

Briefing Paper on the International Obligations of States with respect to Racial and Ethnic Discrimination

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Research into international migration and social cohesion in Europe is funded because governments believe that it can help them formulate and administer appropriate policies. Among other things, European governments have entered into agreements, often in the form of inter-state treaties, and, by doing so, have accepted obligations. Research workers may need to understand the nature of the obligations for the avoidance of racial and ethnic discrimination in the reception of migrants and their descendants. This memorandum is designed to help those of them who wish to learn more about the obligations and about the ways in which their implementation is monitored. It is prepared for a conference to be held in Portugal, and therefore takes this state as an example. Research workers should be able to follow the example to learn more about the actions of states in which they have a particular interest.

United Nations

The Universal Declaration of Human Rights (1948) established 'a common standard of achievement for all peoples and all nations'. It is not itself law, though the constitutions of some states accept it as such a standard. After its adoption the United Nations set about transforming the UDHR into law. This objective was achieved when, in 1976, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights entered into force. They form part of what is known as the International Bill of Human Rights.

In the interim, the United Nations had taken other action. The Convention on the Prevention and Punishment of the Crime of Genocide came into force in 1951 and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1969. The latter included, for the first time, a monitoring procedure. States undertook to submit, to the UN, periodic reports about how they were implementing their treaty obligations. The parties to the treaty elect a committee of eighteen experts to examine these reports and communicate the outcome to the General Assembly. This is the Committee on the Elimination of Racial Discrimination (CERD). All European states have become parties to ICERD.

Also for the first time, the Convention included, in its Article 14, a procedure by which states could agree that persons within their jurisdiction who claimed that the state had not fulfilled its obligations to them as individuals could ask the Committee to issue an opinion on the issue. Governments usually accept the opinions of treaty bodies (which include the International Court of Justice in the Hague and the European Court of Human

Rights in Strasbourg). Individuals cannot use the Article 14 procedure until they have exhausted all remedies available within the state's judicial order. The European states which have made the necessary declaration are: Andorra, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, and The Former Yugoslav Republic of Macedonia. Those which have not done so are: Bosnia & Herzegovina, Croatia, Estonia, Latvia, Lithuania, Montenegro, San Marino, and the United Kingdom of Great Britain and Northern Ireland.

The monitoring of state reports is assisted if states observe standard procedures for the presentation of their reports. To this end, the monitoring body, CERD, has established guidelines; these advise states that their reports should include information on the ethnic characteristics of their population (for a review, see Krizán 2001:62-85).

To find out about how the monitoring procedure operates, an inquirer should go to (1) www.ohchr.org/EN/Pages/WelcomePage.aspx and then, successively, to (2) Human Rights Bodies; (3) Treaty-based bodies; (4) Committee on the Elimination of Racial Discrimination (CERD) for information about the Convention, and next, (5) on the left under Search, click on Treaty Bodies Database; where it is necessary, first, to use the drop down scroll to specify the treaty body – CERD – the state in question, e.g., Portugal, and the Type of document - in this case, State Party Report. A click on the Search button will show that the most recent report, CERD/C/Add.1, was dated 06/05.2004 and was the Eleventh periodic report of Portugal due in 2003. A click on E or F or S will lead to the report in English, French or Spanish. The results of the Committee's examination of the report can be found by returning to the database (step 5) and changing the entry under Type to Concluding Observations/Comments, where, among other things, it will be possible to learn, from paragraph 20, that Portugal was recommended to submit its Twelfth and Thirteenth reports jointly, and that they were due on 23 September 2007. They might therefore be available in time for the conference.

To appreciate what it is that is monitored, it is necessary to study the first seven articles of the Convention. Article 1 defines racial discrimination in relation to the various fields of public life. It differentiates discrimination on purpose from discrimination in effect. In European law, this is the distinction between direct and indirect discrimination. In United States law it is the distinction between disparate treatment and disparate impact. (Social scientists find it helpful to recognize, in addition, the condition of racial disadvantage, which is any form of handicap associated with assignment to a racial category. Racial disadvantage is sometimes the result of discrimination, but it can have other sources; Banton 1994 offers an introductory exposition). Article 2 of the Convention defines state obligations. Article 3 obliges states to prohibit racial segregation. Article 4 obliges them to make incitement to racial hatred a criminal offence. Article 5 obliges them to ensure that everyone within their jurisdiction shall be equal before the law in the enjoyment of their legal rights, security of person, and in their civil, political, economic and social rights. The implementation of obligations under this article will probably be of most interest to IMISCOE researchers. Article 6 obliges states to provide to everyone within

their jurisdiction effective remedies against any violation of their rights. Article 7 obliges states, particularly by introducing measures in teaching, education, culture and information, to combat prejudices that lead to discrimination.

To follow the proceedings before the Committee, it is best to revert to the database (step 5) and, under Type, to select Summary Record where a record can be found of the 1660th meeting (in French) and the 1661st meeting (in English). The first begins with a presentation of the report by the State representative (paragraphs 1-12); paragraphs 13-16 summarize the comments of the Committee member serving as Country Rapporteur, and paragraphs 17-16 those of other Committee members. The record of the 1661st meeting begins with a further such comment, followed, in paragraphs 3-33 by replies from members of the Portuguese delegation; the dialogue continues in paragraphs 34-70.

A description of the Committee's consideration, in 1989, of the Ninth report of Venezuela can be found elsewhere (Banton 1996:1-8). Since that time, CERD's procedures have been improved and extended, but the basic structure remains unaltered. The office of High Commissioner for Human Rights has been established. Further treaties have been agreed. One of them is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which came into force in 2003. Member states of the European Union have agreed not to become parties to this convention. Ratification would impose upon them extensive obligations without corresponding benefits. There have also been discussions, so far without result, about harmonizing or unifying the procedures for monitoring implementation of state obligations in respect of human rights.

International human rights law is founded on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights without discrimination. Some of the rights recognized in national laws are limited to citizens of those states but international law requires that any distinction between be legitimate and proportionate. The principles are set forth in *The Rights of Non-Citizens*, a publication of the Office of the UN High Commissioner for Human Rights HR/PUB/06/11 of 2006.

International Labour Organization

The website www.ilo.org provides information about international labour standards. Under Supervisory Bodies and Procedures, access is available to the Report of the Committee of Experts presented to the International Labour Conference, 97th session, 2008. Section 16 relates to observance of the standards regarding the employment of migrant workers. Under the Index of Conventions, there is reference to the Discrimination (Employment and Occupation) Convention of 1958 (No. 111). In this year's report there is no reference to Portugal.

Council of Europe

One of the first achievements of the Council of Europe was the adoption, in 1950, of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It is limited to civil and political rights. The complementary treaty listing economic and social rights is the European Social Charter. This came into force in 1965 and was amplified in 1996. Article 19 of the Social Charter details the right of migrant workers and their families to protection and assistance.

As already indicated, anyone who believes that a state which is party to the ECHR has failed to protect his or her rights under the Convention and has exhausted all the possibilities of remedy within the state, may seek a ruling from the European Court of Human Rights. He or she must specify the right which the state has allegedly failed to protect. When states have incorporated the ECHR, making it part of their domestic law, the courts in the state follow the decisions of the Court in Strasbourg, reducing the number of appeals taken there.

Article 8 of the ECHR provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. There has been a series of cases in which Roma have alleged that the UK government has failed to protect their right to respect for private and family life in accordance with this article (Banton 2002:182).

Article 9 of the ECHR provides that 'Everyone has the right to freedom of thought, conscience and religion... and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance'. This article has a bearing upon controversies over use of the Islamic head scarf.

Article 10 of the ECHR provides that 'Everyone has the right to freedom of expression'. This was at issue in the case of *Jersild v. Denmark* 36/1993/431/510 (discussed in Banton 2002:175-177). Jersild, a journalist, had been convicted of disseminating statements that insulted persons on account of their race. He had reported the views of a group of young men about Africans and other foreign workers. The Court found, by twelve votes to seven, that the measures taken in Denmark were not 'necessary to a democratic society' as stipulated in Article 10. Therefore Jersild should not have been convicted and Denmark had to compensate him accordingly.

Other rights recognized in 1950 included the right to life, to freedom from torture and slavery, to liberty and security of person, to a fair trial, freedom of assembly, and the right to marriage. In 1952 the rights to the peaceful enjoyment of possessions, to education, and to free elections by secret ballot were added to the list.

Article 14 of the ECHR, as originally adopted, provides that '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'. To bring a claim under this article, the applicant has first to identify which of the

Convention's rights and freedoms had not been secured. This has restricted the scope of Article 14 as a remedy for discrimination. So, in 2000, Protocol 12 was added. Its effect is to change the reference to 'the rights and freedoms set forth in this Convention' to 'any right set forth by law' (see Niessen & Chopin, 2004, Chapters 1 & 2). Portugal is among the states which have not yet accepted this protocol.

Nevertheless, even without Protocol 12, Article 14 has provided relief to Roma in central Europe. Justice Initiative (www.justiceinitiative.org) in November 2007 hailed as momentous a decision of the Grand Chamber of the European Court of Human Rights. It arose from *D.H. and Others v. the Czech Republic*, a case launched eight years earlier by 18 Roma children who sought legal redress for the practice - widespread in Central and Eastern Europe - of shunting Roma students, regardless of their intellectual abilities, into "special" schools for children with learning disabilities. Research by the European Roma Rights Centre showed that Roma students in the city of Ostrava were 27 times more likely than similarly situated non-Roma to be placed in special schools.

The Court, by a vote of 13 to 4, declared that segregating Roma students into special schools is a form of unlawful discrimination in breach of Article 14, taken together with Article 2 of Protocol No. 1 (which secures the right to education). It awarded damages to the applicants. The judgment is path-breaking in a number of respects, including the following: *Patterns of Discrimination* - For the first time, the European Court of Human Rights has found a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in a particular sphere of public life, in this case, public primary schools. As such, the Court has underscored that the Convention addresses not only specific acts of discrimination, but also systemic practices that deny the enjoyment of rights to racial or ethnic groups. *Segregation Is Discrimination* - The Court clarified that racial segregation which disadvantages members of a particular racial or ethnic group amounts to discrimination in breach of Article 14. *Equal Access to Education for Roma is a Persistent Problem throughout Europe* - The Court went out of its way to note that the Czech Republic is not alone: discriminatory barriers to education for Roma children are present in a number of European countries. *Unified Anti-Discrimination Principles for Europe* - This decision brings the European Court of Human Rights' Article 14 jurisprudence in line with principles of antidiscrimination law that prevail within the European Union. The Court further established, clarified or reaffirmed certain principles, including the relevance of statistics.

The Council of Europe has supplemented the work of the European Court of Human Rights by establishing the European Commission on Racism and Intolerance (ECRI). As can be learned from www.coe.int/t/c/human_rights/ecri/, this body is composed of members appointed by governments. It monitors states' observance of their obligations in this field. When preparing a country report, selected ECRI members visit the country and meet with representatives of relevant bodies (see Krizán 2001: 45-61).

ECRI's third report on Portugal was made public on 13 February 2007. It is a document of 128 paragraphs and 24 pages in the English text. Paragraphs 1-5 relate to the relevance of international legal instruments; 6-18 deal with Portugal's criminal law provisions; 19-

24 with civil law provisions; 25-45 with specialized bodies established by the state; 46-54 with access to public services and education; 55-81 with the reception and status of non-citizens; 82-128 with vulnerable groups, particularly Gypsy communities. Four pages are given to responses from Portuguese authorities concerning particular passages in the report.

The executive summary notes the progress that has been made in a variety of fields since publication of the second report in 2002. It draws attention to areas where further action is recommended. Three may be selected for present purposes. Firstly, 'Gypsy communities still suffer from social exclusion and encounter difficulties in their dealings with the majority population, local authorities and law enforcement officials. Access to education, to public services, to housing and the opportunity to carry out an economic activity all remain problematic for these communities'. Secondly, 'A lack of awareness of the problem of racism has been noted on the part of the police, prosecutors and judges. The procedure for receiving complaints of racial discrimination contained in the Law 18/2004 suffers from major dysfunctions. There are allegations of direct and indirect racial discrimination in the fields of employment, housing, healthcare and access to goods and services, particularly affecting Black people and Gypsies'. Thirdly, 'Regarding immigration... progress remains to be made both in managing the backlog and reception by the SEF [Serviço de Estrangeiros e Fronteiras] and in implementing the procedure for granting a legal status to non-citizens living in Portugal'.

In the report ECRI recommends the strengthening of training within the justice system, improved procedures for receiving complaints of racial discrimination, the raising of public awareness, measures for integration, measures for ending misconduct on the part of law enforcement officials, and a national strategy to combat the social exclusion of Gypsies. In paragraphs 99-100 ECRI refers to ethnic monitoring, observing that it is important for Gypsies, and 'also for certain Portuguese nationals of immigrant origin, that studies be undertaken to ascertain whether there is any direct or indirect discrimination against minority groups based on ethnic origin, and if so to find the best way of dealing with such discrimination'.

The Council of Europe also, in 1995, adopted its Framework Convention for the Protection of National Minorities (<http://convention.coe.int/Treaty/EN/Treaties/HTM/157.htm>) which in Article 3 stipulates that

1. Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.
2. Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.

Article 24(1) provides that 'The Committee of Ministers of the Council of Europe shall monitor the implementation of this framework Convention by the Contracting Parties'.

Organization for Security and Co-operation in Europe

See <www.osce.org/about/13509.htm>

States in Eastern Europe that sought membership in the European Union were expected first to become members of the OSCE. The High Commissioner on National Minorities explained the standards expected of them with respect to the protection of minority rights. Negotiations followed. This was of particular importance for ethnic Russian minorities in the Baltic states. The High Commissioner on National Minorities in 1999 published an important *Report on the Situation of Roma and Sinti in the OSCE Area*.

European Union

The website http://europa.eu/index_en.htm describes relevant institutions and activities of the European Union. Among the most important is the power of the inter-government European Council to issue directives. If a state fails to implement a provision of a directive the European Commission may institute proceedings in the European Court of Justice in Luxembourg.

On the basis of Article 13 of the EC Treaty, the Council has adopted two directives. The first, designed to combat discrimination based on racial or ethnic origin ([Council Directive 2000/43/EC](#) of 29 June 2000) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The second outlines a framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation ([Council Directive 2000/78/EC](#) of 27 November 2000) (see Niessen & Chopin, 2004, Chapters 4 & 5). In association with these directives, [Council Decision 2000/750/EC](#) of 27 November 2000, established a Community action programme to combat racial and ethnic discrimination that ran from 2001 to 2006.

In 2008 the Commission presented a proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final). It states that

‘The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing the activities of churches and other religious organisations or their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in

schools, whether to recognize same-sex marriages, and the nature of any relationship between organized religion and the state.’

A very different example of the work of the European Court of Justice is provided by the case brought by the European Parliament against the European Council. The Parliament sought to annul some provisions in Directive 2003/86/EC on the right to family reunification, on the grounds that they did not comply with the right to respect for family life and the principle of non-discrimination enshrined in Articles 8 and 14 of the European Convention on Human Rights (ECHR).

In its judgment of 27 June 2006, the Court stressed that Member States apply the Directive’s rules in a manner consistent with the requirements governing protection of fundamental rights, notably regarding family life and the principle of the best interests of minor childrens. On 8 October 2008 the European Commission issued a report, COM(2008) 610, in which it noted that the Netherlands, Germany and France have introduced conditions governing entry in order to facilitate the integration of those entering their territories under the provision for family reunification. It noted grounds on which the legality of these tests might be challenged.

Apart from cases relating to discrimination, some court decisions bear on the use of migrant labour. For example, in 2004 a Latvian company, Laval un Partneri, secured a contract to repair a school building in Stockholm. Swedish trade unions organized a strike over the wage rates and the issue went to court. The Court of Justice held that notwithstanding the fundamental right of Swedish trade unions to take collective action against ‘social dumping’, there had been an unjustified restriction on the company’s freedom to provide services throughout the European Union (see <http://curia.europa.eu/en> for case 341/05, judgment on 18/12/2007).

The European Parliament has long been concerned about issues of discrimination. The report of the *Committee of Inquiry into Fascism and Racism in Europe*, drafted by Dimitrios Evrigenis, in December 1985 gave rise to a resolution adopted in the following month. A further report, for which the Rapporteur was Glyn Ford, was published in 1991. It recommended ‘that 1995 should be designated European Year of Racial Harmony’. Eventually 1997 was declared The European Year Against Racism. A sum amounting to 4.700.000 Ecus was made available to fund local projects. For a critical commentary on this initiative, see *Journal of Ethnic and Migration Studies* July 1999, 25(3):532-535.

On 15 October 2008 the Council of Ministers adopted the European Pact on Immigration and Asylum (see www.euractiv.com/docad/pacteEN.doc). This is a political agreement, not a legal text. It seeks to promote consistency in the ways in which member states implement their obligations in this area.

On 15 February 2007, the EU established the Fundamental Rights Agency. It is based in Vienna and replaces the EU Monitoring Centre on Racism and Intolerance that was set up in 1997. The mission of the FRA is, among many other things, to provide information and data on fundamental rights matters, to promote dialogue with civil society and work

closely with non-governmental organizations, and to carry out, co-operate with or encourage scientific research and surveys. See <http://fra.europa.eu/fraWebsite>.

The International Centre for Migration Policy Development (www.icmpd.org), also based in Vienna, is an international organization with eleven member states. It was founded in 1993 on the initiative of Austria and Switzerland. Its purpose is to promote innovative, comprehensive and sustainable migration policies and to function as a service exchange for governments and organisations.

Attention is also drawn to the Migration Policy Index (MIPEX) which is produced by a consortium of 25 organisations led by the British Council and Migration Policy Group with financial support from, *inter alia*, the European Commission. The Index may be downloaded from www.integrationindex.eu.

Many other international and European institutions, not mentioned in this memorandum, may have agreed principles and procedures relevant to research into international migration, integration and social cohesion in Europe.

References

- Banton, Michael 1994 *Discrimination*. Buckingham: Open University Press (new impression, with revisions, 1997).
- 1996 *International Action against Racial Discrimination*. Oxford: Clarendon Press.
 - 2000 *Combating Racial Discrimination: the UN and its Member States*. London: Minority Rights Group International.
 - 2002 *The International Politics of Race*, Cambridge: Polity.
- Krizán, Andrea 2001 *Ethnic Monitoring and Data Protection. The European Context*. Budapest: Central European University Press.
- Niessen, Jan & Isabelle Chopin (eds) 2004 *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Leiden: Nijhof.

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