

# **Universalism or Fragmentation: United Nations Treaty-Bodies and Affirmative Actions in Latin-America, the United Kingdom, South Africa, China and India**

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## **1. Introduction**

Equality and non-discrimination are the most fundamental pillars of the international human rights edifice. The State founders of the United Nations (UN) were not ready to agree on a catalogue of rights despite timid references to human rights in different provisions of its foundational treaty.<sup>1</sup> Conversely, the UN Charter already proclaimed equality between men and women to participate in the organs of the United Nations (article 8) and universal respect for human rights without distinction as to race, sex, language, or religion (article 55). Since then, all human rights instruments at international and national level explicitly refer to the principles of equality and non-discrimination. The consensus on the principle is yet to be translated into consensus on the best means to achieve equality, with disagreement especially visible regarding the efficiency of affirmative actions.

Decisions on types of measures, targeted groups and monitoring mechanisms to assess the attainment of objectives pursued by affirmative action measures, where those exist, depend on the specific environment in which they are introduced. As this book demonstrates, different

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<sup>1</sup> Reference to 'human rights' can be found in the preamble of the Charter as well as in articles 1, 13, 55, 56, 60, 62 and 68, UN Charter of the United Nations, adopted on 26 June 1945, in force on 24 October 1945.

approaches adopted towards the design and implementation of affirmative action around the globe obey to specific cultural, geographical, economic or social factors; they also reflect the absence of consensus that characterizes this issue at domestic, regional and international level. Existing scholarship and jurisprudence in the field further reveals the absence of standardized approaches to policies and measures conventionally included under the rubric 'affirmative actions' or 'special measures' as they will be referred to in this chapter

The absence of uniform terminology or criteria to decide whether specific groups should receive different treatment with the aim of achieving greater equality, hinders the attempt to frame the issue beyond the boundaries of individual States in a coherent manner, especially from a legal perspective, because their implementation becomes particularly unpopular when States enforce them by law. This chapter addresses whether the international human rights regime contributes to harmonize regulatory frameworks and principles concerning affirmative actions or, conversely, whether it merely reflects on the diversity of State practices in this area. For this purpose, this chapter explains and updates the arguments and conclusions drawn from previous research analysing the relevant activity of UN human rights monitoring mechanisms and treaty provisions in this field.<sup>2</sup> It then focuses specifically on the recommendation on affirmative actions issued by the United Nations treaty-bodies to the States covered by this book. It evaluates the different engagement of committees with relevant State parties and identifies common trends and inconsistencies of the UN human rights mechanisms in their treatment of special measures.

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<sup>2</sup> See Dominguez-Redondo, E. The United Nations approach to temporary special measures. In: Baez, N; Dominguez Redondo, E. (Eds.) *The existence and efficacy of affirmative action measures in UK, South Africa, India, China, Latin America and Brazil*. Joacaba: Editora UNOESC, 2018. P. 239-266.

## 2. United Nations Human Rights Bodies Approach to Special Measures: Overview

Nine international human rights treaties have set up a body of experts (known as committees or treaty-bodies) to monitor the compliance of State parties with their provisions with the administrative support of the United Nations Organisation. These conventions are known as the core human rights treaties.<sup>3</sup> In all of them, a specific article contains a general prohibition of discrimination in the application of the relevant treaty. For decades, only the 1965 Convention on the Elimination of All Forms of Racial Discrimination<sup>4</sup> and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women<sup>5</sup> included specific provisions on affirmative actions, joined, more recently, by the 2006 Convention on the Rights of Persons with Disabilities.<sup>6</sup> The Convention on the Rights of Persons with Disabilities uses the terminology 'specific measures' to avoid the term 'special' due to its obvious connotations for people with disabilities. This is a relatively new Convention but the jurisprudence of the Committee on the Rights of Persons with Disabilities (CRPD) regarding affirmative actions is growing. As outlined below, the Committee has

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<sup>3</sup> The list of treaties included under this category is available at the Website of the Office of the UN High Commissioner for Human Rights (OHCHR): <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

<sup>4</sup> The oldest of the core human rights treaties, it was adopted on 7 March 1965, entry into force 4 January 1969, 660 UNTS 195.

<sup>5</sup> Adopted on 18 December 1979, entry into force 3 September 1981, 1249, UNTS 13. An Optional Protocol to this Convention was adopted on 6 October 1999, conferring competence to CEDAW to deal with individual complaints, entry into force 22 December 2000, 2131 UNTS 83.

<sup>6</sup> Along with its Optional Protocol, it was adopted on 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3.

used at times the terminology 'special measures' and 'affirmative actions'. However, the Committee's recommendations on 'specific rights' are mostly concerned with the duty of providing reasonable accommodation for persons with disabilities, something the CPRD routinely reminds States parties of the Convention int monitors, in all its concluding observations. The other two bodies of experts monitoring these Conventions - the Committee on the Elimination of All Forms of Racial Discrimination (CERD) and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) - have addressed profusely the issue of special measures in their reports and jurisprudence, including specific general recommendations on the subject matter.

Other UN Committees monitoring core human rights treaties that do not enshrine specific provisions regarding affirmative actions have also contributed to clarify the criteria to identify beneficiaries of differentiated treatment and their scope. Similarly, the known as 'UN Charterbodies', including the Special Procedures and the Universal Periodic Review mechanisms which are subsidiary to the Human Rights Council, have addressed the topic of affirmative measures in their role of monitoring the compliance of States with international human rights standards.

### *2.1. Treaty provisions on special measures*

The Convention on the Elimination of All forms of Racial Discrimination, clarifies from its first article that special measures aimed at ensuring the development and protection of certain racial groups or individuals belonging to them with the aim of guaranteeing them the full and equal enjoyment of human rights, do not constitute discrimination. Article 1(4) states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in

order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights or different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved

This is complemented by article 2.2 imposing an obligation to adopt special measures under certain circumstances:

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

Article 3 of the Convention on the Elimination of All Forms of Discrimination Against Women imposes similar positive obligations on State Parties to ensure the advancement of women.<sup>7</sup>

Article 4 highlights the permissibility of special measures to accelerate the process of advancing equality:

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<sup>7</sup> Article 3: State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, 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.

1. Adoption by State 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.

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

The Convention on the Rights of Persons with Disabilities also clarifies that specific measures aiming at accelerating or achieving equality are not considered discrimination (article 5.1).

## *2.2. Conceptual framework*

States around the globe have used affirmative actions as a means of redressing structural inequality profusely. They have been the object of scrutiny by academics, legislators, policy-makers and the public. They have also been addressed by bodies belonging to regional organisations and the United Nations in attempts to standardise practices or assess their compatibility with international standards. However, there is no generally accepted legal definition of special measures at national or international level, despite relevant initiatives.

At United Nations level, the now defunct Sub-Commission on the Promotion and Protection of Human Rights appointed an expert, Marc Bossuyt, as Special Rapporteur to prepare a study on the concept of affirmative action in 1998. His final report, submitted in 2002, outlines the concept

of affirmative action, the criteria to justify their design and implementation and different forms of affirmative action.<sup>8</sup>

The Special Rapporteur started by adopting the following working definition of affirmative action:

Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.<sup>9</sup>

The approach of the Special Rapporteur focused on the criteria to identify the groups sufficiently disadvantaged to deserve special treatment, emphasising the need of a sufficient connection between the aim sought with affirmative actions and the means to achieve such purpose. The report also highlights ‘the importance of not basing affirmative action solely on group membership, but of taking other factors, such as socio-economic factors into account to verify if someone qualifies for affirmative action’.<sup>10</sup> As for the grounds justifying the introduction of affirmative actions for specific groups, Marc Bossuyt listed the following: a) remedying or redressing historic injustices; b) remedying social/structural discrimination; c) creation of diversity or proportional group representation; d) social utility generated by increasing the well-being of people; e) pre-emption of social unrest; f) better efficiency of the socio-economic system; and, g) as a means of nation building.

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<sup>8</sup> The concept and practice of affirmative action. Final report submitted by Mr. Marc Bossuyt, Special Rapporteur in accordance with Sub-Commission Resolution 1998/5, UN doc. E/CN.4/SUB.2/2002/21 (2002).

<sup>9</sup> Ibid. Para. 6.

<sup>10</sup> Ibid. Para. 15.

The final outcome has been criticized for its formalistic approach, the emphasis on meritocracy, the disregard for the impact of historic discrimination in present generations and the neglect towards updating the meaning of equality sought with the 2001 Durban Conference.<sup>11</sup>

In the context of the Convention it monitors, CERD has articulated the most complete definition of the meaning of special measures. According to this Committee:

“Measures” includes the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life of disfavoured groups, devised and implemented on the basis of such instruments.<sup>12</sup>

In the jargon of the United Nations Organisation, the term ‘special’ refers to the temporary nature of any measure that is meant to be removed once the objective aimed with its implementation is achieved. The time and objective-bound nature of special measures is implied in the word ‘special’. Contrary to the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women includes the redundant expression ‘temporary special measures’ in its article 4.2 reproduced above. This probably explains that, in its General Comment No. 25, CEDAW distinguishes the meaning of ‘temporary’ from ‘special’,

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<sup>11</sup> Romany, C; Chu, J.B. Affirmative action in international human rights law: a critical perspective of Its normative assumptions. 36 *Connecticut Law Review* (2004) P. 859 & 860.

<sup>12</sup> General Recommendation No. 32 – The meaning of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/GC/32, 24 September 2009) Para. 13. See also CEDAW General Recommendation No. 25 on Temporary Special Measures (2004) Para. 22.



relating ‘temporary’ to their provisional nature and ‘special’ to the specificity of the goal they aim to achieve.<sup>13</sup>

CEDAW and CERD have been the most prolific human rights mechanisms in addressing affirmative actions, as can be expected from the bodies monitoring treaties containing express provisions on affirmative actions and the many years they have been in operation. Still, other treaty-bodies have also engaged with the issue. Already in 1981, the Human Rights Committee - monitoring the implementation of the Covenant on Civil and Political Rights<sup>14</sup> - concluded that its articles 2.1 (prohibition of discrimination), 3 (equality between women and men) and 26 (equality before the law) ‘requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights’.<sup>15</sup>

The attempts of treaty-bodies to provide definitions of special measures have been mostly linked to advancing effective equality as primary purpose. Special measures are generally conceived as remedial actions to address the substantial discrimination suffered by certain groups. The Committee on Economic and Social Rights (CESCR) has adopted a more ambitious stance.<sup>16</sup> In its General Comments No 16 (2005) and No 20 (2009) this body has departed from a more traditional

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<sup>13</sup> CEDAW General Recommendation No. 25 (supra note.12, paras 20-22).

<sup>14</sup> Adopted on 16 December 1966, entry into force 23 March 1976, 999 UNTS 171.

<sup>15</sup> ICCPR General Comment 4, *Article 3: Equality between the sexes* (1981) Para. 2.

<sup>16</sup> CESCR monitors the implementation of the International Covenant on Economic, Social and Cultural Rights, adopted on 13 March 1966, entry into force 3 January 1976, 993 UNTS 3.

interpretation,<sup>17</sup> and has understood affirmative action as a means to suppress conditions that perpetuate discrimination, implying that these measures should tackle the underlying causes of discrimination. Furthermore, CESCR has advanced a conception of special measures that should bring 'disadvantaged or marginalized persons or groups of persons to the same substantive level as others'. In other words, CESCR considers that the objective of such provisions should be the achievement of equality of results, although this interpretation is at odds with the intention of the drafters of the Covenant on Economic, Social and Cultural Rights for whom equality of opportunity constituted the main objective.<sup>18</sup> While both CEDAW and CERD's position is that obligations of States parties towards achieving effective equality are independent of proof of historic discrimination, CEDAW also takes a more progressive view on the objective of affirmative actions and conceives them as a means to transform structural, social and cultural changes underpinning past and current discrimination associating them with equality of results.<sup>19</sup>

### *2.3. Special measures as a distinct category*

It is normal to distinguish affirmative actions or special measures from other measures that share the objective of promoting equality. Special measures are articulated as exceptional with an

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<sup>17</sup> See, for instance, CESCR General Comment No 13, UN doc. E/C.12/1999/10 paragraph 32 or ICCPR General Comment No. 18 on non-discrimination (1990) paragraph 10.

<sup>18</sup> See Teklè, T. An international perspective on affirmative action. In: Dupper, O; Sankaran, K. (eds.) *Affirmative action, a view from the global South*. Stellenbosch: Sun Press, 2014. P. 113.

<sup>19</sup> See Chinkin, C. The CEDAW Committee and violence against women. In: Fariior, S. (ed.) *Equality and non-discrimination under international law*. London/New York: Routledge, 2017. P. 369; Teklè (supra note 18) P. 99-100.

autonomous meaning and serving a specific function. The successful implementation of special measures is theoretically assessed by becoming unnecessary, when the goal sought with their introduction is achieved.<sup>20</sup> As explained by CERD, they are thus allegedly different from the positive obligation imposed on States 'to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction'.<sup>21</sup> The temporary nature of special measures also distinguishes them from permanent rights enjoyed by specific categories of persons or community such as minorities or indigenous peoples.<sup>22</sup> CEDAW adopts the same approach in its General Recommendation No. 25 to clarify the relationship between paragraphs 1 and 2 of article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women. Using the words of CEDAW:<sup>23</sup>

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

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<sup>20</sup> CERD General Recommendation No. 32 (supra note 12 paras 12 and 13). See also general comments of the Human Rights Committee regarding the implementation of the International Covenant on Civil and Political Rights: ICCPR General Comment No. 18 on non-discrimination (1990) Para. 173 and ICCPR General Comment No. 25 on the right to participate in public affairs, voting rights and the right to equal access to public services (1996) Para. 23. For an early reminder of the obligation contained in the Convention, see CEDAW General Recommendation No. 5 (1988).

<sup>21</sup> CERD General Recommendation No. 32 (supra note 12 para. 14).

<sup>22</sup> Ibid. Para. 15.

<sup>23</sup> CEDAW General Recommendation 25 (supra note 12 paras. 15 and 16).

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 temporary nature.

However, the measures referred to in article 4.2 provide for different treatment of women and men based on biological differences that are, therefore, permanent unless scientific or technological advances warrant review of this position.<sup>24</sup>

The attempts to formulate different conceptual frameworks for temporary special measures and permanent positive obligations based on characteristics of persons belonging to a group reveals that boundaries are blurred, and the theoretically distinct categories can apply to a wide variety of situations. This is reflected in the language used in the 2009 General Comment of the Committee on Economic, Social and Cultural Rights (ICESCR), when it states that:

In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.<sup>25</sup>

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<sup>24</sup> Ibid. Paras 15 and 16.

<sup>25</sup> ICESCR General Comment No. 20, Non-discrimination in economic, social and cultural rights (article 2.2. of the International Covenant on Economic, Social and Cultural Rights) UN doc. E/C.12/GC/20 para. 9.

The Committee on the Rights of the Child also refers at times to ‘affirmative measures’. However, the Committee normally refers to steps to ensure that children gain the facto enjoyment of their rights, such as education and health, rather than measures aiming at achieving ‘equality’.

#### *2.4. Conditions and beneficiaries*

Treaty bodies have laid out the conditions that special measures should meet in order to remain compatible with the principle of non-discrimination. They must aim at achieving the objectives and purposes protected by the relevant human rights treaty. Their duration in time is subjected to accomplishing the objective pursued with their creation, and therefore they must be temporary.<sup>26</sup> Committees have rarely expressed concern about the longevity of special measures,<sup>27</sup> but have insisted that their temporary nature implies the need to follow-up, which in turn, requires revision of the data justifying their introduction in the first place.<sup>28</sup>

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<sup>26</sup> CERD General Recommendation XIV (March 1993) UN doc A/48/18; CERD General Recommendation XXX on discrimination against non-citizens (2005) paragraph 4; CESCR General Comment No. 19 (1999) paragraph 32; CESCR General Comment No. 16, Article 3L The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (2005) Paras 10, 15, 21, 35 and 36.

<sup>27</sup> See UN doc. A/HRC/28/81 (2015) summarising the expert presentation and initial discussion on the topic of ‘Special measures, including affirmative or positive measures, strategies or actions, to prevent, combat and eradicate all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance. Section B. Para. 44.

<sup>28</sup> See Pastor Murillo Martínez, E. Affirmative action measures or special measures: for redressing historical injustices and structural discrimination against Afro-descendants’. *Summary of the 10<sup>th</sup> Session of Afro-Descendants Work Team*. Geneva, March 2011. P. 6.

In designing special measures, States must assess the socio-economic and cultural status of different groups in the population and their participation in the development of the country. This assessment must be based on disaggregated data, incorporating a gender perspective, by race, colour, descent and ethnic or national origin.<sup>29</sup> Beneficiaries of the special measures should be consulted and have an active role regarding their design and implementation. In all cases the special measures should be tailored to the situation they are trying to change, necessary in a democratic society and should respect the principles of fairness and proportionality.

The identification of the beneficiaries of special measures must be based on structural disadvantage, as proven by reliable disaggregated data. Three specific human rights treaties identify as potential beneficiaries of affirmative actions people suffering from racial discrimination, women and persons with disabilities. The identification of other groups depends on the economic, social and cultural realities of concerned countries and regions, a task that is normally left to the legislator.<sup>30</sup> Therefore, while committees have identified beneficiaries of special measures in their jurisprudence resulting from individual communications and the review of country reports, it is unusual they do so for all communities fitting a specific category universally.

Over time, treaty bodies have started identifying groups that deserve to be beneficiaries of special measures worldwide. This approach can be found for the first time in the 1994 Human Rights Committee's General Comment on persons belonging to minorities.<sup>31</sup> Under the expression

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<sup>29</sup> CERD General Recommendation No. 32 (supra note 12, para. 17).

<sup>30</sup> The concept and practice of affirmative action (supra note 8, para. 9).

<sup>31</sup> CCPR/C/21/Rev.1/Add.5 (1994).

‘positive measures’ both general obligations of the state and temporary special measures are addressed as a tool to advance the material equality of minority groups and persons belonging to minorities. In 2002, CERD reaffirmed, in its General Recommendation No. 29, that States had to adopt special measures as one of the tools to eliminate descent-based discrimination and remedy its consequences. The vagueness of the disadvantaged groups under consideration, ‘minorities’ and descent-based communities, probably facilitated this approach.

There is evidence of a growing consensus on the need of affirmative action at universal level regarding specific groups identified by treaty bodies. In 2011, CERD called for the adoption of urgent special measures around the globe and to educate and raise the awareness of the public on their relevance in addressing structural discrimination that affects people of African descent.<sup>32</sup> A few years earlier, the same Committee advocated such measures for Roma populations.<sup>33</sup> CEDAW has also identified rural women, in particular landless rural women, as a group that needs to be addressed and prioritised in the design and implementation of special measures globally.<sup>34</sup> CEDAW also addresses special measures, albeit superficially, in its general recommendations on older women and on disabled women.<sup>35</sup>

Among Charter bodies, and in contrast with the general fragmented approach of Special Procedures to special measures, several mandate holders have considered Afro-descendent

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<sup>32</sup> See CERD/C/CG/34 (2011) Paras 7, 18-20, 25, 45, 59 and 64.

<sup>33</sup> CERD General Recommendation No. 27 (2000) Paras 28, 29 & 41.

<sup>34</sup> CEDAW General Recommendation No. 35, CEDAW/C/CG/34 (2016) Paras 4, 17(b), 20, 21, 57, 78(d) and 94.

<sup>35</sup> CEDAW General Recommendations No.18 (1991) and No. 27 (2010) respectively.

persons as a deserving beneficiary group worldwide.<sup>36</sup> Unsurprisingly, the Working Group of Experts on People of African Descent has been the most vocal in supporting affirmative actions for this collective, advocating specifically for the always controversial introduction of quotas. For instance, the Working Group considered the adoption of the *Quota law* by Brazil in 2012 ‘a landmark step towards equality in education’ and recommended the provision of sufficient support to enact legislative measures ‘for further affirmative action, particularly in creating quotas in government’.<sup>37</sup> The Working Group has expressed its strong stance in favor of:

...an action plan that will include special measures- such as the full span of legislative, executive, administrative, budgetary and regulatory instruments at every level in the State apparatus, as well as plans, policies, programs and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavored groups, devised and implemented on the basis of such instruments.<sup>38</sup>

The Working Group on People of African Descent has articulated guidelines on conditions to be met by special measures. They should be part of ‘goal-directed programs’ aiming at alleviating

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<sup>36</sup> Information and relevant links to the work of the current Special Procedures can be found at the Website of the Office of the High Commissioner for Human Rights at: <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx>

<sup>37</sup> Report of the Working Group of Experts on People of African Descent on its mission to Brazil (4-14 December 2013) UN doc. A/HRC/27/68/Add.1 (2014) Para. 107b and e). See also Chapter 5 by Baez in this volume.

<sup>38</sup> See: Perspectives of the Working Group on positive action, presentation by Monorama Biswas, 10th session of the Working Group of Experts on People of African Descent (28th March-1 April 2011), available at [www2.ohchr.org/english/issues/racism/groups/african/docs/WGPAD\\_10th\\_AUV.doc](http://www2.ohchr.org/english/issues/racism/groups/african/docs/WGPAD_10th_AUV.doc)



and remedying disparities in the enjoyment of human rights, targeted narrowly to avoid the perception or actual introduction of reverse discrimination. The operationalisation of such programmes is envisaged as follows:

- a. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.
- b. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.
- c. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.
- d. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, color, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.

- e. State parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.<sup>39</sup>

Other mandate holders in charge of special procedures have been more ambiguous in their approach, issuing scattered recommendations regarding the convenience of adopting special measures, without providing clear details. For instance, the Special Rapporteur on violence against women, has recommended the United Kingdom to adopt special measures in line with the recommendations of CEDAW, to accelerate de facto equality between men and women in the country as a whole, as well as the full implementation of Security Council Resolution 1325 (2000) in Northern Ireland.<sup>40</sup> The Special Rapporteur on the right to education has reminded states about the relevance of special measures targeted at vulnerable groups, such as enrolment quotas or financial objectives.<sup>41</sup> Similarly, the Special Rapporteur on the rights of indigenous people has emphasised the pertinence and necessity of adopting special measures to overcome discrimination against indigenous peoples.<sup>42</sup> The Working Group on African Descent has also been more specific than other special procedures when directing recommendations to specific countries. For instance, it has called on the United Kingdom to introduce special measures aiming at empowering people of African descent to be represented in political structures such as

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<sup>39</sup> Ibid.

<sup>40</sup> Report of the Special Rapporteur on violence against women. Mission to the United Kingdom and Northern Ireland (30 March-15 April 2014), UN doc (2015) Paras. 81 and 107.

<sup>41</sup> UN doc. A/HRC/17/29, 2011. Para. 6.

<sup>42</sup> UN doc. A/69/267 Paras 23-29 and 85.

Parliament.<sup>43</sup> Also in relation to the United Kingdom, the Special Rapporteur on violence against women has underlined the need for special measures that recognised that women were disproportionately affected by violence, inequality and discrimination.<sup>44</sup>

The Universal Periodic Review is the newest UN human rights mechanism. Since it became operative in 2008, the topic of affirmative actions has become increasingly present among the recommendations that states issue to each other.<sup>45</sup> By March 2019, forty four States under review have received recommendations on affirmative action mainly concerning the situation of women, indigenous peoples and minorities. It is remarkable that nearly all recommendations were accepted.<sup>46</sup>

The overall picture emerging from the recommendations and general comments of UN human rights treaty bodies and charter bodies is one of increasing relevance of special measures. UN human rights mechanisms have progressively shifted their attention from individual cases

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<sup>43</sup> UN doc. A/HRC/24/52/Add.1 (5 August 2013) Paras. 85, 90-92 and 97.

<sup>44</sup> UN doc. A/HRC/29/27/Add.2 (19 May 2015) Para. 106.

<sup>45</sup> On this mechanism see Domínguez-Redondo, E. The Universal Periodic Review of the Human Rights Council: an assessment of the first session. 7, 3 *Chinese Journal of International Law* (2008) P. 721.

<sup>46</sup> Argentina, Australia, Azerbaijan, Belize, Bhutan, Botswana, Brazil, Bulgaria, Canada, Costa Rica, Czechia, Dominican Republic, Ecuador, Germany, Ghana, Guyana, Haiti, Hungary, Iceland, Japan, Kazakhstan, Kenya, Libya, Macedonia, Maldives, Malta, Marshall Islands, Mauritius, Mexico, Mongolia, Paraguay, Peru, Salomon Islands, Sierra Leone, Slovakia, South Africa, Switzerland, Thailand, Tonga, Turkey, Turkmenistan, Ukraine, Vanuatu and Zambia. See database available at upr\_info Website at <https://www.upr-info.org/database/> under 'text search' using terms 'temporary special measures', 'affirmative action' and 'affirmative actions'.

towards addressing more structural factors determining inequality in the enjoyment of human rights. A growing consensus on the need to introduce special measures to achieve equality is particularly noticeable in relation to women and people of African descent. This development seems concomitant to the progressive acceptance of an autonomous right to 'equality' rather than its understanding as a principle underpinning the human rights agenda or instrumental to the enjoyment or reinforcement of other rights, although the scope and concrete meaning of such autonomous right remains controversial.<sup>47</sup>

### **3. United Nations Treaty Bodies Approach to Special Measures in the UK, Latin America, South Africa, China and India**

When States ratify core human rights treaties they are under the obligation to report periodically to the relevant committee on the steps they have taken to comply with the provisions of the concerned treaty. These periodic national reports are examined by the treaty bodies taking into account other relevant information and engaging in a dialogue with the country under examination. At the end of this process, the relevant treaty body adopts 'concluding observations' that contain recommendation on which measures the State party should adopt to improve the implementation of its international obligations. In their task of assessing the performance of states vis-à-vis human rights compliance through periodic country reports, treaty bodies have frequently referred to special measures. Among them, CEDAW has been the most prolific

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<sup>47</sup> Anne Bayefsky, A. The Principle of Equality or Non-Discrimination in International Law. 11, 1-2 *Human Rights Law Journal* (1990) P. 1.

committee in evaluating the introduction of special measures by countries.<sup>48</sup> The following sections outline the main conclusions and recommendations issued by treaty bodies on this issue regarding the countries covered by this book, using the most salient examples between 2014 and March 2020. In those conclusions and recommendations, treaty bodies commend the introduction of special measures, including quotas, or recommend their adoption or expansion. There is also confirmation about a growing consensus regarding the ‘universal’ beneficiaries of affirmative actions. Women, indigenous peoples and persons of African-descent are the most likely to be named as the beneficiaries of the special measures recommended by the different committees.<sup>49</sup>

### *3.1. United Kingdom of Great Britain and Northern Ireland*

The United Kingdom of Great Britain and Northern Ireland (UK) has ratified all core human rights treaties except the Convention for the Protection of All Persons from Enforced Disappearances and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Several committees have issued recommendations on special measures, as a result of the examination of the periodic report. In 2013, CEDAW expressed its concern at the failure of the UK to introduce further special measures to address the underrepresentation of women in decision-making positions and the continuous use of the

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<sup>48</sup> The compilation of such concluding observations covering the period between 1994 and 2001 can be found in the *United Nations Human Rights Treaties* Website maintained by Prof. Bayefsky at <http://www.bayefsky.com/bytheme.php/index/theme>

<sup>49</sup> Examples of some of the recommendations of CEDAW and CERD covering other countries of the world can be found in Dominguez Redondo, E. (supra note 2).

'Voluntary Search Code' despite the recommendations contained in the Lord Davies' report.<sup>50</sup> CESCR has also recommended that the UK adopts effective measures to eliminate the gender gap and persistent underrepresentation of women in decision-making positions in the public and private sector.<sup>51</sup> Similarly, the Human Rights Committee has recommended the UK to consider special measures as part of the efforts to achieve equitable representation of women in the civil service and in the judiciary.<sup>52</sup> In March 2019, CEDAW elaborated further recommending the UK to adopt special measures 'to improve the representation of women, including "Black, Asian and Minority Ethnic" women and women with disabilities, in Parliament, the judiciary and decision-making positions in the foreign service and its diplomatic missions'.<sup>53</sup> It also called for ensuring the implementation of the Sex Discrimination (Northern Ireland) Order 1976 enabling the use of gender quotas.<sup>54</sup> CEDAW also recommended special measures to facilitate access for women belonging to marginalised groups, to the labour market, increasing employment rates and reducing their concentration among low-pay employees.<sup>55</sup>

In 2016, CERD manifested its concern about the shift of the UK towards policies not including special measures. A few months later, and in relation to persons with disabilities, the CRPD has highlighted the insufficient affirmative actions and provision of reasonable accommodation to

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<sup>50</sup> See UN doc. CEDAW/C/GBR/CO/7 (30 July 2013) Paras. 30-31. On the report by Lord Davies see chapter 8 by Nsubuga in this volume.

<sup>51</sup> UN doc. E/C.12/GBR/CO/6 (14 July 2016) Paras. 26-27.

<sup>52</sup> UN doc. CCPR/C/GBR/CO/7, Para. 12.

<sup>53</sup> UN doc. CEDAW/C/GBR/CO/8 (14 March 2018) Para. 38.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* ara. 44.f.

ensure their access to employment on the open labour market, despite the obligations contained in the EU Directive 2000/78/EC on non-discrimination in the workplace.<sup>56</sup>

Overall, the UK's policies on affirmative action have been closely scrutinized internationally in recent years. All the treaty bodies concerned have found shortcomings and recommended that the UK strengthens its special measures to address inequality.

### 3.2. *China and India*

China is a State party of six core human rights treaties, having ratified the Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; the Convention on the Rights of the Child; and the Convention of the Rights of Persons with Disabilities.

A wide range of affirmative action policies characterize the approach of China towards minorities.<sup>57</sup> This may explain that treaty bodies have paid relatively little attention to this issue and when they have, their recommendations have mainly consisted in requests to strengthen the measures already in place. For instance, CERD called upon China, in 2018, to strengthen special measures aiming at ensuring that ethnic groups have equal access to secondary education.<sup>58</sup> The

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<sup>56</sup> UN doc. CRPD/C/GBR/CO/1 (3 October 2017) Para. 56. See also chapter 4 by Howard in this volume.

<sup>57</sup> Castellino, J. Historical evolution and contemporary debates on affirmative action measures in India and China. In: Baez, N; Dominguez Redondo, E. (Eds.) *The existence and efficacy of affirmative action measures in UK, South Africa, India, China, Latin America and Brazil*. Joacaba: Editora UNOESC, 2018. P. 215-236.

<sup>58</sup> UN doc. CERD/C/CHN/CO/14-17 (19 September 2018) Para. 24.

same committee also encouraged the expansion of special measures targeting ethnic minorities with the objective of reducing the high level of poverty and related inequality affecting those groups.<sup>59</sup> CESCR has urged the country to strengthen the effectiveness of job quotas to promote the integration of persons with disabilities into the labour market,<sup>60</sup> while CEDAW has lamented the insufficient use of special measures, in particular to enhance the rights of ethnic religious minority women and women with disabilities.<sup>61</sup> CEDAW has also recommended the adoption of more prescriptive affirmative action measures such as quotas to accelerate women's participation in political and public life through elected and appointed bodies.<sup>62</sup>

Except for the treaties on torture, disappearances and migrant workers, India has ratified all the core human rights treaties. Most treaty bodies and charter bodies addressing India have focused on the discrimination faced by minorities and against scheduled castes and tribes. Similarly to China, the UN human rights bodies in general and treaty bodies in particular, have not given special importance to special measures when assessing the human rights situation in the

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<sup>59</sup> Ibid. Para. 19.

<sup>60</sup> UN doc. E/C.12/CHN/CO/2 (13 June 2014).

<sup>61</sup> UN doc. CEDAW/C/CHN/CO/7-8 (14 November 2014) Paras 22, 23, 31, 52, 53 and 59.

<sup>62</sup> Ibid.



country.<sup>63</sup> Affirmative action policies have merited little assessment, despite their prominence in the domestic agenda.<sup>64</sup>

Against this background, some references to affirmative action policies can be found in the limited jurisprudence of treaty bodies addressing India in the past six or seven years. In September 2019, the first concluding observations, issued by the CRPD concerning India, noted the lack of implementation of the domestic legislation establishing a 4 per cent quota in employment for persons with disabilities.<sup>65</sup> Additionally, CRPD urged the country to ‘promote the participation of persons with disabilities in political life and in public decision-making processes at all levels, including through affirmative action measures’.<sup>66</sup> In its latest concluding observations to India, issued in 2014, CEDAW recommended that officials become familiar with special measures and to encourage their application to achieve a higher number of girls enrolled in secondary and tertiary education. Additionally, it called for actions to increase the number of women in the judiciary, through a quota system for recruitment.<sup>67</sup> Finally, India was urged

to adopt effective measures in the formal labour market, including temporary special measures, to increase female participation, to narrow and close the wage gap between

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<sup>63</sup> As reflected on the Compilation of UN documents prepared by the Office of the High Commissioner for Human Rights for the latest cycle of the Universal Periodic Review at the time of writing this pages, available in UN doc. A/HRC/WG.6/27/IND/2 (22 February 2017).

<sup>64</sup> Castellino (supra note 57).

<sup>65</sup> UN doc. CRPD/C/IND/CO/1 (29 October 2019) Para. 56

<sup>66</sup> Ibid. Para. 58.

<sup>67</sup> UN doc. UN doc. CEDAW/C/IND/CO/4-5 (24 July 2014) Paras 19 and 20.

women and men and to ensure the application of the principle of equal pay for work of equal value, in addition to equal opportunities at work.<sup>68</sup>

### *3.3. Central America*

As in the rest of Latin-America, Central American countries have ratified all, or almost all, core international human rights instruments. Belize and Honduras are State parties of all them. Guatemala, El Salvador and Nicaragua have ratified all treaties except the Convention on Enforced Disappearances. Costa Rica and Panama have ratified all core human rights treaties save for the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

During the period under examination in this chapter (January 2014-March 2020) Belize only received relevant recommendations from the Human Rights Committee,<sup>69</sup> calling for the enhancement of efforts to achieve the equal representation of women and men in political and public life, including through the introduction of special measures such as quotas.<sup>70</sup>

Contrary to Belize, Honduras has been scrutinised closely by several treaty bodies in recent years. UN human rights mechanisms have addressed the ground-breaking policies adopted by Honduras to achieve substantial equality, some of them following international pressure coming from UN

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<sup>68</sup> Ibid. Para. 29.

<sup>69</sup> Concluding observations issued by the Committee on Migrant Workers (CMW) in 2014 do not address the issue of special measures, see UN doc. CMW/C/BLZ/CO/1 (26 September 2014).

<sup>70</sup> UN doc. CCPR/C/BLZ/CO/1/ADD.1 (11 December 2018) Para. 17.

human rights bodies.<sup>71</sup> This includes ‘The Gender Equality and Equity Plan for 2010–2022’ (*Plan de Igualdad y Equidad de Género 2010–2022*, adopted in 2010); ‘The Public Policy on the Rights and Social Inclusion of Persons with Disabilities in Honduras’ (*Política pública para el ejercicio de los derechos de las personas con discapacidad y su inclusión social en Honduras*, adopted in 2013); ‘Comprehensive Services and Inclusion of Persons with Disabilities Act’ (*Ley de Fomento y Desarrollo para la Atención Integral e Inclusión de las Personas con Discapacidad*, 2013); ‘The Honduran Sign Language Act’ (*Ley de la Lengua de Señas Hondureña (LESHO)*, 2014); and, ‘Public Policy against Racism and Racial Discrimination for the Comprehensive Development of Indigenous and Afro-Honduran Peoples 2016–2022’ (Decreto Ejecutivo PCM-02-2016 *Política Pública contra el Racismo y la Discriminación Racial para el Desarrollo Integral de los Pueblos Indígenas y Afrohondureños*, 2016).

In light of the impetus given to anti-discrimination through the normative and policy framework outlined above, treaty bodies have focused on its effective implementation. Their recommendations are not usually very concrete and, as such, defy measurement and follow-up. For instance, CERD has requested Honduras to adopt special measures to terminate the structural discrimination suffered by indigenous and Afro-Honduran peoples.<sup>72</sup> The Human Rights Committee suggested special measures as part of the efforts to increase the presence of women

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<sup>71</sup> For instance, in 2016, CESCR highlighted the lack of a comprehensive anti-discrimination framework in Honduras, naming particularly discrimination against indigenous peoples, Hondurans of African descent, persons living with HIV/AIDS and discrimination on the grounds of sexual orientation and gender identity  
UN doc. CESCR/C.12/HND/CO/2 (11 July 2016)

<sup>72</sup> UN doc. CERD/C/HND/CO-6-8 (14 January 2019) Para. 17.

in political and public life.<sup>73</sup> CRPD has expressed concern about the Honduran failure to monitor compliance with employment quotas in the public sector.<sup>74</sup>

CEDAW has concluded that Honduras lacks adequate understanding of affirmative actions to achieve substantive equality between men and women. It has deplored the absence of special measures beyond electoral quotas, especially to address discrimination against women belonging to communities of African descent, from rural areas or women with disabilities as well as intersectional discrimination against indigenous women.<sup>75</sup> This Committee has recommended special measures to increase the participation of women in political and public life, naming in particular positions in the National Congress and other decision-making posts in governmental institutions.<sup>76</sup> It called upon the State to ‘ensure that legislated quotas of 50 per cent representation of women are fully implemented in all elections at the national and local levels’. CEDAW also recommended the adoption of a bill on harassment and political violence towards women, enforcement of laws on gender equality, freedom from violence and discrimination against women in political and public life. Finally, CEDAW has recommended ‘softer’ measures including awareness activities on the importance of the participation of women in decision-making for society as a whole.<sup>77</sup>

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<sup>73</sup> UN doc. CCPR/C/HND/CO/2 (22 August 2017) Para. 13.

<sup>74</sup> UN doc. CRPD/C/HND/CO/1 (4 May 2016) Para. 57.

<sup>75</sup> UN doc. CEDAW/C/HND/CO/7-8 (25 November 2016) Paras 18 and 19.

<sup>76</sup> Ibid. para. 27. See also UN doc. CEDAW/C/HND/CO/6 (10 August 2007) Para. 23.

<sup>77</sup> UN doc CEDAW/C/HND/CO/7-8 (25 November 2016) Para. 27.

Guatemala has also been subjected to intense monitoring by treaty bodies in the past five years. In May 2019, CERD recommended the State to adopt special measures aimed at eliminating structural discrimination against indigenous people, as part of a national policy to combat racial discrimination.<sup>78</sup> A year earlier, the Human Rights Committee called upon Guatemala to increase the representation of women, indigenous persons and persons of African descent in political and public life, using, among others, special measures such as quotas.<sup>79</sup> CEDAW has been more specific in recommending the adoption of:

...sustained measures, including temporary special measures, such as amending the Election and Political Parties Act to introduce statutory quotas for women's representation in elected and appointed decision-making positions, enforcing the alternation of men and women for the nomination of candidates within political parties and providing financial incentives to political parties with an equal number of women and men at equal ranks on their electoral lists.<sup>80</sup>

Uncharacteristically, CRPD uses the terminology 'special measures' when recommending their introduction by Guatemala 'to eliminate the particular disadvantages faced by indigenous women, children and older persons with disabilities who have been abandoned or live in extreme poverty.'<sup>81</sup> The Committee also recommended special measures under the terminology 'remedial

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<sup>78</sup> UN doc. CERD/C/GTM/CO/16-17 (27 May 2019) Para. 14.

<sup>79</sup> UN doc. CCPR/C/GTM/CO/4 (7 May 2018) Para. 9.

<sup>80</sup> UN doc. CEDAW/C/GUA/CO/8-9 (22 November 2017) Para. 27; see also Paras 16, 17, 33 and 35. See also UN doc. CEDAW/C/GUA/CO/7 (12 February 2009) Para 26.

<sup>81</sup> UN doc. CRPD/C/GTM/CO/1 (30 September 2016) Para 66.

measures' and 'affirmative actions' to address discrimination of women and girls with disabilities,<sup>82</sup> and access to employment.<sup>83</sup>

Treaty bodies' recommendations on special measures addressed to El Salvador have also focused on women, indigenous people and Afro-descent communities. While CEDAW has welcomed the introduction of quotas on electoral lists for women in relation to elected positions in political parties since 2013, both this Committee and the Human Rights Committee has expressed concern about the limited participation of women in political and public life and their underrepresentation in decision-making positions.<sup>84</sup> CERD has also highlighted the regulation deficit regarding special measures for indigenous women and women of African descent.<sup>85</sup>

The use of special measures is normally recommended as part of a range of anti-discrimination actions the State should introduce in addressing inequality. The language used by CRPD in its concluding observation on El Salvador is exceptional. The Committee has recommended not only the establishment of affirmative measures, with quotas to increase the number of persons with disabilities in the labour market in the public and private sector, especially women with disabilities. It has also called for the imposition of sanctions for non-compliance.<sup>86</sup>

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<sup>82</sup> Ibid. Para 20.

<sup>83</sup> Ibid. Paras 63 and 64.

<sup>84</sup> UN docs. CCPR/C/SLV/CO/7 (9 May 2018) Paras. 11 and 12; and CEDAW/C/SLV/CO/8-9 (9 March 2017) Paras. 20, 21, 31 and 43.

<sup>85</sup> UN doc. CERD/C/SLV/CO/18-19 (13 September 2019) Para. 26.

<sup>86</sup> UN doc. CRPD/C/SLV/CO/2-3 (1 October 2019) Para. 51.

The dramatic deterioration of the situation of human rights in Nicaragua, especially since 2018, has resulted in scarce engagement with international and regional human rights mechanism. Apart from the CMW (in 2016), treaty bodies have not formulated concluding observations on this country.<sup>87</sup>

Having welcomed progress made at national level by Costa Rica in relation to gender equality, CEDAW has recommended the adoption of further special measures at local level to address intersectional discrimination against indigenous women,<sup>88</sup> women of African descent, migrant women, refuge and asylum-seeking women, female heads of households and women with disabilities.<sup>89</sup> The Human Rights Committee has focused on special measures to eliminate the gender gap in decision-making positions.<sup>90</sup> CRPD has called for affirmative measures to raise awareness to promote employment of persons with disability in the private sector as well as effective monitoring of compliance with employment quotas in the public realm.<sup>91</sup>

It is worth highlighting that Costa Rica has received, in February 2020, recommendations on special measures to advance its human rights agenda that were linked to the 2030 Agenda for Sustainable Development.<sup>92</sup> In relation to the Sustainable Development Goals targets 5.1 ('End all

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<sup>87</sup> UN doc. CMW/C/NI/CO/1 (11 October 2016). This report – as it is the general case for the concluding observations issued by CMW - does not report on special measures.

<sup>88</sup> See also UN doc. CERD/C/CRI/CO/19-22 (25 September 2015) Para. 25

<sup>89</sup> UN doc. CEDAW/C/ CR/CO/7 (24 July 2017) Paras. 12, 13, 25, and 41.

<sup>90</sup> UN doc. CCPR/C/CRI/CO/6 (21 April 2016) Para. 16.

<sup>91</sup> UN doc. CRPD/C/CRI/CO/1 (12 May 2014) Para. 56.

<sup>92</sup> UN General Assembly Resolution 70/1, 25 September 2015.

forms of discrimination against women and girls everywhere’) and 10.3 (‘Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and actions in this regard’) Committee of the Rights of the Child (CRC) has recommended the adoption of special measures to strengthen the country’s efforts to eliminate gender stereotypes and remove patriarchal ideologies in education and in the family.<sup>93</sup>

Only the CRPD has issued relevant recommendations on special measures addressed to Panama during the period under examination. After deploring the failure to achieve the 2 per cent quota for persons with disabilities in the labour market, the Committee has called for the implementation of specific strategies to achieve this objective.<sup>94</sup>

#### *3.4. Argentina, Chile, Colombia and Peru*

As explored in Chapter 6, the ratification of international treaties has had an impact on the design and implementation of affirmative actions in Argentina, Chile, Colombia and Peru. All four countries have ratified all nine core human rights treaties, demonstrating a strong commitment to engage with the international human rights machinery.

CESCR has commended Argentina for its National Plan Against Discrimination, but has also expressed concern about its implementation, regretting in particular the failure of the state to meet the quota for the hiring of transsexual persons in the public sector of the Province of Buenos

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<sup>93</sup> UN doc. CRC/C/CRI/CO/5-6 (4 March 2020) Para. 17.

<sup>94</sup> UN doc. CRPD/C/PAN/CO/1(3 September 2017) Paras. 52 and 53.



Aires.<sup>95</sup> Compared with other recommendations and concluding observations regarding special measures, the concision and concrete nature of this statement, referring to the 2015 Act No. 14783, adopted in the Province of Buenos Aires, is remarkable. Also referring to a specific national regulation, CERD has recommended the proper implementation of the Argentinian programme 'Promoting and Raising Awareness of the Rights of the Afro-descendent Community', bearing in mind, inter-alia, its General Recommendation No. 32 on special measures.<sup>96</sup> The concluding observations of CEDAW further demonstrate that committees are able to issue more accurate and detailed evaluations and recommendations when they are addressing specific regulatory frameworks. This Committee has acknowledged the establishment of quotas for the representation of women in the National Congress and trade unions, as well as the bills regarding parity in the participation of women and men in the executive, legislative and judiciary branches of the government. Based on those pre-existing measures, CEDAW has recommended further implementation of special measures at the federal, provincial and municipal levels, establishing specific targets and time frames to accelerate substantive equality of women, mentioning expressly indigenous women, women of African descent, migrant women, older women and women with disability. The Committee has also suggested the regular monitoring and evaluation

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<sup>95</sup> UN doc. E/C.12/ARG/CO/4 (1 November 2018) Paras. 24 and 25.

<sup>96</sup> UN doc. CERD/C/ARG/CO/21-23 (17 January 2017), Para. 7.

of these measures,<sup>97</sup> and implementation of the female union quota established by Act No. 25.674 of 28 November 2002.<sup>98</sup>

Chile has been criticised both by Charter bodies and treaty bodies for the lack of provisions relating to affirmative actions in its 2012 Anti-Discrimination Act.<sup>99</sup> Conversely, CEDAW has commended the normative advances allowing the Ministry for Women and Gender Equity to propose special measures as well as the introduction of a programme for the priority inclusion of gender equality by the Faculty of Physics and Science of the University of Chile, resulting in increased enrolment of girls in the Faculty of Physics.<sup>100</sup> This positive recognition is followed by the standard CEDAW recommendation calling for the introduction of special measures as ‘a necessary strategy to accelerate the achievement of substantive equality in all areas covered by the Convention, in particular in political and public life, where women are underrepresented, and in education and employment, to which migrant and indigenous women have limited access’.<sup>101</sup>

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<sup>97</sup> UN doc. CEDAW/C/ARG/CO/7 (25 November 2016) Paras. 16 and 17.

<sup>98</sup> Ibid. Para. 27. See also Para. 29 (on special measures to accelerate equality for indigenous girls and women as well as to enhance access to education by improving school infrastructure in rural and remote areas). See also, on equality between men and women, UN doc. CCPR/C/ARG/CO/7 (10 August 2016) Para. 8.

<sup>99</sup> See Report of the mission to Chile of the Special Rapporteur on extreme poverty and human rights, UN doc. A/HRC/32/31/Add.1 (8 April 2016), Paras. 36–37. See also CCPR/C/CHL/CO/6 (13 August 2014) Para. 11, and E/C.12/CHL/CO/4 (7 July 2015) Para. 12.

<sup>100</sup> UN doc. CEDAW/C/CHL/CO/7 (14 March 2018) Para. 18

<sup>101</sup> Ibid. Para 19; see also Paras 28 (regarding participation in public and political life) and 33 (on equal access to all levels of education by indigenous girls and women in rural areas).

As to the other countries in this group, Colombia's special measures have been debated by treaty bodies repeatedly. CERD has urged the state to adopt special measures to eliminate structural discrimination against indigenous peoples and persons of African descent.<sup>102</sup> In 2019, CEDAW noted good practices strengthening women's organisations but regretted the absence of special measures aimed at accelerating equality of women in politics, education, employment and health.<sup>103</sup> Therefore, Colombia had yet to comply with the recommendation made by CESCR two years earlier, calling for the adoption of special measures to promote full access by women to education, employment, health care, social security and land.<sup>104</sup> CESCR also recommended affirmative actions to prevent and eliminate the factors that perpetuate structural discrimination against indigenous and Afro-Colombian peoples, in order to improve their enjoyment of economic, social and cultural rights.<sup>105</sup> CRPD has used the terminology 'affirmative actions' and called for their adoption in its latest concluding observations on Colombia.<sup>106</sup>

CEDAW has regretted the failure of Peru to meet existing electoral gender quotas in regional and municipal elections and has recommended the adoption of further special measures to accelerate equality between men and women.<sup>107</sup> CERD has suggested affirmative action measures to

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<sup>102</sup> UN doc. CERD/C/COL/CO/17-19 (22 January 2020) Para. 17

<sup>103</sup> UN doc. CEDAW/C/COL/CO/9 (14 March 2019) Paras. 21 and 22.

<sup>104</sup> UN doc. CESCR/C/COL/CO/6 (19 October 2017) Para. 26.

<sup>105</sup> *Ibid.* Para. 24.

<sup>106</sup> UN doc. CRPD/C/COL/CO/1 (30 September 2016) Para. 61.

<sup>107</sup> UN doc. CEDAW/C/PER/CO/7-8 (24 July 2014) Para. 15

eliminate structural discrimination against indigenous peoples and the Afro-Peruvian population at all levels of the civil service.<sup>108</sup>

### *3.5. Brazil*

Chapter 5 discusses at length the wide range of special measures adopted in Brazil to address structural discrimination affecting women, Afro-Brazilians, indigenous people, persons with disabilities and LGBT persons. The reports of the Brazilian government to the UN human rights machinery demonstrate that this is a source of national pride in terms of human rights achievements.<sup>109</sup> Different human rights bodies have welcomed the quantity and quality of the special measures adopted in Brazil. For instance, following a country visit, the Working Group on People of African Descent declared Brazil 'a leader in affirmative action policies in employment and education for Afro-Brazilians and other marginalized groups'.<sup>110</sup>

Brazil has also ratified - and incorporated into domestic legislation - all core human rights treaties except the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Contrary to other states of the Americas analysed in this book, Brazil has disengaged from cooperating with treaty bodies, and many of its periodic reports are overdue. During the period examined here, only the CRPD published relevant concluding observations

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<sup>108</sup> UN doc. CERD/PER/CO/22-23 (23 May 2018) Para. 13.

<sup>109</sup> See e.g. 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/2' UN doc. A/HRC/WG.6/27/BRA/1 (27 April 2017) Paras. 53-7 (on affirmative actions regarding ethnic-racial equality); and Para. 49 (women representation in popular elections).

<sup>110</sup> UN doc. A/HRC/27/68/Add.1 (23 September 2014) Para. 25.

expressing concern about the low levels of compliance with the quota system by private businesses, and recommending the adoption of measures to remedy the situation.<sup>111</sup>

### 3.6. South Africa

South Africa is a State party of all core human rights instruments except the Convention for the Protection of All Persons from Enforced Disappearances and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Treaty bodies have paid attention to the topic of affirmative actions in several concluding observations aimed at South Africa. In 2018, the CESCR, highlighted the inadequate implementation of the 2 per cent employment quota for persons with disabilities in the private sector and recommended measures to remedy this situation.<sup>112</sup> CRDP has elaborated further on this point, deploring the absence of legislation and policies, including special measures, ‘aimed at addressing multiple and intersecting forms of discrimination against women and girls with disabilities, particularly against black women and girls’. Accordingly, this Committee recommended the design and adoption special measures with the objective of empowering and facilitating the full inclusion of women and girls with disabilities in all spheres of life, addressing multiple and intersecting forms of discrimination.<sup>113</sup>

Referring specifically to the Employment Equity Act 1998 and the Broad-Based Black Economic Empowerment Act 2003, CERD has acknowledged the challenges faced by South Africa to implement affirmative actions to redress inequalities deriving from the *apartheid* era. However, it has also expressed concern at the absence of comprehensive data on the efficiency of special

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<sup>111</sup> UN doc. CRPD/C/BRA/CO/1 (29 September 2015) Paras. 48 and 49.

<sup>112</sup> UN doc. CESCR/C/ZAF/CO/1 (29 November 2018) Paras. 28 and 29.

<sup>113</sup> UN doc. CRPD/C/ZAF/CO/1 (23 October 2018) Paras. 10 and 11; see also Para. 45.

measures in the areas of employment, education and representation in public and political affairs. It also regretted the lack of information on the impact of special measures on indigenous peoples.<sup>114</sup>

#### **4. Conclusions**

The vast majority of countries are State parties of most of the so-called core human rights treaties. The countries covered in this book are no exception. This means that all of them are evaluated periodically by the same international standards and the same monitoring bodies. Through their evaluation of periodic reports, their jurisprudence and their interpretation of provisions of the treaties they monitor, UN human rights treaty bodies are ideally placed to provide an overall picture of the treatment of a specific human rights topic worldwide.

All data examined above confirms former conclusions regarding a growing consensus on the need of special measures among international human rights mechanisms, especially, policies and rules aimed at women and people of African-descent as well as persons with disabilities and, to a lesser degree, indigenous people. It also confirms that treaty bodies' examination of periodic reports is more useful as compilation of data regarding the compliance of States with international human rights standards than as appraisers of the effective implementation of remedies. Treaty bodies do not seem to follow their own advice when issuing recommendations on special measures. With the notable exception of the concluding observations published by CEDAW, recommendations are mostly ambiguous, unmeasurable and not associated with a specific timeline for their

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<sup>114</sup> UN doc. CERD/C/ZAF/CO/1 (5 October 2016) Paras. 14 and 15.

implementation. This is a common feature to all treaty body recommendations.<sup>115</sup> It has been suggested that the strength of treaty bodies lies not in their final assessment and role in promoting implementation of their recommendations but 'in providing states with learning opportunities and an accurate overview of their internal situation'.<sup>116</sup>

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<sup>115</sup> See e.g. Krommendijk, J. The (in)effectiveness of UN human rights treaty body recommendations. 33, 2 *Netherlands Quarterly of Human Rights* (2015) P. 194.

<sup>116</sup> Carraro, V. Promoting compliance with human rights: the performance of the United Nations' Universal Periodic Review and Treaty Bodies. 63, 4 *International Studies Quarterly* (2019) P. 1079.