

Chapter 13

The right to equality and non-discrimination in the administration of justice

Facilitator's Guide

Learning objectives

- To familiarize the participants with the notion of equality before the law and the principle of non-discrimination as understood by international human rights law
- To illustrate how these principles are applied by the international monitoring organs
- To identify groups that may be particularly vulnerable to discriminatory treatment
- To explore what legal steps, measures and/or actions judges, prosecutors and lawyers could take to safeguard the notion of equality and the principle of non-discrimination

Questions I

- How would you define “discrimination” and/or “inequality” of treatment?
- How is the notion of equality before the law and the principle of non-discrimination protected in the country where you work?
- Have you ever been faced with cases of discrimination in your professional life?

Questions II

- Are there any particularly vulnerable groups in the country where you work?
- If so, who are they and how are they discriminated against?
- In the country where you work, are there any particular problems of discrimination based on gender?
- If so, what are they?
- What measures could you take to reinforce the right to equality and non-discrimination in the exercise of your professional responsibilities?

Relevant legal instruments I

Universal instruments (1)

- The Charter of the United Nations, 1945
- The International Covenant on Civil and Political Rights, 1966
- The International Covenant on Economic, Social and Cultural Rights, 1966
- The International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- The Convention on the Elimination of All Forms of Discrimination against Women, 1979
- The Convention on the Rights of the Child, 1989
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
- The Convention on the Rights of Persons with Disabilities, 2006

Relevant legal instruments II

Universal instruments (2)

- The Universal Declaration of Human Rights, 1948
- The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981
- The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

Relevant legal instruments III

Universal instruments (3)

- The Rome Statute of the International Criminal Court, 1998
- The Statute of the International Criminal Tribunal for the former Yugoslavia, 1993
- The Statute of the International Criminal Tribunal for Rwanda, 1994
- The Four Geneva Conventions of 12 August 1949
- The 1977 Protocols Additional to the Geneva Conventions of 12 August 1949

Relevant legal instruments IV

Regional instruments (1)

- The African Charter on Human and Peoples' Rights, 1981
- The African Charter on the Rights and Welfare of the Child, 1990
- The American Convention on Human Rights, 1969
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994
- The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999

Relevant legal instruments V

Regional instruments (2)

- The European Convention on Human Rights, 1950
- The European Social Charter, 1961
- The European Social Charter (Revised), 1996
- The Framework Convention for the Protection of National Minorities, 1995

Key legal texts I

The Charter of the United Nations (1)

Article 1 (3): The purposes of the United Nations are: [. . .]

To achieve international cooperation 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.

Article 13 (1): The General Assembly shall initiate studies and make recommendations for the purpose of . . . (b) promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Key legal texts II

The Charter of the United Nations (2)

Article 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [. . .]

- (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56:

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Key legal texts III

The Universal Declaration of Human Rights

Article 1:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2:

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

Article 7:

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.

Key legal texts IV

The Convention on the Prevention and Punishment of the Crime of Genocide

Article II:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Key legal texts V

The International Covenant on Civil and Political Rights (1)

Article 2 (1):

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

Article 3:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 14 (1):

All persons shall be equal before the courts and tribunals. . . .

Key legal texts VI

The International Covenant on Civil and Political Rights (2)

Article 26:

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

Article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Human Rights Committee has stated “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, colour, 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.” (General comment No. 18 (1989), para. 7).

Key legal texts VII

The International Covenant on Economic, Social and Cultural Rights

Article 2 (2):

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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Key legal texts VIII

The International Convention on the Elimination of All Forms of Racial Discrimination

Article 1 (1):

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Key legal texts IX

The Convention on the Rights of the Child (1)

Article 2:

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, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Key legal texts X

The Convention on the Rights of the Child (2)

Article 29:

States Parties agree that the education of the child shall be directed to: [. . .]

- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

Article 30:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Key legal texts XI

The Convention on the Elimination of All Forms of Discrimination against Women

Article 1:

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.

Key legal texts XII

The African Charter on Human and Peoples' Rights

Article 2:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 19:

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Key legal texts XIII

The African Charter on the Rights and Welfare of the Child

Article 3:

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 21:

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: [. . .]
 - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

Key legal texts XIV

The American Convention on Human Rights (1)

Article 1 (1):

1. The States Parties to this Convention undertake to respect the rights and 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.

Article 24:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Key legal texts XV

The American Convention on Human Rights (2)

The Additional Protocol in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”

Article 3:

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Key legal texts XVI

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, “Convention of Belém do Pará”

Article 6:

The right of every woman to be free from violence includes, among others:

- (a) The right of women to be free from all forms of discrimination; and
- (b) The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

Key legal texts XVII

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1)

Article I (2) (a):

The term “discrimination against persons with disabilities” means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.

Key legal texts XVIII

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (2)

Article I (2) (b):

A distinction or preference adopted by a State party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the right of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a State's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination.

Key legal texts XIX

The European Convention on Human Rights (1)

Article 14:

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

Key legal texts XX

The European Convention on Human Rights (2)

Article 1 of Protocol No. 12 to the Convention:

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

Key legal texts XXI

The European Social Charter, 1961

Third preambular paragraph:

. . . the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin

Key legal texts XXII

The European Social Charter (Revised), 1996

Part V, article E:

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

It is specified in the appendix to the revised Charter that:
“A differential treatment based on an objective and reasonable justification shall not be deemed discriminatory”.

Key legal texts XXIII

The Framework Convention for the Protection of National Minorities, 1995

Article 4:

1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

The right to equality and the principle of non-discrimination: A pillar of international human rights law

International legal provisions in the human rights field show that the right to equality before the law and by the law, including the prohibition of discrimination, is an overarching principle that:

- Is essential to international peace and security
- Conditions the enjoyment of all human rights, be they civil, political, economic, social or cultural
- Constitutes a general principle of law binding on all States

The right to equality and the principle of non-discrimination in public emergencies

The right to equality before the law and to non-discrimination must, in principle, be respected in all circumstances, including in public emergencies and in times of international and non-international armed conflicts.

The meaning in general of equality and non-discrimination

The principle of equality and non-discrimination does not mean that all distinctions made between people are illegal under international law.

Differentiations are lawful provided that they:

- Are pursuing a legitimate aim
- Are based on reasonable and objective criteria

Alleged purposes that cannot be objectively justified and measures that are disproportionate to the attainment of a legitimate aim are contrary to international human rights law.