

# **Discrimination Related to Pregnancy**

## **Case 196, El Salvador 6: “ Violation of the right to job protection during maternity”**

### **Examples of legal instruments and case-law under the International Labour Organisation, the European Court of Human Rights, The European Social Charter and the United Nations**

Cecilia Asklöf

#### **Summary**

The elimination of discrimination in employment and occupation is one of four fundamental principles and rights at work that have been established within the framework of the International Labour organisation (ILO). Convention No. 111 concerning Discrimination in respect of Employment and Occupation is one of ILO:s eight fundamental conventions. Interpreting this Convention, the Committee of Experts has held that special maternity protection measures should be taken to enable women to fulfil their maternal role without being marginalized in the labour market.

According to the applicable conventions of the ILO as well as according to the European Social Charter, it is unlawful for an employer to terminate the employment of a woman from the time she notifies her employer that she is pregnant until the end of her (maternity) leave. Neither is it permissible to give a woman notice of dismissal at such a time that the notice would expire during such a period. Limited protection against dismissal is also offered to workers with family responsibilities.

Under the Termination of Employment Convention No. 158, a dismissal has to be based on a valid reason connected with the capacity or conduct of the worker or on the operational requirements of the undertaking. Pregnancy is explicitly mentioned as one of the grounds that cannot constitute a valid reason for termination. According to the ILO Maternity Protection Convention of 2000, Members are obliged to prohibit employers from requesting pregnancy test or a certificate of such a test when a woman is applying for employment.

It is established case law under the European Social Charter that the worker should be reinstated in her employment in cases of dismissal in breach of the prohibition, as this is the only solution which effectively guarantees job security. Only in exceptional circumstances should compensation be the sole remedy. In such cases compensation should be sufficient to deter the employer and fully compensate the employee.

According to the United Nations International Covenant on Civil and Political Rights (ICCPR), State Parties undertake to ensure the equal right of women and men to the

enjoyment of the rights set forth in the Covenant. Interpreting the Covenant, the Human Rights Committee has held that the right to privacy laid down in Article 17 is violated when employers request a pregnancy test before hiring a woman.

State Parties likewise undertake to ensure the equal right of women and men to the enjoyment of the rights set forth in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Interpreting the Covenant, the Committee on Economic, Social and Cultural Rights has held that the right to work implies not to be unfairly deprived of employment and that the fundamental rights set forth in the Covenant include respect for the physical and mental integrity of the worker in the exercise of his/her employment. The Committee has held that violations of the treaty include failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the rights of others; or the failure to protect workers against unlawful dismissal. El Salvador has ratified both of the above Covenants.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obliges States parties to take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave.

According to the Vienna Convention on the Law of Treaties of 1969, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Generally, interpretation of domestic statutes should be done in the light of the norms contained in the international document.

## **1. The International Labour Organisation (ILO)**

International Labour Standards, i.e. conventions and recommendations, are one of the ILO's primary means of action to promote equality in the workplace and improve working and living conditions of women and men. The legal instruments are drawn up by the ILO's constituents (governments, employers and workers) and setting out basic principles and rights at work.

Conventions are legally binding international treaties that may be ratified by member States. Recommendations normally supplement the convention and serve as non-binding guidelines. Once a country has ratified an ILO convention, it has committed itself to apply it in national law and practice. The Member is also obliged to produce regular reports on the implementation of the Convention.

The Committee of Experts is a body composed of 20 legal experts. Each year it publishes an in-depth General Survey on member States' national law and practice, on a subject chosen by the ILO's Governing Body. The Committee's role is to provide an impartial and technical evaluation of the state of application of international labour standards.

The Governing Body has identified eight conventions as being "fundamental", i.e. covering subjects that are considered as fundamental principles and rights at work. One of these conventions is the Convention concerning Discrimination in respect of Employment and Occupation, (C 111) from 1958.

### **1.1 The Declaration on Fundamental Principles and Rights at Work**

The rights and principles reflected in the fundamental Conventions are also reflected in the 1998 Declaration on Fundamental Principles and Rights at Work. In short, the Declaration provides that "all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith, and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour;
- (d) the elimination of discrimination in respect of employment and occupation."

Each year reports are requested from Members covering the four areas of fundamental principles enumerated in the Declaration. These reports are reviewed by the Governing Body and commented by the Committee of Experts.

### **1.2 Convention No. 111 concerning Discrimination**

The Convention concerning Discrimination in respect of Employment and Occupation, 1958 (C 111), is among the most widely ratified of the ILO conventions. By the end August 2006 as many as 165 countries had ratified the convention<sup>1</sup>, which is considered to express fundamental principles and rights at work.

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<sup>1</sup> Ibid.

Articles 1 and 5 of the Convention contain a definition of the term “discrimination”. The preparatory work to the Convention reveals that the origin of the enumerated grounds of discrimination in Article 1 is attributable to the Universal Declaration of Human Rights<sup>2</sup>.

*Article 1*

1. For the purpose of this Convention the term “discrimination” includes –
  - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation
  - (b) [...]
2. [...]
3. For the purpose of this Convention the terms “employment” and “occupation” include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment-

The definition contains three elements:

- a factual element (the existence of a distinction, an exclusion or a preference, without specifying whether this arises from an act or an omission), which constitutes a difference in treatment;
- a ground on which the difference of treatment is based;
- the objective result of this difference in treatment (the nullification or impairment of equality of opportunity or treatment)<sup>3</sup>.

In referring to “the effect” of a distinction, exclusion or preference, the definition uses the objective consequences of these measures as a criterion. Indirect forms of discrimination and phenomena such as occupational segregation based on sex consequently come within the scope of the Convention<sup>4</sup>.

According to Article 2 each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation. Following Article 3 (b) each Member undertakes “... to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy; ...”.

The General conference of the ILO adopted a recommendation together with the Convention, Recommendation No. 111, (R 111). Concerning the policy mentioned in Article 2 of the Convention, each Member is recommended to formulate a national policy for the prevention of discrimination in employment and occupation. The policy should have regard to the following principles:

- a) the promotion of equality of opportunity and treatment in employment and occupation is a matter of public concern;
- (b) all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of, among other things, security of tenure of employment.

According to ILOEX, El Salvador ratified the Convention in June 1995<sup>5</sup>.

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<sup>2</sup> General Survey of 1988, The Committee of Experts, para. 31.

<sup>3</sup> Ibid., para. 22.

<sup>4</sup> General Survey of 1963, para. 38, as well as General Survey of 1988, para. 28.

<sup>5</sup> [http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?\(El Salvador\)](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(El%20Salvador))

### **1.2.1. Surveys and Reports of the Committee of Experts**

Under article 19 of the ILO Constitution, member States are required to report at regular intervals, at the request of the Governing Body, on measures they have taken to give effect to any provision of certain conventions or recommendations, and to indicate any obstacles which have prevented or delayed the ratification of a particular convention<sup>6</sup>. In the years of 1988 and 1996 the General Surveys were addressing the issue of Equality in Employment and Occupation, i.e. the application of the above convention. Below follows such extracts of the Committee's observations that the present author has deemed relevant to the subject.

The Committee of Experts emphasises that not all distinctions, exclusions or preferences in employment and occupation are deemed to be discrimination<sup>7</sup>. The Convention set aside three categories of measures which "shall not be deemed to be discrimination":

- those based on the inherent requirements of a particular job;
- those warranted by the protection of the security of the State; and
- measures of protection or assistance<sup>8</sup>.

Special measures of protection and assistance concerns, for instance, measures designed to protect maternity or the health of women. In the General Survey of 1996, the Committee declares that:

132. For example, maternity protection, in the form of leave before and after confinement and protection from dismissal, is always necessary. In practice, however, maternity remains subject to discrimination when it is directly and indirectly taken into account in considering applications for employment or as grounds for termination. Maternity is a condition which requires differential treatment to achieve genuine equality and, in this sense, it is more of a premise for the principle of equality than an exception from that principle. Special maternity protection measures should be taken to enable women to fulfil their maternal role without being marginalized in the labour market.

In the 1996 survey, the Committee of Experts points out that many provisions only refer to, as is indeed the case of the Convention, the grounds of sex, without providing a definition of what should be understood by discrimination on the basis of sex<sup>9</sup>. The Committee thereafter makes clear that distinctions on the basis of pregnancy, confinement and related medical conditions are to be considered as discriminatory (in so far as they do not constitute protective measures in the sense of Article 5) and falling within the scope of the Convention<sup>10</sup>.

### **1.3 Conventions No. 3, 103 and 183 concerning Maternity Protection**

The first Maternity Protection Convention (C 3) was elaborated in 1919, the year of the creation of the ILO. It was revised in 1952, when the Convention concerning Maternity Protection (Revised 1952) was adopted, (C 103). This convention has in its turn been revised in 2000, by the adoption of the Maternity Protection Convention 2000 (C 183). Each of the

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<sup>6</sup>[http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Applyingconventions/lang--en/index.html](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Applyingconventions/lang--en/index.html)

<sup>7</sup> General Survey of 1996, para. 117

<sup>8</sup> Ibid., para. 117

<sup>9</sup> General Survey 1996, para. 40

<sup>10</sup> Ibid., para. 41

two revised versions has had a recommendation adopted, R 95 and R 191 respectively. As of today, the up-to-date version from 2000 has been ratified by 13 Members<sup>11</sup>. According to ILOLEX, El Salvador has not ratified any of the three conventions relating to maternity protection.

It does not fall within the ambit of this paper to make a comparison between the three conventions. It will therefore focus on the rights provided for by C183, with some comparisons with C103, the extra information provided by the two recommendations, as well as some of the comments given by the Committee of Experts in their annual Report on the Application of Conventions and Recommendations.

#### *Scope of the Convention*

As regards the personal scope of the Convention, Article 2 declares that the Convention applies to all employed women, including those in atypical forms of dependent work. However, paragraph 2 of the same Article leaves a possibility for Members to exclude wholly or partly from the scope of the Convention limited categories of workers when its application to them would raise special problems of a substantial nature.

#### *Maternity leave*

In brief, both of the two revised versions declare that a woman on production of a medical certificate stating the presumed date of childbirth, shall be entitled to a specified minimum period of maternity leave (according to C 183 not less than 14 weeks). The period of maternity leave shall include a compulsory leave after childbirth (according to C 183 six weeks compulsory leave). Furthermore, the prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date of confinement and the actual date of confinement. The period of compulsory leave to be taken after confinement shall not be reduced on that account. Both versions provide for a right to additional leave before or after the maternity leave period in case of illness arising out of pregnancy or childbirth.

In the Recommendation concerning Maternity Protection 1952, it is recommended to extend the period of maternity leave, where necessary to the health of the woman and wherever practicable. Further extensions should be prescribed in individual cases if necessary to i.a. safeguard the health of the mother and the child.

According to the Maternity Protection Recommendation 2000, Members should endeavour to extend the period of maternity leave referred to in Article 4 of the Convention to at least 18 weeks. Provision should also be made for an extension of the maternity leave in the event of multiple births. Furthermore, to the extent possible, measures should be taken to ensure that the woman is entitled to choose freely the time at which she takes any non-compulsory portion of her maternity leave, before or after childbirth.

#### *Cash and medical benefits*

In short, both conventions contain provisions regarding cash and medical benefits. Cash benefits should be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living (C183).

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<sup>11</sup> <http://www.ilo.org/ilolex/english/convdisp1.htm>

*Employment Protection and Non-discrimination*

This is the provision that has changed the most between the version of 1952 and the version of 2000.

Article 6 of C 103 declares that:

While a woman is absent from work on maternity leave in accordance with the provisions of Article 3 of this Convention, it shall not be lawful for her employer to give her notice of dismissal during such absence, or to give her notice of dismissal at such a time that the notice would expire during such absence.

According to the Recommendation concerning Maternity Protection, 1952, (R 95), the period protected from dismissal should be extended to begin as from the date when the employer of the woman has been notified by medical certificate of her pregnancy and to continue until one month at least after the end of the maternity leave, as provided for in Article 3 of the Convention. Legitimate reasons for dismissal during the protected period are set out in the Recommendation; serious fault on the part of the employed woman, shutting down of the undertaking or expiry of the contract of employment (this list is non-exhaustive). During her legal absence from work before and after confinement, the seniority rights of the woman should be preserved as well as her right to reinstatement in her former work or in equivalent work paid at the same rate.

Article 8 of C 183 states that:

1. It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.

2. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

According to the subsequent Article 9, each Member shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including access to employment. Such measures **shall include a prohibition from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment** (emphasis added), except where required by national laws or regulations in respect of work that is prohibited or restricted for pregnant or nursing women under national laws or regulations or where there is a recognized or significant risk to the health of the woman and child.

According to R 191 a woman should be entitled to return to her former position or an equivalent position paid at the same rate at the end of her leave referred to in Article 5 of the Convention. The period of leave referred to in Articles 4 and 5 of the Convention should be considered as a period of service for the determination of her rights<sup>12</sup>.

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<sup>12</sup> R191 Maternity Protection Recommendation, 2000, paragraph 5.

### *Breastfeeding mothers*

Both conventions declare that the woman has the right to interrupt her work (one or more daily breaks or a daily reduction of working hours) to breastfeed her child. The interruptions of work (or the reduction of daily hours of work) shall be counted as working time and be remunerated accordingly.

According to R 95 nursing breaks should be extended to a total period of at least one-and-a-half hours during the working day. Adjustments should be permitted on production of a medical certificate. Provision should be made for i.a. the establishment of facilities for nursing or day care, preferably outside the undertakings where the woman are working.

R 191 recommends that the frequency and length of nursing breaks should be adapted to particular needs on production of a medical certificate or other appropriate certification. Where practicable and with the agreement of the employer and the woman concerned, it should be possible to combine the time allotted for daily nursing breaks to allow a reduction of hours of work at the beginning or at the end of the working day<sup>13</sup>. Where practicable, provision should also be made for the establishment of facilities for nursing under adequate hygienic conditions at or near the workplace<sup>14</sup>.

#### **1.3.1. Surveys and Reports of the Committee of Experts**

There has been no General Survey focusing on maternity protection between the years of 1985-2007. However, the country specific parts of the General Reports of 2004-2006 contain, for example, the following observations of the Committee of Experts.

- Austria's 2004 country report revealed that certain Acts still authorized, under certain circumstances, the dismissal of women who are pregnant and following confinement, subject to the consent of the judicial authorities. The Committee of Experts made it clear that Article 6 of Convention 103 does not permit that a woman is dismissed or given notice of dismissal during the protected period of maternity leave under any exceptional circumstances for a reason that the national legislation might consider to be legitimate<sup>15</sup>. The Committee stressed that this provision has the objective of providing women with employment security and prevent any discriminatory dismissal, and that it is intended to extend the statutory length of notice to a maximum by an additional period that is equivalent to the time necessary to complete the period of protection in respect of maternity leave<sup>16</sup>.
- From the Committee's comment to the Libyan country report, it is furthermore clear that a provision making the granting of maternity leave conditional upon the completion of a qualifying period of six consecutive months of service with an employer is contrary to the convention<sup>17</sup>. Furthermore, the Committee emphasised that

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<sup>13</sup> Ibid., paragraphs 7-9.

<sup>14</sup> Ibid.

<sup>15</sup> Comment to the Country Report of Austria, Report of the Committee of Experts on the Application of Conventions and Recommendation, III, Part 1A, 2004

<sup>16</sup> Ibid.

<sup>17</sup> Comment to the Country Report of Libya, Report of the Committee of Experts on the Application of Conventions and Recommendation, III, Part 1A, 2004

it is the manner in which the provisions relating to maternity protection are applied in practice which is the core issue<sup>18</sup>.

- Finally, the length of the maternity leave applies to all female workers' covered by the instrument, irrespective of the number of their children. In this regard, the Committee stressed that one of the main objectives of the Convention is to protect women workers' health before, during and after confinement<sup>19</sup>.

#### **1.4 Convention No. 156 concerning Workers with Family Responsibilities**

The need to balance work and family demands reduces women's options as to whether to work, where and in what kind of jobs, thereby undermining their work experience, training, seniority and career prospects, which in its turn contributes to keeping their earnings down<sup>20</sup>.

Convention No. 111 does not expressly cover distinctions made on the basis of family responsibilities. Supplementary standards in this respect were therefore found necessary and in 1981 the Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (C 156), was adopted. At the same time a Recommendation was adopted, (R 165). According to the ILOLEX website, the Convention has so far been ratified by 40 Members<sup>21</sup> and it was ratified by El Salvador in October 2000<sup>22</sup>.

##### *The Convention, in brief*

In brief, the Convention applies to workers with responsibilities in relation to their dependent children, as well as workers with responsibilities in relation to other members of their immediate family. The Convention covers all branches of economic activity and all categories of workers. States which have ratified the Convention shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination, as defined by Articles 1 and 5 in C 111. Measures shall be taken to enable workers with family responsibilities to become and remain integrated in the labour force, as well as to re-enter the labour force after an absence due to those responsibilities.

Article 8 of the Convention addresses the issue of discrimination on the ground of family responsibilities in termination of employment:

“Family responsibilities shall not, as such, constitute a valid reason for termination of employment.”

Paragraph 16 of the Recommendation suggests more broadly that marital status, family situation or family responsibilities should not, as such, constitute valid reasons for refusal or termination of employment. As can be seen, the Convention deals only with termination of employment, whereas the question of refusal of employment was included in the Recommendation.

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<sup>18</sup> Comment to the Country Report of Panama, Report of the Committee of Experts on the Application of Conventions and Recommendation, III, Part 1A, 2004

<sup>19</sup> Comment to the Country Report of Sri Lanka, Report of the Committee of Experts on the Application of Conventions and Recommendation, III, Part 1A, 2004

<sup>20</sup> Ibid. p. 117

<sup>21</sup> <http://www.ilo.org/ilolex/english/convdisp1.htm>

<sup>22</sup> Ibid.

According to paragraph 22 (1) of the Recommendation either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with rights resulting from employment being safeguarded. Paragraph 23 (1) of the Recommendation provides that it should be possible for a worker, man or woman, with family responsibilities in relation to a dependent child to obtain leave in case of its illness. The same applies to another member of the worker's immediate family, paragraph 23 (2).

#### **1.4.1. General Surveys and Reports of the Committee of Experts**

Article 2 of the Convention states: "This Convention applies to all branches of economic activity and all categories of workers". According to the Committee the phrasing of the Convention "... was intended to provide full coverage not only to those currently in employment, but also to those seeking to enter or re-enter the workforce or to undergo training for employment"<sup>23</sup>. In line with previous ILO instruments, it was further considered that the term "economic activity" would cover all forms of occupational activity, whether in the private or public sectors and with or without a profit motive<sup>24</sup>.

The Committee makes clear that, within the broad definition of dependent children, there is [...] considerable scope for specific national regulations regarding the child's age, legal relationship to the worker, residence, and other characteristics, bearing in mind that the concept of "dependence" should signify reliance on the worker for support and sustenance, and physical and mental well-being<sup>25</sup>.

Article 8 does not require that a reason must be given in all cases where workers with family responsibilities are dismissed. In circumstances where employment may be terminated only for valid reasons, Article 8 simply excludes family responsibilities as such, as a valid reason<sup>26</sup>. Furthermore, during the preparatory work it was agreed that Article 8 would be possible to apply by means other than legislation. In other words, the Article seeks to prohibit termination of employment on account of family responsibilities, but allows Members flexibility in determining the manner of its implementation<sup>27</sup>.

### **1.5 Night Work Convention of 1990**

The Convention applies to all employed persons, with the exception of those employed in agriculture, stock raising, fishing, maritime transport and inland navigation.

Article 3 provides that specific measures required by the nature of night work shall be taken for night workers in order to, among other things, protect their health and assist them to meet their family and social responsibilities. Such measures shall also be taken in the field of safety and maternity protection for all workers performing night work.

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<sup>23</sup> General Survey of 1993, Workers with Family Responsibilities, para 46, as well as Record of Proceedings, ILC, 67<sup>th</sup> Session, Geneva, 1981, p.28/8, para. 73

<sup>24</sup> Ibid. para 48, as well as Record of Proceedings, ILC, 67<sup>th</sup> Session, Geneva, 1981, p.28/10, para. 93

<sup>25</sup> Ibid., para 38, as well as Record of Proceedings, ILC, 67<sup>th</sup> Session, Geneva, 1981, p. 28/9, paras. 83-84

<sup>26</sup> General Survey of 1993, Workers with Family Responsibilities, para. 122

<sup>27</sup> Ibid.

According to Article 7 (1) of the Convention measures shall be taken to ensure that an alternative to night work is available to women workers before and after child birth, for a period of at least sixteen weeks, as well as for additional periods in respect of which a medical certificate is produced. Paragraph 3 of the article states that during such periods:

- (a) a woman worker shall not be dismissed or given notice of dismissal, except for justifiable reasons not connected with pregnancy and childbirth;
- (b) the income of the woman worker shall be maintained at a level sufficient for the upkeep of herself and her child in accordance with a suitable standard of living. [...]
- (c) a woman worker shall not lose the benefits regarding status, seniority and access to promotion which may attach to her regular night work position.

The Night Work Recommendation adopted in conjunction to the Convention, (R 178) does not elaborate further on the issue of maternity protection.

## **1.6 Unjustified Dismissal**

The need to base termination of employment on a valid reason is expressed in Article 4 of the Termination of Employment Convention, 1982 (C 158). Under the Convention, valid reasons must be connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

The concept of operational requirements of the undertaking is not defined in the Convention, but are generally defined by reference to redundancy or reduction of the number of posts for economic or technical reasons, or due to force majeure or accident<sup>28</sup>.

Article 5 lists a minimum number of grounds that do **not** constitute valid reasons for termination of employment, among them

- (d) race, colour, sex, marital status, family responsibilities, **pregnancy**, religion, political opinion, national extraction or social origin; and
- (e) absence from work during maternity leave.

The enumerated grounds reflect the protection laid down in a number of other ILO instruments, in particular C 111 (Discrimination), C 156 (Family Responsibilities) and the Maternity Protection Conventions, together with their various Recommendations.

According to ILOLEX, the Convention has not been ratified by El Salvador.

### **1.6.1. General Surveys and Reports of the Committee of Experts**

The Convention requires that there be a valid reason for termination of employment, whether it is terminated following a period of notice or not. In other words, giving the worker a period of notice does not exempt the employer from stating his reasons for terminating the employment<sup>29</sup>.

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<sup>28</sup> General Survey of 1995, Protection against Unjustified Dismissal: Obligation for termination of employment to be justified by a valid reason, para. 96.

<sup>29</sup> Ibid., para 76

Protection against termination of employment in the event of pregnancy or absence from work during maternity leave is an essential component of protection against termination of employment on grounds of sex. The Convention aims to prevent women from being discriminated against during pregnancy and maternity and to save female workers the material and moral consequences that the loss of their employment could have both for themselves and for their children<sup>30</sup>.

Many countries protect pregnant women or new mothers against termination of employment. This protection often covers the entire pregnancy, of which the employer must be notified, usually by means of a medical certificate<sup>31</sup>. Some countries establish a presumption that termination of employment during the period of protection is based on pregnancy or maternity (for example Colombia)<sup>32</sup>. **In Spain the Constitutional Court**, in connection with the scope of sex discrimination, **ruled that failure to renew a temporary contract on account of pregnancy was comparable to a dismissal in violation of fundamental rights**<sup>33</sup>.

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<sup>30</sup> Ibid., para 126

<sup>31</sup> Ibid., para 127

<sup>32</sup> Ibid.

<sup>33</sup> **TC 1.a S 173/1994 of 7 June**, (see endnote 95 in the General Survey of 1995 above)



## 2. The European Convention on Human Rights

Neither the European Convention on Human Rights (ECHR) nor the European Social Charter contains any definition of the concept of discrimination. Discrimination is, however, prohibited by virtue of Article 14 of the ECHR and the adjoining Protocol No.12.

### 2.1 Article 14

The protection provided by Article 14 with regard to equality and non-discrimination is limited in comparison with similar provisions of other international instruments. The principal reason for this is the fact that Article 14 does not contain an independent prohibition of discrimination, it prohibits discrimination only with regard to the enjoyment of the rights and freedoms set forth in the ECHR<sup>34</sup> as well as in the Protocols thereto<sup>35</sup>.

Article 14 does not presuppose a breach of another right or freedom of the ECHR, it is not even necessary to claim such a violation<sup>36</sup>, but it is nevertheless required that the discrimination occurs within the ambit of one or more rights of the ECHR<sup>37</sup>. In other words, Article 14 safeguards individuals and groups of individuals, placed in similar situations, from discrimination in the enjoyment of the rights and freedoms set forth in the other provisions.

Although Article 14 has a limited scope of application, this is in part compensated by the broad interpretation of the substantive provisions, which extends the requirement of non-discrimination to a diversity of situations which would have been excluded under a literal, and thus more restrictive reading of the Convention<sup>38</sup>.

The case-law of the Court has made clear that not every distinction or difference of treatment amounts to discrimination. The test that the Court uses in assessing the existence of discrimination is twofold:

- it has to be established that the situation of the alleged victim can be considered similar to that of persons who have been better treated,
- it has to be established that the differential treatment has no “objective and reasonable justification”<sup>39</sup>.

The difference in treatment in the exercise of a right laid down in the ECHR must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised<sup>40</sup>. What has to be established is whether the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued.

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<sup>34</sup> Explanatory Report to Protocol No. 12 to the ECHR, ETS No. 177

<sup>35</sup> Non-discrimination: a human right, Seminar marking the entry into force of protocol No.12 to the ECHR, 2005, Council of Europe Publishing, p. 24

<sup>36</sup> Rasmussen v. Denmark, judgment of 28 November 1984

<sup>37</sup> E.g. Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1995; Petrovic v. Austria, judgment of 27 March 1998

<sup>38</sup> Non-discrimination: a human right, Seminar marking the entry into force of protocol No.12 to the ECHR, Protection against Discrimination under the European Convention on Human Rights, 2005, Council of Europe Publishing, p.28

<sup>39</sup> Ibid., pp. 28-29

<sup>40</sup> Ibid. p. 29

In short, the applicability of Article 14 depends upon the positive answers to the following questions: Do the facts fall within the ambit of one or more of the other substantive provisions of the ECHR? Was there a difference of treatment? Did the difference of treatment concern persons or groups of persons placed in analogous position? Did a difference of treatment have a reasonable justification, i.e. did it pursue a legitimate aim and was there a reasonable relationship of proportionality between that aim and the means employed to attain it?

*Contracting States freedom to assess the situation*

Under the case-law of the Court, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law<sup>41</sup>, but it is for the Court to give the final ruling in this respect.

## **2.2. Protocol No. 12**

Protocol No. 12 was adopted in November 2000 and entered into force in October 2005. The principle of non-discrimination is laid down in Article 1 of the Protocol.

1. The enjoyment of any right set forth by law 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.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

According to para.18 in the Explanatory Report<sup>42</sup> to the Protocol, the meaning of the term “discrimination” in the Article is intended to be identical to that in Article 14 of the Convention. However, the Article provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the rights and freedoms set forth in the Convention<sup>43</sup>.

In particular, the additional scope of protection provided by Protocol No.12 concerns cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)<sup>44</sup>.

According to the Explanatory Report the wording of Article 1 reflects a balanced approach to possible positive obligations of the Parties. This concerns the question to what extent Article 1 obliges the Parties to take measures to prevent discrimination, even where discrimination occurs in relations between private persons (so-called indirect horizontal

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<sup>41</sup> Rasmussen v. Denmark, Judgment of 28 November 1984, para. 40

<sup>42</sup> <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>; (ETS No. 177)

<sup>43</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, ETS No. 177, para. 21

<sup>44</sup> Ibid. para. 22

effects). The same question arises as regards measures to remedy instances of discrimination. While such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals<sup>45</sup>.

26. On the other hand, it cannot be totally excluded that the duty to “secure” under the first paragraph of Article 1 might entail positive obligations. For example, [...] if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State [...].

According to para. 28 of the Report “... any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, [...], etc.)”.

As far as the present author has been able to ascertain, there has not yet been any cases where Protocol No. 12 has come into play.

### **2.3 Case-law of the European Court of Human Rights**

There is no case-law from the European Court of Human Rights (the Court) concerning unlawful dismissal related to pregnancy. There are, however, cases concerning discrimination in other contexts. The enumeration below is by no means exhaustive and simply intends to demonstrate the most essential statements made by the Court on the subject of discrimination.

#### *Kjeldsen, Busk Madsen and Pedersen v. Denmark*

Three couples, having children of school age, objected to integrated and compulsory sex education as introduced into State primary schools, invoking that it was contrary to the beliefs they held as Christian parents and constituted a violation of Article 2 of Protocol 1 in combination with Article 14 as well as Articles 8, 9. The Court declared that:

The Court first points out that Article 14 [...] prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic (“status”) by which persons or groups of persons are distinguishable from each other<sup>46</sup>.

#### *Abdulaziz, Cabales and Balkandali v. United Kingdom*

The three applicants maintained that they had suffered discrimination on the grounds of sex, since it was easier for a man settled in the United Kingdom than for a woman to obtain permission for his or her non-national spouse to enter or remain in the country for settlement. As this was not disputed by the United Kingdom, argument centred on the question whether this difference had an objective and reasonable justification. The Court held that:

Although the Contracting States enjoy a certain “margin of appreciation” in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, the scope of this margin will vary according to the circumstances, the subject-matter and its background [...]

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<sup>45</sup> Ibid., para 24

<sup>46</sup> Kjeldsen, Busk Madsen and Pedersen v. Denmark, Judgment of 7 December 1976, para. 56

As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention<sup>47</sup>.

*Thlimmenos v. Greece*

The applicant alleged that the refusal of the authorities to appoint him to a post of chartered accountant on account of his criminal conviction for disobeying, because of his religious beliefs, the order to wear the military uniform was in breach of the Convention, Articles 9 and 14. The Court held that:

The Court has so far considered that the right under Article 14 not to be discriminated against [...] is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification [...]. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different<sup>48</sup>.

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<sup>47</sup> Abdulaziz, Cabales and Balkandali v. United Kingdom, Judgment of 18 May 1985, para. 78

<sup>48</sup> Thlimmenos v. Greece, Judgment of 6 April 2000, para. 44

### 3. The European Social Charter

The European Social Charter (the Charter) was adopted in 1961 and revised in 1996, taking into account the developments of labour law and social policies. The Revised Charter<sup>49</sup> of 1996 does not provide for denunciation of the former Charter. However, if a Party accepts the provisions of the Revised Charter, the corresponding provisions of the initial Charter and its Protocol cease to apply to that State.

The European Committee of Social Rights (the Committee) is the body responsible for monitoring the compliance in the States that are party to the (Revised) Charter. It is composed by fifteen members, elected by the Council of Europe Committee of Ministers for a period of six years. Every year the State Parties submit a report indicating how they implement the Charter. The Committee examines the reports and determines whether national law and practice in the State parties are in conformity with the Charter. The conclusions of the Committee are published annually. If a State Party refuses to adhere to a Committee conclusion, the Committee of Ministers addresses a recommendation to the State, asking it to remedy the situation. Under a protocol opened for signature in 1995 as well as according to the Revised Charter, complaints of violations of the Charter may be lodged with the Committee, so-called collective complaints. The Committee has so far received and decided upon 46 complaints.

The Committee has emphasized that the rights embodied in the Charter must be practical and effective rather than theoretical and illusory. This was demonstrated, for example, in the Committee's first decision taken as a result of a collective complaint, No. 1/1998, *International Commission of Jurists v. Portugal*.

... the Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact. In this regard, it considers that the satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (see for example Conclusions XIII-3, pp. 283 and 286).

#### 3.1 Protection of Employment in Relation to Pregnancy

In the Revised Charter of 1996 the right of employed women to protection of maternity is laid down in Part I, paragraph 8 and in Article 8. Other relevant articles are Article 20, Article 24 and Article 27.

##### *Article 8*

Pursuant to Article 8 (1), employed women have the right to take maternity leave up to a total of **at least** fourteen weeks (emphasis added). Following Article 8 (2) the Parties undertake, among other things,

“... to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her

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<sup>49</sup> <http://conventions.coe.int/treaty/en/Treaties/Html/163.htm>; (ETS no. 163)

maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period.”

By virtue of Article 8 (3) mothers who are nursing their infants shall be entitled to sufficient time off for this purpose. Article 8 also contains provisions regarding night work, underground work and dangerous, unhealthy and arduous work for women who have recently given birth or who are nursing their infants (paragraphs 4 and 5).

An Appendix to the Revised Charter contains comments to some of the Articles. With regard to Article 8 (2) it declares that the provision shall not be interpreted as laying down an absolute prohibition. Exceptions could be made in case of misconduct of the employed woman which justifies the breaking of the employment relationship, if the undertaking concerned ceases to operate or if the period prescribed in the employment contract has expired. It is to be noted that the list of exceptions provided in the comment is non-exhaustive.

#### *Article 20*

Article 20 provides for equal treatment in matters of employment and occupation without discrimination on the grounds of sex. In brief, the Parties undertake to take appropriate measures to ensure or promote equal treatment in access to employment and protection against dismissal as well as in relation to terms of employment and working conditions. According to the Appendix, provisions concerning the protection of women, particularly as regards pregnancy, confinement and the post-natal period, shall not be deemed to be discrimination as referred to in the Article. Neither does the Article prevent the adoption of specific measures aimed at removing *de facto* inequalities.

#### *Article 24*

Article 24 obliges the Parties to, among other things, recognise the right of all workers not to have their employment terminated without valid reasons connected to their capacity or conduct or based on the operational requirements of the undertaking as well as the right of workers who have suffered an unjustified dismissal to receive adequate compensation or other appropriate relief. A comment to the Article in the Appendix makes clear, among other things, that:

... for the purpose of the Article the following, **in particular**, shall not constitute valid reasons for termination of employment:

- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, [...];
- (e) maternity or parental leave;
- (f) temporary absence due to illness or injury.

#### *Article 27*

Article 27 concerns the right of workers with family responsibility to equal treatment. The Parties undertake to take appropriate measures to, among other things, enable workers with family responsibilities to enter and remain in employment, as well as re-enter employment after an absence due to those responsibilities and to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.

#### *Part V, Article E*

Part V, Article E of the Revised Charter is a non-discrimination clause, declaring that the enjoyment of the rights set forth in the revised Charter shall be secured without discrimination

on any ground such as, among other things, sex. According to the comment in the Appendix a differential treatment based on an objective and reasonable justification shall, however, not be deemed discriminatory. This is a new Article, based on Article 14 of the ECHR. It confirms the case-law of the Committee in respect of the Charter<sup>50</sup> and it is understood that this provisions prohibits, inter alia, the refusal to employ women on grounds of pregnancy<sup>51</sup>.

In collective complaint No.13/2002, *International Association Autism-Europe (IAAE) v. France*, the Committee gave the following comment to Article E:

The Committee considers that the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein. [...] Therefore, it does not constitute an autonomous right which could in itself provide independent grounds for a complaint.

### **3.2 Case law of the European Social Charter**

The annual reports of the State Parties are examined by the Committee, who determines whether national law and practice in the State parties are in conformity with the Charter. The conclusions of the Committee have formed a considerable body of case law. Below is an excerpt of conclusions that have been published regarding parts of Articles 8 and 20.

#### *Article 8 (1)*

As regards paragraph 1, the Committee has affirmed that this provision involves two obligations, namely:

- a. to provide for women to take at least 14 weeks maternity leave, and
- b. to ensure that the women are adequately compensated for their loss of earnings during the period of leave.

The right to maternity leave of at least 14 weeks must be guaranteed by law<sup>52</sup>. This right must be guaranteed for all categories of employees<sup>53</sup> and the leave must be maternity leave and not sick leave.

The period of leave, partly before and partly after the birth, is to be regarded as a minimum, since it is important both to allow the mother sufficient time to prepare properly for confinement and for her subsequent return to work, and to enable the special needs of the child to be met<sup>54</sup>. The leave is optional for working women, "... except as regards six weeks' post-natal leave, which is compulsory for both the employer and the employee"<sup>55</sup>.

Regarding the issue of adequacy of benefits, the Committee has expressed the following.

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<sup>50</sup> Explanatory Report of the Revised European Social Charter, p. 135

<sup>51</sup> Ibid. p. 136

<sup>52</sup> Conclusions III, Statement of Interpretation on Article 8 para. 1

<sup>53</sup> Conclusions XV-2, Malta, p. 109

<sup>54</sup> Fundamental Social Rights, Case law of the European Social Charter, Council of Europe Publishing, 2nd edition, 2002, p.208

<sup>55</sup> Fundamental Social Rights, Case law of the European Social Charter, Council of Europe Publishing, 2nd edition, 2002, p. 209; Conclusions XIII-5, p.195, Portugal

The Committee draws attention to the fact that during maternity leave a female employee's financial situation must enable her to avoid having to work, so that she can really rest. This obligation can be fulfilled only by continuing payment of the woman's salary or by paying a benefit equivalent to or only slightly lower than that salary.<sup>56</sup>

The right to benefit may be subject to conditions such as minimum period of contribution and/or employment. However, these conditions must be reasonable.<sup>57</sup> A reduction of the salary/benefit due to a ceiling is not in itself contrary to the provision. However, the Committee has recalled that Article 8 (1) requires maternity benefit to be at least equal to 70% of the employee's previous salary (except for very high salaries)<sup>58</sup>.

#### *Article 8 (2)*

As regards the personal scope of the provision, the Committee, throughout all the supervision cycles, has consistently held that all women workers without exception should be entitled to protection under paragraph 2<sup>59</sup>. No limitation of the personal scope is admissible. Paragraph 2 is not among the provisions in the Charter in respect of which Article 33 authorises some of the beneficiaries to be excluded<sup>60</sup>. The Committee checks systematically if female part-time employees and employees related to their employer receive the same protection as others against dismissal. Article 8 (2) applies equally to women on fixed-term and open-ended contracts<sup>61</sup>.

Where national laws in some cases permit dismissal during maternity leave, the Committee is careful to ensure that these correspond to the reasons authorized under its case law (see the excerpt of the Appendix above), especially when only very general terms are used in the reports, such as "objective reasons" or "serious grounds"<sup>62</sup>.

The Committee has stated that the second paragraph is complementary to paragraph 1

... since it is designed to protect maternity as such against possible negative effects on a woman's working life. By prohibiting dismissal of a woman worker during her absence on maternity leave, the Charter seeks to protect her not only against the economic effects of such action, but also against the psychological effects which normally accompanies it.<sup>63</sup>

The Committee has pointed out that the provision "is intended to protect not only the financial security of female workers, but also their security of employment"<sup>64</sup>. This statement has been made repeatedly in the Committee's conclusions.

National legislation has been found not to be in conformity with the Charter when it has permitted exception to the prohibition against dismissal in cases where the employer relocates

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<sup>56</sup> Ibid. p. 215; Conclusions XIII-2, p.87-88, Belgium

<sup>57</sup> Conclusions XV-2, France, p. 197

<sup>58</sup> Conclusions XVII-2, Volume 2, Latvia, (2005)

<sup>59</sup> Fundamental Social Rights, Case law of the European Social Charter, Council of Europe Publishing, 2nd edition, 2002, p. 218

<sup>60</sup> Ibid.; Conclusions XV-2, p. 523, Spain.

<sup>61</sup> Conclusions XIII-4, Austria, p.93

<sup>62</sup> Fundamental Social Rights, Case law of the European Social Charter, Council of Europe Publishing, 2nd edition, 2002, p. 219

<sup>63</sup> Ibid.; Conclusions VII, p. 54

<sup>64</sup> Ibid.; Conclusions XV-2, p. 241, Greece

all or part of the business<sup>65</sup>. Likewise has it been found the be contrary to the Charter to permit dismissal of a worker during her absence on maternity leave in the context of collective redundancy where the undertaking has not ceased to operate, regardless of the fact that authorisation from the administrative authorities was required in such cases, to ensure objective and justifiable reasons for the redundancies<sup>66</sup>.

#### *Reinstatement and compensation under Article 8 (2)*

In cases of dismissal in breach of the prohibition, the worker should be reinstated in her employment, as this is the only solution which effectively guarantees job security<sup>67</sup>. The Committee has emphasised that

“... the purpose of Article 8 para. 2 was to safeguard the jobs of women workers during maternity leave and drew the [...] authorities’ attention to its case law on Article 4 para. 3, which could be applied to this provision. In this regard it is stated that reinstatement should be the rule, that only in exceptional circumstances should compensation be the sole remedy and that the compensation should be sufficient to deter the employer and compensate the employee”<sup>68</sup>.

In its Conclusions from 2007 the Committee strengthens this position by stressing that adequate compensation requires that the victim of dismissal is fully compensated, hence there should be no predefined ceiling on the amount of compensation/damages that may be awarded<sup>69</sup>.

The Committee has also found it necessary to clarify the scope of the provision in respect of the date of notice of dismissal:

Job security for a worker on maternity leave means that the contract on employment must not be terminated during this period. This is guaranteed by the prohibition on giving notice of dismissal at such a time that the period of notice would expire during the absence on leave. The giving of notice during maternity leave initiates the period of notice and, where appropriate, the interview, consultation or conciliation procedures to be carried out during this period. The Committee felt that, given the purposes of maternity leave and the unlawfulness of dismissal during this period, notice of dismissal as such was not incompatible with the Charter provided that the period of notice and any procedures were suspended until the end of the leave. The same rules governing suspension of the period of notice and procedures during maternity leave must apply in the event of notice of dismissal prior to maternity leave, irrespective of the length of the period of notice.<sup>70</sup>

#### *Article 8 (3)*

Time off for nursing should in principle be granted during working hours and should be treated as regarded as normal working time and be remunerated as such<sup>71</sup>. The Committee has

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<sup>65</sup> Conclusions XVII-2, Volume 1, Czech Republic, (2005)

<sup>66</sup> Conclusions XVII-2, Volume 2, Spain (2005)

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.; Conclusions XV-2 p.157, Finland and Conclusions XV-2, p. 200, France. The same conclusion has also been addressed to Belgium, Cyprus and Malta during earlier cycles of supervision.

<sup>69</sup> Conclusions XVIII-2, Volume 1, Armenia, (2007)

<sup>70</sup> Ibid. p. 220; Conclusions XIII-4, pp. 92-93

<sup>71</sup> Conclusions XIII-4, Netherlands, p. 102

held that paid breaks for the purpose of breast-feeding an infant should in principle be granted until the child reaches the age of nine months<sup>72</sup>.

*Article 8 (5)*

The Committee has held that:

National law must make provision for the re-assignment of women who are pregnant or breast-feeding if their work is unsuitable to their condition, with no loss of pay, if this is not possible such women should be entitled to paid leave. Such women should retain their right to return to their previous employment<sup>73</sup>.

*Article 20*

Article 20 of the Revised Charter is almost identical to Article 1 of the Additional Protocol of 1998. The two provisions are similar enough to enable Article 20 to draw from the case law established under Article 1 of the Protocol. In the first conclusions in which the Additional Protocol was examined, the Committee stated that Article 1 entailed greater commitments than those set down under the terms of the Charter, such as Article 8. It made the following general statement:

Acceptance of Article 1 of the Protocol entails the following obligations for States:

- the obligation to promulgate this right in legislation;
- the obligation to take legal measures designed to ensure the effectiveness of this right. In this regard, the Committee referred its case law according to which such measures must provide for the nullity of clauses in collective agreements and individual contracts which are contrary to the principle, for adequate appeal procedures where the right has been violated and for the effective protection of workers against any retaliatory measures (dismissal or other measures) taken as a result of their demand to benefit from the right;
- the obligation to define an active policy and to take practical measures to implement it<sup>74</sup>.

In a following supervisory cycle, the Committee added that:

...it is an essential requirement for the effective protection of the principles enshrined therein that recourse to a judicial procedure must be ensured so that the effective implementation and exercise of these rights is secured for those concerned.

Also, States must ensure through legislation that adequate safeguards exist against discrimination and retaliatory measures. Legislation must provide for the rectification of the situation concerned – in the case of dismissal, reinstatement – and compensation for any financial loss incurred during the intermediate period. Where such a remedy is not possible, financial compensation instead may be acceptable, but only if it is sufficient to deter the employer and compensate the worker. Legislation may also provide for other sanctions against an employer who is guilty of such discrimination.

An alleviation in the burden of proof in cases of alleged gender discrimination is also required. Where persons who consider that the principle of equal treatment as guaranteed by this provision has not been applied to them establish, before a court or other competent authority,

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<sup>72</sup> Conclusions XVIII-2, Volume 1, Armenia (2007) and Conclusions XVII-2, Volume 1, Belgium (2005)

<sup>73</sup> Conclusions XVII-2, Volume 1, Albania (2007)

<sup>74</sup> Conclusions XIII-3, p. 429

facts from which discrimination may be presumed to exist, it shall then be for the respondent to prove that the apparent discrimination is due to objective factors unrelated to any discrimination based on sex and thus does not constitute any contravention of the principle of equal treatment<sup>75</sup>.

Regarding the issue of adequate compensation in case of unjustified dismissal, the Committee stressed that to be in conformity with the Protocol, national law must

... ensure sufficient compensation, that is to say through:

- reinstatement in or retention of employment in the event of unlawful or unfair dismissal, and compensation for any pecuniary damage suffered;
- payment of compensation in proportion to the damage suffered, i.e. covering pecuniary and non-pecuniary damage, if the employee does not wish to return to his or her job or it is impossible for the employment to continue;
- the ending of discrimination and the award of compensation in proportion to the damage suffered in all other cases<sup>76</sup>.

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<sup>75</sup> Conclusions XIII-5, pp. 255-256

<sup>76</sup> Conclusions XVII-2, Volume 1, Czech Republic and Finland (2005)

## 4. The United Nations

### 4.1 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966, at the same time as the Covenant on Economic, Social and Cultural Rights. The monitoring body of the Covenant, The Human Rights Committee, is a body composed of 18 independent experts that monitors the implementation of ICCPR by its State parties. All State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments. Below follows an extract of some of articles of the Covenant.

#### *Article 2 para 3*

1. Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. [...]
3. Each State party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;
  - (c) [...]

#### *Article 3*

The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

#### *Article 17*

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right<sup>77</sup>.

#### **4.1.1. General Comment No. 28, equality of rights between men and women**

General Comments have been issued by the Human Rights Committee (CCPR), clarifying the scope and meaning of the Articles. In this paper, special attention shall be accorded to General Comment No. 28 on the equality of rights between men and women. It has been issued on the

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<sup>77</sup> CCPR/C/21/Rev.1/Add.10, General Comment No.28, 29 March 2000, para. 2

basis of the above Article 3. However, the Comment is not limited to Article 3, it also provides interpretations of other Articles of the Covenant, seen in relation to Article 3. For instance, the following is laid down in relation to Article 5 and Article 17 (the right to privacy).

9. [...] ... in accordance to article 5, nothing in the Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights provided for in article 3, or at limitations not covered by the Covenant. Moreover, there shall be no restriction upon or derogation from the equal enjoyment by women of all fundamental human rights recognized or existing pursuant to law, conventions, regulations or customs, on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

20. States parties must provide information to enable the Committee to assess the effect of any laws and practices that may interfere with women's right to enjoy privacy and other rights protected by article 17 on the basis of equality with men. [...] **Women's privacy may also be interfered with by private actors, such as employers who request a pregnancy test before hiring a woman** (emphasis added). [...]

31. The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields. [...] State parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services.

Article 26 of the Covenant provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. Article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right<sup>78</sup>. It prohibits discrimination in law or in fact in any field regulated or protected by public authorities. [...] In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant<sup>79</sup>.

According to the UN website of the High Commissioner for Human Rights, El Salvador ratified the Covenant in 1979<sup>80</sup>.

#### **4.2 The International Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966. Pursuant to Article 2, paragraph 2 of the ICESCR the State parties undertake to guarantee the rights enunciated in the Covenant without discrimination of any kind. By virtue of Article 3 the State Parties to the Covenant are obliged to ensure the equal right of men and women to the enjoyment of the economic, social and cultural rights set forth in the Covenant.

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<sup>78</sup> General Comment No. 18: Non-discrimination: . 10/11/89, para 12

<sup>79</sup> Ibid.

<sup>80</sup> <http://www2.ohchr.org/english/bodies/ratification/4.htm>

The ICESCR proclaims the right to work in a general sense in its Article 6 and explicitly develops the individual dimension of the right to work through the recognition in Article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions.

*Article 6*

1. The State Parties to the present Covenant recognizes the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. [...]

*Article 7*

The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work [...]  
[...]

*Article 10*

The States Parties to the present Covenant recognize that:

1. [...]
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

General Comments have been issued by the Committee on Economic, Social and Cultural Rights (CESCR), clarifying the scope and meaning of the Articles. In this paper, special attention is accorded to General Comment No. 18 on the right to work and General Comment No.16 on the equal rights of women and men under the Covenant. Unfortunately no General Comment has been issued regarding the above article 10.

#### **4.2.1. General Comment No. 18 regarding the right to work**

According to General Comment No. 18, the right to work encompasses all forms of work, whether independent work or wage-paid work. It implies the right not being forced in any way whatsoever to engage in employment. It also implies the right not to be unfairly deprived of employment<sup>81</sup>. According to the Comment, **these fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment**<sup>82</sup>, (emphasis added). Furthermore, it is stressed that **in particular**, pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment<sup>83</sup>. According to the present author, the fundamental right of the worker to physical and mental integrity is closely related to the issue of privacy under the ICCPR; in the present context specifically to the above mentioned statement that it constitutes an interference with a woman's privacy to request a pregnancy test before hiring her.

State parties have immediate obligations in relation to the right to work. Hence, the principle of non-discrimination in Article 2 (2) of the Covenant is immediately applicable

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<sup>81</sup> E/C.12/GC/18.(General Comments), General Comment No. 18: . 06/02/2006, para. 6

<sup>82</sup> Ibid., para 7

<sup>83</sup> Ibid., para 13

and is neither subject to progressive implementation nor dependent on available resources<sup>84</sup>.

According to the Comment, State parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the Covenant. In the context of article 6, this “core obligation” encompasses the obligation to ensure non-discrimination and equal protection of employment”<sup>85</sup>.

35. Violations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties. They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; **or the failure to protect workers against unlawful dismissal** (emphasis added).

The concept of unlawful dismissal is not defined in the Comment. Instead, it refers to ILO Convention No. 158 in the following wording:

11. ILO Convention No. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its article 4 and in particular imposes the requirements to provide valid grounds for dismissal as well as the right to legal and other redress in case of unjustified dismissal.

According to the Comment any person or group who is a victim of a violation of the right to work should have access to effective judicial or other appropriate remedies at the national level<sup>86</sup>. Judges and other law enforcement authorities are invited to pay greater attention to violations of the right to work in the exercise of their functions<sup>87</sup>.

#### **4.2.2 General Comment No. 16, equality of rights between men and women**

While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, article 3 of the ICESCR also mandates the equal enjoyment of the rights in the Covenant for men and women in practice<sup>88</sup>. General Comment No. 16 is issued regarding the equal right of men and women to the enjoyment of all economic, social and cultural rights.

According to article 3, States parties must respect the principle of equality in and before the law<sup>89</sup>. The Comment contains the following definitions of direct and indirect discrimination.

12. Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men and women, which cannot be justified objectively.

Any difference in treatment related to pregnancy amounts to direct discrimination, since a distinction made on the grounds of pregnancy is based expressly and exclusively on the sex of the woman, simply because of the fact that men cannot become pregnant.

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<sup>84</sup> Ibid., para 33

<sup>85</sup> Ibid., para 31

<sup>86</sup> Ibid., para. 48

<sup>87</sup> Ibid., para. 50

<sup>88</sup> E/C.12/2005/4.(General Comments), General comment No. 16 (2005): .11/08/2005, para. 6

<sup>89</sup> Ibid., para. 9

13. Indirect discrimination occurs when a law, a policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented.[...]

State parties have an **obligation to monitor and regulate the conduct of non-State actors** to ensure that they do not violate the equal right of men and women to enjoy their economic, social and cultural rights on a basis of equality<sup>90</sup> (emphasis added).

21. The obligation to fulfil requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include:

- To make available and accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes; [...]

26. Article 9 of the Covenant requires that State parties recognize the right of everyone to social security, including social insurance, and to equal access to social services. Implementing article 3, in relation to article 9, requires, inter alia, equalizing the compulsory retirement age for both men and women [...] and **guaranteeing adequate maternity leave for women** (emphasis added), paternity leave for men, and parental leave for both women and men.

The Comment stresses that violations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels<sup>91</sup>.

According to the UN website of the High Commissioner for Human Rights, El Salvador ratified the Covenant in 1979<sup>92</sup>.

### 4.3 CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979. CEDAW provides a definition of discrimination against women, and identifies measures required to ensure women's right to equality.

The implementation of the Convention is monitored by the Committee on the Elimination of Discrimination against Women. The Committee is composed of 23 experts nominated by the Governments and elected by the States parties. At least every four years, the States parties are expected to submit a national report to the Committee.

The Committee makes general recommendations on any issue affecting women to which it believes that States parties should devote more attention. These recommendations have tended to be rather short and their primary purpose has not been to clarify the scope and meaning of the articles in the Convention. Lately the recommendations have grown more substantial, but none of the recommendations so far issued seems to have any connection to pregnancy-related

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<sup>90</sup> Ibid., para 20

<sup>91</sup> Ibid., para 42

<sup>92</sup> <http://www2.ohchr.org/english/bodies/ratification/3.htm>

discrimination. It follows from the above that here is no equivalent to the general comments issued under ICCPR and ICESCR.

An Optional Protocol to the Convention was adopted in 1999. According to the Protocol the Committee is mandated to (1) receive communications by from individuals or groups of individuals, submitting claims of violations of rights protected in the Convention to the Committee and (2) initiate inquiries into situations of grave or systematic violations of women's rights. So far approximately 10 such communications have been received by the monitoring Committee. None of the communications that the present author has been able to access touches upon the subject at hand.

#### **4.3.1. Content**

The preamble of the Convention states: "Bearing in mind [...] that the role of women in procreation should not be a basis for discrimination ..."

##### *Article 1*

For the purposes of the present Convention, "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and of fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 11 focuses on the elimination of discrimination in employment. According to paragraph 1, States shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure [...] in particular (a) the right to work as an inalienable right of all human beings.

Article 11, paragraph 2 focuses directly on discrimination in the field of employment, in particular on grounds of marriage or maternity.

##### *Article 11*

1. [...]

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provisions of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. [...]

### 4.3.2. Interpretation

In August 2000, a Judicial Colloquium on the domestic application of the CEDAW Convention and the Convention on the Rights of the Child was held by the Department of Economic and Social Affairs at the United Nations. Senior judges and magistrates were invited to discuss how to use international human rights law in domestic decision-making. Below follows some of the interpretations made by the text of CEDAW in the context of work and work-related rights.

From the preamble, Article 1 and Article 11, para. 1 (a) follows that "... job vacancies which are not open to ... mothers/pregnant women ..., are contrary to the provisions of the CEDAW Convention"<sup>93</sup>

... the actual content and meaning of the norms contained in international human rights instruments relevant to the given case should be discovered by original research. Some of the sources of interpretation of the letters of these documents are common to all international treaties and are summarized in **the Vienna Convention on the Law of Treaties**. According to article 31 (1): **"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."**<sup>94</sup> (emphasis added).

... discrimination against women "shall mean *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights...*" (emphasis added)

- "any" [...] meaning; business rationale is not a justification for discriminatory treatment. [...]
- "which has the effect or purpose of impairing or nullifying the recognition ... of human rights", meaning; [...], i.e. either discriminative effect **or** discriminative purpose is covered by the Convention. Effect is an objective element, purpose is a subjective element<sup>95</sup>.

Article 2 (e) of the CEDAW Convention states: "[States Parties undertake] to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". Meaning: protection from discrimination by private actors (employers). All the norms apply to private action as well as to state action<sup>96</sup>.

#### *Country report of El Salvador*

El Salvador submitted its sixth periodic report under the Convention in 2002<sup>97</sup>. In the introduction El Salvador states:

El Salvador recognizes the importance of international conventions and treaties, which even take precedence over the country's secondary legislation. [...]

The Convention takes precedence over other secondary legislation of the country; as a result, all necessary efforts must be made to comply with its provisions, the importance of which is recognized even in the Constitution.

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<sup>93</sup> Bringing International Human Rights Law Home, Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, United Nations Publication 2000, p. 89

<sup>94</sup> Ibid., pp. 86-87

<sup>95</sup> Ibid., p. 90

<sup>96</sup> Ibid., p. 91

<sup>97</sup> CEDAW/C/SLV/6, 25 November 2002

In the Committee's concluding comments to El Salvador's report<sup>98</sup>, it states:

268. The Committee recommends that the necessary measures should be taken to ensure compliance with the provisions of article 11 of the Convention and of the relevant International Labour Organization conventions ratified by El Salvador.

270. The Committee urges the State party strictly to enforce labour legislation in maquila industries, including their supervision and monitoring, especially occupational safety and health measures, and requests that information on this matter be included in the next report.

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<sup>98</sup>[http://www.un.org/womenwatch/daw/cedaw/cdrom\\_cedaw/EN/files/cedaw25years/content/english/countries\\_comments.html](http://www.un.org/womenwatch/daw/cedaw/cdrom_cedaw/EN/files/cedaw25years/content/english/countries_comments.html)

## 5. The Inter-American System

In 1948 the Ninth International Conference of American States was held in Bogotá. The conference led to the adoption of the Charter of the Organization of American States (OAS), as well as to the approval of the American Declaration of the Rights and Duties of Man and the Inter-American Charter of Social Guarantees. The content of the American Declaration is similar to that of the Universal Declaration of Human Rights, adopted the same year.

At present, the Inter-American system for the protection of human rights has a normative basis consisting of several instruments, for example

- the American Declaration of the Rights and Duties of Man,
- the American Convention on Human Rights,
- the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

Under the OAS Charter, all member States are bound by the provisions in the American Declaration of the Rights and Duties of Man. In addition, the majority of the States have ratified the American Convention on Human Rights (the Convention) and accepted the jurisdiction of the Inter-American Court of Human Rights. According to the OAS website, El Salvador has ratified the Convention as well as accepted the jurisdiction of the Inter-American Court of Human Rights.

There are two supervisory bodies of the Inter-American system; the Inter-American Commission on Human Rights (the Commission), based in Washington D.C., and the Inter-American Court of Human Rights (the Court), based in San José, Costa Rica.

### *The Inter-American Commission on Human Rights*

One of the Inter- American Commission's key functions is to consider petitions from individuals who claim that the state has violated a protected right. If a friendly settlement cannot be reached, the Commission may recommend specific measures to be carried out by the state to remedy the violation. If a state does not follow the recommendations, the Commission has the option to publish its report or take the case to the Court, provided that the state involved has accepted the jurisdiction of the Court.<sup>99</sup> The Commission convenes six weeks every year. It has created rapporteurships to focus on specific areas of human rights.

### *The Inter-American Court of Human Rights*

In addition to the cases brought to it by the Commission, the Court may exercise an advisory function to interpret the American Convention and other human rights treaties in force in the hemisphere. Member states may recognize the jurisdiction by the Court in an independent declaration.

#### 5.1. The American Declaration of the Rights and Duties of Man

The Declaration recognizes a series of civil, social, economic and cultural rights, for example the following.

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<sup>99</sup> [http://www.oas.org/key\\_issues/eng/KeyIssue\\_Detail.asp?kis\\_sec=2](http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=2)

Article VII of the Declaration<sup>100</sup> provides:

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

According to Article XIV every person has the right to work under proper conditions:

Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.

[...]

## **5.2. The American Convention on Human Rights**

The American Convention on Human Rights<sup>101</sup> (the Convention) is an instrument primarily focusing on civil and political rights. It does not enumerate any specific economic, social or cultural rights, though it contains a reference to such rights.

According to Article 1 the State parties to the Convention undertakes to respect the rights and freedoms recognized in the Convention and to ensure all persons subject to their jurisdiction the free and full exercise of those rights without any discrimination for reasons of, for example race, colour or sex.

Article 11 provides:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. 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 honour or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

It should be recalled that the International Covenant on Civil and Political Rights also includes the right to privacy and that, according to the interpretation of the Covenant made by the Human Rights Committee, this right is interfered with if women are requested to undergo a pregnancy test before being hired, (see above). As regards the interpretation of the American Convention on Human Rights in relation to other international treaties, see below.

Chapter 3 of the Convention is dedicated to the Economic, Social and Cultural Rights. However, the chapter only contains one article, Article 26, which under the heading “Progressive Development” prescribes the following:

The State Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational scientific and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

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<sup>100</sup> [http://www.hrcr.org/docs/OAS\\_Declaration/oasrights.html](http://www.hrcr.org/docs/OAS_Declaration/oasrights.html)

<sup>101</sup> [http://www.hrcr.org/docs/American\\_Convention/oashr2.html](http://www.hrcr.org/docs/American_Convention/oashr2.html)

### 5.3. The Additional Protocol to the Convention

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights<sup>102</sup>, (the Protocol of San Salvador), was adopted in San Salvador in 1988 and entered into force in 1999. Among other things the preamble emphasizes the close relationship between economic, social and cultural rights and civil and political rights.

Pursuant to Article 3 the State parties undertake to guarantee the exercise of the rights without discrimination of any kind for reasons related to, among others, sex. Article 6 provides for the right to work. By virtue of the second paragraph of the Article, the State parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment. The State Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

According to Article 7 the right to work presupposes just, equitable and satisfactory conditions of work, particularly with respect to:

[...]

d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of **unjustified dismissal**, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;

[...]

Article 9 provides for the right to social security:

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means of a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.
2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, **in the case of women, paid maternity leave before and after childbirth** (emphasis added).

Pursuant to Article 19, the States parties must submit periodic reports on the progressive measures they have taken to achieve the full realization of the rights set forth in the text.

Violation of rights set forth in the Protocol may give rise to application of the system of individual petitions. However, according to Article 19, paragraph 6, the petition system is reserved for certain rights and can only be applied to those rights, i.e. trade union rights and

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<sup>102</sup> <http://www.oas.org/juridico/English/Treaties/a-52.html>

the right to education. The individual petition system does not extend to the other rights enumerated in the Protocol.

According to the OAS website<sup>103</sup>, the Protocol of San Salvador has been ratified by El Salvador.

#### 5.4. Declaration of Mar del Plata

In November 2005, the Fourth Summit of the Americas was held in Argentina. Among other things, it resulted in a political declaration called “Creating Jobs to Fight Poverty and Strengthen Democratic Governance”. The Declaration repeatedly refers to the ILO Declaration on Fundamental Principles and Rights at Work (1998). Being a political declaration, it has no independent standing in court. Nevertheless, it is an interesting document.

Below follows some extracts. Emphasis has been added to certain phrases.

21. We commit to implementing active policies to generate decent work and create the conditions for quality employment that imbue economic policies and globalization with a strong ethical and human component, putting the individual at the center of the work, the company and the economy. **We will promote decent work, that is to say: fundamental rights at work, employment, social protection and social dialogue.**

23. We will combat gender-based discrimination in the work-place, promoting equal opportunities to eliminate existing disparities between men and women in the working world through an integrated approach that incorporates gender perspective in labor policies, including by promoting more opportunities for ownership of businesses by women.

30. We commit to strive to ensure equal opportunities to employment for all as well as to work to eliminate discrimination in the work place, in access to education, training and remuneration. In this context, we will pay special attention to gender-differentiated needs, the needs of indigenous peoples, Afro-descendants and other groups in vulnerable situations.

55. We are committed to building a more solid and inclusive institutional framework, based on the coordination of economic, labor and social policies to contribute to the generation of decent work, which must comprise:

a) A labor framework that promotes decent work and reaffirms our respect for the ILO Declaration on Fundamental Principles and Rights at Work (1998) and its follow-up. **We shall continue to strengthen the application of our national labor laws and promote their effective enforcement [...]**

63. We recognize that the universal promotion and protection of human rights, **including civil, political, economic, social and cultural rights** on the basis of the principle of universality, indivisibility, and interdependence, as well as respect for international law, including international humanitarian law, international human rights law, and international refugee law are essential to the functioning of democratic societies. [...]

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<sup>103</sup> <http://www.oas.org/juridico/English/signs/a-52.html>

## 5.5. Interpretation of the treaties

The Inter-American Court of Human Rights does not seem to have delivered any case law with direct bearing on economic, social and cultural rights. The Court has however, made some comments regarding the relationship between the existing inter-american human rights instruments and other international instruments.

### *Advisory Opinion OC-5/85*

The Government of Costa Rica requested an advisory opinion of the Inter-American Court regarding the compatibility of domestic law with the American Convention<sup>104</sup>, more specifically “the scope and limitations on the right to freedom of expression, of thought and of information and the only permissible limitations contained in Articles 13 and 29 of the American Convention, ...”. The Government wanted to know if the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism is permitted or included among the restrictions or limitations authorized by Articles 13 and 29 of the American Convention on Human Rights.

The Court stated that “... it is frequently useful, [...] to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text.” It made the following conclusion:

52. [...] Subparagraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as

restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

**Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail** (emphasis added).

## 5.6. States parties' obligations in relation to recommendations made

As regards States parties' obligation to live up to the commitments made when ratifying an international treaty, the Court has, for instance, stated the following:

80. However, in accordance with **the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention**, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the **obligation to make every effort to apply with the recommendations of a protection organ such as the Inter-American Commission**, which is, indeed, one of the principal organs of the Organization of American States, whose function is "*to promote the observance and defense of human rights*" in the hemisphere (OAS Charter, Articles 52 and 111).

81. Likewise, Article 33 of the American Convention states that the Inter-American Commission is, as the Court, competent "*with respect to matters relating to the fulfillment of*

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<sup>104</sup> Advisory Opinion OC-5/85 of 13 November 1985, Compulsory Membership in an Association prescribed by Law for the Practice of Journalism, Series A, No. 5

*the commitments made by the State Parties"*, which means that by ratifying said Convention, States Parties engage themselves to apply the recommendations made by the Commission in its reports.<sup>105</sup>

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<sup>105</sup> Case of Loayza Tamayo, Judgment of 17 September 1997, Series C No. 33, paras 80-81.