) must be implemented for everybody without discrimination and in full equality.

To summarize, discrimination consists of different treatment for two persons, or groups of persons, when both are in a comparable situation. Conversely, treating equally two persons or groups of persons when both are in different situations can also constitute discrimination. The international human rights instruments prohibit all distinction, exclusion, restriction or other forms of differentiated treatment within any given community – but also between communities – that cannot be justified and that compromises the enjoyment of human rights for all based on the principle of equality.

When one observes the contemporary world from this perspective, one notices that hundreds of millions of persons continue to suffer discrimination throughout the world because they belong to a people or an ethnic group, because of their language, their religious belief, their social and/or economic situation, their political opinions, their sex, their age (the elderly, "a burden on society" or the young lacking education, training and employment) or because of their sexual orientation.

It should be noted in this regard that any country considered a state governed by law[1] according to international criteria can at the same time practice discrimination against the majority of its population, as was the case in apartheid South Africa.

Although neo-liberal globalization has blurred national distinctions, it is far from having reduced discrimination. Rather, it has displaced it. In some respects, this discrimination is more frankly overt, insidious, and sometimes also exacerbated and expressed through unspeakable subtle brutality. Globalization has not only weakened governments, questioning the validity of universal public services, but, worse, it has favored the expression of new forms of discrimination within societies. In some places, the male-female divide has taken on new forms while

[1] A state governed by law is construed as being an institutional system in which public power is regulated by law; in other words, a state that respects the independence of the judiciary as well as all those judicial standards (national and international) to which is it subjected, practicing the equality of all before the law, while prohibiting arbitrary practices and discrimination (v. inter alia http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/qu-est-ce-que-etat-droit.html

other places have experienced a most emphatic return to traditional cleavages. One can be said to be witnessing the ascendency of a sort of world-wide apartheid: a divide between nationals and non-nationals, between generations, between the healthy and the handicapped, between rural and urban dwellers etc. All undermine social cohesion and democracy.

Moreover, the outbreak and/or pursuit of many conflicts, including armed conflicts, throughout the various regions of the world, the increase in international migration and forced internal displacements, as well as social regression and the emergence of clearly xenophobic and/or "racist" political parties[2] (in Europe in particular), the inequalities at all levels… constitute so many illustrations of discrimination.

The "permanent war" proclaimed against terrorism by the United States president George Walker Bush, has further exacerbated racism and discrimination. This war, moreover, has been exploited by many other governments to criminalize their political opposition. In fact, while the United States' war against terrorism targeted in particular Arab Muslims, considered "potential terrorists", it has served as an excuse for numerous other countries to reduce their political adversaries to silence.

However, as already emphasized, the principles of equality and non-discrimination are part of the fundamental pillars of human rights. Both are intimately linked and essential to the enjoyment of the other human rights.

There is an abundance of publications on the question of non-discrimination, but they are concentrated most often on one of its aspects (education, work,

[2] The concept of race, introduced in the nineteenth century by A. Gobineau to establish a hierarchy among human groups that could justify the exploitation of certain groups by others, was largely used by the colonial powers and was adopted by the Nazi ideologues as a foundation for the policy of extermination of millions of human beings considered sub-human
(v. http://en.wikipedia.org/wiki/Arthur_de_Gobineau)
However, this terminology continues to be used in daily life and in politics. It is also used in international human rights instruments. In the context of these instruments, discrimination based on race and skin color refer to "an individual's ethnic origin" (v. *General Comment Nº 20* of the United Nations Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, 2 July 2009, § 19). It should be noted moreover that the definition given to "racial discrimination" in the *International Convention on the Elimination of All Forms of Racial Discrimination* concerns not only skin color or ethnic origin but also all discrimination in "the political, economic, social and cultural domains or in all other area of public life" (v. Chapter I). Further, the 174 states parties to this convention (as of 14 April 2011) "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination…" (Article 4). One should also note that in the *Final Declaration of the Durban Review Conference* (Geneva, 2009), the United Nations member states rejected all theories of "racial superiority" and reaffirmed that "all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights" (§6). They also firmly rejected "any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races" (§ 2). It should be emphasized that some fifteen Western countries, including the United States and Israel, having boycotted the Review Conference, did not approve the *Final Declaration* (v. also Chapter V).

ANNEX

INSTANCES TO WHICH ONE MAY RECUR

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freedom of opinion and expression etc.)[3] or on one category of persons (women, indigenous peoples, religious groups, migrants etc.). This booklet intends to give a "panorama" of the many facets of discrimination.

At a time when, in spite of the obvious legislative and educational endeavors in this area, discrimination remains current, undermining civil and political rights as well as economic, social and cultural rights and is the cause of multiple discords among the stakeholders of society, there is good reason to present an overview of the scope of the right to non-discrimination.

Many examples throughout this booklet, like milestones, covering various situations, will, it is hoped, facilitate its reading and allow the reader to appreciate the scope of non-discrimination in human rights provisions.

[3] V. inter alia, the recent ILO report, *ILO Global Report on Equality at Work 2011,* http://www.ilo.org/global/publications/books/forthcoming-publications/WCMS_154874/lang--en/index.htm

CONCLUSION

As we have just seen, the right to non-discrimination is both a right recognized at the national, regional and international levels and atypical in that it is in constant evolution depending on the mores and the times.

It should be noted, moreover, that "non-discrimination has become a compulsory norm, *jus cogens*, of international law. It cannot be subjected to any derogation. Serious, flagrant, systematic and deliberate violations of this norm can be considered crimes against humanity, in conformity with Article 7 of the Statute of the International Criminal Court."[158]

However, in practice, the implementation of this right leaves much to be desired and leads to numerous partisan and ideological disputes.

Taking into account that discrimination is very often to be found at the origin of serious and wide-scale human rights violations, it is indispensable to work for the effective prohibition of discrimination as an imperative and supreme norm, to wit a norm of *jus cogens*. It is also indispensable to work for the principle of equality, as protection against arbitrariness, and to fight so that the principles that underpin rule of law become a reality for all.

At the World Conference on Racism in Durban (2001), the international community declared itself determined "to materialize the notion of a human family based on equality, dignity and solidarity, and to make the twenty-first century a century of human rights, the eradication of racism, racial discrimination, xenophobia and related intolerance and the realization of genuine equality of opportunity and treatment for all individuals".[159]

Will it keep its word?

[158] José L. Gómez del Prado, "Racisme et xénophobie: la conférence mondiale de Durban – 2001" (French only), http://www.aidh.org/uni/biblio/pdf/1-4.pdf

[159] *Durban Declaration*, preamble, § 35.

"We further affirm that all peoples and individuals constitute one human family, rich in diversity. They have contributed to the progress of civilizations and cultures that form the common heritage of humanity. Preservation and promotion of tolerance, pluralism and respect for diversity can produce more inclusive societies." (§ 6)

Inequality and Social Exclusion

"We note with concern that racism, racial discrimination, xenophobia and related intolerance may be aggravated by, inter alia, inequitable distribution of wealth, marginalization and social exclusion." (§ 9)

"We emphasize that poverty, underdevelopment, marginalization, social exclusion and economic disparities are closely associated with racism, racial discrimination, xenophobia and related intolerance, and contribute to the persistence of racist attitudes and practices which in turn generate more poverty." (§ 18)

Migrants, Asylum Seekers and Refugees

"We recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices." (§ 16)

"[The Conference] urges States to take all necessary measures to address, as a matter of urgency, the pressing requirement for justice for the victims of racism, racial discrimination, xenophobia and related intolerance and to ensure that victims have full access to information, support, effective protection and national, administrative and judicial remedies, including the right to seek just and adequate reparation or satisfaction for damage, as well as legal assistance, where required." (§160)

Redress, Reparation, Compensation

"[The Conference] urges States to adopt the necessary measures, as provided by national law, to ensure the right of victims to seek just and adequate reparation and satisfaction to redress acts of racism, racial discrimination, xenophobia and related intolerance, and to design effective measures to prevent the repetition of such acts." (§ 166)

These are accepted norms that certain Western governments wanted to call into question by boycotting the Durban Review Conference[156] and they seem still not to have given up, for Canada has already announced that it will boycott the a fourth World Conference in New York in September 2012.[157]

[156] V. note 152.

[157] AFP dispatch 25 November 2010 (French only): http://fr.canoe.ca/infos/quebeccanada/archives/2010/11/20101125-143419.html

I. INTERNATIONAL DEFINITION AND CONTENT OF THE RIGHT TO NON-DISCRIMINATION

The right to non-discrimination constitutes one of the fundamental and non-derogable principles of human rights and has been confirmed in international instruments (v. also Chapter II.A) as well as regional instruments (v. Chapter II.B). For considerations of space, we shall deal only with the main ones.

The right to non-discrimination emanates from the general postulate of the equal dignity of human beings, which has been affirmed by the ***Charter of the United Nations***[4] and the ***Universal Declaration of Human Rights***[5] as well as by all international human rights instruments. It should be emphasized that non-discrimination covers civil and political rights as well as economic, social and cultural rights.

Among the purposes and principles of the United Nations is the realization of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all **without distinction as to race, sex, language, or religion**" (Chapter I, Article 1.3, *Charter of the United Nations*, emphasis added). This formulation was also used in Chapter IX, Article 55 of the *Charter*.

Article 2.1 of the *Universal Declaration* prohibits all forms of discrimination beyond the criteria mentioned by the *Charter of the United Nations*:

> *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

Other provisions of the *Universal Declaration* further prohibit discrimination in specific areas such as work, the civil service and justice. "Everyone, without any discrimination, has the right to equal pay for equal work" (Article 23.2). "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination" (Article 7). "Everyone has the right of equal access to public service in his country" (Article 21.2). "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal" (Article 10).

[4] Adopted 26 June 1945. It is binding on the current 192 member states: http://www.un.org/en/documents/charter/index.shtml

[5] Adopted 10 December 1948, and accepted by all United Nations member states without exception: http://www.un.org/en/documents/udhr/index.shtml

The ***International Convention on the Elimination of All Forms of Racial Discrimination***[6] was the first international human rights convention though which countries began to codify the rights in the *Universal Declaration*. Further, it constitutes the main international instrument dealing with "racial"[7] discrimination. Article 1.1 of this convention defines the term "racial discrimination" broadly and not limited to skin color or ethnic origin:

> *"any distinction, exclusion, restriction or preference based on race, color, 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".*

The Committee for the Elimination of Racial Discrimination (CERD)[8] has reaffirmed that discrimination based on **descent** refers not only to "race" but "includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights."[9]

The identification of national or ethnic origin of an individual or group of individuals is often problematic, since many countries, even when multi-ethnic, refuse to recognize it. In this regard, the CERD reasons that "such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned"[10].

This convention is not limited to prohibiting all forms of discrimination, but, by ratifying it, states parties must set limits to freedom of expression and "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form" (Article 4).

A. From a Civil and Political Rights Perspective

The ***International Covenant on Civil and Political Rights*** (***ICCPR***)[11] requires unequivocally the implementation of the principle of non-discrimination for all the rights specified therein:

> *"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,*

[6] Adopted 21 December 1965, entered into force 4 January 1969, ratified by 174 countries (as of 16 March 2011): http://www2.ohchr.org/english/law/cerd.htm

[7] V. note 2.

[8] Entrusted with overseeing compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination* (v. Chapter IV.C.2).

[9] Emphasis added. V. *General Recommendation N° 29*, 1 November 2002, §§ 6, 7 of the preamble: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f0902ff29d93de59c1256c6a00378d1f?Opendocument

[10] *General Recommendation No 08*, 22 August 1990: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3ae0a87b5bd69d28c12563ee0049800f?Opendocument

[11] Adopted 16 December 1966, ratified by 167 countries (as of 16 March 2011): http://www2.ohchr.org/english/law/ccpr.htm

dignity of mankind, a crime against humanity, and a threat to international peace and security."[154]

It recommended that governments take measures against all ideologies and practices such as apartheid, Nazism, fascism and neo-fascism based on racial or ethnic exclusion or intolerance, hatred, terror or the systematic denial of basic human rights and freedoms.

The third conference was held in Durban (South Africa) in 2001. Although Israel and the United States walked out of the conference in protest against the calling into question of the Israeli government, the conference adopted a declaration and plan of action that remains today a road map in this area for all public collectivities. The conference condemned the barbaric practices and injustices not only of the past (slavery and colonialism in particular) but also of the present (inequalities, social exclusion, discrimination against migrants and refugees etc.), while demanding compensation for the victims.[155] Here are several extracts.

> ***Slavery***
>
> *"We acknowledge… that slavery and the slave trade are a crime against humanity." (§ 13)*
>
> ***Colonialism***
>
> *"We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences." (§ 14)*
>
> ***Apartheid and Genocide***
>
> *"We recognize that apartheid and genocide in terms of international law constitute crimes against humanity and are major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and acknowledge the untold evil and suffering caused by these acts and affirm that wherever and whenever they occurred, they must be condemned and their recurrence prevented." (§ 15)*
>
> *"We recall that the Holocaust must never be forgotten." (§ 58)*
>
> ***All Forms of Discrimination***
>
> *"We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, color, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status." (§ 2)*

[154] The *International Convention on the Elimination and Repression of the Crime of Apartheid* had already been adopted by the United Nations on 30 November 1973 (Resolution 3068 XXVIII), which entered into force 18 July 1978. The World Conference used the terms of the first article of the *Convention*.

[155] http://www.un.org/en/ga/durbanmeeting2011/pdf/DDPA_full_text.pdf

at the origin of their marginalization, exclusion, precariousness, ostracism."[150]

It is in this context that the importance of the struggle against racism, racial discrimination, xenophobia and intolerance must be analyzed. It is also in this context that the importance of holding world conferences on these questions must be understood. Although the condemnation of the apartheid regime in South Africa and of Israeli policies towards the Palestinians[151] have always divided governments, some of which (Western, most notably) have not hesitated to boycott the work of the United Nations in this area[152], the message carried and the program of struggle proposed by these conferences are of crucial importance. Moreover, it is in no way exaggerated to say that it is owing to the commitment of the overwhelming majority of countries and to sanctions imposed by the United Nations that South Africa's apartheid regime came to and end.

To date, the United Nations has organized three conferences (plus 2009 Durban Review Conference in Geneva, see below) to combat racism and racial discrimination. The first conference was held in Geneva in 1978. It condemned apartheid in South Africa as an "extreme form of institutionalized racism" and characterized it as a "crime against humanity". Further, it affirmed that:

"Any doctrine of racial superiority is scientifically false, morally condemnable, socially unjust and dangerous, and has no justification whatsoever;

All peoples and all human groups have contributed to the progress of civilisation and cultures which constitute the common heritage of humanity;

All forms of discrimination … based on the theory of racial superiority, exclusiveness or hatred are a violation of fundamental human rights and jeopardize friendly relations among peoples, co-operation between nations and international peace and security."[153]

The Conference also recommended, owing to the degrees of economic inequality resulting from racial discrimination, that the efforts aiming to combat racism comprise measures designed to improve the living conditions of men and women.

The second conference, held in Geneva in 1983, also dealt with apartheid and put in place sanctions against the South African government of the time. Reaffirming its condemnation of racism, the conference declared, among other things, that "Racism and racial discrimination are continuing scourges which must be eradicated throughout the world... apartheid totally abhorrent to the conscience and

[150] "DURBAN I step forward, DURBAN II steps backward?" Written statement submitted by the CETIM, 2 April 2009, to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (follow-up to Durban), held in Geneva 20-24 April 2009: http://www.cetim.ch/en/interventions_details.php?iid=320

[151] In 1975, in Resolution 3379 (10 December 1975) the General Assembly affirmed that "Zionism is a form of racism and racial discrimination". The same Assembly decided to "revoke" Resolution 3379 by voting Resolution 46/86 (16 December 1991), at a time when negotiations between the Palestinians and Israelis seemed promising with the holding of the Madrid Conference.

[152] V. CETIM Bulletin Nº 35, November 2009: http://www.cetim.ch/en/documents/bull35ang.pdf

[153] See "A historical perspective: getting from here to there", https://visit.un.org/WCAR/e-kit/fact2.htm

such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Article 2.1).

As can be seen, the *ICCPR* makes no distinction between nationals and non-nationals[12]. Article 26 codifies equality thus:

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

The United Nations treaty oversight bodies (v. Chapter IV.C) attribute capital importance to the principle of non-discrimination. Regarding civil and political rights, the Human Rights Committee[13] has declared: "Non-discrimination, together with equality and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."[14]

As the *Covenant* contains no definition of discrimination, the Human Rights Committee has formulated one:

"The Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[15]

It should be noted that equality of treatment does not necessarily mean identical treatment and every differentiation of treatment does not constitute discrimination. As the Human Rights Committee has observed: "…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."[16] For example, setting an age for being eligible to stand for elective office cannot, objectively, be considered discriminatory.[17]

Special measures or preferential treatment (called "positive discrimination" or "affirmative action") are also allowed and/or even considered necessary, "temporarily", to correct de facto discrimination. The Human Rights Committee has stipulated that:

[12] Nonetheless, Article 25 of the *ICCPR* limits certain political rights to "citizens", in other words, to nationals.

[13] Entrusted with overseeing compliance with the *ICCPR* (v. Chapter IV.C.2).

[14] Human Rights Committee, *General Comment Nº 18: Non-discrimination*, 10 November 1989, § 1: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument

[15] Ibid., § 7.

[16] Ibid., § 13.

[17] Human Rights Committee, *General Comment Nº 25*, July 12, 1996, § 15: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument

"in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".[18]

Another factor that must be taken into account, as UNESCO has rightly noted, is that "a law or policy that was originally considered reasonable might become discriminatory over time because of changing social values within a given society. As societies became better informed and more gender- and ethnicity-sensitive, they also tend to become more poverty-sensitive."[19] If one takes the example of poverty, depending on the period and the society, it was considered either as one's lot in life or part of the social hierarchy, whereas today it is considered a violation of human rights.[20] The ratification of international human rights instruments obliges governments to take concrete and effective measures to eliminate all forms of discrimination and to undertake positive actions in favor of "vulnerable" groups (women, ethnic and religious minorities, indigenous peoples, migrants, refugees etc.).

In this regard, the *ICCPR*'s Article 14.1 (on equality before the courts), Article 18 (on freedom of thought, conscience and religion), Article 19 (on the right to freedom of expression), Article 20.2 (on the prohibition of advocacy of national, racial or religious hatred), Article 24 (on the right of children to protection)) and Article 27 (on the rights of minorities) are particularly pertinent to the protection of the abovementioned groups.

B. From an Economic, Social and Cultural Rights Perspective

It is interesting to observe the relation between non-discrimination and economic, social and cultural rights. In spite of abundant jurisprudence (at the national, regional and international levels), certain countries contest the justiciability of economic, social and cultural rights. Others invoke as a shield "the progressive realization" of these right (Article 2.1 of the *International Covenant on Economic, Social and Cultural Rights – ICESCR*)[21] or constraints due to "available resources" (Article 2.1, *ICESCR*).

[18] Human Rights Committee, *General Comment Nº 18: Non-discrimination*, 10 November 1989, § 10: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument

[19] UNESCO, "Non-Discrimination", § 4: http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights/poverty-eradication/non-discrimination/

[20] V. inter alia, Jose Bengoa, *The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution*, E/CN.4/Sub.2/1997/9, 30 June 1997: http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/0787bf8f329583948025665f0049b974/$FILE/G9712954.pdf

[21] Adopted by the United Nations General Assembly on 16 December 1966, entered into force 3 January 1976, ratified by 160 countries (as of 20 April 2011): http://www2.ohchr.org/english/law/cescr.htm

V. PERSPECTIVES FROM THE WORLD CONFERENCES ON RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND THE INTOLERANCE ASSOCIATED WITH IT

As emphasized above, racism, racial discrimination, xenophobia and intolerance not only persist in structural, economic and social forms but have a tendency to threaten democracy and social cohesion. As we recently wrote:

"Racism, in such forms as one sees it evolving today, cannot be summed up in the evil practices and attitudes of individuals or groups or in bad practices of states, of employers and others even if these murderous and degrading aspects of daily life are not only deplorable but also contrary to the minimum respect of human rights and thus to be condemned for this simple reason. But in fact and moreover, all while perpetuating itself, racism has changed the color of its skin, if one may say so.

"More accurately, it no longer refers only to the color of the skin, even if this remains a dominant aspect of discrimination. It goes beyond. In the context of current polarizing globalization, the victims are not only the peoples and the people of color, although they sill constitute the majority. This racism is added to and results from a much broader social inequality, an inequality among peoples as among individuals living in the same country.

"This racism has become systemic, a part of the system of exploitation and domination prevailing at the global level. It targets the poor, the producer who is not sufficiently profitable to earn enough to live well, the insolvent because they are non-consumers, the elderly because they are wards of society, the marginalized, the non-productive, the disqualified according to whatever criteria, the informal workers, the slum dwellers, the small farmers, those who are the vast majority of the people of the world.

"Thus the small white farmer of Arizona can be part of this whereas the highly qualified professional, even when of African of Asian origin, can escape from it, if not from the petty annoyances that he will continue to suffer painfully.

"The effectiveness of the neo-Nazi groups and the extreme right as well as of other fundamentalist currents lies precisely in their ability to divide those who are excluded from the benefits of globalization, those populations that have become superfluous, to make them affront each other and hate each other in the name of so-called cultural particularities or of inconciliable races rather than their joining together in opposition to the policies that are

On 8 January 2010, confronted with these violent demonstrations and in order the expel them from the region, the inhabitants of Rosarno beat migrant Travelers with iron bars, fired on them and intentionally drove over them, causing 50 injured, including 18 police who were trying to intervene.

In the wake of these serious events, some 1,400 migrants were arrested and sent to centers in Bari and Crotona, including asylum seekers and those with residency visas. The Italian authorities began the expulsions on 11 January 2010.

After an exchange of letters with the Italian government, the Special Rapporteur made the following observations and recommendations.

The Special Rapporteur warned against making hasty generalizations about the criminal behavior or social deviance of members of certain minorities, which stigmatize these groups even more, rather than promoting effective alternatives that might lead to their social inclusion.

The Special Rapporteur expressed his deep concern regarding the abovementioned incidents, the declarations and measures proposed criminalizing the Roma and migrants in Italy. He also expressed his acute apprehension in reaction to the interior minister's proposal to take the finger prints of all the Roma, including children, in order to identify "sans papiers" living in Italy. For the Special Rapporteur, this proposal could clearly be characterized as discriminatory because it targets exclusively the Roma minority in Italy. The Rapporteur was moreover dismayed by the aggressive and discriminatory rhetoric used by political leaders, including by members of the government, who created an overall environment of hostility, antagonism and stigmatization of the Roma community in the eyes of the public.

The Special Rapporteur also noted that government policies concerning the Roma should be firmly implemented so as to prevent all discriminatory practices targeting this community, which practices begin with the local authorities and private property owners regarding access to adequate housing. Measures should be taken to firmly combat local housing discrimination measures and illegal expulsions of Roma, avoid relegating the Roma to camps outside populated areas, isolated and without access to health care and other services.

The Special Rapporteur recommended that the Italian government recognize the Roma and the Sinti as national minorities, adopt a national policy for these communities, to respond in particular to their housing and employment needs, but also to the needs of their children who are socially ostracized.

Finally, the Special Rapporteur, quoted paragraph 48 of the *Durban Declaration and Program of Action*, that declaring the responsibility of all governments "to protect the human rights of migrants under their jurisdiction" and "to safeguard and protect migrants against illegal or violent acts, in particular acts of racial discrimination and crimes perpetrated with racist or xenophobic motivation by individuals or groups". The Durban Conference emphasized "the need for their fair, just and equitable treatment in society and in the workplace".

However, the Committee on Economic, Social and Cultural Rights (CESCR)[22] has pointed out that "the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. ... It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."[23] Moreover, the principle of non-discrimination is "an immediate and cross-cutting obligation"[24]. It is "neither subject to progressive implementation nor dependent on available resources."[25]

Further, the *ICCPR*'s Article 2.2 stipulates:

> *"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

As the *ICCPR* also contains no definition of non-discrimination, the Committee on Economic, Social and Cultural Rights has formulated the following one:

> *"discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment."*[26]

For the Committee, the category "other status" mentioned in Article 2.2 of the *ICESCR*, includes, inter alia (the list is not exhaustive): "disability"; "age" (for example, access by youth to training and employment and by the elderly to retirement pensions); "sexual orientation and gender identity"; "place of residence" (disparities between rural and urban areas, the situation of nomads, displaced persons). Yet this category could also include "denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability."[27]

The Committee has insisted, moreover, that nationality must not constitute an obstacle for the enjoyment by everybody of the rights listed in the *Covenant*:

> *"The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-*

[22] Entrusted with overseeing compliance by states parties to the *ICESCR* (v. Chapter IV.C.2).
[23] CESCR, *General Comment 3*, 14 December 1990, § 9: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument
[24] CESCR, *General Comment Nº 20*, E/C.12/GC/20, 2 July 2009, § 7: http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc
[25] CESCR, *General Comment Nº 18*, E/C.12/GC/18, 6 February 2006, § 33: http://tb.ohchr.org/default.aspx?Symbol=E/C.12/GC/18
[26] CESCR, *General Comment Nº 20*, E/C.12/GC/20, 2 July 2009, § 7.
[27] Ibid., §§ 28, 29, 32, 34, 27.

nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and document."[28]

The Committee, as it has in the case of the disabled, has further emphasized that public entities are not the only ones concerned by the principle of non-discrimination: "It is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities."[29]

Finally, the Committee has focused on non-discrimination in all its general comments on the rights listed in the *ICESCR* (inter alia food, water, adequate housing, education, health, work).[30]

In closing, it is worth mentioning here the study conducted by the Human Rights Council's Advisory Committee[31] on discrimination in the context of the right to food.[32] In this context, the Advisory Committee carried out in parallel a study on the rights of peasants and other persons living in rural areas. In its preliminary study of this matter, the Committee identified persons who were vulnerable and subject to discrimination in rural settings, while exploring the causes of this discrimination (land expropriation, sexual discrimination, lack of agrarian reform or minimum wages, criminalization of peasant movements etc.). It also presented the international instruments and mechanisms that could protect the rights of these persons and compensate for the protection that is lacking in this area. Taking into account that 80% of the persons suffering from hunger live in rural areas, the Advisory Committee came down in favor of the adoption of a new international instrument to improve the protection of the rights of these persons.[33]

[28] Ibid., § 30.

[29] CESCR, *General Comment Nº 5*, 12 September1994, §11: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument

[30] V. especially *General Comments Nº 4, 11, 12, 13, 14, 15 and 18*. All general comments are all available on the website of the Office of the United Nations High Commissioner for Human Rights: http://www2.ohchr.org/english/bodies/cescr/comments.htm

[31] An expert body under the purview of the Human Rights Council. V., in this regard, the CETIM critical report *The Human Rights Council and its Mechanisms*: http://www.cetim.ch/en/publications_cahiers.php?currentyear=&pid=#council

[32] V. *Study of the Human Rights Council Advisory Committee on discrimination in the context of the right to food*, A/HRC/16/40, 16 February 2011, 16th session of the Human Rights Council.

[33] *Preliminary study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas*, A/HRC/16/63, 18 February 2011, 16th session of the Human Rights Council: http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-63.pdf

On 19 July 2007, more than a thousand Roma were expelled from their camps in Magliana, in Tivoli (Rome) and in Pisa.

On 11 August 2007, four Roma children, who had earlier been expelled from Pisa with their parents, died in a fire in their improvised lodging in Livorno. The cause of the fire remains undetermined.

On 28 December 2007, the Italian government adopted a decree allowing the expulsion of European Union nationals accused of constituting a "threat to public order" and "public safety".

On 13 May 2008, approximately 60 people attacked Roma settlements in the outskirts of Naples, using homemade incendiary devices to set fire to tents and houses. On the same day, four Molotov cocktails were thrown at a Roma camp in Novarra, near Milan.

On 14 May 2008, during riots, two Roma camps were set on fire at Ponticelli near Naples. Yet, during the weeks preceding the riots, several tracts inciting to racial hatred had been posted in the streets of Ponticelli without any reaction on the part of the police.

In Trieste, the local administration cut the water and electricity in a Sinti camp, apparently in order to force them to leave.

At the same time, several leaders of the Northern League issued anti-immigrant declarations. The interior minister, Roberto Maroni, stated publicly on 11 May 2008 that "all the Roma camps should immediately be dismantled and the inhabitants should be expelled, even incarcerated". The deputy mayor of Milan, Ricardo De Corato added that he would impose a limit on the number of Roma in Milan.

Between 12 and 14 May 2008, hundreds of "sans papiers"[149] throughout Italy were arrested and their fingerprints taken with a view to expelling them from the country. Among them were 50 Roma who were living in a camp in Rome.

On 21 May 2008, the Italian Council of Ministers adopted a series of new measures on public security. These made it possible, among other things, to criminalize clandestine immigration and to detain immigrants in "identification and expulsion centers" for up to 18 months. They also made expulsions easier, limited family reunification and allowed the confiscation of apartments rented out to illegal immigrants. Moreover, these measures contained a declaration of a state of emergency that making it possible to deal with what was described as a critical situation in Campania, Lombardy and Lazio and which involved many non-European Union citizens illegally living in the country as nomads.

On 7 January 2010, two African migrants coming from work were targets of shots from an air-rifle fired by Italians. In reaction, the migrants, mostly of African origin, invaded the streets and violently protested against these attacks, setting fire to cars, breaking wind shields and attacking local stores. The police finally intervened to stop the violence.

[149] The term, meaning "without [identification] papers" is used for migrants in European countries without work permits ("papers") even though they have a passport or a national identity card.

In his report on the ***Situation of Muslim and Arab peoples in various parts of the world***, the Special Rapporteur noted "…a clear increase in Islamophobia, to which there are two fundamental aspects: intellectual legitimization of increasingly overt hostility towards Islam and its followers by influential figures in the world of arts, literature and the media; and tolerance of such hostility in many countries".[143]

In his report on ***Political platforms which promote or incite racial discrimination***, the Special Rapporteur noted:

> *"the normalization of racism, racial discrimination and xenophobia for political ends, the penetration of the racist political platforms of extreme right-wing parties and movements in the political programs of democratic parties, and the growing intellectual legitimization of those platforms (…) the resurgence of acts inciting to racial hatred and violence, in spite of the existence, in most national legislations, of provisions meant to counter such acts."*[144].

Regarding mission reports, the Special Rapporteur, to date, has conducted missions in the following countries (in alphabetical order): Australia, Brazil, Canada, Columbia, Czech Republic, Dominican Republic, Estonia, France, Germany, Guatemala, Guyana, Honduras, Hungary, Italy, Ivory Coast, Japan, Kuwait, Latvia, Lithuania, Mauritania, Nicaragua, Romania, Russia, Switzerland, Trinity and Tobago, United Kingdom.[145]

The urgent appeals consist of the Special Rapporteur's intervention to governments to demand explanations regarding allegations of human rights violations that he has received. In this regard, the Special Rapporteur has intervened several times with the Italian government concerning several incidents involving the Roma[146] the Sinti[147] and other immigrant in Italy. Here is a summary of these incidents and the position of the Special Rapporteur.[148]

[143] *Report to the sixtieth session of the Commission on Human Rights*, E/CN.4/2004/19, 23 February 2004, p. 2. V. also the report to the sixty-second session of the Commission on Human Rights, E/CN.4/2006/17, 13 February 2006 and report to the ninth session of Human Rights Council, A/HRC/9/12, 2 september 2008.

[144] *Report to the fifth session of the Human Rights Council*, A/HRC/5/10, 25 May 2007, p. 2. V. also the two earlier reports presented to the Commission on Human Rights, E/CN.4/2004/61, 15 April 2004, and E/CN.4/2006/54, 13 January 2006.

[145] All the country specific reports of the Special Rapporteur are available on the site of the UN High Commissioner for Human Rights: http://www2.ohchr.org/english/issues/racism/rapporteur/visits.htm

[146] In Europe, various groups and sub-groups are commonly called Roma, Romani, Gypsies or Travelers. The Romani and Travelers form a group of between 10 and 12 million in Europe and are present in almost all the member states of the Council of Europe. V. http://www.coe.int/t/dg3/romatravellers/default_EN.asp and the Council of Europe's *Glossary on Roma and Travelers*.

[147] There is a southern sub-group of the Sinti living in northern Italy (Piedmont and Lombardy) and in Provence whose language has borrowed words from Italian. V note 146.

[148] V. A/HRC/7/19/Add.1, 21 February 2008, §§ 92-112, presented to the Human Rights Council's seventh session; A/HRC/11/36/Add.1, 9 May 2009, §§ 46-63, presented to the Council's eleventh session; A/HRC/14/43/Add.1, 21 May 2010, §§ 80-93, presented to the Council's fourteenth session.

II. OTHER PERTINENT TEXTS

A. At the International Level

Besides the abovementioned international instruments, the following texts also deal with the right to non-discrimination.

The ***Convention on the Elimination of All Forms of Discrimination against Women***[34]**,** in Article 1, gives a broad definition to discrimination, which applies to all the provisions of the *Convention*:

> *"For the purposes of the present Convention, the term 'discrimination against women' shall mean* ***any distinction, exclusion or restriction made on the basis of sex*** *which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (emphasis added).*

It should be emphasized that this convention also deals with the full development and advancement of women (Article 3); the elimination of prejudices and customary practices based on sexual stereotypes (Article 5); trafficking in women and the exploitation of female prostitution (Article 6); public and political life (Articles 7, 8); equality of rights in education (Article 10); elimination of discrimination in employment, health care and economic and social life (Articles 11, 12, 13), equality before the law (Article 15); and elimination of discrimination against women in all in all matters relating to marriage and family relations (Article 16).

The ***Convention on the Rights of the Child***[35] in Article 2, states:

> *"1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind,* ***irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status [****emphasis added]****.*
>
> *"2. States Parties shall take all appropriate measures to ensure that the child is protected* ***against all forms of discrimination*** *or punishment on the*

[34] Adopted by the United Nations General Assembly 18 December 1979, entered into force 3 September 1981, ratified by 186 countries (as of 16 March 2011), making it, after the *Convention on the Rights of the Child* (191 ratifications) the most ratified of the human rights treaties: http://www2.ohchr.org/english/law/cedaw.htm

[35] Adopted 20 November 1989, entered into force 2 September 1990, ratified by all countries with the exception of the United States of America and Somalia, which have nevertheless signed it: http://www2.ohchr.org/english/law/crc.htm

basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members [emphasis added]".

The ***International Convention on the Rights of Persons with Disabilities***[36] prohibits any discrimination based on disability.

The right to non-discrimination is also mentioned in Articles 1, 7, 13, 17, 18, 25, 27, 28, 30, 43, 45, 54, 55 of the ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families***[37].

In Articles 1.1 and 1.2, the ***Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief***[38] stipulates: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice." It further stipulates (Article 2.1): "No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."

The ***Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities***[39] also prohibits discrimination (Article 2.1): "Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."

The ***International Labor Organization's Convention 111*** (25 July 1958)[40] deals with the ***elimination of discrimination in employment and occupation***. Article 1.a prohibits "any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." On the other hand, its Article 2 specifies: "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

The ***ILO's Convention 100 on equality of pay*** (29 June 1951),[41] deals in Article 1.b with "equal remuneration for men and women workers for work of equal

[36] Adopted 13 December 2006, entered into force 3 May 2008, ratified by 98 countries: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx

[37] Adopted 18 December 2006, entered into force 1 July 2003, ratified by 42 countries: http://www2.ohchr.org/english/law/cmw.htm

[38] Proclaimed by the United Nations General Assembly 25 November 1981: http://www2.ohchr.org/english/law/religion.htm

[39] Adopted by the General Assembly18 December 1992: http://www2.ohchr.org/english/law/minorities.htm

[40] Entered into force 15 June 1960, ratified by 169 countries (as of 23 February 2011): http://www.ilo.org/ilolex/english/convdisp1.htm

[41] Entered into force 23 May 1953, ratified by 168 countries (as of 23 April 2011): http://www.ilo.org/ilolex/english/convdisp1.htm

are being perniciously employed to foment racial hatred, xenophobia and anti-Semitism."[139]

Further, this scourge tends to threaten democracy and social cohesion:

"The current resurgence of racism, racial discrimination, xenophobia and related intolerance represents a major threat not only to the rights of the victims but also to the development of democracy and social cohesion. This threat has attained new and alarming heights in the context of the current global 'war on terror', as a result of intellectual legitimization of racist and xenophobic ideas via public discourse, and the translation into public policies by mainstream political parties of perspectives that were formally promoted by far-right political movements."[140]

It is worth noting that the Special Rapporteur has four means of giving effect to this mandate: annual reports, thematic reports, mission reports and "urgent appeals".

In his annual reports, the Special Rapporteur has identified the main cause of this scourge: "Discrimination, racism and xenophobia by definition constitute a rejection of or a failure to recognize difference. In the history of nation States, this rejection has led to the development, through historical writings and education, of a national identity founded on a particular ethnic group, race, culture or religion. This ghetto-identity, over the longer term, has thrived on the twin forces of opposition to and demonization of others and the heightening of that identity. Political domination has often been defended on the grounds of a deep-seated belief in cultural superiority. Throughout history, this ideology has provided an intellectual prop for all imperial ventures, especially slavery and colonization."[141]

It is not surprising that, to combat all forms of racism, the Special Rapporteur considers that "efforts to combat racism must involve economic, social and political measures and relate to the question of identity".[142]

Regarding the thematics reports, one should mention in particular two reports drafted by the Special Rapporteur: *Situation of Muslim and Arab peoples in various parts of the world* and *Political platforms which promote or incite racial discrimination*.

[139] *Annual report of the Special Rapporteur to the fifty-third session of the Commission on Human Rights*, E/CN.4/1997/71, 16 January 1997, § 139: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G97/101/89/PDF/G9710189.pdf?OpenElement

[140] *Annual report of the Special Rapporteur to the fifth session of the Human Rights Council*, A/HRC/5/10, 25 May 2007, § 60: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/126/78/PDF/G0712678.pdf?OpenElement All the reports of the Special Rapporteurs are available on: http://www2.ohchr.org/english/issues/racism/rapporteur/annualHRC.htm

[141] *Annual report of the Special Rapporteur to sixty-first session of the Commission on Human Rights*, E/CN.4/2004/18, 21 January 2004, § 5: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/104/76/PDF/G0410476.pdf?OpenElement

[142] *Annual report of the Special Rapporteur to the sixty-second session of the Commission on Human Rights*, E/CN.4/2006/16, 18 January 2006, § 62: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/102/69/PDF/G0610269.pdf?OpenElement

forms of racism, racial discrimination, any form of discrimination against Blacks, Arabs and Muslims, xenophobia, negrophobia, anti-Semitism, and related intolerance, as well as governmental measures to overcome them".[136]

Regularly renewed, this mandate was considerably broadened in 2008 by the new Human Rights Council. The Special Rapporteur is thus now required "to gather, request, receive and exchange information and communications with all relevant sources, on all issues and alleged violations falling within the purview of his/her mandate, and to investigate and make concrete recommendations, to be implemented at the national, regional and international levels, with a view to preventing and eliminating all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance".[137]

Until now, three rapporteurs have held the mandate.[138] From their work, it is evident that no country is free from discrimination. Worse, the situation at the outset has not only continued but has evolved:

> *"…racism and racial discrimination persist in various regions of the world both in their structural, economic and social form and in the form of xenophobia. Theories of racial inequality are raising their head while at the same time modern communication technologies, especially the Internet,*

[135] V. *Resolution 1993/20*, 2 March 1993, adopted without a vote: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1993-20.doc

[136] V. *Resolution 1994/64*, 9 March 1994, § 4, adopted without a vote: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1994-64.doc

[137] Among these issues, one might mention the following : 2. (a) Incidents of contemporary forms of racism and racial discrimination against Africans and people of African descent, Arabs, Asians and people of Asian descent, migrants, refugees, asylum-seekers, persons belonging to minorities and indigenous peoples, as well as other victims included in the Durban Declaration and Program of Action; (b) Situations where the persistent denial of individuals belonging to different racial and ethnic groups of their recognized human rights, as a result of racial discrimination, constitutes gross and systematic violations of human rights; (c) The scourges of anti-Semitism, Christianophobia, Islamophobia in various parts of the world, and racist and violent movements based on racism and discriminatory ideas directed at Arab, African, Christian, Jewish, Muslim and other communities; (d) Laws and policies glorifying all historic injustices and fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance and underpinning the persistent and chronic inequalities faced by racial groups in various societies; (e) The phenomenon of xenophobia; (f) Best practices in the elimination of all forms and manifestations of racism, racial dissemination, xenophobia and related intolerance; ... (k) The sharp increase in the number of political parties and movements, organizations and groups which adopt xenophobic platforms and incite hatred, taking into account the incompatibility of democracy with racism; (l) The impact of some counter-terrorism measures on the rise of racism, racial discrimination, xenophobia and related intolerance, including the practice of racial profiling and profiling on the basis of any grounds of discrimination prohibited by international human rights law; (m) Institutional racism and racial discrimination; (n) The efficiency of the measures taken by Governments to remedy the situation of victims of racism, racial discrimination, xenophobia and related intolerance; (o) Impunity for acts of racism, racial discrimination, xenophobia and related intolerance, and maximizing remedies for the victims of these violations." Resolution 7/34. *Mandate of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance* in *Report of the Human Rights Council*, General Assembly Official Records, Sixty-third session, Supplement N°. 53 (A/63/53), pp. 168-172: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/148/64/PDF/G0814864.pdf?OpenElement

[138] Maurice Glélé-Ahanhanzo (Benin), Doudou Diène (Senegal) and Githu Muigai (Kenya).

value refers to rates of remuneration established without discrimination based on sex".

The ILO's Convention 169 on indigenous and tribal peoples (27 June 1989)[42] stipulates in : "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples." (art. 3.1)

For the UNESCO ***Convention against Discrimination in Education***[43], "The term `discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) of depriving any person or group of persons of access to education of any type or at any level; (b) of limiting any person or group of persons to education of an inferior standard; (c) subject to the provisions of Article 2 of this Convention[44], of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or (d) of inflicting on any person or group of persons conditions which are in-compatible with the dignity of man" (Article 1.1).

The ***World Conference on Human Rights***[45] recalled governments' obligations "to develop and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".

While characterizing apartheid, genocide, slavery and human trafficking as "crimes against humanity" (§§ 13, 14, 15), the declaration of the ***World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance***[46] ***acknowledged that "racism, racial discrimination, xenophobia and related intolerance*** occur on the grounds of race, color, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status" (§ 2). It also recognized that "racism, racial discrimination, xenophobia and related intolerance may be aggravated by, inter alia, inequitable distribution of wealth, marginalization and social exclusion" (§ 9). It further recognized that "colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and

[42] Entered into force 5 September 1991, ratified by 22 countries (as of 24 April 2011): http://www.ilo.org/ilolex/english/convdisp1.htm

[43] Adopted 14 December 1960, entered into force 22 May 1962: http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html

[44] Article 2 does not consider discriminatory the establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, or for religious or linguistic reasons, nor are private educational institutions "if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities". In this regard, v. the CETIM booklet, *The Right to Education*: http://www.cetim.ch/en/publications_education.php?currentyear=&pid=

[45] *Vienna Declaration and Program of Action*, A/CONF.157/23, 12 June 1993, § 5 of the preamble: http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en

[46] Adopted in Durban (South Africa) September 2001: http://www.un.org/en/ga/durbanmeeting2011/pdf/DDPA_full_text.pdf

people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences" (§ 14). In the words of this declaration, "xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices" (§ 16). And it affirmed, inter alia, that "all peoples and individuals constitute one human family, rich in diversity. They have contributed to the progress of civilizations and cultures that form the common heritage of humanity. Preservation and promotion of tolerance, pluralism and respect for diversity can produce more inclusive societies" (§ 6).

It is worth noting in this regard that the ***Durban Review Conference*** reaffirmed that "all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity" and strongly rejected "any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races".[47]

B. At the Regional Level

There are several regional treaties protecting human rights, among which are the *African Charter on Human and Peoples' Rights*, the *European Convention on Human Rights*, the *European Social Charter* and the *American Convention on Human Rights* (v. also Chapter IV.B).

1. ***African Charter on Human and Peoples' Rights***[48] promotes and protects human rights and freedoms on the African continent. Its implementation is overseen by the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (v. also Chapter IV.B).

Article 2 of the *Charter* stipulates: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter ***without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status*** [emphasis added]."

Among other things, the *Charter* stipulates: "every individual shall be equal before the law" and "equal protection of the law" (Article 3); "the state shall ensure the elimination of every discrimination against women and children" (Article 18.3); and "the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs" (Article 18.4).

The *African Charter* also affirms that "all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the

[47] *Outcome document of the Durban Review Conference*, Geneva, April 2009, §6: http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf

[48] Adopted in 1981, entered into force 21 October 1986, ratified by all the countries of the African Union (53 in all): http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf

CEDAW concluded that there had been violation of Articles 10.h,[129] 12[130] and 16.1.e[131] of *Convention*.[132]

3. Special Procedures of the Human Rights Council

The Human Rights Council (which superseded the Commission on Human Rights in 2006) comprises 42 mandates, of which 33 are thematic and 9 based on specific country situations, all called "special procedures".[133] They cover both economic, social and cultural rights (food, water, adequate housing, health etc.) and civil and political rights (torture, arbitrary detention, forced disappearances, summary and extrajudicial executions etc.). They can also deal with the rights of groups considered vulnerable (women, indigenous peoples, minorities etc.).[134]

It goes without saying that all mandate holders, (special rapporteurs, independent experts and representatives of the United Nations Secretary General) are obliged to deal with the question of non-discrimination within the framework of their respective mandates. In the context of this booklet, in view of its specific subject and for reasons of space, we are concentrating on the mandate of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance.

Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance

In 1993, the Commission on Human Rights created the mandate of the Special ***Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance***.[135] In 1994, the Commission requested the Rapporteur "to examine according to his mandate incidents of contemporary

[129] Article 10.h deals with "access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning".

[130] Article 12 reads as follows: "1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

[131] According to Article 16-1, states parties commit themselves to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women… (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

[132] V. CEDAW/C/36/D/4/2004, 29 August 2006: http://www2.ohchr.org/english/law/docs/Case4_2004.pdf

[133] The following countries have been condemned by the Human Rights Council or are subject to "technical cooperation" with it: Burundi, Cambodia, Haiti, Israel, Iran, Myanmar, North Korea, Somalia, Sudan. A special rapporteur is named for the situation of each country (in theory, for one year, to be renewed depending on the case, except for Israel), who presents a report to the Council. For further information and regarding the special case of Israel, v. CETIM, *The Human Rights Council and Its Mechanisms:* http://www.cetim.ch/en/publications_cahiers.php?currentyear=&pid=#council

[134] Ibid., as well as the website of the United Nations High Commissioner for Human Rights: http://www2.ohchr.org/english/bodies/chr/special/index.htm

families". In view of this, the CEDAW recommended that the Indian government, inter alia, " urgently discharge its responsibility to act with due diligence to investigate all crimes including that of sexual violence perpetrated against women and girls, to punish perpetrators and to provide adequate compensation without further delay". It also recommended that the government, "widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women....Take immediate, effective and gender-specific measures to rehabilitate and compensate women victims of violence, including sexual violence, and their families in Gujarat." Further, the CEDAW recommended that the government "consider developing, coordinating and establishing a truth and reconciliation commission in Gujarat".[126]

In its concluding observations concerning ***Saudi Arabia***, the CEDAW expressed its concern, in particular, about the "***the general reservation*** made upon ratification of the Convention by the State party, which is drawn so widely that it is ***contrary to the object and purpose of the Convention*** [emphasis added]".[127]

Following the examination of ***France***'s report, "noting the evaluation by the State party of the implementation of the Act of 15 March 2004 banning the wearing of 'signs or dress through which pupils ostensibly indicate which religion they profess in public primary, middle and secondary schools', the Committee nevertheless remains concerned that the ban should not lead to a denial of the right to education of any girl and their inclusion into all facets of French society."

Concerned by restrictive measures regarding family union, which essentially affect women, such as DNA testing, found to be discriminatory by the HALDE (Haute autorité de lutte contre les discriminations et pour l'égalité – High Authority for the Struggle against Discrimination and for Equality) and language proficiency tests as well as tests relating to knowledge of the values of the Republic, the CEDAW requested that the government "to take effective measures to eliminate all forms of discrimination against immigrant women".

The CEDAW further requested that the government "intensify its efforts to ensure de facto equality for women in the labor market, …take comprehensive measures in order to address all forms of violence against women, including domestic violence, …take all appropriate measures to suppress all forms of trafficking and exploitation of prostitution of women and girls".[128]

Regarding individual complaints, Ms Andrea Szijjarto, Rom, of Hungarian nationality, recurred to the CEDAW, declaring that she had been forcibly sterilized by hospital personnel in a hospital in ***Hungary***. In its August 2006 decision, the

[126] CEDAW/C/IND/CO/SP.1, 22 October 2010, §§ 12, 23, 25, 28, 19, 27.a, 35.a, 37.a respectively: http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-IND-CO--SP1.pdf

[127] CEDAW/C/SAU/CO/2, 8 April 2008, § 9: http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SAU.CO.2_en.pdf

[128] CEDAW/C/FRA/CO/6, 8 April 2008, §§ 20, 23, 27, 29, 31: http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.FRA.CO.6.pdf

domination of a people by another" (Article 19) and that "every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance" (Article 28).

2. The ***Convention for the Protection of Human Rights and Fundamental Freedoms***[49] usually called simply the *European Convention on Human Rights* (*ECHR*), like other international instruments, prohibits, all forms of discrimination.

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." (Article 14)*

It should be noted, however, that though Article 14 guarantees equality in the enjoyment of rights and freedoms recognized in the *ECHR*, there is no guaranteed right to equality in and of itself. The European Court of Human Rights thus cannot rule on a discrimination case unless it is based on litigation of rights protected by the *ECHR*. Further, when it is called upon to rule on a violation of Article 14, the Court always links this review to a substantial guarantee by the *ECHR*. It systematically recalls in its rulings the linking character of Article 14 that makes it inoperable when it is invoked autonomously. However, the Court affirms that the absence of violation of a substantial right of the *Convention* does not constitute an obstacle to reviewing allegations based on non-discrimination. It should also be noted that the rights and freedoms recognized by the *ECHR* cover vast areas such as the right to life, the right to respect of one's private and family life, the freedom of thought, of conscience and of religion.[50]

Article 1 of *Protocol 12* of the *ECHR*[51] enshrined this right by enunciating a **general prohibition** against discrimination:

> *"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
>
> *"2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."*

The provisions of Article 1 are given in general terms. In this way, they confer upon it a much broader scope than Article 14 of the *ECHR*. They cover the enjoy-

[49] Adopted 4 November 1950, entered into force 3 September 1953, ratified by all 47 members states of the Council of Europe: http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

[50] V. *Handbook on European Non-Discrimination Law*: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Handbook+on+non-discrimination/

[51] Adopted on 4 November 2000, entered into force 1 April 2005, ratified by 18 of the Council of Europe's member states 47.

ment of every right provided for by law and not only those guaranteed by the *ECHR*, unlike Article 14. The commentary of Article 3 regarding the relationship between the *ECHR* and the *Protocol* indicates that Article 1 of the *Protocol* covers the provisions contained in Article 14 of the *ECHR*. Also, as an additional protocol, it cannot suppress, modify nor deprive of effect the provisions of Article 14, which continue to apply between parties to the present protocol. Further, as stipulated in the commentaries of the *Protocol*, "the additional scope of protection under Article 1 concerns cases where a person is discriminated against:

i. in the enjoyment of any right specifically granted to an individual under national law;
ii. ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
iii. iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
iv. iv. by any other act or omission by a public authority (for example, the behavior of law enforcement officers when controlling a riot)."[52]

3. The ***European Social Charter***[53] guarantees certain social and economic rights (work place relations and social protection, for the most part). Article E states that all the rights recognized in the *Charter* must be implemented "without discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status".

Moreover, the principle of non-discrimination is explicitly mentioned in the following articles of the *Charter*: "the right to just conditions of work" (Article 2); "the right to a fair remuneration" (Article 4); "the right of employed women to protection of maternity" (Article 8); "the right of persons with disabilities to independence, social integration and participation in the life of the community" (Article 15); "the right of children and young persons to social, legal and economic protection" (Article 17); "the right of migrant workers and their families to protection and assistance" (Article 19); "the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex" (Article 20); "the right of elderly persons to social protection" (Article 23); "the right of workers with family responsibilities to equal opportunities and equal treatment" (Article 27).

4. The ***American Convention on Human Rights***[54] prohibits all discrimination: "The States Parties to this Convention undertake to respect the rights and

[52] V. *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report*, § 22: http://conventions.coe.int/Treaty/en/Reports/Html/177.htm

[53] Adopted in 1961 by the Council of Europe and revised in 1996. The new charter, called the *Revised European Social Charter*, entered into force in 1999 and has progressively replaced the initial treaty. V. http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm

discrimination brought before its domestic courts are promptly addressed and implemented.

"The Committee reiterates that the Citizenship and Entry into Israel Law (Temporary provision) should be revoked and that the State party should review its policy with a view to facilitating family reunifications for all citizens and permanent residents without discrimination.

"The Committee reiterates that the State party should cease its practice of collective punitive home and property demolitions. The State party should also review its housing policy and issuance of construction permits with a view to implementing the principle of non-discrimination regarding minorities, in particular Palestinians, and to increasing construction on a legal basis for minorities of the West Bank and East Jerusalem. It should also ensure that municipal planning systems are not discriminatory.

"The State party should increase its efforts to protect the rights of religious minorities and ensure equal and non-discriminatory access to places of worship. Furthermore, the State party should pursue its plan also to include holy sites of religious minorities in its list."[124]

The Committee on the Elimination of Discrimination against Women

The states parties to the *Convention the Elimination of All Forms of Discrimination against Women*[125] must regularly present a report to the ***Committee on the Elimination of Discrimination against Women (CEDAW)*** concerning measures that they have adopted for its implementation. After the entry into force of the *Convention*, the first report is due within one year, then a report every four years, minimum, or as often as the Committee requests (Article 18).

By virtue of the optional protocol to the *Convention*, the CEDAW examines both individual and collective complaints brought before it alleging violations of the provisions of the *Convention*. It can conduct investigations on the territory of a state party to the protocol in case of "serious" and "systematic" violations of the rights enshrined in the *Convention* (Article 8). It should be noted that the protocol does not admit of any reservations (Article 17).

Regarding the examination of states parties' reports, during the examination of the second and third periodic reports of ***India*** (November 2010), the CEDAW, concentrating in particular on the intercommunity violence of 2002 in Gujarat, deplored, inter alia, "the lack of due diligence demonstrated by the State party in promptly investigating the case of violence, including sexual violence against women, …the lack of adequate measures to protect women victims/witnesses throughout the judicial process, …the narrow definition of rape in the current Penal Code, …that gender-specific measures have not been taken by the State party to rehabilitate and compensate women victims of the Gujarat massacre and their

[124] Ibid., §§ 5, 6, 15, 17, 20.

[125] Adopted 10 December 1999 by the General Assembly, ratified by 102 member states as of 28 March 2011: http://www2.ohchr.org/english/law/cedaw.htm

In its concluding observations on the ***Philippines***, the Committee recommended that the government "ensure effective enforcement of the above legislation and ensure that indigenous peoples' land and resource rights enjoy adequate protection in relation to mining and other competing usage, and that the capacity of the National Commission on Indigenous Peoples is strengthened. Positive measure should be expanded to include land rights issues". Regarding discrimination based on sexual orientation, the Committee requested the government to "strengthen human rights education to forestall manifestations of intolerance and de facto discrimination".[121]

In its concluding observations on ***Chili***, the Committee expressed its concern, inter alia, about: the persistence of legislative provisions on the family that are discriminatory toward women for the administration of their property; discrimination toward certain persons because of their sexual orientation; discrimination against women in employment, particularly in the private sector; the non-recognition of the status of conscientious objector to military service. The Committee recommended that the government "expedite the adoption of legislation recognizing the right of conscientious objection to military service … guarantee equal rights to all individuals … hasten the adoption by the Senate of the act repealing the joint property marital regime and replacing it with a community property regime … redouble its efforts to combat discrimination against women in employment, through such measures as reversing the burden of proof in discrimination cases to favor women employees, so that employers must explain why women hold positions of lower rank, have lesser responsibilities and earn lower wages".[122]

Regarding ***Israel***, the Committee reaffirmed that the *ICCPR* "is applicable in respect of acts done by a State in exercise of its jurisdiction outside its own territory. Furthermore, the applicability of the regime of international humanitarian law does not preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities or agents outside their own territories, including in occupied territories".[123] In the light of this reaffirmation, the Committee made the following recommendations to the state of Israel concerning non-discrimination.

> *"The State party should ensure the full application of the Covenant in Israel as well as in the occupied territories, including the West Bank, East Jerusalem, the Gaza Strip and the occupied Syrian Golan Heights. In accordance with the Committee's general comment No. 31, the State party should ensure that all persons under its jurisdiction and effective control are afforded the full enjoyment of the rights enshrined in the Covenant.*
>
> *"The State party should amend its Basic Laws and other legislation to include the principle of non-discrimination and ensure that allegations of*

[121] CCPR/CO/79/PHL, 1 December 2003, §§ 16, 18: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.79.PHL.En?Opendocument

[122] CCPR/C/CHL/CO/5, 18 May 2007, §§ 13, 16, 17, 18: http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.CHL.CO.5.pdf

[123] CCPR/C/ISR/CO/3, 3 September 2010, § 5: http://www.ccprcentre.org/doc/HRC/Israel/CCPR.C.ISR.CO.3_en.pdf

freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, **without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition** [emphasis added]" (Article 1.1).

Equality and equal protection by the law are mentioned in Article 24, and the equality of the rights of spouses is also mentioned, in Article 17.

[54] Adopted 22 November 1969, entered into force en 1978, ratified by 25 of the 34 member states of the Organization of American States, with the notable exception of the United States, which nonetheless signed it in 1977: http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm

proceedings before the national tribunals". In view of these requests of the victim, "The Committee considers the dialogue ongoing".[117]

In another case, Nikolaus Fürst Bleucher von Wahlstatt, a dual national (United Kingdom and Czech Republic), claimed to be the victim of violations, committed by the ***Czech Republic***, of the rights enshrined in Articles 2.1, 2.3, 14 and 26 of the *ICCPR*. The plaintiff claimed that law No 229/1991, enacted by the Czech government "to redress former land confiscations that had occurred with regard to agricultural properties in the period between 1948 and 1989", was discriminatory and did not allow him to recover his property that he had inherited from a relative. In its decision of 27 July 2010, the Human Rights Committee noted that the introduction into the law in question of a nationality criterion as a necessary condition for obtaining restitution of property confiscated by the authorities established an arbitrary and thus discriminatory distinction among individuals who were all victims of previous confiscations and constituted a violation of Article 26 of the *Covenant*. This was all the more so in that in the present case the plaintiff effectively satisfied the criterion of nationality and that the restitution was refused on the grounds that the original owner should have also fulfilled this condition. In the light of these considerations, the Committee ruled that "the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation if the properties cannot be returned". It also requested "the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation if the properties cannot be returned". Further, it requested that "the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law".[118]

Regarding the recommendations of the Human Rights Committee upon examination of the reports of states parties, here are several examples.

In its concluding observations on ***Croatia***, the Committee declared itself "concerned at the lack of a comprehensive law prohibiting discrimination in private-sector areas such as employment and housing". It recommended: "The State party should ensure that all members of ethnic, religious and linguistic minorities enjoy effective protection against discrimination and are able to enjoy their own culture and use their own language, in accordance with article 27 of the Covenant."[119]

Regarding ***Egypt***, the Committee, concerned by the numerous discriminations to which women are subjected (renunciation of all right to a financial support in case of divorce by unilateral repudiation, exclusion from positions of responsibility, genital mutilation etc.), recommended that Egypt "do away with all discrimination between men and women in its domestic legislation".[120]

[117] *Report of the Human Rights Committee* General Assembly Official Records, Sixty-fifth session Supplement Nº. 40 (A/65/40), pp. 154-156: http://www.bayefsky.com/general/a_65_40_2010.pdf

[118] *Nikolaus Fürst Blücher von Wahlstatt v. Czech Republic, Communication Nº. 1491/2006, U.N. Doc. CCPR/C/99/D/1491/2006 (2010).* §§ 2.3, 12: http://www1.umn.edu/humanrts/undocs/1491-2006.html

[119] CCPR/CO/71/HRV, 30 April 2001, §§ 19, 22: http://www.unhchr.ch/tbs/doc.nsf/0/7c3306a53f34ff43c1256a2a0036d955?Opendocument

[120] CCPR/CO/76/EGY, 28 November 2002, §§ 7 to 11: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument

The full authority of the Committee extends also to the second optional protocol of the *Covenant*, on the abolition of the death penalty, for those countries that have ratified it.

It should be noted that Article 41 of the *ICCPR* also confers upon the Committee the power to examine intergovernmental complaints.

As already mentioned, the Committee adopts, in the form of general comments, its interpretations of the content of the provision of the *ICCPR* (v. also Chapters I.A and III). For example, in its ***General Comment Nº 15 on the position of aliens under the Covenant,***[115] the Committee stated: "The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof." (§ 2)

Here are several cases of individual complaints.

In Lecraft v. ***Spain***, the plaintiff claimed to be a victim of racial discrimination because she had been subjected to an identification check in a railroad station, solely on the basis of her color. The Committee noted a violation of Article 26, read jointly with Article 2.3, building on the following considerations "The Committee considers that identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination."[116]

On 11 November 2009, the foreign minister and other Spanish officials of high rank met with Ms Lecraft and apologized to her for the acts she had been subjected to. On 15 January 2010, the Vice-Minister of the Interior in charge of security met with Ms Lecraft and presented her with the written and oral apology of his ministry. He also explained the measures taken by the ministry to make sure that police officials would not commit such acts of racial discrimination. On 23 April 2010, in her comments addressed to the Human Rights Committee, Ms Lecraft stated that, while she appreciated the limited action taken by Spain, they were "insufficient". She requested, in substance, that the Spanish government make public its apology, provide "detailed suggestions on steps that may be implemented to prevent repetition", and "requested 30,000 euros for moral and psychological injury and a further 30,000 euros towards the legal costs she incurred in the

[115] Adopted at its twenty-seventh session on 11 April 1986: http://www2.ohchr.org/english/bodies/hrc/comments.htm

[116] Case Nº. 1493/2006 (*Williams Lecraft v. Spain*), in *Report of the Human Rights Committee*, General Assembly Official Records, Sixty-fourth session, Supplement Nº. 40 (A/64/40), § 198: http://www.ccprcentre.org/doc/ICCPR/AR/A_64_40(Vol%20I)_Eng.pdf

III. OBLIGATIONS OF GOVERNMENTS

Generally, the international human rights instruments impose upon the ratifying states three types of obligations: ***respect***, ***protect*** and ***fulfil*** human rights. In our earlier booklets, we mentioned the scope and the content of these obligations in regard to several economic, social and cultural rights[55]. Given the transversal and non-derogable character of the right to non-discrimination, it is appropriate here to discuss the nature of governments' obligations in this area. These are the obligation to take ***legislative, administrative*** and ***judicial*** measures as well as all other "***adequate measures***" required to honor their commitments.

A. Legislative and Administrative Measures

When a government ratifies an international human rights convention, the first thing it must do is bring its legislation in line with the convention, for, according to the *Vienna Convention on the Law of Treaties (1969)*, a ratifying state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". (Article 27)

A government cannot issue reservations to the right to non-discrimination, for the right to non-discrimination is a non-derogable right. Such reservations are thus "incompatible"[56] with the objects and purposes of the international human rights instruments already mentioned (v. Chapters I, II).

Governments are obliged to "respect" and to "guarantee" all human rights of all persons on their territory and under their jurisdiction[57]. Thus, not only nationals but also non-nationals are concerned[58]. It is the same for persons who are not on the national territory of a country but who are under its jurisdiction (military occupation, trusteeship or protectorate territory, peace-keeping operations etc.).

Although the *International Covenant on Civil and Political Rights* formally prohibits "any propaganda for war" and "any advocacy of national, racial or religious hatred", which it characterizes as "incitement to discrimination, hostility or violence" (Article 20), the international human rights instruments in general and the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination against Women* in particular constitute veritable road maps for those governments that wish to prevent all forms of discrimination in the implementation of all

[55] V. *The Right to Food*, *The Right to Health*, *The Right to Housing*, *The Right to Work*, *The Right to Education* and *The Right of Peoples to Self-Determination*: http://www.cetim.ch/en/publications_brochures.php

[56] Human Rights Committee, *General Comment Nº 31*, § 5.

[57] Ibid., § 10.

[58] Nonetheless, Article 25 of the *ICCPR* limits certain political rights to "citizens", i.e. to nationals.

human rights (civil, economic, political, social and cultural rights) and all forms of discrimination based on sex.

As already emphasized, the right to non-discrimination must be linked to the principle of equality and equal protection under the law. In this regard, the Human Rights Committee has pointed out that "when legislation is adopted by a State party, it must comply with the requirement of article 26 [of the *ICCPR*] that its content should not be discriminatory".[59]

Of course, governments' obligations are not limited to "not violating" human rights; rather, governments must undertake to have these rights respected by third parties, international institutions as well as national and transnational business enterprises. For example, the *Convention on the Elimination of All Forms of Racial Discrimination against Women* requires that governments "take all appropriate measures to eliminate discrimination against women by ***any person, organization or enterprise*** [emphasis added]" (Article 2.e)[60].

Thus, in addition to "abstaining from any discriminatory actions", governments must "adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights"[61]. In this regard, the Committee on Economic, Social and Cultural Rights considers, for example, that special measures in favor of handicapped persons "to reduce structural disadvantages… should not be considered discriminatory"[62]. The *Convention on the Elimination of All Forms of Racial Discrimination against Women* does not consider as "discriminatory" any "temporary special measures aimed at accelerating de facto equality between men and women" (Article 41).

B. Judicial Measures

By virtue of international human rights law, in order to implement human rights, governments must, ***without discrimination***, accord means of redress to every person under their jurisdiction.[63] Thus, the competent authorities of any given country are obliged to undertake investigations of all allegations of human rights violations. Should such allegations be borne out, the governments must take measures including "appropriate compensation" (restitution, rehabilitation, measures of satisfaction, etc.) and "guarantees of non-repetition" (for exemple changes

[59] Human Rights Committee, *General Comment 18*, § 12: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument

[60] Article 2.1.d of the *International Convention on the Elimination of All Forms of Racial Discrimination* imposes a similar obligation upon governments. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have adopted positions along these lines (v. inter alia Human Rights Committee, *General Comment 31*, § 8 [http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument] and Committee on Economic, Social and Cultural Rights, *General Comment 14* , §§ 35, 39, 51.

[61] Committee on Economic, Social and Cultural Rights, *General Comment 20*, § 36: http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc

[62] Committee on Economic, Social and Cultural Rights, *General Comment 5*, 9 December 1994, §§ 9, 18: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument

[63] V. inter alia the *Universal Declaration of Human Rights*, Article 8; the *ICCPR*, Article 2.3; *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 6.

In its concluding observations regarding ***Nepal***, the Committee, noting with concern that "in spite of the provisions in the Interim Constitution prohibiting caste-based discrimination, such discrimination persists with impunity", recommended, inter alia, "a thorough review of national laws be undertaken with a view to identifying and rectifying all provisions that directly or indirectly permit discrimination on the basis of caste and multiple discrimination of women from certain groups".[111]

In its concluding observations for ***Kenya***, the Committee, "concerned about the exemption of Export Processing Zones from the application of the Employment Act and the Occupational Health and Safety Act", recommended that the state party "review its incentive regime for Export Processing Zones, remove their exemption from Kenyan labor legislation, including the Employment Act , the Occupational Health and Safety Act and minimum wage regulations, strictly enforce labor standards and further increase the number of labor inspections, promote training and promotion opportunities for workers, ensure trade union freedom and combat sexual harassment and racial discrimination in the Export Processing Zones".[112]

<u>The Human Rights Committee</u>

Oversight of compliance with the *International Covenant on Civil and Political Rights* (*ICCPR*) is assured by the ***Human Rights Committee (CCPR)***, which comprises 18 independent experts. It meets three times a year (twice in Geneva and once in New York) for three weeks each time.[113]

All states parties are required to submit periodic reports to the Committee regarding how they are implementing the *Covenant*. The government must submit an initial report one year after ratification of the *Covenant* then every time the Committee requests one (usually every four years). The Committee examines each report and makes known its concerns to the government in question in the form of "concluding observations".

The Committee is authorized to receive and examine complaints against a government from individuals if the government in question has ratified the optional protocol to the *ICCPR*. Over 100 countries have recognized the authority of the Committee to receive and deal with communications from individuals (or groups) which consider themselves victims of violations of the rights guaranteed in the *ICCPR*. An individual (or group of individuals) may submit a communication of this sort only after having exhausted all the domestic avenues of redress.[114]

[110] E/C.12/1/Add.53, 1 December 2000, §§ 11, 12: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.53.En?Opendocument

[111] E/C.12/NPL/CO/2, 16 January 2008, §§ 13 et 32: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/401/48/PDF/G0840148.pdf?OpenElement

[112] Cf. E/C.12/KEN/CO/1, 1 December 2008, § 17: http://www2.ohchr.org/english/bodies/cescr/cescrs41.htm

[113] For details, v. http://www2.ohchr.org/english/bodies/hrc/index.htm

[114] This is a general principle applied to all international instances. This principle can be derogated, depending upon the case, if a country's judiciary is deemed unable to deal with the matter.

its *General Comment Nº 20* on the right to non-discrimination, the Committee recalled:

> *"Discrimination undermines the fulfillment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio economic inequality, often because of entrenched historical and contemporary forms of discrimination." (§ 1)*

The Committee emphasizes moreover that non-discrimination and equality, fundamental aspects of international human rights law, are indispensable to the exercise of and the enjoyment of economic, social and cultural rights in conformity with Article 2.2 of the *ICESCR*.

Concerning the economic and social situation, the Committee recalls further:

> *"**Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society** [emphasis added]. ... A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places."*[108]

Regarding the recommendations of the Committee following the examination of the reports of the states parties, here are several examples.

In its recommendations to ***Australia*** **(**adopted 12 June 2009), the Committee on Economic, Social and Cultural Rights, noting that the anti-discrimination legislation of this country did not furnish complete protection against all forms of discrimination in all the areas linked to the rights mentioned in the *Convention* (Article 2.2), recommended that the government "enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds." It further requested that the government "take immediate steps to improve the health situation of indigenous people, in particular women and children, including by implementing a human rights framework that ensures access to the social determinants of health such as housing, safe drinking water, electricity and effective sanitation systems".[109]

In its concluding observations concerning ***Portugal***, the Committee deplored "intolerance and discrimination with regard to Roma people, refugees and immigrants... that foreign workers cannot enroll in the vocational guidance and training courses to which Portuguese workers are entitled". It also deplored "the persistence of discrimination against women in the fields of employment and equality of wages and opportunity with men."[110]

[108] *General Comment Nº 20*, E/C.12/GC/20, § 35, 2 July 2009.
[109] E/C.12/AUS/CO/4, 12 June 2009, §§ 14 et 28: http://www.bayefsky.com/pdf/australia_t4_cescr_42.pdf

in relevant laws and practices as well as bringing to justice the perpetrators of human rights violations).[64]

The failure to bring to justice perpetrators of human rights violations is considered a breach on the part of the government in the observance of its commitments in these areas. In this regard, the Human Rights Committee has stated that "no official status

justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility".[65]

In another vein, according to the Committee on Economic, Social and Cultural Rights, a "State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant".[66] The Committee further has affirmed that "guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights".[67]

C. International Cooperation

As we has already noted in earlier booklets[68], international cooperation and assistance are enshrined in the *Charter of the United Nations* (Articles 55, 56), the *International Covenant on Economic, Social and Cultural Rights* (Article 2.1) and in the *Declaration on the Right to Development* (Articles 3 and 4 in particular). By virtue of these instruments, governments without the means or unable to honor their human rights commitments to their populations can appeal for support from other countries, for all countries are required, collectively and individually, to realize these rights. This support should not be limited to financial matters but must include all sorts of cooperation: exchanges of experiences, cultural exchanges, training etc. The international organizations and the United Nations agencies must, in their respective areas of competence, make contributions for the effective implementation of all human rights.

As emphasized above, while governments are obliged to cooperate on the legal level, for example, to extradite perpetrators of human rights violations in the fight against impunity, they also have the obligation:

> *"not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7*

[64] Human Rights Committee, *General Comment 31*, § 16: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument
[65] Ibid., § 18.
[66] Committee on Economic, Social and Cultural Rights, *General Comment 3*, § 10.
[67] Committee on Economic, Social and Cultural Rights, *General Comment 9*, § 15: http://www2.ohchr.org/english/bodies/cescr/comments.htm
[68] V. inter alia *The Right to Education* and *The Right to Development*: http://www.cetim.ch/en/publications_education.php http://www.cetim.ch/en/publications_ddevelep.php

of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[69]

It should be noted, moreover, that international cooperation should be based on the principle of sovereign equality of states (*Charter of the United Nations*, Article 2.1) and the right of all peoples to determine their political status in order to freely assure their economic, social and cultural development (Common Article 1.1 of the two international human rights covenants).[70] According to such a principle, all discrimination among countries should be prohibited.

[69] Human Rights Committee, *General Comment 31*, § 12: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument

[70] V. in this regard *The Right of Peoples to Self-Determination*, CETIM: http://www.cetim.ch/en/publications_autodetermination.php

Turkey, inter alia, "take steps to prevent and combat such attitudes, including through information campaigns and education of the general public. Furthermore, in the light of its general recommendation No. 19 (1995) on article 3 of the Convention, the Committee encourages the State party to monitor all tendencies which may give rise to racial or ethnic de facto segregation".[103]

Concerned by the enforcement of anti-terrorist law N° 18314 mainly with regard to the members of the Mapuche in Chile, because of events that took place in the context of social demands and in relation with the defense of their rights over their ancestral lands, the CERD recommended that the Chilean government "(a) reform the Counter-Terrorism Act (No. 18.314) to ensure that it is applied only to terrorist offences that deserve to be treated as such; (b) ensure that the Counter-Terrorism Act is not applied to members of the Mapuche community for acts of protest or social demands; and (c) put into practice the recommendations made in this regard by the Human Rights Committee in 2007 and by the special rapporteurs on the situation of human rights and fundamental freedoms of indigenous people, following their visits to Chile in 2003 and 2009. The Committee draws the State party's attention to its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system (sect. B, para. 5 (e))"[104]

<u>The Committee on Economic, Social and Cultural Rights</u>

The ***Committee on Economic, Social and Cultural Rights (CESCR)*** is entrusted with overseeing compliance with the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*). Comprising 18 independent experts, it meets twice a year in Geneva for three weeks each time.[105]

All states parties are required to submit to the CESCR an initial report within two years of having ratified the CESCR, then a report every five years. The Committee examines each report and makes known it concerns and recommendations to the state party in the form of "concluding observations".

An optional protocol to the *ICESCR* was adopted 10 December 2008. It allows recourse to the Committee (individually or collectively) for violations of economic, social and cultural rights. Although, to date, it has been signed by 35 countries, it has been ratified by only three[106], whereas ten are required for it to enter into force.

The Committee also adopts "general comments"[107] in which it clarifies its interpretation of the provisions of the *ICESCR* (v. also Chapter I.B). For example, in

[103] CERD/C/TUR/CO/3, § 13, 24 March 2009, http://daccess-ods.un.org/TMP/8839336.63368225.html

[104] CERD/C/CHL/CO/15-18, § 15, 7 September 2009, http://daccess-ods.un.org/TMP/3589543.40219498.html

[105] V. http://www2.ohchr.org/english/bodies/cescr

[106] Ecuador, Mongolia and Spain, as of 18 March 2011.

[107] Between 1989 and 2009, the Committee adopted 21 general comments, to deal with, inter alia, the nature of state parties' obligations (N° 3), the right to adequate housing (N^os^ 4 and 7); the situation of handicapped persons (N° 5); economic, social and cultural rights of the aged (N° 6); the right to education (N^os^ 11 and 13); the right to food (N° 12), the right to health (N° 14); the right to water (N° 15).

The CERD can adopt "preventive measures" under its early warning procedure. Since 1993, it has examined a great number of cases and adopted decisions on serious, wide-scale, repeated and persistent racial discrimination presenting at times the characteristics of genocide, notably acts of extreme violence such as the bombing of villages, the use of chemical weapons and land mines, extrajudicial killings, rape and torture committed against minorities and indigenous peoples. The CERD has adopted decisions concerning, inter alia, large-scale internal displacement and the flow of refugees relative to racial discrimination and has considered cases of encroachment on indigenous peoples' community lands, in particular the exploitation of natural resources and the building of infrastructure that threatens to cause irreparable damage to tribal and indigenous peoples. Other decisions of the Committee have dealt with mounting hatred, violence and racial discrimination as reflected in economic and social indicators, inter-ethnic tensions, racist propaganda and calls to racial intolerance, as well as the absence of a sufficient legislative framework to define and criminalize all forms of racial discrimination.[101]

Regarding the review of the states parties' reports, here are several illustrative examples.

Concerned by, inter alia, "the limited enjoyment of political, economic, social and cultural rights by, inter alios, Arab, Azeri, Balochi, Kurdish communities and some communities of non–citizens" in ***Iran***, whereas the country was enjoying economic growth, the CERD requested the government to "take the necessary steps to achieve effective protection from discrimination against, inter alios, Arab, Azeri, Balochi and Kurdish communities and some communities of non–citizens, in view of general recommendation No. 30 (2004) on discrimination against non-citizens, in various domains, in particular, employment, housing, health, education and freedom of expression and religion".[102]

Concerned by allegations of the persistence of hostile behavior on the part of the population in general, notably aggressions and threats against the Roma, Kurds and persons belonging to non-Muslim minorities, the CERD recommended that

Roma (N° 27); non-citizens (N^os^ 11 and 30). V. http://www2.ohchr.org/english/bodies/cerd/comments.htm

[101] *Directives applicable to the early warning urgent procedure. Annual Report* A/62/18, Annex, Chapter III, p. 115 (http://tb.ohchr.org/default.aspx?ConvType=17&docType=36). For example, in the *Statement on the human rights of the Kurdish people*, adopted 10 March 1999, the CERD, while expressing "its concern about acts and policies of suppression of the fundamental rights and the identity of the Kurds as a distinct people", emphasized that "the Kurdish people, wherever they live, should be able to lead their lives in dignity, to preserve their culture and to enjoy, wherever appropriate, a high degree of autonomy". Further, it appealed "to the competent organs of the United Nations and to all authorities and organizations working for peace, justice and human rights to deploy all necessary efforts in order to achieve peaceful solutions which do justice to the fundamental human rights and freedoms of the Kurdish people" (A/54/18, § 22: http://tb.ohchr.org/default.aspx?ConvType=17&docType=36) See also others statements adopted by the CERD between 2003 and 2011 on the website of High Commissionner on Human Rights, http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about

[102] CERD/C/IRN/CO/18-19, § 15, 20 September 2010: http://daccess-ods.un.org/TMP/9923534.39331055.html

IV. IMPLEMENTATION AND OVERSIGHT MECHANISMS

A. At the National Level

The legislation of most countries includes the principle of non-discrimination, equality of all before the law and equal protection under the law. The legislation of some countries, like India[71] and Mexico[72], could even be characterized as exemplary in the matter whereas in practice a considerable portion of the population of these countries (the lower echelons of the caste system, indigenous peoples, migrants, and others owing to their situation in society) is subject to discrimination.

The situation is the same for the overwhelming majority of the world's population. Taking into account that most countries are multi-ethnic and that the power of their governments is often held by an ethnic minority and/or a single social class, indeed, by a clan, the majority of these populations find themselves excluded on the economic and social level as well as on the political level. The legislation adopted very often remains a dead letter or is enforced only for a part of the population (minority or majority), thus deviating from the fundamental principles of the rule of law. This is also because, being marginalized, these populations very often are ignorant of their rights and of the very existence of such legislation.

However, the adoption of good legislation at the national level is the first step in fighting any discrimination and, generally, impunity for perpetrators of human rights violations. Moreover, the use of mechanisms of protection at the regional and international levels is conditional, in theory at least, on exhaustion of all domestic avenues of redress .[73] This is why citizens, human rights militants and social movements, when national conditions allow, should avail themselves of these avenues.

[71] The Indian constitution, in Part III (1 December 2007), dealing with fundamental rights, prohibits all discrimination on "grounds only of religion, race, caste, sex, place of birth or any of them" (Article 15.1). It abolishes the category of "Untouchability" and prohibits its practice "in any form" (Article 17). It guarantees, inter alia, "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State" (Article 16.1): http://lawmin.nic.in/coi/coiason29july08.pdf

[72] The Constitution of Mexico, in Chapter 1 (Article 1.3), dealing with "individual prerogatives and immunities", states: "Discrimination based on ethnical or national origin as well as discrimination based on gender, age, disabilities of any kind, social status, religious opinions, preferences of any kind, civil status or on any other reason which attempts against human dignity and which is directed to either cancel or restrain the individuals' privileges and immunities, shall be prohibited." Trans by Carlos Pérez Vásquez, 2005: http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf

[73] Derogations to this conditionality may be accorded, according to the case and to the mechanisms, if the judiciary of a country has not been diligent.

B. At the Regional Level

On three continents (Africa, America and Europe), there are human rights protection mechanisms. Regarding non-discrimination, two jurisdictional mechanisms at the regional level are worth mentioning, for they have developed an accrued, effective and innovative control in the area of non-discrimination, to wit the European Court of Human Rights and the Inter-American Court of Human Rights.

1. European Court of Human Rights

Created in 1959, the European Court of Human Rights is an international jurisdiction entrusted with monitoring compliance with the *European Convention on Human Rights* (*ECHR*) by its signatory states.[74] It deals with complaints (individual or collective) alleging violations of the provisions of the *ECHR*.

Since 1988, the Court has been sitting permanently in Strasbourg and can be recurred to directly by individuals, groups or states parties to the *ECHR*. Also, any person or group claiming to be a victim of a violation of the *Convention* can recur to the Court (Article 34) provided that the plaintiff's country of residence allows it (Article 56). Intergovernmental complaints are also possible (Article 33).[75]

The Court's rulings since its creation have incited the states parties to the *ECHR* to modify their legislation and administrative practices in many areas including those dealing with ***the right to non-discrimination***. In fact, the Court has affirmed that this is a matter of "fundamental principle" that "underpins the Convention".[76] This principle supposes that equal treatment be reserved to equal individuals and implies also the existence of a norm prescribing equality of treatment. There follow several examples.

Asim Sahin, a German citizen of Turkish origin appealed to the Court against Germany for a refusal of his request to visit his son born out of wedlock. The plaintiff alleged that the German court's ruling not only violated his right to respect for his private family life guaranteed by Article 8 of the *ECHR* but also constituted discriminatory treatment toward him under Article 14 of the *ECHR.* Assim Sahin is the father of a child born out of wedlock in June 1988, whom he has recognized and for whom he agreed to pay child support. While he maintained a continuous relationship with the child, the child's mother, with whom he is in contention, decided in November 1990 to forbid all contact between father and son. The plaintiff brought the matter before the German courts, which rejected his request, basing their ruling on the provisions of German Civil Code Article 1711. This article stipulates, in essence, that "the person entrusted with custody of the child sets the conditions for visits by the father to the child".

The plaintiff considered that this provision constituted for him a discriminatory measure relative to a divorced man in the same situation. The status of the

[74] To date, 47 countries have ratified the *ECHR*. They include, in addition to the European Union countries, all member states of the Council of Europe.

[75] For further information: http://www.echr.coe.int/ECHR/homepage_en

[76] V. Străin and Others v. Romania, 21 July 2005, § 59, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en

Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970). In its advisory opinion of 21 June 1971, the ICJ noted, inter alia, that South Africa "had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for al1 without distinction as to race," and that the practices of the South African government at the time in Namibia constituted "a denial of fundamental human rights" and "a flagrant violation of the purposes and principles of the Charter." In conclusion, it declared "the continued presence of South Africa in Namibia" to be illegal, enjoining it to "withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory". The ICJ also concluded that "States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration".[98]

2. The United Nations Human Rights Treaty Oversight Bodies

The Committee for the Elimination of Racial Discrimination

Oversight of compliance by states parties to the *International Convention for the Elimination of All Forms of Racial Discrimination* is carried out by the ***Committee for the Elimination of Racial Discrimination (CERD)***. Composed of 18 independent experts, it was the first United Nations human rights treaty body, having begun its work in 1970.

The states parties must regularly submit reports to the CERD on measures taken to implement the provisions of the *Convention*. The first report is due one year after ratification enters into force, then every two years or whenever the CERD requests one.

The CERD is authorized to hear complaints, which may be filed by persons or groups of persons claiming that their rights have been violated by a state party, in conformity with the *Convention*'s Article 14[99], after having exhausted all domestic avenues of redress. The number of communications submitted since 1982, when the complaints mechanism became operational, has remained more than modest. However, the jurisprudence of the CERD demonstrates the importance of the role it plays.

The CERD is also authorized to accept intergovernmental complaints under Article 11 of the *Convention*.

Further, the CERD adopts general comments in which it clarifies the scope and the content of the provisions of the *International Convention for the Elimination of All Forms of Racial Discrimination*. To date, it has adopted 33.[100]

[98] *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of June 21, 1971*, §§ 131, 133: http://www.icj-cij.org/docket/files/53/5595.pdf

[99] As of 22 July 2010, 58 states parties had accepted Article 14's individual complaints procedure.

[100] Regarding racial discrimination toward groups considered vulnerable, the CERD has adopted the following general comments on: refugees and displaced persons (Nº 22); indigenous peoples (Nº 23);

the Commission, which considered that these provisions were discriminatory in the sense that they apply different standards to the same category of persons. Those born in Ivory Coast are treated according to the origin of their parents, which, according to the Commission, is contrary to the spirit of Article 2 of the *African Charter on Human and Peoples' Rights*. In parallel, Article 132 grants a total immunity to member of the National Public Security Committee for serious human rights violations committed during the transition period. The immunity does not benefit others who have perpetrated serious crimes during the transition period but are not members of the Committee. These last are, de facto, subject to discrimination relative to the members of the Committee, who cannot be held responsible by their victims. The victims, for their part, are deprived of the right to seek justice and compensation for the wrongs that have been done to them. This violates the principle of equality before the law enshrined in Article 3, but also violates Article 7 of the *Charter*, which deals with access to justice and the judicial guarantees emanating from that access. The Commission affirmed that depriving victims of the right to seek redress encourages impunity, which is contrary to the obligations of governments stipulated in Article 1 of the *African Charter on Human and Peoples' Rights*.

Taking this into account, the Commission concluded in its July 2008 decision that the Ivory Coast government had indeed violated Articles 1, 2, 3, 7 and 13 of the *Charter* and enjoined it to take all necessary and appropriate measures to remedy this situation.[95]

C. At the International Level

1. International Court of Justice

Created in June 1945 by the *Charter of the Untied Nations*, the International Court of Justice (ICJ) is the United Nations system's main judicial body. It has its headquarters in The Hague (Netherlands). The Court's mission is to settle, in accordance with international law, legal disputes submitted to it by States ("contentious cases") and to give advisory opinions ("advisory proceedings") on legal questions referred to it by authorized United Nations organs and specialized agencies.[96]

The ICJ, on several occasions, has ruled on the right of peoples to self-determination[97] in the context of non-discrimination. Starting in 1950, the ICJ followed closely the League of Nations mandate for South-West Africa given to South Africa. On 29 July 1970, the Security Council recurred to the ICJ for its opinion on *The Legal Consequences for States of the Continued Presence of South*

[95] V. *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire*, AHRLR 75 (ACHPR 2008): http://www.chr.up.ac.za/index.php/browse-by-institution/achpr-commission/257-cote-divoire-mouvement-ivoirien-des-droits-humains-midh-v-cote-divoire-2008-ahrlr-achpr-2008.html

[96] V. http://www.icj-cij.org/court/index.php?p1=1&p2=6

[97] In this regard, see, inter alia, the CETIM booklet, *The Right of Peoples to Self-Determination*: Chapter VI.C.l "The ICJ", p. 54.

divorced man regarding visiting rights is regulated by Article 1634 of the German Civil Code, which states that "the parent not having custody of the child has the right to maintain personal contact with the child". Taking into account these facts, the Court noted that the situation of fathers who had divorced was different from that of fathers of children born out of wedlock. The former have legal visiting rights (that can nonetheless be limited or suspended) whereas the others benefit from such a right only if the mother consents or if a court judges it in the interest of the child. The ruling of the German court was thus based on the provisions of Article 1711, which make visiting rights for the father dependent on the consent of the mother or on a decision of the court in the interest of the child.

However, the Court noted that, given the contention between the child's parents, only special circumstances could allow the possibility of the mother's granting visiting rights for the father in keeping with the terms of Article 1711. It noted that the German jurisdiction, which was convinced of the good intentions of the plaintiff regarding his son, nonetheless imposed on the father a cost greater than that incurred by a divorced father. According to the Court, a measure is discriminatory, in conformity with Article 14, if it lacks objective and reasonable justification, to wit if it does not pursue a legitimate purpose or if there is no proportionality between the means used and the purpose intended. The Court also recalled that only very serious reasons could lead to the conclusion that a difference of treatment based on a birth out of wedlock was compatible with the *ECHR*. It is the same for a difference of treatment between the father of a child born of a relation where the parents live together without being married and the father of a child born of married parents. The Court affirmed that there was no reason of such a nature in the case under consideration and concluded with a decision on 8 July 2003 that there had been a violation of Article 14, pertaining to the prohibition of discrimination, combined with Article 8 on the protection of the right to respect of private family life.[77]

In another case, the Court ruled against Belgium regarding discrimination of illegitimate children in matters of inheritance. An unmarried mother, Paula Marckx, was obliged to adopt her daughter, Alexandra, and be subject to family counsel oversight. Alexandra could not benefit from an inheritance from her mother because she was considered under Belgian law (at the time) as illegitimate. In its ruling of 13 June 1979, the Court affirmed a violation of Article 14 combined with a violation of Article 8 of the *ECHR*.[78] This case opened the door to a 1987 "profound reform" of Belgian family law, even if "certain inequalities subsist regarding the illegitimate child".[79]

[77] Sahin v. Germany, 8 July 2003, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en

[78] Marckx v. Belgium, 13 June 1979, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en

[79] In fact, a child born out of wedlock cannot bear his/her father's name and can be raised in the marital residence only if the spouse, victim of adultery, consents to it. Moreover, regarding inheritance, this child does not have the same rights as the other children since he/she can be excluded from sharing in kind and cannot request the conversion of the usufruct of the surviving spouse. V. http://www.senat.fr/lc/lc47/lc47_mono.html

Following a refusal by the mayor of Warsaw (Poland) to authorize a demonstration, the Foundation for Equality (Fundacja Rownosci) and five militants for homosexual rights brought the matter to the European Court of Human Rights. The plaintiffs had sought, within the context of Equality Days, to organize from 10 to 12 June 2005 a gathering (a march) in Warsaw in order to sensitize public opinion to the discriminations suffered by minorities – sexual, national, ethnic and religious – as well as by women and the handicapped. The plaintiffs maintained that a supplementary document had been requested of them – whereas said document had never been required for other demonstrations that the mayor had authorized – in order to discredit the sensitization demonstration for the rights of persons belonging to sexual minorities.

The plaintiffs further objected to public statements by the mayor, who clearly expressed himself against demonstrations intending to promote the rights of homosexuals. Having ascertained the facts, the Court ruled that there had been a violation of Article 14 prohibiting discrimination, combined with a violation of Article 11, dealing with freedom of association and assembly. The Court noted in its ruling that it could not in its ruling ignore the explicit views expressed by the mayor against homosexuality, noting further that the mayor had expressed himself thus while his municipal services were in possession of the request for a demonstration authorization filed by the plaintiffs. The Court reckoned that one could reasonably suppose that the opinions of the mayor had had repercussions on the interpretation of the requests filed by the plaintiffs and thus had affected in a discriminatory manner their rights and freedom of assembly.[80]

In 1995, the dock workers union of Russia (SDR) created a section in the port of Kaliningrad, in opposition to the historical maritime transport employees union. In May 1996, the SDR took part in collective bargaining that resulted in a new collective contract extending annual vacation time and improving pay. As a result, the number of its members increased, in two years, from 11 to 275 (as of 14 October 1997). According to the plaintiffs, the marine trading company of Kaliningrad employed at that time more than 500 dock workers. On 14 October 1997, at the initiative of the SDR, the longshoremen went on strike to demand better pay, better working conditions, health insurance and life insurance. On 28 October, after two weeks of striking, they went back to work without having had their demands satisfied. The plaintiffs alleged that, since that time, the company management had been harassing the SDR members to punish them for having gone on strike and to push them to leave the union. The Court concluded that there had been a violation of Article 11 combined with Article 14, ruling that "The Court finds crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and should have the right to take legal action to obtain damages and other relief. Therefore, States are required under Articles 11

[80] Bączkowski and Others v. Poland, 3 May 2007, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en

from its territory is not absolute. It can be subjected to limits related to non-discrimination on the grounds of origin, notably nationality. The Commission added that the rights defined by the *African Charter on Human and Peoples' Rights* must benefit all without discrimination, citizens and non-nationals alike.

By its May 2008 decision, the Commission found the Angolan government to be in violation of the abovementioned rights, and especially the essential right of equality and non-discrimination guaranteed by Article 2 of the *African Charter*. It enjoined the Angolan government to take all measures necessary to re-establish the situation of the victims prior to the violation of their rights through the wide-scale policy of expulsion.[94]

On 8 April 2002, the Commission received a complaint from the Mouvement ivoirien des droits humains (MIDH), accusing ***Ivory Coast*** of violation of Articles 2 (right to non-discrimination), 3 (equality before the law) and 13 (right to participate in the public affairs of one's country).

The MIDH maintained that Articles 35 and 65 of the Ivorian constitution of 2000 limited and conditioned access to the exercise of certain public functions. In fact, these articles established criteria relative to the origin of candidates' parents, limiting citizen participation and contributing to creating discrimination within the Ivorian population. In this sense, they violated the principle of non-discrimination and equality enshrined in Article 2 of the *African Charter on Human and Peoples' Rights*. The same could be said of Article 132 of the constitution, which grants total immunity to members of the National Public Security Council – governing under the military transition from 24 December 1999 to 24 October 2000 and who committed serious violations of the civil, political, economic and social rights of the populations – as well as to those behind the 24 December 1999 coup d'état. This immunity constitutes not only a discriminatory measure, but it also violates the provisions of Article 3 enshrining equality before the law. Moreover, these provisions made it impossible for the victims to seek justice and to obtain compensation for harm and violations they had been subjected to.

The provisions of these articles are clear. Article 65 of the constitution states that the candidate for the presidency and for the speaker of the national assembly must be of Ivorian nationality, born of parents of Ivorian origin who had never renounced their Ivorian nationality and had never acquired another. Article 35 excluded from candidacy for the presidency and the post of national assembly speaker Ivorian citizens who had acquired their nationality other than by birth, to wit by marriage or by naturalization, those born of parents of Ivorian origin but who, at some point in their life, had acquired another nationality and those who at some point had renounced their Ivorian nationality.

There is no doubt that such provision are discriminatory and that they create a categorization among Ivorian citizens, excluding a part of the population from the right to participate in the public affaires of their country. This was confirmed by

[94] V. *Institute for Human Rights and Development in Africa vs Angola*, The African Commission on Human and Peoples' Rights, AHRLR 43 (ACHPR 2008) http://www.chr.up.ac.za/index.php/browse-by-institution/achpr-commission/198-angola-institute-for-human-rights-and-development-in-africa-v-angola-2008-ahrlr-achpr-2008-.html

4. African Commission on Human and Peoples' Rights

Established in 1987, the African Commission on Human and Peoples' Rights is entrusted with overseeing compliance with the African human rights protection treaties, among which is the *African Charter on Human and Peoples' Rights*. All states parties to the *African Charter* must present periodic reports to the Commission on measures taken to realize, ***"without distinction of any kind"***, the rights enshrined in the *Charter* (Articles 1 to 18, 19 and 27).

The African Commission can also receive complaints from individuals and NGOs regarding violations of any of the rights protected by the *African Charter on Human and Peoples' Rights*. In case of violation of the right to non-discrimination, the African Commission can draft a report and address its recommendations to the government in question. The great weakness of this mechanism is that its recommendations are not binding for the states parties (whence the establishment of the African Court of Human Rights).[93] But its major advantages are that the Commission is relatively easy of access, by both individuals and NGOs, that its mandate includes the protection of all human rights and that appealing to this instance, depending on the case, can put pressure on the government concerned to better respect human rights. Here are two cases treated by the African Commission concerning non-discrimination.

By means of a campaign called "Operação brilhante", the Angolan government was carrying out a policy of wide scale expulsion of foreigners present on its territory. In particular, many of the foreigners, of Gambian origin, were expelled from zones where diamonds mines were located. Esmaila Connateh, one of the Gambian victims, and 13 other victims, backed by the Institute for Human Rights and Development in Africa, appealed to the African Commission, requesting a ruling on this policy whose implementation violated the civil, political, economic and social rights of the persons affected by it, to wit foreigners present in ***Angola***.

The victims alleged violation by the Angolan authorities of Articles 1 (obligation of governments to respect the provisions of the *Charter*). 2 (right to equality and non-discrimination), 3 (equality before the law), 5 (right to personal protection), 6 (right to personal security), 7 (right to judicial guarantees), 12 (right to free movement), 14 (right to property) and 15 (workers' rights) of the *African Charter on Human and Peoples' Rights*.

On 4 October 2004, the case was heard by the Commission, which concluded that the expulsions by the Angolan government manifestly targeted non-nationals. This was a conclusion uncontested by the government. Obviously, these measures were of a discriminatory character towards foreigners, which led to flagrant violations of the victims' human rights. In fact, the victims affirmed that the violations to which they were subjected (expulsion, expropriation, arrest, arbitrary detention, confiscation of identity documents…) were directly related to the victims' foreign origin. This was not denied by the government, which reinforced the complaint. The Commission recalled that the right of a government to expel an individual

[93] Created by the African countries in 1998 when they adopted *Protocol to the African Charter on Human and Peoples' Rights*. The Protocol entered in to force 25 January 2004.

and 14 of the Convention to set up a judicial system that ensures real and effective protection against anti-union discrimination."[81]

2. European Committee of Social Rights

The 1995 Protocol (which entered into force in 1998) providing for a system of collective complaints has made it possible to recur to the European Committee of Social Rights[82] in case of violation of the *European Social Charter* (v. Chapter II.B). Consequently, the states parties that have ratified[83] the *Charter* must also submit an annual report on the implementation of the *Charter* in law and in practice. Here are several examples of complaints that resulted in favorable rulings for the plaintiffs or in the Committee's accepting to hear the case.

On 29 May 2009, the Center on Housing Rights and Evictions (COHRE) filed a complaint with the European Committee of Social Rights denouncing the implementation of "security measures", said to be urgent, and racist and xenophobic statements in Italy that resulted in evictions and illegal campaigns targeting Roma and Sinti in a disproportionate manner and forcing them into homelessness. The COHRE alleged violations of Articles 16 (right of the family to social, legal and economic protection), 19 (right of migrant workers and their families to protection and assistance), 30 (right to protection against poverty and social exclusion) and 31 (right to adequate housing), invoked singly or in combination with the non-discrimination clause in Article E of the *Revised European Social Charter*. In its 25 June 2010 ruling, the European Committee of Social Rights concluded that Italy had violated Articles 16, 19, 30 and 31 in combination with Article E.[84]

On 15 November 2010, in a similar case, the COHRE and the European Roma and Travelers Forum filed a complaint with the Committee concerning evictions of Roma from their housing and from ***France*** during the summer of 2010. The two organizations alleged that these evictions violated Article 31 (right to adequate housing) and Article 19.8 (guarantees against expulsion) of the *Revised Charter* and that the facts in question constituted ***discrimination*** (Article E) in the enjoyment of the abovementioned rights. On 25 January 2011, the Committee agreed to hear the case.[85] Given the seriousness of the allegations, the Committee also decided to consider the case on an expedited basis. It is worth emphasizing that, in a previous case concerning the Travelers, the Committee had already ruled

[81] *Danilenkov and Others v. Russia*, 10 December 2009, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en

[82] V. http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp?

[83] As of 20 May 2010, 43 of the 47 Council of Europe member states had ratified the European Social Charter. The four outstanding countries (Liechtenstein, Monaco, San Marino and Switzerland) have nonetheless signed it. On the other hand, only 14 of the 47 countries have accepted the collective complaint procedure (Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia, Sweden). V. http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/signatureratificationindex_EN.asp?

[84] Complaint No. 58/2009 Centre on Housing Rights and Evictions (COHRE) v. Italy, http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

[85] Complaint No. 63/2010 Centre on Housing Rights and Evictions (COHRE) v. France, http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

against France (19 October 2009) for violation of Articles 31.1 and 31.2, Article E (***non-discrimination***) combined with Article 31, Article 16, Article E combined with Article 16, Article 30, Article E combined with Article 30 and Article 19.4.c of the *Revised Charter*.[86]

On 25 August 2008, the COHRE filed a complaint against ***Croatia*** for violation of Article 16 (right of the family to social, legal and economic protection) under the non-discrimination clause of the Preamble of the *Revised Charter*, alleging that the ethnic Serb population, displaced during the war in Croatia, was victim of discriminatory treatment; that families have not been able to recover the homes that they had occupied before the conflict and have been unable to benefit from financial compensation for the loss of their homes. In its 22 June 2010 decision, the European Committee of Social Rights ruled that there had been a violation of Article 16 in consideration of the non-discrimination clause of the Preamble of the *Revised Charter*.[87]

3. Inter-American Court of Human Rights

Established in 1978 with the entry into force of the *American Convention on Human Rights*, the Inter-American Court of Human Rights has its permanent seat in San José (Costa Rica). The jurisdiction of the Court applies to countries that, having ratified the *American Convention on Human Rights*, have accepted the jurisdiction of the Court.[88]

This mechanism is very dynamic and has played an important role in the prevention of human rights violations and in the evolution of the jurisprudence in many areas, including non-discrimination. In fact, the Inter-American Court of Human Rights has not hesitated to raise the right to non-discrimination to the rank of *jus cogens* (an imperative norm for governments) in its consultative opinion on "the legal condition and the right of immigrant workers" in the United States (v. illustration).

[86] Complaint No. 51/2008 European Roma Rights Centre (ERRC) v. France, http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

[87] Complaint No. 52/2008 Centre on Housing Rights and Evictions (COHRE) v. Croatia, http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

[88] To date, 22 countries out of the 34 on the American continent have recognized the jurisdiction of the Court, with the notable exceptions of Canada and the United States. V. http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm

The victims and their representatives took the matter to the Inter-American Human Rights Commission, which, after examining the case and making recommendations to the government, decided to bring the matter to the Inter-American Human Rights Court. The Commission requested that the Court find against the Dominican Republic for failing in its obligations (Article 1), but also for violation of Articles 3 (right to the recognition of legal identity), 8 (judicial guarantees), 19 (rights of the child), 20 (right to nationality), 24 (equality before the law) and 25 (right to judicial protection) under the *American Convention on Human Rights*.

Following the hearing and consideration of the arguments of the parties, the Court ruled on 8 September 2005 that the Dominican Republic had violated the abovementioned rights to the detriment of the Yean and Bosico children. It considered the refusal by the Dominican authorities to issue birth certificates discriminatory. In fact, the Dominican constitution (Article 11), as well as the civil code (Article 9) accepts birth on Dominican territory as a criterion determining the right to Dominican nationality, and this, independently of the origin of the parents. Thus, the refusal to issue birth certificates to children born on Dominican territory of parents of Haitian origin violated not only the legal provisions of the Dominican Republic but constituted a discrimination against these children as opposed to other children born on Dominican territory of parents of Dominican origin. These latter benefited de facto from birth certificates by virtue of their birth on Dominican territory, in full conformity with the laws of the Dominican Republic. They were not subject, unlike children born in the Dominican Republic of parents of Haitian origin, to unjustified measures for the issuance of birth certificates through the late declaration of their birth, which constitutes, according to the terms of the Court, an arbitrary action devoid of any reasonable and objective criteria. Such measures appeared contrary to the higher interest of the children and constituted de facto a deliberate discrimination against the Bosico and Yean children. The Court added that the measure demanded for the issuance of the birth certificates through a latter day declaration of nationality must not be an obstacle to the benefit of the right to nationality, particularly for Dominicans of Haitian origin, who belong to a vulnerable group within the Dominican population.

The Court enjoined the Dominican government to pay the victims monetary compensation for the injury incurred, as well as to publish the unfavorable judgment in the national audiovisual and press media, and also to adopt legislative and administrative measures that would regulate the procedure as well as the conditions under which obtaining birth certificates after a late declaration of birth, in such a way as to make it simple, accessible and reasonable so that those requesting birth certificates would not remain without legal status.[92]

[92] V. *Dilcia Yean and Violeta Bosico v. Dominican Republic*, p. 22 of the 2005 annual report of the Inter-American Human Rights Court: http://www.corteidh.or.cr/bus_fechas_result.cfm?buscarPorFechas=Search&fechaDeInicio=8%2F9%2F2005&fechaDeFin=09%2F08%2F2005&id_Pais=23&chkCasos=true&chkOPiniones=false&chkMedidas=false&chkSupervisiones=false

to appeal the decision. Further, the drafting of the election law in 2000 had made it difficult for indigenous communities to participate in political life and had even restricted it in that they were obliged to constitute a political party, an organizational formation unknown in their culture and in the democratic practice of the indigenous communities.

Learning of this from the YATAMA as well as from the Centro Nicaraguense de Derechos Humanos and from the Center for Justice and International Law, with its recommendations remaining unheeded, the Commission decided to bring the matter before the Court. Following an examination of the position of both parties, the Court concluded by ruling on 23 June 2005 that there had been a violation by the government of Nicaragua of political rights, but also and above all a violation of the principle of equality before the law and non-discrimination, to the detriment of the candidates of the YATAMA indigenous party. Defining and implementing provisions of the election law that limited the participation in the electoral process to only those organizations constituted in political parties, thus denying de facto the specificity of the indigenous communities, tended to create, in the words of the Court, discrimination against the candidates of the YAMATA, who were de facto placed in a vulnerable situation relative to the other candidates. Originally constituted in an association, they could not take part in elections requiring an organizational structure that they were ignorant of. The YATAMA candidates thus found themselves excluded form the electoral process, but also and above all from participation in the political life of Nicaragua. This was a violation of Article 23 of the *American Convention on Human Rights.* It was an even more serious violation that the decision leading to the exclusion of the YATAMA candidates was not open to appeal, which violated the provisions of Articles 8, 24 and 25 concerning judicial guarantees, equality before the law and judicial protection, respectively.

Noting these violations par the Nicaraguan government, the Court imposed upon it a certain number of obligations including the payment of monetary compensation for the benefit of the YATAMA candidates, the publicizing of the unfavorable judgment in the national audiovisual and press media, but also and above all the reform of the 2000 electoral law, as well as the implementation of measures allowing effective participation by the indigenous communities in the electoral process, in political life, in conformity with indigenous tradition, customs and practices.[91]

In 1997, the request for birth certificates for Dilcia Yean (10 years old) and Violeta Bosico (12 years old) was denied by the ***Dominican Republic*** authorities. The two girls, of Haitian descent, were born in the Dominican Republic. Without a birth certificate, Violeta and Dilcia were deprived of their right to a nationality and, consequently, of their civil, political, economic, and social rights. There were expelled from school on the grounds that only children with a Dominican birth certificate were allowed to attend school.

[91] V. *Case of YATAMA vs Nicaragua*, p.18 of the *2005 annual report* of the Inter-American Human Rights Court (http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf) and the decision of the Inter-American Court of Human Rights, 23 June 2005 (http://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf)

Illustration

Advisory Opinion on the Legal Condition of the Rights of Clandestine Immigrants Workers by the Inter-American Court of Human Rights, 17 September 2003

On 10 May 2002, Mexico requested of the Inter-American Court of Human Rights an advisory opinion on the respect of the rights of clandestine migrant workers in the United States. In a very tense political context, the Mexican government intended thus to clarify the situation of the rights of Mexican workers illegally in the United States. Beyond the legal questions that this involved, the discussion had a considerable practical importance for Mexico, which estimates the number of Mexican emigrants at some six million, of whom almost two and a half million are clandestine (figures 2002). The Mexican government emphasized in its request its concern regarding the legal interpretations and practices in certain countries of the Organization of the American States (OAS), which it considers incompatible with the Inter-American system of human rights protection. The interpretations and practices that Mexico had in mind would be discriminatory with regard to clandestine workers and would result in encouraging employers to deny them their social rights. This situation constitutes, according to the Mexican government, a threat for the protection of human rights in the region of the OAS.[89]

In its request, Mexico asked four questions of the Court. First, it asked if, within the framework of the principle of legality before the law as set forth in the human rights treaties, a member state of the OAS can treat differently immigrant workers relative to the rights granted to the rest of the population. The second and the third questions dealt with the legal or illegal status of workers: would the fact that a worker might be in possession of regulation documentation change the obligation of the government regarding the principle of equality and the prohibition of discrimination, a principle in contradiction with *erga omnes*? Finally, the last question requested that the Court rule on the importance of the principle of equality and thus the prohibition of discrimination, as well as on its possible inclusion among the *jus cogens* norms.[90]

Ludovic Hennevel succinctly presents the ruling of the Inter-American Court on this consultative opinion that set a milestone. We reproduce here extracts from his above cited article.

"3. In its advisory opinion number 18, the reasoning of the Inter-American Court is built on three points. It begins by recalling the general principle to respect and guarantee human rights incumbent upon the member states of the Organization of American States. Second, it analyses the content of the principle of equality and non-discrimination, which it characterizes as *jus cogens*. Finally, it applies the resulting principles to migrants and clandestine workers.

[89] V. Ludovic Hennebel, researcher at the Centre de philosophie du droit of the Free University of Brussels, "L''Humanisation' du droit international des droits de l'homme, commentaire sur l'avis consultatif no. 18 de la Cour interaméricaine relatif aux droits des travailleurs migrants", *Revue trimestrielle des droits de l'homme*. (59/2004) (French only).

[90] V. *Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants*, §§ 1 to 4 (Spanish only) (http://www.corteidh.or.cr/opiniones.cfm) and the explication of the opinion by Amaya Ubeda de (French only) Torres (http://leuropedeslibertes.u-strasbg.fr/article.php?id_article=98&id_rubrique=6)

"4. First, the Court affirms that all governments have the obligation to respect and to guarantee human rights. The Court recalls that this obligation is general and is enshrined in several international human rights instruments. It results, in particular, from human rights as deriving from the attributes of the human person not depending in any way on a person's belonging to a given country. The Court characterizes the obligation to respect and to guarantee the exercise of human rights and *erga omnes* obligation. This obligation is imposed upon governments to the benefit of any person under their jurisdiction, independent of migrant status of any person under consideration. The Court also judged that human rights likely to be required to be guaranteed and respected by all governments are those of the Inter-American Convention and of the International Covenant on Civil and Political Rights, including the right to benefit from legal guarantees.

"5. Second, the Court analyses the "principle of equality and non-discrimination" (el principio de igualdad y no discriminación") – the use of the singular would seem to imply that the Court considers that equality and non-discrimination form a single principle comprising two elements. The Court then clarifies that "distinction" and "discrimination" must be distinguished. "Distinction" is admissible is so far as it is reasonable, proportional and objective, whereas "discrimination" is characterized precisely by it unreasonable, non-proportional and subjective character. Discrimination, according to the Court, includes all sorts of exclusion, restriction and privilege that are neither objective nor reasonable and that are carried out to the detriment of human rights. Citing its own advisory jurisprudence and the jurisprudence of the European Court of Human Rights, the Inter-American Court insists on the nuance that exists between the notion of "distinction" and that of "discrimination" and recalls that "distinctions" can be made in particular when it is a matter of offering a vulnerable person particular protection. The Court concludes that the "principle of equality and non-discrimination" implies that governments have the obligation not only to not introduce into their judicial systems discriminatory regulations but also to repeal already existing discriminatory regulations and to combat discriminatory practices. Next, the Court characterizes the "principle of equality and non-discrimination" by affirming that it falls under *jus cogens*. The Court recalls that, while *jus cogens* has its origin in treaty law, citing in this regard Articles 53 and 64 of the *Vienna Convention on the Law of Treaties,* it has undergone its own evolution particularly in the area of human rights. It concerns not only treaties but also all legal acts that are null and void once they contravene a rule of *jus cogens*. The Court judges that the "principle of equality and non-discrimination", given that it falls under *jus cogens*, has an imperative character. Consequently, it is incumbent upon all states and affects third parties, including individuals. This implies that the government, at both the international and the domestic level, cannot act in contradiction with the "principle of equality and non-discrimination" to the prejudice of any given group of persons. The Court considers then that the general obligation to respect and guarantee human rights must also be executed in conformity with the "principle of equality and non-discrimination" and that the state can, in practice, allow distinctions only if they are reasonable and objective. The government is responsible for the non-respect of this obligation.

6. Third, the Court recalls the vulnerability of migrants, which justifies a particular protection. The Court affirms that the irregularity of migrants' situation can in no way serve as an excuse for discrimination in regard to their enjoyment of the exercise of their rights. This does not prevent the state from taking measures against illegal migrants, but it must, at least in the implementation of its measures, respect the human

rights of clandestine workers and guarantee the exercise of the enjoyment of their rights. If the state can neither discriminate against migrants nor tolerate discriminatory situations and practices, it can, on the other hand, set distinctions between legal and illegal migrants and between migrants and its nationals (for example concerning the exercise of political rights), on condition that these distinctions are reasonable, objective and proportional and do not infringe upon human rights. The Court affirms that the right to a fair trail is part of the minimal rights the must be guaranteed for the benefit of migrants. The minimal legal guarantees must be strictly observed, in particular in administrative procedures and in all other procedure likely to affect human rights. As for the rights of the worker, the Court stipulates that they benefit every person engaged in a remunerated activity. The exercise of a remunerated activity is the only criterion that identifies a person as a "worker". Once this identification is established, the court affirms that the worker benefits automatically from workers' rights. These rights must be recognized and guaranteed, independent of the irregularity of the migrant's situation. The Court emphasizes also that nothing obliges employers to hire clandestines. If they do so, however, they must assume the consequences and accept that the clandestine has thus become a worker benefiting from the rights that accompany this status. The principles thus arrived at by the Inter-American Court apply to both the public sector and to the private sector. If the government is the employer, it is obvious that it must guarantee and respect the workers' rights of all public employees, be they nationals, migrants, legal or illegal, in default of which it would engage its international responsibility. But the Court goes further, judging that the government also has the obligation to monitor respect of human rights, particularly workers' rights, between individuals. The Court draws inspiration explicitly in this respect from the German theory of the *Drittwirkung* ("third-party effect") according to which human rights must be respected by both the public powers and individuals, considering that the obligation to respect and guarantee human rights applies also to relations between individuals. The government thus must prevent violations of workers' rights by private employers and assure that contractual relations do not infringe upon human rights. Employers, for their part, have the obligation to respect workers' rights. The government's international responsibility is implicated from the moment it tolerates discriminatory actions or practices against migrant workers. As for the notion of "workers' rights", the Court considers that it includes the entirely of workers' rights in conformity with the judicial system in question, national or international."

Regarding individual and collective complaints, here are examples concerning non-discrimination.

On 17 June 2003, the Inter-American Commission on Human Rights brought before the Court a case that threatened to end in a ruling against Nicaragua for violation of its obligations under the *American Convention on Human Rights* (Article 1). The Commission alleged further Nicaragua's violations of Articles 8 (right to a fair trail), 23 (political rights), 25 (legal protection), for having prevented the participation in municipal elections of the regional political party (YATAMA) set up by the indigenous peoples of the North Atlantic and the South Atlantic Autonomous Region (autonomous regions along Nicaragua's Atlantic coast). By a 15 August 2000 decision, Nicaragua's Supreme Electoral Council had excluded from the election lists the YATAMA regional party, without however allowing it