

## **General Recommendation No. 32**

### **The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination**

#### **I. Introduction**

##### ***A) Background***

1. At its 71<sup>st</sup> session, the Committee on the Elimination of Racial Discrimination (the Committee) decided to embark upon the task of drafting a new General Recommendation on special measures, in light of the difficulties observed in the understanding of such notion. At its 72<sup>nd</sup> session, the Committee decided to hold at its next session a thematic discussion on the subject of special measures within the meaning of articles 1(4) and 2(2) of the Convention. The thematic discussion was held on 4 and 5 August 2008 with the participation of States parties to the Convention, representatives of the Committee on the Elimination of Discrimination against Women (CEDAW), the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and non-governmental organizations. Following the discussion, the Committee renewed its determination to work on a general recommendation on special measures, with the objective of providing overall interpretative guidance on the meaning of the above articles in light of the provisions of the Convention as a whole.

##### ***B) Principal Sources***

2. The General Recommendation is based on the Committee's extensive repertoire of practice referring to special measures under the Convention. Committee practice includes the concluding observations on the reports of States parties to the Convention, communications under Article 14, and earlier general recommendations, in particular General Recommendation 8 on Article 1, paragraphs 1 and 4 of the Convention, as well as General Recommendation 27 on Discrimination against Roma, and General Recommendation 29 on Article 1, paragraph 1, of the Convention (Descent), both of which make specific reference to special measures.

3. In drafting the recommendation, the Committee has also taken account of work on special measures completed under the aegis of other UN-related human rights bodies, notably the report by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of

Human Rights,<sup>1</sup> and General Recommendation 25 of the Committee on the Elimination of Discrimination against Women on ‘temporary special measures’.<sup>2</sup>

### ***C) Purpose***

4. The purpose of the General Recommendation is to provide, in light of the Committee’s experience, practical guidance on the meaning of special measures under the Convention in order to assist States parties in the discharge of their obligations under the Convention, including reporting obligations. Such guidance may be regarded as consolidating the wealth of Committee recommendations to States parties regarding special measures.

### ***D) Methodology***

5. The Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner. The context for the present recommendation includes, in addition to the full text of the Convention including its title, preamble and operative articles, the range of universal human rights standards on the principles of non-discrimination and special measures. Context-sensitive interpretation also includes taking into account the particular circumstances of States parties without prejudice to the universal quality of the norms of the Convention. The nature of the Convention and the broad scope of the Convention’s provisions imply that, while the conscientious application of Convention principles will produce variations in outcome among States parties, such variations must be fully justifiable in light of the principles of the Convention.

## **II. Equality and Non-Discrimination as the Basis of Special Measures**

### ***A) Formal and de facto Equality***

6. The International Convention on the Elimination of All Forms of Racial Discrimination is based on the principles of the dignity and equality of all human beings. The principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law, with substantive or *de facto* equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles.

### ***B) Direct and Indirect Discrimination***

7. The principle of enjoyment of human rights on an equal footing is integral to the Convention’s prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The ‘grounds’ of discrimination are extended in practice by the notion of

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<sup>1</sup> ‘The Concept and Practice of Affirmative Action, final report by special rapporteur, Mr. Marc Bossuyt, E/CN.4/Sub.2/2002/21.

<sup>2</sup> Adopted at the thirtieth session of the Committee, A/59/38, Annex I (2004).

‘intersectionality’ whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable ‘distinction, exclusion or restriction’ but also by an unjustifiable ‘preference’, making it especially important that States parties distinguish ‘special measures’ from unjustifiable preferences.

8. On the core notion of discrimination, General Recommendation 30 of the Committee observed that differential treatment will ‘constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’<sup>3</sup> As a logical corollary of this principle, General Recommendation 14 observes that ‘differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate’.<sup>4</sup> The term ‘non-discrimination’ does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.

### ***C) Scope of the Principle of Non-Discrimination***

9. The principle of non-discrimination, according to Article 1.1. of the Convention, protects the enjoyment on an equal footing of human rights and fundamental freedoms ‘in the political, economic, social, cultural or any other field of public life.’ The list of human rights to which the principle applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party. The reference to public life does not limit the scope of the non-discrimination principle to acts of the public administration but should be read in light of provisions in the Convention mandating measures by States parties to address racial discrimination ‘by any persons, group or organization.’<sup>5</sup>

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<sup>3</sup> General Recommendation No. 30, paragraph 4.

<sup>4</sup> A/48/18, chapter VIII B.

<sup>5</sup> Article 2.1. (d); see also Article 2.1. (b).

10. The concepts of equality and non-discrimination in the Convention, and the obligation on States parties to achieve the objectives of the Convention, are further elaborated and developed through the provisions in Articles 1.4 and 2.2 regarding special measures.

### **III. The Concept of Special Measures**

#### ***A) Objective of Special Measures: Advancing Effective Equality***

11. The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. Special measures are one component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination, the successful achievement of which will require the faithful implementation of all Convention provisions.

#### ***B) Autonomous Meaning of Special Measures***

12. The terms ‘special measures’ and ‘special and concrete measures’ employed in the Convention may be regarded as functionally equivalent and have an autonomous meaning to be interpreted in light of the Convention as a whole which may differ from usage in particular States parties. The term ‘special measures’ includes also measures that in some countries may be described as “affirmative measures”, “affirmative action” or “positive action” in cases where they correspond to the provisions of articles 1(4) and 2(2) of the Convention, as explained in the following paragraphs. In line with the Convention, the present recommendation employs the terms ‘special measures’ or ‘special and concrete measures’ and encourages States parties to employ terminology that clearly demonstrates the relationship of their laws and practice to these concepts in the Convention. The term ‘positive discrimination’ is, in the context of international human rights standards, a *contradictio in terminis* and should be avoided.

13. ‘Measures’ includes the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments. States parties should include as required in order to fulfil their obligations under the Convention, provisions on special measures in their legal systems, whether through general legislation or legislation directed to specific sectors in light of the range of human rights referred to in Article 5 of the Convention, as well as through plans, programmes and other policy initiatives referred to above at national, regional and local levels.

### ***C) Special Measures and Other Related Notions***

14. The obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention.

15. Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practise their own religion and use their own language, the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men.<sup>6</sup> Such rights are permanent rights, recognised as such in human rights instruments, including those adopted in the context of the United Nations and its agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.<sup>7</sup>

### ***D) Conditions for the Adoption and Implementation of Special Measures***

16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural<sup>8</sup> status and conditions of the various groups in the population and their participation in the social and economic development of the country<sup>7</sup>.

18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

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<sup>6</sup> See CEDAW General Recommendation 25, paragraph 16.

<sup>7</sup> See for example paragraph 19 of CEDAW General Recommendation 25, and paragraph 12 of the Recommendations of the Forum on Minority Issues on rights to education, A/HRC/10/11/Add.1 (2009).

<sup>8</sup> Article 2.2. includes the term 'cultural' as well as 'social' and 'economic'.

#### IV. Convention Provisions on Special Measures

##### A) Article 1, paragraph 4

19. Article 1, paragraph 4 of the Convention stipulates that “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, 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”.

20. By employing the phrase ‘**shall not be deemed racial discrimination**’, Article 1, paragraph 4 of the Convention makes it clear that special measures taken by States parties under the terms of the Convention do not constitute discrimination, a clarification reinforced by the *travaux préparatoires* of the Convention which record the drafting change from ‘should not be deemed racial discrimination’ to ‘shall not be deemed racial discrimination’. Accordingly, special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.

21. In order to conform to the Convention, special measures do not amount to discrimination when taken for the ‘**sole purpose**’ of ensuring equal enjoyment of human rights and fundamental freedoms. Such a motivation should be made apparent from the nature of the measures themselves, the arguments used by the authorities to justify the measures, and the instruments designed to put the measures into effect. The reference to ‘sole purpose’ limits the scope of acceptable motivations for special measures within the terms of the Convention.

22. The notion of ‘**adequate advancement**’ in Article 1, paragraph 4, implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination. Such disparities include but are not confined to persistent or structural disparities and *de facto* inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. It is not necessary to prove ‘historic’ discrimination in order to validate a programme of special measures; the emphasis should be placed on correcting present disparities and on preventing further imbalances from arising.

23. The term ‘**protection**’ in the paragraph signifies protection from violations of human rights emanating from any source, including discriminatory activities of private persons, in order to ensure the equal enjoyment of human rights and fundamental freedoms. The term ‘protection’ also indicates that special measures may have preventive (of human rights violations) as well as corrective functions.

24. Although the Convention designates ‘**racial or ethnic groups or individuals requiring ... protection**’ (Article 1, paragraph 4), and ‘racial groups or individuals belonging to them’ (Article 2, paragraph 2), as the beneficiaries of special measures, the measures shall in principle be available to any group or person covered by Article 1 of the Convention, as clearly indicated by the *travaux préparatoires* of the Convention, as well as by the practice of States parties and the relevant concluding observations of the Committee.<sup>9</sup>

25. Article 1, paragraph 4 is expressed more broadly than Article 2, paragraph 2 in that it refers to individuals ‘requiring ... protection’ without reference to ethnic group membership. The span of potential beneficiaries or addressees of special measures should however be understood in light of the overall objective of the Convention as dedicated to the elimination of all forms of racial discrimination, with special measures are an essential tool, where appropriate, for the achievement of this objective.

26. Article 1, paragraph 4 provides for limitations on the employment of special measures by States parties. The first limitation is that the measures ‘**should not lead to the maintenance of separate rights for different racial groups**’. This provision is narrowly drawn to refer to ‘racial groups’ and calls to mind the practice of Apartheid referred to in Article 3 of the Convention which was imposed by the authorities of the State, and to practices of segregation referred to in that article and in the preamble to the Convention. The notion of inadmissible ‘separate rights’ must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights.

27. The second limitation on special measures is that ‘**they shall not be continued after the objectives for which they have been taken have been achieved**’. This limitation on the operation of special measures is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved.<sup>10</sup> The length of time permitted for the duration of the

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<sup>9</sup> See also paragraph 7 above.

<sup>10</sup> CESCR General Comment No. 20, paragraph 9.

measures will vary in light of their objectives, the means utilised to achieve them, and the results of their application. Special measures should, therefore, be carefully tailored to meet the particular needs of the groups or individuals concerned.

***B) Article 2, paragraph 2***

28. Article, paragraph 2 of the Convention stipulates that “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”.

29. Article 1, paragraph 4 of the Convention is essentially a clarification of the meaning of discrimination when applied to special measures. Article 2, paragraph 2 carries forward the special measures concept into the realm of obligations of States parties, along with the text of Article 2 as a whole. Nuances of difference in the use of terms in the two paragraphs do not disturb their essential unity of concept and purpose.

30. The use in the paragraph of the verb ‘**shall**’ in relation to taking special measures clearly indicates the mandatory nature of the obligation to take such measures. The mandatory nature of the obligation is not weakened by the addition of the phrase ‘**when the circumstances so warrant**’, a phrase which should be read as providing context for the application of the measures. The phrase has, in principle, an objective meaning in relation to the disparate enjoyment of human rights by persons and groups in the State party and the ensuing need to correct such imbalances.

31. The internal structure of States parties, whether unitary, federal or decentralised, does not affect their responsibility under the Convention, when resorting to special measures, to secure their application throughout the territory of the State. In federal or decentralised States, the federal authorities shall be internationally responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary.

32. Whereas Article 1, paragraph 4 of the Convention uses the term ‘special measures’, Article 2, paragraph 2 refers to ‘**special and concrete measures**’. The *travaux préparatoires* of the Convention do not highlight any distinction between the terms and the Committee has

generally employed both terms as synonymous.<sup>11</sup> Bearing in mind the context of Article 2 as a broad statement of obligations under the Convention, the terminology employed in Article 2, paragraph 2, is appropriate to its context in focusing on the obligation of States parties to adopt measures tailored to fit the situations to be remedied and capable of achieving their objectives.

33. The reference in Article 2, paragraph 2 regarding the objective of special measures to ensure ‘**adequate development and protection**’ of groups and individuals may be compared with the use of the term ‘advancement’ in Article 1, paragraph 4. The terms of the Convention signify that special measures should clearly benefit groups and individuals in their enjoyment of human rights. The naming of fields of action in the paragraph - ‘social, economic, cultural and other fields’ - does not describe a closed list. In principle, special measures can reach into all fields of human rights deprivation, including deprivation of the enjoyment of any human rights expressly or impliedly protected by Article 5 of the Convention. In all cases it is clear that the reference to limitations of ‘development’ relates only to the situation or condition in which groups or individuals find themselves and is not a reflection on any individual or group characteristic.

34. **Beneficiaries of special measures** under Article 2, paragraph 2 may be groups or individuals belonging to such groups. The advancement and protection of communities through special measures is a legitimate objective to be pursued in tandem with respect for the rights and interests of individuals. The identification of an individual as belonging to a group should be based on self-identification by the individual concerned, unless a justification exists to the contrary.

35. Provisions on the **limitations of special measures** in Article 2, paragraph 2, are in essence the same, *mutatis mutandis*, as those expressed in Article 1, paragraph 4. The requirement to limit the period for which the measures are taken implies the need, as in the design and initiation of the measures, for a continuing, system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal. States parties should also carefully determine whether negative human rights consequences would arise for beneficiary communities consequent upon an abrupt withdrawal of special measures, especially if such have been established for a lengthy period of time.

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<sup>11</sup> The UN declaration on the Elimination of All Forms of Racial Discrimination referred, in Article 2.3. to ‘special and concrete measures’. See also paragraph 12 above.

## **V. Recommendations for the preparation of reports by States parties**

36. The present guidance on the content of reports confirms and amplifies the guidance provided to States parties in the Harmonized Guidelines on Reporting to the International Human Rights Treaty Monitoring Bodies,<sup>12</sup> and the Guidelines for the CERD-specific document to be submitted by States parties under Article 9, paragraph 1 of the Convention.<sup>13</sup>

37. Reports of States parties should describe special measures in relation to any articles of the Convention to which the measures are related. The reports of States parties should also provide information, as appropriate, on:

- The terminology applied to special measures as understood in the Convention;
- the justifications for special measures, including relevant statistical and other data on the general situation of beneficiaries, a brief account of how the disparities to be remedied have arisen, and the results to be expected from the application of measures;
- the intended beneficiaries of the measures;
- the range of consultations undertaken towards the adoption of the measures including consultations with intended beneficiaries and with civil society generally;
- the nature of the measures and how they promote the advancement, development and protection of groups and individuals concerned;
- the fields of action or sectors where special measures have been adopted;
- where possible, the envisaged duration of the measures;
- the institutions in the State responsible for implementing the measures;
- the available mechanisms for monitoring and evaluation of the measures;
- participation by targeted groups and individuals in the implementing institutions and in monitoring and evaluation processes;
- the results, provisional or otherwise, of the application of the measures;
- plans for the adoption of new measures and the justifications thereof;
- information on reasons why, in light of situations that appear to justify the adoption of measures, such measures have not been taken.

38. In cases where a reservation affecting Convention provisions on special measures is maintained, States parties are invited to provide information as to why such a reservation is considered necessary, the nature and scope of the reservation, its precise effects in terms of national law and policy, and any plans to limit or withdraw the reservation within a specified time-frame. In cases where States parties have adopted special measures despite the

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<sup>12</sup> HRI/MC/2006/3.

reservation, they are invited to provide information on such measures in line with the recommendations in paragraph 37 above.

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<sup>13</sup> CERD/C/2007/1.