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In this section we have discussed the *notion of discrimination*, a practice that is prohibited in a number of international instruments, and one of the only specific human rights obligations to be explicitly enshrined in the UN Charter.

Below are the key lessons to take away from this section, before turning to the section exam:

Not all distinction is an instance of discrimination: laws, public policies and private practices constantly draw distinctions between individuals, based on a variety of acceptable criteria. It is only when laws, policies or practices are based on *arbitrary* distinctions – i.e., differences in treatment that lack a reasonable justification – that a distinction becomes discriminatory. *Arbitrary* distinctions are distinctions that are based on prohibited grounds, that do not pursue a legitimate objective, or that results in differences of treatment that go beyond what is necessary to achieve an otherwise legitimate objective.

The prohibition of discrimination may vary in scope, depending on whether it applies independently, providing a general protection against discrimination, or whether it only prohibits discrimination in the enjoyment of the rights guaranteed under the relevant instruments.

The prohibition of discrimination is addressed to all organs of the State, and also imposes on the State to tackle discrimination by private actors. Article 26 ICCPR illustrates this, by imposing on the States parties both negative and positive obligations. These obligations are that States shall (1) guarantee equality before the law (a requirement addressed to courts and law enforcement authorities); (2) guarantee the equal protection of the law (a requirement addressed to the Legislator); (3) prohibit any discrimination in private relationships (something to which all organs of the State may contribute); and (4) guarantee to all persons equal and effective protection against discrimination (which may impose the adoption of positive action measures in situations of structural discrimination).

Moreover, **the prohibition includes different elements**, which may include direct and indirect discrimination; failure to provide reasonable accommodation; and, arguably, failure to adopt positive action measures, to combat instances of structural discrimination faced by certain groups of society. The various prohibitions of discrimination in international human rights law are not uniform as regards the range of elements included in each prohibition. We have noted in particular:

- *Direct* discrimination occurs when a distinction is imposed based on a prohibited ground of discrimination, or that is arbitrary because it is unrelated to a legitimate objective or is disproportionate. This does not necessarily mean that direct discrimination is *intentional* or *conscious*. Indeed, racism or sexism, or other forms of stereotyping, may be unconscious.
- Similarly, *indirect* discrimination (the adoption of an apparently neutral measure that disadvantages a particular group or has a disproportionate impact on that group) may be quite deliberate (the apparently neutral measure is chosen because it will lead to the exclusion of members of a certain category), but it also may be unintended, i.e., be the result of a measure chosen for legitimate reasons but without taking into account the fact that it may have exclusionary impacts. The adoption of a measure that is not intended to discriminate but which has a disproportionate impact on a particular group is also indirect discrimination.

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neutral measures that discriminate in fact will be considered discriminatory if the same objectives could have been attained by the adoption of other, equally effective measures.

- The requirement of *reasonable accommodation* goes beyond the above definitions of discrimination by imposing a duty on actors to identify, in *individual* cases, which measures could be taken to ensure that the specific needs of an individual are taken into account, in the context in which he or she is seeking access (for instance) to employment, housing or education.



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