Equality and Non-Discrimination under International Law

Volume II

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The Library of Essays on International Human Rights

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ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England

Ashgate Publishing Company
110 Cherry Street
Suite 3-1
Burlington, VT 05401-3818
USA

www.ashgate.com

British Library Cataloguing in Publication Data.
A catalogue record for this book is available from the British Library.

The Library of Congress has cataloged the printed edition as follows: 2014955140

ISBN 9781409440703

MIX
Paper from responsible sources
FSC® C013985

Printed in the United Kingdom by Henry Ling Limited,
at the Dorset Press, Dorchester, DT1 1HD

Acknowledgements

Ashgate would like to thank the researchers and the contributing authors who provided copies, along with the following for their permission to reprint copyright material.

Brill for the essays: Dinah Shelton (2009), 'Prohibited Discrimination in International Human Rights Law', in Aristotle Constantinides and Nikos Zaiko (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa*, Leiden/Boston: Martinus Nijhoff Publishers/Brill Academic, pp. 261–92. Copyright © 2009 Koninklijke Brill NV, Leiden; Sejal Parmar (2004), 'The European Court of Justice and Anti-Discrimination Law: Some Reflections on the Experience of Gender Equality Jurisprudence for the Future Interpretation of the Racial Equality Directive', in Jan Niessen and Isabelle Chopin (eds), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Leiden: Martinus Nijhoff, pp. 131–54. Copyright © 2004 Koninklijke Brill NV, Leiden.

Editpress for the essay: Christine Chinkin (2010), 'The CEDAW Committee and Violence against Women', in Adriana Di Stefano (ed.), *Gender Issues and International Legal Standards: Contemporary Perspectives*, Catania: ed.it, pp. 3–22.

Alice Edwards for the essay: Alice Edwards (2008), 'Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies', *Texas Journal of Women and the Law*, **18**, pp. 1–59. Copyright © 2008 Alice Edwards.

The family of Louis Henkin for the essay: B.G. Ramcharan (1981), 'Equality and Nondiscrimination', in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York: Columbia University Press, pp. 246–69.

Johns Hopkins University Press for the essays: Arvonne S. Fraser (1999), 'Becoming Human: The Origins and Development of Women's Human Rights', *Human Rights Quarterly*, **21**, pp. 853–906. Copyright © 1999 Johns Hopkins University Press; Frédéric Mégret (2008), 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?', *Human Rights Quarterly*, **30**, pp. 494–516. Copyright © 2008 Johns Hopkins University Press.

Intersentia for the essay: Ingrid Westendorp (2012), 'Using Culture to Achieve Equality', in Ingrid Westendorp (ed.), *The Women's Convention Turned 30: Achievements, Setbacks, and Prospects*, Mortsel, Belgium: Intersentia NV, pp. 111–31.

N.P. Engel Verlag for the essay: Anne F. Bayefsky (1990), 'The Principle of Equality or Non-Discrimination in International Law', *Human Rights Law Journal*, **11**, pp. 1–34.

Oxford University Press for the essays: Jarlath Clifford (2013), 'Equality', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, pp. 420–45. Copyright © 2013 Jarlath Clifford. By permission of Oxford University Press; Matthew Craven (1995), 'Non-Discrimination and Equality', in *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*, Oxford: Clarendon Press, pp. 153–93. Copyright © 1995 Matthew Craven. By permission of Oxford University Press; Daniel Moeckli (2013), 'Equality and Non-Discrimination', in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, 2nd edition, Oxford: Oxford University Press, pp. 157–73. By permission of Oxford University Press; Michael Banton (1996), 'The Racial Convention', in *International Action against Racial Discrimination*, Oxford: Clarendon Press, pp. 50–73. Copyright © 1996 Michael Banton. By permission of Oxford University Press; Michael O'Flaherty and John Fisher (2008), 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles', *Human Rights Law Review*, **8**, pp. 207–48. Copyright © 2008 the authors; Kevin Boyle and Anneliese Baldaccini (2001), 'A Critical Evaluation of International Human Rights Approaches to Racism', in Sandra Fredman (ed.), *Discrimination and Human Rights: The Case of Racism*, Oxford: Oxford University Press, pp. 135–91. By permission of Oxford University Press; Fareda Banda (2012), 'Article 10', in Marsha Freeman, Christine Chinkin and Beatte Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, Oxford: Oxford University Press, pp. 253–78. By permission of Oxford University Press.

University of Pennsylvania Press for the essay: Johannes Morsink (1999), 'Colonies, Minorities, and Women's Rights', in *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, pp. 92–129. Copyright © 1999 Johannes Morsink.

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Series Preface

The *Library of Essays on International Human Rights* provides access, in a single series, to some of the most important and influential journal articles and papers on the subject. Selections include broad overviews of key areas in international human rights law, critical assessments of this law and of human rights institutions and inquiries into areas of contestation. Some are classic works in the field; others are more recent works that provide insight into important developments or debates.

The series comprises five volumes. A volume on the development of international human rights law covers both the historical and philosophical development of human rights law as well as major issues during this development. A volume on challenges of human rights law presents works not only on issues of non-state actors, transitional justice and terrorism, but also articles on a human rights approach to public health, severe poverty as a human rights violation, investment arbitration as a venue of human rights challenges and climate change. The subject of equality and non-discrimination under international law merited its own volume, as the principles of equality and non-discrimination lie at the heart of human rights law. They are the only human rights explicitly included in the UN Charter, and they appear in virtually every major human rights instrument.

The volume on the United Nations system for protecting human rights presents leading articles on the UN bodies specially created to promote and monitor the implementation of human rights, but it also goes beyond those entities to present articles on the human rights work of UN specialized agencies such as the World Health Organization, the International Labour Organization, UNICEF and UNESCO. Finally, the volume on regional systems for protecting human rights provides selections on the regional human rights instruments and on institutions and their jurisprudence, procedures, activities and effectiveness.

Each volume opens with an introductory essay providing an overview of the topic covered and discussing the significance and context of the works selected. It is my hope that this series will serve as a valuable research resource for those already well-versed in the subject as well as those new to the field.

STEPHANIE FARRIOR
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Series Editor

Introduction

> 'The claim to equality before the law is in a substantial sense the most fundamental of the rights of man,' wrote Sir Hersch Lauterpacht. 'It is the starting point of all other liberties.' (Lauterpacht, 1945, p. 115)

The principles of equality and non-discrimination lie at the heart of international human rights law. They are the only human rights explicitly included in the UN Charter, and they appear at the beginning of virtually every major human rights instrument. Prejudice is often the motivation underlying other rights violations, so measures that protect against manifestations of that prejudice serve to protect a broad array of human rights.

This volume contains works by leading authors on the subject of equality and non-discrimination under international law. The selections explore theories of equality, the issue of formal versus substantive equality, structural and institutional inequality and perspectives on how to determine when difference in treatment is permissible or impermissible under international law. The selections examine what grounds of discrimination are prohibited and why, and the intersection of multiple grounds of discrimination. In addition, they address approaches to determining what special measures, also known as affirmative action, are allowed or even required under human rights law. Issues of state responsibility for discrimination by non-state actors are also examined, as are legal requirements to use non-legal measures to address discrimination, such as governmental programmes to address root causes of the prejudice that leads to discrimination. In this volume, readers will find the drafting history of human rights treaty provisions on equality and non-discrimination, and incisive critiques of how UN and regional human rights bodies have interpreted and applied these provisions. Non-treaty instruments that have influenced international law and practice are also discussed.

The essays contained in this volume are grouped into four parts. The first presents works that explore theoretical concepts of equality and non-discrimination. The next addresses the development of international legal standards on the subject. The third presents essays analysing how those standards have been interpreted and applied by UN and regional human rights bodies, and the last contains works on what measures besides legal action states are to take in order to achieve equality and non-discrimination.

The theory of non-discrimination and equality articulated by Judge Tanaka in his historic dissent in the *South West Africa* cases[1] pervades today's international law on the subject. This influential text is not included in this volume because of its length and because it is so widely available on-line and in multiple books; readers interested in this field are encouraged to read the text in full. Writing that 'freedom can exist only under the premise of the equality

[1] *South West Africa (Second Phase)*, [1966] ICJ Reports, Advisory Opinions and Orders, Judgment of 18 July 1966, Dissenting Opinion by Judge Tanaka. The claims were brought before the International Court of Justice (ICJ) by Ethiopia and Liberia against the apartheid regime of South Africa regarding its governance of South-West Africa (later Namibia). Judge Tanaka's famed dissent argued against the ICJ decision to dismiss the claims on the ground that the applicant states had no legal ground to bring them.

principle', Judge Tanaka asked: 'What is the content of this principle?' He answered with a detailed exploration of Aristotle's famed maxim that 'what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference' (p. 305).

The equality principle, Judge Tanaka explained,

> does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently. (ibid.)

As articulated by Bertie Ramcharan in 'Equality and Nondiscrimination', included in Part I of this volume (Chapter 2), 'equal treatment for unequals is itself a form of inequality' (p. 35). In fact, Judge Tanaka wrote, '[t]o treat unequal matters differently according to their inequality is not only permitted but also required'(Tanaka dissent, p. 306). The principle of equality thus requires not only the equal treatment of equals, but also consideration of differences in assessing whether different treatment is just and is geared to achieving *de facto* equality, not just formal equality. This is the very approach taken in international human rights law. Essays contained in this volume explore just how this principle has been applied in practice by international and regional human rights bodies.

Another well-established norm in international law is that discrimination need not be intentional or in bad faith for it to be unjust and unreasonable. Judge Tanaka propounded this principle in response to South Africa's argument that its policy of apartheid was needed in order to promote the well-being and social progress of the inhabitants of South-West Africa (now Namibia), which it governed. Judge Tanaka declared: 'the unreasonableness and injustice do not depend upon the intention or motive of [South Africa], namely its *mala fides*'(p. 314). The importance of this principle cannot be emphasized enough. Written into human rights treaties and applied by human rights courts and treaty bodies, this rule recognizes that just because the discriminatory deprivation of human rights one is experiencing is unintentional, that does not diminish the existence and experience of discrimination. Examples of the application of this principle are provided in essays in this volume.

The extent to which the rights to equality and non-discrimination are held by non-citizens is also examined in several of the selections in this volume. Significantly, the rights in the Universal Declaration of Human Rights belong to 'everyone' or 'all persons', and the same holds true for rights in human rights treaties, with the exception of a few rights explicitly limited to citizens, such as the right to vote or to enter one's country. Though some treaty clauses permit states to draw distinctions between citizens and non-citizens (for example, Article 2 of the Racial Discrimination Convention, 1965), the treaty monitoring bodies have made it clear that any differentiation must be for a legitimate purpose and not because of prejudice against foreigners. International human rights law regarding the rights of non-citizens is addressed in detail in the studies and reports by David Weissbrodt for the UN Sub-Commission on the Promotion and Protection of Human Rights,[2] work that he later developed into his impressive book on the subject (Weissbrodt, 2008).

[2] David Weissbrodt, *Final Report on the Rights of Non-Citizens*, UN Doc. E/CN.4/Sub.2/2003/23 (2003), and his earlier studies and reports cited therein.

John Humphrey, who prepared the first draft of the Universal Declaration of Human Rights, wrote that non-discrimination, like human rights, runs through the UN Charter like 'a golden thread' (quoted in Shelton, 2009, p. 264, n. 8). Indeed, Hernán Santa Cruz once remarked that the 'United Nations Organization had been founded principally to combat discrimination in the world'.[3] The international law on discrimination and equality that has developed since the adoption of the UN Charter is explored in the selections in this volume.

Concepts of Equality and Non-Discrimination

Jarlath Clifford's 'Equality' (Chapter 1) begins with an examination of the philosophical foundations of equality. His informative discussion moves from Aristotle's famed maxim that like cases should be treated alike, to Aquinas, Hobbes and natural law theory, Nozick, and on to equality as a necessary component of Rawls's justice equation, Amartya Sen's approach in his 1979 lecture 'Equality of What' and Ronald Dworkin. Next, he outlines concepts of equality and non-discrimination in international human rights law. Clifford suggests that several different conceptions of equality exist that apply in different contexts: 'Claiming a violation of the rights to non-discrimination or equality before the law thus often triggers an evaluation of one or more conceptions of equality' (p. 9), and sometimes requires examination of overlapping conceptions of equality. He identifies and discusses four: equality as consistent treatment; equality of opportunity; equality of outcomes; and transformative equality.

In his next part examining equality as a structural principle of international human rights law, Clifford addresses the definition, scope and interpretation of the principles of equality and non-discrimination, presenting examples from the human rights treaty monitoring bodies' annual reports and jurisprudence. He also explores the contours of what measures are permissible to counter *de facto* inequality, including special measures/affirmative action.

On the importance of recognizing the right to equality, Clifford observes that '[i]nequality is often the seed of long-term, systematic human rights violations. Social, economic, and political inequality is a feeding ground for mistrust, anger, hatred, exclusion, and violence that cultivates prejudice, separation, and stigma' (p. 26). Clifford's analysis demonstrates how the principle of equality 'is instrumental in reinforcing other fundamental human rights principles' (p. 27).

Bertrand Ramcharan's 'Equality and Nondiscrimination' (Chapter 2) is a valuable resource on the equality and non-discrimination provisions of the International Covenant on Civil and Political Rights. Ramcharan enriches our understanding of the content and meaning of these provisions by weaving their drafting history into his discussion. Opening his essay with the pronouncement that '[e]quality and nondiscrimination constitute the dominant single theme of the Covenant' (p. 29), he analyses the non-discrimination provisions in the Covenant, and examines equality as a right in and of itself, independent of the other enumerated rights.

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[3] UN Doc. A/C.3/ SR.100 (12 October 1948). Available in the *travaux préparatoires* of the Universal Declaration of Human Rights, at: http://www.un.org/depts/dhl/udhr/docs_1948_3rd_3c_ga.shtml. He followed that remark, however, by a reference to '[c]ertain Latin American countries where discrimination was unknown'. The notion among some UN delegates that discrimination was limited to such countries as South Africa and the United States was widespread for decades to come.

Ramcharan's examination of the *travaux préparatoires* of the Covenant shows that the drafters aimed to address both *de jure* and *de facto* equality. Article 26 on equality before the law and equal protection of the law, Ramcharan explains, 'was intended to ensure equality, not identity of treatment, and would not preclude reasonable differentiations between individuals or groups of individuals on grounds that were relevant and material' (p. 37). In addition, the *travaux* show the drafters' goal of protecting not only against discrimination on the grounds listed in the Article 2 non-discrimination clause, but also freedom from discrimination more broadly. Article 3 of the Covenant ensuring equality between men and women was not added until the final stages of drafting, in the General Assembly. Significantly, Ramcharan observes, the provision is not phrased as a prohibition of discrimination, but 'as an affirmation of the entitlement of women as well as men to human rights generally' (p. 35).

The notion that positive measures in favour of disadvantaged groups (affirmative action) does not constitute prohibited discrimination was accepted during the drafting of both covenants. As one delegate stated during the drafting, 'special measures ... were essential for the achievement of true social equality', as these 'were in fact protective measures'. The delegate 'thought it essential to make it clear that such protective measures would not be construed as discriminatory within the meaning of the paragraph' (p. 43). The United Kingdom and the United States were among the states that expressly supported this position.

Ramcharan also discusses the state obligation to address discrimination by private individuals, non-discrimination in various fields such as education and the political sphere and the fact that with very few exceptions, 'the rights recognized by the Covenant are human rights, not merely citizens' rights' (p. 46).

Another valuable resource is Daniel Moeckli's 'Equality and Non-Discrimination' (Chapter 3), which begins with an insightful discussion of concepts of equality and non-discrimination and how they can be interpreted. His overview of the norms of equality and non-discrimination in international law is illustrated with numerous examples of their interpretation and application by UN and regional human rights bodies. He also explains the concepts of direct and indirect discrimination and explores the requirements for justifying difference in treatment. The basic test is that difference of treatment must be reasonable and objective, such that the aim is to achieve a purpose that is legitimate and not grounded in prejudice, and the means used are proportionate to the aim. A range of factors might be used in assessing proportionality, including whether the disadvantage experienced by the affected people is excessive in relation to the aim. Moeckli provides examples of purposes that have been deemed insufficient to justify difference in treatment, including administrative convenience, long-standing tradition, prevailing views in society and the convictions of the local population.

As Moeckli notes, disproportionate impact in some situations may be difficult to prove. A European Court of Human Rights case he cites illustrates the 'decisive importance' (p. 66) that statistical evidence may have on the outcome of an indirect discrimination case. Moeckli points out that often, the data needed to establish a discriminatory effect can often only be collected by the state. Thus, he notes, the UN treaty bodies emphasize to states their duty to collect relevant statistical data, disaggregated by the various grounds articulated in non-discrimination provisions.

Finally, Moeckli examines the positive obligation of states to ensure equality and their duty to take action to ensure the enjoyment of this right, rather than simply prohibiting individual acts of discrimination. The latter approach

> is severely limited in that it focuses on discrimination understood as individual, isolated events that can be remedied through penalizing the perpetrators and compensating the victims. In fact discrimination is often the consequence of deeply embedded patterns of disadvantage and exclusion that can only be addressed through changes to social and institutional structures. (p. 66)

Thus, states have an obligation to take 'proactive steps to eliminate structural patterns of disadvantage and to further social inclusion' (p. 66).

In her informative essay 'The Principle of Equality or Non-Discrimination in International Law', Anne F. Bayefsky (Chapter 4) analyses how this principle has been approached and applied by human rights treaty bodies and the European Court of Human Rights. She critically examines how these institutions have addressed the issue of discriminatory intent and discriminatory effect, justified and unjustified distinctions in treatment and when special measures are deemed consistent with the requirement of non-discrimination. Her overview and critique of the jurisprudence of these bodies reveals inconsistencies in their approach, most often when it comes to cases of discrimination against women. One lesson to be drawn from her analysis is that although the human rights bodies have pronounced certain standards regarding equality and non-discrimination, they have not necessarily applied them.

Matthew Craven includes a detailed and informative essay, 'Non-Discrimination and Equality' (Chapter 5), in his book on the International Covenant on Economic, Social and Cultural Rights. After discussing various concepts of non-discrimination and equality, Craven directly addresses the issue of what equality means when it comes to economic, social and cultural rights. He explains that the drafters of the Covenant did not intend the treaty to require equal distribution of material benefits to all. Instead, the Covenant sets out a 'process of equalization in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society' (p. 110). Equality of opportunity is the objective, and 'an uneven distribution of material benefits is only tolerable in so far as the satisfaction of the basic economic, social, and cultural rights of every member of society is already achieved' (p. 110). However, as he points out, 'statistical evidence of "results" will be used as a measure of equality of opportunity, if only to ensure the effectiveness of any action taken' (p. 113). Craven includes numerous examples from the ESC Committee's review of state reports in his overview of the committee's interpretation and application of the Covenant's equality and non-discrimination provisions. Issues addressed include what constitutes impermissible and permissible differential treatment under the Covenant, how to determine discriminatory effect and the grounds on which discrimination is prohibited.

One important question that arises is whether and on what grounds discrimination on the basis of nationality is permitted. Craven points out that Article 2 of the Covenant prohibits discrimination on the ground of 'national origin', but not nationality. Some have interpreted 'national origin' to include non-nationals, whereas others have not. This part of his essay discusses the approach of various ESC Committee members to this question in such areas as housing, employment and social security. Craven emphasizes that in examining any difference in treatment of non-nationals, the Committee must be sure to assess whether the state decision is motivated by true economic reasons, or prejudice. Indeed, the Committee has been critical of state policy or action when it appears that foreigners were penalized simply for being foreign rather than because of any real threat to national interests.

It should be emphasized that when it comes to the question of 'progressive implementation' of state obligations under the Covenant,[4] the prohibition of discrimination is an obligation of immediate effect, not one to be dribbled out progressively over time. Additional parts of Craven's essay explore the types of state action required to achieve equality and non-discrimination, issues of affirmative and protective action, and the important question of the state obligation to protect against discrimination by private individuals.

Development of International Legal Standards

The drafting history of the equality and non-discrimination provisions of the Universal Declaration of Human Rights (UDHR) is a fascinating one. Johannes Morsink relates this history in intriguing detail in 'Colonies, Minorities, and Women's Rights' (Chapter 6). Why, for example, include both 'race' and 'colour' in the non-discrimination clause? Morsink recounts the story that led to both terms being included. As for 'national origin' in the non-discrimination clause, it was introduced with the understanding that it did not refer to citizenship, but rather, 'national characteristics'. The discussion of prohibiting discrimination on the basis of 'language' centred on the desire of members of linguistic minority groups to see their language rights protected, particularly in education, religion and courts. A minority language provision was proposed for what became Articles 10 and 11 of the UDHR, in order to ensure full equality in a court and a fair trial, but ultimately the provisions were not adopted. 'Political opinion' in the list of prohibited grounds of discrimination has what Morsink describes as an 'in-and-then-out kind of history' (p. 166) which he relates in detail, showing the Soviets energetically attempting at every turn to remove that category from the list. The prohibition of discrimination on the basis of 'property status' was aimed at ensuring that everyone have the same rights, whether rich or poor. Morsink's research shows that the prohibition of discrimination on the basis of 'birth status' was aimed at addressing inherited social and economic privilege, and was meant to cover such categories as social conditions, social status, caste and class.

Were the rights proclaimed in the Universal Declaration held by 'all men', or 'all human beings'? Article 1 of the Universal Declaration begins: 'All human beings are born free and equal in dignity and rights.' The original drafts, however, began with the phrase 'All men', and Eleanor Roosevelt herself did not support changing it, stating that 'it had become customary to say "mankind" and mean both men and women' (p. 175). It was only when the draft came before the Third Committee that the opening Article began 'All human beings'. In addition, the first drafts of the Preamble of the Universal Declaration reiterated all the UN Charter's preambular clauses on equality and rights but one: the Charter's reaffirmation of the 'equal rights of men and women'. Morsink conveys the arguments made against omitting this clause from the Declaration. Ultimately, the Third Committee voted 32–2 for the UDHR's preamble to include reference to the Charter's reaffirmation of the 'equal rights of men and women'. The two states that voted against including it: China and the United States.

Morsink also recounts the discussions around the drafting of the UDHR provisions on equal marriage rights, voting rights, equal access to public service and the right to equal pay

[4] In Article 2 of the ESC Covenant, each state party 'undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized' in the Covenant.

for equal work, as well as the two provisions that contain an explicit gender bias, the phrase 'himself and his family' (Article 23 on just remuneration for work, and Article 25 on an adequate standard of living).

The drafting of the International Convention on the Elimination of All Forms of Racial Discrimination is related by Michael Banton, a member for 15 years of CERD, the committee that monitors the treaty, in his book *International Action against Racial Discrimination*. Banton places his essay 'The Racial Convention' (Chapter 7) in the context of other action that had been taken to address racial discrimination by such bodies as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization and the UN Security Council. A social scientist, Banton brings his discipline to bear in his discussion of the drafting history. Banton points out that the drafting of the CERD Convention was influenced by a 1949 UN Secretary-General memorandum stressing that the prevention of discrimination must be based, among other things, on the knowledge of actual social conditions. Knowledge of these conditions was needed in order to determine steps to be taken through legal action, administrative action and long-term educational programmes.

Although both the UN Charter and the UDHR make reference to distinctions on the basis of race, the CERD Convention was the first to provide a definition of discrimination. Banton relates the debates over how to define racial discrimination in the Convention, and discusses the treaty's prohibition of not just intentional discrimination, but also that which has the discriminatory effect of impairing rights. 'Racial prejudice may be a motivation without being an intention', he notes, and some actions are motivated by prejudice of which one is not necessarily conscious (p. 206). The treaty aims at eradicating discrimination whether intentional or not.

In her informative essay 'Becoming Human: The Origins and Development of Women's Human Rights (Chapter 8), Arvonne S. Fraser presents the evolution of thought and activism in the West in the struggle for women's equality. Tracing this history from Christine de Pizan's *Le Livre de la Cité des Dames* in 1405 to modern times, Fraser recounts women's organizing internationally from the late 1880s, the issues they took on and the treaties and other international instruments they helped develop. Her account is replete with telling details[5] as she relates activity at the UN and other international organizations, and the progression of ideas and theories put forward.

Forty years after adoption of the two covenants, the United Nations adopted the UN Convention on the Rights of Persons with Disabilities. In 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?', Frédéric Mégret (Chapter 9) provides a cogent analysis of the treaty and suggests that 'the argument can be made that the Convention comes close to creating new rights, or at least very new ways of seeing common rights' (p. 269).

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[5] Of the 1980 UN World Conference on Women, for example: 'Males headed virtually every government delegation, even in the preparatory conferences. Interested primarily in the political issues and protecting their country's point of view, they left their chairs to female delegation members unless a political issue was on the agenda; then the blue suits, white shirts, and ties would emerge en masse into the meeting hall. Women would turn around and look at each other knowingly as they relinquished their seats. Finally, in one preparatory meeting when the men emerged from the outer hall, a swell of spontaneous laughter greeted them' (p. 260).

An influence on the development of international law comes not only from treaties but also from non-treaty sources such as soft law and similar instruments. In their essay 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (Chapter 10), Michael O'Flaherty and John Fisher discuss the grave and widespread human rights violations that led a group of human rights experts to develop the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles). O'Flaherty, then a member of the UN Human Rights Committee, was Rapporteur for the development of the Yogyakarta Principles; Fisher, co-director of ARC International, an NGO based in Geneva that works within the UN system to advance the human rights of lesbian, gay, bisexual, transgender/transexual and intersex (LGBTI) people, was also active in developing the Principles. Their essay reviews the growing international law and practice regarding the human rights of people of diverse sexual orientations and gender identities. They describe the practice of the UN human rights treaty bodies, the European Court of Human Rights and the UN Special Procedures regarding the non-discrimination principle as it applies to sexual orientation, and provide numerous specific examples. The authors relate the process used to develop and adopt the Yogyakarta Principles, and provide an assessment of the impact of the Principles in state practice and UN fora. The authors take note of what they call the imperfections of the Principles, but say the instrument should be understood as a work-in-progress.

Interpreting and Applying the Law

Following the part in this volume on the development of international legal standards on equality and non-discrimination is a part on the interpretation of those standards and their application in practice. Dinah Shelton's informative essay 'Prohibited Discrimination in International Human Rights Law' (Chapter 11) is an astute overview of how the prohibition of discrimination is interpreted and applied in international human rights law. Shelton provides an insightful examination and critique of the jurisprudence of international tribunals and of the UN and regional monitoring bodies, including judgments, advisory opinions, general comments and observations in the review of state periodic reports.

As Christine Chinkin notes in her essay on 'The CEDAW Committee and Violence against Women' (Chapter 12), the equality-based model of the Convention on the Elimination of All Forms of Discrimination against Women was criticized soon after its adoption for focusing on areas in the public sphere of most concern to men. This framework 'failed to account for the ways in which human rights abuses affect women differently because of their gender. In particular the Convention did not address the issue of violence against women committed because they are women' (p. 370).

What was needed, Chinkin writes, 'was a reconceptualisation of human rights law to take account of violence against women' (p. 371). The Committee on the Elimination of Discrimination against Women (CEDAW Committee) responded to this call in its General Recommendation No. 19, which recognizes 'the reality [...] that women experience arbitrary deprivation of life most frequently from within the family, or from the community rather than at the hands of state agents' (p. 370). Chinkin provides a succinct description of the genesis of the general recommendation, along with examples of its application in the CEDAW Committee's review of state reports and individual complaints. The Committee has not placed

its focus on cases of individual killings, but instead, has called upon states to address the socio-cultural problems underlying this violence, and to take measures to transform the structural nature of gender violence by transforming attitudes, cultural stereotypes and behaviours. Chinkin also discusses impunity for violence against women, obstacles to women's access to justice and the important state obligation to take steps to prevent violence against women in the first place and not just after it has taken place. She sets out the range of measures the Committee has recommended to counter violence against women, and notes the Committee's concern that information and data on gender-based violence continue to be inadequate.

Alice Edwards provides a valuable contribution on how the non-discrimination principle has been developed and applied in 'Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies' (Chapter 13). She explores how the concepts of equality and non-discrimination on the basis of sex have been interpreted generally, and analyses in detail how these concepts have been applied by the UN human rights treaty bodies to various forms of violence against women. She remarks that since adoption of the UN Charter, although there has been progress in that substantive rather than simply formal equality is understood to be the goal, 'there is still uncertainty as to the meaning of the terms and their application in particular settings' (p. 392), and the implementation of these principles by the treaty bodies is mixed.

Addressing violence against women through the principles of equality and non-discrimination is an approach that Edwards finds 'inherently problematic' (p. 393). This is in part because 'it equates violence against women to sex discrimination and is therefore subject to understandings of the latter term, which have proven to be complex and unsettled (however they are defined)' (p. 393). Another reason is that 'this approach covers only gender-related forms of violence rather than all forms of violence against women and creates, therefore, a two-tiered system of protection' (p. 393). Additionally,

> it reinforces an international legal system that disadvantages women by subjecting them to additional, different, or unequal criteria. By requiring women to characterize the violence they suffer as sex discrimination rather than as violence per se, they are treated unequally under the law. (p. 393)

Indeed,

> [u]tilizing sex discrimination law because it is the only available remedy almost covers up the violence that has occurred or diminishes the extent of the conduct. ... There is something counterintuitive about calling violent conduct discrimination rather than violence itself. (p. 445)

Kevin Boyle and Anneliese Baldaccini's 'A Critical Evaluation of International Human Rights Approaches to Racism' (Chapter 14) provides a thorough and insightful analysis of the subject. In a detailed part explaining how central racial discrimination has been in the development of international human rights law, they discuss the 'pioneering studies' (p. 460) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Their essay explores the definition of racial discrimination and the scope of the substantive provisions of the Racial Discrimination Convention. It then explains how the CERD Committee has applied these provisions in practice, providing examples in such areas as justified distinctions in the case of non-nationals, special measures and affirmative action, the public and private reach of the Convention, governmental interference in private conduct when it comes to hate

speech and remedies for victims of discrimination. It also briefly addresses the important provision in Article 7 requiring states to address the root causes of racial discrimination.

The essay next presents an assessment of the work of the CERD Committee. The authors remark that, considering the widespread and serious nature of racial discrimination in the world, it is disappointing that so few individual complaints have been submitted to the Committee, a fraction in comparison with those submitted to the Human Rights Committee. Boyle and Baldaccini also describe and assess of the work of the Special Rapporteur on racism, racial discrimination, xenophobia and related intolerance, and the UN decades and world conferences to combat racism and racial discrimination. They conclude their review of 50 years of international human rights approaches to racial discrimination with a 'mixed verdict in terms of achievement' (p. 502). There were successes in ending apartheid and rejecting racial discrimination as a state ideology, but as for rejection of racist beliefs and the elimination of racial and ethnic discrimination, they remark, 'the record is dismal' (p. 502). They end with a call for new approaches and a renewed focus on such measures as education.

Another body that has played an instrumental role in interpreting and applying the principles of equality and non-discrimination is the European Court of Justice (ECJ), whose jurisprudence on the subject Sejal Parmar examines in 'The European Court of Justice and Anti-Discrimination Law: Some Reflections on the Experience of Gender Equality Jurisprudence for the Future Interpretation of the Racial Equality Directive' (Chapter 15). The starting point for her essay is the European Union's Racial Equality Directive, which prohibits racial discrimination in such important areas as health care, education and housing. Because gender equality law was a source of inspiration for the Racial Equality Directive, Parmar examines the sex equality jurisprudence of the European Court of Justice to assess potential areas of relevance for interpreting the Directive. In the process, Parmar finds what she calls a '*reflexive cross-fertilisation* process between EU race and gender equality law' (p. 511, emphasis in original). The essay is a useful resource on ECJ decisions on a range of issues in sex equality, including the Court's approaches to what constitutes discrimination, what evidence is needed to prove indirect discrimination, exceptions to the principle of equality, including how to assess genuine occupational qualifications, what positive action measures are permissible to achieve substantive equality and what burden of proof to use in discrimination cases.

Another relevant work too lengthy to include in this volume is Stephanie Farrior's (1996) 'Molding the Matrix: The Theoretical and Historical Foundations of International Law and Practice Concerning Hate Speech'. The prohibition of hate speech is required by some human rights treaties and permitted by others as a measure to counter national, racial or religious discrimination or hatred.[6] This essay provides a detailed account of the drafting history of the relevant treaty provisions, explains how these provisions have been applied in practice, and analyses the theories that emerge.

[6] During the drafting of the hate speech provision of the Civil and Political Rights Covenant (Article 20), the Philippines proposed an amendment adding several categories, including 'sex', to the prohibited bases for advocating hatred and discrimination, but the proposal was not adopted. UN Doc. E/CN.4/365 (1950).

Non-Legal Measures for Achieving Equality and Non-Discrimination

Legislation and judicial decisions will not, alone, achieve equality and non-discrimination. As a delegate stated during the drafting of the Racial Discrimination Convention, '[u]sing legislation by itself was like cutting down a noxious weed above the ground and leaving the roots intact' (quoted in Banton, 1996, p. 59). As Kevin Boyle and Anneliese Baldaccini note in their essay included in this volume,

> [e]limination of racial, ethnic, and other types of discrimination, as forms of human rights violation, requires significant social change in most if not all societies. It cannot be achieved solely by the enactment of anti-discrimination laws, important as such laws are. (p. 451)

The final part of this volume presents works that explore treaty provisions setting out measures beyond legislation and judicial action that states are to take in order to eliminate discrimination and achieve equality.

One of the most important measures that can help counter prejudice is education. The central importance of education in achieving other rights is conveyed by Fareda Banda in her essay 'Article 10' (Chapter 16) in the comprehensive volume *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, edited by Marsha Freeman, Christine Chinkin and Beatte Rudolf. Banda notes that education is 'arguably the most important' of the economic, social and cultural rights in the Women's Convention in that it facilitates the enjoyment of other rights (p. 534). In addition to proclaiming the equal right to education, Article 10 sets out a number of specific measures that states should take to ensure this right, including the revision of textbooks and teaching methods to eliminate any stereotyped concepts of the roles of men and women. After providing a brief overview of the drafting history of Article 10, Banda explains how the CEDAW Committee has interpreted the Article's provisions in its General Recommendations, Concluding Observations and Optional Protocol jurisprudence. She also provides examples where the CEDAW Committee has addressed intersectional discrimination in, for example, the experience of education discrimination by minority and indigenous women and girls. In addition, she provides examples of state court judgments that have cited and relied on CEDAW Convention Article 10.

The CEDAW Committee has interpreted the requirement that education be enjoyed 'on a basis of equality between men and women' to require not just formal equality, but substantive equality and transformative equality through structural change and measures aimed at abolishing stereotypes. The 'all appropriate measures' that states must take to ensure the right to education, the Committee has indicated, include the provision of 'training on changes in legislation and implementation measures to police, judges, health personnel, media, community and religious leaders' (p. 557). The media can play a vital role in helping bring about the changes in attitudes called for in Article 10. This includes the provision of information on family planning, to which Article 10 requires states ensure access, and the Committee has called upon states to encourage the media to play this role. The essay concludes with the observation that, although no state has entered a reservation to Article 10, a number of reservations entered to other provisions may have an impact on the enjoyment of the right to education without discrimination.

The drafters of the Racial Discrimination Convention recognized that laws alone will not suffice in reducing discrimination. Article 7 of the Convention requires states to take