

Expert Opinion on the Right to Family Life and Non- discrimination

A submission by the Open Society Justice Initiative

November 2008

I Introduction

1. The Open Society Justice Initiative (Justice Initiative) pursues law reform activities grounded in the protection of human rights and contributes to the development of legal capacity for open societies. It has offices in Budapest, Hungary; London, the UK; New York and Washington, the United States; and Abuja, Nigeria. Its principal activities include submitting legal opinions before national and international courts on questions of law in which it has specialized expertise. The Justice Initiative submits legal opinions in many cases before *inter alia* the European Court of Human Rights¹, the Inter-American Court of Human Rights² and the African Commission on Human and Peoples' Rights.³ The Justice Initiative has extensive expertise in European, American and African comparative human rights law.
2. The Justice Initiative is asked to provide an expert opinion with regard to the operation of the *Citizenship and Entry into Israel Law* and the standards that are applicable in the Americas, Europe and Africa pursuant to regional human rights mechanisms with regard to the right to family and private life and to anti-discrimination principles.

Relevant Domestic Law

3. The law was originally introduced by a government decision of May 12, 2002 which placed a moratorium on applications for family reunification between Israeli citizens and Palestinians from the Occupied Palestinian Territories. This was enacted into law in July 2003 through the *Citizenship and Entry into Israel Law (Temporary Order) 2003*, initially on a temporary basis, but then extended three times. In July 2005 the law provided exceptions permitting the application for visa permits by women over the age of 25 and men over the age of 35.
4. The law was challenged before the Israel Supreme Court, which upheld the law in a 6-5 decision in May 2006.
5. In March 2007 the Knesset voted to renew the law to July 2008, and extended it to apply to citizens of Iran, Iraq, Lebanon and Syria, as well as to those of the Palestinian Authority. They also created a special committee that would consider exceptions on a humanitarian basis. We understand that the law has again been extended.

¹ For example: *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia*; *Bogdonavichus and Others v. Russia*; *Makhashev Brothers v. Russia*; *Makuc and Others v. Slovenia*; *Romanenko et al v. Russia*; *D.H and Others v. Czech Republic*; *Ramzy v. Netherlands*.

² For Example: *Claude et al v. Chile*; *Mauricio Herrera Ulloa v. Costa Rica*; *Yean and Bosico v. Dominican Republic*.

³ . For example: *Yusuf Ali and Others v. Kenya*; *Asociación pro Derechos Humanos de España, et al. v. Equatorial Guinea*; *Good v. Botswana*; *People v. Côte d'Ivoire*; *Radio Freedom FM v. Cameroon*; *Institute for Human Rights and Development in Africa v. Guinea Conakry*.

II The right to family and private life

European Law

6. The right to respect for family and private life is well-established under the law of the Council of Europe, an organization with 47 member States throughout Europe. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states “everyone has the right to respect for his private and family life ...”⁴ Article 16 of the European Social Charter, another Council of Europe treaty, recognizes the family as a ‘fundamental unit of society,’ requiring social, economic, and legal protection from the State.⁵ The ECHR asserts that there “shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country....”⁶
 7. The Court has held that the concept of family life applies not only to a nuclear family but also to other forms of relationships, and that the existence of family life will depend on the nature of the relationship rather than their legal definition. The purpose of family life is in order that family relationships can ‘develop normally’ and for family members to enjoy each others company. *Marckz v Belgium*, ECHR, (1979) para.31; *Olsson v Sweden*, ECHR (1988) para. 59.
 8. With regard to engaged couples, family life may exist where there is sufficient evidence of strength of intention to create family life or the existing establishment of relations. Application No.15817/89, *Wakefield v UK* (1990).
 9. Article 8 also protects the right to respect for private life, which is defined broadly without exhaustive definition. *Niemietz v Germany*, (1992). This includes the right to have relationships with others and to develop as a human being. *Bruggemann and Scheuten v Germany*, App. No. 6825/74. The European Commission of Human Rights, one of the predecessors of the current court, explicitly found in the *Wakefield* case, above, that a relationship between an engaged couple did ‘fall within the scope of the notion of private life envisaged by Article 8 (Art. 8) of the Convention’. In that case the applicant was a prisoner, and so unable to marry his fiancée.
- Interference and proportionality*
10. Art.8 is a qualified rather than an absolute right, and the State is permitted to interfere with the right where the interference is in accordance with the law, is for a legitimate purpose contained within Art.8(2) and is a proportionate response to the problem. The interference must be ‘necessary in a democratic society’ which is defined by reference to the purposes of the Convention, including ‘tolerance’, ‘pluralism’ and ‘broadmindedness’. *Dudgeon v UK*, (1981) para.51.

⁴ See Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005, November 9, 1950, art. 8.

⁵ See European Social Charter, CETS No. 035, October 18, 1961, revised May 3, 1996, art. 16.

⁶ *Id.*

11. With regard to the definition of proportionality, the Court will not merely review whether the action of the State was reasonable or not, but will determine whether the reasons given for the interference are relevant and sufficient as a whole. *Olsson v Sweden* (1988) para.68. The Court will also ensure that the state has provided sufficiently persuasive reasons, (*Dudgeon v UK*, (1991) at para..54) and then examine the extent of the interference with the rights of the individual. *Smith and Grady v UK*, 1999.
12. However, the court has outlined the limits that apply in considering the proportionality of any interference.
13. Firstly, a ‘blanket ban’ which applies to every individual fitting within a particular category without any consideration of the individual circumstances of the case, will almost certainly fail the test of proportionality. In the case of *Hirst v United Kingdom (No.2)*, (GC) 6 October 2005, the Court was considering a law which prevented prisoners from voting. The Grand Chamber found a violation of the Convention for a policy that was indiscriminate, used as a blanket restriction and with automatic application, concluding that:

“Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.” *At paragraph 82.*

14. Secondly, the Court has held that it is never permissible for there to be a discriminatory reason for an interference in an Article 8 right such as ethnicity or nationality. See part III below.

Effective Rights.

15. The Strasbourg Court has frequently stated that the Convention does not just provide theoretical protection but must effectively guarantee rights, so as to avoid a protection that is ‘worthless’. This means that where there is a question of interpretation the Convention should be interpreted in the way that best protects the right under consideration for the individual.
16. For example, in considering the issue of the importance of providing *effective* legal assistance in criminal cases, the Strasbourg Court has stated that:

‘..the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective....Adoption of the

Government’s restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of [Article 6(3)(c)] and the structure of Article 6 as a whole.’ *Artico v Italy* (1981) 3 EHRR 1, at 33.

17. In the case of *Soering v UK* (1989) the Court referred to the need for an effective interpretation of rights as one of the objects of the treaty:

“In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective”. At para. 87.

Procedural Fairness

18. The ECtHR has also considered the need for there to be procedural fairness in coming to a decision on family re-unification. In the case of *Ciliz v. Netherlands*, the Court described the necessity of balancing individual rights under Article 8 of the Convention and the State’s interest in regulating its society:

“the Court also reiterates that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.”⁷

19. The Court then concluded (at paragraph 72) that a Turkish citizen’s right to live in the same country as his Dutch citizen son overrode the Netherlands’ interest in restricting immigration.
20. The procedural protections in the right to family life also mean that the individuals concerned must be involved in the decision-making process. In *W v. United Kingdom*, which involved the procedures adopted by a local authority with regard to the taking into care of a child, the ECtHR found that the British authorities had not allowed the father of the child to be sufficiently involved in critical stages of decision making regarding his family, constituting a violation of Article 8.⁸ The Court emphasized that in cases involving rights related to family life, national governments must adhere to procedures that allow the relevant parties to be heard, noting, ‘The decision-making process must...be such as to secure that their [the applicants’] views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them.’⁹

European Union Law

21. Within the 27 Member States of the European Union the right to family life is further protected. The right to family life is set forth in Article 7 of the Charter of

⁷ See *Ciliz v. Netherlands*, Application No. 29192/95, ECtHR, July 11, 2000, para. 66.

⁸ See *W. v. United Kingdom*, Application No. 9749/82, ECtHR, July 8, 1987, para. 62.

⁹ *Id.* at para. 63.

- Fundamental Rights of the European Union (EU)¹⁰. The right to family reunification is also well-recognized in the EU, established as an independent right in the European Council’s Directive on the Right to Family Reunification¹¹ (the Directive). The language of the Directive suggests that it was enacted in recognition that the protection of family life is enshrined in numerous international instruments, such that it must be considered a fundamental right. The Directive also requires the Member States to permit the reunification of citizens and their non-citizen spouses.¹²
22. The Directive does recognize exceptions to a State’s duty to protect the family, specifically when reunification would present a threat to public security, i.e. cases in which ‘a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.’¹³ However, the Directive emphasizes that family reunification is ‘a necessary way of making family life possible’¹⁴ and that ‘[m]easures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life.’¹⁵ In other words, the right to family life becomes meaningless in the absence of a State’s recognition of that right, especially in cases where family reunification is necessary to establish a family life. As a result, any measures adopted by a State restricting reunification for the purpose of public security must not wantonly violate citizens’ right to family life, unity, and reunification.
23. The European Court of Justice (ECJ), an organ of the EU, has considered Article 8 of the ECHR, which all EU Member States have ratified. In *European Parliament v. Council of the European Union*, the ECJ noted that respect for family life is a fundamental right protected by law. Member States have both positive and negative obligations to protect the rights of citizens in their territories, even if such obligations conflict with the State’s immigration procedures:

“This right to live with one’s close family results in obligations for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory. Thus, even though the ECHR does not guarantee as a fundamental right the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the

¹⁰ See Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities*, 2000/C 364/3, December 18, 2000, art. 7. The Charter was proclaimed by the main bodies of the European Union on 12 December 2007 as representing the fundamental values of the EU. It has yet to enter into legal force.

¹¹ See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *Official Journal of the European Communities*, L 251/12, October 3, 2003 .

¹² *Id.* at art. 4(1)(a)

¹³ *Id.* at preamble, para. 14.

¹⁴ *Id.* at preamble, para. 4.

¹⁵ *Id.* at preamble, para. 2.

right to respect for family life as guaranteed by Article 8(1) of the ECHR.”¹⁶

24. The ECJ has asserted that while States have ‘a margin of appreciation’ when determining security safeguards in immigration procedures, measures that disrupt family unification must be ‘justified and proportionate.’¹⁷
25. Thus, though European law recognizes exceptions to the rights to family reunification, both the Council of Europe and the European Union’s texts either set out explicitly or have been interpreted to set out specific conditions constraining the State’s right to limit family reunification. The EU’s Directive on the right to family reunification sets forth procedures for how States should treat applications for family reunification, and specifies the rights of family members living within the State once the application is accepted.¹⁸
26. In sum, European institutions have concluded that depriving people of the right to family reunification is equal to interference with family life. Moreover, the right of family reunification is widely considered as a positive right, in cases where States have the obligation to facilitate it as indicated in this expert opinion:

“Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated. Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities for enjoying that right elsewhere. Equally, deportation or expulsion could constitute an interference with the right to family unity unless justified in accordance with international standards”.¹⁹

Inter-American Law

27. The American Convention on Human Rights (ACHR) provides for the right to family life in Articles 11 and 17. Article 11 states: ‘No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.’ Article 17 is entirely dedicated to the rights of the family:
 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by

¹⁶ *European Parliament v. Council of the European Union*, Case C-540/03, ECJ, June 27, 2006, Summary of Judgment, para. 2.

¹⁷ *European Parliament v. Council of the European Union*, at para. 42.

¹⁸ Council Directive 2003/86/EC, chapters III and VI.

¹⁹ Geneva Expert Roundtable, ‘Summary Conclusions on Family Unity’, UNHCR/IOM/08/2002, UNHCR/FOM/08/2002, Annex 8, November 8-9, 2001, available at http://www.unhcr.bg/global_consult/family_unity_en.pdf, last visited September 24, 2008.

domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.²⁰

28. Article VI of the American Declaration of the Rights and Duties of Man (American Declaration)—the non-binding declaration that preceded the ACHR—recognizes the family as ‘the basic element of society,’ and as such, indicates that every individual has a right to a family.²¹ Article V mirrors the language contained in Article 11 of the ACHR, and prohibits ‘abusive attacks’ against individuals’ private and family life.²²
29. Both the Inter-American Commission on Human Rights (established under the American Declaration) and the Inter-American Court of Human Rights (established by the ACHR) have recognized the right to family reunification. On May 30, 2000, in the *Dominican Republic Case*, the Inter-American Commission asked the Inter-American Court of Human Rights to adopt provisional measures to stop the Dominican Republic from engaging in the massive expulsion of Haitians and Dominicans of Haitian origin, since this action was endangering the lives and physical integrity of the deportees. In addition, the deportations had caused families to be separated and many minor children abandoned. On August 18, 2000, the Inter-American Court granted the provisional measures with respect to the persons identified by the Commission. The Court ordered the Dominican State to refrain from deporting the applicants, and to ensure the reunification of the parents with their young children, who were still residing in the Dominican Republic.²³
30. Not only are States obligated to refrain from disrupting families through forced deportations, but the Inter-American Court has also held that governments may sometimes be required to actively facilitate the reunification of families. In the *Case of the Serrano-Cruz Sisters v. El Salvador* (2005), the Court addressed the State’s duty to investigate the disappearance of two children during an incursion by the Salvadorean Army in the mid-1980s. While the Court was unable to formally find a violation of Article 17, as the events at issue occurred before El Salvador had accepted OAS jurisdiction, the Court recognized the obligation of the State to provide reparations to the affected families through an ‘inter-institutional commission to trace children who disappeared as a result of the armed conflict in El Salvador....’²⁴ The Court determined that the Commission ‘must take the initiative to adopt the necessary measures to investigate and collect evidence about the possible whereabouts of the young people who disappeared

²⁰ American Convention on Human Rights, O.A.S Treaty Series No. 36, 1144 U.N.T.S. 123, July 18, 1978, arts. 11, 17.

²¹ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 1948, art. V

²² *Id.* at art. VI.

²³ *Dominican Republic Case. Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic (Provisional Measures Requested by the Inter-American Commission on Human Rights)*. IACrtHR, September 8, 2000, p. 11

²⁴ *Ernestina and Erlinda Serrano Cruz v. El Salvador*, IACrtHR, March 1, 2005, para. 184.

when they were children during the armed conflict, and thereby facilitate the determination of what happened and family reunification.²⁵

31. In sum, the Inter-American system acknowledges the right to family life and family unity, and imposes upon States both positive and negative obligations to ensure these rights are enforced.

African Human Rights Law

32. As in the European and Inter-American systems, the African legal system also recognizes the family as a fundamental unit of society, and imposes upon States the obligation to protect the unity of the family. The right to family life is detailed in Article 18 of the African Charter for Human and Peoples' Rights (African Charter), which states: 'The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.' The African Commission invoked this right in the case of *Modise v. Botswana* (2000), in which it held that the Botswana government's immigration procedures violated the complainant's rights to family unity. Specifically, the Commission stated that by deporting the complainant to South Africa, the government 'expose[d] him to personal suffering, it deprived him of his family, and it deprived his family of his support.'²⁶
33. The African Commission solidified the State's obligation to protect the family unit in a series of mass expulsion cases. In one of its earliest decisions, the African Commission determined that forced expulsions from the Democratic Republic of the Congo to Rwanda constituted a human rights violation and a breach of Article 18. The Commission held, '[t]he...mass transfer of persons from the eastern provinces of the Complainant State to camps in Rwanda...is inconstant with Article 18(1) of the African Charter, which recognises the family as the natural unit and basis of society and guarantees it appropriate protection.'²⁷ In the same year, the Commission censured the Zambian government for actively engaging in the destruction of families through mass expulsion, stating, 'the Zambian government has forcibly broken up the family unit which is the core of society thereby failing in its duties to protect and assist the family as stipulated in Article 18(1) and 18(2) of the Charter.'²⁸

III Non-discrimination on the basis of ethnicity is clearly established in all regional human rights systems; family life and unity are rights that must be respected without discrimination.

European Law

34. As described above, the right to family life is firmly entrenched in European law, and States are prohibited from engaging in action that impinges upon this

²⁵ *Id.* at para. 185.

²⁶ *John K. Modise v Botswana*, (2000) AHRLR 25 (ACHPR 1997), para 32.

²⁷ *Democratic Republic of the Congo v. Burundi, Rwanda, Uganda*, Communication No. 227/ 1999, (2004) AHRLR 19 (ACPHR 2004), para. 81.

²⁸ *Amnesty International v. Zambia*, Communication No. 212/98, ACPHR, 1999, para. 59.

fundamental right. Thus, governments may not engage in racial or ethnic discrimination that harms the unity of the family.²⁹ As stated in the European Union’s Directive 2000/43/EC (Race Directive):

The right to equality before the law and protection against discrimination for all persons constitutes a *universal right* recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.³⁰

35. The Race Directive also places the onus on the respondent to disprove claims of unequal treatment, once the applicant has established a presumption of discrimination before a court of law.³¹
36. The legal principle of equal treatment is detailed in Article 14 of the European Convention on Human Rights.³² The ECtHR has held that the purpose of Article 14 is to ensure that the Convention’s substantive rights are not applied in a discriminatory fashion.³³ In *Timishev v. Russia* (2005), the ECtHR held that courts may consider additional claims of discrimination under Article 14—even after finding a substantive violation—if ‘clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.’³⁴ An

²⁹ See Goran Cvetic, ‘Immigration Cases in Strasbourg: The Right to Family Life Under Article 8 of the European Convention’, *International & Comparative Law Quarterly*, No. 36, 1987, p. 647: “[A]lthough free to enact their immigration laws, States cannot create such laws so as to negate or contradict other well-established rules of international law. For example, their laws must not be discriminatory.”

³⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Communities, L 180/22, preamble para. 3 (emphasis added).

³¹ *Id.* at art. 8(1).

³² See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 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.”

³³ See, e.g., *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, ECtHR, December 13, 2005, para. 53.

³⁴ *Id.* In addition, the Convention’s newly-enacted Protocol 12 extends protection from discrimination to “any right set forth by law,” with “law” understood to mean both international law and the constitutional law of member states. See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 177, April 1, 2005, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=11/10/2006&CL=ENG>, last visited September 24, 2008. The Explanatory Report to Protocol 12 state that the Protocol was passed after the European Commission against Racism and Intolerance (ECRI) conducted a comparison of international human rights instruments addressing discrimination, and determined that “the protection offered by the ECHR from racial discrimination should be strengthened by means of an additional protocol containing a general clause against discrimination on the grounds of race, colour, language, religion or national or ethnic origin.” (Explanatory Report, para. 7, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm>, last visited September 24, 2008). As stated in the Explanatory Report, “[t]he brief Preamble refers, in the first recital, to the principle of equality before

- analyst of European Union law has applied this concept to family rights, stating that ‘a State has to apply the notion of respect for family life equally to marriages between its own nationals and to marriages between one of its nationals and a non-national. Any other approach would amount to discrimination against the latter and a breach of Article 14 of the European Convention on Human Rights.’³⁵
37. European law distinguishes between direct and indirect discrimination. Article 2(2) of the Race Directive deems direct discrimination to have occurred when ‘one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.’³⁶ In its general policy recommendations concerning the national legislation of Council of Europe member States, the European Commission against Racism and Intolerance (ECRI) has also condemned state-sanctioned direct discrimination, which it has defined as ‘any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.’³⁷ The recommendation noted that differential treatment is neither objective nor reasonable if it does not pursue a legitimate aim, meaning ‘there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.’³⁸
38. The ECHR has found that discrimination on the basis of nationality may amount to a violation of the Convention. In *Gaygusuz v Austria* (1996) the Court was considering a Turkish national who had been living and working in Austria for many years. He attempted to claim certain benefits but was denied them simply on the basis that he was a non-Austrian national. The Court found that the case concerned the right to property protected by the Convention and that the discrimination on the basis of nationality was an unlawful breach of Article 14 taken with the right to property.
39. Strasbourg has held that discrimination on the grounds of race can never be justified. In the case of *Cyprus v Turkey*, (1976) the Commission found a violation of Art.8 taken with Art.14 where there was a difference in treatment with regard to Greek Cypriots living in Northern Cyprus (at para.503). In the *East African Asians Case* (1973) it was considered that such discriminatory treatment may even amount to inhuman or degrading treatment.

Inter-American Law

40. Article 17 of the ACHR acknowledges that the domestic authority is responsible for setting forth the legal conditions for marriage, but the Convention also notes that these conditions may not violate the proscription against discrimination.³⁹

the law and equal protection of the law. This is a fundamental and well-established general principle, and an essential element of the protection of human rights, which has been recognized in constitutions of member states and in international human rights law.” (para. 14, emphasis added).

³⁵ Cvetic, p. 652.

³⁶ Council Directive 2000/43/EC, art. 2(2).

³⁷ European Commission against Racism and Intolerance, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, December 13, 2002, para. 1(b).

³⁸ *Id.*

³⁹ American Convention on Human Rights, arts. 11, 17.

- The Convention’s guarantee of equal treatment is set forth in Article 24, which states: ‘All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.’⁴⁰ Similarly, the American Declaration of the Rights and Duties of Man guarantees that ‘[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.’⁴¹
41. The Inter-American Commission on Human Rights has adopted this language in its rulings on the right to non-discrimination. In *María Eugenia Morales de Sierra v. Guatemala* (2000), the Commission held that equality between citizens serves as the very foundation for both the ACHR and the American Declaration.⁴² The body went on to hold that “[s]tatutory distinctions based on status criteria, such as, for example, race or sex, therefore necessarily give rise to heightened scrutiny.”⁴³
 42. The Inter-American Court of Human Rights has addressed the prohibition against state-sponsored discrimination in no uncertain terms. In the *Juridical Condition and Rights of the Undocumented Migrants* (2003), the Court stated:

‘The principle of equality before the law and non-discrimination permeates every act of the powers of the State....Indeed, this principle may be considered preemptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.’⁴⁴
 43. The Court explicitly classified the principle of non-discrimination as a *jus cogens* norm, which prohibits governments from instituting any state action that creates a situation of *de jure* or *de facto* discrimination.⁴⁵ More specifically, the Court has held that States may not ‘enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.’⁴⁶
 44. Addressing the issue of discriminatory practices in the realm of immigration, the Court in the *Case of the Girls Yean and Bosico v. Dominican Republic* (2005) noted that ‘[s]tates may establish distinctions in the enjoyment of certain benefits between its citizens, foreigners in a regular situation, and foreigners in an irregular situation.’⁴⁷ However, the Court went on to say that ‘[p]olicies and

⁴⁰ *Id.* at art. 24.

⁴¹ American Declaration of the Rights and Duties of Man, art. 2.

⁴² *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/00, OEA/Ser.L/V/II.111 Doc. 20 rev. at 929, 2000, para. 36.

⁴³ *Id.*

⁴⁴ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, IACrHR (Ser. A) No. 18, September 17, 2003, para. 101.

⁴⁵ *Id.*

⁴⁶ *Id.* at para. 103.

⁴⁷ *Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, IACrHR (Series C) No. 130 (2005), September 8, 2005, para. 112.

practices that are deliberately discriminatory, as well as those that have a discriminatory impact on a specific category of individuals are prohibited, even if the discriminatory intention cannot be proved.⁴⁸ In the Advisory Opinion issued in the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (1984), the Inter-American Court held that a State can legitimately engage in discriminatory behavior only when ‘the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.’⁴⁹

45. Writing a separate opinion, Judge Rodolfo E. Piza explained the contours of ‘proportionality.’ In Judge Piza’s view, ‘a reasonable distinction in the matter of granting nationality that could be objectively justified in accordance with the nature and purposes of that specific institution could always be discriminatory and, therefore, illegal, if, examined in the light of the principles and values of the Convention as a whole, it was contradictory to those principles...e.g., if it were based on standards of racial discrimination, because such standards are absolutely repudiated by international law.’⁵⁰ Under this conception of discrimination, a national policy may in fact be proportionate under domestic law, but simultaneously illegal under more general international human rights norms.

African Human Rights System

46. Although it is a younger human rights regime than either the Inter-American or European system, the African legal system has adopted strict prohibitions against state-condoned discrimination. The African Charter includes several articles addressing the issue of equal treatment. Article 2 states:

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, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.⁵¹

47. Similarly, Article 3 guarantees all individuals the equal protection of the law, and Article 19 commands that “all peoples shall be equal; they shall enjoy the same respect and shall have the same rights.”⁵² The African Commission has defended the right to nondiscrimination in its caselaw. Early cases set forth the contours of Article 2, outlining the specific rights that attach to the prohibition against non-discrimination.⁵³ In *Legal Resources Foundation v. Zambia* (2001), the

⁴⁸ *Id.*

⁴⁹ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, IACrtHR, January 19, 1984, para. 57.

⁵⁰ *Yean and Bosico v. Dominican Republic*, para. 15.

⁵¹ African Charter on Human and People’s Rights, art. 2.

⁵² *Id.* at arts. 3, 19.

⁵³ *See, e.g., Malawi African Association and Others v. Mauritania*, (2000) AHRLR 149 (ACHPR 2000), para. 131. The judgment found that black Mauritians suffered discrimination and other human rights abuses at the hands of the Mauritanian government: “Article 2 of the Charter lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination

Commission stated that ‘[e]quality or lack of it affects the capacity of a person to enjoy many other rights. For example, [a person who is disadvantaged because] of his place of birth or social origin suffers indignity as a human being and an equal and proud citizen.’⁵⁴

48. In the context of citizenship, the Commission has held that discriminatory immigration procedures enacted to remedy statewide economic challenges may still result in impermissible distinctions based on national origin.⁵⁵ In *Union Interafricaine des Droits de l’Homme and Others v. Angola* (1997), the Commission recognized that States have a right to deport immigrants who are illegally present within their borders, but emphasized that ‘it is unacceptable to deport individuals without allowing them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law.’⁵⁶
49. In addition, mechanisms designed to limit citizenship in a country for the purposes of public safety must not derogate from the principles established in the African Charter. In *Amnesty International v. Zambia* (1999), the Commission held that a deportation order issued against two residents on the grounds that they ‘were likely to be a danger to peace and good order in Zambia’ was untenably vague and constituted a violation of the rights to equal treatment.⁵⁷ Quoting Article 2, the Commission stated that by ‘forcibly expelling the two victims from Zambia, the State has violated their right to enjoyment of all the rights enshrined in the African Charter.’⁵⁸

IV Minority Groups are Given Special Rights in International Law, in Recognition of their Vulnerability to Marginalization and Discrimination

European law

50. The rights of minorities to be treated equally within their country of residence, freely pursue their cultural practices, and establish relationships with members of their group are embodied in a variety of European legal instruments. General protections are set forth in Article 14 of the ECHR, cited above, which guarantees

and to ensure equality among all human beings.” See also *Organisation Mondiale Contre la Torture and Others v. Rwanda*, (2000) AHRLR 282 (ACHPR 1996), paras. 21-22: the Rwandan government had contravened the Charter by expelling Burundi nationals who had been refugees in Rwanda for many years. The Court held: “Article 2 of the Charter reads: 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, . . . national and social origin There is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates article 2.”

⁵⁴ *Legal Resources Foundation v. Zambia*, AHRLR 84 (ACHPR 2001), para. 63.

⁵⁵ *Union Interafricaine des Droits de l’Homme and Others v. Angola*, AHRLR 18 (ACHPR 1997), para. 18: Angolan government rounded up and expelled West African nationals on its territory.

⁵⁶ *Union Interafricaine des Droits de l’Homme and Others v. Angola*, at para. 20.

⁵⁷ *Amnesty International v. Zambia*, ACHPR, Comm. No. 212/98, 1999, paras. 3, 50.

⁵⁸ *Id.* at para. 52.

- equal treatment in the implementation of rights secured by the Convention, while Protocol 12 to the Convention, currently in force in 17 countries, applies this principle to any right set forth by law. Protocol 12 specifies that the prohibition against discrimination applies to national minorities.⁵⁹ Likewise, Article 21 of the Charter of Fundamental Rights of the European Union proscribes discrimination based on affiliation with a national minority group.⁶⁰
51. Several regional instruments are devoted solely to the protection of minority rights in European States. These documents underscore the right of minority groups to establish social connections with members of their group within the resident State. The Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM) recognizes that the ‘protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.’⁶¹ Furthermore, the FCNM obliges State Parties to promote the economic, social, political and cultural life of persons belonging to a national minority, and requires that governments recognize these rights on an equal basis with members of the State’s majority group.⁶²
 52. The European Union’s Family Reunification Directive, which establishes the right of family reunification between citizens and their non-national spouses, also necessitates that States effectuate the Directive’s provisions without discrimination on the basis of, *inter alia*, membership in a national minority group.⁶³ And the Council of Europe’s Charter for Regional and Minority Languages, which prohibits the ‘unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language,’ emphasizes that an objective of protecting minority languages is to ensure the ‘development of links...between groups using a regional or minority language and other groups in the State employing a language used in identical or similar form....’⁶⁴
 53. The region’s legal instruments guaranteeing equal rights to national minority groups and safeguarding the cultural forms of minority citizens are supplemented by protections set forth by the Organization for Security and Cooperation in Europe (OSCE). The 1975 Helsinki Declaration, a product of the Conference on Security and Cooperation in Europe, accords protection to national minorities and provides that:

...the participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of

⁵⁹ Protocol 12 to the ECHR, art. 1.

⁶⁰ See Charter of Fundamental Rights of the European Union, art. 21.

⁶¹ Framework Convention for the Protection of National Minorities, CETS No. 157, January 2, 1998, art. 1.

⁶² FCNM, arts. 4, 15.

⁶³ See Council Directive 2003/86/EC, preamble.

⁶⁴ See Charter for Regional and Minority Languages, CETS No. 148, November 5, 1992, arts. 7(1)(3), 7(2).

human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.⁶⁵

54. Similar obligations were established in the more narrowly-tailored Lund Recommendations on the Effective Participation of National Minorities in Public Life. This document posits that the protection of minority culture is instrumental for ensuring stable governance in the European nations, asserting that the ‘[e]ffective participation of national minorities in public life is an essential component of a peaceful and democratic society.’⁶⁶
55. Prior to the drafting of the Lund Recommendations, the 1990 Document of the Copenhagen Meeting on the Human Dimension (Copenhagen Document) confirmed the right of national minorities to associate and maintain linkages with members of their group in the absence of interference by the State. Section IV states, ‘[t]o belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice.’⁶⁷ As a result, national minorities have the right to ‘establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs.’⁶⁸ The Copenhagen Document represents the strongest validation of a minority group’s rights to establish social and cultural ties with members of its own group without disruption by the State.
56. Finally, the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (Moscow Document), issued one year after the Copenhagen Document, severely limits the capacity of States to derogate from the principles of non-discrimination—including as applied to national minorities—in the event of a public emergency. The Moscow Document defines emergency measures as inherently ‘exceptional’ to the general operation of state law and administrative procedures, meaning that such measures may ‘neither go further nor remain in force longer than strictly required by the exigencies of the situation.’⁶⁹ Furthermore, it states that emergency procedures may not discriminate solely on the basis of ‘race, colour, sex, language, religion, social origin or of belonging to a minority.’⁷⁰
57. Overall, the European legal system provides stringent protections for national minorities, prohibiting discrimination on the basis of group affiliation, and ensuring that members of these groups are allowed to establish ties with one another within the territory of their State of residence.

⁶⁵ The Final Act of the Conference on Security and Cooperation in Europe, 14 I.L.M. 1292, 1295, August 1, 1975, section 1(a)(VII).

⁶⁶ Lund Recommendations on the Effective Participation of National Minorities in Public Life, Foundation on Inter-Ethnic Relations, OSCE, September 1999, art. 1(1).

⁶⁷ Document of the Copenhagen Meeting on the Human Dimension of the CSCE, OSCE, 1990, art. 32.

⁶⁸ Document of the Copenhagen Meeting on the Human Dimension of the CSCE, art. 32(4).

⁶⁹ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, OSCE, 1991, arts. 28(6), 28(7).

⁷⁰ *Id.*

The Inter-American system

58. The Inter-American system refers to ‘indigenous people’ rather than minority groups. Indigenous people are defined as those having a historical continuity with pre-colonial societies on their territories; they consider themselves distinct from other sectors of society; they form at present non-dominant sectors of society; and they are determined to reserve, develop, and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁷¹
59. The rights of indigenous people and equality between them and the others are widely recognized. Both the UN Declaration on the Rights of Indigenous People⁷² (the Indigenous People Declaration) and the International Labor Organization Convention on the Indigenous and Tribal People⁷³ (the ILO Convention) emphasize the right to equality for indigenous people to be free from discrimination⁷⁴. Moreover, the ILO Convention and the Indigenous People Declaration impose a responsibility on the States to guarantee indigenous peoples’ rights and protect all the other rights mentioned in the two instruments.⁷⁵
60. Indigenous peoples’ right to equality and non-discrimination includes not only equality before the law and all the rights given to the other citizens, but also the right not to be discriminated against by laws which in practice affect them alone. Enjoyment of these rights— including family life and reunification—shall be without ‘hindrance or discrimination’⁷⁶. Moreover, Article 2(2)(a) of the ILO Convention states that States have responsibility to ensure that indigenous people enjoy, on equal footing, the opportunities and rights granted to other members of the population. Hence, any laws that put indigenous people in unequal position before the law infringe the ILO Convention.
61. The Inter-American Court of Human Rights has, on many occasions, expressly mentioned indigenous peoples’ right to equality and non-discrimination, as well as the State’s duty to respect their cultural and social rights. For example, in the Case *Yakye Indigenous Community v. Paraguay*⁷⁷ (2005), the Court, while dealing with an indigenous land case, found:

“In view of the fact that the instant case addresses the rights of the members of an indigenous community, the Court deems it appropriate to

⁷¹ University of Minnesota Human Rights Center, *STUDY GUIDE: The Rights of Indigenous Peoples*, 2003, available at <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>, last visited on September 24, 2008.

⁷² United Nations Declaration on the Rights of Indigenous Peoples, A/Res/ 61/295, September 13, 2007.

⁷³ Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 5 September 1991.

⁷⁴ See for example Rights of Indigenous Peoples Declaration, art. 2; Indigenous and Tribal Peoples Convention, arts. 3, 4.

⁷⁵ See for example Rights of Indigenous Peoples Declaration art. 8; Indigenous and Tribal Peoples Convention art. 2.

⁷⁶ Indigenous and Tribal Peoples Convention, art. 3.

⁷⁷ *Yakye Axa Indigenous Community v. Paraguay*, IACHR, June 17, 2005, para 51.

recall that, pursuant to Articles 24 (Right to Equal Protection) and 1(1) (Obligation to Respect Rights) of the American Convention, the States must ensure, on an equal basis, full exercise and enjoyment of the rights of these individuals ..., the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity.”

62. The Court here emphasizes that States must take into account social and cultural differences between the indigenous people and the rest of the population when it enacts laws.⁷⁸ Laws that negatively affect indigenous people are discriminatory and unequal. In the same decision, the Court said that ‘it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs’.⁷⁹ This makes clear that the State’s duty does not stop with refraining from actions that negatively affect the indigenous people, but extends to positive action to provide the protection necessary protect indigenous peoples’ integrity and social life, including family life. This includes instances where the socio-cultural life of the indigenous people leads them to create family and social relations predominantly within their group. The Court also emphasized the importance of the relation between the indigenous people and their traditional lands, which form part of their cultural identity. In other words, the State must consider the relationships between people who used to consider now-politically divided areas as one social and cultural space, because it was thus according to their traditional way of life⁸⁰.
63. Indigenous people have the right to cultural and social ties, including family ties, as part of their identity. The Inter-American Court stated that ‘the right to identity is intimately associated with the right to recognition of juridical personality, the right to have a name, the right to a nationality, the right of family and the right to maintain family relations.’⁸¹

⁷⁸ See also *Sawhoyamaxa Indigenous Community v. Paraguay*, IACHR, March 29, 2006, para 60.

⁷⁹ *Yakye Axa Indigenous Community v. Paraguay*, para. 63.

⁸⁰ *Yakye Axa Indigenous Community v. Paraguay*, para 135: “The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity”

⁸¹ *Ernestina and Erlinda Serrano Cruz v. El Salvador*, November 23, 2004

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