

**IWRAP ASIA PACIFIC OCCASIONAL PAPERS SERIES**

**NO. 8**

**ADDRESSING INTERSECTIONAL DISCRIMINATION  
WITH TEMPORARY SPECIAL MEASURES**

**International Women's Rights Action Watch Asia Pacific**





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## Preface

This paper originated from IWRAP Asia Pacific's desire to, one, support the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee) in its efforts then to formulate a General Recommendation on temporary special measures; and two, in the context of the Programme of Action of the United Nations World Conference Against Racism, to encourage advocates, states and treaty bodies to utilise temporary special measures in favour of women who experience intersectional discrimination and thus face multiple barriers in realising their human rights.

The CEDAW Committee and other treaty bodies play an important role in the development of a progressive interpretation of human rights standards, and over the years, have contributed to furthering our understanding of the application and impact of such standards at the national level. One major way through which this has taken place has been the formulation of General Recommendations, also known as General Comments, that is, authoritative interpretations by treaty bodies which advance analysis of articles and subject areas of their respective treaties, and guide states that are party to these conventions or covenants, on ways to best implement human rights standards at the domestic level.

At the same time as General Recommendations are formulated and applied, however, it is equally important that there is effective monitoring of state obligations, and the recognition of new elements to non-discrimination and equality. Women's human rights standards need to be continuously used and transformed by those of us actively seeking to link the global and the local while engaging in constructive dialogue with our governments. Only then can States parties to international human rights treaties ensure that women are provided with spaces and opportunities to claim and realise the full range of their rights.

With the adoption of General Recommendation No. 25 on temporary special measures (Article 4.1 of the CEDAW Convention) in 2004 (See Annex 1), the CEDAW Committee has provided a framework to further understand the concept of substantive equality; the inter-relationships of all forms of discrimination; and the obligation of States parties to craft policies, programmes and measures to address all forms of discrimination faced by women. Nevertheless, for maximum benefit, it is up to advocates and States parties to ensure that experiences and views on the impact of temporary special measures on the lives of women are "particularised" to each national context.

We hope this paper can be used to initiate further reflections on mechanisms and enabling conditions that need to be in place to ensure equality and human rights of all women and their communities. Furthermore, we encourage the CEDAW Committee to gather lessons learnt through the process of drafting the General Recommendation on Article 4.1, and initiate an on-going discussion with other human rights treaty bodies on the need to address temporary special measures and intersectional discrimination.



## I. Introduction

The Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW Convention) clearly endorses the implementation by States parties of “temporary special measures” for women. These refer to programmes, policies and laws that place them in a situation of comparative advantage to men for a limited period, with the aim of achieving substantive equality between the two sexes in the long term.<sup>1</sup> Specifically, Article 4.1 of the CEDAW Convention reads:

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.

Other provisions of the Convention echo Article 4.1’s call for affirmative measures.<sup>2</sup> In fact, when considered together, Articles 2, 3 and 5 imply an obligation on the part of States parties to employ temporary special measures when necessary, to end discrimination and gender stereotypes, as well as to ensure the development and advancement of women.<sup>3</sup>

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<sup>1</sup> CEDAW (2001), Committee’s Approach to Article 4, Paragraph 1 of the Convention, Report by the Secretariat, CEDAW/C/2001/II/5, para. 46. Apart from “temporary special measures”, such remedial policies have been variously termed “affirmative action”, “positive action”, and “positive measures”.

<sup>2</sup> Article 4.2 also endorses the use of affirmative measures but unlike those under Article 4.1, it prescribes affirmative programmes to protect maternity that are not temporary in nature, and thus is excluded from the focus of this paper.

<sup>3</sup> Article 2 of the CEDAW Convention condemns discrimination against women “in all its forms” and requires that states pursue efforts to end adverse treatment of women; Article 3 directs states to undertake in all areas “all appropriate measures... to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”; while Article 5 requires States parties to adopt “all appropriate measures” to eliminate prejudicial gender stereotypes. This language is reproduced in Articles 6 (violence against women in the form of trafficking and exploitation); 7 (political and public life); 8 (representation in international bodies); 10 (education); 11 (employment); 12 (healthcare); 13 (economic and social life); 14 (rural life); and 16 (marriage and family relations). Given the broad scope of Article 3 (“in all fields”), it is likely that the phrase “all appropriate measures” also applies to Articles 9 (nationality) and 15 (legal rights).

As “measures aimed at accelerating *de facto* equality”, temporary special measures may depart from formal equality in order to achieve substantive equality between men and women.<sup>4</sup> While formal equality promotes equal treatment, substantive equality recognises that the neutral, gender-blind character of formal equality masks structural discrimination and privilege that are embedded or built into institutions as a result of past discrimination.<sup>5</sup> It is this embedded structure of discrimination that temporary special measures aim to redress.

Often misunderstood as promoting preferential treatment, temporary special measures are typically aimed at levelling the playing field since the field is tilted in favour of groups that have historically benefited from preference and privilege. As such, they do not give disadvantaged groups preferences but instead seek to redress the fact that embedded preferences for privileged groups are already built into a variety of institutions. A measure that neutralises institutionalised preferences for privileged groups attempts to create a fair baseline where everyone enjoys substantive equality, rather than merely shifting preferences in favour of underprivileged groups.

To be effective, temporary special measures must particularly target women experiencing intersectional discrimination<sup>6</sup> and as a result, face multiple barriers to the achievement of equality. From this lens, temporary special measures must be accompanied by or operate in the context of enabling mechanisms which support the achievement of substantive equality. These mechanisms include services (e.g. child care); structural policies (e.g. maternity and paternity leave); and effective institutional remedies to overcome and deter discrimination (e.g. injunctive relief or compensation provided by administrative or judicial bodies).<sup>7</sup> Article 3 of the CEDAW Convention places governments under an obligation to provide such enabling conditions.

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<sup>4</sup> See Hanna Beate Schöpp-Schilling, “Background Paper for a General Recommendation on CEDAW Article 4.1”, CEDAW/C/2002/I/WP.1, para 27 [hereinafter Schöpp-Schilling, Background Paper]; and IRAW Asia Pacific, “The Principles of Substantive Equality, Non-Discrimination and State Obligation as Prescribed by the CEDAW Convention”, <<http://www.iwraw-ap.org/convention/principles.htm>>.

<sup>5</sup> IRAW Asia Pacific, *ibid.*

<sup>6</sup> See Part III for an elaboration on the concept of “intersectional discrimination”.

<sup>7</sup> US Supreme Court Justice Ruth Bader Ginsburg and Deborah Jones Merritt include these enabling mechanisms within the mandate of affirmative action: “The Universal Declaration of Human Rights encompasses both civil or political rights and economic and social rights. Affirmative action stands at the intersection of these two complementary categories. Affirmative action aims to redress historic and lingering deprivations of the basic civil right

This paper defines temporary special measures as: (i) positive steps, (ii) directly undertaken or sponsored by the state, (iii) in favour of women or subgroups of women, and (iv) which are aimed at attaining substantive equality.<sup>8</sup> These measures may target the civil, political, economic, cultural or social fields and may extend to the public and private spheres. Following this introduction, the paper shows how temporary special measures are a means to remedying structural discrimination and achieving substantive equality, and how its use can be justified. Next it discusses why these measures should be utilised for women who encounter multiple forms of discrimination; while the final section presents strategies for the implementation of these measures.

## II. TEMPORARY SPECIAL MEASURES

### *Addressing structural discrimination and achieving substantive equality*

#### *Structural discrimination*

Structural discrimination refers to social, economic or cultural background conditions that place a particular group in a position of disadvantage relative to other groups in society.<sup>9</sup> These background conditions are created historically through past discrimination, which in turn, has become entrenched in institutions. They are also informed by the “public-private” dichotomy that has traditionally failed to recognise and remedy human rights violations occurring in the private sphere, including, for example, domestic violence and the undervaluing of

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to equality, the legacy of slavery in the United States, for example, or of the caste system long entrenched in India. It was also conceived as a means to advance the economic and social well-being of women, racial minorities, and others born into groups or communities that disproportionately experience poverty, unemployment, and ill health [...] affirmative action [includes] any program that takes positive steps to enhance opportunities for a disadvantaged group, with a view to bringing them into the mainstream of civic and economic life”. See “Affirmative Action: An International Human Rights Dialogue”, *The Record* 275, 280 (1999).

<sup>8</sup> See IRAW Asia Pacific, “Temporary special measures (Article 4.1) as a means for addressing intersectional discrimination under the CEDAW Convention”, April 2002, Unpublished paper. In addition, by benefiting from the interdependence of rights, temporary special measures that assist women achieve one set of rights may often promote women’s equal access to other rights.

<sup>9</sup> Kimberlé Williams Crenshaw (2000), “Gender-Related Aspects of Race Discrimination”, UN Expert Group Meeting on Gender and Racial Discrimination 6, EGM/GRD/2000/WP.1.

domestic labour.<sup>10</sup> Once entrenched, these past practices of discrimination often become masked as part of the neutral baseline of these institutions. Due to its invisibility, its pervasiveness, and its firm hold on the structures governing economic, social and cultural life, this form of discrimination is particularly difficult to remedy.

Examples of structural discrimination include the gendered division of labour in many societies and within social sub-groups, which may cause “gender-neutral” employment and benefit policies to have a disparate impact on women.<sup>11</sup> For instance, in *Bilka Kaufhaus v. Weber von Hartz*, the Court of Justice of Luxembourg found that a private establishment’s policy of denying pension benefits to part-time workers – the majority of who were women – inevitably had a disproportionate impact on women as a group.<sup>12</sup> Feminist scholars have also shown that women seek part-time employment often because they bear a greater burden of work within the home and family.<sup>13</sup> Another example is the practice of giving promotions to employees with seniority in traditionally male-dominated sectors, a practice that inherently benefits men. Since men have worked longer than women in these sectors, they have greater seniority. As well, providing

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<sup>10</sup> The public-private dichotomy functions as a form of structural discrimination against women because it is a background social structure that masks rights violations within the private sphere. Pursuant to Article 2(e) of CEDAW, States parties condemn discrimination against women in all forms and undertake “[t]o take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”. Further, General Recommendation No.19 supports this undertaking by stating in paragraph 9 that “discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5)” and that “[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent the violations of rights or to investigate and punish acts of violence, and for providing compensation”. *ibid.* note 10.

<sup>11</sup> See Crenshaw, *op. cit.*, p6.

<sup>12</sup> CJ 13 May 1986, Case 170/84, ECR 1986, 1607, cited in Marc Bossuyt, Special Rapporteur (2001), “Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: The concept and practice of affirmative action”, p23, note 20, E/CN.4/Sub.2/2001/15. The court found the policy to be impermissible because “the right to equal pay ‘is infringed by a department store company which excludes part-time workers from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively qualified factors unrelated to any discrimination on grounds of sex’”. *ibid.*

<sup>13</sup> Katharine T. Bartlett (1993), “Feminist Legal Methods” in D. Kelly Weisberg (ed.), *Feminist Legal Theory: Foundations*, p552. According to her, the question that must be posed is “why the conflict between work and family responsibilities in women’s lives is seen as a private matter for women to resolve within the family rather than a public matter involving restructuring of the workplace”.

employment opportunities to those with credentials historically reserved for men (such as educational degrees from previously all-male institutions) will benefit men and largely exclude women. Under these circumstances, temporary special measures are justified to remedy these structural disadvantages historically suffered by women.

Opponents of temporary special measures discount the impact of discriminatory structures, arguing that a focus on these structures alone is an inadequate way to view the problems of disadvantaged groups, without also considering the effects of diverse social conditions. Pointing to the gap between rich and poor in their access to social goods (e.g. education), they argue that, “when a social problem is deep-seeded, neither the non-discrimination principle nor affirmative action will help integrate disadvantaged groups”. They further maintain that remedial socio-economic programmes affecting the general population (e.g. education or poverty alleviation programmes) should be implemented to assist disadvantaged groups to compete and that these programmes in fact constitute a type of special measure.<sup>14</sup>

Rather than undermining the contention that structural discrimination exists, the argument that disparities derive from diverse social conditions merely points out that measures to address structural discrimination must take into account intersectional discrimination. In particular, they *must* consider the multiple barriers women experiencing intersectional discrimination face when trying to access and/or realise their human rights. Furthermore, the argument does not challenge the idea that temporary special measures must address structural discrimination but instead rightly points out that such measures must also include enabling conditions, such as structural policies aimed at redressing broad income disparities among social groups.

In sum, structural discrimination is the most persistent obstacle to the achievement of substantive equality and should therefore be the primary focus of temporary special measures.<sup>15</sup>

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<sup>14</sup> See Bossuyt, *op. cit.*, p6, para. 26, for a discussion on criticisms of temporary special measures.

<sup>15</sup> See Penelope Andrews (1998), “Striking the Rock: Confronting gender equality in South Africa”, in *Michigan Journal of Race and Law*. Vol. 3, 307, 329; and Penelope Andrews (1999), “Affirmative Action in South Africa: Transformation or tokenism”, in Penelope Andrews (ed.), *Law in Context: Gender, Race and Comparative Advantage. A cross-national assessment of programs of compensatory discrimination*, Vol. 15(2) 1998-July 1999, p86.

## ***Substantive equality***

Temporary special measures must be understood in relation to the CEDAW Convention's objective to promote substantive, not merely formal, equality between men and women. Where the existing paradigm of non-discrimination law advances a comprehensive conception of substantive equality, temporary special measures are not necessary because this approach ensures equal results and equal opportunity. However, where formal equality is the favoured approach, the results-orientation of temporary special measures is necessary to address the embedded and structural nature of discrimination which a formal equality approach alone fails to address.

Substantive equality differs from formal equality in three ways:

### ***i) It requires states to ensure equality of results between men and women***

First, a substantive equality approach requires not only equality of opportunity but also equality of results to address the embedded nature of discrimination. States must secure equality of opportunity by removing obstacles to women's opportunity to access these goods through "a framework of laws and policies... supported by institutions and mechanisms for their operation".<sup>16</sup> In its focus on equality of results, substantive equality differs from formal equality by entitling women to outcomes and social goods, such as employment or educational possibilities, on an equal basis with men.<sup>17</sup> Thus, substantive equality addresses the equal enjoyment of rights both qualitatively and quantitatively. Equality of results is defined by measurable progress by states in the amelioration of women's condition in a variety of sites or contexts. In designing these remedial programmes, states must target women experiencing intersectional discrimination whose access to opportunities is especially limited by the multiple barriers they face. A key indicator of progress is improvement in the circumstances of such women. The results-oriented nature of substantive equality is reflected in the CEDAW Convention's Article 2, which requires states "to ensure... the practical realisation" of the equality principle.

### ***ii) It acknowledges that states may need to treat men and women differently for this purpose***

Second, substantive equality also recognises that it may be necessary to treat men and women differently in order to achieve equality of results.<sup>18</sup> Since the baseline

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<sup>16</sup> IWRAP Asia Pacific, *op. cit.*

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

of opportunity itself is not neutral, the gender-neutral approach of formal equality can mask and perpetuate the built-in inequality that is embedded from historical discrimination against women. A substantive equality approach allows for differential treatment to level the playing field for women, particularly where structures of dominance and subordination are embedded in the baseline of opportunity. As discussed previously, in seeking to establish substantive equality, effective temporary special measures should aim at ending structural discrimination.

*iii) It recognises the need for enabling conditions to achieve this*

Third, also as mentioned, the concept of substantive equality incorporates the need for enabling conditions, defined earlier as services, structural policies, and institutional mechanisms to overcome discrimination. When Article 3 and Article 4.1 are considered together, it is clear that the CEDAW Convention promotes the achievement of substantive equality through temporary special measures which are combined with enabling conditions.

### ***Justification for temporary special measures***

Given the CEDAW Convention's aim to end structural discrimination and secure substantive equality, temporary special measures can be justified on the following grounds:<sup>19</sup>

#### ***Compensatory justice***

Compensatory justice seeks “to make up for past harms and disadvantages women suffered as a group or, [can be] based on forward-looking principles, which aim at future equality of opportunity for them as a group”.<sup>20</sup> After all “[a] divided past cannot permit a shared present and a shared future unless the present generation finds ways of pacifying its aggrieved and tormented victims”.<sup>21</sup> Past discrimination against women, particularly those who face multiple barriers, lays the groundwork for their continued exclusion because it is difficult to break historically entrenched patterns of structural discrimination. Temporary special measures are therefore justified to remedy the lingering effects of discrimination.

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<sup>19</sup> With the exception of the discussion on “Access to Rights”, the information presented in this section is derived from Schöpp-Schilling, Background Paper.

<sup>20</sup> Hanna Beate Schöpp-Schilling (2001), “Article 4 of the CEDAW Convention”, Unpublished paper, p6.

<sup>21</sup> B. Parekh (1992), “A case for positive discrimination”, in Bob Hepple and Erika Szyszczak (eds.), *Discrimination: The limits of the law*. London: Mansell, cited in Bossuyut, *op. cit.*, p22, note 19.

Men benefit from built-in preferences, given the privileges they have enjoyed historically, and from stereotypes regarding the relative abilities of men and women,<sup>22</sup> which reinforce patterns of privilege for men and exclusion for women.<sup>23</sup> Even though many *de jure* discriminatory laws have been repealed, women continue to face *de facto* discrimination because past *de jure* discrimination is built into hiring patterns, institutions, systems and structures of society.

For example, Indian programmes of temporary special measures specifically seek to “compensate” *dalits* for a historical pattern of discrimination.<sup>24</sup> Special measures in favour of *dalits* were initiated in 1932 in the form of an increased number of seats in parliament to compensate for their past exclusion, while current special measures include reservations for parliamentary seats, government employment and entry into institutions of higher education. Some of these measures are specifically aimed at *dalit* women and thus, take into consideration the gendered impact of structural discrimination against this community. Likewise, in post-apartheid South Africa, special measures reflect the compensatory justice rationale. In a broad sense, even those temporary special measures based on other rationales reflect the government’s desire to compensate the victims of the apartheid system for “the legacy of cemented racism and sexism, which typified the apartheid social, economic, political and legal edifice.”<sup>25</sup>

### ***Distributive justice***

Distributive justice is a forward-looking justification, oriented towards correcting current “imbalances between women and men with respect to their access

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<sup>22</sup> Women’s marginalisation has been attributed to “traditional, historical, religious and cultural beliefs that have made women’s inequality seem acceptable”. Since such stereotypical beliefs are deeply entrenched and justify the inferior treatment of women in relation to men, women continue to face pervasive discrimination. See Women’s Economic Equality Project, “Draft General Comment on Article 3 of the International Covenant on Economic, Social and Cultural Rights 7”, December 2001.

<sup>23</sup> Prejudicial attitudes towards women are so entrenched in institutional processes and legitimised by culture and tradition, that they remain marginalised members of society. See also Shanthi Dairiam (2001), “Issues to Consider in Implementing Article 4 of the Convention”, Unpublished paper.

<sup>24</sup> See Oliver Mendelsohn (1999), “Compensatory Discrimination and India’s Untouchables”, in Andrews (1999), *op. cit.*

<sup>25</sup> Andrews, *ibid.*, p83. The legal basis for the affirmative policies is two-fold. One is the Bill of Rights of the South African Constitution which specifically provides for the adoption of special measures (see South African Constitution, 1996, Section 9(2)), and the second is the African National Congress’s Reconstruction and Development Programme, a five-year government plan initiated in 1994. See p82, note 6.



to the elements of a ‘humane life’.<sup>26</sup> Despite obligations under the CEDAW Convention (i.e. to end discrimination against women), and the Beijing Platform for Action adopted at the 1995 Fourth UN World Conference on Women (i.e. to develop “national platforms for action”), disparities persist between men and women. For example, UNIFEM’s “Progress of the World’s Women 2000” biennial report reveals that there is much progress to be made before the gender gap in earnings is reduced, and before women in all countries can hold 30 percent or more of decision-making positions in the economic field. The report also shows that women continue to face social obstacles to equality such as violence against women and the unequal sharing of non-paid care work.

Temporary special measures in several parts of the world are informed by the distributive justice rationale as demonstrated in the following case studies.

### *European Union*

Under Article 2.4 of the 1976 Equal Treatment Directive, the European Union endorses the adoption of temporary special measures to promote distributive justice for women.<sup>27</sup> The law forbids discrimination “without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities”.<sup>28</sup> The directive emphasises current disparities between men and women to support temporary special measures. For example, in *Marschall v. Land Nordrhein-Westfalen*, the European Court of Justice upheld a German policy of temporary special measures that granted women comparative advantage in employment in fields traditionally dominated by men.<sup>29</sup> This decision can be distinguished from *Kalanke v. Freieund Hansestadt Bremen*, an earlier case in which the Court struck down a similar policy.<sup>30</sup> While in *Kalanke* the Court viewed the programme as extending beyond the mandate of Article 2.4 by according “absolute and unconditional priority” in employment to equally qualified women, the policy in *Marschall* qualified the

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<sup>26</sup> Schöpp-Schilling, *op. cit.*, p6.

<sup>27</sup> Council Directive 76/207/EEC, 1976 O.J. (L39) 49 as discussed in Kendall Thomas (1999), “The Political Economy of Recognition: Affirmative action discourse and constitutional equality in Germany and the USA”, in *Columbia Journal of European Law*, Vol. 5, p329, 352.

<sup>28</sup> Catherine Barnard (2001), “The Changing Scope of the Fundamental Principle of Equality?” in *McGill Law Journal*, Vol. 47, p955, 960.

<sup>29</sup> Case C-409/95, 1997 ECR I-6363 as discussed in Thomas, *op. cit.*, p358.

<sup>30</sup> Both cases involved “tie-breaker policies”, a modest form of temporary special measures that gives priority, here in employment, to female candidates who are equally qualified to male candidates in line for a particular position. *ibid.*, pp351-58.

“rule of priority” benefiting women to give special consideration to exceptional male candidates.<sup>31</sup> In approving temporary special measures in *Marschall*, the European Court appears to favour using such measures, pursuant to Article 2.4 of the directive, to achieve distributive justice for women.

European states have in fact widely implemented such measures. Thus, in *Marschall*, German authorities were publicly supported by the European Commission and the governments of Spain, Austria, Finland, Sweden and Norway when they defended the employment programme as a measure to redress persistent gender disparities in public employment.<sup>32</sup> Moreover, the Treaty of Amsterdam, adopted after the *Marschall* decision, amended Article 141.4 of the treaty establishing the European Community to authorise member states to undertake temporary special measures in the field of employment.<sup>33</sup> In emphasising the existence of “disadvantages” and that the goal should be “equality in practice”, the provision explicitly relies on the distributive justice and substantive equality approaches in favouring temporary special measures.

## Canada

The Canadian experience with temporary special measures similarly reflects the distributive justice rationale. In 1982, the Canadian Charter of Rights and Freedoms affirmed the constitutionality of “affirmative action programmes” and distinguished such measures from unlawful discrimination.<sup>34</sup> The charter explicitly states that the aim of such programmes is the “amelioration of conditions of disadvantaged individuals or groups”.<sup>35</sup> Consistent with the charter, the federal Employment Equity Act, instituted first in 1986 and as a new bill in 1995, requires federal employers to adopt special measures to further equal representation of women and other

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<sup>31</sup> Specifically, the policy provided as follows: “Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual male candidate tilt the balance in his favour.” Cited in *ibid.*, p358.

<sup>32</sup> *ibid.*, pp358-59.

<sup>33</sup> See Barnard, *op. cit.*, pp963-64.

<sup>34</sup> See Constitution Act, 1982, Section 15(2) at <[http://laws.justice.gc.ca/en/const/annex\\_e.html#VII](http://laws.justice.gc.ca/en/const/annex_e.html#VII)>. Section 15(2) states that the non-discrimination principle of Section 15(1) “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

<sup>35</sup> *ibid.*

disadvantaged groups in the workforce.<sup>36</sup> Canada's endorsement of special measures extends beyond the federal level to local jurisdictions, all of which explicitly permit "affirmative action" programmes in their human rights codes.<sup>37</sup>

### *South Africa*

In South Africa, the jurisprudence of the Constitutional Court and government policies on temporary special measures draw on the distributive justice rationale, as well as the other rationales discussed in this section. For instance, requiring that "a candidate's race, gender or disability... be taken into account in considering the suitability of that candidate for appointment or promotion", a 1994 amendment to the Public Service Act mandates special measures in the area of government employment to correct hiring imbalances, mainly between whites and blacks, and between men and women.<sup>38</sup> Likewise, the Employment Equity Act was adopted in 1998 to redress persistent racial disparities in private and public employment, with the aim of "redistributing" jobs in an equitable manner.<sup>39</sup> The Act requires both private and public sector employers to adopt special measures in favour of "black people (African people, people classified as "Coloureds" and Indian South Africans), women and people with disabilities".<sup>40</sup> In *President of the Republic of South Africa and the Minister for Correctional Services v. Hugo*, the South African Constitutional Court distinguished temporary special measures from "unfair discrimination".<sup>41</sup> It asserted that "identical treatment in all circumstances"

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<sup>36</sup> Lubomyr Chabursky (1992), "The Employment Equity Act: An examination of its development and direction", *Ottawa Law Review*, Vol. 24, p305, 329. As Section 2 of the law states: "The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences".

<sup>37</sup> *ibid.*, p325-26.

<sup>38</sup> Andrews (1999), *op. cit.*, p88.

<sup>39</sup> *ibid.*, p89.

<sup>40</sup> *ibid.*, p90.

<sup>41</sup> *President of the Republic of South Africa and the Minister for Correctional Services v. Hugo*, CCT 11/96. The Court upheld the constitutionality of a Presidential Act allowing for the special release of prisoners who were mothers of children under the age of twelve, on the grounds that in present-day South Africa mothers as opposed to fathers bear the greater burden in the upbringing of their children. Discussed in Andrews (1999), *op. cit.*, p97. See also Penelope Andrews (2001), "From Gender Apartheid to Non-Sexism: The pursuit of women's rights in South Africa", Vol. 26, *North Carolina Journal of International Law and Commercial Regulation*. pp693, 705-6.

would not lead to the broader goal of “a society which affords each human being equal treatment on the basis of equal worth”.<sup>42</sup>

### ***Social utility***

The social utility justification for temporary special measures emphasises their positive effects in terms of (i) mobilising the economic and social potential of women for the common good of society, and (ii) encouraging and facilitating the full social integration of women, thus benefiting the entire community through social transformation and the promotion of diversity.<sup>43</sup> An example of the first case is temporary special measures that are aimed at narrowing the wage gap between men and women. Besides benefiting women, such programmes often benefit children by supporting them with maternal income and therefore add utility to society as a whole.

Examples in the United States (US) and South African contexts demonstrate the achievement of social transformation and diversity through temporary special measures. Commentators have noted that male students benefit from the participation of female students in the classroom particularly where female students contribute different perspectives or experiences. A case in point is the Bakke decision by the US Supreme Court, finding that different students bring “diverse” backgrounds to the campus and thus enrich the educational experience for all.<sup>44</sup>

The case of South Africa provides another example of the social utility rationale and, in particular, illustrates that temporary special measures most effectively promote the twin goals of social transformation and diversity when they target women facing multiple barriers. The special measures outlined in the South African Constitution and in the African National Congress’ Reconstruction and Development Programme seek social transformation and the promotion of diversity in a national economy “that once barred 75 percent of the population from any meaningful role”.<sup>45</sup> The programme “incorporates affirmative action not as a fleeting phenomenon, but as a process that is integrally tied to the business culture, academic endeavours and the public service”.<sup>46</sup> These policies are directed at the greater inclusion of black South Africans to transform the country’s social and economic life.

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<sup>42</sup> Andrews (1999), *op. cit.*, p97.

<sup>43</sup> Schöpp-Schilling, *op. cit.*

<sup>44</sup> *Regents of the University v. Bakke* (1978), 483 US 265.

<sup>45</sup> Andrews (1999), *op. cit.*, p82.

<sup>46</sup> *ibid.*

Under the South African government's policy of temporary special measures, African, Indian and Coloured women present a special case, providing the most powerful demonstration of the potential for temporary special measures to achieve social transformation and promote diversity. Since "black women, and particularly African women, were the most disadvantaged members of the South African polity",<sup>47</sup> they presently confront structural discrimination that has both gender and racial dimensions.<sup>48</sup> Because the subordination of women, particularly black women, is deep-rooted and endemic, temporary special measures targeted at this group has the greatest transformative potential for the broader society. Such measures also promise to promote diversity by bringing black women into educational and other institutions.

As these examples illustrate, temporary special measures promote social utility by mobilising women's potential and enabling social integration that promotes transformation and diversity. Although temporary special measures directly benefit disadvantaged women by according them *de facto* equality and eradicating past and current discrimination, society as a whole benefits from and will be transformed by the full and equal participation of women, particularly those facing multiple barriers. Some non-beneficiaries, such as children, immediately gain from such policies, and others benefit from such programmes in the medium and long terms, when the positive effects of temporary special measures are felt throughout society.

### ***Access to rights***

A further justification for temporary special measures is how such measures allow women to fully claim and realise their human rights. Because human rights are interdependent, the adoption of temporary special measures that assist women achieve one set of rights will likely help them achieve other rights. For example, given the interlocking nature of civil and political rights, on the one hand, and economic, social and cultural rights, on the other, gender equality measures in the employment context may promote women's enjoyment of economic rights, such as the right to work or the right to enjoy an adequate standard of living. Alternatively, temporary special measures in the form of gender-sensitive policies of poverty alleviation, education and skill-building facilitate women's access to civil and political rights, such as reproductive rights and access to legal redress.<sup>49</sup>

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<sup>47</sup> *ibid.*, p104, note 9.

<sup>48</sup> Andrews (2001), *op. cit.*, pp694-96.

<sup>49</sup> Emphasising the connection between the enjoyment of reproductive rights and economic empowerment, UNIFEM's "Progress of the World's Women 2000" report (p18) states: "There is mounting evidence that women's ability to fully enjoy human rights – indeed, even

Temporary special measures initiate this process and thus can result in women's full and equal access to rights.

### ***Countering arguments against temporary special measures***

Despite the CEDAW Convention's clear commitment to the principle of substantive equality,<sup>50</sup> many critics continue to approach the issue of discrimination from a formal equality perspective. They assume that the non-discrimination principle requires facial neutrality and that temporary special measures which deviate from formal equality constitute discrimination. This view ignores Article 4.1's explicit statement that temporary special measures "aimed at accelerating *de facto* equality between men and women shall not be considered discrimination...". Although the CEDAW Convention clearly establishes that programmes must be judged based on whether they achieve or are aimed at advancing *de facto* equality, this section addresses the "formal equality" critique, given its persistence.

#### ***Critique 1: Temporary special measures provide "preferences" or result in "reverse discrimination"***

Temporary special measures have been misunderstood as offering "preferential treatment" to women and as resulting in "reverse discrimination". This misconception is based on the myth that the baseline of opportunity is neutral and that temporary special measures provide a preference or privilege which deviates from this foundation of equality. In fact, the baseline is not neutral but rather, contains built-in privileges for men due to past and continuing discrimination.

In a context where women face social and institutional discrimination, and such inequalities stand as obstacles in their way to development and dignity,

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to demand such rights – is integrally linked to their economic empowerment. A study of the circumstances in which women in poor communities feel entitled to make decisions about marriage and childbearing, contraception and sexuality was carried out by the International Reproductive Rights Research Action Group in seven countries: Brazil, Egypt, Malaysia, Mexico, Nigeria, the Philippines and the United States. Among its conclusions is that the ability to take such decisions requires a sense of personal autonomy, which develops in tandem with the knowledge that women can provide for themselves and their children. Their sense of personhood... fundamentally depends on having incomes of their own".

<sup>50</sup> See CEDAW Article 1 which defines discrimination as any "distinction, exclusion or restriction... which has *the effect* or purpose of impairing or nullifying the recognition, enjoyment or exercise by women... of human rights and fundamental freedoms..." (emphasis added in italics). See also Schöpp-Schilling, Background Paper, para. 27.

temporary special measures do not give women “preferences”, but merely ensure “the right to treatment as an equal for the members of marginalised groups”.<sup>51</sup> Non-beneficiaries cannot argue that temporary special measures discriminate against or are detrimental to them, because “the only costs to non-beneficiaries that result from affirmative policies are the loss of these privileges, privileges that are the result of a lack of fairness and opportunity for others”.<sup>52</sup>

### *Critique 2: Temporary special measures undermine meritocracy or result in mediocrity*

Maintaining that such measures depart from “meritocratic” modes of selection, opponents of temporary special measures also argue that they are harmful to society. However, temporary special measures broaden the concept of merit, rather than reject it. Conventional methods used to evaluate “merit” often fail accurately to gauge the applicant’s “merit”. First, they do not account for the fact that members of disadvantaged groups are often not provided with the skills to succeed in conventional evaluative techniques, such as standardised tests. Second, they tend to stress certain skills and de-emphasise others, despite the fact that the skills emphasised may not correlate with the actual requirements and needs of a job or position. Thus, while an applicant from a disadvantaged group may be more talented than a member of an advantaged group according to the actual requirements or needs of a particular position, she may score lower on a standardised test. Moreover, several studies have shown that standardised tests, a common device for assessing “merit”, do not necessarily predict performance.<sup>53</sup> In addition, the elements that are recognised as “merit” may stem from a dominant set of experiences and privileges that are embedded in structural discrimination.

Ideally, temporary special measures that shift reliance away from traditional indicators of merit should be structured to broaden our understanding of how to evaluate merit, while also rectifying continued exclusion and marginalisation of women and creating a level playing field for both men and women.<sup>54</sup> Frequently, such measures are necessary to recognise meritorious members of disadvantaged groups and to give them the opportunity to obtain competitive jobs or positions. Marginalised women cannot be assumed to be “less qualified” than their male

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<sup>51</sup> Luke Charles Harris and Uma Narayan (1997), “Affirmative Action as Equalising Opportunity: Challenging the myth of ‘preferential treatment’” in Hugh LaFollette (ed.), *Ethics in Practice: An anthology*, Blackwell Publishing.

<sup>52</sup> *ibid.*

<sup>53</sup> See note 56 for details.

<sup>54</sup> Susan Sturm and Lani Guinier (2001), *Who’s Qualified: A new democracy forum on the future of affirmative action*, Beacon Press.

counterparts simply because their capabilities were “not accurately gauged or fairly evaluated by prevailing selection criteria and procedures”.<sup>55</sup> In fact, it is through policies of temporary special measures granting more effective equality of opportunity that such marginalised women are put on an equal footing with men.

Some of the methods of evaluating merit can be challenged by examining the following two case studies:

- *Male-centred standardised tests*  
Standardised evaluation through written tests is a common method used to assess merit. However, there is a body of emerging literature that questions the value of such tests in accurately measuring merit or predicting positive performance.<sup>56</sup> Further, the facial neutrality of these conventional methods is deceiving because in practice they can be exclusionary due to cultural biases, particularly for disadvantaged groups lacking the same degree of formal education, access to test preparation programmes, and other opportunities.
- *Male-centred physical endurance indicators*  
Physical endurance tests, such as those based on height, weight and strength requirements, are also facially gender-neutral, but in practice can have a disparate impact on women because these requirements do not, for example, fit the physical characteristics of women. In some countries, such tests are often required for entry into police, military and fire-fighter positions. Although some may argue that such physical characteristics are necessary for these

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<sup>55</sup> Harris and Narayan, *op. cit.*

<sup>56</sup> According to Susan Sturm and Lani Guinier, the Law School Admission Test (LSAT), a standardised test used for law school admittance in the US, neither predicts performance in first year law school nor performance as an attorney after graduation. A study of graduates of Michigan Law School found that the admission indices – including the LSAT – fail to correlate with other accomplishments after law school, including income levels and career satisfaction. *op. cit.* p9. Similarly, although standardised test scores are used as an absolute measure by the public and institutions in decision making, there is evidence that they do not predict success equally well for men and women. Rosser’s study in 1987, of three college admission tests, reveals that although women consistently earn better high school and college grades, they receive lower scores on all three tests. This shows that “standardised test scores adversely affect women’s chances for admission to colleges and universities”. Already, qualifications of women tend to be under-valued and under-appraised. These disadvantages are further exacerbated by the use of standardised tests which do not accurately reflect their abilities “as important criteria of admission”. See Harris and Narayan, *ibid.*



jobs, and despite the fact that they inevitably favour males, the tests fail to account for other skills required in such occupations which women might possess to a greater degree than the physical indicators, such as dispute resolution, persuasion, counselling and community involvement. The latter skills, when taken into account in hiring police officers, for instance, can help reduce cases of police brutality and increase police responsiveness to domestic violence reports.<sup>57</sup>

### ***International human rights mechanisms supporting temporary special measures***

As mentioned in the Introduction of this paper, the obligation to apply Article 4.1 of the CEDAW Convention is implied in the sweeping language of Articles 2, 3 and 5. It can also be deduced from other articles addressing specific thematic areas. Under these, temporary special measures are implicit in the “all appropriate measures” called for in Article 3 to ensure *de facto* equality for women in the relevant fields.<sup>58</sup>

In addition, CEDAW General Recommendation No. 23 specifically notes that the Convention “encourages the use of temporary special measures in order to give full effect to Articles 7 and 8”, which require that states undertake “all appropriate measures” to end discrimination against women in political and public life and to ensure their equal participation as representatives of their governments in international bodies. To reach not only *de jure* but also *de facto* equality under Articles 7 and 8, temporary special measures under Article 4 can be used to remove formal barriers to the participation of women in the public sphere such that they reach equality in political life.

Examples of temporary special measures which can be implemented to achieve equality of participation of women include “recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas

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<sup>57</sup> The Report of the Independent Commission on the Los Angeles Police Department (pp83-84) notes that, “‘Female LAPD officers are involved in excessive use of force at rates substantially below those of male officers... The statistics indicate that female officers are not reluctant to use force, but they are not nearly as likely to be involved in use of excessive force,’ due to female officer’s perceived ability to be ‘more communicative, more skilful at de-escalating potentially violent situations and less confrontational’” cited in Sturm and Guinier, *ibid.*, p12.

<sup>58</sup> See also CEDAW, General Recommendation No. 25 (2004), Temporary Special Measures.

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”.<sup>59</sup> In the face of entrenched male domination in the public sphere, women require encouragement and support of States parties and all sectors of society to achieve full and effective participation. Further, States parties “have an obligation 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”.<sup>60</sup>

Apart from the CEDAW Convention, support for temporary special measures can be drawn from various other international treaty bodies and instruments, some of which specifically authorise temporary special measures and others which embrace the goal of substantive equality inherent in temporary special measures.

### *Universal Declaration of Human Rights (UDHR)*

Articles 1, 2, 7, 23, 25, 26 and 29 of the UDHR, the founding instrument of human rights law, support a notion of substantive equality that is consistent with temporary special measures. In stating that “motherhood and childhood are entitled to special care and assistance”,<sup>61</sup> for instance, the declaration moves beyond the formal equality paradigm to a broader substantive vision of equality.

### *International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)*

Article 3 of both the ICCPR and ICESCR require States parties to implement the principles of equality, each stating, “The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all... rights set forth in the present Covenant”.

As General Comment No. 4 of the Human Rights Committee – the expert body monitoring the implementation of the ICCPR – makes clear, Article 3 reflects a rejection of a strict formal equality approach.<sup>62</sup> Further, in its General Comment

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<sup>59</sup> CEDAW, General Recommendation No. 23 (1997), Women in Political and Public Life, para. 15.

<sup>60</sup> *ibid.*

<sup>61</sup> UDHR Article 25.

<sup>62</sup> See HRI/GEN/1/Rev.4 (2000) cited in Marc Bossuyt, Special Rapporteur, “Comprehensive Examination of Thematic Issues Relating to Racial Discrimination: The concept and practice of affirmative action”, para 33, E/CN.4/Sub.2/2000/11 (2000). As the Committee states, “[A]rticle 3, as articles 2(1) and 26 in so far as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one,

No. 18, the Human Rights Committee affirms that states may be, and in some cases are, under an obligation to adopt temporary special measures in accordance with the provisions of the ICCPR.<sup>63</sup> The Committee also notes that such measures are specifically those necessary “to correct discrimination in fact”.<sup>64</sup>

Similarly, General Comment No. 1 of the Committee on Economic, Social and Cultural Rights (CESCR) – the body of experts monitoring the implementation of the ICESCR – observes that an initial step towards the realisation of the Covenant’s provisions is the identification of disadvantaged sectors of the population, and then making these the focus of positive state action aimed at securing the full realisation of their rights.<sup>65</sup> More importantly, in General Comment No. 16, the CESCR stresses the importance of the principle of substantive equality and says that “[t]emporary special measures may sometimes be needed in order to bring disadvantaged or marginalised persons or groups of persons to the same substantive level as others”.<sup>66</sup>

### *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

The ICERD<sup>67</sup> closely resembles the CEDAW Convention in its provision for special measures. Its Article 1.4 provides that “[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups... shall not be deemed racial discrimination”. That it places particular importance on special measures is also clear in how the relevant provisions precede the direct prohibition of race discrimination in this treaty. Also, ICERD Article 2.2 directs States parties to take

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requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws. Hence, more information has generally been required regarding the role of women *in practice* with a view to ascertaining whether measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations under article 3” (emphasis added in italics).

<sup>63</sup> With respect to the requirement under the Covenant to institute temporary special measures in some cases, the Committee states: “[T]he principle of equality sometimes *requires* States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, 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” (emphasis added in italics).

<sup>64</sup> *ibid.*

<sup>65</sup> UN Doc HRI/GEN/Rev.4 (2000), para. 3.

<sup>66</sup> UN Doc E/C.12/2005/3 (2005), para. 15.

<sup>67</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, UN GAOR, 20th Session, Supp. No. 14, at 47, UN Doc. A/6014 (1965).

“special 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”. Thus, the Convention forwards the case for positive measures to eliminate racial discrimination, “when the circumstances so warrant”. Like Article 4.1 of CEDAW, the special measures under ICERD are meant to be temporary.

General Recommendation No. 14 of the Committee on the Elimination of Racial Discrimination (CERD) reaffirms ICERD’s endorsement of temporary special measures to redress racial discrimination and stipulates that the terms of Article 1.4 will guide the Committee as it monitors States parties’ compliance with the Convention.<sup>68</sup> Thus, “a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of Article 1, paragraph 4, of the Convention”.<sup>69</sup>

### III. TEMPORARY SPECIAL MEASURES AND INTERSECTIONAL DISCRIMINATION

Feminist scholars have demonstrated that women experience multiple barriers when gender discrimination intersects with other forms of discrimination (e.g. discrimination based on race, ethnicity, sexuality, etc.), and/or other barriers (e.g. poverty, rural residence, etc.).<sup>70</sup> When gender discrimination intersects with other forms of discrimination, feminist scholars refer to this as “intersectional” discrimination.<sup>71</sup> Rejecting the idea that a combination of forms of discrimination merely has an additive effect, these scholars point out that intersectional discrimination multiplies and amplifies the obstacles women face, thus leaving them in a situation of further

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<sup>68</sup> UN Doc A/48/18 (1993), para. 2.

<sup>69</sup> *ibid.*

<sup>70</sup> Crenshaw, *op. cit.*, p7. The term “axis” is used to describe identities such as gender, race, ethnicity, caste, poverty, etc.

<sup>71</sup> The terms “multiple” discrimination and “compound” discrimination are also used. See also Lisa A. Crooms (1997), “Indivisible Rights and Intersectional Identities or ‘What Do Women’s Human Rights Have to Do with the Race Convention?’” in *Howard Law Journal*, Vol. 40, p619; Lisa A. Crooms (2001), “Intersectionality, Human Rights, and De-Marginalising Black Women”, in Celina Romany (ed.), *Race, Ethnicity, Gender and Human Rights in the Americas: A new paradigm for activism*, The Race, Ethnicity and Gender Justice Project in the Americas, Washington College of Law, p77; Celina Romany (2000),

disadvantage. The intersection of gender discrimination with other barriers (e.g. poverty, rural residence, etc.) similarly has a multiplicative effect.<sup>72</sup> It produces something unique and distinct from any one form of discrimination standing alone.<sup>73</sup>

Enjoyment of substantive equality should be guaranteed to all women. If temporary special measures are to achieve equality in such a comprehensive manner, they must be designed especially to target the many women who experience intersectional discrimination and thus, face multiple barriers to the achievement of the full and equal enjoyment of their human rights.

Case studies demonstrate that temporary special measures often neglect the ways in which gender discrimination intersects with other forms of discrimination. For this reason, it is rare to find temporary special measures that address the multiple barriers faced by women who are marginalised on various grounds, including their economic status (poverty). Such measures have a limited impact on women, particularly women most in need of them. Programmes geared toward advancing women's rights can thus be criticised when they fail to improve the circumstances of all women, including those who face multiple disadvantages or vulnerabilities. Similarly, programmes designed to benefit both male and female members of certain disadvantaged groups (e.g. minority groups) fall short in their goal when they do not improve the situation of the women concerned.

For instance, in Colombia, a law on the rights of Afro-descendant communities aimed at improving this minority group's access to political participation and land titles has been criticised because "the situation of Afro-descendant women was not addressed and thus, only men are currently benefiting from temporary special measures aimed at Afro-Colombians".<sup>74</sup>

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"Themes for a Conversation on Race and Gender in International Human Rights Law", in Adrien Katherine Wing (ed.), *Global Critical Race Feminism: An international reader*, New York: New York University Press, p58; and Celina Romany, "Introduction" in *Race, Ethnicity, Gender and Human Rights in the Americas: A new paradigm for activism*, The Race, Ethnicity and Gender Justice Project in the Americas, Washington College of Law, p13.

<sup>72</sup> Recognising the interdependence of civil, political, economic, social and cultural rights, the human rights framework acknowledges the interlocking nature of gender inequality with other forms of dominance and subordination. See Crooms (1997), *op. cit.*, p631.

<sup>73</sup> See Ontario Human Rights Commission (2002), "Discussion Paper on An Intersectional Approach to Discrimination: Addressing multiple grounds in human rights claims", <[http://www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper\\_1.shtml](http://www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper_1.shtml)>.

<sup>74</sup> See also "The Intersection of Race, Ethnicity and Gender in the Context of Temporary Special Measures", Working Paper submitted by the Human Rights Institute, International Women's Rights Action Watch Asia Pacific and the Race, Ethnicity and Gender Project in the Americas, (2001), pp12-13 [hereinafter HRI-IWRAW Asia Pacific, Temporary Special Measures Paper].

Conversely, gender-based temporary special measures must also take into account other forms of discrimination and other obstacles to address the situation of subgroups of women who face multiple barriers. Recognising numerical advances with respect to women's education in Latin America, the Commission on the Status of Women nonetheless noted their uneven distribution among the female population:

Poor and rural women are more likely to be illiterate, to have no access to training programmes and higher education. Since the public educational system is fragmented, the poor attend low-quality schools, and vulnerable groups are most affected. Great disparities continue to persist... between urban and rural zones, among different ages and social classes.<sup>75</sup>

Similarly, in Mali the school enrolment of girls measured at 59 percent in urban areas, but only at 13 percent in rural areas.<sup>76</sup>

Experts on gender discrimination have cited other notable failures. At a 1997 conference, Celina Romany observed that affirmative action plans in the US have assisted white women and minority men, while ignoring minority women.<sup>77</sup> Likewise, Shelagh Day and Salma Khan distinguished between temporary special measures concerning employment in Southern and Northern countries; the latter have focused on the formal labour market, addressing "one workplace at a time".<sup>78</sup> Consequently, these remedial measures have neglected the plight of marginalised women who are reduced to "non-standard jobs, part-time work or home work".<sup>79</sup>

These examples show that the success of temporary special measures seeking to improve the situation of *all* women rests upon the ways the multiple barriers women who experience intersectional discrimination are recognised and accounted for.

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<sup>75</sup> Commission on the Status of Women (CSW) (1995), "Monitoring the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women", Report of the Secretary-General, E/CN.6/1995/3/Add.2, para. 15.

<sup>76</sup> *ibid.*, para. 20.

<sup>77</sup> IWRAP (University of Minnesota) (1997), "Achieving the Rights Result: Affirmative action and article 4 of the Women's Convention" and IWRAP (University of Minnesota) Consultation Reports (1997).

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

## ***Intersectional discrimination through the lens of treaty bodies and other human rights sources***

This section explores human rights treaties and other international sources, which support the need for temporary special measures to address the multiple barriers particular disadvantaged groups of women face. It also considers the jurisprudence of international bodies as well as national experiences.

### ***The CEDAW Convention and the CEDAW Committee***

The CEDAW Convention recognises the connection between gender-based discrimination and other barriers. Its Preamble states,

“[T]he eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of states is essential to the full enjoyment of the rights of men and women.”

Specific provisions of the CEDAW Convention also reflect the need for temporary special measures to address the effects of intersectional discrimination and recognise the multiple barriers to equality that marginalised groups of women face. For example, in requiring States parties to take, “all appropriate measures to eliminate discrimination against women in... [the] areas of economic and social life”, Article 13 provides that women have a “right to bank loans, mortgages and other forms of financial credit”. Indeed, several micro-credit loan initiatives targeting women around the world demonstrate that because poor and rural women – whose poverty and rural residence constitute barriers to their advancement – often lack credit histories and other prerequisites to getting bank loans, gender-specific measures are needed to assist them. Similarly, Article 14 of the Convention requires States parties to implement measures to improve the general situation of rural women, in sites such as housing and health care.

In its comments on States parties' compliance with the Convention, the CEDAW Committee has highlighted instances of multiple barriers faced by marginalised groups of women.<sup>80</sup> Reporting to the UN General Assembly in 1997, the Committee expressed concern about the ways gender inequality intersects with rural, migrant, immigrant and ethnic status in the following contexts:

- Elevated illiteracy rates among girls and rural women in Morocco and Turkey;

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<sup>80</sup> Report of the Committee on the Elimination of Discrimination against Women, UN GAOR, 52nd Session Supp. No. 38, UN Doc. A/52/38/Rev.1 (1997).

- High unemployment among female migrants in cities in Turkey;
- The impact of economic reforms on women in free-trade zones and rural areas in the Philippines;
- Lack of access to state social and legal programmes for refugee and immigrant women in Denmark.

In its twenty-fifth session in June 2001, the CEDAW Committee had before it a report by its secretariat providing an analysis of the Committee's approach to Article 4.1 of the Convention. By drawing on several of the Committee's Concluding Comments, the report reviewed its understanding of the relation between temporary special measures and addressing multiple barriers marginalised groups of women face. It cited the CEDAW Committee specifically discussing Turkey's failure to institute temporary special measures for Kurdish women, victims of "double discrimination" because they confront both gender and ethnic barriers.<sup>81</sup> It also cited the Committee's recommendation that the Indian Government adopt temporary special measures with respect to education, employment and health to ameliorate the position of *dalit* women and girls, who face both caste and gender barriers, and noted that the Committee had requested India to develop a schedule for the implementation of these measures, and track their progress in its next periodic report.

### ***ICERD and CERD***

While the ICERD does not explicitly acknowledge the intersection of racial and gender discrimination, in March 2000, its expert body, CERD, issued General Recommendation No. 25 on Gender-Related Dimensions of Racial Discrimination, demonstrating that the ICERD is intended to reach forms of racial discrimination that have a differential impact on men and women. In this General Recommendation, CERD resolved to incorporate gender considerations into its study of racially discriminatory practices and suggested that it would cooperate with States parties to establish a more effective system to monitor racial discrimination against women. It also calls on States parties to provide information on gendered experiences of racial discrimination in future periodic reports.

CERD has referred to three categories of adverse treatment suffered by women who face multiple barriers.<sup>82</sup> The first category involves racial discrimination that deliberately targets women because of their gender, such as:

- Sexual violence against female members of racial or ethnic groups, both in the context of incarceration and armed conflict;

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<sup>81</sup> CEDAW (2001), *op. cit.*, para. 43.

<sup>82</sup> CERD, General Recommendation No. 25 (2000), Gender-related dimensions of racial discrimination.



- Forced sterilisation of indigenous women;
- Abusive treatment of female workers in the informal sector or domestic workers abroad.

The second involves racism with consequences impacting mainly or only women, such as pregnancy resulting from racially-motivated rape and the shunning of rape victims in some societies. The third category involves gender discrimination that thwarts women's ability to combat racial discrimination by limiting their access to remedies and complaints procedures. Examples of this type of discrimination are gender bias in the legal system and discrimination against women in the private arena.

Additionally, CERD's review of States parties' compliance with the ICERD has produced notable findings that illustrate the multiple barriers minority and immigrant women face:

- Lower salaries and higher rates of sterilisation among Afro-Brazilian women relative to white women;<sup>83</sup>
- Low number of immigrant women employed or, if employed, pursuing professional careers in Australia;<sup>84</sup>
- Vulnerability of female foreign domestic workers to violence, persecution and denial of religious freedom in Kuwait.<sup>85</sup>

### ***United Nations (UN) World Conferences***

#### *i) UN World Conference on Women, Beijing*

The Beijing Declaration adopted at the 1995 Fourth UN World Conference on Women recognises "multiple barriers" women and girls face "because of factors such as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people".<sup>86</sup> The Conference's outcome document, the Platform for Action, a wide-ranging programme for the improvement of women's global condition, similarly notes the pernicious effect of multiple barriers.<sup>87</sup>

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<sup>83</sup> CERD, Summary Record of the 1158th Meeting: Brazil, 49th Session, CERD/C/SR.1158 (1996), para. 48 cited in Helen Christakos (1997), "A Case Study of the Utility of Existing International Anti-Discrimination Law Interpretations for Ending Unconscious and Intersecting Forms of Discrimination". Unpublished PhD. thesis, Cambridge University. p45.

<sup>84</sup> CERD, Summary Record of the 1394th Meeting: Australia, CERD/C/SR.1394 (2001), para. 67.

<sup>85</sup> CERD, Summary Record of the 1325th Meeting: Kuwait, CERD/C/SR.1325 (1999), paras. 46 and 58.

<sup>86</sup> para. 32.

<sup>87</sup> Specifically, the Platform for Action (para. 46):

[R]ecognises that women face barriers to full equality and advancement because of such

## ii) UN World Conference Against Racism

The final documents of the UN World Conference Against Racism (WCAR)<sup>88</sup> – the Declaration and the Programme of Action – recognises the need to address the multiple barriers that women who experience direct or indirect forms of intersectional discrimination face. In particular, paragraph 69 of the Declaration acknowledges “that racism, racial discrimination, xenophobia and related intolerance reveal themselves in a differentiated manner for women and girls, and can be among the factors leading to a deterioration in their living conditions, poverty, violence, multiple forms of discrimination, and the limitation or denial of their human rights”.

To inform WCAR with a gender perspective, the United Nations Development Fund for Women (UNIFEM) commissioned a background paper, which, in noting that the failure to integrate a gender perspective obscures our understanding of racism, examined the need for WCAR to address the intersections of racial discrimination with other forms of discrimination, such as gender inequality. Citing the Beijing Platform for Action, it reiterated that, “gender subordination may be informed and heightened by racism, xenophobia, and other experiences”.<sup>89</sup> The paper also called for measures to address the intersections of race, ethnicity, gender, and other axis of power. Such measures include social services for women heads of households who have lost male relatives in ethnic conflict (e.g. in Bosnia, Rwanda) or to violence, imprisonment or economic difficulty (e.g. African-American women in the US).<sup>90</sup> In these examples, temporary special measures are needed to redress the situation of these women as well as their dependents, specifically under the rationale of social utility described earlier, meaning that by assisting women as well as their dependents to improve their own living conditions, these measures, by extension,

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factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other status. Many women encounter specific obstacles related to their family status, particularly as single parents; and to their socio-economic status, including their living conditions in rural, isolated or impoverished areas. Additional barriers also exist for refugee women, other displaced women, including internally displaced women as well as for immigrant women and migrant women, including women migrant workers. Many women are also particularly affected by environmental disasters, serious and infectious diseases and various forms of violence against women.

<sup>88</sup> Known in full as the UN World Conference against Racism, Racial Discrimination, Xenophobia and Other Forms of Intolerance.

<sup>89</sup> “Integrating Gender into the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance” (2001), para. 2. Background paper prepared for UNIFEM by Professor Catherine Powell and students at the Human Rights Clinic, Columbia Law School [hereinafter UNIFEM, Background Paper].

<sup>90</sup> *ibid.*, para. 20.

would bestow benefits upon society as a whole in the form of enhanced socio-economic development.

As part of preparations towards the same conference, the UN Division for the Advancement of Women, the Office of the High Commissioner for Human Rights and UNIFEM convened an expert group meeting on gender and racial discrimination in November 2000. The background paper for this meeting defined key concepts, identified the principal manifestations of intersectional discrimination, and made two relevant points.<sup>91</sup>

First, it attributes the historic neglect of intersectional discrimination to the twin dynamics of “over-inclusion” and “under-inclusion”. Where discrimination against a group of women is viewed solely in terms of gender discrimination and analysis of racial discrimination is neglected, the particular experience is said to be “over-included” with respect to gender.<sup>92</sup> In the case of “under-inclusion”, discrimination is analysed solely from the perspective of race, despite the presence of gender aspects.<sup>93</sup> Second, the paper points out that patterns of intersectional discrimination often are masked due to the existence of structural discrimination. Economic, cultural or social forces create background conditions of racism or sexism, which institutionalise discrimination and incorporate it into a baseline that is characterised as neutral, and as such, hides these institutionalised forms of discrimination.<sup>94</sup>

### ***UN Commission on the Status of Women (CSW)***

In 2001, the CSW issued conclusions on gender aspects of racism and other forms of discrimination. Drawing on the Beijing Declaration and Platform for Action, the conclusions emphasise the urgent need to address the problem of intersectional discrimination. The CSW also proposed remedial measures which governments could implement to combat such discrimination.<sup>95</sup>

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<sup>91</sup> Crenshaw, *op. cit.*

<sup>92</sup> *ibid.*, p4. The paper notes the trafficking in women: “[I]n the recent report on trafficking sponsored by the Commission on the Status of Women, no attention was directed toward the fact that often race or related forms of subordination contribute to the likelihood that some women rather than others will be subject to such abuses”.

<sup>93</sup> *ibid.*, p5. Here, the paper points to the forced sterilisation of Puerto Rican and African American women in the US; the gender elements of the problem are subsumed under its racial dimensions.

<sup>94</sup> *ibid.*, p6. The paper describes the experience of dalit women in India, who suffer abuse when they travel to wells to collect water. A gendered division of labour forms the backdrop for the violence – a form of discrimination – inflicted upon them as members of a caste.

<sup>95</sup> CSW (2001), “Agreed Conclusions on Gender and All Forms of Discrimination, in particular Racism, Racial Discrimination, Xenophobia and Related Intolerance”, 45th Session.

## *UN Office of the High Commissioner for Human Rights (OHCHR)*

As well in 2001, the OHCHR advocated a series of temporary special measures aimed at addressing intersectional discrimination to be adopted at the national level.<sup>96</sup> Other bodies, as well as scholars, have suggested similar programmes.<sup>97</sup> It is also important to highlight that as a result of efforts led by the OHCHR, some governments have taken the lead in implementing plans that address the multiple barriers to equality which marginalised groups of women face.

## **IV. IMPLEMENTING TEMPORARY SPECIAL MEASURES: DEVELOPING A FRAMEWORK FOR ACTION**

Studies and recommendations by various international bodies have identified key elements that characterise successful programmes of temporary special measures. With reference to these findings, this section addresses the implementation of temporary special measures and provides examples of effectively instituted national plans. Where this is concerned, it is important that states be encouraged to advance and codify in national law, a definition of discrimination which clearly distinguishes temporary special measures from impermissible discrimination. Such a law would provide the basis for countering challenges to temporary special measures in favour of women brought by men who argue that they are victims of “reverse discrimination”.

### *Elements of a model programme*

#### *Target sites and target groups*

Temporary special measures can address various “target sites” of discrimination or of other barriers, thus satisfying the area-specific mandates of provisions of the CEDAW Convention. Sites are areas such as education or employment in which

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<sup>96</sup> UN Office of the High Commissioner for Human Rights (2001), “Gender Dimensions of Racial Discrimination”, pp24-27.

<sup>97</sup> UNIFEM, Background Paper, para. 19. A UN expert study on gender and HIV/AIDS also notes that “[p]ositive strategies to assist women who are affected by HIV/AIDS might include the encouragement of informal sector entrepreneurship and micro-credits, as well as community action groups and social welfare support mechanisms”. Stephen Matlin and Nancy Spence (2000), “The Gender Aspects of the HIV/AIDS Pandemic”, EGM/HIV-AIDS/2000/OP 1.

women encounter (i) gender discrimination or (ii) gender discrimination combined with other forms of discrimination or other barriers. The term “target site” is used when these areas become the focus of temporary special measures.

For example, education is the “target site” of a literacy programme for women. A variety of target sites are identified in the CEDAW Convention, such as in Article 5 (prohibits discrimination in the context of cultural and religious practices); Articles 7 and 8 (political and public life and representation in international bodies); Article 10 (education); Article 11 (employment); Article 12 (access to health care); and Article 13 (economic and social life); and Article 15 (legal rights).<sup>98</sup> Other key target sites include housing, gender-based violence, decision-making, poverty, armed conflict, the criminal justice system, access to justice, land and property, family and community life, welfare policy, development programmes, and the media.<sup>99</sup>

The following illustrates the application of temporary special measures by target sites:

#### *i) Education*

In India, the District Primary Education Programme aims to improve government schools in rural areas and particularly focuses on the situation of women and girls, including those of lower castes.<sup>100</sup> Notable elements of this government programme include:

- Distribution of free educational materials to girls from disadvantaged sectors of society (e.g *dalit* girls, rural girls, etc);
- Guaranteeing female representation on Village Education Committees responsible for school operations; hiring additional female teachers and imposing the condition that each school have at least one; and ensuring equality in gender representation among school employees; and
- Early Childhood Care and Education Centres for school-going siblings of girls who would normally have care-taking responsibility for their siblings.

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<sup>98</sup> Schöpp-Schilling, Background Paper, paras. 38-55.

<sup>99</sup> See CEDAW Articles 3 (addressing all fields of discrimination) and 7 (addressing political and decision-making power). To some extent, the site of “poverty” merges with that of “economic and social life,” notably with respect to special measures in the form of microcredit loans and other financial assistance.

<sup>100</sup> CSW, “Summary of the WomenWatch online working groups on the 12 critical areas of concern of the Beijing Platform for Action”, UN Doc. E/CN.6/2000/PC/CRP.1, January 2000, p15.

### *ii) Housing*

In Canada, the federal housing programme has taken into consideration the need to allocate public housing to women, including Aboriginal women, who have been victims of domestic violence.<sup>101</sup>

### *iii) Peace building*

Following the genocide in Rwanda, the government entrusted Rwandan Women Committees with the formation and management of Women Communal Funds to foster economic development among women by providing them with low interest micro-credit.<sup>102</sup>

### *iv) Employment*

In Uganda, government policies have successfully mobilised women for employment in technical posts, the army, police, local government and commissions. Notably, the government requires that there be at least one female executive in all areas of employment.<sup>103</sup>

### *iv) Decision-making*

In Argentina, a law establishing a 30 per cent quota for women in the National Congress has been enacted and implemented.

The “target group” of temporary special measures can either be (i) the general female population<sup>104</sup> or (ii) a subset of women who encounter particular barriers or are multiply disadvantaged.<sup>105</sup> For example, a micro-credit loan programme administered in rural areas is directed at the “target group” of rural women. Given that some groups of women face intersectional discrimination because of their gender as well as other status which furthers their disadvantage, subordination

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<sup>101</sup> Centre for Equality Rights in Accommodation (2002), “Women and Housing in Canada: Barriers to equality”, <<http://www.equalityrights.org/cera/docs/barriers.htm>>.

<sup>102</sup> Commission on the Status of Women acting as the preparatory committee for the special session of the General Assembly entitled “Women 2000: gender equality, development and peace for the twenty-first century”, Summary of the WomenWatch Online Working Groups on the 12 Critical Areas of Concern (E/CN.6/2000/PC/CRP.1) p34 , 44th session. <<http://www.un.org/womenwatch/daw/csw/ecn6-2000-pc-crp1.pdf>>.

<sup>103</sup> *ibid.*, pp38-39.

<sup>104</sup> The general population of women can constitute a “target group,” such as when the general population of women and girls were segregated in Afghanistan under the Taliban.

<sup>105</sup> An example of a sub-group of women who are multiply disadvantaged is dalit women who are subject to caste-based violence. They represent a “target group” that suffers multiple barriers in the form of caste-based and gender-based discrimination.

or “powerlessness” (e.g. on the basis of their race; ethnicity; religious belief; nationality or national origin; caste, class or economic situation; migrant, refugee or internally displaced status; disability or health status; occupation; age; sexuality or marital status), they may require specific temporary special measures to eliminate the multiple barriers they must overcome to attain substantive equality. Articles 3 and 14 of the CEDAW Convention in particular, support the implementation of temporary special measures that target women who face multiple barriers.<sup>106</sup>

### *Forms of temporary special measures*

Temporary special measures assume three principal forms: affirmative mobilisation, affirmative fairness, and positive special measures.<sup>107</sup> As discussed above, states have an obligation pursuant to Articles 2, 3 or 5 of CEDAW to adopt temporary special measures as a means of achieving substantive equality.

#### *(i) Affirmative mobilisation*

Measures of affirmative mobilisation seek to achieve substantive equality by supporting, actively involving, and building the capacity of members of a particular disadvantaged community, the “target group” of the measures, to claim educational, employment and other rights and opportunities. Such programmes “support” individuals by providing skills and training to make them active citizens and competitive candidates for particular positions.<sup>108</sup> Affirmative mobilisation programmes raise women’s awareness of their rights and of available opportunities, as well as empower and mobilise them to claim these.

#### *(ii) Affirmative fairness*

Measures of affirmative fairness are governance mechanisms and complaints procedures to perceive and address allegations of discrimination.<sup>109</sup> Once in place, these play an affirmative role since their very existence creates a disincentive against future discriminatory action.

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<sup>106</sup> Schöpp-Schilling, Background Paper, paras. 43 and 54.

<sup>107</sup> Bossuyt, *op. cit.*, paras. 46-56. While the Special Rapporteur describes the three categories as affirmative mobilisation, affirmative fairness and affirmative preference, this paper uses the terminology “positive special measures” in lieu of affirmative preference, in light of our critique of viewing temporary special measures as a preference.

<sup>108</sup> *ibid.*, para. 47. The Special Rapporteur identifies in particular “remedial interventions such as job training, out-reach and other skill-building or empowerment programmes...”.

<sup>109</sup> *ibid.*, para. 48. The Special Rapporteur cites the following examples of affirmative fairness: “effective and credible grievance or complaint procedures to handle allegations of discrimination, review procedures to double-check personnel actions, and examination of practices in an attempt to eliminate non-intentional discriminatory practices”.

### *(iii) Positive special measures*

Positive special measures provide comparative advantages to a “target group” that is disadvantaged in some way, by granting its members priority over equally qualified candidates who are non-members of the group in the allocation of social resources.<sup>110</sup> Positive special measures recognise that members of disadvantaged groups, such as women, have been denied the means to compete at a level of equality for such goods. Therefore, such measures seek to level the playing field – to create equality of opportunity – between members of disadvantaged as opposed to dominant social groups by ensuring that the former have access to social resources, such as employment or education.

## ***Principles for effective implementation***

If programmes of temporary special measures are to promote substantive gender equality, they must, at minimum, incorporate five core principles: consultation, continuous feedback, monitoring, enabling conditions, and the promotion of standards through public education.

### ***Consultation***

Consultation refers to collaboration among the following actors in the design and implementation of temporary special measures:<sup>111</sup>

- National and local governments,
- International bodies, such as UN agencies,
- Non-Governmental Organisations (NGOs),
- The private sector, and
- Women targeted to benefit from the relevant measures.

The interaction among these actors can take place in a variety of configurations, levels and directions. For example, an NGO administering a particular programme can consult the “target group” of women, the government authorities sponsoring the programme, or both. If the programme were managed by the state (rather than an

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<sup>110</sup> *ibid.*, para. 52. The Special Rapporteur cites the following examples: “Members of designated groups can be automatically given additional points on competitive examinations... Informal percentages, guidelines, goals, quotas or reservations can be imposed that fix the proportions of social goods the designated groups must receive”.

<sup>111</sup> Such consultation would be consistent with CERD’s General Recommendation No. 25, in which the treaty body proposed to work with States parties to combat intersectional discrimination.



NGO intermediary), the government authorities would directly address the women concerned. To democratise and maximise the value of this process, consultation must entail not only collaboration, but also participation and transparency.

This consultation with the women concerned should be pursued from the start, by means of an initial assessment of whether and which special measures are required to redress their situation in a particular site of discrimination or other disadvantage. Initial consultation should precede design and implementation of the measures to ensure that they are effective and respond to those affected. To accurately assess the need for special measures, data on women's conditions must be analysed from both quantitative and qualitative perspectives.<sup>112</sup> Indeed, women's actual, qualitative experience should always be a factor in the decision to institute special measures, especially in cases where a statistical analysis indicates that a minimal number of women are affected, and would thus weigh against the creation of a special programme. Care must also be taken to evaluate whether temporary special measures should target other barriers that intersect with gender discrimination (e.g. poverty in a micro-credit programme for poor women). Moreover, because national data may be unavailable or incomplete for certain groups of women, an assessment should utilise collaborative techniques with various groups to ensure accurate evaluation for the design of temporary special measures.

Local NGOs or authorities that observe and document the circumstances of women in their geographic areas can collect quantitative and qualitative data at the field level. By consulting with particular actors directing or sponsoring a specific programme, as well as the women whom it benefits, the design and implementation of a programme of temporary special measures will gain from the diversity of perspectives and allow for its principal weaknesses to be detected and effectively remedied. Similarly, there must be transparency throughout the stages of design and operation of the specific measure, for the relevant actors to voice their concerns and usefully contribute to the project. In this sense, participation promotes transparency, and transparency furthers participation.

Through consultation too, states can respond effectively to the particular needs of the targeted women; reach a larger group of them by promoting parallel programmes in the private sector; and learn from the experiences of other states and bodies that have implemented temporary special measures. Cooperation among key actors is thus essential to the achievement of real equality between men and women at the national level.

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<sup>112</sup> The specific methods of data-gathering are addressed below in the subsection on Monitoring Strategies.

## *Continuous feedback*

Continuous feedback is an extension of the principle of consultation. At the domestic level, continuous feedback may link targeted groups with local organisations or local governments and the latter, in turn, with national authorities.<sup>113</sup> At the international level, continuous feedback brings national governments together with international monitoring bodies, such as the CEDAW Committee and CERD, to track the progress of temporary special measures.

The feedback process is based on reciprocity; the actors involved give as well as receive information. At the first level, women benefiting from temporary special measures evaluate the measures by giving feedback to locally based groups or authorities implementing them. Drawing on this information, the local actors then submit progress reports and address particular concerns to the national agency sponsoring the specific remedial plan. The national body directly responds to the local entity with appropriate recommendations or further inquiries, and the local body informs the women who initiated the feedback loop. This exchange of information across the board is continuous, mirroring the process of design and implementation of the temporary special measures.

At the second level, in their periodic reports to treaty bodies such as the CEDAW Committee or CERD, national governments discuss the status of particular positive programmes, as well as identify specific obstacles to effective implementation. These bodies can promote proper implementation by responding to concerns raised and encouraging governments to set and achieve positive benchmarks, corresponding to the level of women's empowerment and advancement in the context of particular programmes.<sup>114</sup> Subsequent periodic reports would then monitor the progress achieved with regards to the defined goals. While the feedback at this level is "periodic" rather than "continuous", it reinforces and builds upon the more regular information sharing that occurs at the domestic level.

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<sup>113</sup> The following multi-tiered structure represents only a model of continuous feedback. It is also possible for national governments directly to institute temporary special measures and to consult with targeted women and local authorities or Non-Governmental Organisations in their design and implementation.

<sup>114</sup> The HRI-IWRAW Asia Pacific Temporary Special Measures Paper (p15) elaborates on the role of these institutions: "These bodies should endorse participatory processes and ensure the representation of disadvantaged women in all processes and at all levels". Notably, the monitoring bodies should recommend temporary special measures in neglected contexts or sites, such as housing, as well as "ensure that the intent and monitoring of recommendations go hand in hand with a constant re-evaluation of objectives".

## *Monitoring strategies*

Monitoring strategies, especially data collection, are a building block of the continuous feedback process. First, to chart the progress of temporary special measures, governments must regularly undertake and publish statistical analyses of women's condition in various fields.<sup>115</sup> The data must include both percentages and raw numbers and must be disaggregated according to gender, race and other relevant characteristics.<sup>116</sup> This way, the situation of women facing multiple barriers as a result of intersectional discrimination can also be assessed.<sup>117</sup>

Second, careful data collection and the accompanying continuous feedback received, by charting progressive improvement, will allow successful programmes to be dismantled and thus satisfy CEDAW Article 4.1's mandate that special measures be "temporary" in nature. Indeed, once the goal of substantive equality has been achieved in a particular field, the relevant temporary special measures can be discontinued. This process must be a gradual one, however, to determine the real impact of the special measures and fully reap their positive gains for the targeted group of women. A programme that is hastily dismantled risks reinstating discriminatory conditions. For example, a programme that aims at hiring a particular percentage of women in entry-level jobs might be terminated through a progressive reduction in the number of entry-level positions reserved for women, and once they are discontinued, training programmes might pursue an advocacy function for a sustained period by informing the target group of similar skill-building and educational resources available to them in their geographic area.

Third, a final monitoring strategy surveys and then investigates the failure of certain temporary special measures. Thus, "the question 'why' [is] asked if the desired effect is not achieved," and the particular programme can be modified accordingly to have a positive and substantial impact on the target group of women for whom it was designed.<sup>118</sup>

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<sup>115</sup> Schöpp-Schilling, *op. cit.*, p7 citing CEDAW General Recommendation No. 9 of 1989.

<sup>116</sup> HRI-IWRAW Asia Pacific Temporary Special Measures Paper.

<sup>117</sup> Such monitoring is consistent with CERD General Recommendation No. 25 (para. 5), which states that governments and monitoring bodies in their periodic reports and comments, respectively, should note the "[forms] and [manifestations]" of gender and other discrimination, their context, their [compounded] effects, and "[t]he availability and accessibility of remedies and complaint mechanisms".

<sup>118</sup> Dairiam, *op. cit.*, p4. Dianne Otto has developed a useful table, provided in Annex 2 of this paper, for evaluating the success of special measures. See also Dianne Otto (2002), "'Gender Comment'": Why does the UN Committee on Economic, Social and Cultural Rights need a general comment on women?", in *Canadian Journal of Women and the Law*, Vol. 14 No. 1, pp67-68.

## *Enabling conditions*

Women, particularly from groups facing multiple structural barriers to equality, cannot access temporary special measures in the absence of enabling conditions, notably those “basic social, economic services necessary for women to lead their lives with dignity”.<sup>119</sup> Such conditions include not only services such as childcare but also structural policies, such as maternity or paternity leave, and institutional remedies to combat discrimination. These conditions, which are implicit in CEDAW Article 3, are therefore an essential element of any successful remedial plan.<sup>120</sup> Enabling conditions create a “context” in which temporary special measures can effect real change in women’s status.<sup>121</sup>

## *Public education*

Finally, to be successful, temporary special measures must incorporate public education programmes on human rights to enhance access to and the potential benefits of these measures. Educational programmes should be sensitive to the need to reach women who experience intersectional discrimination and are facing multiple barriers to equality. Such programmes should also be geared towards:

- Raising women’s awareness of their human rights, legal entitlements and benefits while providing them with guidance and training on the means to access these;
- Providing the necessary support for overcoming cultural and social barriers to women’s empowerment in their particular communities;<sup>122</sup> and

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<sup>119</sup> Dairiam, *ibid.*, p2. See also Ginsburg, *op. cit.*, p280.

<sup>120</sup> Dairiam, *ibid.*

<sup>121</sup> HRI-IWRAW Asia Pacific Temporary Special Measures Paper, p15. In India, childcare services would allow women to serve in public office and in this way make use of the quota system, a form of positive special measure, designed to favour them. (*ibid.*, p4.) Enabling conditions also refer to general public services, such as transport and access to information, that are vital to the success of all categories of temporary special measures. Thus, women’s participation in a literacy programme (an example of affirmative mobilisation) may require the availability of efficient transport. Moreover, women’s awareness of the existence of such programmes may depend on an effective informational system.

<sup>122</sup> For example, in rural Bangladesh parents refused to send their daughters to school because the schoolteachers were male. In the context of “cultural barriers,” the promotion of standards through public education would also aim to prevent or minimise community or family backlash to temporary special measures in favour of women. In one case in India, a community threatened to rape the mother of a *dalit* boy if he accepted an educational scholarship he had been offered. (HRI-IWRAW Asia Pacific Temporary Special Measures Paper, p13). In addition, promotion of standards in the context of “cultural barriers”

- Promoting public awareness on human rights issues from a gender lens to combat popular stereotypes and beliefs that place limits on women's advancement by perpetuating discrimination.<sup>123</sup>

It is clear that temporary special measures, if they are to foster real gender equality, must at minimum integrate the above-mentioned principles into the implementation process.

## V. CONCLUSION

This paper has illustrated possible approaches to addressing temporary special measures at the national level that relate to the content of CEDAW General Recommendation No. 25 (on Article 4.1). The meaning and extent of temporary special measures has been and needs to continue being re-conceptualised. At all times, the standard of substantive equality should be the central element in developing a methodology or framework for implementing temporary special measures, and this should also extend to women who experience intersectional discrimination and face multiple barriers to the realisation of their human rights.

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would aim to overcome the resistance of institutions implementing temporary special measures. In a Malaysian case, public school administrators in rural areas did not permit children of plantation workers to take school books home, in this way preventing them from preparing for their exams.

<sup>123</sup> HRI-IWRAW Asia Pacific Temporary Special Measures Paper, p15.

## **Annex 1**

### **General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women**

#### Temporary special measures

##### I. Introduction

1. The Committee on the Elimination of Discrimination against Women decided at its twentieth session (1999), pursuant to article 21 of the Convention, to elaborate a general recommendation on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women. This new general recommendation would build, inter alia, on earlier general recommendations, including general recommendation No. 5 (seventh session, 1988), on temporary special measures, No. 8 (seventh session, 1988), on implementation of article 8 of the Convention, and No. 23 (sixteenth session, 1997), on women in public life, as well as on reports of States parties to the Convention and on the Committee's concluding comments to those reports.

2. With the present general recommendation, the Committee aims to clarify the nature and meaning of article 4, paragraph 1, in order to facilitate and ensure its full utilisation by States parties in the implementation of the Convention. The Committee encourages States parties to translate this general recommendation into national and local languages and to disseminate it widely to the legislative, executive and judicial branches of government, including their administrative structures, as well as civil society, including the media, academia, and human rights and women's associations and institutions.

##### II. Background: the object and purpose of the Convention

3. The Convention is a dynamic instrument. Since the adoption of the Convention in 1979, the Committee, as well as other actors at the national and international levels, have contributed through progressive thinking to the clarification and understanding of the substantive content of the Convention's articles and the specific nature of discrimination against women and the instruments for combating such discrimination.

4. The scope and meaning of article 4, paragraph 1, must be determined in the context of the overall object and purpose of the Convention, which is to eliminate all forms of discrimination against women with a view to achieving women's *de jure* and *de facto* equality with men in the enjoyment of their

human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of *de jure* as well as *de facto* equality with men.

5. The Convention goes beyond the concept of discrimination used in many national and international legal standards and norms. While such standards and norms prohibit discrimination on the ground of sex and protect both men and women from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the Convention focuses on discrimination against women, emphasising that women have suffered, and continue to suffer from various forms of discrimination because they are women.

6. A joint reading of articles 1 to 5 and 24, which form the general interpretative framework for all of the Convention's substantive articles, indicates that three obligations are central to States parties' efforts to eliminate discrimination against women. These obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men.

7. Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination - committed by public authorities, the judiciary, organisations, enterprises or private individuals - in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the *de facto* position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations<sup>2</sup> and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.

8. In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming

under-representation of women and a redistribution of resources and power between men and women.

9. Equality of results is the logical corollary of *de facto* or substantive equality. These results may be quantitative and/or qualitative in nature, that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.

10. The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.

11. Women's biologically determined permanent needs and experiences should be distinguished from other needs that may be the result of past and present discrimination against women by individual actors, the dominant gender ideology, or by manifestations of such discrimination in social and cultural structures and institutions. As steps are being taken to eliminate discrimination against women, women's needs may change or disappear, or become the needs of both women and men. Thus, continuous monitoring of laws, programmes and practices directed at the achievement of women's *de facto* or substantive equality is needed so as to avoid a perpetuation of non-identical treatment that may no longer be warranted.

12. Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such multiple discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple discrimination against women and its compounded negative impact on them.

13. In addition to the Convention on the Elimination of All Forms of Discrimination against Women, other international human rights instruments and policy documents adopted in the United Nations system contain provisions on temporary special measures to support the achievement of equality. Such measures are described in different terminology, and the meaning and interpretation given to such measures also differs. It is the Committee's hope that the present general



recommendation on article 4, paragraph 1, will contribute to a clarification of terminology<sup>3</sup>.

14. The Convention targets discriminatory dimensions of past and current societal and cultural contexts which impede women's enjoyment of their human rights and fundamental freedoms. It aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their *de facto* or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realise *de facto* or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.

### III. The meaning and scope of temporary special measures in the Convention on the Elimination of All Forms of Discrimination against Women

#### Article 4, paragraph 1

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.

#### Article 4, paragraph 2

Adoption by States parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

#### A. Relationship between paragraphs 1 and 2 of article

15. There is a clear difference between the purpose of the "special measures" under article 4, paragraph 1, and those of paragraph 2. The purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their *de facto* or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation. These measures are of a temporary nature.

16. Article 4, paragraph 2, provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature,

at least until such time as the scientific and technological knowledge referred to in article 11, paragraph 3, would warrant a review.

## B. Terminology

17. The *travaux préparatoires* of the Convention use different terms to describe the “temporary special measures” included in article 4, paragraph 1. The Committee itself, in its previous general recommendations, used various terms. States parties often equate “special measures” in its corrective, compensatory and promotional sense with the terms “affirmative action”, “positive action”, “positive measures”, “reverse discrimination”, and “positive discrimination”. These terms emerge from the discussions and varied practices found in different national contexts<sup>4</sup>. In the present general recommendation, and in accordance with its practice in the consideration of reports of States parties, the Committee uses solely the term “temporary special measures”, as called for in article 4, paragraph 1.

## C. Key elements of article 4, paragraph 1

18. Measures taken under article 4, paragraph 1, by States parties should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field. 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* or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms. While the application of temporary special measures often remedies the effects of past discrimination against women, the obligation of States parties under the Convention to improve the position of women to one of *de facto* or substantive equality with men exists irrespective of any proof of past discrimination. The Committee considers that States parties that adopt and implement such measures under the Convention do not discriminate against men.

19. States parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1, to accelerate the achievement of a concrete goal for women of *de facto* or substantive equality, and other general social policies adopted to improve the situation of women and the girl child. Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures.

20. Article 4, paragraph 1, explicitly states the “temporary” nature of such special measures. Such measures should therefore not 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. The duration of a temporary special measure should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time. Temporary special measures must be discontinued when their desired results have been achieved and sustained for a period of time.

21. The term “special”, though being in conformity with human rights discourse, also needs to be carefully explained. Its use sometimes casts women and other groups who are subject to discrimination as weak, vulnerable and in need of extra or “special” measures in order to participate or compete in society. However, the real meaning of “special” in the formulation of article 4, paragraph 1, is that the measures are designed to serve a specific goal.

22. The term “measures” encompasses a wide variety of legislative, executive, administrative and 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. The choice of a particular “measure” will depend on the context in which article 4, paragraph 1, is applied and on the specific goal it aims to achieve.

23. The adoption and implementation of temporary special measures may lead to a discussion of qualifications and merit of the group or individuals so targeted, and an argument against preferences for allegedly lesser-qualified women over men in areas such as politics, education and employment. As temporary special measures aim at accelerating achievement of *de facto* or substantive equality, questions of qualification and merit, in particular in the area of employment in the public and private sectors, need to be reviewed carefully for gender bias as they are normatively and culturally determined. For appointment, selection or election to public and political office, factors other than qualification and merit, including the application of the principles of democratic fairness and electoral choice, may also have to play a role.

24. Article 4, paragraph 1, read in conjunction with articles 1, 2, 3, 5 and 24, needs to be applied in relation to articles 6 to 16 which stipulate that States parties “shall take all appropriate measures”. Consequently, the Committee considers that States parties are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate

the achievement of the overall, or a specific goal of, women's *de facto* or substantive equality.

#### IV. Recommendations to States parties

25. Reports of States parties should include information on the adoption, or lack thereof, of temporary special measures in accordance with article 4, paragraph 1, of the Convention, and States parties should preferably adhere to the terminology "temporary special measures", to avoid confusion.

26. States parties should clearly distinguish between temporary special measures aimed at accelerating the achievement of a concrete goal of women's *de facto* or substantive equality, and other general social policies adopted and implemented in order to improve the situation of women and the girl child. States parties should bear in mind that not all measures which potentially are or would be favourable to women qualify as temporary special measures.

27. States parties should analyse the context of women's situation in all spheres of life, as well as in the specific, targeted area, when applying temporary special measures to accelerate achievement of women's *de facto* or substantive equality. They should evaluate the potential impact of temporary special measures with regard to a particular goal within their national context and adopt those temporary special measures which they consider to be the most appropriate in order to accelerate the achievement of *de facto* or substantive equality for women.

28. States parties should explain the reasons for choosing one type of measure over another. The justification for applying such measures should include a description of the actual life situation of women, including the conditions and influences which shape their lives and opportunities - or that of a specific group of women, suffering from multiple discrimination - and whose position the State party in tends to improve in an accelerated manner with the application of such temporary special measures. At the same time, the relationship between such measures and general measures and efforts to improve the position of women should be clarified.

29. States parties should provide adequate explanations with regard to any failure to adopt temporary special measures. Such failures may not be justified simply by averring powerlessness, or by explaining inaction through predominant market or political forces, such as those inherent in the private sector, private organisations, or political parties. States parties are reminded that article 2 of the Convention, which needs to be read in conjunction with all other articles, imposes accountability on the State party for action by these actors.

30. States parties may report on temporary special measures under several articles. Under article 2, States parties are invited to report on the legal or other basis for such measures, and their justification for choosing a particular approach. States parties are further invited to give details about any legislation concerning temporary special measures, and in particular whether such legislation provides for the mandatory or voluntary nature of temporary special measures.

31. States parties should include, in their constitutions or in their national legislation, provisions that allow for the adoption of temporary special measures. The Committee reminds States parties that legislation, such as comprehensive anti discrimination acts, equal opportunities acts or executive orders on women's equality, can give guidance on the type of temporary special measures that should be applied to achieve a stated goal, or goals, in given areas. Such guidance can also be contained in specific legislation on employment or education. Relevant legislation on non-discrimination and temporary special measures should cover governmental actors as well as private organisations or enterprises.

32. The Committee draws the attention of States parties to the fact that temporary special measures may also be based on decrees, policy directives and/or administrative guidelines formulated and adopted by national, regional or local executive branches of government to cover the public employment and education sectors. Such temporary special measures may include the civil service, the political sphere and the private education and employment sectors. The Committee further draws the attention of States parties to the fact that such measures may also be negotiated between social partners of the public or private employment sector or be applied on a voluntary basis by public or private enterprises, organisations, institutions and political parties.

33. The Committee reiterates that action plans for temporary special measures need to be designed, applied and evaluated within the specific national context and against the background of the specific nature of the problem which they are intended to overcome. The Committee recommends that States parties provide in their reports details of any action plans which may be directed at creating access for women and overcoming their under representation in certain fields, at redistributing resources and power in particular areas, and/or at initiating institutional change to overcome past or present discrimination and accelerate the achievement of *de facto* equality. Reports should also explain whether such action plans include considerations of unintended potential adverse side-effects of such measures as well as on possible action to protect women against them. States parties should also describe in their reports the results of temporary special measures and assess causes of possible failure of such measures.

34. Under article 3, States parties are invited to report on the institution(s) responsible for designing, implementing, monitoring, evaluating and enforcing such temporary special measures. Such responsibility may be vested in existing or planned national institutions, such as women's ministries, women's departments within ministries or presidential offices, ombudspersons, tribunals or other entities of a public or private nature with the requisite mandate to design specific programmes, monitor their implementation, and evaluate their impact and outcomes. The Committee recommends that States parties ensure that women in general, and affected groups of women in particular, have a role in the design, implementation and evaluation of such programmes. Collaboration and consultation with civil society and non-governmental organisations representing various groups of women is especially recommended.

35. The Committee draws attention to and reiterates its general recommendation No. 9, on statistical data concerning the situation of women, and recommends that States parties provide statistical data disaggregated by sex in order to measure the achievement of progress towards women's *de facto* or substantive equality and the effectiveness of temporary special measures.

36. States parties should report on the type of temporary special measures taken in specific fields under the relevant article(s) of the Convention. Reporting under the respective article(s) should include references to concrete goals and targets, timetables, the reasons for choosing particular measures, steps to enable women to access such measures, and the institution accountable for monitoring implementation and progress. States parties are also asked to describe how many women are affected by a measure, how many would gain access and participate in a certain field because of a temporary special measure, or the amount of resources and power it aims to redistribute to how many women, and within what time frame.

37. The Committee reiterates its general recommendations Nos. 5, 8 and 23, wherein it recommended the application of temporary special measures in the fields of education, the economy, politics and employment, in the area of women representing their Governments at the international level and participating in the work of international organisations, and in the area of political and public life. States parties should intensify, within their national contexts, such efforts especially with regard to all facets of education at all levels as well as all facets and levels of training, employment and representation in public and political life. The Committee recalls that in all instances, but particularly in the area of health, States parties should carefully distinguish in each field between measures of an ongoing and permanent nature and those of a temporary nature.

38. States parties are reminded that temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women. Temporary special measures should also be implemented in the areas of credit and loans, sports, culture and recreation, and legal awareness. Where necessary, such measures should be directed at women subjected to multiple discrimination, including rural women.

39. Although the application of temporary special measures may not be possible under all the articles of the Convention, the Committee recommends that their adoption be considered whenever issues of accelerating access to equal participation, on the one hand, and accelerating the redistribution of power and resources, on the other hand, are involved as well as where it can be shown that these measures will be necessary and most appropriate under the circumstances.

## Notes

1 Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.

2 "Gender is defined as the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes." *1999 World Survey on the Role of Women in Development*, United Nations, New York, 1999, page ix.

3 See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, which mandates temporary special measures. The practice of treaty monitoring bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee, shows that these bodies consider the application of temporary special measures as mandatory to achieve the purposes of the respective treaties. Conventions adopted under the auspices of the International Labour Organisation, and various documents of the United Nations Educational, Scientific and Cultural Organisation also explicitly or implicitly provide for such measures. The Subcommission on the Promotion and Protection of Human Rights considered this question and appointed a Special Rapporteur to prepare reports for its consideration and action. The Commission on the Status of Women reviewed the use of temporary special measures in 1992. The outcome documents adopted by United Nations world conferences on women, including the Platform for Action of the 1995 Fourth World Conference on Women and its follow-up review of 2000, contain references to positive action as a tool for achieving *de facto* equality. The use of temporary special measures by the Secretary - General of the United Nations is a practical example in the area of women's employment, including through administrative instructions on the recruitment, promotion and placement of women in the Secretariat. These measures aim at achieving the goal of 50/50 gender distribution at all levels, but at the higher echelons in particular.

4 The 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. However, the term "positive action" is used in yet another sense in international human rights law to describe "positive State action" (the obligation of a State to initiate action versus a State's obligation to abstain from action). Hence, the term "positive action" is ambiguous inasmuch as its meaning is not confined to temporary special measures as understood in article 4, paragraph 1, of the Convention. The terms "reverse discrimination" or "positive discrimination" are criticised by a number of commentators as inappropriate.



## **Annex 2**

### **Guidelines for addressing intersectional discrimination under the CEDAW Convention<sup>124</sup>**

#### **I. What is intersectional discrimination?<sup>125</sup>**

Intersectional discrimination is the result of the disadvantage, marginalisation and/or exclusion arising from a combination of various forms of oppression (e.g. sexism, racism, xenophobia, homophobia, etc.) which, together, produce something unique and distinct from any one form of discrimination standing alone. A significant proportion of women experience distinct forms of discrimination because they experience the effects of sexism, racism and other forms of exclusion simultaneously. For example, refugee women who belong to religious and ethnic minorities are often targets of discrimination on the basis of their gender as well as their religion, race/ethnicity, non-citizen status, and economic disadvantage. The effect of intersectional discrimination on a woman is compounded and therefore, leaves her in a situation of further disadvantage.

Women experience multiple barriers to the achievement of substantive equality when gender discrimination intersects with other forms of discrimination (e.g. discrimination based on race, ethnicity, age, sexuality, religion, disability status, citizenship, health status, etc) as well as other barriers (e.g. poverty, inequality in the private sphere, negative stereotypes, rural residence, etc). Unfortunately, even now, in most countries, intersectional discrimination is not recognised in laws or policies.

Intersectional discrimination has also been referred to as “multiple forms of discrimination”, and at the United Nations (UN) level, references to this have been made in UN official documents such as the outcome documents of the UN World Conference Against Racism, Racial Discrimination, Xenophobia and

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<sup>124</sup> These guidelines were prepared by Maria Herminia Graterol Garrido. They are intended for use by those planning to present comprehensive alternative information on the situation of groups of marginalised women to the CEDAW Committee during its review of States Parties’ reports. Although their focus is on evaluating policies, legislation and programmes aimed at improving the situation of such groups of women, it is hoped that the ideas presented here will also encourage further consideration of these issues by others.

<sup>125</sup> Most of the definitions and points in Part I and II of this paper were taken from Ontario Human Rights Commission (2002), “Discussion Paper on An Intersectional Approach to Discrimination: Addressing multiple grounds in human rights claims”, <[http://www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper\\_1.shtml](http://www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper_1.shtml)>.

Other Forms of Intolerance as well as General Recommendations and General Comments by various treaty bodies, including the CEDAW Committee.

## II. Overview of the international approach to addressing multiple forms of discrimination

The intersectional approach to address multiple forms of discrimination seeks to take into account the historical, social and political contexts in which discrimination takes place thus recognising the unique experience of a woman marginalised on several grounds. It allows for particular experiences of discrimination to be exposed, acknowledged, analysed and remedied.

The intersectional analysis requires a shift from a single ground perspective to an analysis based on the assumption that an individual's experiences are based on multiple identities that can be linked to more than one ground of discrimination. In this regard, it is necessary to acknowledge that one of the limitations in using this approach in the context of litigation is that in many countries, different kinds of anti-discrimination legislation are used to address specific grounds of discrimination. For this reason, developing a case on multiple "areas" of discrimination may not be well accepted by judges. For example, it is easier for a judge to know which laws and standards to apply when a sexual harassment case is argued as discrimination on the grounds of sex or gender. If the same case were to be argued as intersectional discrimination on the grounds of sex, race, HIV/AIDS and sexual orientation, the outcome and analysis of the situation would depend on the pro-activeness of the judge, as well as on the opportunities or limitations of laws already in existence.

Despite the limitations of experimenting with the intersectional approach to discrimination in litigation, it is important to incorporate this analysis into processes that may assist women to expose new forms of disadvantage, exclusion and discrimination. As such, it is important to consider intersectional discrimination as an integral part of feminist and women's human rights analysis of laws and policies. In this regard, the intersectional approach to discrimination should be integrated in efforts to monitor the implementation and realisation of international human rights treaties such as the CEDAW Convention.

### **Benefits of the intersectional approach**

- Acknowledges the complexity of the forms of discrimination experienced by marginalised groups of women.
- Recognises that the experience of discrimination may be unique and takes into account the social and historical context of victims.
- Places the focus on society's response to the individual as a result of the confluence of grounds of discrimination and does not require women to slot themselves in to unnecessarily rigid (or limited) compartments or categories of identity.
- Addresses the fact that discrimination has evolved and tends to no longer be overt, but rather more subtle, multi-layered, systemic, environmental and institutionalised.
- Reveals the extent of discrimination even if main groups affected by a particular form of discrimination are "discrete and insular minorities".

*Source: "Discussion Paper on An Intersectional Approach to Discrimination: Addressing multiple grounds in human rights claims", Ontario Human Rights Commission (2002) <[http://www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper\\_1.shtml](http://www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper_1.shtml)>.*

### **III. Guidelines on intersectional discrimination under the CEDAW Convention**

Sustained efforts in developing greater understanding of all dimensions of intersectional discrimination are necessary to:

- Explore approaches to apply the CEDAW Convention's framework as a tool to analyse and address intersectional discrimination;
- Contribute to a better understanding of the compounded effect of intersectional discrimination on the advancement of marginalised groups of women towards more effective changes in law and policy;
- Contribute to the expansive interpretation of the principles of substantive equality and non-discrimination contained in the CEDAW Convention; and
- Suggest different approaches to monitoring the implementation of the full scope of human rights guarantees contained in other international human rights treaties (e.g. ICERD, ICESCR, ICCPR and CRC).

The guidelines below show how the CEDAW Convention's framework can be used to assess the situation of women who experience intersectional discrimination

on the basis of gender and other characteristics (e.g. race, ethnicity, sexual orientation, marital status, age, religion, etc.).

### Analysis of specific articles of the CEDAW Convention that can be useful to address intersectional discrimination

**Article 1:** The definition of discrimination. Analysis of the terms of Article 1 of the CEDAW Convention demonstrates that the over arching framework of the Convention can be used to approach intersectional discrimination. According to Article 1, discrimination against women is:

- **Any distinction** (e.g. a regulation according to which women need to obtain higher grades than men to enter engineering school) **exclusion** (e.g. a law establishing women cannot apply to university). **restriction** (e.g. an institutional practice discouraging indigenous women to apply to nursing school)
- **in the law** (*de jure*) or **in practice** (*de facto*)
- **made on the basis of sex** (and gender stereotypes that perpetuate ideas of subordination and inequality)
- **with the effect or purpose** (whether intended or unintended, e.g. a gender-neutral provision that establishes that only persons who can read and write can exercise their right to vote may have a disproportionate effect on women as their illiteracy levels are higher)
- **of impairing or nullifying the recognition, enjoyment or exercise**
- **by women** (as individuals or as a group)
- **irrespective of their marital status** (and other status such as nationality, religion, race, ethnicity, sexuality, etc.)
- **on the basis of equality of men and women** (and ensuring equality among all groups of women)
- **of human and fundamental freedoms in all fields** (as contained in the CEDAW Convention and other human rights instruments that have contributed to the expansive interpretation of the human rights of women).

**Article 4(1):** Recommends states to adopt temporary special measures to accelerate *de facto* equality between men and women, in particular, measures benefiting groups of women made vulnerable by multiple forms of discrimination.

**Article 5(1):** Establishes the obligation of the state to take appropriate measures to modify social and cultural patterns of conduct which are based on the idea of superiority of men over women, and could potentially be used to challenge the idea of supremacy and privilege of one group of women over another on the basis of race, ethnicity, age, health status, class, etc.

**Article 14:** Takes into account the specific problems of a particular group of women, rural women. The measures recommended in this article can be used as a starting point to frame recommendations to the state relating to the realisation of the rights of marginalised groups of women.

**Article 23:** Stresses that the provisions set forth in Articles 1-16 of the Convention should not affect laws and policies that are already in place in a particular state, which are more conducive to the achievement of substantive equality. In other words, if a state is already implementing policies, laws and programmes based on an intersectional approach to discrimination framework, these should inform the application of the CEDAW Convention at the domestic level.

### **Suggested guidelines for assessing the situation of women who face intersectional discrimination**

1. Consider the following factors when evaluating the status of human rights and democracy in your country:

- Constitutional or other statutory provisions on pluralism, multiculturalism and diversity
- Constitutional or other statutory guarantees related to human rights
- Any provisions establishing the relationship of international human rights treaties and the constitution of other statutes

2. In evaluating the effectiveness of standards for ensuring and promoting non-discrimination and substantive equality, consider the Constitution, legislation and policies to determine:

- How are discrimination and equality defined
- Whether there are consistent standards to promote non-discrimination and ensure substantive equality
- Whether discrimination against women is prohibited and whether there are remedies available to victims
- Whether other forms of discrimination are prohibited and whether there are remedies available to victims

3. Assessing the formal, *de jure*, approaches to intersectional discrimination (note: some of these may overlap with point no. 1 above):

- Are there laws and policies that address intersectional discrimination?
- Is there jurisprudence on intersectional discrimination?
- Are there mechanisms in place to bring forward complaints on intersectional discrimination?
- Do laws and/or human rights mechanisms provide, implicitly or explicitly, any protection to victims of intersectional discrimination?

4. Identifying critical issues affecting groups of women that experience intersectional discrimination (assessing the real, *de facto*, situation):

- What makes specific groups of women more likely to be affected by intersectional discrimination?
- What are the problems and issues that affect women from discriminated groups? Analysing the context – circumstances in which discrimination occurs and main areas of concern (e.g. health, education, etc.)
- What evidence is there of the existence and extent of the problem?
- What are the contributing factors? (e.g. immediate, historic, structural, systemic, etc.)
- Listing of discriminatory stereotypes that could be linked to Article 5 of the CEDAW Convention to determine competing grounds for discrimination
- What are the obstacles or impediments to the realisation of the human rights of women who are vulnerable to or victims of intersectional discrimination?
- What steps should states take to promote the advancement of victims of intersectional discrimination in all areas covered by the CEDAW Convention (e.g. political participation, education, health, etc.)?
- What steps should states take to eliminate intersectional discrimination?

5. Evaluating the effectiveness of steps already taken by the government to address and eliminate intersectional discrimination:

- How effective is government action aimed at the elimination of all forms of discrimination against women? Are there gaps?
- How effective is government action aimed at the elimination of other forms of discrimination? For example, are men and women victims of racial discrimination treated equally?
- How does the state assess the needs of women belonging to discriminated groups?
- Is there statistical data or evidence of the scale or effectiveness of government action?
- Does the government monitor its own actions?
- What measures or mechanisms exist to hold the government accountable for its actions or lack of action?

6. Assessing the real impact of temporary special measures:

- Provide a historical background on temporary special measures aimed at improving the situation of disadvantaged groups of women
- Use Table 1 to gather, analyse and evaluate data on special measures aimed at improving the situation of marginalised groups of women
- Formulate recommendations regarding implementation and monitoring of temporary special measures that aim at improving the situation of women facing intersectional discrimination.

**Table 1: Model for evaluating the impact of temporary special measures**

Package of implementation measures	Purpose	Qualitative Outcomes				Evaluate effectiveness and redesign if necessary
<p>What measures are being implemented to accelerate the achievement of equality among various groups of men and women? (e.g. legal, administrative, policy-based, educative etc.)</p> <p>When analysing these measures, determine what kind of model of equality they are based on: e.g. formal? protectionist? substantive? or one that aims to assert the superiority of a particular “identity” or group over all others.</p>	<p>What is the real purpose of these measures? Is it consistent with the goal of accelerating the achievement of de facto equality for all groups of women?</p> <p>In other words, are there equal opportunities for all groups of women?</p>	<p>Is there equal access to opportunities for all groups of men and women?</p>				<p>Is the package of measures ensuring and attaining equal results for all groups of women? If not, it should be redesigned to ensure substantive equality is achieved.</p>
		<p><b>For women</b></p>	<p><b>For men</b></p>	<p><b>For sub-groups of women</b></p>	<p><b>For sub-groups of men</b></p>	
				<p>(e.g. elderly women, single women, poor women, elderly men, poor men, etc.)</p>		
		<p>For these two categories, you require gender disaggregated data for your analysis.</p>		<p>For these two categories, you require data disaggregated by sex as well as other factors such as race, age, etc. for your analysis.</p>		

Adapted from Dianne Otto. (2002). “Gender Comment’: Why does the UN Committee on Economic, Social and Cultural Rights need a General Comment on Women?” in *Canadian Journal of Women and the Law*. Vol. 14, No. 1, pp67-68.

7. Evaluating the efficiency and effectiveness of state machinery meant to promote human rights, women's equality and rights of disadvantaged groups:

- Describe agencies and mandates in relation to human rights, women's equality and rights of disadvantaged groups
- Highlight programmes addressing discrimination
- Determine whether or not there is institutional recognition of intersectional forms of discrimination
- Determine the existence and adequacy of remedies available and accessible to victims of intersectional discrimination
- Make recommendations on mapping adequate responses to address these problems

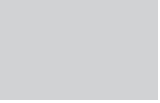
8. Monitoring the implementation of the outcome document of the World Conference Against Racism and the Beijing Platform of Action:

- Describe government actions and measures adopted to improve the situation of women facing intersectional discrimination pursuant to the commitments contained in the WCAR Programme of Action and the Beijing Platform for Action

9. Assessing the successful implementation of the CEDAW Convention:

- In what ways has the state failed to eliminate intersectional discrimination?
- What makes specific groups of women vulnerable to intersectional discrimination?
- What enabling conditions need to be established for women from discriminated groups to access rights?
- What should the state do to rectify the situation and fulfil its obligations?







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