

INFORMATION SOURCES AND MEASURES OF INTERNATIONAL LABOR STANDARDS ON EMPLOYMENT DISCRIMINATION

Constance Thomas[†]

I. INTRODUCTION

The purpose of this paper is, first, to provide an overview of the information sources that the International Labour Office (ILO) uses in the course of acting as secretariat for the ILO supervisory bodies on the application of international labor standards, and, second, to identify the indicators used in the measurement of the application of those standards in the area of discrimination. Much of the information provided below goes beyond the subject area of discrimination and is applicable to the monitoring of other fundamental labor standards and related human rights instruments as well.

Not wanting to belabor a point that is certainly well-recognized by all in the field of labor and human rights, the assessment or measurement of the application of social and human rights is far from an exact science or purely quantifiable exercise. There is not even full agreement on what is meant by the term indicator. As Maria Green points out in her review of current approaches to human rights measurement, there exists a variety of definitions or usage of this term ranging from the strictly statistical to the thematic; including the use of benchmarks to the creation of indices with rankings.¹ Clearly there should be no question that information other than statistics is used in monitoring how a state is applying a convention. The identification of that information, its sources, and the extent to which it is able to be relied upon will be a major focus of the paper.

[†] International Labour Office, Section Chief, International Labour Standards Department, Geneva, Switzerland.

1. Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurements*, 23 HUM. RTS. Q. 1062 (2001).

In Section II of the paper, specific attention is drawn to the definition of discrimination contained in ILO Conventions and how it has been interpreted and applied. To provide the context within which the identified sources and indicators are used, a review of the ILO standards and supervisory system is provided in Section III.

A list of possible sources of information that is used by the ILO is provided in Section IV—although it must be admitted that the list may not be exhaustive. There is also an attempt to indicate the manner in which the information can be relied upon. Here it is important to point out that reliability may be different than usefulness or even credibility, both of which depend to a large extent upon the specific information in question. An attempt has been made in this paper to list only those sources that, generally at least, display those qualities of credibility and usefulness. To better understand the reason for listing some of the sources, an overview is provided of the relevant provisions of international and regional instruments on non-discrimination and equality as an Appendix to the paper.

Section V provides some indicators by which the application of discrimination standards can be measured. These are largely based on the practice of the ILO supervisory system. In this regard, the definition of the term indicator used by Green would appear most appropriate for the type of information presented herein. She defines indicator as a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.² In this respect, the obligation side of the rights is perhaps given a bit more weight than criteria established to determine the actual enjoyment of the rights by individuals or groups. Nonetheless, every effort is made to capture both the performance as well as the outcome aspects since the application of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Equal Remuneration Convention, 1951 (No. 100) are aimed at promoting and achieving substantive as well as formal equality.

II. ILO NON-DISCRIMINATION AND EQUALITY STANDARDS

When addressing discrimination in the field of labor and fundamental rights, it would be most appropriate to be guided primarily by the provisions of ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the ILO Equal

2. *Id.* at 1065.

Remuneration Convention, 1951 (No. 100).³ Both Conventions cover all persons/workers in the public and private sector. Convention No. 111 provides a very broad definition of discrimination: “any distinction, exclusion or preference (made on certain grounds), which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation.” The Convention covers all discrimination that may affect equality of opportunity and treatment in law and practice. In essence, the Convention equates discrimination both with inequality in employment outcomes as well as inequality in determinants of inequality. Thus, sources and measures related to education and training are as relevant as access and promotion questions. It also covers both direct and indirect discrimination (disparate impact). Intent is not an element of the definition of prohibited discrimination under the Convention.

The grounds listed in the Convention upon which discrimination is prohibited are: race, color, national extraction, political opinion, religion, sex, and social origin. Making clear that this is not meant to be an exhaustive list, the Convention provides for a determination of other grounds to be made at the national level. While the designation of other grounds may be said to further the application of the Convention, such designation is voluntary and failure to do so would not be an issue of non-compliance.⁴

The non-discrimination in employment and occupation covers the following areas:

- Access to vocational guidance and training (by implication, access to education)
- Access to self-employed occupation
- Placement services
- Access to wage earning or salaried employment
- Access to the public service
- Access to workers’ and employers’ organizations
- Promotion
- Security of tenure
- Remuneration and benefits
- Other conditions of employment (safety and health, hours of work, holidays, etc.)

3. For detailed discussion on requirements of the Conventions, *see* CONSTANCE THOMAS & YUKI HORII, *FUNDAMENTAL RIGHTS AT WORK AND INTERNATIONAL LABOUR STANDARDS* (ILO, Geneva, 2003).

4. For a general overview of the topic and ILO action, *see* TIME FOR EQUALITY AT WORK, *GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* (ILO, Geneva, 2003).

- Collective negotiations
- Social security based on employment

In determining the extent of application of Convention No. 111, the ILO Committee of Experts on the Application of International Labour Conventions and Recommendations (Committee of Experts) has had occasion to develop the principles and definitions relating to discrimination. For example, the Committee has clearly established that the Convention covers direct and indirect forms of discrimination. The Committee has also had occasion to consider various types of conduct that may be considered as discrimination in employment and occupation on the different grounds covered in the instrument. For example, with respect to sex discrimination, the range is wide and includes sexual harassment, restrictions on women's rights to enter into legal contracts, requirements of husband's permission to travel, imposition of negative pregnancy tests or forced sterilization procedures to access jobs. This is just an indication of the dynamic manner in which the broad definition of discrimination in the Convention has been able to be applied in a variety of contexts and manifestations over the years. The Convention clearly conveys that decisions based on the inherent requirements of the job, or the implementation of affirmative action programs, should not be considered as discriminatory. It should also be borne in mind that the definition and understanding of the concept of discrimination under Convention No. 111 largely corresponds to the meaning of discrimination as used in the U.N. Convention on all Forms of Racial Discrimination (CERD) and the U.N. Convention on all Forms of Discrimination Against Women (CEDAW). Thus, the definition of discrimination contained in Convention No. 111 continues to be a sound and up-to-date basis for any international monitoring.

Convention No. 100 refers to equal remuneration for work of equal value between men and women as concerns rates of remuneration established without discrimination based on sex. By situating the comparison at the level of the "value" of work, the Convention goes beyond a reference to "the same" or "similar" work and covers different jobs to which the same value may be attributed. The term "value," while not specifically defined by the Convention, refers to the worth of the job for purposes of computing remuneration.

The Convention defines the term "remuneration" as including the ordinary, basic, or minimum wage or salary and any additional emoluments whatsoever paid directly or indirectly, whether in cash or in kind, by the employer to the worker arising out of the worker's

employment. The definition is couched in the broadest possible language to ensure that equality is applied to all aspects of a worker's compensation for work. Thus, when assessing compliance, review must go beyond wage payments.

The Committee of Experts has noted in a review of the application of the Convention that pay differentials remain one of the most persistent forms of inequality between men and women. In order to begin to tackle the issue, adequate data on wages and incomes disaggregated by sex is necessary and often lacking at the national level. Linkages to gender stereotypes, sex segregation in the labor market, unequal sharing of family responsibilities, lower levels of skill and experience development have been cited as some of the causes of the pay gap between men and women.⁵

III. ILO STANDARDS AND THE SUPERVISORY SYSTEM IN A NUTSHELL

The ILO's primary reason for existing has always been the setting and implementation of labor standards, and various mechanisms have been evolved to accomplish this task. The existing procedures fall into two main groups, relying respectively on the examination of periodic reports and on consideration of complaints.⁶ Each allows information to be collected, and either makes judgments on the degree of implementation or collects and publishes information from which others may arrive at their own conclusions.

The ILO adopts Conventions and Recommendations as well as other instruments. Conventions may be ratified and create binding obligations on member states. Recommendations provide guidance and may not be ratified. For example, both Convention No. 100 on Equal Remuneration and Convention No. 111 on Discrimination have accompanying Recommendations, Nos. 90 and 111 respectively. The Conventions set out the main principles and obligations and the Recommendations provide possible means of implementation.

A. *Obligations in Respect of Standards Irrespective of Ratification*

The ILO Constitution requires member states, in all cases, to submit ILO Conventions and Recommendations to their competent

5. *ILO Report of the Committee of Experts*, International Labour Conference, 89th Sess., ¶¶ 36-50 (2001).

6. They are supplemented by the non-supervisory promotional procedures provided for under the 1998 ILO Declaration.

authorities (normally the legislature) within a year to eighteen months of adoption, for consideration of implementing action and, in the case of Conventions, of ratification. They must also supply reports not only on Conventions that they have ratified but also, when requested by the Governing Body, on unratified Conventions and on Recommendations, to indicate the position of their law and practice, the difficulties encountered, and future prospects. The latter reports yield a "General Survey" by the Committee of Experts.

B. Ratification of Conventions

By ratification, a state undertakes to give effect to a Convention. The ratification of ILO Conventions cannot be accompanied by reservations, an exception to general international practice, though there are flexibility clauses in many ILO Conventions that allow choices to be made at, or shortly following, ratification. Generally, a Convention enters into force after receipt of two ratifications. International Labor Conventions and Recommendations are minimum standards and do not affect any law, custom, or agreement that is more favorable for workers. As of July 1, 2004, 160 countries have ratified Convention No. 111 and 161 countries have ratified Convention No. 100.

Conventions can be denounced by states that have ratified them, usually at intervals of ten years. There have been limited denunciations of this kind (except recently for outdated ILO Conventions on, e.g., prohibitions of night work for women). In addition, ratification of a revising Convention usually results in the automatic denunciation of an older instrument on the same subject.

C. Reports on Ratified Conventions

Each state is required by the ILO Constitution to supply reports on the measures taken to give effect to ratified Conventions. Originally, reports were due each year on every ratified Convention, but with the increase in the number of Conventions and of ratifications, the reporting periodicity has been extended several times. Reports are now requested every two years on a group of twelve key Conventions dealing with freedom of association, non-discrimination, forced labor, child labor, employment policy, labor inspection, and tripartite consultation. For other Conventions, reports are, in principle, called for once in five years, but they can be requested at shorter intervals where the supervisory bodies note

serious problems of application or when employers' or workers' organizations submit observations on difficulties of implementation.

D. The Incorporation of International Conventions in National Law as a Result of Ratification

In a number of countries, the ratification of a Convention makes it part of national law and directly enforceable at the national level. However, to be applied effectively in such cases, a Convention must be self-executing. Most ILO Conventions are not drafted in this way, and require supplementary measures or regulations for their application. A recent review shows an increasing usage of international conventions by national courts and labor tribunals, regardless of the manner in which the country incorporates international law into domestic law.⁷

E. Supervisory Procedures Based on the Examination of Periodic Reports⁸

Most supervision takes place on the basis of regular reporting and dialog with the ILO's supervisory bodies. The ILO receives between 1,500 and 2,000 government reports each year on the application of all the Conventions. The reports supplied by governments on the application of Conventions and of Recommendations are examined in the first instance by the Committee of Experts, which is composed of twenty independent persons. The Committee's comments take the form either of "observations" contained in its printed report or of "direct requests" addressed directly to the governments concerned. These comments may request further information, ask the Government to make changes, or comment on the measures adopted to give effect to a Convention. The Committee also prepares general surveys each year on one or several related Conventions and Recommendations.

The reports of the Committee of Experts are submitted to a tripartite Committee on the Application of Conventions and Recommendations at each session of the International Labour Conference. This body discusses with the representatives of the

7. See Constance Thomas, Martin Oelz, & Xavier Beaudonnet, *Use of International Labour Law in Domestic Courts*, in A TRIBUTE TO NICHOLAS VALTICOS (forthcoming 2004); VIRGINIA LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW (1982).

8. All the Committee's observations, as well as the rest of the supervisory material mentioned here, are contained in the interactive database *ILOLEX*, at <http://www.ilo.org/public/english/standards/index.htm> or on CD-ROM.

governments concerned selected cases of serious violations and questions of principle, based on comments by the Committee of Experts (some twenty to twenty-five cases a year). Governments appear, provide information, and reply to questions.

In 1964, a procedure of "direct contacts" was introduced, under which representatives of the ILO visit countries (with the agreement of the governments concerned) to discuss difficulties in the implementation of ILO standards. This procedure has been applied to some hundreds of cases since then (and is sometimes called "technical advisory missions" or another term if the government concerned refuses to take part in "direct contacts"). At times, it has also involved extensive fact-finding.

Since the Committee began keeping records of this kind in 1964, it has recorded over 2,300 cases, concerning more than 150 countries or territories, in which governments have taken measures in direct response to comments by the supervisory bodies. Many more such instances are recorded of measures taken in order to allow ratification, or to improve application without the prompting of the ILO.⁹

F. Procedures Based on the Examination of Complaints

The ILO Constitution makes provision for two kinds of contentious procedures. The procedure of complaint under Article 26 of the ILO Constitution allows complaints to be filed by any member state against another member state on the application of a Convention that both have ratified. This procedure may also be initiated by the Governing Body on receipt of a complaint from a delegate to the Conference or on its own motion (*inter alia*, when seized of a representation by an employers' or workers' organization under the procedure described below). In nine cases, the Governing Body has appointed a Commission of Inquiry to investigate the issues. Some of the more recent of these cases concerned the employment of Haitian workers on sugar plantations in the Dominican Republic (1983); trade union rights in Poland (1984); employers' organizing rights in Nicaragua (1990); political discrimination in public service

9. In its annual report, the Committee of Experts regularly reports on cases of progress. For the year 2003, the Committee expressed its *satisfaction* on the adoption of necessary changes to law or practice, following its comments on non-compliance on thirty-four instances in twenty-eight countries. Also, the Committee noted *with interest* various measures taken to improve application of ratified conventions covering 213 instances in 106 countries. *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 92nd Sess., Rpt. III (Part 1A) (2004).

employment in the Federal Republic of Germany (1987); discrimination, particularly against minorities, in Romania (1991); and trade union rights in Belarus (2003). A complaint filed in 1996, following the examination of earlier representations, alleged massive forced labor in Myanmar, and the Commission of Inquiry found that these allegations were amply justified. Commissions of Inquiry receive written submissions, hear witnesses, and, when necessary, make on-the-spot visits. A number of other complaints have been referred to the Committee on Freedom of Association (see below) or were the subject of an agreed settlement reached with the assistance of the ILO.

The Myanmar case referred to above led in June 2000 to the first instance of the ILO's use of Article 33 of the Constitution, which provides that the Governing Body may propose to the Conference "such measures as it may deem wise and expedient" to secure observance of the findings of a Commission of Inquiry. The ILO continues to follow up on this case.

Representations may be made under Article 24 of the Constitution by employers' or workers' organizations on the ground that a state does not secure the application of a ratified Convention. They are considered by a three-member committee of the Governing Body, and then by the Governing Body itself. Fewer than 100 representations have been submitted during the existence of the ILO, since 1919, but twenty-three were submitted in the years 1993-95. The pace has slowed down somewhat since then, but the striking increase in recourse to this procedure in recent times appears to reflect growing difficulties in numerous countries in securing observance of ratified Conventions. A majority of the Article 24 representations concern allegations of discrimination. In the 1980s these cases dealt mostly with issues of discrimination based on political opinion or affiliation. More recently, the cases have concerned discrimination based on ethnicity, in particular against indigenous peoples.

G. Special Machinery in the Field of Freedom of Association¹⁰

In the field of freedom of association, special machinery was set up by the ILO in 1950, in agreement with the Economic and Social Council of the United Nations, for examination of complaints by

10. See ILO, PROCEDURE FOR THE EXAMINATION OF COMPLAINTS ALLEGING INFRINGEMENT OF TRADE UNION RIGHTS (1985); ILO, LAW ON FREEDOM OF ASSOCIATION: STANDARDS AND PROCEDURES (1995).

governments or by employers' or workers' organizations. Since the procedure draws its authority from the ILO Constitution, it may be invoked against states that have not ratified the freedom of association Conventions. The machinery comprises two bodies.

The Committee On Freedom of Association¹¹ is a tripartite body of nine members, appointed by the Governing Body from among its members and presided over by an independent person. It has dealt with some 2,000 cases on a wide range of issues. While generally basing itself on written submissions, it may in appropriate cases hear representatives of the parties and also resort to the procedure of direct contacts, as mentioned above. Such visits have taken place to a large number of countries, including Argentina, Canada, Chile, Colombia, Cuba, Ethiopia, Korea, Nicaragua, Paraguay, Poland, Surinam, Tunisia, Turkey, and others.

The Fact-Finding and Conciliation Commission, composed of independent persons, may undertake more extensive investigations, similar to a commission of inquiry. A case may not be referred to the Commission without the consent of the government concerned and, in the early years, several governments refused to give their consent. Subsequently, a number have done so, but if the governments concerned have ratified the Conventions, the tendency is to resort to the Article 26 procedure which does not require consent. The most important cases concerned Japan (1966), Chile (1975), and South Africa (1992). The Commission may consider cases concerning states that are not members of the ILO but are members of the U.N., as happened with regard to South Africa (which withdrew from the ILO from 1964–1994) and the United States (during a brief withdrawal 1977–1980).

IV. INFORMATION SOURCES

A. Information Used by ILO Supervisory Bodies in Assessing Compliance of International Labor Standards Concerning Non-discrimination in Employment and Occupation

The supervisory bodies of the ILO are bound to rely on official information in terms of their assessments and judgment-making. Official information is comprised of information that comes from

11. See G. von Potobsky, *Protection of Trade Union Rights—Twenty Years' Work by the Committee on Freedom of Association*, 105 INT'L LAB. REV. 69-83 (1972); A.J. Pouyat, *The ILO's Freedom of Association Standards and Machinery: A Summing Up*, 121 INT'L LAB. REV. 287-302 (1982); ILO, *DIGEST OF DECISIONS OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO* (4th ed. 1996).

acknowledged Government sources; ILO-recognized worker or employer organizations at national and international levels and U.N. treaty bodies. Other unofficial sources of information may also be taken into consideration but not strictly relied upon to form judgments. As will be seen from the following lists, the supervisory bodies rely on an array of official information, both quantitative and qualitative.

B. Official Information

1. Government Reports

- Government reports submitted under ILO ratified Conventions (Article 22 of ILO Constitution) (ILO files)
- Government reports submitted under non-ratified ILO Conventions and Recommendations (Article 19 of ILO Constitution) (ILO files)
- Government reports submitted under ILO Declaration on Fundamental Principles and Rights at Work (Article 19 of ILO Constitution) (public, published in summarized form)
- Government reports submitted under U.N. Convention on the Elimination of all forms of Racial Discrimination (public and can be accessed online¹²)
- Government reports submitted under U.N. Convention on the Elimination of all forms of Discrimination against Women (public)
- Government reports submitted under U.N. Covenant on Economic, Social and Cultural Rights (public)
- Government reports submitted under U.N. Covenant on Civil and Political Rights (public)
- Government reports submitted to Council of Europe under the European Social Charter (public)
- Government submitted labor market statistics, usually from their Statistics Departments but sometimes from Ministries of Labour, Ministries of Women's Affairs (ILO files, public databases)

12. At <http://www.un.org/womenwatch/daw/cedaw/reports.htm>.

- Labor inspection reports from Ministries of Labour or other inspectorates such as equality officers (ILO files, usually public or able to be obtained through research)
- Equal Employment Opportunity Commission or Human Rights Commission reports (usually public or able to be obtained through research)
- Ombudsman Reports (public)
- National Reports to international conferences such as Beijing and Beijing plus 5; National Reports to Durban Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance (public—one-time report—not often updated)

Government reports submitted under Articles 22 and 19 of the ILO and under U.N. Treaties are able to be fully relied on for purposes of assessment. The advantage of these reports is that anything presented in such reports may be used to form a judgment. Such information is considered to have a fairly high degree of credibility due to the fact that the government reports are prepared with the knowledge that they will be reviewed, commented on by other national level actors, scrutinized, and verified, to the extent possible, by Committees of individuals conversant with the subject matter of the report and perhaps aware of at least some aspects of the national situation. On the other hand, these reports often fail to include relevant adverse information. The information contained in them may be censored or paint an unrealistically positive image. The reports also may be incomplete, imprecise, and even ill-informed in part—but they seldom contain assertions of complete factual falsehoods. This general rule is substantiated by the exceptional cases. But, true or false, the Government assertions can be used to assess implementation. The provision of knowingly false statements is often considered to be indicative of serious problems of compliance.

The content of the Government reports is, or should be, based on questionnaires for each ILO Convention or guidelines produced for each U.N. Convention, both based on the provisions of the Conventions. The questionnaires on discrimination and equal pay focus on the legal or regulatory means in the country to prohibit discrimination and require equal pay for work of equal value, adoption of a national equality policy, repeal of discriminatory laws, measures taken to implement the rights and principles of non-discrimination and equality in practice, participation of the workers' and employers' organizations, relevant statistical data, and national level monitoring. Thus, they focus heavily on state action and also on

individual and group enjoyment of the right to non-discrimination and equal opportunity and treatment in employment and occupation. Reports submitted to the ILO are also to contain written replies to questions and concerns raised in comments by the Committee of Experts. The quality of the reports is often based on factors such as the training of the labor officers, the human and financial resources of the Ministry of Labour, the importance placed on meeting international obligations within the country, the priority given to the subject-matter of the Convention, say of discrimination, and the availability of information on the subject.

In the field of discrimination and equality, it is important to view any information and evaluate any action within the national context. The manner in which the Government characterizes the situation also is considered to be very important. Unlike the other fundamental rights that may be more clear-cut in their application, the area of discrimination and equality is more phenomenal, with dynamic and promotional aspects. The right to non-discrimination is premised upon the existence in every society of some degree or form of bias or prejudice on one or more of the grounds listed in the Convention. Thus, the starting point is the presumption of discrimination. Compliance entails taking action to stop direct and indirect discrimination in all its mutations and evolutions and taking action to promote equality. It is a never-ending task as new manifestations of discrimination appear and others die out.¹³ Thus, unlike the other fundamental rights, admission of the existence of discrimination is viewed to be positive—as the first step of identification. Of course, the identification must be followed up by measures and action to eliminate such discrimination. If a country remains only at the identification stage, the positive first step would quickly become a negative failure to take action to remedy the non-compliance. Complete denials of the existence of any form of discrimination are highly suspect and are taken more as evidence of lack of knowledge or understanding or lack of any attention to the area of discrimination and equality. In other words, the denial is often taken as a sign of non-compliance. On the other hand, denials on selected grounds of discrimination may be a sign of knowledge of the situation and be considered credible. For example, this may occur when a government indicates that racial and sexual discrimination are areas identified for

13. This is not to be confused with the issue of progressive realization of economic, social, and cultural rights because it is well established that the right to non-discrimination is immediately applicable.

government action but that religious-based discrimination is not a problem in the country. If no other official or credible secondary sources contradict this assertion, it may be taken as true until information to the contrary is submitted or uncovered.

The relevant ministries normally prepare government reports for supervision. Thus, it is often very important to review and compare all the reports from a country to get a more accurate picture of the situation with regard to discrimination and equality. For instance, the average labor official may not be sensitive to issues of violence against women, including sexual harassment, to the same extent that officials in the Women's Bureau are. On the other hand, the women's national machinery may be more welfare-oriented and a solid labor or equality inspectorate may know the problems confronting women in employment to a much greater extent. Thus, the general rule is to review all available national reports.

Information on gender inequality is much more accessible than information on other types of discrimination. Statistics are more likely than not to be disaggregated by sex than by any other criterion, such as race or religion. The information produced for the World Conferences on Women is very extensive and rich. The information recently produced for the U.N. World Conference on Racism, Racial Discrimination, Xenophobia and other Related Intolerance held in Durban also produced some good data for the economic and social situation of racial and ethnic groups in countries.¹⁴

2. Worker and Employer Organization Reports

- Representations or complaints submitted by trade unions or employers' organizations under articles 24 and 26 of the ILO Constitution (ILO files)
- Comments submitted by trade unions or employers' organizations under article 23 of the ILO Constitution (ILO files)
- Collective bargaining agreements (usually not public but some can be obtained through research—in some cases they actually constitute part of the regulatory system in a country)

While Government reports are considered to be the mainspring of international supervision of all international treaties and

14. See U.N. HCHR Web site of the U.N. World Conference on Racism, Racial Discrimination, Xenophobia and other Related Intolerance, Durban, South Africa, 2003, at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.Conf.189.12.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.Conf.189.12.En?Opendocument).

conventions, they are not intended to be the sole basis of review. In the ILO, organizations of workers and employers have constitutional rights to submit information on the contents of the report of the Government or on the application of the provisions of any ratified Convention. Of course, the degree of reliability of the information coming from these organizations depends on their independence from the Government and other political parties, their level of representativeness in the country, and their organizational infrastructure (i.e., do they have the ability and the necessary data to challenge Government statistics). The ILO typically receives employer and worker comments on 10–15% of the 1,500–2,000 Government reports received each year.

Examples of the range and types of comments made by workers' and employers' organizations may be found in the observations contained in the reports of the Committee of Experts. In some instances, both employers' and workers' organizations may engage in a dialog about the extent of application of a particular Convention. Such a case is found in the Committee of Experts' observations on the application of Convention No. 100 in New Zealand over the last ten years. There, the organizations each provide their views on why the pay gap between men and women still exists, what actions are exacerbating or helping it, and what action the Government should be required to take.¹⁵ Trade unions in Japan have also commented extensively on the application of Conventions Nos. 100 and 156. The Committee of Experts annual reports have included as many as a dozen comments by Japanese trade unions. These comments express concerns over the discriminatory nature of part-time work arrangements, transfers, contract terms, and conditions and their impact on unequal pay between men and women and the reconciliation of work and family responsibilities.¹⁶

3. Other Official Government Information

- Constitutions, laws, regulations (public, ILO files, some in ILO Web sites: NATLEX, Gender Equality Policies,

15. ILO, *General Report of Committee of Experts on the Application of Conventions and Recommendations*, 72nd Sess. (2001); Equal Remuneration Convention: New Zealand (ILO, No. 100), 165 U.N.T.S. 303 entered into force May 23, 1953, available at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>.

16. For example, in 2003, the Japan National Hospital Workers' Union, the Staff Union of Okayama University Medical School, and the Women's Labor Union all submitted comments on implementation of C. 100. These are available at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>.

ILO Department responsible for labor legislation). Relevant provisions may be found in the following legislative topics:

- Labor
- Employment
- Equality or non-discrimination
- Women or group-specific
- Social security
- Wages
- Safety and Health
- Maternity
- Sexual Harassment
- Racial Hatred
- Human Rights
- Judicial decisions (public, ILO files, individual research)
- Administrative rules, instructions such as public service rules and classification schemes with wage rates and other remuneration payments (public, ILO files, individual research)
- Explicit national policies or plans on employment, national development, equality, women, minorities, migration, indigenous or tribal peoples
- University rules, course offerings, admission, and completion statistics
- Vocational training and education access, admission, and completion statistics (UNESCO, UNICEF documents, training institutes)
- Oral statements made by the Government and other members of the Committee on the Application of Standards of the International Labour Conference during its discussion of individual cases

Published national Constitutions are highly reliable as are national laws, although in some countries it is difficult to keep pace with the amendments. In some countries, few copies of the labor code exist and amendments are simply handwritten. In some countries, legal provisions remain on the books even after the highest judicial authorities in the country have declared such provisions to be null and void as contrary to provisions of the Constitution or even international instruments. Regulations are even harder to obtain copies of and to monitor changes. In some countries, judicial decisions are not published. It is often in the tertiary level of

regulations that discriminatory provisions are found—left over from past ages or ignored. In some instances, they are well and intentionally hidden. For instance, we have verification of the existence of such regulatory restrictions, say on women or particular ethnic groups, once the removal of the restriction is announced. In some countries, language makes these documents subject to access and use restrictions as they are written in local languages. Thus, in the ILO we rely to a great extent on the informal translations offered by an international staff and on a rather large translation budget.

The World Wide Web has certainly made access to legal documentation quicker and more thorough, but it has not solved all deficiencies that exist in the important quest for full legislative, regulatory, and administrative information. In accessing compliance, care is taken not to rely too much or only on information found on the Web.

4. Other Official Documentation

- ILO Committee of Experts on the Application of Conventions and Resolutions: direct requests and observations. (These observations are published annually in a publicly-available book; both observations and direct requests are available online¹⁷ and on disc format through ILOLEX)
- Concluding observations from U.N. treaty bodies (public and published annually in a book and available online¹⁸)
- ILO complaint procedure body decisions (some are public and published online¹⁹ and on disc format through ILOLEX)
- ILO general surveys (public and published annually in a book and online²⁰ and on disk format through ILOLEX)
- Time for Equality at Work (2003). The ILO released this “global report” on discrimination under the follow-up to its 1998 Declaration on Fundamental Principles

17. At <http://www.ilo.org>.

18. At <http://www.unhchr.un>.

19. At <http://www.ilo.org>.

20. At <http://www.ilo.org>.

and Rights at Work. Available online.²¹ ILO and U.N. staff mission reports (not usually public)

- ILO Statistics: include information as disaggregated as possible by sex, race, and age at a minimum on the key economic and demographic indicators such as working age population; on the main labor force indicators including total labor force, employment and unemployment totals, levels, and percentage rates, as well as statistics on wages, including minimum wages, hours of work, occupational classifications, employment by educational attainment, number of work permits, etc.
- ILO Databases on statistics, labor laws, employment indicators, equality provisions and policies for men and women (info in database validated by Government)
- U.N. Rapporteur reports. For example, the U.N. Commission on Human Rights appointed a Special Rapporteur on violence against women. Available online.²²
- U.N. statistics on mortality rates, birth rates, literacy rates, etc. (public)
- European Commission against Racism and Intolerance country reports (public based on country visits. Available online.²³)
- Other regional intergovernmental bodies' reports such as Organization of American States (OAS), European Union, Organization for Security and Cooperation in Europe (OSCE) (public)

In addition to the Government reports prepared and submitted for the sole purpose of supervision, other Government-produced reports or documents are considered to be official information. The reliability and usefulness of such information varies depending on the purpose of the documentation and its quality. The reports submitted to the major international Conferences are often very well drafted and contain important macro- and policy information, given that extra funds are made available for such preparations. On the other hand, they are usually one time events and thus do not help much with time series analysis. (The exception has been the Conferences on Women

21. At <http://www.ilo.org/public/english/standards/decl/publ/reports/report4.htm>.

22. At <http://www.un.org/rights/dpi1772e.htm>.

23. At http://www.coe.int/t/E/human_rights/ecri.

held every five or ten years since 1975).²⁴ It must also be considered that these reports are not prepared with a view to supervisory scrutiny resulting in less attention to detail. Nevertheless, these other sources are often considered to be highly reliable and are used to verify or supplement that information in Government or other interested party reports.

C. Unofficial Information

1. Important Secondary Information

- Some international NGOs' reports, such as Human Rights Watch, Amnesty International (public), American Friends' Service Committee, International Labour Rights Fund. Some of these groups undertake and publish country-specific research on a particular topic such as domestic workers or sexual harassment.
- CEDAW Shadow Reports are national reports comprised of views of NGOs from that country and are usually published for each country that files a government report on the application of the Convention. Compiled by the Humphrey Institute at the University of Minnesota. They are available online.²⁵
- Regional and national NGOs concerned with discrimination, such as CAFRA (Caribbean Association of Feminist Applied Research) in the Caribbean that might undertake labor-related projects, such as country-specific assessments of law and practice.
- U.S. report to the Senate on Human Rights (public).
- ILO (or U.N. bodies) studies, research, country assessments, information notes (some public, others unpublished).
- Women and ethnic group participation in trade union membership and leadership (ICFTU, WCL, and PSI newsletters, Web sites, and publications).
- World Bank Poverty Assessment Reports (public).

24. For example, reports of the U.N. 1995 Conference on Women are *available at* <http://www.un.org/womenwatch/daw/beijing/platform/index.html>.

25. *At* <http://www.unhchr.un>.

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- UNDP Development Reports, national and comparative (public).
- Law review articles (public).
- Conference, seminar, or workshop reports and discussions (ILO organized or attended given higher priority) (some published, others unpublished).
- Technical cooperation requests and operational status and evaluation reports (little public except some evaluation reports).
- Surveys and assessments on the existence of discrimination-reliability would depend on methodology, scope of coverage, sponsoring organization, and criteria used (for example, was gender cross cutting in survey on ethnic discrimination).
- Company policies.

2. Other Secondary Information

- Academic research, articles
- Newspaper, magazine articles

The above-listed types of secondary information are important to consider in assessing the official information. While judgments as to violations or compliance with fundamental principles may not be based on such information alone, the information in such sources may supply the basis for an informed question to be posed to the Government. Such information may also provide a broader context within which to assess the specific information on the situation of discrimination. Newspapers also can provide direct information on the existence of discrimination through job advertisements, and as such, are considered reliable primary sources; they may also provide evidence of problems in a country and serve as a basis for raising questions.

A first assessment on reliability of whatever information is available will be how the ILO or U.N. supervisory bodies react to it— with a positive attitude, questions on further details, or even a judgment that the Convention is not applied. Thus, the most consistent sources of information for monitoring purposes would be Government reports to the ILO and the U.N. treaty-bodies, ILO and U.N. treaty body observations of compliance with the designated Convention, and trade union and other NGO (with observer status) comments on the level of compliance by a member state with a discrimination-related Convention. At the national level, the human

rights or equality monitoring bodies can be excellent sources of information where they exist and are permitted to independently function.

V. INDICATORS

A. *Compliance/Non-compliance Assessment: Points of Reference*

As indicated above, Government action is a focus of attention in the monitoring of discrimination. The obligation is both negative and positive under the Conventions. The state must not engage in discrimination through law or practice, and it must take action to promote equality through policy and other action. Thus, indicators that measure what the Government is doing are key. To determine the impact of the Government action in addressing discrimination, outcome indicators are necessary. These indicators would include labor market information, statistics, education attainment levels, pay, use of complaint mechanisms, and content and implementation of court rulings.

In assessing compliance with the Conventions on discrimination and equality, the level of progress in compliance or non-compliance is measured over time and marked in relation to the country's own previous situation. This is more like a time series study. Thus, a percentage rate of participation of women in the labor market may be progress for one country and represent a loss for another. That does not mean that wider averages are completely ignored. In this same example, the progress still may be seen as slow and insufficient because the participation rate is still low in comparison with the international average. Here, it is the movement in a positive direction that is considered to be most important. On the other hand, in the country with a loss, the participation rate may be lower than in previous years for that country, but may still be above the international average and thus would be seen as something to keep an eye on, but not overly worrisome in terms of compliance with international labor standards.

The use of precise indicators for numerically ranking countries is neither advocated nor supported in the area of discrimination. This is largely due to concern over the manner in which information would be assessed and used. It would most likely not be much of an exaggeration to say that most persons involved with supervision of international standards loathe the ranking and indexing approach. Rather, the preferred approach is one of benchmarking using the progress of the country to assess progress. Such an approach could

conceivably be used to establish an overall assessment of progress or performance of a given country in relation to another country's relative performance. Performance rates could even be clustered into several groups. One could even consider identifying core and progress indicators and using some combination of those to determine groupings. For example, under the Review of Annual Reports under the Follow-Up to the Declaration on Fundamental Principles and Rights, a compilation of information is used that incorporates the means of assessing the situation including both the factual as well as the institutional context and the efforts made or envisaged to ensure respect, promotion, and realization of these principles and rights. This is work that has only begun and requires much more attention.

At this point in time, it is possible to identify a number of criteria that could be used to measure national-level application of the fundamental right and principle of non-discrimination at work:

- Existence of national law prohibiting discrimination on grounds of race, sex, political opinion, national extraction (ethnicity), color, religion, and social origin in employment and occupation (a constitutional right to equal rights before the law is relevant, but not the same or sufficient) (supporting laws such as maternity protection, recognition of part-time work, right to education, etc. also considered to be important)
- Existence of any discriminatory laws/removal of such laws
- Labor force statistics:
 - A. Percentage of women, men, and specific groups in the labor force, and their participation rates and levels. Same for employment and unemployment. Looking for equitable sharing of unemployment or increases in employment levels among vulnerable population groups (race, religion) and sex.
 - B. Educational attainment and employment.
 - C. Participation in admin/management levels.
 - D. Public sector composition.
 - E. Levels and occupational classifications.
- Education and vocational training participation rates
- Occupational segregation (concentration in few dominated sectors/industries usually calculated using participation of over 70%—some countries use 60%)
- Job classifications: decision-making positions

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- Remuneration income levels (using wide definition of remuneration and equal value standard where possible)
- Self employment: size and type of businesses
- Productive assets: land, information, technology, and financial resources (rights to ownership, access to credit, etc.)
- Explicit national policy on equality or on a specific sex (i.e., national policy on women—preferable to have one directed at employment and occupation or at least a designated section in broader policy)
- Identification of vulnerable groups in labor market with policies and programs aimed at improving their position
- Positive/affirmative action programs (should be aimed at achieving equality and not considered to be discriminatory)
- National mechanism to promote equality (composition, independence, mandate important)
- Labor inspection on non-discrimination and equality issues (number of grievances, complaints, resolutions of complaints, training on discrimination areas)
- Complaint mechanism to handle and remedy discrimination complaints (resources, use, number of complaints on employment discrimination and decisions, training of judges on discrimination)
- Promotion of equality and non-discrimination through industrial relations and by and within workers' and employers' organizations (collective agreement provisions, action plans, policies, guidance services on issues of discrimination, workers education, management training)
- Sensitization campaigns/public education on non-discrimination and promotion of equality, multiracial societies geared to public at large as well as labor market actors (changing mindsets)
- Relevant support measures (i.e., child care or family care services for workers, safe public transportation for poor communities, outreach programs)
- Requests for and implementation of international technical assistance projects to promote equal opportunity and treatment in employment through legislative drafting assistance, law review, employment

creation for minority groups and/or women, training in non-discrimination and equal rights, etc.

- Reported or documented discriminatory practices such as negative pregnancy testing, job advertisements, etc.

Each of the above indicators can be further elaborated on, depending on the specificity of the information available. The use of multiple factors is advised in order to obtain a more complete and accurate picture of the existence of non-discrimination and equal opportunity and treatment in a national setting. It allows for measuring equality in terms of rights, educational attainment, income levels, voice and decision-making, institutional support, and policies. The above do not provide for measuring the broader societal context of the lives of women, men, and groups of persons, such as health status, family status, nutritional levels, control over resources, etc., although these factors could all be considered to be relevant to employment and income generation. Thus, more general macro-level material is often consulted to develop an overview of the national political, economic, and social situation.

While the above listing is what the author generally uses in reviewing situations, it may be useful to provide several examples of indicators or measures of discrimination and inequality that have been formulated and used for other particular purposes. Unfortunately, these tend to be restricted to gender inequality and do not extend to other grounds. David Kucera, in his work on monitoring the effects of core worker rights on labor costs and foreign direct investment, selected five inequality measures for gender equality: 1) percent of females in industry employment; 2) percent of females in admin-managerial/percent of female labor force to determine extent of glass ceiling; 3) percent of female profess-tech/percent of female labor force to determine occupational segregation; 4) female/male educational attainment; and 5) female/male literacy rates.²⁶

In the area of measuring rights, the World Human Rights Guide provides data on the human rights performance of roughly 100 countries.²⁷ There is also the Human Freedom Index, a classification of countries by their human rights performance published by UNDP in their Human Development Report of 1991. These guides focused on three indicators to attempt to measure gender equality in rights: 1) political and legal equality; 2) social and economic equality; and 3)

26. David Kucera, *The Effects of Core Worker Rights on Labour Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom"*, ILO Decent Work Research Programme Discussion Paper, DP/130/2001.

27. Humana 1986, 1992.

equality of the sexes in marriage and divorce proceedings. Specificity in the area of employment rights is not present in these reports. Subsequently, UNDP added a gender index to its development index that produced quite interesting results with substantial changes in a country's ranking when the gender equality measures were incorporated into the index.

VI. CONCLUSION

While the ILO has been supervising international labor standards for seventy-five years, the articulation of uniform precise criteria for public use for measuring compliance or non-compliance has been avoided. The assessments have been undertaken by specialists in the specific subject matters on a state-by-state basis using the provisions of the Convention and the "jurisprudence" of the supervisory bodies. Reasoning as to the comments of the Committee of Experts, some of which are not public, are set out so that the Government and employers' and workers' representatives can respond. Thus, a dialog is established between the supervisory bodies and the Government—and on many occasions this dialog has led to positive changes in conformity with the Conventions. Cases of serious or persistent concerns are raised in published comments of the supervisory bodies and thus may provoke a public discussion on the case at the International Labour Conference. Throughout this process, it must be underscored that the purpose of supervision is to promote greater application of the Conventions. The analysis in many instances is very technical and detailed, and perhaps is only understood by the experts on the subject in the Government. The comments of the supervisory bodies are intended not only to identify non-compliance, but also to review and encourage developments that lead to greater application. This is particularly the case in the area of discrimination, where comments are used to identify gaps, note interesting developments, raise concerns, encourage further action in areas, and, in some cases, note absolute areas of non-compliance. Within the U.N. system of supervisory bodies, information is shared among them in an attempt to avoid contradictory or inconsistent concluding observations. The common approach is not one based on blame but on states' responsibilities. While greater and more visible use of international labor standards and the promotion of their application outside the supervisory systems of the U.N. and ILO is welcomed, caution should be exercised to avoid duplication, abuse, or undermining of the international supervisory systems. It is hoped that new and innovative

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uses of international labor standards will be developed in a manner that serves to strengthen the protection of all women and men against unlawful discriminatory practices in their working lives.

APPENDIX

INTERNATIONAL STANDARDS ON NON-DISCRIMINATION AND EQUALITY: AN OVERVIEW

There are standards on equality at both universal and regional levels, not all of which are entirely consistent with one another, though they all pursue a similar objective. As the paper lists sources of information related to existing international and regional standards, it was thought appropriate to provide an overview of those standards.

I. UNIVERSAL STANDARDS

The 1948 Universal Declaration on Human Rights deals with this in its Article 2, in a provision that applies to the entire text. That Article provides:

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.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The right to be free from workplace discrimination is found first in the ILO Constitution, adopted in 1919, thus predating the Universal Declaration. The original text of the Constitution provided, in the General Principle, “The principle that men and women should receive equal remuneration for work of equal value.” When the Constitution was amended in 1946, this principle was included in the Preamble of the new text. The relevant provision—in a curious accident—provides in English for “equal pay for work of equal value,” but in French it provides for *à travail égal, salaire égal*, or “equal pay for equal work,” a more limited expression. The ILO Constitution also provides more generally for non-discrimination in work in the Declaration of Philadelphia, adopted by the International Labour Conference in 1944 and incorporated into the Constitution in 1946. Part II of the Declaration of Philadelphia declares that:

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organization that lasting peace can be established only if it is based on social justice, the Conference affirms that -

- (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity . . .

Two years after the adoption of the Universal Declaration, the ILO adopted the first of its post-war human rights Conventions dealing with equality. The Equal Remuneration Convention, 1950 (No. 100) provides for equal remuneration for work of equal value (this time in both English and French, the two official languages), as between men and women.¹ In 1958, the ILO adopted the Discrimination (Employment and Occupation) Convention (No. 111), which provides generally for protection from workplace discrimination on the basis of “race, colour, sex, political opinion, religion, national extraction and social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation” (Art. 1(1)(a)), with various exceptions and additions explained elsewhere in ILO submissions.

The rest of the universal Conventions relating specifically to discrimination were adopted by the United Nations. The next adopted was the International Convention on the Elimination of all Forms of Racial Discrimination (1965), Article 5 of which obliges ratifying countries to guarantee the right to equality before the law in the enjoyment of several rights, including:

- e. Economic, social and cultural rights, in particular:
 - I. the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.

When the International Covenant on Economic, Social and Cultural Rights was adopted in 1966, it took a slightly different—and more complicated—approach. Its Article 2 provides for the rights enunciated in the Covenant to be exercised without discrimination “as to race, colour, sex, language, religion, political or other opinion,

1. After this, the ILO regularly used the expression “equal work for work of equal value” in its standards. There is, however, one set of instruments that used the “equal work” formulation: Conventions Nos. 76, 93, and 109, which are successive versions of a Convention on “Wages, Hours of Work and Manning (Sea)”; in this context there appears to be no inconsistency with the “equal value” expression used in other ILO standards.

national or social origin, property, birth or other status.” It complicates the issue of “equal work” vs. “equal value” by appearing to accord the lower standard to women as compared to men. Article 7 of this Covenant provides for:

- a remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work . . .
- c equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

The Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, contains the fullest description of all these instruments of the measures to be taken to prevent discrimination in employment and occupation, but, of course, relates strictly to gender-based discrimination, within a general context of protection against discrimination. Its Article 11 provides that:

States Parties shall take all appropriate action to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . .

and goes on to list at some length action for the right to work, to the same employment opportunities, free choice of profession and employment and advancement, equal remuneration and treatment for work of equal value, social security, and health and safety. It also provides for measures to protect women in case of pregnancy—prohibition of dismissal, maternity leave supporting social services, and protection against dangerous work.

This completes the list of international Conventions adopted specifically on the subject of discrimination, but other Conventions also deal with the subject, or incorporate the right to freedom from discrimination at work in their provisions. This is true for migrant workers, concerning which three Conventions have been adopted at the universal level. These Conventions provide both for prevention of discrimination between migrants, on the usual bases; and then for discrimination between migrants and nationals. The first of these

Conventions is the ILO's Migration for Employment (Revised) Convention, 1949 (No. 97),² Article 6 of which provides as follows:

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory treatment no less favourable than that which it applies to its own nationals in respect of the following matters:
 - (a) in so far as such matters are regulated by law or regulations or are subject to the control of administrative authorities—
 - (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;
 - (ii) membership of trade unions and enjoyment of the benefits of collective bargaining;
 - (iii) accommodation;
 - (b) social security . . .
 - (c) employment taxes, dues or contributions payable in respect of the person employed; and
 - (d) legal proceedings relating to the matters referred to in this Convention.

A later ILO Convention on the same subject, the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) also dealt with this subject. In Article 10 it provides:

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

A certain number of other ILO Conventions on various aspects of migration for employment—particularly in the field of social security and equal protection for all migrant workers' benefits in this

2. This Convention revised and replaced the earlier ILO Migration for Employment Convention, 1939 (No. 66), Article 6 of which contained similar, but less detailed, protection against discrimination for migrant workers, providing also that protection of equality could be subjected to conditions of reciprocity.

context—provide for equal treatment irrespective of nationality, or at least for reciprocity between nations in this respect. These ILO Conventions are in force, and Conventions Nos. 97 and 143 have been ratified by eighteen and forty-two countries, respectively. A United Nations Convention adopted in 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, has recently come into force with ratification by twenty countries. It contains the following provision in its Article 1:

1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Article 7 of the Convention provides that

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to (the same list of criteria).

Article 25(1) goes on to provide they “shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and . . . (a) Other conditions of work . . . (b) Other terms of employment . . .”

Another group, concerning which provisions have been adopted prohibiting discrimination at work, is indigenous and tribal peoples. There are two international conventions on the subject, both adopted by the ILO with the participation of the rest of the international system in 1957 and 1989, respectively.³ The Indigenous and Tribal Populations Convention, 1957 (No. 107) states in Article 15 that:

2. Each Member shall do everything possible to prevent all discrimination between workers belonging to the populations concerned and other workers, in particular as regards—
 - (a) admission to employment, including skilled employment;
 - (b) equal remuneration for work of equal value;

3. The United Nations is working on a draft Declaration on indigenous rights that, at the time of writing, is before the Commission on Human Rights, and that also contains non-discrimination provisions.

- (c) medical and social assistance, the prevention of employment injuries, workmen's compensation, industrial hygiene and housing;
- (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organizations.

Convention No. 107 was revised by the Indigenous and Tribal Peoples Convention, 1989 (No. 169), which takes the principle even further. It provides, in Article 20:

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
 - (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
 - (b) equal remuneration for work of equal value;
 - (c) medical and social assistance, occupational safety and health all social security benefits and any other occupationally related benefits, and housing;
 - (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
 - (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them; . . .
 - (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women and protection from sexual harassment.

This is, incidentally, the only explicit protection in positive international law from the extreme form of sexual discrimination known as sexual harassment. A long list of other ILO Conventions on various subjects also contain the concept of protection against discrimination in employment, variously worded but consistent on the

point of equal treatment. In some cases, additional grounds are added—e.g., age, tribe, or trade union affiliation.⁴ More specialized Conventions of the ILO on such subjects as freedom of association and collective bargaining (Nos. 98, 135 and 141), forced labor (No. 105), conditions of work on plantations (No. 110), employment policy (No. 122), human resource development (No. 142), disabled workers (No. 159), and others all carry non-discrimination provisions. Maternity protection conventions (Nos. 3 and 183) are deemed to be related.

II. REGIONAL STANDARDS

On the regional level, the European standards are the best developed. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms contains no article on non-discrimination at work, but it does contain Article 14:

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

Protocol No. 12 to the European Convention on Human Rights, adopted on November 4, 2000, introduces a general prohibition of discrimination going beyond, but covering, employment. The European Social Charter of 1961 contains no general non-discrimination clause except in its preamble:

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

In its Article 4, it then contains the following passage:

With a view to ensuring the effective exercise of the right to a fair remuneration, the Contracting Parties undertake: . . .

- (3) to recognise the right of men and women workers to equal pay for work of equal value.

In an Additional Protocol to the Social Charter, adopted in 1988, the Council of Europe included Part I(1):

All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

4. See especially ILO Conventions Nos. 82 and 117 on Social Policy (Basic Aims and Standards).

To this was added Part II, Article 1, which spelled out additional protection in regard to discrimination on the basis of sex:

Right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

1. With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:
 - access to employment, protection against dismissal and occupational resettlement;
 - vocational guidance, training, retraining and rehabilitation;
 - terms of employment and working conditions including remuneration;
 - career development including promotion.
2. Provisions concerning the protection of women, particularly as regards pregnancy, confinement and the post-natal period, shall not be deemed to be discrimination as referred to in paragraph 1 of this article.
3. Paragraph 1 of this article shall not prevent the adoption of specific measures aimed at removing de facto inequalities.
4. Occupation activities which, by reason of their nature or the context in which they are carried out, can be entrusted only to persons of a particular sex may be excluded from the scope of this article or some of its provisions.⁵

The revised (1996) Social Charter, now open to ratification, provides in Article 20 of Part I that:

All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

In Article 4, Part II, it provides:

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

5. The Appendix to the Protocol adds, in relation to Art. 1, ¶ 4:

This provision is not to be interpreted as requiring the Parties to embody in laws or regulations a list of occupations which, by reason of their nature or the context in which they are carried out, may be reserved to persons of a particular sex.

- (3) to recognise the right of men and women workers to equal pay for work of equal value;

In none of the texts considered here, in the Charter, its Protocols or amendments, is there any general prohibition of discrimination on any basis other than sex, other than the preambular language cited above. The Organization of American States adopted the American Convention on Human Rights, also known as the “Pact of San José, Costa Rica,” in 1969. Its Part I, Chapter I, Article 1, paragraph 1 lays down a general “Obligation to respect rights”:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any distinction for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

The Convention then goes on to include sections, covered by this general provision, on a wide range of civil and political rights, among which are included freedom from slavery and forced labor, and the right to organize, with a general reference in Part III to economic, social and cultural rights. This gap was filled nineteen years later, when the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights—the “Protocol of San Salvador”—was adopted in 1988. The Additional Protocol includes in its Article 3 a general “Obligation of non-discrimination”:

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

The substantive rights contained in the Additional Protocol, too lengthy to reproduce in detail here, include the Right to Work (Article 6), Just, Equitable and Satisfactory Conditions of Work (Article 7), Trade Union Rights (Article 8), and the Right to Social Security (Article 9).

Finally, the African Charter on Human and Peoples’ Rights was adopted in 1981. Article 2 provides:

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

The African Charter is not a labor-rights document. Nevertheless, it does include a prohibition of slavery and the slave trade (Article 5), and the statement in Article 15 that “Every individual shall have the

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right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”