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A FRAMEWORK TO COMBAT
DISCRIMINATION IN EUROPE

DEALING WITH DIFFERENCE

A FRAMEWORK TO COMBAT
DISCRIMINATION IN EUROPE

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DEALING WITH DIFFERENCE

A FRAMEWORK TO COMBAT
DISCRIMINATION IN EUROPE

Amnesty International Publications



Published by
Amnesty International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom

© Amnesty International
Publications 2009
Index: EUR 01/003/2009

ISBN: 978-0-86210-443-6
Original language: English
British Library Cataloguing in Publication Data.
A catalogue record for this book is available from the British Library.

Cover photograph © AP Photo/John McConnico

Printed on 100 per cent recycled post-consumer waste paper by
Lightning Source
Milton Keynes, UK

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ABBREVIATIONS

CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CERD	UN Committee on the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC	UN Convention on the Rights of the Child
CRPD	UN Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms)
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
ESC	European Social Charter
EU	European Union
FRA	European Union Agency for Fundamental Rights
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Co-operation and Security in Europe

INTRODUCTION

Discrimination is one of the most serious and pervasive human rights abuses in Europe today. Millions of people are still subjected to exclusion, poverty, ill-treatment, even violence, because of who they are, what they are presumed to be or what they believe. The equal treatment of all is not just a matter of good sense or common courtesy. It is more than a wise or generous concession extended by the strong to the weak or the many to the few. It is a right – and all governments have an obligation to ensure that this fundamental principle is respected.

Discrimination takes many forms. It ranges from insults and assault to the denial of basic goods, services and other rights. Victims of discrimination may be disadvantaged in the area of employment, or have restricted access to education, housing and adequate health care. Discriminated groups may also be denied their rights to participate in public life, to associate freely, to practice their religion or preserve their distinct cultural identities. Discrimination in the criminal justice system manifests itself in the denial of due process and the higher likelihood of certain groups being subjected to torture and other ill-treatment. All these types of discrimination can be found all across Europe.

Whatever form it takes, discrimination is based on the denial or denigration of difference. It results from the failure to respect the inherent dignity and equal worth of all human beings. Human rights cannot flourish, therefore, where their enjoyment is denied or limited on the basis of a person's origin, skin colour, religion, gender, gender identity, sexual orientation, age, disability or other status.

Discrimination may occur in both the private and the public sphere. Typically, it is a pervasive phenomenon that permeates society's structures, institutions, social relations and attitudes. As a result, victims of discrimination are often trapped in a cycle of exclusion, disadvantage, prejudice and further discrimination.

The widespread denial of economic and social rights to members of particular groups rapidly results in their de facto segregation. Even where they are not officially endorsed, popular prejudices have a dangerous tendency to penetrate official structures, resulting in entrenched institutional discrimination. Elevated to public policy, discrimination results in segregation in law, and — in its most extreme form — in apartheid. The slow-burning logic of prejudice leading to discrimination, discrimination to segregation and segregation to elimination lies behind the human rights catastrophe of the Holocaust.

The international human rights framework was created in response to these horrors and the profound desire to ensure that they could not happen again. Combating discrimination is at the heart of this system. This is reflected in the first two articles of the Universal Declaration of Human Rights, which state that "All human

beings are born free and equal in dignity and rights” – Article 1 – and that “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 2.

Over the last 60 years, international anti-discrimination standards have evolved considerably. European countries have been at the forefront of this movement and the region¹ has some of the most advanced anti-discrimination standards in the world. This report provides a simple, but comprehensive introduction to these standards – and explains what they mean in practice. It offers an overview of the main issues relating to discrimination in Europe today and seeks to provide guidance on the identification of individual instances of discrimination. Lastly, it sets out the wide array of measures that states should take to guarantee non-discrimination and promote real equality.

Europe has come a long way since 1945. Over the last two decades, the raising of the iron curtain, new technologies and greater mobility have brought its peoples and countries even closer together. The enjoyment of human rights has spread. Discrimination, however, has not been eliminated; difference is still met with denial and denigration.

Sixty years ago, the Universal Declaration of Human Rights was adopted recognizing the principle that human rights are universal and indivisible – that all human rights should be enjoyed by all people. This is at the heart of Amnesty International’s mission. Fighting discrimination is too.

1/DISCRIMINATION IN EUROPE: AN OVERVIEW

Discrimination remains a pressing problem in Europe, despite relatively advanced regional and national anti-discrimination standards and, in many countries, the positive evolution of social attitudes towards traditionally targeted groups.

There is no need to scratch the surface. Racist, chauvinist, homophobic, Islamophobic and anti-Semitic discourse is still common: in the street, in the media and in political debate. Attitudinal surveys throughout Europe consistently reveal high levels of prejudice and intolerance at all levels of society.² Overt direct discrimination in national laws and practices is less common than it once was, but it is still found. Of equal concern, however, is hidden, indirect discrimination, whereby apparently neutral laws and practices disproportionately affect and prejudice unfavoured sectors of society – both intentionally and through the unchecked perpetuation of entrenched discriminatory attitudes in public institutions. The persistence of widespread social prejudices continues to result in large-scale discrimination in the private sector as well; in employment, in the access to housing, goods and services, through insults and through violence.

DISCRIMINATION AND DEGRADING TREATMENT

The European Court of Human Rights has recognized that in some cases discrimination can constitute so great an affront to human dignity as to amount to degrading treatment (under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, prohibiting torture or inhuman or degrading treatment or punishment). This will occur where the discrimination denotes contempt or lack of respect for the personality of individuals or was expressly designed to humiliate or debase them.³

Far greater efforts are required to combat discrimination in Europe. Conspicuous gaps in national legislative frameworks need to be filled and existing legislation needs to be implemented much more effectively. Prejudice and intolerance in official structures and society more generally need to be addressed, while greater focus on the social inclusion of marginalized groups is urgently required.

RACISM, XENOPHOBIA AND RELATED INTOLERANCE

Racism, xenophobia and related intolerance have proved particularly difficult to eliminate in Europe. Europe is a continent of differences; its complex history – both at home and abroad – has resulted in the constant flow of different peoples, languages and religions that rarely respect national boundaries. Dealing with these differences, and respecting the rights of all, has been, and remains today, one of Europe's greatest challenges.

Several categories of groups that are frequently discriminated against can be distinguished. There are, firstly, traditional or long-standing, minorities. These may, like the Roma or the Kurds, reside in many countries without having a homeland of their own. They may, alternatively, constitute minorities in one country but the majority in another. A host of new minorities facing discrimination have arisen in the states that acquired or regained their independence in the 1990s. Such has been the fate, for instance, of the Russian-speaking minorities in the Baltic States⁴ and the many new minorities resulting from the break up of the former Yugoslavia. In addition to these "European" minorities, successive waves of post-war immigration have brought millions of new people and many new religions, cultures and customs to Europe's shores. While the precise treatment of these different groups varies from country to country, they share similar experiences of discrimination.

THE ROMA

The Roma, one of Europe's oldest minorities, have endured a long history of persistent discrimination and disadvantage throughout Europe that has only recently begun to be acknowledged and addressed. Despite this, widespread, openly racist and discriminatory comments and practices towards them continue, right across the region.⁵

In a Europe that is increasingly coming together through greater prosperity and mobility, the Roma are in grave danger of being left behind. In both the East and the West, the Roma continue to face serious obstacles in accessing basic goods and services and securing the equal rights to housing, health care, education and to work.⁶ Millions of Roma still live in informal settlements with no or inadequate sanitation, startlingly high levels of unemployment and limited access to health care services.⁷ Amnesty International has documented how the marginalization of Roma has been perpetuated by their segregation in the education systems of a number of central and eastern European countries, in which Romani children are systematically streamed into special schools with reduced facilities and vastly simplified curriculums to those, often just down the road, that are attended by non-Romani residents.⁸

SEGREGATION OF ROMA IN SLOVAKIA

"If all Romani children go to primary school, the white children become a minority. To avoid that, the white people make our children go to special schools... Roma from

wealthy families attend the normal primary school. But the Roma from poor families usually end up in a special school."

A Romani employee of a municipality in eastern Slovakia

"If I open a Roma class, I will lose all the white children. They are not clean enough, nor do I have space for them."

Director of a nursery school, Kosice

"Our children do not play with white children. They cannot even play football on the football ground because the police would come and make them leave... Children here have nothing, not even anywhere to play. The white children have their own soccer pitch. Our children play in the countryside."

Romani parent, Svinia

Amnesty International, *Still separate, still unequal: Violations of the right to education of Romani children in Slovakia* (Index: EUR 72/002/2007).

In western Europe, obstacles to obtaining the documentation necessary to access public services, the failure to accommodate nomadic lifestyles, widespread prejudice and the dwindling demand for their traditional skills and occupations has resulted in vicious cycles of poverty and exclusion for many Roma.

Throughout Europe, the Roma are poorly represented in political and administrative structures and face considerable difficulties in integrating into mainstream society while preserving their distinct cultural identities. The Roma are being placed on the fringe of the fringe; their treatment is a serious affront to a continent that considers itself a standard bearer for human rights in the world.⁹

OTHER MINORITIES

Other national, ethnic and linguistic minorities also face considerable difficulties in accessing their rights, particularly in the newly independent states of the 1990s, in which an upsurge of nationalism has resulted in the exclusion, de facto and de jure, of non-dominant groups. Amnesty International has, for instance, documented the discrimination that members of the Russian-speaking minority in Estonia have faced in the field of employment, in the education system and in acquiring citizenship.¹⁰ Their situation is similar in Latvia. Throughout the Balkans, new national minorities have faced serious difficulties in returning to their original places of residence and securing the restitution of property and other rights lost as a result of their departure during the various armed conflicts of the 1990s.¹¹ Discrimination in the area of employment, particularly in the larger, formally state-owned companies, has been particularly severe as workforces have become increasingly mono-ethnic through deliberate policies of expulsion and exclusion.¹²

DMITRI: THE RIGHT TO WORK

Dmitri is a stateless man in his fifties. He was born in Russia but moved to Estonia when he was very young. He studied engineering at university. He used to work in the oil shale industry during the Soviet period, in eastern Estonia. However, after Estonian independence, the company he was working for was closed. Dmitri hoped for employment as an engineer in one of the many new companies that emerged in the new Estonian market economy.

“But I did not know Estonian. I applied for many jobs but I didn’t get any. They told me I didn’t fulfil the language requirements. I was often told that they wanted to employ me, I had a good reputation as a qualified and experienced engineer, but that they simply couldn’t employ me as it was against the law. I don’t blame them for not hiring me, it is important to follow the law.”

Dmitri spent a long time being unemployed. In the mid-90s he moved to Russia to seek employment. He got a job with a small engineering firm. His wife and children stayed in Estonia. After a few years Dmitri moved back to Estonia because he missed his family too much.

“I decided to make a real effort to create a life for myself and family in the new Estonia. I wanted to learn Estonian, become an Estonian citizen and get a good job to support my family and give my children a good role model. I took a course to learn Estonian, but at my age it is difficult to learn a foreign language. Also, I am not good with languages; I’m an engineer, my mind is mathematic, not linguistic.”

Dmitri failed his language exam and lost the money he had spent on the language course. This meant that he could not become an Estonian citizen, and that he was still not able to apply for the majority of jobs in Estonia. Dmitri has now found a job in a sector which requires no education and no Estonian language skills.

“I am happy that Estonia is independent, I can see that the future is brighter for kids here than it is in Russia or would have been in the USSR. But I am sad for myself. I used to be an engineer, I used to be proud of my profession and I loved my job. Now I am considered a burden to society. I’m considered a useless Russian who doesn’t speak Estonian, who has a low income job and doesn’t contribute to the future of this country. I try to stay positive, but it’s hard.”

Amnesty International, *Linguistic minorities in Estonia: Discrimination must end* (Index: EUR 51/002/2006).

While the legal framework relating to the protection of national minorities in Europe has developed considerably over the last few decades, many still face difficulties in obtaining official recognition of their minority status¹³ and in fully enjoying the cultural rights essential to the preservation of their cultural identities, such as education and media in their own language.

IMMIGRANTS AND NEW ETHNIC MINORITIES

Most western European countries have conspicuously failed to effectively integrate their post-war immigrants and new ethnic minorities in a way that guarantees their enjoyment of all human rights and, at the same time, accommodates their social, cultural and religious differences. It is increasingly common to hear the compatibility of the two being called into question, with thinly veiled xenophobia often lying behind calls for the greater adoption of the values and customs of majority communities. Tolerance and respect must be mutual, however, to be meaningful. They must also be accompanied by real equality of opportunity. This has not been fully achieved anywhere. Even three generations down the line, and long after the acquisition of citizenship, millions of members of visible ethnic minorities still face discrimination, disadvantage and exclusion in all areas of life. The rise of far-right political parties (to positions of power in many countries), and the ubiquity of xenophobic discourse is just the visible tip of the prejudice affecting the daily lives of both long-established ethnic minorities and recent immigrants.

Discrimination on the grounds of ethnic origin remains widespread in the fields of housing¹⁴, employment¹⁵ and the access to services, particularly in the private sector. Racist attacks by non-state actors, including by organized nationalist and neo-Nazi groups, continue to be a problem in western Europe¹⁶ and have started occur with alarming frequency in Russia¹⁷ and the Ukraine¹⁸ in the recent years. Racism within law enforcement agencies manifests itself both in the inadequate service and protection extended to members of ethnic minorities who are victims of crime, and in racially motivated abuse and ill-treatment. This also needs to be acknowledged and addressed in many European countries.¹⁹

DISCRIMINATION BY THE POLICE: FRANCE

Amnesty International has detected a pattern whereby police misconduct, including ill-treatment, occurs predominantly with regard to individuals perceived to be foreign, and points to an official perception that such persons may be a greater security risk, or more liable to commit offences, than white or non-Muslim French nationals or other Europeans. Discrimination can reinforce impunity for police officers, responsible for the ill-treatment of such people, who act in the knowledge that their behaviour will not be investigated thoroughly, if indeed at all. One of the consequences of this climate of impunity is that people whose rights have been violated are silenced, either because they do not feel able to report the abuse or because police and prosecutors choose not to receive or register complaints or do not follow them up.

Amnesty International, *France the search for justice: The effective impunity of law enforcement officers in cases of shootings, deaths in custody or torture and ill-treatment*
(Index: EUR 21/001/2005)

Migrant workers and asylum-seekers have borne the brunt of these xenophobic attitudes. Throughout Europe, a range of measures have been introduced to discourage the arrival and expedite the departure of irregular migrants and asylum-seekers, often resulting in serious violations of their human rights. These include lengthy periods of detention in inadequate facilities pending the determination of asylum claims, significantly reduced guarantees in asylum proceedings, the denial of the most basic social assistance, and their often violent removal.²⁰ The right to family life has been widely restricted for regular migrants, who face increasing difficulties in reunification with spouses and children from their countries of origin in their new countries of residence.²¹ Irregular migrants are increasingly being targeted for expulsion regardless of their family ties or their length of residence, while the rest of society profits from their precarious status: entire industries (notably construction, tourism and agriculture) have come to depend on the regular supply of cheap and exploitable labour that they offer.

VIOLATIONS OF THE RIGHTS OF MIGRANTS IN CEUTA AND MELILLA

PN (name withheld) from the Democratic Republic of the Congo, was part of a group of approximately 500 people who attempted to cross the border between Morocco and Ceuta on 29 September 2005. As the first group of people tried to place makeshift ladders to climb the first fence, members of the Spanish Civil Guard on the other side of the fence shot rubber bullets at them to push them back off the fences. PN was shot in the right foot and immediately lost a toe. He later spent three weeks in hospital and underwent surgery to amputate another of his toes.

PN was advised by local non-governmental organizations not to file a complaint in order to avoid reprisals. Although PN stated in hospital and in his asylum interview that he was wounded by a firearm, as far as Amnesty International is aware at the time of writing no action has been taken by any authority to investigate the incident.

CM (name withheld) from Mali entered Melilla for the third time in October 2005. The first time he managed to reach the police station in Melilla where they gave him a receipt. He told Amnesty International that he was stopped by members of the Spanish Civil Guard on his way to the Short Stay Immigration Centre. They destroyed his receipt and took away his clothes, leaving him only with his underwear, before handing him over to the Moroccan police who assaulted him and took him to the Moroccan town of Oujda on the Algerian border. The second time he succeeded in crossing the two fences and was on his way to the police station when he was stopped by members of the Spanish Civil Guard. They assaulted him and confiscated all his clothes except for his shoes and took his diary containing phone numbers. He was handed over to the Moroccan authorities who again took him to Oujda.

Foreigners and members of ethnic minorities are often particularly vulnerable to double or multiple discrimination. Migrant women, for instance, are often discriminated against both within their own communities on account of their gender (through the pressure to conform to traditional gender roles and such practices as forced marriages) and in the broader community (for instance, in the field of employment) on account of both their gender and their ethnic origin. Women victims of human trafficking also regularly suffer from double discrimination – they are not only exploited as women for the purposes of forced prostitution, but also, as foreigners, enjoy less protection as the victims of crime than nationals.²²

RELIGIOUS GROUPS

There is often considerable overlap between different grounds of discrimination. This is particularly evident in respect of discrimination on the grounds of ethnic origin and religion. Indeed, telling the two apart can sometimes be quite difficult. Discriminators are not always that discerning; they tend rather to lump all “otherness” together and discriminate accordingly.

Two groups that are frequently discriminated against on account of a variety of overlapping prejudices are Jews and Muslims. Jews and Muslims may be discriminated against not only on the grounds of their ethnic origins and often misunderstood or presumed religious beliefs, but also because of their presumed political beliefs and responsibility for world events. Thus, European Jews are subject to abuse and even violence on account of a perceived responsibility for the situation in Israel and the Occupied Palestinian Territories, while European Muslims are often indiscriminately associated with extremist views and violent ideologies. Discrimination on these overlapping grounds takes a variety of forms including violent attacks, interferences with the freedom of religion and expression and the denial of equal access to employment, goods and services.

Anti-Semitism has a long and painful history in Europe. Even if the public expression of anti-Semitic sentiment is less common today than it once was, it still enjoys widespread popular currency and is not always countered with the force it should be. As a result, individual acts of anti-Semitism, including violent attacks on Jewish people and the desecration of places of worship and burial, still occur with worrying frequency across Europe.²³

Islamophobia in Europe is, in its current guise, a more recent phenomenon coinciding with the large-scale arrival of Muslim immigrants in the majority of western European countries over the last 50 years. This short time has been sufficient, however, for Islamophobia to penetrate deep into the mainstream of public discourse and political debate. Even if it is often difficult to distinguish from a broader xenophobia, it is clear that Islamophobia exists as a distinct and deeply troubling phenomenon that has been significantly exacerbated by the reaction to the 11 September 2001 attacks in the USA.²⁴ The result is a variety of human rights violations.

RESTRICTIONS ON THE WEARING OF RELIGIOUS SYMBOLS AND FORMS OF DRESS

The wearing of religious symbols and other forms of religious and cultural dress³⁰ is an emotive issue that stands at the crossroads of social, political and human rights related concerns. The issue touches on social cohesion, multi-culturalism, equality of opportunity, stereotyping of religious beliefs and communities, preservation of theocratic or secular state structures, religious institutions and their relationship to the state, freedom of conscience and belief, freedom of expression, the right to non-discrimination and gender equality. It is not surprising, therefore, that religious symbols and forms of dress has generated intense debate in many European countries, as new restrictions on the wearing of such symbols and dress have been introduced and old ones challenged, particularly in the areas of education and employment.

Amnesty International's position is based on international human rights law and standards and, in particular, Articles 18 and 19 of the International Covenant on Civil and Political Rights and Articles 9 and 10 of the European Convention on Human Rights, which cover freedom of thought, conscience, belief and religion and freedom of expression³¹. The way people choose to dress can be an important expression of their religious, cultural or personal identity or beliefs. Amnesty International takes the view that individuals have the right to choose whether to wear — or not to wear — religious symbols or other forms of clothing and that they should exercise this choice free from discrimination, violence or coercion.

This is not to say, however, that restrictions on the right to wear religious symbols or other forms of dress can never be legitimate. Under international human rights law the right to hold opinions or beliefs is absolute, and no restrictions may be placed on it. The freedom of expression and the right to manifest or practise one's religion may, however, be subjected to certain restrictions. But in order to comply with international law such restrictions must meet a three-part test: they must be prescribed by law; they must address a specific legitimate objective (ensuring respect for the rights of others, or to protect public safety, order, health, or morals); and they must be necessary for that purpose.³² Moreover, such restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.³³

Restrictions on the right to wear religious symbols and other forms of dress may be justifiable, therefore, where they are introduced for a legitimate purpose, such as the protection of public safety, are proportionate to that end and do not discriminate, in purpose or effect. One example which might meet this test would be a ban on headscarves in a laboratory setting with open flames because of the risk of fire. As both the wearing and the restricting of religious symbols and dress

can impact in many different ways on the enjoyment of a wide range of human rights, assessing the legitimacy of restrictions will always require careful consideration on a case-by-case basis.³⁴

The other relevant principle is that of the universality of human rights. States must respect rights 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 (ICCPR Art 2; ICESCR Art. 2). Furthermore, states also have an obligation to protect individuals against human rights abuses by non-state actors, which may affect their ability in practice to exercise other human rights such as the right to work, education, freedom of movement, or freedom of expression. In the context of school dress codes, the right to education, the right to non-discrimination, the right to manifest one's religious beliefs and the obligation to protect children and young people against harassment and intimidation will all need to be considered. However, the fact that one person's expression causes another person's discomfort is not a basis for prohibiting that expression, for example, a teacher or student's discomfort at a student's dressing in a manner which does not conform to his or her gender is not a valid reason to restrict that dress.

As individuals should, as a general rule, be free to wear what they choose, it will be for the restricting authority, whether a school, a government, a local council, or a private employer, to establish the necessity of any restriction. It must do this by reference to demonstrable facts, not presumptions, speculation or prejudice. In her dissenting opinion in the case of *Leyla Sahin v. Turkey*, Judge Tulkens argued that “[o]nly indisputable facts and reasons whose legitimacy is beyond doubt — not mere worries or fears — are capable of ... justifying interference with a right guaranteed by the [European] Convention”. The preservation of the secular nature of the state would not, of itself, provide a blanket justification for a restriction, although the state concerned may be able to demonstrate the need for restrictions on the manifestation of religious beliefs in particular public spheres in order to ensure public safety or protect the rights of others.

In Amnesty International's view, if violence is being used within the family or by a non-state actor to compel a child to dress in a certain manner, then the appropriate response is for the state to intervene through the family or criminal law system to protect the child, ensure an effective remedy and to promote the child's best interest. Using dress codes which ban certain forms of religious or cultural dress is not the appropriate way for the state to respond to violence and threats of violence.

The rising tide of Islamophobia has resulted in increased discrimination against Muslims and individuals presumed to be Muslims in all areas of life. Even long-standing Muslim communities face difficulties in exercising their rights to freely practice their religion with the construction of mosques often being prevented by strong local resistance²⁵ and existing places of worship occasionally, but increasingly being subject to vandalism and arson attacks.²⁶ Discrimination against Muslims in the area of employment, particularly of women wearing religious dress, is widespread across Europe.²⁷ Indeed, the right to wear religious dress is itself being increasingly contested. (See Information and policy Issues, Restrictions on the wearing of religious symbols and forms of dress, p10.)

Europe's Muslims have also been both specifically targeted and disproportionately affected by a range of security measures which, ostensibly designed to counter the threat of terrorism, have often resulted in serious human rights violations. Ethnic profiling has resulted in Muslims being disproportionately stopped, searched and arrested, with negligible results in terms of successful prosecutions²⁸. Under hastily introduced counter-terrorism legislation, Muslims suspected of often only the most oblique involvement in terrorism-related activities, have faced prolonged preventive detention, the denial of due process and removal to countries in which they face a real risk of being subjected to torture or other ill-treatment.²⁹ In addition to the violations of the rights of individuals, such measures have fed popular prejudices and contributed to the further alienation of Europe's Muslim communities.

It is clear that the human rights framework cannot provide all the answers to the many challenges posed by Europe's rich diversity. It does, however, provide a minimum set of rights and obligations, which, if better respected, would contribute greatly to the harmonious flourishing of Europe's many different peoples, traditions, cultures, languages and religions.

GENDER EQUALITY

Gender equality is one area in which real advances have been made in Europe over the last few decades, in both social attitudes and practice. These real advances have not gone so far, however, as to ensure complete equality. Women are still discriminated against in many areas. In the area of employment, women still struggle to achieve promotion to senior positions and equal pay for equal work, while women continue to be conspicuously under-represented in politics in most European countries.³⁵

International human rights standards recognize gender-based violence and exploitation as particularly pernicious forms of discrimination. Across Europe, however, millions of women continue to suffer domestic violence and related human rights violations as a result of low public awareness and inadequate legislative and practical protection.³⁶ Women are also disproportionately victims of human trafficking and indentured labour, particularly for the sex trade.³⁷

VIOLENCE AGAINST WOMEN – CRIME AND IMPUNITY

“Are you the one who has come to talk about the birds brought in here who say they have been raped?... At least 85 per cent of them are whores. They want to have sex, but then do not manage to come to an agreement. They are prostitutes, overtly or secretly. An expert can see this.”

Hungarian police officer interviewed by Amnesty International

Amnesty International, *Hungary: Cries unheard: The failure to protect women from rape and sexual violence in the home* (Index EUR 27/002/2007).

SEXUAL ORIENTATION AND GENDER IDENTITY OR EXPRESSION

For all the advances of the last few decades, lesbian, gay, bisexual and transgender individuals (LGBT) continue to face discrimination across Europe in both law and practice. Despite the formal prohibition of discrimination on the grounds of sexual orientation in many areas, several states still refuse to legally recognize same-sex relationships and grant them equal civil rights.

INTOLERANCE IN POLAND AND LATVIA

“If deviants begin to demonstrate, they should be hit with batons.”

Wojciech Wierzejski, Deputy of the Sejm (Polish National Assembly), 11 May 2006

“They say they promote family values – throwing excrement in plastic bags, is that ‘family values’?”

Linda Freimane, Riga Pride 2006 organizer, speaking about the counter-demonstrators. 24 July 2006

“We’ll do to you what Hitler did with Jews”

Members of All Polish Youth (Młodzież Wszechpolska) counter-demonstrating during 2005 Poznań Equality March

Amnesty International, *Poland and Latvia. Lesbian, Gay, Bisexual and Transgender Rights in Poland and Latvia* Index: EUR 01/019/2006.

The social acceptance of homosexuality varies widely across countries, communities and areas of life. In many professions and social contexts homosexuality is still taboo, while the open expression of homosexual or transgender identities is still regularly met with rejection and abuse. Amnesty International has, for instance, documented violations of the right to freedom of expression and assembly in a number of eastern European countries, where Pride events have been either prohibited or allowed to proceed without adequate protection against violent disruption by homophobic groups.³⁸ Throughout Europe, homophobic attacks still occur with alarming frequency.

Transgender people face discrimination based on their gender identity or expression. Discrimination against transgender persons is written into law in many countries. Some countries do not permit transgender persons to amend their identity documents to reflect their gender identity. Countries that do permit such changes often require irreversible surgical infertility and divorce, if applicable, before permitting such changes.³⁹ Violence against transgender persons is widespread; at times, transgender persons are killed. Transgender persons who come into contact with police, including those who report incidents against them, often report harassment and other mistreatment. Transgender persons also face hostility in health care, employment, and education.

DISABILITY

Across Europe millions of people with disabilities still face difficulties in accessing their rights and enjoying the full range of goods and services. Even in the less prosperous countries of central and eastern Europe this is as much a question of attitudes as a lack of resources. Far greater efforts are therefore required to promote the active inclusion of all persons with disabilities in the daily life of European societies.

Persons with mental and severe physical disabilities face particularly extreme forms of discrimination, especially in central and eastern Europe, where there are still far too few community-based alternatives to institutionalisation in chronically under-funded and under-staffed social care homes and psychiatric institutions.⁴⁰ Amnesty International and organizations working on behalf of people with disabilities have highlighted systemic patterns of arbitrary detention, ill-treatment and other cruel, inhuman and degrading treatment in such centres.⁴¹ Even in the wealthier countries of the West, thousands of people with mental disabilities and psychiatric disorders are serving sentences in detention centres that are ill-equipped to meet their immediate medical needs and prepare them for their rehabilitation in the community.⁴²

OTHER GROUNDS

International human rights standards also recognize other grounds of discrimination, such as age and social or economic status. Despite its formal prohibition, age-based discrimination is still widespread, particularly in the field of employment. Discrimination on the grounds of social and economic status is also common, but is much less frequently recognized as a human rights violation. Often, it is obscured by other, more visible forms of discrimination; indeed, poverty is often the result of discrimination on other grounds, as ethnic minorities, immigrant communities and women are often denied opportunities and access to services on account of their origin or gender. However, poverty can also be the cause of discrimination, where it affects not just what the poor can afford but also the services that are available to them. Indeed, the quality of public services, such as health care and education, often

varies considerably between adjacent neighbourhoods, depending on the relative wealth of their residents. Discrimination on the grounds of status will also occur where national and local authorities channel funding and services to sectors of the population that they believe are more likely to vote for them. Discrimination on the grounds of economic status is also common, indeed, endemic, in European justice systems, as impoverished litigants and defendants are often unable to afford or access quality legal representation.⁴³

Legal status, relating, for instance, to registration requirements or the official recognition of residence, may also constitute a prohibited ground of discrimination, where the required status is either unjustly withheld, or irrelevant to the right or service denied. Internally displaced persons commonly face discrimination in accessing social benefits and housing on the same terms as long-standing residents in their new places of residence.⁴⁴

An inclusive Europe, a Europe tolerant of diversity and respectful of difference, a Europe offering real equality of opportunity and the equal enjoyment of all human rights, cannot be achieved while discrimination remains rife. Discrimination still occurs at all levels and in all areas of society. Combating it successfully requires the engagement of everyone.

2/DEFINING DISCRIMINATION

Discrimination is a human rights violation prohibited by a range of binding human rights standards. The term “discrimination” has a precise and well-established meaning in international law. The UN Human Rights Committee – the body of independent experts which monitors the implementation of the International Covenant on Civil and Political Rights – has clarified that the use of the term in the Covenant encompasses:

“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.”⁴⁵

However, not every differentiation of treatment will constitute discrimination; it will not “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate...”⁴⁶ The European Court of Human Rights has defined discrimination in much the same way:

“A difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised.’”⁴⁷

THE ELEMENTS OF DISCRIMINATION

Under international law, discrimination has three distinct elements. There must be: unfavourable treatment; based on a prohibited ground; lacking reasonable and objective justification.

UNFAVOURABLE TREATMENT

The unfavourable treatment must affect the enjoyment of a right by an individual or group of individuals. Typically, it involves the denial of or interference with a basic service or right. Whether or not a particular measure results in unfavourable

THE EQUALITY PRINCIPLE

Guaranteeing non-discrimination means respecting the equality principle — or treating all individuals equally in both law and fact. Treating people equally, however, does not always mean treating everyone in the same way. This would only be true if we were all identical and lived at all times in exactly the same conditions. Evidently, this is not the case; we differ in countless ways, not least in our gender, the languages we speak, our religious beliefs, our ethnicity, our sexual orientation, our political opinions, how well we can see or hear, our mobility, our wealth and our health.

In most contexts, these differences will not be relevant. In some, however, they may justify different treatment. In yet others, they may even require it. The key to treating people equally lies in identifying the relevance of these differences in different contexts, so as to ensure equality in fact as well as apparent equality in law. Where the difference is not relevant, such as the colour of one's skin to the ability to do a particular job, different treatment will amount to discrimination.

There may be some circumstances, however, in which equal treatment, or the failure to take a relevant difference into account, would in practice result in inequality or discrimination.⁴⁸ This will be the case where existing inequalities are such that a nominally level playing field perpetuates the exclusion of a historically discriminated group.⁴⁹ It will also be the case where the equal enjoyment of rights is denied by the failure to accommodate relevant differences generating special needs, for instance, where wheelchair users are denied access to public buildings by the failure to install ramps.

The equality principle is well established in international law. Stated simply it requires that: “What are equal are to be treated equally and what are different are to be treated differently...”⁵⁰ where the difference in treatment must be both objectively justified and proportionate to the aim to be achieved.⁵¹

treatment is to be measured objectively; it is the effect of a measure and not the intention behind it that matters. In practice, discrimination can occur in a variety of different ways:

- **A distinction** — for instance paying women less than men for the same work, or the targeting of young black men for ill-treatment by the police.
- **An exclusion** — for instance refusing identity documents to Roma and Travellers, or denying child asylum-seekers the right to access to education.
- **A restriction** — for instance limiting the freedom of assembly of lesbian, gay, bisexual or transgender people or placing restrictions on the construction of Muslim places of worship.

- **A preference** — for instance providing public funding to a single State Church, or favouring applications for public housing from white individuals.
- **A segregation** — for instance systematically sending disabled children or Romani children to separate schools without regard for their abilities and needs.⁵²
- **A denial of reasonable accommodation** — for instance, failing to provide wheelchair access to public buildings,⁵³ or to accommodate the reasonable requirements of an employee’s religious beliefs.

PROHIBITED GROUNDS

Not all unfavourable treatment is discriminatory. In order for there to be discrimination, the unfavourable treatment must be based on a prohibited ground such as: ethnicity, religion, national or social origin, language, physical appearance, descent, gender, gender identity, sexual orientation, age or disability.

Discriminatory grounds can include any personal quality, characteristic or circumstances upon which arbitrary distinctions are made. These often involve characteristics crucial to individuals’ identity such as religion, ethnic origin, nationality, language, gender, gender identity and sexual orientation. However, this need not be the case. It is increasingly recognized that discrimination may be based on a wide range of personal circumstances that may vary over time, such as political beliefs, health and social or economic status.⁵⁴

Different human rights instruments cover different grounds of discrimination. Some, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), only cover specified grounds.⁵⁵ Others, such as the International Covenant on Civil and Political Rights (ICCPR)⁵⁶ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁵⁷ and the Charter of Fundamental Rights of the European Union contain “open-ended” lists of grounds, including within their scope unfavourable treatment based on grounds other than those specifically listed.

Open-ended lists, commonly preceded by the words “such as” or “including”, allow human rights bodies interpreting the instruments to adapt to new situations and evolving social customs, instead of remaining constrained by the concerns at the time of drafting. For example, discrimination based on sexual orientation is now widely recognized as human rights violation but this ground has until recently rarely been mentioned explicitly in human rights instruments.⁵⁸ It has nonetheless repeatedly been read into open-ended non-discrimination provisions by international courts and monitoring mechanisms,⁵⁹ which are increasingly extending the same protection to transgender individuals.⁶⁰

REASONABLE AND OBJECTIVE JUSTIFICATION

International human rights bodies have clearly established that not all cases of unfavourable treatment based on a prohibited ground constitute discrimination. For

there to be discrimination, the unfavourable treatment must lack an objective and reasonable justification. In other words, if the unfavourable treatment pursues a legitimate aim (such as protecting public health or security) and is proportional to that aim, there is no discrimination.⁶¹

This is generally the most difficult and controversial aspect of the determination of discrimination. The assessment of what is reasonable needs to be based on a close examination of each individual case. This examination will need to reflect both very specific local considerations and the broader context in which the unfavourable treatment is taking place.

In many cases, even if the unfavourable treatment pursues a legitimate aim (such as protecting public order), if there are alternative means for achieving the aim that do not adversely affect particular groups, then the unfavourable treatment will be found to be disproportionate. The European Court of Human Rights has been particularly insistent that unfavourable treatment based on prohibited grounds will require particularly weighty justifications to be compatible with the non-discrimination principle.⁶²

TYPES OF DISCRIMINATION

International human rights law recognizes two forms of discrimination: direct and indirect.⁶³

DIRECT DISCRIMINATION

Direct discrimination is unfavourable treatment that is, on its face, based on a prohibited ground. Direct discrimination may be “open”, that is, explicit in the text of a law or clear from a particular practice. It can also be “hidden” but nevertheless identifiable.

EXAMPLES OF DIRECT DISCRIMINATION

- Campsite regulations prohibiting Travellers.
- A restriction on access to emergency health care based on residency status.
- A sign outside a swimming pool reading: “no Arabs allowed”.
- A system of public sanitation which systematically fails to cover areas where members of certain minority groups are resident.
- A law banning the use of minority languages in the media.
- The refusal by police to provide protection to LGBT activists during public gatherings.

INDIRECT DISCRIMINATION

Indirect discrimination occurs when an apparently neutral law, rule, procedure or practice results in a disproportionate disadvantage for, or disparate impact on, a particular group which has no objective or reasonable justification.⁶⁴ It is the effect of

a standard or practice upon a particular group, and not necessarily the intention, that matters in determining whether this type of discrimination has occurred.⁶⁵

EXAMPLES OF INDIRECT DISCRIMINATION

- A law that limits the definition of “housing” for the purpose of social assistance to fixed housing, thereby excluding Roma and Travellers living in caravans.
- A testing procedure used to determine whether children are to be streamed into the ordinary school system or schools for those with learning difficulties that assumes a linguistic ability that children belonging to certain minority groups do not possess.
- A height requirement for a job excluding the majority of women.
- A law governing property restitution that imposes a continuous residency condition where individuals belonging to certain ethnic groups have been obliged to live outside of the country for several years.

The non-discrimination provisions in most international human rights instruments cover both direct and indirect discrimination. Sometimes this is indicated by a reference to the effect of unfavourable treatment in the wording of the non-discrimination provision itself. For instance, Article 1 of ICERD defines racial discrimination as:

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

More frequently, however, this is clarified through interpretive commentary⁶⁶ and jurisprudence. For example, the case law of the European Court of Human Rights makes clear “that if a policy or general measure has disproportionate prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group.”⁶⁷

MULTIPLE DISCRIMINATION

In practice, individuals often experience what is known as “multiple” or “intersectional” discrimination. This will occur where they simultaneously fall into two categories of discriminated person. Multiple discrimination often results in unique forms of discrimination. Typically, it affects some of the most vulnerable members of society, such as immigrant women and the impoverished old, who are trapped in particularly severe cycles of exclusion and deprivation.

The specificity of multiple discrimination needs to be recognized in order to be tackled effectively.⁶⁸ To do so it is essential to widen the analytical lens beyond each individual ground and seek to capture the lived experiences of real people, both in the formulation of policy and when hearing allegations discrimination in the courts.

In a General Recommendation on “gender-related dimensions of racial discrimination”, the Committee on the Elimination of Racial Discrimination – the body of independent experts which monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) – considered the different ways in which racial discrimination may affect women and men due to intersecting grounds:

“...racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.”⁶⁹

Widespread ethnic profiling practices⁷⁰ (see Information and policy issues, Ethnic profiling p34) occurring across Europe in the context of anti-terrorism measures provide striking examples of multiple discrimination. Those disproportionately singled out by police for searches, raids, detention, preventive arrest and other discriminatory practices tend to be not only Muslim, but also young (between late teens to early thirties), male and presumed to be of Middle Eastern, South Asian or North African descent.⁷¹

The overlapping of personal identities and characteristics also opens the door for one ground to serve as a proxy for others where domestic legal protection against discrimination on that ground is lacking or weak. Nationality requirements, for instance, often serve to mask discrimination on the grounds of religion or ethnicity.

MULTIPLE DISCRIMINATION: ROMANI WOMEN IN MACEDONIA

“Romani girls and boys are divided from when they are very little. If you are a girl, you don't go to school. You stay in the house. If you are a boy then you go to school to make you a man. Even when a girl goes to school, she has to get home in time to look after her brothers and sisters.”

“Lots of Romani women were applying for work in a textile factory ... I was among them. The manager told us we don't employ Romani women because our employees don't want to work with Roma.”

These quotes show how Romani women are often discriminated against on account of both their gender and their ethnicity. Looking at the access of Romani women to education, employment and health care, [Amnesty International's] report concluded that such double discrimination – by the state, by non-state actors and often by men within the Romani community – is widespread, routine and pervasive.

The cases documented by Amnesty International are reflected in statistics collected by the United Nations Development Programme (UNDP), according to

which some 39 per cent of Romani women living in Macedonia have had no education, or had not completed their primary education, compared to 22 per cent of Romani men and 8 per cent of non-Roma living in close proximity to Roma; 83 per cent of Romani women and 65 per cent of Romani men had never been employed within the formal economy, compared to 50 per cent of non-Roma living in close proximity to Roma; some 31 per cent of Romani women compared to 27 per cent of Romani men suffered from chronic illness, compared to 23 per cent of non-Roma living in close proximity to Roma.⁷²

Amnesty International found that Romani women were not just discriminated against on account of their gender and ethnicity, but also on account of their poverty and, often, their lack of formal documentation. Such multiple discrimination typically results in vicious cycles of exclusion and prejudice and the cumulative denial of several rights as the denial of one, such as the right to education, will often result in greater difficulties in accessing others, such as the right to work or adequate housing.

Amnesty International, *"Little by little we women have learned our rights": The Macedonian government's failure to uphold the rights of Romani women and girls* (Index: EUR 65/004/2007).

3/INTERNATIONAL NON-DISCRIMINATION STANDARDS AND MONITORING MECHANISMS

The international human rights framework includes a great many anti-discrimination norms in a variety of different instruments at different levels. While they all share the same, or broadly similar, definitions of discrimination, they cover different grounds, protect different rights and are enforced in different ways.

UNITED NATIONS

At the universal level, the legally binding International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) both prohibit discrimination on the grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” in relation to the enjoyment of the other rights set out in those two treaties.⁷³ Anti-discrimination provisions of this kind, which limit the protection they offer to the enjoyment of the other fundamental rights set out in the same instrument, are known as “accessory” provisions. The ICCPR does, however, contain a further, “free-standing”, article prohibiting discrimination on the same grounds in all areas and in respect of all rights.⁷⁴ It states:

“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.”

Other binding UN instruments provide additional protection against discrimination to specific groups or on specific grounds. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW) and on the Rights of Persons with Disabilities (CRPD) all contain free-standing provisions prohibiting discrimination in all areas on the grounds of, respectively, “race, colour, descent, or national or ethnic origin”, gender and disability.⁷⁵ The Convention on the Rights of the Child prohibits discrimination against children in respect of the rights it contains on the same grounds as the ICCPR and the ICESCR.⁷⁶

With the exception of the Convention on the Rights of Persons with Disabilities, all these Conventions have been ratified by all the Council of Europe member states⁷⁷ and are therefore binding on them.⁷⁸ The implementation of these treaties is monitored by committees of independent experts — their respective “treaty bodies” — which periodically review the compliance of signatory states with their obligations under the treaties. The Committees which monitor the implementation of the ICCPR, CEDAW and ICERD, may also examine individual complaints from those in the very large majority of countries in Europe that have formally recognized this competence.⁷⁹

COUNCIL OF EUROPE

Established in 1949 and now comprising 47 member states, the Council of Europe⁸⁰ is the region’s oldest intergovernmental organization for the promotion of human rights, democracy and the rule of law. It has developed a great many human rights standards, whose implementation it monitors through a variety of different mechanisms and procedures. Foremost among its normative instruments is the European Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights or the ECHR). The ECHR potentially offers considerable protection against discrimination as it guarantees all individuals a right of petition to an international court – the European Court of Human Rights – before which they may seek to obtain a remedy for a breach of their rights under the ECHR.

The ECHR contains an open, accessory provision prohibiting discrimination in the enjoyment of the other rights set out within it 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”.⁸¹ However, while this article is “open”, in the sense that it does not limit the grounds upon which a claim of discrimination may be based, it does limit the protection afforded to the enjoyment of the other human rights set out in the ECHR. As it does not expressly cover all economic, cultural and social rights, its anti-discrimination clause will not necessarily protect individuals against discrimination in, say, the access to employment or health care⁸². An additional Protocol to the ECHR, Protocol 12, does contain a free-standing anti-discrimination provision that would cover all instances of discrimination in respect of all rights. As of November 2008, however, only 17 of the 47 Council of Europe member states (six being EU member states) had ratified this Protocol.⁸³

Additional protection against discrimination in Europe is provided by the Council of Europe European Social Charter⁸⁴ (ESC), which covers a wide range of economic and social rights. The ESC contains an open, accessory provision prohibiting discrimination. Unlike most treaties, however, the ESC gives states the option of accepting some provisions and opting out of others and is therefore frequently referred to as an “à la carte” instrument. The European Committee of Social Rights (ECSR) monitors the implementation of this treaty – and the more comprehensive revised European Social Charter (ESC) which is intended to replace it once all Council of Europe member states have become parties.

EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE

In addition to the European Court of Human Rights and the European Committee of Social Rights, another body of the Council of Europe is also mandated to monitor discrimination in Council of Europe member states: the European Commission against Racism and Intolerance (ECRI). ECRI is an independent human rights monitoring body which focuses on discrimination on the grounds of colour, language, religion, nationality and national and ethnic origin. It monitors racist attitudes and racial discrimination in each of the member states of the Council of Europe and draws up reports containing its analysis of laws and practice as well as recommendations as to how each country might deal with the problems identified. It also adopts General Policy Recommendations to member states outlining measures that states should take to combat different forms of racism and xenophobia.⁸⁶

The ESC is not enforced by the European Court of Human Rights, however, and there is no right of individual petition to the ECSR. However, 11 Council of Europe member states⁸⁵, 10 of which are also members of the EU, have ratified an Additional Protocol to the ESC which grants the ECSR the authority to consider collective complaints brought by certain organizations, which allege that the state has failed to implement a provision of the treaty which it has accepted. This mechanism can be used by international and national trade unions and employers' organizations, as well as non-governmental organizations that have been qualified to do so, to challenge systemic discriminatory practices affecting the enjoyment of rights set out in the ESC.

EUROPEAN UNION

European Union (EU) responsibilities in the field of human rights, and in the fight against discrimination in particular, have developed considerably since the foundation of the European Economic Community in 1957. The EU's current aims and competencies are set out in two treaties: the Treaty establishing the European Community and the Treaty on European Union. Article 6 of the Treaty of the EU proclaims that the EU "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" and states that the EU "shall respect fundamental rights, as guaranteed by the ECHR. Article 13 of the Treaty establishing the European Community provides a legal basis for EU action "to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

The EU's main human rights instrument is the Charter of Fundamental Rights. This instrument, which complements and, in some areas, builds on existing international human rights norms, contains a provision prohibiting,

*“any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.”*⁸⁷

The Charter of Fundamental Rights also requires the EU to “respect cultural, religious and linguistic diversity.”⁸⁸ At the moment the Charter has an essentially declaratory status. However, the Treaty of Lisbon (the EU Reform Treaty), which was signed by all EU member states in 2007, incorporates the Charter into EU law. If the Treaty is ratified by all member states, the Charter will become binding on EU institutions. It will also be binding on member states when they are acting to implement EU law.⁸⁹ The Treaty also explicitly adds combating social exclusion and discrimination to the list of EU aims.⁹⁰

The Agency for Fundamental Rights (FRA) is the EU’s main human rights monitoring mechanism.⁹¹ Its objective is to conduct research and analysis and advise EU institutions and member states on the respect for human rights when implementing Community law. Established in 2007, the FRA has replaced the European Monitoring Centre on Racism and Xenophobia (EUMC); and combating racism and xenophobia remains central to its mandate.

ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE

The Organization for Security and Co-operation in Europe (OSCE) is an intergovernmental organization that focuses on conflict prevention, crisis management and post-conflict rehabilitation. It has 56 member states including all of the Council of Europe member states plus Belarus, the former Soviet Republics of Central Asia, the USA and Canada. The promotion of human rights, democracy and the rule of law are central to the OSCE mandate and it has created a number of mechanisms that work in this area. A number of these are particularly active in the anti-discrimination field and the OSCE as a whole has sought to engage more strongly in this area in recent years.⁹⁷

The OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) is the organization’s foremost body for promoting human rights.⁹⁸ In 2004 it launched a Tolerance and Non-Discrimination Programme focusing on the areas of hate crime, racism and xenophobia, anti-Semitism, intolerance and discrimination against Muslims and freedom of religion or belief. It compiles an annual publication on hate crimes in the OSCE area.⁹⁹ The Tolerance and Non-Discrimination Programme’s Information System provides an overview of relevant international standards and initiatives in these areas.¹⁰⁰ The OSCE High Commissioner on National Minorities also addresses systemic practices of discrimination affecting social cohesion and the enjoyment of minority rights in OSCE participating states.¹⁰¹

OTHER INTERNATIONAL NON-DISCRIMINATION STANDARDS

A number of international conventions provide additional protection for particular groups, who, as a result of their specific characteristics, needs or vulnerability, often fall victim to discrimination. These include members of national minorities, migrant workers and those subjected to trafficking in human beings.

The Council of Europe Framework Convention on the Protection of National Minorities, which has been ratified by almost all Council of Europe member states,¹⁰² provides additional protection to members of national minorities. It not only requires states not to discriminate on the grounds of being part of a national minority¹⁰³, but also requires them to promote effective equality by taking due account of the “specific conditions” of minorities.¹⁰⁴ Further positive action is required of states to promote the conditions necessary for national minorities to maintain and develop their languages, traditions and cultural heritage.¹⁰⁵

The European Charter for the Protection of Regional or Minority Languages places additional binding obligations on states parties regarding the promotion and use of minority languages in public life, including in the education system, the media, and in dealings with judicial and administrative authorities.¹⁰⁶

Migrant workers are particularly vulnerable to discrimination on account of their visible differences, their nationality and, often, their irregular residence status. Some differences of treatment on the grounds of nationality and the legality of migrants’ residence will be objectively justified. However, these criteria are often used to discriminate against foreigners in the enjoyment of such fundamental rights as the right to education, housing and due process. Three international instruments provide protection to migrant workers: the International Labour Organization (ILO) 1949 Migration for Employment Convention (Revised), the ILO 1975 Migrant Workers (Supplementary Provisions) Convention, and the UN 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Each convention extends the scope of the persons, rights and areas covered; they have in turn been ratified by progressively fewer countries.

The 1949 Convention is limited to the rights of legally resident migrants in the area of employment. The 1975 Convention extends the protection of legally resident migrants to other fundamental rights and areas beyond employment, while the 1990 Convention also includes minimum standards for the protection of the rights of irregular migrants. As of February 2009, these conventions had been ratified by only 18, 14 and four European countries respectively¹⁰⁷; millions of migrants, in Europe, particularly the most vulnerable migrants in irregular situations are, as a result, denied the supplementary protection that these conventions, and the last in particular, provide.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,¹⁰⁸ contains an internationally agreed definition and some minimum standards for the prevention of human trafficking; it encourages states to take some measures to protect persons who have been trafficked. As of November 2008 it had been ratified by all but eight of the 47 Council of Europe

NON-DISCRIMINATION IN EUROPEAN UNION LAW

The EU has strong competences in the field of non-discrimination by virtue of Article 13 of the Treaty establishing the European Community (TEC), which empowers the EU's institutions to: "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Article 2 of the TEC requires the EU to promote gender equality.

The EU has consequently adopted a number of laws, or "directives"⁹², requiring member states to implement a variety of measures to combat discrimination of different kinds. The directives enacted so far are clustered around three broad areas:

- Non discrimination on the ground of sex
- Non discrimination on the ground of race and ethnicity
- Non discrimination on the remaining grounds of Article 13 of the TEC

The main directives in each of these areas are:

- The Equal Pay and the Equal Treatment Directives (Dir. 75/117 and Dir. 76/207) which address discrimination on the ground of sex. These so called "Gender Directives" have been followed by two more recent directives: Directive 2006/54 on the "equal treatment of men and women in matters of employment and occupation" and Directive 2004/113 on the "equal treatment between men and women in the access to and supply of goods and services". Besides protecting equality between men and women, these legal instruments have also been recognized as providing protection to transgender people.⁹³
- Directive 2000/43 on the "equal treatment between persons irrespective of racial or ethnic origin," sometimes referred to as the "Race Directive".
- Directive 2000/78 on "equal treatment in employment and occupation", sometimes referred to as the "framework directive" or "Equality Directive".

In contrast to the Race and Gender Directives, which provide protection beyond the employment sphere to include discrimination in other important aspects of social

life such as health care, education, social protection and access to goods and services, the Equality Directive 2000/78 only prohibits direct and indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation in the areas of employment and vocational training. There are therefore several significant areas of discrimination that are not covered by EU law. According to the current EU framework, it would, for instance, be unlawful to refuse to rent an apartment to a black Muslim woman because of her ethnic origin, but not on the basis of her religion, sexual orientation or possible disability. While some member states have extended their legal protection to cover discrimination on all grounds in all areas, this is not yet the case across the EU and not a requirement under EU law. In July 2008 the European Commission presented a proposal for a new directive to extend the protection against discrimination on all grounds beyond the sphere of employment.⁹⁴ This proposal requires the unanimous approval of all member states to be adopted.

EU directives require member states to ensure that judicial or administrative procedures are available for the enforcement of the rights and obligations that they cover. Once implemented therefore, individuals should be able to seek a remedy for their breach before national courts.

The implementation of directives at the national level is also monitored directly by the European Commission. The failure to transpose directives into national law may result in infringement proceedings being brought against the non-complying member state. Monitoring by the Commission of the implementation of the 2000 Equality Directives has revealed a large number of short-comings. In June 2007, the European Commission sent formal requests to 14 member States⁹⁵ to implement Directive 2000/43 fully. In January 2008, the Commission informed 11 countries of its concerns regarding the implementation of Directive 2000/78 and gave three further countries formal notice of its intention to initiate infringement proceedings.⁹⁶

member states (of which five are EU members).¹⁰⁹ The Council of Europe Convention on Action against Trafficking in Human Beings requires states which are parties to it to adopt a range of measures aimed at preventing trafficking and protecting victims.¹¹⁰ It includes a chapter on “Measures to protect and promote the rights of victims, guaranteeing gender equality”, which recognizes and seeks to combat the double discrimination that many victims of trafficking often face as both foreigners and women. It was adopted and open for signature in 2005. By November 2008, it had been signed by 41 member states Council of Europe member states, but ratified by only 19, leaving many trafficked persons vulnerable to further abuse and discrimination even after their identification as victims by state authorities.

THE RESPECT FOR ROMA RIGHTS IN THE EU

Research by Amnesty International and other NGOs has shown that sporadic and incomplete responses by the EU and member states have failed to secure structural and sustainable improvements in the situation of many millions of Roma in crucial areas such as the access to education, housing, health and employment.

The EU has both the responsibility and, if used properly, the tools to take a more active role in addressing one of the most extensive and complex human rights problems within its territory. However, it still has no integrated and comprehensive policy specifically targeting discrimination against Roma.

Amnesty International has therefore joined other organizations to emphasize the need for a comprehensive, human rights-based EU Framework Strategy on Roma Inclusion to make more effective use of existing EU funds and instruments.

4/HOW TO GUARANTEE EQUALITY: THE HUMAN RIGHTS FRAMEWORK

The binding international non-discrimination standards considered in the previous section impose a range of different obligations on European states. The purpose of this section is to consider what these standards mean in practice. This section identifies both the measures that states must take to eliminate discrimination, and sets out additional measures and examples of good practice that Amnesty International believes to be particularly important to promoting equal treatment in practice.

The obligations imposed on states under international law can be categorized into three broad types. States must:

- **Respect** the right to non-discrimination, which means that states must ensure that their laws and practice are not discriminatory.
- **Protect** the right to non-discrimination, which means that they must ensure that individuals are protected against discrimination by third parties, through effective regulation and enforcement.
- **Fulfil** the right to non-discrimination, which requires states to take the necessary legislative, administrative, budgetary, judicial and promotional measures to ensure the full realization of the right to non-discrimination.¹¹¹

The obligation to **respect** the right to non-discrimination not only requires states to refrain from interfering with the right, but also imposes a positive duty to identify and eliminate discrimination in state structures, such as institutional racism¹¹² in the police, or the failure to provide effective access to public services to persons with disabilities. States also have a positive duty to investigate, punish and remedy discrimination carried out by or with the consent or acquiescence of public authorities.

States must not only refrain from discriminating themselves, they must also ensure that individuals are **protected** against discrimination by third parties. This means that states must exercise due diligence to prevent discrimination by private or non-state actors through effective legislation, policy measures and the provision of adequate avenues of redress and effective sanctions for discrimination carried out in the private sector.

The obligation to **fulfil** the right to non-discrimination requires states to take a range of measures to ensure that the right is effectively enjoyed in practice in both the public and the private sectors. This obligation includes duties to promote non-discrimination through measures designed to identify widespread discrimination, combat its underlying causes, and prevent future occurrences.

In practice, concrete obligations will often fall under more than one of these headings. International law requires states to take a variety of measures to eliminate discrimination and promote equality, which will often serve multiple functions.

RESPECT THE RIGHT TO NON-DISCRIMINATION

The obligation to respect the right to non-discrimination imposes both positive and negative obligations on states. This means that states must both refrain from discriminating and take positive steps to ensure that they carry out their functions in a non-discriminatory manner.

REFRAIN FROM DISCRIMINATION

A fundamental obligation imposed on states by international law is to ensure that all state actors and institutions, at both the national and the local levels, avoid taking actions that discriminate either directly or indirectly.

This requires states to ensure that:

- Legislation, regulations, circulars and guidelines do not permit or result in discrimination.
- The practices of all public institutions and officials when implementing legislation, providing services or fulfilling any other function do not discriminate.

PROHIBIT THE USE OF DEROGATORY LANGUAGE BY PUBLIC OFFICIALS

The obligation to refrain from discriminating also requires all state actors not to sponsor, incite or defend discrimination carried out by others.¹¹⁸ This means that public and elected officials must take care to avoid speech that incites discrimination, hostility or violence against, for instance, ethnic or religious minorities or migrants – and face sanctions if they do not.¹¹⁹ Inflammatory public discourse against these minorities is commonplace in Europe, however, and can even be heard in national parliaments and from the mouths of senior government officials.

In response to such discourse in respect of refugees and asylum-seekers ECRI has recommended that authorities should ensure that they do not encourage negative attitudes about asylum-seekers and refugees in public opinion;¹²⁰ express generalizations and stigmatizing remarks concerning asylum-seekers or specific groups of asylum-seekers;¹²¹ or propagate prejudices and stereotypes about these groups of persons.¹²² It likewise recommends that politicians, journalists and other public figures should take the utmost care to avoid perpetuating hostility or negative stereotypes about non-citizens and members of minority groups.¹²³ These standards are equally applicable to other groups that are subject to intolerance.

POSITIVE STEPS TO PREVENT DISCRIMINATION

As soon as a state or its agents act in any area of life, respecting non-discrimination standards will require a variety of positive steps to ensure that that action is not in any way discriminatory.

ASSESSING THE IMPACT OF LEGISLATION

Legislatures and authorities considering the introduction of new laws and policies must be careful to consider their likely impact on different groups. Particular care must be taken to ensure that, even if they do not discriminate overtly, new laws and policies do not result in indirect discrimination. The screening of draft legislation by parliamentary human rights committees can greatly contribute to this task. Consultation with a range of representative associations can also be a good way of identifying potential short-comings and eliminating them early in the legislative process.

TRAINING STATE OFFICIALS

Human rights bodies have consistently stressed the importance of adequate training to ensuring that all state officials respect the principle of non-discrimination.¹²⁴ States should carry out targeted training initiatives aimed at all public officials in all sectors (including the judiciary, police, teachers, social workers, health professionals, local authorities, and so on) about relevant non-discrimination and equality standards and ways of implementing them.

This training should also seek to combat common prejudices such as racism, sexism, homophobia, and, where relevant, seek to promote greater understanding of different cultural norms in order to combat the ignorance and underlying prejudices that feed and justify discrimination. Such training is particularly important for public officials who come into contact with individuals from all walks of life.

The UN Committee for the Elimination of Racial Discrimination (CERD) has, for instance, issued a specific recommendation on the training of law enforcement officials, stating that: “Law enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin.”¹²⁵ ECRI has recommended that such training should cover information about racism and discrimination as well as applicable legislation relating to these issues.¹²⁶ It should also relate human rights and non-discrimination standards to operational policing.¹²⁷

TAKING DUE ACCOUNT OF DIFFERENCES

Sometimes, respecting the right to non-discrimination will require more than just treating everyone in the same way. Some groups, such as ethnic minorities or persons with disabilities, may be prevented from enjoying the same rights and accessing the same services as others if relevant factual differences, such as their mobility or linguistic ability, are not accommodated. Sometimes, therefore,

ETHNIC PROFILING

Ethnic profiling is a common police practice in Europe that very often constitutes discrimination. Despite this, it remains under-recorded and poorly understood in many countries.

Ordinary profiling consisting of the identification of the likely attributes of criminal suspects for the purposes of directing law enforcement activity is a standard and often necessary police practice. Descriptive profiles are those which are drawn up on the basis of available evidence to assist the police in the identification of the perpetrators of offences which have been committed; predictive profiles are those which are used preventively to focus intelligence gathering or other pre-emptive measures on those believed to be most likely to be engaged in or planning criminal activity.

Ethnic profiling occurs when the police include criteria such as skin-colour, language, religion, nationality or ethnic origin.¹¹³ While the use of such criteria to direct law enforcement activity does not automatically result in discrimination, it will be discriminatory where it has no objective or reasonable justification.¹¹⁴

The use of ethnic criteria in police profiles may sometimes be justified. Descriptive profiles based on specific and reliable information indicating that the perpetrators of a particular offence belonged to a particular ethnic group will obviously assist the police in identifying and apprehending them. However, not all uses of such profiles will be justified; it would not normally, for instance, be justified to direct police officers stop all white males in the vicinity of the scene of a crime solely on the basis that the offender was known to be white. In assessing whether a particular instance of ethnic profiling is discriminatory, it is necessary to consider the legitimacy of the aim pursued and the reasonableness or proportionality of the means employed. Predictive profiles might also be justified where they are employed to direct a narrow range of minimally intrusive measures on the basis of time- and place-specific operational intelligence. What will almost never be justified, however, is the use of ethnic criteria to place entire communities under suspicion, or subject members of a particular group to intrusive security measures that interfere with their human rights.

The precise extent of discriminatory ethnic profiling in Europe is difficult to measure owing to the almost total absence of official statistics recording the ethnicity of individuals targeted by police activity.¹¹⁵ However, a growing body of research in several countries is revealing widespread discrimination on the basis of ethnic profiles.¹¹⁶

Ethnic profiling is particularly prevalent throughout Europe in relation to the Roma and visible ethnic minorities, who are far more likely to be subjected to random

stops and searches (involving a significantly higher incidence of abuse or ill-treatment) or arrested on the suspicion of involvement in crime than others engaged in the same activity. Although such ethnic profiling sometimes flows from official instructions, it often results from widespread prejudices within law enforcement agencies associating particular groups with criminal activity, which generate structural patterns of discrimination.

Ethnic profiling has been introduced in a much more deliberate, and often quite public, fashion in the context of anti-terrorism activities. Typical focuses for ethnic profiling in this context have been the use of “stop and search” powers to disproportionately check on presumed Muslims, mass raids on and identity checks outside mosques and extensive data-mining (involving the trawling through public computer databases for the records of up to several millions of people falling into extremely broad religious and ethnic categories).

While such ethnic profiling pursues an important and legitimate aim (insofar as it is aimed at the prevention of terrorism), Amnesty International considers that such practices will usually fail to constitute reasonable and proportionate means of achieving it and are therefore discriminatory. Such measures often fail to include all potential suspects within their scope and result in an over-reliance on excessively broad criteria at the expense of more targeted operational policing. It is notable that neither the significant extension of “stop and search” powers in the United Kingdom nor the massive data-mining operation in Germany following the 11 September 2001 attacks in the USA have to date yielded a single successful prosecution for terrorism-related offences. These shortcomings in the operational effectiveness of ethnic profiling need to be considered in conjunction with both the seriousness of the interferences with the rights of the individuals that are targeted (including, in particular, the rights to privacy and freedom of movement) and the broader negative consequences for communities that are collectively tarnished by measures that play to and reinforce xenophobic sentiments.

Greater sensitivity to the detrimental human rights consequences of ethnic profiling and stricter measures to prevent its discriminatory use are required throughout Europe. ECRJ recommends the explicit prohibition of the discriminatory inclusion of ethnic criteria in police profiles and greater efforts to monitor the use of ethnic profiles, including through the collection of data on the ethnicity of the subjects of police interventions.¹¹⁷ Clear guidelines for initiating stops and carrying out identity checks and searches significantly reduce the risk of such powers being employed in a discriminatory way; they are still lacking in many European countries.

respecting the right to non-discrimination will require positive steps on the part of the state (such as the installation of audible announcements for the blind in public places and the provision of interpreters in public institutions) in order to ensure equal treatment in practice (see Information and policy issues, in particular, Temporary special measures, page 51).

PROTECT THE RIGHT TO NON-DISCRIMINATION

International law obliges states to protect individuals against all acts of discrimination, whether these are carried out by the state or by private actors. This means that they must take the necessary measures to prevent, investigate, punish and provide redress for discrimination resulting from state actions or the actions of private individuals, businesses, organizations and other non-state actors.¹³¹

International non-discrimination standards require states to provide protection against a wide range of unfavourable treatment in the private sphere. Individuals must be protected not only against the denial of the equal right to employment, goods and services but also against exploitation and abuse on account of their belonging to a particular category, or to which their belonging to a certain category makes them particularly vulnerable, such as “honour crimes”,¹³² domestic violence,¹³³ and racist¹³⁴ or homophobic attacks.

In practice, states are required to: **develop** comprehensive legislation prohibiting direct and indirect discrimination on all grounds in both the public and the private spheres; **ensure** victims of discrimination access to effective remedies and/or reparation; take action to **prevent** and provide protection against discriminatory acts; **monitor** the implementation of anti-discrimination legislation.

DEVELOP COMPREHENSIVE LEGISLATION PROHIBITING DISCRIMINATION

Anti-discrimination legislation serves both a dissuasive and an educational role. The prohibition of discrimination sends out a clear signal that it is unacceptable, while the classification of different types of discrimination, and the situations in which they can arise, serve to educate the public as to what is really meant by the term.

Effective anti-discrimination legislation requires the introduction of comprehensive civil and administrative law provisions offering individual victims effective avenues of redress. It also requires the criminalization of certain forms of discrimination and the provision of appropriate penalties.

THE PROHIBITION OF DISCRIMINATION IN CIVIL AND ADMINISTRATIVE LAW

It is vital that anti-discrimination provisions in civil and administrative law are comprehensive enough to provide individuals with protection against all instances of discrimination that they might encounter. Non-discrimination legislation should therefore:

ACCOMMODATING DIFFERENCE

Guaranteeing equality in practice will sometimes require relevant differences to be accommodated in order to ensure that groups with special needs are able to access the full range of rights.

For instance, The UN Convention on the Rights of Persons with Disabilities (CRPD) places an obligation on states to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.”¹²⁸ Examples of such measures include the installation of wheelchair ramps and Braille signs in public buildings, the provision of appropriately adapted teaching methods, and information and support services.

The extent of the obligation on states to take such measures is determined by the requirement of “reasonable accommodation”. This principle is defined in the CRPD as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”¹²⁹

A variety of measures may also be required for minority groups that differ from the majority in their language, religion, traditions and way of life, in order to assist them in accessing regular goods and services and to enable them maintain differences that are essential to their identity.¹³⁰ The reasonable accommodation of such differences may require such measures as the provision of material or financial support for minority language media, education in minority languages, or “stopping places” for Roma and Travellers who lead nomadic lifestyles.

It is important to note that measures designed to respond to such needs are neither privileges nor charity. Their adoption is an obligation on states that flows from the right of members of such groups not to special treatment but to equal treatment.

■ Cover all grounds of discrimination

It has been seen in section 3 that different international norms binding on European states prohibit discrimination on different grounds. Very few countries, however, have ratified Protocol 12 to the European Convention on Human Rights, which prohibits discrimination on all grounds in all areas, while the EU Equality Directives cover all grounds, but not equally in all areas. National laws dealing with discrimination still

often only prohibit discrimination on a limited range of grounds – leaving gaps in the law which can be exploited, and allowing serious discrimination to occur, without national remedies being available. Individuals are also often protected to different extents depending on the grounds on which they are discriminated against, as different laws have been introduced at different times offering different guarantees and procedures for enforcing them.

The failure to provide equal protection on all grounds also means that discrimination on impermissible grounds can be disguised under other, formally legitimate, grounds. This often occurs in respect of discrimination on the grounds of nationality,¹³⁵ which is employed to discriminate in practice against certain minority groups, such as the Roma, who may have lived for generations in a country without formally acquiring citizenship.

■ **Cover all sectors**

Many states also limit the coverage of their anti-discrimination legislation to certain sectors, such as employment, but exclude others, such as housing and law enforcement. If anti-discrimination legislation excludes key sectors in which individuals experience discrimination it can have only limited effect in combating structural patterns of discrimination and leaves people vulnerable to social exclusion.

■ **Cover discrimination in both the public and the private spheres**

All actors, public and private, need to fall within the scope of anti-discrimination legislation. Legislation should not allow certain categories of organizations, businesses or persons to discriminate with impunity.¹³⁶

■ **Prohibit both direct and indirect discrimination**

In order to provide effective protection against both direct and indirect discrimination, anti-discrimination legislation should explicitly cover and define both forms. This is important not only to provide redress to victims of all forms of discrimination, but also to raise public awareness of indirect discrimination. The EU Equality Directives specifically require EU member states to include both forms of discrimination in their legal framework in relation to the areas they cover.

■ **Prohibit racial segregation**

The Committee on the Elimination of Racial Discrimination (CERD) and ECRI both recommend that racial segregation¹³⁷ should be specifically prohibited.¹³⁸ ECRI commented in General Policy Recommendation No. 7 that “in theory the application of general legal principles and the definition of discrimination” should enable segregation to be covered, however “practice demonstrates that these acts often tend to be overlooked or excluded from the scope of application of legislation.” ECRI therefore recommends that laws expressly provide that racial segregation is a form of discrimination.

■ **Provide that temporary special measures are not discriminatory**

International human rights law makes clear that temporary special measures are not a form of discrimination and are in certain circumstances in fact required to counter discrimination and bring about de facto equality.¹³⁹ This may be the case, for instance, for measures designed to facilitate the access of persons from ethnic minorities to jobs from which they have traditionally been excluded. Expressly providing in law that such measures are not a form of discrimination is particularly important to countering widespread public perceptions to the contrary.

THE PROHIBITION AND PROSECUTION OF CRIMES WITH A DISCRIMINATORY ELEMENT

International human rights law requires that racially motivated and gender-based violence, which are flagrant and intentional acts of discrimination, should be subject to criminal prosecution under laws providing for sanctions which reflect the gravity of the human rights abuse. The same principles apply to acts of violence motivated by other forms of intolerance such as targeted attacks on gay men, lesbians, bisexual and transgender persons, or persons with disabilities.

ICERD, for instance, stipulates that states parties “shall declare an offence punishable by law ... all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”¹⁴⁰. In General Recommendation 19, the Committee on the Elimination of Discrimination against Women (CEDAW) emphasized the need for: “effective legal measures, including penal sanctions, civil remedies compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault and sexual harassment in the workplace.”¹⁴¹ Some states have created specific criminal offences to cover such violence, while others provide for possibility of recognizing the aggravating circumstance of the discriminatory motive for such attacks through greater sentencing powers.

Law enforcement officials must be assiduous in their investigations where it is suspected that crimes have a racist, homophobic or similar element (often referred to as “hate crimes”). In *Nachova and Others v. Bulgaria*, the European Court of Human Rights stated: “Where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.”¹⁴²

In *Stoica v. Romania*, the European Court of Human Rights further stated “that when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.”¹⁴³

ENSURE ACCESS TO EFFECTIVE REMEDIES

EFFECTIVE REMEDIES

States are obliged to ensure that an effective remedy is accessible to all individuals whose right to be free from discrimination is violated. To this end, states are required to establish accessible and effective judicial and administrative procedures.¹⁴⁷

Generally, individuals should have recourse to judicial remedies. The Committee on Economic, Social and Cultural Rights has stressed that:

“The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a state party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”¹⁴⁸

ECRI has recommended that “in urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination.”¹⁴⁸ This is particularly important in cases where the immediate consequences of discrimination are particularly serious or irreparable (such as eviction from one’s home).¹⁵⁰

Effective remedies will require both adequate reparations for victims and proportionate and dissuasive sanctions against perpetrators of discrimination. The UN Human Rights Committee has emphasized that:

“Article 2, paragraph 3, [of the ICCPR, on non-discrimination] requires that States parties make reparation to individuals whose Covenant rights have been violated... the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”¹⁵¹

In cases of discrimination, compensation should be available for both material and moral damages.¹⁵² Other appropriate remedies might include: the restitution of rights which have been lost; non-monetary forms of reparation, such as the publication of all or part of a court decision; and the imposition on the discriminator of a programme of positive measures, where the discrimination goes beyond an individual instance of discrimination.¹⁵³

It is to be noted that in many European countries criminal and civil law sanctions for various forms of discrimination remain too soft to be effectively dissuasive.¹⁵⁴ It is also notable that the circumstances in which courts or other mechanisms have the power to impose positive measures are relatively few, which often means that individual victims may secure personal redress, without the underlying structural causes of their discrimination being satisfactorily addressed.

ACCESSIBLE REMEDIES

Anti-discrimination legislation should provide for mechanisms and procedures that enable victims to make practical use of available remedies and enforce their rights effectively. This means that avenues of redress need to accommodate the fact that victims of discrimination typically find themselves in a weak position and may face considerable difficulties in substantiating their claims. Discriminators are generally in possession of information that is crucial to proving discrimination, making it particularly difficult for victims to collect evidence (for instance an employer who refuses a job to an individual possesses the information about other candidates, the reasons for rejection and the company's internal composition). Victims of discrimination are often also vulnerable to retaliatory actions by discriminators or other parties. Victims may also face financial difficulties in taking legal action, particularly in employment related cases resulting in the loss of earnings.

International and European¹⁵⁵ standards provide for a number of ways of overcoming these difficulties. They include: ensuring that the burden of proof is shared (and shifted once a prima facie case has been made out by the alleged victim); ensuring that statistics can be used as evidence to prove discrimination; measures to protect against reprisals against those who complain and witnesses; enabling organizations to bring complaints on behalf of victims; ensuring free legal advice and legal aid is available; and supplementing the remedies available through the judicial system with non-judicial and quasi-judicial complaints mechanisms.

■ Provide a shared burden of proof

In the case of *Nachova and others v. Bulgaria*,¹⁵⁶ the European Court of Human Rights ruled that the effective implementation of the prohibition of discrimination under the ECHR may require the use of measures that take into account the difficulties involved in proving discrimination. One way of overcoming these difficulties is to provide for a shared burden of proof for discrimination claims in civil and administrative proceedings. As the EU Directive on “the burden of proof in cases of discrimination based on sex” explains, complainants “could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.”¹⁵⁷

All the EU Equality Directives therefore require EU member states to provide for the shifting of the burden of proof for discrimination claims in administrative and civil courts. They express this requirement as follows:

*“if persons who consider themselves wronged because of a discriminatory act establish, before a civil court or any other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.”*¹⁵⁸

■ Allow statistics as a means of proof

Statistics can provide crucial support to complaints of discrimination. Even where legislation provides for a shifting of the burden of proof in discrimination cases,

HATE SPEECH

In recent years there have been increasingly heated debates in many European countries over the potential conflict between the prohibition of hate speech and the protection of the freedom of expression. While the political and social context of this debate may have shifted since the 11 September 2001 attacks in the USA the human rights standards applicable to this issue have existed for some time and remain constant.

The term “hate speech” is not expressly used or defined in international law. In ordinary discourse, the term is sometimes used loosely to cover any public expression of racist or xenophobic views or opinions offensive to religious believers. However, Amnesty International understands it to refer to those forms of expression described in Article 20 of the ICCPR, that is, “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. It is not enough, therefore, for the content of an utterance to be offensive or hateful for it to constitute “hate speech”; the utterance must, in addition, encourage hostility in, or discrimination or violence by, others. Article 20 of the ICCPR not only permits, but requires, states to prohibit this kind of speech. Hate speech can also be directed at other groups including women, people with disabilities, gay men, lesbians, bisexual and transgender people.

The ECHR contains no express provision requiring the prohibition of hate speech, but has been interpreted in such a way as to allow for its prohibition in a manner consistent with the ICCPR. ICERD goes further than either of these two instruments, however, in that it expressly requires states to provide for the punishment, and not just the prohibition, of the incitement to racial discrimination or racially motivated violence.¹⁴⁴ ICERD also requires the punishment of “the dissemination of ideas based on racial supremacy or hatred” more generally, without the express requirement that such dissemination constitute incitement to discrimination, hostility or violence.

Despite the provision in Article 4 of ICERD – that it should be implemented with due regard for the principles of the Universal Declaration of Human Rights – its potentially broad application has created difficulties for states seeking to transpose the prohibition into national law in a manner consistent with their other human rights obligations.¹⁴⁵ Accordingly, several European states have, when ratifying ICERD, included an interpretative statement stressing the importance they attach to the respect for the rights laid down in the ECHR in the application of Article 4 of ICERD.

This is because the prohibition of hate speech requires a balance to be struck between two equally important rights: the right to non-discrimination and the right to freedom of expression. While the right to non-discrimination reflects the importance of respecting the inherent and equal worth of all individuals, the right to freedom of expression is an essential aspect of freedom itself and a crucial safeguard for the exercise of other rights. It is for this reason that both the ICCPR and the ECHR place strict limits on the extent to which freedom of expression can be restricted. International standards also recognize that freedom of expression is easily eroded and even legitimate restrictions can readily be abused to silence criticism and divergent points of view.

Amnesty International therefore considers that all prohibitions on hate speech should be precisely formulated and require a clear intention to incite discrimination, hostility or violence or a conscious disregard of the risk that such discrimination, hostility or violence would result.

As stated by the European Court of Human Rights, the right to freedom of expression extends “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness, without which there is no ‘democratic society’.”¹⁴⁶

Hate speech is more than merely offensive, however, and is not protected in this way. States have an obligation to combat it. It is essential that their efforts to do so are not limited to formal prohibitions, but extend to broader measures in the fields of education and social policy designed to eliminate the root causes of racism and intolerance.

complainants still need to put forward enough factual evidence for there to be a presumption of direct or indirect discrimination, which is then subject to rebuttal. In cases of indirect discrimination, statistical evidence has proved essential in many cases to demonstrate the negative effect of apparently neutral laws or practices on members of a particular group.¹⁵⁹ International law does not explicitly require states to permit the use of statistics as a means of proving discrimination, but doing so will help states to meet their obligation to provide effective protection against indirect discrimination.¹⁶⁰

■ **Provide protection against reprisals**

Providing complainants and witnesses with protection from retaliation can encourage victims of discrimination to put forward their complaints. The EU Equality Directives require states to “introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.”¹⁶¹ ECRI has recommended that protection against retaliation should “not only be afforded to the person who initiates proceedings or brings the complaint, but should also be extended to those who provide evidence, information or other assistance in connection with the court proceedings or the complaint.”¹⁶²

■ **Provide the possibility for non-governmental organizations to bring complaints**

Allowing NGOs, trade unions or other legal entities to lodge complaints on behalf of victims can also help to overcome the hesitation many victims feel when making complaints, particularly when they allege discrimination on the part of public authorities.¹⁶³ Again, the EU Equality Directives all require states to make this possibility available in respect of the areas they cover.¹⁶⁴

■ **Provide aid with legal costs**

Victims of discrimination frequently face difficulties in enforcing their rights as a result of their inability to access legal counsel or cover the costs involved in pursuing a complaint. It is extremely important for states to ensure that the original discrimination endured by victims is not compounded by further discrimination in the access to a remedy on account of a person’s economic status. States should therefore ensure that legal advice is available to alleged victims of discrimination. Ensuring a process of court-appointed lawyers experienced in the relevant field, for example is one way to help ensure the accessibility of legal remedies for those who do not have their own counsel. In addition, ensuring the availability of qualified quality legal representation free of charge to those who wish to seek a remedy before the courts or other bodies and cannot afford to hire their own counsel is an important way to ensure all victims of discrimination are able to access available remedies.¹⁶⁵

■ **Non-judicial complaints mechanisms**

The access of victims of discrimination to an effective remedy can be greatly facilitated by the creation of non-judicial or quasi-judicial complaints mechanisms offering simpler, faster and cheaper avenues of redress than judicial proceedings. ECRI therefore recommends that states create independent mechanisms competent to “hear and consider complaints and petitions concerning specific cases and to seek

settlements either through amicable conciliation or, within the limits prescribed by the law, through binding and enforceable decisions”.

A number of European countries have created general human rights or specialized equality institutions or Ombudsmen competent to hear and investigate individual complaints of discrimination in both the private and the public spheres. Many of these institutions combine a complaints function with broader statutory powers to promote and monitor state compliance with anti-discrimination standards (see below). While non-binding mediated settlements can provide a shorter and simpler route to redress, it is important that the initiation of such informal proceedings should not preclude victims from seeking judicial remedies should they subsequently wish to.

PROTECT INDIVIDUALS AND GROUPS FROM DISCRIMINATORY ACTS

Under international law, states are required to prevent discrimination not only through its prohibition in law, but also through active intervention to protect the rights of known or likely victims of discrimination. States must, for instance, protect the right of lesbian, gay, bisexual and transgender people not to be discriminated against in respect of the freedom of peaceful assembly not just by allowing events such as Prides to take place, but also by protecting participants against harassment, abuse or disruption from counter-campaigning individuals or groups.¹⁶⁶ Similarly, states must protect places of worship or burial from disturbance and desecration.¹⁶⁷

MONITOR THE EFFECTIVENESS OF NON-DISCRIMINATION LEGISLATION

Despite the gaps identified above, most European countries now have legislation in place prohibiting a fairly wide range of discriminatory practices. Real problems remain, however, when it comes to the implementation of these laws. Remedies are often difficult to access and the activity of public authorities is often inadequately supervised.

International law requires more of states than just establishing legal frameworks. It requires the effective enjoyment of rights in practice. In order to ensure that anti-discrimination legislation is effectively implemented and to ensure that appropriate corrective measures can be taken, it is important that states put in place systems for monitoring its application and identifying shortcomings. These systems should seek to assess the impact of the legislation and monitor the number and nature of complaints, the way they are dealt with and their outcomes. Monitoring systems should be put in place with respect to the implementation of both criminal¹⁶⁸ and civil and administrative law¹⁶⁹ provisions. In respect of criminal law provisions, ECRI has recommended that states: “Ensure that accurate data and statistics are collected and published on the number of racist and xenophobic offences that are reported to the police, on the number of cases that are prosecuted, on the reasons for not prosecuting and on the outcome of cases prosecuted.”¹⁷⁰

FULFIL THE RIGHT TO NON-DISCRIMINATION

International human rights standards do not only require states to prevent discrimination by prohibiting and remedying individual occurrences of discrimination. They also require states to take a variety of proactive measures to counter the causes and consequences of underlying patterns of discrimination in order to promote the equality of all persons in practice.

Discrimination is a widespread phenomenon with a long, complex and varied history in every society in Europe. The attitudes that underpin discrimination are typically deeply embedded. Racism, sexism and other latent prejudices continue to permeate social structures and relations, even if it is less usual than it once was to hear them advocated as explicit ideologies. They manifest themselves in relations with power, privilege, inclusion and exclusion. The fulfilment, or realization, of the right to non-discrimination requires positive action to break these self-perpetuating cycles.

States are therefore under an obligation to identify and correct entrenched discriminatory practices, assist historically or widely disadvantaged groups and promote greater tolerance and understanding.

There are several ways in which states can achieve these goals. They include: imposing **equality duties** on public bodies; creating independent human rights or **equality institutions** to promote and monitor the implementation of non-discrimination legislation; collecting **data** regularly; implementing **temporary special measures**; and combating intolerance through **educational and awareness raising** initiatives.

IMPOSE EQUALITY DUTIES ON PUBLIC AUTHORITIES

International standards are currently evolving as regards the elements that states are required to include in their anti-discrimination legislation in order to proactively counter widespread discrimination. ECRI recommends a number of legislative provisions aimed at eliminating discrimination in public institutions. These include the imposition of a duty on public authorities to promote equality and prevent discrimination in the exercise of their functions.¹⁷¹ Such steps might include the obligation on central, regional and local government bodies to devise and implement “equality programmes” setting out targets and standards for their internal administration and in their dealings with the public.¹⁷²

An obligation on authorities to conduct impact assessments of their regulations and policies on different groups can also help to identify and eliminate institutional discrimination. ECRI recommends that the respect for these duties be monitored by independent equality bodies.¹⁷³

ESTABLISH NATIONAL HUMAN RIGHTS INSTITUTIONS TO PROMOTE EQUALITY

The importance of national human rights institutions for the protection and promotion of human rights is widely accepted by international human rights

bodies. Most European countries now have them, although they differ considerably in their names, functions and competences. They range from ombudsman institutions that take individual complaints, to different types of national commissions mandated to monitor the respect for human rights norms more generally. Some institutions combine both these functions. Some countries have several such institutions, covering different regions or different thematic areas (such as disability, the rights of children, or racial equality), while others combine them all in a single institution.

In 1993, the UN General Assembly adopted the Principles relating to the Status of National Institutions (also known as the Paris Principles) that set minimum standards for effective independent human rights institutions.¹⁷⁴ Human rights bodies monitoring the implementation of treaties in the area of non-discrimination, such as CERD¹⁷⁵, the CEDAW committee, and ECRI¹⁷⁶ have made recommendations on the competences that such institutions should have in their respective areas. These international mechanisms regularly examine the existence and effectiveness of such national institutions in their reporting.¹⁷⁷

The recently adopted Convention on the Rights of Persons with Disabilities specifically requires states parties to “maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention.”¹⁷⁸

The EU Racial and Gender Equality Directives also oblige EU member states to create bodies mandated to provide independent assistance to victims of discrimination in pursuing their complaints about discrimination, conduct surveys, publish reports and make recommendations on any issue relating to the discrimination it covers.¹⁷⁹

Such institutions should as a minimum be mandated to monitor the existence of discrimination in the law and practice of states and public bodies; carry out research into patterns of societal discrimination; advise on the potentially discriminatory impact of draft legislation; propose general or targeted policy measures to combat intolerance and prejudice; issue recommendations for the elimination of discrimination in law and practice; and provide advice and assistance, including legal aid, to individual victims of discrimination in their efforts to obtain redress.

The most effective institutions combine these monitoring and advisory functions with the competence to examine individual complaints of discrimination in both the private and the public sectors. Such institutions should be able to hear and autonomously investigate allegations of discrimination and seek settlements either amicably, through mediation and negotiation with all the parties, or through binding and enforceable decisions. Granting such institutions the power to oblige state and private actors to take a range of special and positive measures to address underlying causes and consequences of discrimination identified in individual cases, or as a result of the review of the fulfilment of statutory equality duties, greatly improves their effectiveness and accelerates change in areas and institutions revealed to engage systematically in discriminatory practices.

It is essential that all anti-discrimination bodies are properly independent, well resourced and staffed, and possess real powers of investigation, both in respect of individual complaints and in relation to general reviews of the respect of non-discrimination standards by state institutions.

COLLECT STATISTICAL DATA ON THE SITUATION OF DIFFERENT GROUPS

Accurate, disaggregated data is vital to identifying and addressing discrimination.¹⁸⁰ It is particularly important in recognizing the indirect discrimination that arises from laws and practices that on the face of it appear neutral. Such data can, for example, reveal low rates of participation of ethnic minority women in the public service, or a disproportionately high number of members of ethnic minorities stopped by police for random checks. Statistical data can provide an important means of demonstrating indirect discrimination, making it possible for individuals to prove that they fall into a class of persons disadvantaged by certain regulations or practices.¹⁸¹

European and international human rights bodies consistently request states to provide disaggregated data covering the prohibited grounds of discrimination, so that they may monitor states' progress in promoting equality.¹⁸² In its General Recommendation No. 24, for instance, the CEDAW committee stated: "in order to enable the Committee to evaluate whether measures to eliminate discrimination against women in the field of health care are appropriate, States parties must report on their health legislation, plans and policies for women with reliable data disaggregated by sex on the incidence and severity of diseases and conditions hazardous to women's health and nutrition and on the availability and cost-effectiveness of preventive and curative measures. Reports to the Committee must demonstrate that health legislation, plans and policies are based on scientific and ethical research and assessment of the health status and needs of women in that country and take into account any ethnic, regional or community variations or practices based on religion, tradition or culture."

Statistical monitoring is also essential for designing and monitoring the implementation of policies and measures to combat discrimination and promote full equality.¹⁸³ The Advisory Committee on the Framework Convention for the Protection of National Minorities has repeatedly noted that discrepancies in estimates as to the numbers of persons belonging to national minorities can "seriously hamper the ability of the state to target, implement and monitor measures to ensure the full and effective equality of persons belonging to national minorities."

There is a widespread, but erroneous perception that collecting data on religious belief, ethnicity or origin violates the rights to privacy and the protection of personal data and perhaps even non-discrimination standards. So long as the purpose for which such data is required is legitimate (which it will be where the aim is precisely to monitor possible discrimination) and adequate safeguards are in place to ensure individual anonymity, there is no legal reason why the provision or collection of such data should not be required.¹⁸⁴

NATIONAL ACTION PLANS AGAINST RACISM

At the UN World Conference against Racism¹⁸⁵ held in Durban, South Africa, in 2001, all EU countries signed up to a Programme of Action that urged states “to establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance, including their gender-based manifestations.”¹⁸⁶ Only half of all EU states have adopted such plans; a number are still in the process of developing them, while 10 have yet to begin.¹⁸⁷

National Action Plans against Racism are comprehensive, long-term strategies based on a detailed analysis of the nature, causes and consequences of racism in all areas and sectors and containing concrete legislative and policy measures to combat it. They should be developed through a process of broad consultation with civil society and government agencies and contain concrete, time-specific targets.

While the precise scope and content of National Action Plans against Racism will vary from country to country, they should all:

- contain measures to address racism in the delivery of public services, the functioning of the criminal justice system and the access to employment, housing, health and education;
- contain measures to promote the greater inclusion of discriminated groups in public life, representative government and national and local administrations;
- aim to strengthen anti-discrimination legislation and improve access to effective remedies;
- address the root causes of racism and intolerance and contain measures to strengthen the enjoyment of cultural and minority rights.

States should aim to achieve these goals through legislation, their social policies, the introduction of special and positive measures where appropriate, the education of public officials in non-discrimination standards and practices, public awareness-raising campaigns and the education system.

The success of National Action Plans against Racism depends on their ability to engage with all organs and sectors of society and the existence of a strong co-ordinating authority within government mandated to drive and monitor their implementation. Assessing the effectiveness of the individual components of National Action Plans against Racism, and ensuring their responsiveness to new and multiple forms of discrimination requires both the identification of indicators of change and the collection of disaggregated data enabling it to be measured accurately.

IMPLEMENT TEMPORARY SPECIAL MEASURES

Discrimination, particularly widespread and longstanding discrimination, often results in continuing disadvantage and exclusion long after its formal prohibition. Effectively combating discrimination where it has become deeply ingrained in social relations and institutional practices may require a variety of measures to accelerate the equal enjoyment of rights by discriminated groups in different areas. Such measures might include additional material, financial or vocational support for members of discriminated groups, facilitating their access to goods and services, reserved places and equality targets. (See Information and policy issues, Temporary special measures, page 51.)

International law is clear that states are under an obligation to introduce special measures, where, and for so long as, they are objectively justified. Article 2(2) of ICERD states, for instance:

“States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”

Providing for the possibility of the imposition of temporary special measures on both public bodies and private entities by judicial or other appropriate mechanisms will also contribute to the fulfilment of the obligation on states to ensure the effective enjoyment of the right to non-discrimination. ECRI, for instance, recommends that the law “should provide for the possibility of imposing a programme of positive measures on the discriminator” as “this is an important type of remedy in promoting long-term change in an organisation.”¹⁸⁸ For instance, the law might allow for a company found discriminating against women in decisions over job promotion to be obliged to review its standards and procedures for determining promotions and set targets for hiring women into management positions.

COMBAT PREJUDICE AND RAISE AWARENESS

The obligation to promote the right to non-discrimination includes fighting against the underlying prejudices that feed and legitimize discrimination. States are therefore obliged to adopt immediate and effective measures, especially through teaching, education, culture and public information to combat stereotypes based on ethnicity, nationality, language, religion, sexual orientation, sex, disability and other prohibited grounds.¹⁹⁶ Awareness raising measures should target the general public as well as public institutions and specific actors.¹⁹⁷ States are also required to ensure that their education systems combat negative stereotypes and promote an appreciation and respect for diversity. They should review school textbooks and

TEMPORARY SPECIAL MEASURES

Often members of historically disadvantaged groups continue to be discriminated against long after their formal equality in law has been achieved as lingering societal prejudices and the perpetuation of entrenched practices and power relations result in the continued favouring of one group over another.

In such circumstances, respecting the equality principle may require the adoption of temporary special measures designed to assist members of such groups in overcoming structural obstacles to achieving genuine equality in practice. Such measures may include the granting of preferential treatment to members of disadvantaged groups compared to the rest of the population. Such measures may for instance be necessary to ensure the greater representation of women or members of ethnic minorities in public office.¹⁸⁹

While such measures may on occasion be of a similar nature to those required to accommodate relevant differences (see Information and policy issues, Accommodating difference, p37; for instance, targeted information and support programmes), it is important to note that their rationale is different. While the aim of both types of measure is to promote equality in practice, temporary special measures are not designed to accommodate relevant differences that would otherwise disadvantage individuals in the equal enjoyment of their rights, but to overcome the negative consequences of continuing discrimination on the basis of irrelevant differences.

Examples of temporary special measures include targeted financial assistance and training, the development of campaigns directed at equal participation and setting quotas and targets to promote the equal access to employment, education and representative government.

Temporary special measures are often referred to by a variety of different names.¹⁹⁰ Some of the more widely used include: “special measures”, “positive measures”, “positive action” and “affirmative action”.¹⁹¹ Such measures are also sometimes referred to as “positive discrimination”. This term is misleading, however, as special measures are not really discrimination at all. Discrimination is by definition unreasonable, arbitrary and unjust treatment. If the positive measure is proportionate to the legitimate goal it seeks to achieve (that is, equality), it would not amount to discrimination.¹⁹²

The purpose of temporary special measures must, therefore, be clearly articulated and the means must be very carefully tailored to meet the aims. Care must be taken to ensure that temporary special measures do not result in segregation.¹⁹³ It also follows that such measures will also only be justified for so long as the societal disadvantage persists. Any continuation of the measures beyond this point would no longer be objectively justified.¹⁹⁴ Temporary special measures are not only allowed, in some circumstances they are required.¹⁹⁵

other educational material to ensure that stereotypes are not promoted. Human rights issues including non-discrimination and respect for diversity should be included in the school curriculum.¹⁹⁸

The CEDAW, for instance, requires states to take all appropriate measures towards “The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.”¹⁹⁹

These measures should aim not only at countering negative stereotypes, but also providing objective information about the situation of group members that recognize individuals’ multiple identities.

5/PUT AN END TO DISCRIMINATION

Whether it's being turned away from a restaurant because of the colour of one's skin, or being assaulted in the street for speaking the wrong language or praying at the wrong place; whether it's being passed over for promotion because of one's gender or age, or being insulted for one's sexual orientation; whether it's being denied access to education on account of a disability, or adequate housing on account of one's ethnicity: discrimination, in big ways and small, blights the lives of millions of people across Europe.

Indeed, prejudice is the single greatest cause of human rights violations in Europe today. Combating prejudice, and eliminating the widespread discrimination that results, count among the regions' most important and difficult human rights challenges.

RECOMMENDATIONS

Amnesty International calls on all Council of Europe member states to:

- Ratify and implement Protocol 12 to the European Convention on Human Rights, on the general prohibition of discrimination.

Amnesty International calls on the European Union to:

- Strengthen its anti-discrimination legislation to provide equal protection against discrimination on all grounds and in all areas.

Amnesty International further calls on the governments of all European countries to:

- Prohibit direct and indirect discrimination on all grounds in all areas and to ensure that victims of discrimination, including multiple discrimination, have access to effective judicial remedies, including, where necessary, through the provision of legal aid and through allowing non-governmental organizations to represent or bring cases on behalf of individual victims.
- Ensure that hate crimes are effectively combated and that victims have access to effective remedies.
- Introduce statutory equality and non-discrimination duties for all public bodies and provide for the monitoring of their compliance by independent monitoring mechanisms which report publicly.

- Create independent national anti-discrimination bodies to monitor and make recommendations regarding the respect for non-discrimination legislation; that have effective investigative powers; are able to examine individual complaints of discrimination in both the private and the public sector and take binding and enforceable decisions in respect of them; and are adequately staffed and funded.
- Consult widely with civil society, including in particular relevant non-governmental organizations, when considering the introduction of measures which risk having an adverse affect on particular groups, or which are designed to combat discrimination and intolerance or assist discriminated groups.
- Ensure the effective monitoring of the impact of legislation and policies on different groups, particularly in relation to the provision of public services and law enforcement, including through the collection and publication of disaggregated data.
- Adopt and effectively implement national action plans to combat the causes and manifestations of discrimination.
- Provide effective training to public officials in non-discrimination standards and, where relevant, in intercultural understanding.
- Ensure that the promotion of tolerance and the respect for diversity are fostered through public education systems and awareness-raising measures.
- Implement the recommendations of relevant international human rights protection mechanisms.

ENDNOTES

1. For the purposes of this publication, “Europe” is understood to include the 47 member states of the Council of Europe plus Belarus.
2. According to the 2008 Eurobarometer, 62% of Europeans believe that discrimination on the grounds of ethnic origin is widespread; 51% believe it to be widespread on the grounds of sexual orientation, 45% on the grounds of disability, 42% on the grounds of religion and 36% on the grounds of gender. *“Discrimination in the European Union: Perceptions, Experiences and Attitudes”*, July 2008, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf. See also: Majorities’ Attitudes Towards Minorities: Key Findings from the Eurobarometer and the European Social Survey, March 2005; The European Monitoring Centre on Racism and Xenophobia (EUMC). Available at <http://fra.europa.eu/fra/material/pub/eurobarometer/EB2005/EB2005-summary.pdf>. al.
3. See *Abdulaziz, Cabales and Balkandali v the United Kingdom* (App. Nos. 9214/80, 9473/81, 9474/81, 28/05/1985) at paragraph 91.
4. Small indigenous Russian-speaking minorities in the Baltic States were greatly swelled by an influx of Russians after 1945.
5. See for instance a survey, referred to in an essay by Istvan Pogany for the Human Rights Law Review, which revealed that out of 500 degree level history students in Hungary 35% agreed that a propensity to commit crime was “in the Gypsies blood” and 60% agreed with the statement that the Roma are themselves primarily responsible for anti-Roma sentiment. *Minority Rights and the Roma of Central and Eastern Europe*, Human Rights Law Quarterly 2006 6:1-25. The Survey itself is available (in Hungarian) at <http://www.es.hu/pd/display.asp?chanel=CIMOLDAL0407>.
6. See report by Alvaro Gil-Robles, *The Human Rights Situation of the Roma, Sinti and Travellers in Europe*. Strasbourg: CommDH(2005)4. See also European Commission against Racism and Intolerance country reports, Opinions of the Advisory Committee for the Framework Convention on National Minorities and European Roma Rights Centre country reports.
7. For more information on the situation of Europe’s Roma visit for example the website of the European Roma Rights Centre at www.errc.org.
8. Amnesty International, *False starts: The exclusion of Romani children from primary education in Bosnia and Herzegovina, Croatia and Slovenia*, (Index: EUR 05/002/2006); *Still separate, still unequal: Violations of the right to education of Romani children in Slovakia* (Index: EUR 72/002/2007).

See also the judgment of the European Court of Human Rights in *D. H. and Others v Czech Republic* Application No. 57325/00, 13th November 2007.
9. Recommendations for the improvement of the respect for the human rights of Roma have been drawn up by both the UN Committee on the Elimination of Racial Discrimination (General Recommendation No. 27: Discrimination against Roma) and the Council of Europe’s European Commission against Racism and Intolerance (General Policy Recommendation N° 3: Combating racism and intolerance against Roma/Gypsies).
10. Amnesty International, *Linguistic minorities in Estonia: Discrimination must end* (Index: EUR 51/002/2006).
11. See Amnesty International, *The Balkans: Summary of Amnesty International’s Concerns in the Region: January – June 2007* (Index: EUR 05/003/2007). See also

- Amnesty International, *Slovenia: The “erased” – Briefing to the UN Committee on Economic, Social and Cultural Rights* (Index: EUR 68/002/2005).
- 12.** See, for instance, Amnesty International, *Bosnia and Herzegovina: Behind closed gates: Ethnic discrimination in employment* (Index: EUR 63/001/2006)
- 13.** Amnesty International believes that the existence of a minority should be determined according to reasonable and objective criteria. Membership of a minority should be by choice and self-identification; UN Committee on the Elimination of Racial Discrimination, General Recommendation VIII (Thirty-eighth session, 1990).
- 14.** 2008 Report on Racism and Xenophobia in the Member States of the EU, p. 58; The European Monitoring Centre on Racism and Xenophobia.
- 15.** 2008 Report on Racism and Xenophobia in the Member States of the EU, p. 43; The European Monitoring Centre on Racism and Xenophobia.
- 16.** 2008 Report on Racism and Xenophobia in the Member States of the EU, p. 27; The European Monitoring Centre on Racism and Xenophobia.
- 17.** See for instance, Amnesty International, *Russian Federation: Violent racism out of control* (Index: EUR 46/022/2006).
- 18.** See for instance, Amnesty International, *Ukraine: Government must act to stop racial discrimination* (Index: EUR 50/005/2008).
- 19.** See for instance, Amnesty International, *France the search for justice: The effective impunity of law enforcement officers in cases of shootings, deaths in custody or torture and ill-treatment* (Index: EUR 21/001/2005) p. 2.
- 20.** See for instance, Amnesty International, *Spain and Morocco: Failure to protect the rights of migrants – Ceuta and Melilla one year on* (Index: EUR 41/009/2006). Amnesty International, *Spain: The Southern Border: the state turns its back on the human rights of refugees and immigrants* (Index: EUR 41/008/2005). Amnesty International, *Malta: Investigation of incidents at Hal-Safi Detention Centre finds excessive use of force and ill-treatment of detainees by armed forces* (Index: EUR 33/002/2005). Amnesty International, *Italy: Temporary stay – Permanent rights: The treatment of foreign nationals detained in ‘temporary stay and assistance centres’ (CPTAs)* (Index: EUR 30/004/2005). Amnesty International, *Greece: Out of the Spotlight: The rights of foreigners and minorities are still a grey area* (Index: EUR25/016/2005). Amnesty International, *United Kingdom – Seeking asylum is not a crime: detention of people who have sought asylum* (Index: EUR 45/015/2005).
- 21.** See for instance: Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Denmark, 13th-16th April 2004, (CommDH (2004)12), p.6.
- 22.** Amnesty International, *Living in the Shadows: a primer on the human rights of migrants* (Index: POL 33/006/2006).
- 23.** Anti-Semitism: Summary overview of the situation in the European Union 2001-2007, Updated Version January 2008; European Monitoring Centre on Racism and Xenophobia (EUMC).
- 24.** Muslims in the European Union: Discrimination and Islamophobia, December 2006; European Monitoring Centre on Racism and Xenophobia (EUMC).
- 25.** For example, the public demonstrations against the construction of a mosque in Cologne, Germany, in June 2007 and, in 2008, the move by the Swiss People’s Party to force a national referendum to prohibit the building of minarets on the grounds of the symbolizing a “politico-religious claim to power, which challenges human rights.”
- 26.** *Muslims in the European Union: Discrimination and Islamophobia*, December 2006; See in particular Chapter 4 on Manifestations of Islamophobia: focusing on violence and crime pp 66-107. European Monitoring Centre on Racism and Xenophobia (EUMC).
- 27.** See for instance: ECRI’s third report on Austria, CRI(2005)1.

- 28.** For more information, see James Goldston: *Ethnic Profiling and Counter-Terrorism: Trends, Dangers and Alternatives*. June 2006.
- 29.** See for instance: Amnesty International, *UK: Human Rights: A Broken Promise* (Index EUR 45/004/2006); Amnesty International, *United Kingdom: Deportations to Algeria at all costs* (Index EUR 45/001/2007). See also, Amnesty International, *Europe and Central Asia: Summary of Amnesty International's Concerns in the Region: January – June 2007* (Index EUR 01/010/2007) for an analysis of legislation in Italy permitting the deportation of foreigners believed to constitute a security threat without adequate procedural guarantees (the Pisanu Law).
- 30.** Such symbols and dress may be gender specific, such as headscarves for Muslim women, or the *yarmulke* for Jewish men, or gender neutral, such as the *karra* for Sikhs or crosses for Christians.
- 31.** The rights guaranteed by these articles apply equally to religious and non-religious beliefs.
- 32.** The UN Human Rights Committee has stressed that the requirement of necessity means that the restriction must be the least intrusive measure that might achieve the intended legitimate objective, and it implies also that the specific interference in any particular instance must be proportionate to that objective. See UN Human Rights Committee, General Comments Nos. 22, 27 and 31.
- 33.** For example, see UN Human Rights Committee, General Comment No. 22.
- 34.** Report to the UN Commission on Human Rights submitted by Asma Jahangir, Special Rapporteur on freedom of religion or belief, UN Doc. E/CN.4/2005/61, 20 December 2004, paras 67, 70.
- 35.** Across the Council of Europe member states, women represent less than 20% of national legislatures. Source: Viewpoint of the Council of Europe Commissioner for Human Rights, August 2007, available at www.coe.int/t/commissioner/viewpoints.
- 36.** For a discussion of states' obligations to address violence against women see: Amnesty International, *Making Rights a Reality: The Duty of States to Address Violence Against Women* (Index ACT 77/049/2004). For concrete examples of inadequate state responses to domestic violence see: Amnesty International, *Spain: More than words. Making protection and justice a reality for women who suffer gender based violence in the home* (Index EUR 41/005/2005); Amnesty International, *France: Violence against women: a matter for the State* (Index EUR 21/001/2006); Amnesty International, *Albania: Violence against Women in the Family: "It's not her shame"* (Index EUR 11/002/2006); Amnesty International, *Belarus: Domestic violence – more than a private scandal* (Index EUR 49/014/2006); Amnesty International, *Georgia: Thousands suffering in silence – Violence against women in the family* (Index EUR 56/009/2006); Amnesty International, *Ukraine: Domestic Violence – Blaming the Victim* (Index EUR 50/005/2006).
- 37.** Amnesty International, *Living in the Shadows: a primer on the human rights of migrants* (Index POL 33/006/2006); *Amnesty International Report 2007: The state of the world's human rights* (Index POL 10/001/2007).
- 38.** See relevant sections of country entries on Latvia, Lithuania, Moldova, Poland, Romania and the Russian Federation in the *Amnesty International Report 2008* (Index: POL 10/001/2008). For more information on lesbian, gay, bi-sexual and transgender rights visit the website of the International Lesbian and Gay Association at www.ilga.org.
- 39.** In *Goodwin v UK* the European Court of Human Rights ruled that the United Kingdom's refusal to recognize the reassigned sex of a transsexual person and the denial of the right to marry was a breach of both Articles 8 (right to family life) and 12 (right to marry) of the Convention on Human Rights. (*Goodwin v. UK*; Application no. 28957/95, 11 July 2002).
- 40.** See European Coalition for Community Living, *Included in Society: Results and*

Recommendations of the European Research Initiative of Community-Based Residential Alternatives for Disabled People. Geert Freyhoff, Camilla Parker, Magali Coué, Nancy Greig eds. (Les Editions Européennes 2003).

41. See Amnesty International, *Romania: Memorandum to the government concerning inpatient psychiatric treatment* (Index: EUR 39/003/2004); Amnesty International, *Bulgaria: Far from the eyes of society: Systematic discrimination against people with mental disabilities* (Index: EUR 15/005/2002), 10 October 2002; Amnesty International, *Bulgaria and Romania: Amnesty International's Human Rights Concerns in the EU Accession Countries* (Index: EUR 02/001/2005). See also *Cage Beds: Inhuman and Degrading Treatment or Punishment in Four EU Accession Countries*, 2003; Mental Disability Advocacy Centre.
42. See for instance the reports of the Council of Europe Commissioner for Human Rights on his visits to the United Kingdom in November 2004, (CommDH(2005)6 at p. 41) and France in September 2005 (CommDH(2006)2 at p. 39).
43. For an overview of expenditure and access to legal aid in Council of Europe member states, see the *Report on the European Judicial Systems – Edition 2006*, compiled by the European Commission for the Efficiency of Justice, available at www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf.
44. See Amnesty International, *Azerbaijan: Displaced then discriminated against – the plight of the internally displaced population* (Index EUR 55/011/2007). See also Amnesty International, *Slovenia: The “erased” – Briefing to the UN Committee on Economic, Social and Cultural Rights* (Index: EUR 68/002/2005), for an analysis of how the refusal to restore the permanent residency status of several thousand long-term residents whose status was withdrawn shortly after Slovenia achieved independence, has resulted in severe discrimination in their access to a variety of economic and social rights.
45. General Comment No. 18: Non-discrimination, Thirty-seventh session (1989), Para 7.
46. General Comment No. 18: Non-discrimination, Thirty-seventh session (1989), Para 13.
47. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A, No. 94, paragraph 72.
48. In the *Thlimmenos* case, the European Court of Human Rights ruled that: “... *The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention [the European Convention for the Protection of Human Rights and Fundamental Freedoms] is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*” *Thlimmenos v. Greece* (Application No. 34369/97) 6 April 2000, at paragraph 44.
49. In its General Recommendation No. 25 on temporary special measures, the Committee on the Elimination of Discrimination against Women (a body of independent experts which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women by states parties), commented: “*In the Committee’s view, a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming under-representation of women and a redistribution of resources and power between men and women.*”
50. Explanatory Report to Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

(hereafter, Protocol 12 to the ECHR). The Explanatory Report clearly articulates the relationship between non-discrimination and equality, stating that: "... it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists..." (paragraph 15).

51. See *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (Application No. 9214/80; 9473/81 9474/81) 28 May 1985, paragraph 82.

52. Article 3 of ICERD provides that: "*States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.*"

The Committee on the Elimination of Racial Discrimination has observed "*that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds. The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. It invites States parties to monitor all trends which can give rise to racial segregation, to work for the eradication of any negative consequences that ensue, and to describe any such action in their periodic reports.*" General Recommendation XIX on Article 3 of the Convention.

In relation to persons with disabilities, Article 24 (2) (a) of the Convention on the Rights of Persons with Disabilities, states "*States Parties shall ensure that: Persons with*

disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability".

53. The UN Convention on the Rights of Persons with Disabilities defines "reasonable accommodation" as: "*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*" (Article 2).

The EU Framework Directive for Equal Treatment in Employment and Occupation also defines reasonable accommodation. In Article 5 it states that reasonable accommodation "*means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.*" Council Directive 2000/78/EC.

54. The United Nations Development Programme has commented on the type of personal circumstances covered by non-discrimination provisions as follows: "*Human rights are for everyone, as much for people living in poverty and social isolation as for the rich and educated. International law prohibits discrimination in the enjoyment of human rights on any ground, such as ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The term "or other status" is interpreted to include personal circumstances, occupation, life style, sexual orientation and health status. People living with HIV and AIDS for instance, are entitled to the enjoyment of their fundamental human rights and*

freedoms without any unjustified restriction.” Poverty Reduction and Human Rights, a Practice Note. June 2003, p. 7, available at: [http://www.undp.org/governance/docs/HRPN_\(poverty\)En.pdf](http://www.undp.org/governance/docs/HRPN_(poverty)En.pdf).

In the case of *John K. Love, William L. Bone, William J. Craig and Peter B. Ivanoff v. Australia*, the Human Rights Committee held that “a distinction related to age which is not based on reasonable and objective criteria, may amount to discrimination on the ground of “other status...” Human Rights Committee, Communication No. 983/2001, CCPR/C/77/D/983/2001, 23 April 2003 at paragraph 8.2.

55. ICERD covers only discrimination on the basis of race, colour, descent, or national or ethnic origin and CEDAW covers only discrimination on the basis of sex.

56. Article 26.

57. Article 14.

58. Article 21 (1) of the Charter of Fundamental Rights of the European Union explicitly prohibits discrimination on the grounds of “disability, age or sexual orientation”.

59. The United Nations Human Rights Committee and the European Court of Human Rights have, for instance, found violations under Articles 26 of the ICCPR and 14 of the ECHR respectively on grounds of sexual orientation. See for example Human Rights Committee, *Young v Australia* (No. 941/2000, ICCPR), European Court of Human Rights, *B.B. v the United Kingdom* (No. 53760/00, 10/10/2004), *S.L. v Austria* (No. 45330/99, 09/01/2003) and *L. and V. v Austria* (Nos. 39392/98 and 39829/98, 09/01/2003).

60. See, for instance, the judgment of the ECHR in *Christine Goodwin v. UK* (Application no. 28957/95) at paragraph 90: “... the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the

personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikulić v. Croatia*, no. 53176/99, judgment of 7 February 2002, § 53, both to be published in *ECHR 2002-...*). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.”

61. In the Belgian Linguistics Case, the European Court of Human Rights made clear that a “*difference in treatment ... must not only pursue a legitimate aim: Article 14 [the non-discrimination guarantee of the European Convention] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.*” Belgian Linguistics Case (No. 2), 1 European Human Rights Report (EHRR) 252, para. 10 (1968). This test has been consistently applied by the European Court of Human Rights under Article 14, by the Human Rights Committee in assessing claims under article 26, as well as by other human rights bodies. See for example Human Rights Committee, *Broeks v. the Netherlands*, 172/1984, 9 April 1987; HRC, *Zwaan-de Vries v. the Netherlands*, 182/1984, 9 April 1987.

62. See, for example, *East African Asians*, 3 EHRR 76 (1973), para. 207 (“a special importance should be attached to discrimination based on race”); *Hoffman v Austria*, 17 EHRR 293, para. 36 (1993) (“a distinction based essentially on a difference in religion alone is not acceptable”); *Abdulaziz, Cabales and Balkandali v United Kingdom*, Application no. 9214/80; 9473/81; 9474/81, para 78 (“very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.”); *Inze v Austria*, application no. 8695/79, 28 October 1987 (“Very weighty

reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention"); *Gaygusuz v. Austria*, 23 EHRR 365, para. 42 (1996) ("*very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.*"); *Karner v. Austria*, Application no. 40016/98, 24 July 2003, para 37 ("*very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention... Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification*").

63. See, for instance, the definitions of direct and indirect racial discrimination in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.

64. See, for instance, Article 2(2)(b) of EU Directive 2000/78 on establishing a general framework for equal treatment in employment and occupation.

65. In General Recommendation 14, the CERD explained that: "In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." This approach is also followed by other human rights bodies.

66. The United Nations Human Rights Committee has stated in General Comment No. 18 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." [emphasis added] UN Human Rights Committee, General Comment No. 18: Non-discrimination, Thirty-seventh session (1989) at paragraph 7.

67. *Zarb Adami v. Malta*, App. No. 17209/02, 20 June 2006 at paragraph 80.

The HRC applied similar reasoning in *Althammer et al v Austria*, in which it stated that "... a violation of article 26 [of the ICCPR, on the prohibition of discrimination] can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate." Communication No. 998/2001, seventy-eight session.

68. For instance, Article 6 of the UN Convention on the Rights of Persons with Disabilities states that: "*States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.*"

69. UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 25: Gender related dimensions of racial discrimination, 56th session, 2000; paragraph 1.

70. In its General Policy Recommendation 11 on combating racism and racial discrimination in policing, ECRI defines racial profiling as: "*The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or other similar law enforcement activities*". For more information on racial profiling, see James Goldston *Ethnic Profiling and Counter-Terrorism: Trends, Dangers and Alternatives*, June 2006.

71. The specific groups targeted vary from country to country. See James Goldston: *Ethnic Profiling and Counter-Terrorism: Trends, Dangers and Alternatives*. June 2006.

72. UNDP, *Faces of Poverty, Faces of Hope. Vulnerability Profiles for Decade of Roma*

Inclusion Countries, Bratislava, 2005 (UNDP, Faces of Poverty).

73. ICCPR, Article 2(1); ICESCR, Article 2(2).

74. ICCPR, Article 26.

75. ICERD, Article 1(1); CEDAW, Article 2; CRPD, Article 5.

76. CRC, Article 2.

77. With the exception of the ICERD, which has not been ratified by Andorra.

78. As of February 2008, the CRPD has been signed by all Council of Europe member states with the exception of Latvia, Liechtenstein, Russia, Serbia, Switzerland and the Ukraine. Belarus has also not signed the CRPD.

79. As of February 2008, Monaco, Switzerland and the United Kingdom had not yet ratified the First Optional Protocol to the ICCPR. As of the same date, only Armenia, Bulgaria, Estonia, Latvia, Monaco and Switzerland had not yet ratified the Optional Protocol to the CEDAW. The United Kingdom, Latvia, Estonia, Greece, Croatia, Bosnia and Herzegovina and Armenia had so far declined to recognize the competence of the Committee on the Elimination of Racial Discrimination to consider complaints from individuals about violations of their rights under this treaty by the state.

80. For more information visit the Council of Europe website at www.coe.int.

81. Article 14 of the ECHR.

82. The European Court of Human Rights is developing a small but growing body of jurisprudence on economic and social rights falling within the scope of the ECHR. For instance, in the case of *Cyprus v. Turkey* the Court observed “*that an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.*” Application no. 25781/94, para. 219.

83. The EU member states to have ratified Protocol 12 ECHR are The Netherlands,

Cyprus, Luxembourg, Finland, Romania and Spain. The Non-EU member states are Albania, Armenia, Bosnia and Herzegovina, Croatia, Georgia, Romania, San Marino, Serbia, Macedonia and the Ukraine.

84. For more information, consult the ESC website at http://www.coe.int/T/E/Human_Rights/Esc.

85. Belgium, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Norway, Portugal, Sweden.

86. For more information, see ECRI website at http://www.coe.int/t/e/human_rights/ecri.

87. Article 21 of the Charter of Fundamental Rights.

88. Article 22 of the Charter of Fundamental Rights.

89. Two countries, the United Kingdom and Poland, have secured an “opt-out” of the Charter of Fundamental Rights.

90. Article 3 of the EU Reform Treaty (formerly Article 2 of the Treaty of the European Union) states that the EU “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. Article 10 of the new Treaty on the Functioning of the EU states that: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

91. For more information, see FRA website: <http://fra.europa.eu/fra/index.php>.

92. According to Article 249 TEC a directive is a legal instrument directed to the member states and it is binding as to the result to be achieved, leaving open the choice of forms and methods.

93. This was first recognized by the European Court of Justice in *P v. S* and *Cornwall County Council* (Case C-13/94) [1996], *K.B & NHS Pensions Agency* (Case C-117/01) [2004]. This was confirmed in a

joint statement by the Commission and the Council of 4 October 2004 referring to Directive 2000/113 (see <http://register.consilium.eu.int/pdf/en/04/st13/st13369.en04.pdf>). At the moment, however, EU law has only been recognized to cover transgender persons who have undergone medical treatment and have changed, or are in the course of changing, their legally recognized gender.

94. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

95. Spain, Sweden, Czech Republic, Estonia, France, Ireland, United Kingdom, Greece, Italy, Latvia, Poland, Portugal, Slovenia and Slovakia.

96. The Czech Republic, Estonia, Ireland, Greece, France, Italy, Hungary, Malta, the Netherlands, Finland and Sweden were all sent reasoned opinions by the Commission. Formal notice of the initiation of infringement proceedings was given to Germany, Latvia and Lithuania.

97. See for instance the OSCE Ministerial Council Decisions on combating discrimination and intolerance of recent years (Decisions 10/07, 13/06, 10/05, 12/04, 04/04/ and 06/02, available at <http://tandis.odihhr.pl/index.php?p=ki-ra,instru&qid=a559563c50bcd8ce915c97ab41b9c64e&sort=pubdate>).

98. For more information visit: <http://www.osce.org/odihhr>.

99. Available at http://www.osce.org/odihhr/item_11_26296.html.

100. For more information visit <http://tandis.odihhr.pl/index.php?p=home>

101. For more information visit <http://www.osce.org/hcnm/>

102. Council of Europe member states who have not signed are: Andorra, Belgium, France, Greece, Iceland, Luxembourg, Monaco and Turkey. The respect for the Framework Convention on the Protection of National Minorities is monitored by the

Council of Europe's highest decision-making body, the Committee of Ministers, which is assisted by an Advisory Committee composed of independent experts.

103. Article 4(1) of the Framework Convention.

104. Article 4(2) of the Framework Convention.

105. Article 5 of the Framework Convention.

106. The Charter has only been signed by half of the Council of Europe member states. State parties are required to submit periodic reports on the implementation of their obligations under the treaty. These reports are examined by an independent committee of experts, which submits its views and suggests recommendations to the Committee of Ministers. The Committee of Ministers may then adopt such recommendations to state parties as it considers necessary.

107. The 1949 Migration for Employment Convention has been ratified by the Albania, Armenia, Belgium, Bosnia and Herzegovina, Cyprus, France, Germany, Italy, Macedonia, Moldova, Montenegro, the Netherlands, Norway, Portugal, Serbia, Slovenia, Spain and United Kingdom; the 1975 Migrant Workers (Supplementary Provisions) Convention has been ratified by Albania, Armenia, Bosnia and Herzegovina, Cyprus, Italy, Macedonia, Montenegro Norway, Portugal, San Marino, Serbia, Slovenia, Spain and Sweden; the 1990 International Convention on the Protection of the Rights of All Migrant Workers has only been ratified by Albania, Bosnia and Herzegovina, Montenegro, Serbia.

108. This Protocol, which was adopted in 2000, supplements the United Nations Convention against Transnational Organized Crime. More information about the Protocol and its signatories can be found on <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>.

109. Ratified by all Council of Europe member states except Andorra, Czech Republic, Greece, Iceland, Ireland, Liechtenstein, Luxembourg and San Marino.

- 110.** In addition to requiring international co-operation and the introduction of a range of criminal law provisions, the Convention obliges states to introduce measures on the identification of victims, the protection of private life, material and psychological assistance for victims, a minimum recovery period before repatriation, compensation and redress and the possibility of obtaining residence permits.
- 111.** This typology has now been recognized by treaty monitoring bodies as well as regional human rights enforcement bodies. See General Comments of the Committee on Economic, Social and Cultural Rights and, for example, Inter-American Court of Human Rights, Case *Velázquez Rodríguez*, Judgment of 29 July 1988, Series C, No. 4, and *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, October 2001.
- 112.** A definition of institutional racism was provided by the authors of the report of the Stephen Lawrence Inquiry. Stephen Lawrence was a young black man whose murder in London UK, in 1993, was poorly responded to and inadequately investigated by the police. A public inquiry was set up in 1997 to look into matters arising from the death of Stephen Lawrence in order to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes. The authors concluded that there was a problem of institutional racism in the United Kingdom's police forces. They defined institutional racism as: *"The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people."* Inquiry into the Matters Arising from the Death of Stephen Lawrence, para. 6.34.
- 113.** Profiling may also be based on other characteristics which are prohibited grounds for discrimination, such as gender or sexual orientation. Like ethnic profiling this, too, can be discriminatory.
- 114.** In its General Recommendation No.11, ECRI defines discriminatory ethnic profiling as: "The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities".
- 115.** Only the United Kingdom systematically collects information on the ethnicity of individuals stopped and searched by the police.
- 116.** See *Ethnic Profiling by Police in Europe*, Open Society Justice Initiative, June 2005; and *I Can Stop and Search Whoever I Want — Police Stops of Ethnic Minorities in Bulgaria, Hungary and Spain*, Open Society Justice Initiative, April 2007.
- 117.** ECRI General Policy Recommendation N°11, paras. 1 & 2.
- 118.** See for instance, Article 2(1)(b) of ICERD, which states that *"Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organisations"*.
- 119.** See, for instance, Article 4(c) of ICERD, which states that *"States Parties ... shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."*
- 120.** See for example ECRI's third report on France, CRI(2005)3. ECRI's third round country reports are available at: http://www.coe.int/t/e/human_rights/ecri/4-Publications/1default.asp#TopOfPage.
- 121.** See for example ECRI's third report on Austria, CRI(2005)1.
- 122.** See for example ECRI's third report on France, CRI(2005)3.
- 123.** See for example ECRI's third report on Germany, CRI92004)23.
- 124.** ECRI's country reports often contain sections on "Education and Awareness-raising". In its third report on the Czech Republic, for example, ECRI recommended

“that widespread targeted training be aimed at public officials in different sectors of life working at the local level, involving not only general anti-discrimination training, but also awareness raising of legal obligations as concerns equality and non-discrimination as well as relevant national priorities.”
CRI(2004) 22, paragraph 100.

See also CERD Concluding observations in its country monitoring. In its observations about Luxembourg, for instance, CERD stated it *“is concerned at allegations of discriminatory or vexatious conduct towards non-nationals on the part of officials working in various national or local authorities. While aware of the information provided by the State party about human rights training for State employees, the Committee encourages the State party to include within the training a specific focus on the problems of racism and discrimination, and to ensure that all officials who come into contact with minority groups receive training of this type.”*
Concluding observations of the Committee on the Elimination of Racial Discrimination: Luxembourg, 18/04/2005, CERD/C/LUX/CO/13 at paragraph 19.

125. CERD, General Recommendation 13 “on the training of law enforcement officials in the protection of human rights” Forty-second session (1993).

126. See for example, ECRI’s third report on Albania (paragraph 78), Estonia (paragraph 118), Germany (paragraph 86), “the Former Yugoslav Republic of Macedonia” (paragraph 90), Norway (paragraph 75), and Romania (paragraph 106).

127. See for example, ECRI’s third report on Spain (paragraph 93).

128. Convention on the Rights of Persons with Disabilities, Article 9.

129. Convention on the Rights of Persons with Disabilities, Article 2.

130. UN Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities), Fiftieth Session 1994, paragraph 6.2. See also Article 5(1) of the Framework Convention for the Protection of National Minorities, which places an obligation upon

States Parties to *“...undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.”* See also Article 4(2) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 which provides that: *“States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”*

131. See UN Human Rights Committee, General Comment No. 31 on Article 2 [on non-discrimination] of the International Covenant on Civil and Political Rights: *“The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”*
Eightieth session (2004) at paragraph 8.

See also CERD, General Recommendation XX on Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination: *“to the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.”*

132. “Honour crimes” are punitive measures, often murder, committed by members of a family against a female member of the family whom they believe to have brought dishonour on the family through their failure to observe traditional customs and values.

The Human Rights Committee, in General Comment No. 28, points out that Article 26 of the ICCPR covers acts by private individuals, including honour crimes: *“The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields.... The commission of so-called ‘honour crimes’ which remain unpunished constitutes a serious violation of the Covenant and in particular of articles 6, 14 and 26. Laws which impose more severe penalties on women than on men for adultery or other offences also violate the requirement of equal treatment.”* Human Rights Committee, General Comment No. 28: Article 3 (the equality of rights between men and women), Sixty-eighth session, 2000.

133. The Declaration on the Elimination of Violence against Women, which explicitly recognises the link between discrimination against women and violence against women, also calls on states to: *“exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”.*

134. ICERD, Article 4(a).

135. For instance, the European Union Directive 2000/43 on “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin” (Racial Equality Directive) covers discrimination based on “racial or ethnic origin” but does not include “nationality” among the grounds of discrimination falling within its scope.

136. ECRI General Recommendation No. 7, paragraph 7 on National Legislation to Combat Racism and Racial Discrimination, recommends: *“The law should provide that the prohibition of discrimination applies to all*

public authorities as well as to all natural and legal persons, both in the public and in the private sectors, in all areas, notably: employment, membership of professional organizations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services.”

137. ECRI defines segregation as: *“the act by which a (natural or legal) person separates other persons on the basis of one of the enumerated grounds without an objective and reasonable justification, in conformity with the proposed definition of discrimination. As a result the voluntary act of separating oneself from other persons on the basis of one of the enumerated grounds does not constitute segregation.”* See ECRI General Policy Recommendation No. 7, Explanatory Memorandum, paragraph 16.

138. CERD, General Recommendation XIX on Article 3 (on racial segregation), paragraph 1. ECRI General Policy Recommendation No. 7, Explanatory Memorandum, paragraph 15.

139. ECRI General Policy Recommendation No. 7, paragraph 5 states that: *“The law should provide that the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the grounds enumerated in paragraph 1b) (henceforth enumerated grounds), or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved.”*

140. Article 4(a). In General Recommendation XV, CERD clarified that Article 4(a) of ICERD requires States parties to *“penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.”* Committee on the Elimination of Racial Discrimination, Forty-second session, 1993.

- 141.** See also Amnesty International, *Making Rights a Reality: the Duty of States to Address Violence Against Women*, (Index ACT 77/049/2004) at pp. 18-19.
- 142.** ECHR, *Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, Grand Chamber judgment, Strasbourg, 6 July 2005, at paragraph 160.
- 143.** *Stoica v. Romania*, (Application no. 42722/02), 4 March 2008.
- 144.** ICERD, 4a) "State Parties ... Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;"
- 145.** In the case of *Jersild v. Denmark*, the ECHR provides an interesting analysis of the difficult balance to be struck each time between the international law obligations to protect the freedom of speech and to prohibit hate speech. *Jersild v. Denmark*, 23 September 1994, Series A, No. 298
- 146.** ECHR, *Handyside v. The United Kingdom*, 7 December 1976.
- 147 See, for instance, ICERD Article 6: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."
- 148.** General Comment No. 9: the domestic application of the Covenant, Nineteenth Session (1998).
- 149.** ECRI General Policy Recommendation No. 7, paragraph 10.
- 150.** ECRI General Policy Recommendation No. 7, Explanatory Report, paragraph 28.
- 151.** HRC, General Comment No. 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Eightieth Session (2004).
- 152.** CERD stressed this in General Recommendation XXVI stating that: "the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated... the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate." CERD, General Recommendation XXVI on article 6 of the Convention, 1399th meeting, 24 March 2000 Fifty-sixth session (2000), paras. 1 and 2.
- 153.** Positive measures are discussed in further detail in this report in Information and policy issue, National Action Plans against Racism, on p49.
- 154.** The Council of Europe Commissioner for Human Rights stated in a recent report on Roma: "In addition to bringing a remedy to the victim, court decisions can have a preventive function by way of indicating to the public that certain behaviour is illegal. This requires, however, that sanctions imposed for the crimes of discrimination are of a sufficient level to be effective. In some countries, it is reported that the relatively low level of sanctions imposed in discrimination cases does not provide a sufficient deterrent for violations, nor are they effective in terms of preventing recidivism." Alvaro Gil-Robles Report on the Human Rights Situation of the Roma, Sinti and Travellers in Europe. CommDH (2005)4, May 4, 2005 at paragraph 16.

For more information on effective remedies and compensations see *Non-Discrimination in International law: A Handbook for*

Practitioners pp. 134-136. Interights, available at <http://www.interights.org/handbook/index.htm>.

155. Particularly those developed in the EU Equality Directives and in ECRI's General Policy Recommendations.

156. *Nachova and others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, First Section Chamber judgment, Strasbourg, 26 February 2004 at paragraph 168. The case of Nachova involved allegations that the killing of two Roma men by a Bulgarian police officer involved racial motivation (see also this report p39). The judgment noted that “in cases where the authorities have not pursued lines of inquiry that were clearly warranted in their investigation into acts of violence by State agents and have disregarded evidence of possible discrimination, it may, when examining complaints under Article 14 of the Convention, draw negative inferences or shift the burden of proof to the respondent Government, as it has previously done in situations involving evidential difficulties.” (paragraph 169).

157. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, at paragraph 17 of the preamble.

158. Council Directives 2000/43/EC (article 8), 2000/78/EC (article 10), 2004/113/EC (article 9). See also ECRI General Recommendation No. 7 at paragraph 11. This reflects the well established practice of UN Treaty Bodies of shifting the burden of proof in cases of discrimination. See for example: Human Rights Committee, *Chedi Ben Ahmed Karoui v Sweden* Case No. 185/2001, 25 May 2002, at para 10; Conclusions of the Committee of Economic, Social and Cultural Rights on Luxembourg, UN Doc. E/C.12/1/Add.86 (2003) § 10, and Poland, UN Doc. E/C.12/1/Add.82 (2002) § 7. This is also a well-established practice of the European Court of Justice. See for example: *Case C-33/89 Kowalska* [1990] ECR I-2591 at para. 16 and *Case I09/88 Danfoss* [1989] ECR 3199 at para 16.

159. Statistics are one of the main indicators

of indirect discrimination. See detailed discussion in “Written submission of Interights and Human Rights Watch” in case of D.H. and Others v. Czech Republic before the European Court of Human Rights, available on the internet at: http://www.justiceinitiative.org/db/resource2?res_id=102627

In *Hoogendijk v. the Netherlands* (Application no. 58461/00, 6 January 2005), the European Court of Human Rights stated: “[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.”

160. See Discussion in EU Network of Independent Experts on Fundamental Rights, *Report on the Situation of Fundamental Rights in the European Union*, January 2004 at p. 109. See also discussion in Miguel Sierra, Maria. *Towards Equal Treatment: Transposing the Directive – Analysis and Proposals*. European Network Against Racism, March 2002] at pages 14 and 17.

161. Article 10, Directive 2004/113/EC. The wording of Article 9 of Directive 2000/43/EC is identical except that the word “individuals” is substituted for the word “persons”. The wording of Article 11 of Directive 2000/78/EC is more specific to the employment context.

162. ECRI General Policy Recommendation No. 7, Explanatory Memorandum at paragraph 57. See also paragraph 27 of Recommendation.

163. See ECRI General Policy Recommendation No. 7, paragraph 25 and Explanatory Memorandum, paragraph 56.

164. Sexual Equality Directive (2004/113

EC), Article 8(3); Equal Treatment in Employment Directive (2000/78 EC), Article 9(2), Racial Equality Directive (2000/43 EC), Article 7(2). All states that: “*Member States shall ensure that associations, organizations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*”

165. See ECRI, General Policy Recommendation No. 7, paragraph 26.

166. The European Court of Human Rights has, for instance, stated that “*a demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold a demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.*” *Plattform Ärzte für das Leben v. Austria*, (Application no. 10126/82) at para. 32

167. The European Court of Human Rights has found that states have a positive obligation under Article 9(1) concerning the freedom of belief to secure the peaceful enjoyment of religious freedom from hostile attacks by others: “*the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from*

exercising their freedom to hold and express them.” *Otto Preminger-Institut V. Austria* (Application no. 13470/87) para. 47.

168. In its recent concluding observations on Bosnia and Herzegovina, for instance, CERD noted “*with concern reports about the lack of effective implementation of criminal law provisions, such as Articles 145 and 146 of the Criminal Code of Bosnia and Herzegovina, punishing acts of racial discrimination (Arts. 4 (a) and 6).*” It urged: “*that the State party ensure the effective implementation of all legal provisions aimed at eliminating racial discrimination, and that it provide in its next report updated information concerning the application by courts within Bosnia and Herzegovina of criminal law provisions punishing acts of racial discrimination, in particular Articles 145 and 146 of the Criminal Code of Bosnia and Herzegovina; such information should include the number and nature of cases brought, convictions obtained and sentences imposed, and any restitution or other remedies provided to victims of such acts.*” CERD, Concluding Observations: Bosnia and Herzegovina, Sixty-eighth session, 20 February – 10 March 2006, at paragraph 16.

169. In its third report on Spain, ECRI recommended that: “*the Spanish authorities keep the effectiveness of the existing civil and administrative law provisions against racial discrimination under close review... [and] in so doing, they consider fine-tuning this legislation...*” More specifically it recommended “*that the Spanish authorities collect data on the implementation of the new provisions against racial discrimination, notably on the number of complaints filed and the outcome of these complaints, including redress or compensation awarded.*” ECRI (2006) 4, Adopted on 24 June 2005 made public on 21 February 2006, at paragraphs 15 and 16.

170. General Policy Recommendation No. 1 on combating racism, xenophobia, anti-Semitism and intolerance. ECRI (96) 43 rev., adopted on 4 October 1996.

171. See ECRI General Policy Recommendation No. 7, paragraph 8. For

an example of such legislation at the national level, see Section 71(1) Race Relations Act 1976 as amended by Race Relations (Amendment) Act 2000. This legislation places a positive duty on public authorities to eliminate discrimination and to seek to promote equal opportunities and good relations between persons of different racial groups. The Commission for Racial Equality is granted explicit powers to enforce compliance with these duties.

172. ECRI General Policy Recommendation No.7, Explanatory Memorandum, paragraph 27.

173. ECRI General Policy Recommendation No. 7, paragraph 13.

174. See Principles relating to the Status of National Institutions, annex to National Institutions for the Promotion and Protection of Human Rights, CHR Res. 54, UN ESCOR, 1992, Supp. No. 2 of UN Doc. E/1992/22, chap. II, sect. A; GA Res. 48/134, UNGAOR, 1993, Annex.

175. See Committee on the Elimination of Racial Discrimination, General Recommendation XVII on the establishment of national institutions to facilitate the implementation of the Convention, Forty-second session (1993).

176 ECRI, General Policy Recommendation No. 2.

177. For example, in its recent Concluding Observations on Lithuania, CERD stated that: *“while welcoming the existence of a number of advisory bodies dealing with human rights and specifically with the rights of national minorities, regrets that the State party has not yet envisaged establishing a National Human Rights Institution...”* CERD, Concluding Observations: Lithuania, 11/04/2006, Sixty-eight session, 20 February – 10 March, 2006, at paragraph 11. Similarly, in its Concluding Comments on Austria, the CEDAW committee expressed concern *“that the mandate of the Equal Treatment Commission in regard to discrimination against women focuses only on the field of employment, while going into other spheres of life for cases of discrimination on the basis of race or ethnic origin.”* CEDAW committee, Concluding Comments: Austria, 2

February 2007, Thirty-seventh session, 15 January – 2 February, 2007. *In its third report on Poland, ECRI strongly encouraged: “... the Polish authorities to set up in the near future an independent body specialised in and focussing on combating racism and racial discrimination, with due regard to ECRI’s General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level, and General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.”* ECRI, Third Report on Poland, CRI(2005)25, paragraph 43.

178. Convention on the Rights of Persons with Disabilities, Article 33(2).

179. Council Directive 2000/43/EC, Article 13; and Directive 2006/54/EC, Article 20.

180. See *Roma Rights Quarterly*, 2/2004: Ethnic Statistics, for a detailed discussion of the need for statistics in order to improve the situation of Roma.
http://www.errc.org/Romarights_index.php.

181. See E.U. Network of Independent Experts on Fundamental Rights, *Thematic Comment No. 3*, pp. 13-14.

182. In General Recommendation No. 9 on Statistical data concerning the situation of women, the CEDAW committee states: *“Considering that statistical information is absolutely necessary in order to understand the real situation of women in each of the States parties to the Convention, “Having observed that many of the States parties that present their reports for consideration by the Committee do not provide statistics, “Recommends that States parties should make every effort to ensure that their national statistical services responsible for planning national censuses and other social and economic surveys formulate their questionnaires in such a way that data can be disaggregated according to gender, with regard to both absolute numbers and percentages, so that interested users can easily obtain information on the situation of women in the particular sector in which they are interested.”* Eighth session (1989).

ECRI General Policy Recommendation No. 1 on Combating racism, xenophobia, anti-Semitism and intolerance, states: “*Since it is difficult to develop and effectively implement policies in the areas in question without good data, [member States should] collect, in accordance with European laws, regulations and recommendations on data-protection and protection of privacy, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, anti-Semitism and intolerance.*” CRI(96)43.

183. See for instance, Advisory Committee on the Framework Convention for the Protection of National Minorities. Opinion on Poland. ACFC/INF/OP/I/(2004)005, paragraph 27; Opinion on Slovakia. ACFC/INF/OP/I/(2001)001, paragraph 21; Opinion on Czech Republic. ACFC/INF/OP/I/(2002)002, para. 28.

184. The EU Network of Independent Experts on Fundamental Rights has recently analysed this issue in great detail in its “Thematic Comment No. 3: the Protection of Minorities in the European Union” and concluded that: “*The rules relating to the processing of personal data, including the heightened protection of sensitive data relating to the ethnic origin or the religious beliefs of the individual, should not be seen however as an obstacle to an adequate monitoring of the impact on certain ethnic, religious or linguistic groups of either public policies or legislation or private practices. On the contrary, they constitute a necessary and welcome safeguard against any risk of abuse in the process of such monitoring, a pre-condition for which therefore is that these rules protecting personal data are strictly adhered to. Although a number of States seem to consider that this form of monitoring is in conflict with the protection of personal data, especially as guaranteed under their national legislation implementing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, there is no such contradiction in*

fact. In the opinion of the Network, although there may be strong cultural obstacles to ethnic, religious or linguistic monitoring, there are no insuperable legal obstacles to such monitoring.” At pp. 15- 16.

185. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; www.un.org/WCAR/.

186. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Programme of Action, para. 66.

187. National Action Plans are in the process of being drawn up in Austria, and Germany. By the beginning of 2008 there had been no progress in Estonia, France, Greece, Hungary, Italy, Luxembourg, Malta, Portugal, Slovenia and Spain.

188. ECRI General Policy Recommendation No.7, paragraph 34 Explanatory Memorandum.

189. See for instance, CEDAW committee, General Recommendation 23: “*While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. [...] The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life.*” (Sixteenth session, 1997): at para. 15.

190. “Temporary special measures” is the term employed by the UN Convention on the Elimination of all forms of Discrimination against Women; see Article 4(1): “*Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*”

191. “Special measures” is the term employed by ICERD, Article 1(4). The term “Positive

measures” is used by the European Court of Human Rights, and the UN Human Rights Committee has referred to such measures as “affirmative action”.

192. Protocol 12 to the ECHR and its Explanatory Report clearly articulate the relationship between positive measures and the proportionality principle. The preamble to Protocol 12 reaffirms *“that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures”*. The explanatory note further explains that this paragraph of the preamble: *“refers to measures taken in order to promote full and effective equality and reaffirms that such measures shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for them ... The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected.”*

193. Article 1(4) of ICERD makes clear that positive measures will not be discriminatory where they respect the proportionality principle. It provides that: *“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”*

194. See also the CEDAW committee’s General Recommendation No. 25 on Article 4, paragraph 1 of the Convention: *“Adoption by States Parties of temporary special measures aimed at accelerating de facto*

equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”

195. See, for instance, ICERD Article 2(2): *“States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”*

In General Comment No. 18 on non-discrimination, the Human Rights Committee stated that: *“...the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”*

196. In the area of racial discrimination, see: ICERD, Article 7, and the Declaration on Race and Racial Prejudice adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1978. Regarding discrimination against women, see CEDAW, Article 3 and 5.

197. ECRI has highlighted the need for both general and targeted awareness raising campaigns in many of its first, second and third round reports. See for example, ECRI's third reports on Croatia, Greece, Lithuania and Slovakia.

198. The UNESCO Declaration on Race and Racial Prejudice comments that: "*States, in accordance with their constitutional principles and procedures, as well as all other competent authorities and the entire teaching profession, have a responsibility to see that the educational resources of all countries are used to combat racism, more especially by ensuring that curricula and*

textbooks include scientific and ethical considerations concerning human unity and diversity and that no invidious distinctions are made with regard to any people; by training teachers to achieve these ends; by making the resources of the educational system available to all groups of the population without racial restriction or discrimination; and by taking appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children." Article 5(2).

199. CEDAW, Article 10(c).

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199. CEDAW, Article 10(c).

DEALING WITH DIFFERENCE

A FRAMEWORK TO COMBAT DISCRIMINATION IN EUROPE

Discrimination is one of the most serious and pervasive human rights abuses in Europe today. In ways large and small, ranging from insults to assault and the denial of basic services and other rights, it blights the lives of millions of people across the continent. But discrimination is not always well understood, nor is enough being done to combat it.

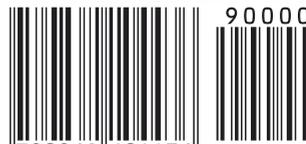
Governments need to recognize and deal with the different needs of individuals. Some need a better understanding of what discrimination is, and what can – and must – be done about it. *Dealing with difference* provides an overview of the most common manifestations of discrimination in Europe, as well as a comprehensive introduction to the relevant regional and international human rights standards. It also presents Amnesty International's views on some of the more complex issues that arise in relation to discrimination.

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ISBN 978-0-86210-443-6



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