# The Relevance of International Instruments

## on Racial Discrimination to Racial Discrimination Policy in Ontario

**Frédéric Mégret**

Frédéric Mégret is an Assistant Professor at the University of Toronto Faculty of Law. A recent immigrant to Canada, his work focuses on the global and transnational dimension of rights protection. He is the co-editor of "The United Nations and Human Rights" and a regular contributor on issues of human rights.

ABSTRACT

International law has a long history of dealing with problems of racial discrimination. In all likelihood, policies against racial discrimination in Ontario can only benefit from an opening to and interaction with the international debate, although too much should probably not be expected of international law.

The most important treaty when it comes to racial discrimination is the Convention on the elimination of racial discrimination (CERD) adopted in 1966, which is both quite universal (only 25 states are not party) and very specialized. However, it is worth noting that there are a number of international instruments, which although they do not deal exclusively with racial discrimination, also form part of the corpus of norms dealing with the subject. The most famous universal instruments are the Universal Declaration on Human Rights and the International Covenant on Civil and Political rights. Other much more specialized instruments exist, such as the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organization in 1958, and the Convention against Discrimination in Education adopted by UNESCO in 1960.

One should also be aware of various regional conventions to the same effect, including the Inter-American Convention on human rights and the European Convention on human rights. Although strictly speaking only the former is applicable to Canada, it helps to think of various regional treaties as being susceptible to influence each other. One should not discard, therefore, the possibility that concepts evolved in one regional context, might be applied in another.

Perhaps more importantly than the conventions themselves, most of which tend to be very general in nature, are the case law, reports, and resolutions of various bodies directly or indirectly entrusted with their implementation. The Committee on the elimination of racial discrimination is clearly the most famous and the one most directly entrusted with the application of CERD. Its case law is limited because few individual petitions have made it beyond the receivability stage, but its General comments and annual reports are worth keeping an eye on. The Human Rights Committee, which monitors the application of the Covenant on civil and political rights, has also issued one general comment on the right to be free from racial discrimination.

Paradoxically, however, it is the regional bodies that are the best source of international law on racial discrimination. Although their obvious limitation is that they are set in a regional context, they have the considerable advantage of hearing on average many more cases than the truly universal bodies. This means that each of the Inter-American and European Courts has decided two or three landmark cases on racial discrimination.

Finally, one would have to include a variety of organs that are not strictly courts or monitoring organs but that do have a role in shaping what international law has to say on racial discrimination. Examples include almost any UN human rights body (the Commission on human rights, the sub-Commission) or even not specifically a human rights body (the General Assembly). The output of such bodies tends to be quite general, but they have occasionally created sub-bodies with a more specific mandate relating to racial discrimination[1]. Regional sources are too many to mention. The important thing to understand is that these bodies do not produce "hard law", but that they do concur to define broad trends relating to racial discrimination.

### What is international law's definition of racial discrimination?

Racial discrimination occurs not simply when differences are made between certain racial groups, but when this differentiation adversely affects the enjoyment of rights otherwise protected by international human rights treaties by members of one group. Racial discrimination occupies a special status within the more general prohibition of arbitrary discriminations. It is worth noting that the European Court of Human Rights, for example, has come close to considering that in some cases racial discrimination, in addition to being a self-standing human rights violation, may as such involve a degrading treatment under Article 3 of the European Convention on Human Rights, because a particular form of offence to human dignity is involved.[2]

Racial groups should be defined objectively and states should not be allowed to "pick and chose" what is a racial group and what is not for the purposes of CERD. While the Universal Declaration and the ICCPR focused only on race, the CERD prohibits discrimination on the basis of "race, color, descent, or national or ethnic origin". It is sufficient, according to the Racial Discrimination committee, that a particular group consider itself "subjectively" a racial group and be seen as one, for it to be considered as such.

Although CERD did not include any direct reference to indigenous peoples, the Racial Discrimination committee has since made it abundantly clear that discrimination against indigenous peoples is the functional equivalent of racial discrimination and prohibited as such.

**A) Discrimination: Intention and Effect**

One of the trickier issues when defining racial discrimination is defining discrimination itself. Relevant treaties do not give a definition, so it has been left to various organs' interpretations of it. The easy case is one where discrimination is explicit, but proving that a measure's purpose is discriminatory is considered sufficient. The European Court of Human Rights in a case opposing Greece to Turkey on the fate of Cyprus found that despite the fact that Greek Cypriots where not nominally designated in a series of laws, these laws were clearly destined to affect that community and no other.

However, even in cases where discrimination is neither explicit nor the provable purpose of a piece of legislation (for example because parliamentary records do not show any obvious discriminatory intent), it may still be possible to consider that a law violates the prohibition on racial discrimination if it "has an *unjustifiable disparate impact* upon a group distinguished by race, colour, descent, or national or ethnic origin".[3] There have been a few examples of this in the case law. The Inter-American Court, for example, considered that while nominally non-discriminatory, a proposal that its naturalization law include a "comprehensive examination on the history of the country and its values" would in practice and given the context of Costa Rican society, have unfairly discriminated against the indigenous population (whose Spanish writing skills were generally not the same as the rest of the population's).

There are obvious difficulties, however, with saying that discrimination can occur merely because of the effects that are bound to arise when dealing with economic and social rights. Effects can be hard and contentious to prove and may only appear long after a piece of legislation or practice has been adopted. Second, there is in theory no limit to how far an "effect approach" to racial discrimination might go. What if, for example, economic policies were adopted which were prejudicial to the poor in a society where certain racial groups constituted a disproportionate part of the poor (or where these groups were disproportionately represented among the poor)?

The extent to which international law makes such "accidental" or unintentional discrimination illegal is not entirely clear. The European Court of Human Rights has provided some elements of interest. In the case of Abdulaziz, Cabales and Balkandali, for example, it was determined that UK immigration laws, even though they "differentiated on the basis of people's nationality, and indirectly their race, ethnic origin and possibly their colour", were not racist because there was "no evidence of an actual difference of treatment on grounds of race". In fact, to the extent that the applicable rules included a "specific instruction to immigration officers to carry out their duties without regard to the race, colour or religion of the intending entrant" and were "applicable across the board to intending immigrants from all parts of the world, irrespective of their race or origin",[4] the Court was satisfied that their purpose was to curtail immigration and not to discriminate as such.

**B) Legal differentiation vs. illegal discrimination**

There really is no exception to the prohibition on racial discrimination. However, it is true that certain types of state practice are considered to be outside the ambit of racial discrimination strictly construed. International sources have come strongly in favor of so-called positive discrimination. Article 4 of the race convention notes that "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination*". In fact, the Committee on Human Rights has gone further, by pointing out that "(…) the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant"[5]. This makes it legitimate for the state to grant part of a population "certain preferential treatment in specific matters as compared with the rest of the population"[6]. The legality of positive discrimination, however, is submitted to two conditions: first, such measures must not "as a consequence, lead to the maintenance of separate rights for different racial groups"; second, such measures as are taken for the purposes of positive discrimination "shall not be continued after the objectives for which they were taken have been achieved".

One question that arises, however, is whether there might ever be any other differentiation on racial grounds that would be considered legal. The issue arises particularly in connection with the practice of "racial profiling" which involves targeting certain communities for the purposes of law and order. As is well known, racial profiling threatens to become an endemic problem, in Ontario as elsewhere, as a result of efforts to curb terrorism.

It is worth pointing out that the international law of racial discrimination might be seen as providing a loophole in that respect. Under international law, an otherwise unlawful discrimination may be lawful, according to the Racial Discrimination committee itself, if the criteria for a given differentiation "judged against the objectives and purposes of the Convention, are legitimate".[7] It is likely that proponents of racial profiling would seize on this wording to defend the practice. However, one should be wary of such arguments. According to the Inter-American Court, one of the essential requirements for discrimination to be valid is that it be "reasonable". Reasonableness refers to both ends and means, but when it comes to means it remains "impermissible to subject human beings to differences in

treatment that are inconsistent with their unique and congenerous character".[8] This seems to suggest that racial discrimination is probably unique in relation to all other possible forms of discrimination in that it can never be made legal by the pursuit of a "legitimate" social goal.

### The applicability of international instruments in Canada

Although it is far from being alone in doing so, Canada is not explicit about the applicability of international human rights instruments domestically. The Canadian Human Rights Act does not refer to Canada's international obligations, including CERD.

Because Canada's is a so-called "dualist" system, CERD would in theory have to be directly "incorporated" into Canadian law before it becomes applicable. There is however a good case that even short of incorporation, Canada's international obligations should have some value in Canadian Courts. In the Baker case, for example, Justice L'Heureux-Dubé argued (and this was supported by a majority of the Court) that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[9] Arguably, this should be the minimal role assigned to international norms on racial discrimination.

Another route for the applicability of international norms concerning racial discrimination is customary international law. The advantage of arguing for the customary international law status of CERD is it obviates the need for incorporation. There is a very good case that the international community's norms on racial discrimination have acquired just such a status (almost universal ratification would be a good indicator).

### What can an OHRC policy on racial discrimination learn from these international definitions and conventions?

Apart from the issue of racial profiling which I have already hinted at and which has attracted very widespread and unambiguous international condemnation, one area where the Ontario debate might benefit from attention to international law is that of economic and social rights. The Committee on Racial discrimination has repeatedly stressed that economic discrimination is as much a form of racial discrimination as discrimination affecting the enjoyment of civil and political rights. Some of the primary areas in which the issue of protecting economic and social rights will arise are employment, housing, health-care and education, where many contemporary modes of discrimination occur. Proving discrimination in such cases can be hard, but the Committee has made it clear that it is ready to rely on various structural indicators (e.g.: differentials in the employment rate) to uncover systemic practices of racial discrimination.

A related issue of current interest to international organs is the possibility that private actors rather than simply the state might violate the human right to racial discrimination. At the very least, it has been argued that the State should uphold a normative environment where private discrimination may not occur. Appropriate remedies should be provided to those whose rights have been violated.

Finally, much of the Racial Discrimination committee's recent work has been devoted to the protection of migrants, refugees and asylum seekers' protection against radical discrimination. CERD is quite clear about the fact that the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens", but the Durban Declaration has insisted that discrimination against non-nationals is often one of the main sources of contemporary racism. This issue is the object of the Committee's latest general comment.[10] Undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live are another related matter of concern. The Committee has pointed out that although distinctions between citizens and non-citizens are legitimate they should be confined to the minimum. For example according to the Committee, "Although some (…) rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, *human rights are, in principle, to be enjoyed by all persons*".[11] It follows that states should ensure that "legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status".[12]

### Conclusion

The international law of discrimination provides us with a fairly rich and varied material on the nature of racial discrimination. Even if not directly applicable, its definitions should at the very least inform the Ontarian debate.

### Endnotes

1 Examples include the Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Working Group on the effective implementation of the Durban Declaration and Programme of Action, and the Working Group of Experts on People of African Descent.

2 East African Asians v UK [1973] 3 EHRR 76, para. 207.

3 General Recommendation XIV, Definition of discrimination (Art. 1, par.1), para. 2.

4 East African cases, supra note 2, paras. 84-85.

5 General Comment No. 18: Non-discrimination: 10/11/89.

6 Id.

7 General Recommendation XIV, Definition of discrimination, para. 2.

8 55.

9 [1999] 2 S.C.R. 817, para. 70.

10 General Recommendation 30, Discrimination against non-citizens, CERD/C/64/Misc.11/rev.3.

11 Id., para. 1. 3.

12 Id., para. 2. 7.