

***Background conference document prepared by the Office of the
United Nations High Commissioner for Human Rights***

The concept of ‘special’ measures in international human rights law*

Executive summary

One of the issues considered by the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities during its fifth session was the concept of ‘measures aimed at accelerating de facto equality of persons with disabilities’ (Article 7, paragraph 5 of the Working Group draft text).

The aim of this background document is to review the existing core human rights treaties and the jurisprudence of treaty bodies on ‘special’ measures, with a view to clarifying the nature and scope of these measures, as well as their interrelations with other social policies aimed at improving the situation of a particular group of individuals.

The paper concludes that these measures are grounded in the State’s obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices, and represent a means to accelerate the achievement of equality between members of a particular target group and the rest of society.

‘Special’ measures do not constitute a violation of the general prohibition of discrimination, provided that they are (i) aim at correcting conditions which prevent or impair the enjoyment of the rights; (ii) be based on reasonable and objective criteria; and (iii) limited in time. Their temporary character also implies that such measures must be discontinued once their objectives have been achieved: their continuation beyond that point would necessarily entail as a consequence the maintenance of ‘unequal and separate standards’ for individuals belonging to a particular group.

* In the present background document, the term ‘special’ measures is used to refer to measures aimed at accelerating the equalisation of opportunities for a particular disadvantaged or marginalised group of individuals. The use of this term is in accordance with the language used in existing human rights treaties and recent jurisprudence of treaty bodies. However, the adjective ‘special’ appears in inverted commas so as to make it clear that its use does not intend to compromise discussions currently underway on whether to qualify the word ‘measures’ by using an adjective or not.

I. Introduction

1. At its fifth session, held in New York from 24 January to 4 February 2005, the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (hereinafter, the Ad Hoc Committee) held informal discussions on several draft Articles of the proposed new treaty, with the aim of clearing up as many of the issues concerning the draft articles as possible.

2. One of the issues considered by the Ad Hoc Committee during this session was the concept of ‘measures aimed at accelerating de facto equality of persons with disabilities’ in paragraph 5 of draft Article 7 (Equality and non-discrimination) of the Working Group text. In his report to the Ad Hoc Committee,¹ the Coordinator noted that while the inclusion of such measures in the draft Article attracted general support, a divergence of views remained on several related issues, including:

- (a) whether to use an adjective such as ‘special’ or ‘positive’ to qualify the word ‘measures’ and, if so, which adjective would be preferable;
- (b) whether to retain the phrase ‘separate standards’ in the second part of the draft Article; and
- (c) whether to retain reference to the discontinuation of these measures once their objectives have been achieved.

3. The Coordinator referred the last two phrases of draft Article 7(5) to the facilitator for further work with delegations. Reflecting the discussions, paragraph 5 currently reads as follows:

5. [Special] [Positive] measures aimed at accelerating de facto equality of persons with disabilities shall not be considered discrimination on the basis of disability, [but shall in no way entail as a consequence the maintenance of unequal or separate standards]; [those measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved] [those measures shall be discontinued when they are no longer justified in the light of the objectives of equal opportunity and equal treatment].

¹ Report of the Coordinator to the fifth session of the Ad Hoc Committee, in Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fifth session, A/59/360, Annex II.

4. The aim of this background document is to review the existing core human rights treaties and the jurisprudence of treaty bodies on ‘special’ measures, with a view to clarifying the nature and scope of these measures, as well as their interrelations with other social policies aimed at improving the situation of a particular group of individuals.

II. ‘Special’ measures in existing international instruments

5. Equality is one of the fundamental principles of human rights law and is as such enshrined in the main United Nations human rights instruments.² The realisation of equality presupposes the elimination of all forms of discrimination based on such prohibited grounds as race, colour, sex, language, religion or belief, political or other opinion, national or social origin, property, birth or other status such as age, ethnicity, disability, marital, refugee or migrant status. Nonetheless, the elimination of all forms of discrimination against a particularly disadvantaged or marginalised group of individuals is not *per se* sufficient to ensure the equal effective enjoyment of all human rights and fundamental freedoms by the individuals belonging to such target group.³ Thus, in addition to the negative obligation to refrain from discriminatory actions and practices against the members of the group, States are also required to adopt measures aimed at achieving the realisation of both *de jure* and *de facto* equality for the individuals belonging to the target group. These measures are usually referred to as *special measures*.⁴

6. Among the existing core human rights treaties, only the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contain provisions expressly authorising the adoption of such measures. Article 1(4) of the ICERD provides that

² On the significance of the principle of equality and its interrelation with the general prohibition of discrimination, see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, N.P. Engel Publisher, 2005, pp. 597 ff.

³ Typically, the target group is composed of individuals who all have a characteristic in common (e.g. gender, nationality or membership of an ethnic, religious or linguistic minority) and who find themselves in a disadvantaged position due to their membership in that group.

⁴ On the issue of terminology, see *infra*, paras. 11-12.

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.⁵

Article 4(1) of the CEDAW contains a similar formulation:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.⁶

7. International treaties adopted under the auspices of United Nations Specialised Agencies also indicate the permissibility of measures aimed at redressing imbalances and past discrimination practices. For example, the ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111) allows States parties to adopt ‘special measures of promotion and assistance’ to promote equal opportunities and treatment of particular groups of individuals who are discriminated against in respect of employment and occupation.⁷ The UNESCO Convention against Discrimination in Education does not contain any reference to such measures, but allows under certain circumstances the establishment or maintenance of separate educational systems or

⁵ This provision has to be read in connection with Article 2(2), according to which

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

⁶ On the permissibility of temporary special measures in the context of women with disabilities, see Degener, T. and Quinn, G. (eds.), *Human Rights and Disability. The current use and future potential of United Nations human rights instruments in the context of disability*, United Nations, New York and Geneva, 2002, pp. 109-110.

⁷ Article 5:

1. Special measures of protection or assistance provided in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.
2. Any Member may, after consultation with representative employers’ and workers’ organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

institutions to guarantee the effective realisation of the right to education of particular groups of individuals (e.g. linguistic minorities).⁸

8. Other existing United Nations human rights treaties do not include specific provisions concerning the adoption of measures aimed to accelerate the advancement of particular disadvantaged or marginalised groups of individuals. During the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), the representative of India proposed to include reference to ‘special measures for the advancement of any socially and educationally backward sections of society’ in the non-discrimination provisions of the two Covenants. This proposal was eventually withdrawn, but an interpretative statement was included in records of the Third Committee of the General Assembly.⁹

III. ‘Special’ measures in the jurisprudence of treaty bodies

9. The jurisprudence of the committees of independent experts (known as the ‘treaty bodies’) that monitor the implementation of treaty provisions by States parties

⁸ Article 2:

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Convention:

- (a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;
- (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;
- (c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

⁹ See M. Bossuyt, *The concept and practice of affirmative action*, Final report submitted by Special Rapporteur in accordance with Sub-Commission resolution 1998/5, E/CN.4/Sub.2/2002/21, paras. 40-41 and 47-48.

also provide evidence of the admissibility of these measures under international human rights law. In General Comment No. 28 on the equality of rights between men and women (2000), the Human Rights Committee recognised that the obligation to ensure to all individuals the rights recognised in the ICCPR requires that States parties take ‘all necessary steps’ to enable every person to enjoy those rights. These steps include

not only [the adoption of] measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.¹⁰

Similarly, in General Comment No. 18 on non-discrimination (1989) the Committee noted that the principle of equality sometimes requires States

to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.¹¹

The Committee on the Elimination of Discrimination against Women recommended in General Recommendation No. 18 on disabled women (1991) that States parties provide information in their periodic reports on measures taken to address the particular situation of this particular group of women,

including special measures to ensure that they have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life.¹²

10. In general, treaty bodies tend to refer to the need to adopt ‘special’ measures in the context of equality between men and women.¹³ However, some General

¹⁰ Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 3.

¹¹ Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 10.

The Committee went on by saying that

in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

¹² Committee on the Elimination of Discrimination against Women, *General Recommendation No. 18: Disabled women*, A/46/38, 4 January 1991.

¹³ See Human Rights Committee, *General Comment No. 28, cit.*; Committee on Economic, Social and Cultural Rights, *General Comment No. 16: Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, E/C.12/2005/3, 13 May 2005; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 18, cit.*; Committee on

Comments call for the adoption of such measures in favour of other groups of individuals particularly vulnerable to discrimination. In General Comment No. 5 on persons with disabilities (1994), for example, the Committee on Economic, Social and Cultural Rights stated that the obligation of States parties to the ICESCR to promote progressive realisation of economic, social and cultural rights of persons with disabilities

clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on [them]. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.¹⁴

In similar fashion, the ICESCR Committee stated in General Comment No 6 on the economic, social and cultural rights of older persons (1995) that

in so far as respect for the rights of older persons requires special measures to be taken, States parties are required by the Covenant to do so to the maximum of their available resources.¹⁵

In General Comment No. 23 on the rights of minorities (1994), the Human Rights Committee affirmed that

positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.¹⁶

General Recommendation No. 27 of the Committee on the Elimination of Racial Discrimination on discrimination against Roma (2000) recognises Roma communities as among the most disadvantaged and most subject to discrimination in the contemporary world, and recommends States parties to take special measures in favour of Roma in a number of fields, including education, public and private employment and participation in public life.¹⁷

the Elimination of Discrimination against Women, *General Recommendation 23: Political and public life*, A/52/38, 13 January 1997; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: Temporary special measures*, Thirtieth session, 2004.

¹⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with disabilities*, 9 December 1994, para. 9.

¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment No 6: The economic, social and cultural rights of older persons*, 8 December 1995, para. 10.

¹⁶ Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 6.2.

¹⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 27: Discrimination against Roma*, 16 August 2000, paras. 28-29 and 41.

IV. Characteristics of ‘special’ measures:

(a) Terminology

11. Measures aimed at achieving equalisation of opportunities for disadvantaged or marginalised groups of individuals are not always indicated with the same term in the jurisprudence of treaty bodies. The Human Rights Committee has referred to these measures by using the terms ‘positive measures’ or ‘affirmative action’.¹⁸ In recent years, the ICESCR Committee has used the term ‘temporary special measures’, but in the past it made use of the same expressions used by the Human Rights Committee.¹⁹ The Committee on the Elimination of Discrimination against Women has expressly considered the issue of terminology in General Recommendation No. 25 on temporary special measures (2004). The Committee noted that the *travaux préparatoires* and the Committee itself in its previous recommendations used different terms to describe temporary special measures, and that in different national context this term is often equated

with the terms ‘affirmative action’, ‘positive action’, ‘positive measures’, ‘reverse discrimination’ and ‘positive discrimination’.²⁰

In his final report to the Sub-Commission, the Special Rapporteur on the concept and practice of affirmative action also noted that different terms are used at the national level to refer to such measures, including

‘preferential policies’, ‘reservations’, ‘compensatory or distributive justice’, ‘preferential treatment’, etc.²¹

12. From the work of treaty bodies it appears that terms ‘affirmative action’ and ‘positive action’ are equivalent.²² The CEDAW Committee noted that ‘positive action’ is also used in international human rights law

¹⁸ Human Rights Committee, *General Comment No. 28, cit.*, para. 3; *General Comment No. 23, cit.*, para 6.2; *General Comment No. 18, cit.*, para. 10.

¹⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 16, cit.*, paras. 10, 15 and 35-36; *General Comment No 6, cit.*, para. 10; *General Comment No. 5, cit.*, para. 9.

²⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, cit.*, para. 17.

²¹ M. Bossuyt, *The concept and practice of affirmative action, cit.*, para. 5.

²² According to the CEDAW Committee

to describe ‘positive State action’ (the obligation of a State to initiate action versus a State’s obligation to abstain from action),²³

and is thus better avoided. The terms ‘reverse discrimination’ and ‘positive discrimination’ – sometimes used at the national level – are criticised by a number of commentators as inappropriate.²⁴ During the drafting of the CEDAW, some Governments stressed that the Convention should

in no way require Governments to impose ‘reverse discrimination’, by which they meant ‘discrimination in favour of women’, since – save in certain carefully defined circumstances – this would represent a permanent departure from the objective of equal status and opportunities and would not be in the long-term interest of women themselves.²⁵

(b) The meaning of the adjective ‘special’

13. In General Recommendation No. 25, the Committee on the Elimination of Discrimination against Women analysed the use of the adjective ‘special’ to define measures aimed at establishing *de facto* equality between men and women. The Committee considered that

[t]he term ‘special’, though being in conformity with human rights discourse, needs to be carefully explained,

as it may be interpreted as depicting

women or other disadvantaged groups as weak, vulnerable and in need of extra or ‘special’ measures in order to participate and compete in society.²⁶

[t]he term ‘affirmative action’ is used in the United States of America and in a number of United Nations documents, whereas the term ‘positive action’ is currently widely used in Europe as well as in many United Nations documents.

(Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*, *cit.*, footnote 4).

²³ *Ibid.*

²⁴ On the use of the term ‘positive discrimination’, see M. Bossuyt, *The concept and practice of affirmative action*, *cit.*, para. 5:

While in the minds of some the concept of ‘affirmative action’ is also covered by the term ‘positive discrimination’, it is of the utmost importance to stress that the latter term makes no sense. In accordance with the now general practice of using the term ‘discrimination’ exclusively to designate ‘arbitrary’, ‘unjust’ or ‘illegitimate distinctions’, the term ‘positive discrimination’ is a *contradictio in terminis*: either the distinction in question is justified and legitimate, because not arbitrary, and cannot be called ‘discrimination’, or the distinction in question is unjustified or illegitimate, because arbitrary, and should not be labelled ‘positive’.

²⁵ L. A. Rehof, *Guide to the “Travaux Préparatoires” of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, Martinus Nijhoff, 1993, p. 68.

²⁶ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*,

The Committee pointed out that

the real meaning of ‘special’ in the formulation of Article 4, paragraph 1, is that the measures are designed to serve a specific goal.²⁷

An analysis of Article 4(1) pursuant to the general rule of treaty interpretation codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT)²⁸ confirms the interpretation given by the CEDAW Committee.²⁹

(c) The term ‘measures’

14. With regard to the use of the term ‘measures’, the CEDAW Committee noted in the same General Recommendation that this word

encompasses a wide variety of legislative, executive, administrative or other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment hiring and promotion; numerical goals connected with time frames; and quota systems.³⁰

The choice of a particular ‘measure’

will [thus] depend on the context in which Article 4, paragraph 1, is applied and on the specific goal it aims to achieve.³¹

cit., para. 21.

²⁷ *Ibid.*

²⁸ The Vienna Convention on the Law of Treaties was opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties, and entered into force on 27 January 1980, in accordance with article 84(1). The rules of interpretation of international treaties, set forth in Articles 31-32 of the Convention, are commonly regarded as reflecting customary international law.

²⁹ Article 31(1) of the VCLT states that a treaty has to be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty’. The ordinary meaning is usually ascertained by referring to the dictionary and to the context in which the term is used. According to the law dictionary, the adjective ‘special’ means – inter alia – ‘designed or selected for a particular purpose’ (Merriam-Webster’s Dictionary of Law, Merriam-Webster, 1996, available at www.dictionary.com). The context in which the adjective is used confirms the meaning proposed by the dictionary. These measures are in fact aimed at achieving a specific purpose: ‘accelerating de facto equality between men and women’.

³⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, cit.*, para. 22. For an analysis of the most commonly used types of special measures at the national level, see K. Kitching (Ed.), *International Discrimination Law: A Handbook for Practitioners*, Published by Interights, January 2005, pp. 103 ff., and M. Bossuyt, *The concept and practice of affirmative action, cit.*, pp. 16 ff.

³¹ *Ibid.* For example, in General Recommendation No. 23 on political and public life, the CEDAW Committee identified a wide range of measures that could be implemented by States parties to achieve equal participation of women in political and public life,

Similarly, the Committee on Economic, Social and Cultural Rights pointed out that

[t]he nature, duration and application of such measures should be designed with reference to the specific issue and context, and should be adjusted as circumstances require.³²

(d) Compatibility with the general prohibition of discrimination

15. One of the most problematic aspects of the concept of ‘special’ measures is their relationship with the general prohibition of discrimination. *Prima facie*, these measures seem to run counter to a strictly formal notion of equality, as they tend

to privilege group over individual rights when in many systems individual rights are paramount. The right to equal treatment is an individual right; preferential treatment concerns group rights.³³

The key issue in legal analysis of ‘special’ measures is thus to determine

whether the individual right not to be discriminated against yields to the right of the disadvantaged group to be compensated for past discrimination.³⁴

16. Treaty bodies have on several occasions analysed the relationships between ‘special’ measures and the general prohibition of discrimination enshrined in human rights law. In General Recommendation No. 25 on temporary special measures, the Committee on the Elimination of Discrimination against Women notes that the aim of temporary special measures is to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field. Therefore, the Committee views the application of these measures

not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto and substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms.³⁵

including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies.

(Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23: Political and public life*, A/52/38, 13 January 1997, para. 15).

³² Committee on Economic, Social and Cultural Rights, *General Comment No. 16, cit.*, para. 36.

³³ K. Kitching (Ed.), *International Discrimination Law: A Handbook for Practitioners, cit.*, p. 96.

³⁴ *Ibid.*

³⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*,

Several other General Comments or Recommendations stress that these measures do not constitute a violation of the principle of non-discrimination, but rather a legitimate means to eliminate past discrimination and achieve equalisation of opportunities for a particular group of individuals. In General Comment No. 5 on persons with disabilities (1994), the Committee on Economic, Social and Cultural Rights pointed out that

[b]ecause appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities, such actions should not be considered discriminatory in the sense of article 2(2) of the ICESCR as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective.³⁶

In General Comment No. 23 on the rights of minorities (1994), the Human Rights Committee stated clearly that special measures must comply with the provisions of articles 2(1) and 26 of the ICCPR both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population, and concluded that

as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.³⁷

CEDAW General Recommendation No. 23 on women's participation in civil and political life (1997) notes that while the adoption of special measures to achieve full and equal participation of women in civil and political life may be desirable, States parties have an obligation

cit., para. 18. See also Committee on Economic, Social and Cultural Rights, *General Comment No. 16, cit.*, para. 36:

Such measures are not to be considered discriminatory in themselves as they are grounded in State's obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices...

³⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 5, cit.*, para. 18. See also Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education*, E/C.12/1999/10, 8 December 1999, para. 32:

[t]he adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education...

³⁷ Human Rights Committee, *General Comment No. 23, cit.*, para. 6.2. See also Human Rights Committee, *General Comment No. 18, cit.*, para. 10, where the Committee recognises that these measures may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population, but concludes that

as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens.³⁸

The Human Rights Committee has also recognised the compatibility of special measures with the general prohibition of discrimination in two cases brought before it under the first Optional Protocol. In the case of *Stalla Costa v. Uruguay* (1987), the Human Rights Committee found the preferential treatment granted to certain public officials in getting admitted to the public service to be a permissible affirmative action in favour of a group of public officials dismissed on ideological, political or trade-union grounds during the years of military rule.³⁹ In the recent case *Jacobs v Belgium* (2004), the Committee found the adoption of positive measures aimed at increasing the representation and participation of women in the public service to be an objective and reasonably justifiable measure under Articles 2, 3, 25(c) and 26 of the Covenant.⁴⁰

(e) Temporary character

17. Not all the measures designed to accelerate the achievement of equality of opportunities for a particular disadvantaged group of individuals can be regarded as ‘special’ measures. The difference between these measures and other general social policies aimed at improving the situation of a particular disadvantaged group of individuals consists in their temporary nature. While Article 1(4) of the ICERD does not qualify these measures as ‘temporary’, both the ICERD and the CEDAW expressly provide that such measures shall be discontinued when their objectives have been achieved. In General Recommendation No. 25 (2004), the CEDAW Committee explicitly states that such measures should not

³⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23, cit.*, para. 15.

³⁹ CCPR/C/30/D/198/1985, para. 10:

Taking into account the social and political situation in Uruguay during the years of military rule, in particular the dismissal of many public servants pursuant to Institutional Act No. 7, the Committee understands the enactment of Act No. 15.737 of 22 March 1985 by the new democratic Government of Uruguay as a measure of redress. Indeed, the Committee observes that Uruguayan public officials dismissed on ideological, political or trade-union grounds were victims of violations of article 25 of the Covenant and as such are entitled to have an effective remedy under article 2, paragraph 3 (a), of the Covenant. The Act should be looked upon as such a remedy...

⁴⁰ CCPR/C/81/D/943/2000, paras. 9.3 ff.

be deemed necessary forever, even though the meaning of ‘temporary’ may, in fact, result in the application of such measures for a long period of time.⁴¹

The Committee on Economic, Social and Cultural Rights also pointed out that ‘temporary’ special measures

should be distinguished from *permanent* policies and strategies undertaken towards equality of men and women (Emphasis added).⁴²

The temporary character of these measures is also stressed by the Special Rapporteur on the concept and practice of affirmative action in his final report to the Sub-Commission.⁴³

(f) Discontinuation of ‘special’ measures: prohibition on maintaining unequal or separate standards

18. The temporary character of ‘special’ measures also entails that these measures must be put to an end when they have achieved their goal. The aim of these measures is to bring a disadvantaged or marginalised persons or group of persons to the same substantive level as others. ‘Special’ measures are not meant to confer ‘special rights’ to the members of such groups. Therefore, while the duration of ‘special’ measures cannot be determined exactly at the time the measures are adopted, the *dies ad quem* for their termination is nonetheless easily identified: it coincides with the effective realisation of equalisation of opportunities for the individuals belonging to the target group. Beyond this point, the maintenance of such measures would constitute a violation of the principle of non-discrimination.⁴⁴

⁴¹ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, cit.*, para. 19. The Committee went on by saying that the duration of a temporary special measure

should be determined by its functional result in response to a concrete problem and not by a pre-determined passage of time.

⁴² Committee on Economic, Social and Cultural Rights, *General Comment No. 16, cit.*, para. 35.

⁴³ M. Bossuyt, *The concept and practice of affirmative action*, Final report submitted by Special Rapporteur in accordance with Sub-Commission resolution 1998/5, E/CN.4/Sub.2/2002/21, para. 6:

“Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.”

⁴⁴ On the relationship between ‘special’ measures and the general prohibition of discrimination see also *supra*, paras. 15-16.

19. Both the ICERD and the CEDAW explicitly subject the legitimacy of such measures to their temporary character, providing – with similar formulations – that they (i) shall not entail as a consequence the maintenance of unequal or separate rights or standards and (ii) shall be discontinued when their objectives have been achieved.⁴⁵ These two pre-conditions are intimately linked: the continuation of ‘special’ measures after the achievement of their objectives would necessarily entail as a consequence the maintenance of a ‘special’ status for individuals belonging to a particular group. Treaty bodies have on several occasions insisted on the need to discontinue these measures after the achievement of the objectives for which they had been adopted. In its General Recommendation on temporary special measures, the Committee on the Elimination of Discrimination against Women stated that

must be discontinued when their desired results have been achieved and sustained for a period of time.⁴⁶

Similarly, the Committee on Economic, Social and Cultural Rights pointed out that

[t]he results of such measures should be monitored with a view to being discontinued when the objectives for which they are undertaken have been achieved.⁴⁷

In General Comment No. 13 on education, the Committee used the language similar to that in Article 4(1) of the CEDAW, stating that the adoption of special measures aimed at achieving *de facto* equality in the context of education for disadvantaged groups does not constitute discrimination with regard to the right to education,

so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.⁴⁸

⁴⁵ Article 1(4) of the ICERD acknowledges that these measures shall not be deemed racial discrimination

provided, however, that [they] do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they [are not] continued after the objectives for which they were taken have been achieved.

Article 4(1) of the CEDAW states that in order to be consistent with the principles of equality and non-discrimination these measures

shall in no way entail as a consequence the maintenance of unequal or separate standards, and shall be discontinued when the objectives ‘of equality of opportunity and treatment’ have been achieved.

⁴⁶ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, cit.*, para. 20.

⁴⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 16, cit.*, para. 36.

⁴⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 13, cit.*, para. 32.

Similarly, in General Comment No. 5 the ICESCR Committee recognised that special measures in favour of persons with disabilities should not be considered discriminatory in the sense of Article 2(2) of the ICESCR

as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective.⁴⁹

V. Conclusions

20. An analysis of the existing core human rights treaties and the jurisprudence of the treaty bodies show that the adoption of measures aimed at accelerating the equal effective enjoyment of human rights by a particular disadvantaged or marginalised group of individuals does not pose any problem under international human rights law. Under existing human rights treaties, States parties have an obligation to take ‘all necessary steps’ to enable individuals to enjoy their rights. With regard to marginalised and otherwise disadvantaged groups of individuals, this obligation requires the adoption of ‘special’ measures aimed at ensuring the realisation of both *de jure* and *de facto* equality for the individuals belonging to these groups.

21. These measures are indicated with different terms at the national level. The treaty bodies have used several terms to refer to these measures. Nonetheless, recent jurisprudence of the monitoring committees shows a tendency to make greater use of the expression ‘special measures’, the only one to be explicitly grounded in existing human rights treaties (see Articles 1(4) of the ICERD and 4(1) of the CEDAW). In General Recommendation No. 25, the Committee on the Elimination of Discrimination against Women has made it clear that the adjective ‘special’ is used to stress that these measures are ‘designed to serve a specific goal’: the equalisation of opportunities for members of the target group.

22. ‘Special’ measures do not constitute a violation of the general prohibition of discrimination set out in the existing core human rights treaties. They are grounded in the State’s obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices, and represent a means to accelerate the

⁴⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 5, cit.*, para. 18.

achievement of equality between members of the target group and the rest of society. In order to comply with the overarching principles of equality and non-discrimination 'special' measures must

- aim at correcting conditions which prevent or impair the enjoyment of the rights;
- be based on reasonable and objective criteria; and
- limited in time.

The nature, duration and application of such measures should be designed with reference to the specific issue and context, and should be adjusted as circumstances require.

23. The temporary character of these measures permits to differentiate these measures from other general social policies aimed at improving the situation of a particular disadvantaged group of individuals. As 'special' measures aimed at accelerating the equalisation of opportunities for individuals belonging to a particular target group, they must be discontinued when their objectives have been achieved. Their continuation after the achievement of their objectives would necessarily entail as a consequence the maintenance of a 'special' status for individuals belonging to a particular group, and lead to an impermissible discrimination in favour of members of such a group.