

“Lawyers for Lawyers “

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TRAINING MANUAL ON HUMAN RIGHTS AND HUMAN RIGHTS PROTECTION FOR LAWYERS

FILE N°33: DISCRIMINATION

➤ What does the term “discrimination” mean in international law?

One of the values underlying the concept of human rights is **equality**.

In legal terms, human equality has two dimensions: equality before the law and equal protection by the law, which are enshrined in the majority of international legal instruments relating to human rights (UDHR Article 7, ICCPR Article 26, ACHR Article 24, ACHPR Article 3, and Article 20 of the European Charter of Fundamental Rights).

The corollary of equality is the principle of **non-discrimination**. All individuals must be treated in the same way, including if they are of different status (which does not justify any difference in treatment).

This explains why the major general instruments protecting human rights prohibit all **discrimination**, defined as **any distinction in the enjoyment of acknowledged rights and freedoms, particularly on the basis of race, colour, gender, language, religion, political or any other opinion, national or social origin, wealth/economic position, birth or any other situation** (UDHR Article 2, ICCPR Article 2, ICESCR Article 2 (2), ACHR Article 1, ACHPR Article 2, ECHR Article 14 and Article 21 of the European Charter of Fundamental Rights).

The ECHR adds “**membership of a minority**” to this list, the ACHPR adds “**ethnic group**”, and the European Charter of Fundamental Rights adds “ethnic origins”, “membership of a national minority”, “a **handicap**”, “**age**”, “**sexual orientation**” (while “nationality” is the subject of Article 21, paragraph 2).

While the prohibition of discrimination is laid down as a general principle, it also operates with respect to specific rights (women’s rights, children’s rights) or in certain fields (the right to work, right to remuneration, political rights), or as a limit on derogations from established rights allowed in exceptional circumstances.

Article 28 of the African Charter of Human and Peoples’ Rights is particularly interesting, in that it imposes “a duty to respect and consider [one’s] fellow beings without discrimination” on every individual.



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➤ **What form may discrimination take?**

Discrimination may be *direct* (obvious), *indirect* (a measure or act appears to be neutral but may, in reality, lead to discrimination, although this is not the intention), or *hidden* (the discrimination is indirect and intentional).

➤ **What obligations do States have in this field?**

With respect to the three levels of legal obligations by which States are bound by virtue of the human rights treaties to which they are Parties, the principle of non-discrimination entails the following obligations:

- Obligation to **respect**: States must refrain from practising any discrimination with respect to individuals.
- Obligation to **protect**: States must ensure that no discrimination occurs on their territory.
- Obligation to **fulfil**: States must do everything they can to ensure that all individuals are able to enjoy their human rights without any discrimination on their territory.

➤ **What are the limits to the principle of non-discrimination?**

Certain circumstances or conditions may justify differentiating between people if the aim is to achieve equality.

The differentiation must therefore meet certain criteria: it must be objective, sufficiently reasonable and proportionate. It may take several forms:

- *Positive discrimination* is based on the right to equality. It is intended to promote equality by defining objectives, and does not affect third parties.
- *Inverse discrimination* is based on the right to non-discrimination. It is intended to compensate for and eliminate existing discrimination by introducing quotas, and does affect third parties.

➤ **Which are the main international legal instruments specifically intended to combat discrimination?**

- **Universal system for the protection of human rights**

- International Convention on the Elimination of All Forms of *Racial Discrimination*, 1965.
- Declaration on *Race and Racial Prejudice*, 1978 (UNESCO).
- The Durban Declaration and Programme of Action to combat *Racism*, 2001.
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on *Religion or Belief*, 1981.
- Convention concerning Equal *Remuneration* for Men and Women Workers for Work of Equal Value, 1951 (ILO Convention No. 100).
- Convention concerning Discrimination in Respect of *Employment and Occupation*, 1958 (ILO Convention No. 111).
- International Convention on the Protection of the Rights of All *Migrant Workers* and Members of Their Families, 1990.
- *Migrant Workers* Convention, 1975 (ILO Convention No. 143).
- Convention against Discrimination in *Education*, 1960 (UNESCO).
- Convention on the Rights of *Persons with Disabilities*, 2006.
- Convention on the Elimination of All Forms of Discrimination against *Women*, 1979.

- Declaration on the Elimination of *Violence against Women*, 1993.
- Convention concerning *Indigenous and Tribal Peoples*, 1989 (ILO Convention No. 169).
- Declaration on the Rights of *Indigenous Peoples*, 2007.
- Declaration on the Rights of Persons Belonging to *National or Ethnic, Religious and Linguistic Minorities*, 1992.

- **Inter-American system for the protection of human rights**

- Inter-American Convention on the Elimination of All Forms of Discrimination Against *Persons with Disabilities*, 1999
- Inter-American Convention on the Prevention, Punishment and Eradication of *Violence against Women*, 1994 (Convention of Belem Do Para).

➤ **What protection mechanisms have been put in place?**

- **Bodies charged with ensuring that human rights conventions including anti-discrimination measures and specific conventions outlawing discrimination are put into effect.**

- *Universal system for the protection of human rights*

- ✓ Human Rights Committee (CCPR)

A committee made up of independent experts whose mission is to monitor the application of the International Covenant on Civil and Political Rights (See File n° 3 on International Law and Human Rights).

It is authorised to receive individual complaints in the event of presumed violations of rights acknowledged by the Covenant by the States Parties to its first Optional Protocol (such as violations of Article 2 of the Covenant, which relates to the principle of non-discrimination, or Article 18 on freedom of thought, conscience and religion).

- ✓ Committee on the Elimination of Racial Discrimination (CERD)

A committee made up of independent experts that monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.

It has four main functions:

- It considers **periodical reports** submitted by the **States** that have ratified the Convention on the implementation of the rights enshrined in the Convention;
- It considers **complaints** received from **States Parties** relating to violations of the Convention by other States Parties;
- It considers **complaints** from **individuals** claiming to be victims of racial discrimination within the meaning of the Convention;
- It adopts preventive measures in the form of **early warnings**, which are intended to prevent a situation degenerating into a conflict, or in the form of **urgent procedures** when a situation requires the Committee's immediate attention in order to prevent and limit serious breaches of the Convention (the Committee assesses the seriousness and scope of such situations, including the escalation of violence or the possibility that irreparable harm may be inflicted upon victims of discrimination for reasons of race, colour, ancestry or national or ethnic origin).

The Committee also makes recommendations on the interpretation of human rights provisions, in the form of general comments concerning questions linked to thematic issues.

✓ Committee on the Elimination of Discrimination against Women (CEDAW)

This committee is made up of independent experts, all of whom are women. Its mission is to monitor the implementation of the Convention on the Elimination of All Forms of Discrimination against Women.

It considers **periodical reports** submitted by the **States** Parties to the Convention (Article 18).

An Optional Protocol to the Convention was adopted in 1999. Under its terms, **individuals or groups of individuals** who fall within the jurisdiction of a State Party to the Convention and who claim to be victims of a violation by that State of any of the rights set forth in the Convention, may submit communications (or communications may be submitted in the names of such persons).

Conditions: - The communication must be made in writing and may not be anonymous;
- The State in question must be a Party to the Optional Protocol to the Convention;
- Domestic remedies must have been exhausted;
- Conditions for admissibility are set forth in Article 4 of the Protocol.

Procedure: See Articles 3 to 9 of the Protocol.

As part of the communication consideration process, the Committee may ask the State Party concerned to adopt interim measures, as a matter of urgency, in order to avoid irreparable damage. It may also conduct an inquiry, which may include visiting the site of the events complained of. At the end of the process, the Committee sends its findings and any recommendations to the claimant and to the State concerned. The State must then, within a period of 6 months, send a written reply to the Committee on the action it has taken in response to the findings and recommendations.

✓ Committee on the Rights of Persons with Disabilities (CRPD)

This committee is made up of independent experts and is responsible for monitoring the implementation of the Convention on the Rights of Persons with Disabilities.

It considers **reports** submitted to it by **States** on the measures they have taken to fulfil their obligations under the Convention (Article 35).

Under the Optional Protocol to this Convention, which was adopted the same year, **individuals or groups of individuals** (or persons acting on their behalf), who fall within the jurisdiction of a State Party and who claim to be victims of a violation by that State of any of the rights set forth in the Convention, are allowed to submit **complaints**.

Conditions: - The communication must be made in writing and may not be anonymous;
- The State in question must be a Party to the Optional Protocol to the Convention;
- Domestic remedies must have been exhausted;
- Conditions for admissibility are set forth in Article 2 of the Protocol.

Procedure: See Articles 3 to 7 of the Protocol.

As part of the communication consideration process, the Committee may ask the State Party concerned to adopt preventive measures, as a matter of urgency, in order to avoid irreparable harm. It may also conduct an inquiry, which may include visiting the site of the events complained of. At the end of the process, the Committee sends its comments and any recommendations to the claimant and to the State concerned. The State must then, within a period of 6 months, send its observations to the Committee.

- ✓ Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)

This committee is made up of independent experts who monitor implementation of the International Convention on the Protection of the Rights of all Migrant Workers and the Members of their Families.

It has the following functions under the Convention:

- It considers the regular **reports** submitted by **States** Parties on the measures taken to implement the Convention (Article 73).
- It considers **communications** from **States** Parties relating to violations of the Convention by other States Parties, if the State has agreed in advance to recognise the jurisdiction of the Committee. (Article 76).
- It considers **communications** from **individuals** in the event that any of the rights set forth in the Convention have been violated, if the State has agreed in advance to recognise the jurisdiction of the Committee. However, this Article will only come into force when ten States have made a declaration to this effect (currently only Mexico has done so). (Article 77).

- *Inter-American System for the Protection of Human Rights*

- ✓ Inter-American Commission on Human Rights

The purpose of the Commission is to promote and protect human rights in the Americas (See File n° 9 on the Inter-American system for the protection of human rights).

It has jurisdiction to deal with petitions alleging the violation of any right recognised by the American Convention on Human Rights submitted by any person, group of persons or by an NGO.

Certain Inter-American conventions, such as the Belem Do Para Convention, provide that the violations of certain obligations recognised in the convention may be the subject of petitions to the Commission (for example, Article 12 of the Belem Do Para Convention stipulates that, in the event of any violation of Article 7, any individual or group of individuals may refer the case to the Inter-American Commission on Human Rights).

- ✓ Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities

This committee, which is provided for in Article 6 of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities, monitors the fulfilment of the commitments arising under the Convention. It is made up of one representative from each State Party.

It considers the regular **reports** submitted by **States** Parties on the measures taken to implement the Convention. The reports must also describe the progress made to eliminate all forms of discrimination against persons with disabilities, and any issues or difficulties arising in the implementation of the Convention.

On the basis of this information, the **Committee** prepares **reports** including its conclusions, observations and suggestions of a general nature further to the gradual implementation of the Convention.

- *African System for the Protection of Human Rights*

- ✓ African Commission on Human and Peoples' Rights

The purpose of the Commission is to promote and protect human rights in Africa.

It has jurisdiction to deal with complaints relating to the violation of rights recognised in the African Charter of Human and Peoples' Rights submitted by any person or organisation.

The jurisdiction of the African Court on Human and Peoples' Rights extends to other human rights instruments ratified by the States concerned. However, only States and the Commission may refer cases to this Court.

- *European system for the protection of human rights*

The European Court of Human Rights considers applications, from both states and individuals, concerning alleged violations by States Parties of the European Convention on Human Rights. (See File n° 7 on the European system for the protection of human rights).

- **Other means of combating discrimination**

- *Special Rapporteurs or equivalent persons (See File n° 31)*

– Special Rapporteurs within the universal system for the protection of human rights: Rapporteur on the rights of indigenous peoples; Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Independent Expert on questions relating to minorities; Working Group of five independent experts on persons of African ancestry; Rapporteur on the human rights of migrants; Rapporteur charged with the issue of violence against women; Rapporteur on human trafficking, particularly the trafficking of women and children.

- Special Rapporteurs within the Inter-American system for the protection of human rights: Rapporteur on the rights of indigenous peoples; Rapporteur on persons of African ancestry and racial discrimination; Rapporteur on migrant workers and the members of their families; Rapporteur on women's rights.

– Special Rapporteurs within the African system for the protection of human rights: Working Group on indigenous peoples/communities; Rapporteur on the rights of women in Africa.

- *Independent national authorities defending human rights (See File no. 32)*

Examples: the HALDE in France (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*: the French Equal Opportunities and Anti-Discrimination Commission), an independent administrative authority which investigates cases on its own initiative and cases referred to it by victims of discrimination (or by associations) involving any of the criteria prohibited by law: age, gender, origin, family situation, sexual orientation, customs, genetic characteristics, membership – whether real or supposed – of an ethnic group, nation, race, physical appearance, disability, state of health, pregnancy, surname, political opinions, religious beliefs, or union activities (Article 225-1 of the French Criminal Code (*Code pénal*)).

Sources:

– International legal instruments cited

– United Nations website: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination.aspx>

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