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SPECIAL MEASURES UNDER THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

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RESUMEN:

El texto de la Convención para la Eliminación de todas las formas de Discriminación Racial (ICERD, por sus siglas en inglés) resalta dos aspectos acerca de las "medidas especiales" (también conocidas como "acción afirmativa"). En primer lugar, deja claro que tales medidas cuando se toman con el fin de asegurar un avance adecuado de los grupos étnicos con desventajas raciales, no constituyen discriminación racial en virtud de la Convención. En segundo lugar, establece que los Estados Partes están obligados a adoptar medidas especiales "cuando las circunstancias lo justifiquen". Esta contribución examina de cerca el tratamiento de la Convención de las medidas especiales, con especial atención a la recomendación general adoptada por el Comité para la Eliminación de la Discriminación Racial al respecto.

ABSTRACT:

The text of the Convention for the Elimination of All Forms of Racial Discrimination (ICERD) says two things about "special measures" (also sometimes referred to as "affirmative action"). First, it makes clear that such measures, when taken for the purpose of securing adequate advancement of disadvantaged racial of ethnic groups, do not constitute prohibited racial discrimination under the Convention. Second, it establishes that the States Parties are required to adopt special measures "when the circumstances so warrant." This contribution closely examines the Convention's treatment of special measures, with particular attention to the General recommendation adopted by the Committee for the Elimination of Racial Discrimination on the subject.

PALABRAS CLAVE: *Discriminación, raza, Estado*

KEYWORDS: *Discrimination, race, State*

My remarks shall focus on the treatment of «special measures» in the Convention for the Elimination of All Forms of Racial Discrimination, as well as in the practice of the Committee for the Elimination of Racial Discrimination. The Committee's practice is reflected in its Concluding Observations and in its General Recommendation No. 32, titled «The meaning and scope of special measures in the Convention on the Elimination of Racial Discrimination. » In theory, the Committee might also have occasion to address special measures in Individual Communications against States parties that have opted into this procedure under Article 14 of the Convention. However, to date the Committee has not addressed, in its decisions on individual communications, whether a State's decision to employ special measures, or its failure to do so, amounts to a breach of the Convention.

Before turning to the Convention's text, let me address a terminological point. The Convention uses the term «special measures»

to describe a concept that is sometimes referred to by other terms, such as «affirmative action, » «affirmative measures, » or «positive measures. » But the meaning of these terms in certain legal systems can be different from the meaning in the Convention. For example, in the United States, the term «affirmative action» is generally – though not always – used to describe programs that draw distinctions along racial or ethnic grounds in order to benefit disadvantaged groups. As I will discuss later, «special measures» is a broader term that includes these sorts of programs, but also programs that seek to improve the position of disadvantaged groups by other means. Although the committee occasionally uses these other terms, especially «affirmative action, » our preference, for the purpose of clarity, is to stick to the wording of the Convention. There is one term that we definitively reject: the term «positive discrimination. » This phrase, we have said, is a contradiction in terms, since all racial discrimination is prohibited by the Convention and therefore cannot be «positive. » The term «reverse discrimination» is more complicated should be used cautiously, if at all. A measure pursued by a State party could in theory amount to reverse discrimination -- if it fails to satisfy the conditions set forth in the Convention for using special measures. If a measure does satisfy the Convention's conditions, then the measure does not amount to discrimination, and hence is not reverse discrimination.

Let me turn now to the Convention's text. The Convention mentions special measures in two provisions: article 1, section 4, and article 2 section 2. Article 1 defines racial discrimination, which is prohibited by the Convention, and section 4 makes clear that special measures ordinarily do not constitute prohibited racial discrimination. Specifically, Article 1, section 4 provides that «Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. »

Article 1, section 4 should be understood as a clarification of the definition of «racial discrimination» in Article 1, section 1. Section 1 defines racial discrimination as «distinction[s], exclusion[s], restriction[s] or preference[s] based on race, colour, descent, or national or ethnic origin. » Since special measures sometimes take the form of «preferences» based on race or ethnicity, they might be thought to be barred by Article 1, section 1. Section 4, however, makes it clear that such preferences are not barred if they are adopted to secure the adequate advancement of groups requiring such protection, and if other conditions are satisfied. One might think that section 4 is an exception to the broad prohibition of racial preferences. The Committee, however, views section 4 as instead a clarification of the meaning of section 1. Section 1 does not prohibit all preferences, but only those preferences «which ha[ve] the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. » The Committee elaborated on this definition in its General Recommendation 14, in which we observed that «differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate. » Article 1, section 4 should be understood to clarify that preferences

adopted for the purpose of securing the advancement of disadvantaged groups serve a legitimate purpose, and, if they meet the other conditions set forth in Article 1, section 4, they do not violate the Convention.

What are the conditions that determine the validity of special measures?

Article 1, section 4 refers to special measures taken for the «sole purpose» of securing the advancement of disadvantaged groups. According to the Committee's General Recommendation 32, the «sole purpose» language «limits the scope of acceptable motivations for special measures within the terms of the Convention. » This raises potentially difficult questions when racial preferences are adopted for multiple purposes. For example, in some countries, racial preferences in university admissions are justified on the ground that it is important for the educational mission to expose students to a diverse range of viewpoints. The achievement of diversity would appear to be a motivation distinct from securing the advancement of disadvantaged groups. One might say that ensuring that the voices of disadvantaged minorities are heard in the university setting does help secure the advancement of these groups, but this is not their «sole purpose. » The theory is that such diversity also helps improve the education of students who are not members of these groups. Do racial preferences adopted for the purpose of achieving diversity run afoul of the limitations of Article 1, section 4, because they are not taken for the «sole purpose» of securing the advancement of disadvantaged groups? The Committee's General Recommendation does not addressed this point, but its practice does not suggest that special measures are problematic because they serve this additional purpose. This may be an example of the Committee's interpretation of the Convention as a «living instrument. » Measures rarely have a single purpose. A literal approach to the «sole purpose» criterion is therefore unrealistic.

Article 1, section 4 also provides that special measures must be adopted for the purpose of securing «adequate advancement» for disadvantaged groups. What is «adequate advancement»? The General Recommendation indicates that this term refers to «goal directed programs which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination. » These include «persistent or structural disparities and de facto inequalities resulting from» historical circumstances. But there is a danger that the minority communities themselves may not agree that special measures are necessary to secure their advancement. Accordingly, the General Recommendation provides that special measures should be designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities. Special measures should not be imposed on disadvantaged groups against their wishes. (Note also that Recommendation requires consultation with «affected communities, » not just the beneficiaries of the special measures. This presumably means consultation with representatives of races or ethnicities that would not be benefited by the special measure.)

Article 1, section 4 imposes two additional conditions for the validity of special measures: they must be temporary and not lead to the maintenance of separate rights for different racial groups. Specifically, the Convention provides that the validity of special measures is subject to the requirement «that such measures do not . . . lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. » This formulation can be contrasted with Article 2(2) – which I will discuss further below – which provides that special 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. » The formulations are different in a subtle but potentially important way: article 1(4) imposes two separate requirements – the measures must not maintain separate rights for different racial groups and they must be temporary; article 2(2) imposes one requirement – the wording indicates that measures may establish separate rights for different racial groups as long as they are temporary. The General Recommendation does not discuss the difference in language. In discussing article 1(4), the Recommendation interprets it to impose two separate requirements (that the measures not establish separate rights for different racial groups and that they be temporary). In discussing article 2(2), the Recommendation says that the limitations it imposes are «in essence the same» as those imposed by article 1(4). The General Recommendation does go on to say, however, that the obligation not to maintain special rights for different racial groups in «narrowly drawn» insofar as it refers only to «racial» groups, and thus and calls to mind the practice of Apartheid in South Africa.

Regarding the requirement that the special measures are temporary, the General Recommendation makes several points. As noted, the Convention says that the special measures should not be retained after their objectives have been achieved. The General Recommendation notes, however, that «negative human rights consequences» might result from the sudden withdrawal of special measures that have existed for a long time. The Recommendation urges States parties to be sensitive to this possibility. The General Recommendation also interprets article 1(4) as contemplating that special measures come to an end when their objectives have been «sustainably» achieved. The concept of sustainability was drawn from the work of the Committee on Economic Social and Cultural Rights. The General Recommendation also notes that, in order to determine whether the special measures have served their objective, it is important for States parties to have in place a continuing, system of monitoring their application and results through the collection of accurate data, disaggregated by race, colour, 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. »

Finally, and perhaps most importantly, the General Recommendation draws an important distinction between special measures, which must be temporary, and the permanent rights to which certain minorities might be entitled. For example, minorities have the right to enjoy their own culture, profess and practice their own religion and use their own language, and indigenous peoples have the right to use land traditionally occupied by them. Similarly, women have rights to non-identical treatment based on biological differences, such as maternity leave. These permanent rights should be distinguished from special measures, which are to be used only temporarily. The Recommendation also makes clear that these permanent rights recognized by international human rights law are not «special rights» within the meaning of article 1(4).

Let's now move to the second article of the Convention that mentions special measures, article 2, section 2. Whereas article 1(4) tells us that a special measure, when it satisfies the conditions just discussed, is not prohibited, article 2(2) is more affirmative: it tells us that special measures are sometimes required. Article 2(2) provides, in its entirety, as follows:

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.

We have already discussed the second sentence. I will now focus on the first. In brief, article 2(2) provides that states «shall» take special measures «when the circumstances so warrant. » As the General Recommendation notes, the article's «use of the verb 'shall'…indicates the mandatory nature of the obligation to take special measures. » The General Recommendation adds that this obligation is not weakened by the phrase «when circumstances so warrant, » which merely indicates the context in which such measures are required – that is, they are required when there is a disparate enjoyment of human rights by persons or groups and an ensuing need to correct such imbalance. The need to take special measures to correct such imbalances is a reflection of the fact that «the principle of equality underpinned by the Convention combines formal equality before the law . . . with substantive or de facto equality in the enjoyment and exercise of human rights as the aim to be achieved. »

What are the special measures that states are required to employ to correct such imbalances? General Recommendation 32 defines «measures» broadly as including «the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments. » Beyond this, the General Recommendation does not give particular examples of special measures. General Recommendation 25 adopted by Committee for the Elimination of Discrimination Against Women (CEDAW) is more illuminating in this regard. According to CEDAW's General Recommendation, the concept of special 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.

Although CERD's General Recommendation does not include these examples, CERD's practice is consistent with CEDAW's list of examples of special measures. We have considered each of these types of measures to be a special measure in certain circumstances. Thus, special measures include programs that draw racial distinctions for the purpose of securing advancement of disadvantaged groups, but they also include measures that do not draw such distinctions, but instead make extra efforts to recruit or train members of such groups.

The Report of the 2002 report by the Special Rapporteur of the Subcommittee on the Promotion and Protection of Human Rights of the Commission on Human Rights, entitled «The Concept and Practice of Affirmative Action, » draws similar distinctions among special measures. The report distinguishes between three categories of special measures. First is «affirmative mobilization, » which includes such measures as increased efforts to recruit members from underrepresented minorities. The second category is «affirmative fairness, » which includes measures designed to ensure that selection processes have not unintentionally discriminated against members of disadvantaged minorities. The third category is «affirmative preferences, » which are measures that take the race or ethnicity of

members of disadvantaged group into account in the selection process, for example for employment or university admissions, or in other contexts, such as politics. «Affirmative preferences, » in turn, can take different forms – race can be a tie-breaker, for example, when the qualifications of two applicants are otherwise equal; or race can serve to place the member of a disadvantaged group ahead of a member of another group even though the latter would otherwise be selected. Quotas are a type of affirmative preference. According to the Rapporteur's report, all of these forms of special measures can be justified, depending on the circumstances, but the first two are uncontroversial, and should be used widely, whereas «affirmative preferences» are more delicate and require greater caution.

I should emphasize that this report is not a CERD document and does not purport to be describing CERD practice (although, I should also note that its author has recently been elected a member of CERD). But something like the approach of this report seems implicit in paragraph 16 of CERD General Recommendation 32, which provides as follows:

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

In other human rights contexts, the requirement that a measure be «necessary in a democratic society» has been read to impose rather stringent limits. This language, and the reference to «principles of fairness and proportionality, » suggest that special measures falling into the categories of affirmative mobilization and affirmative fairness will be easier to justify and more commonly appropriate than measures falling into the category of «affirmative preferences» – and even within this last category, some types of measures will require greater justification than others. All of them are valid under appropriate circumstances, and may even be mandatory given the circumstances. But their appropriateness will depend on the particular circumstances in the State party.

Notwithstanding the above, I should note that CERD practice on special measures has primarily been focused on urging States parties to put such measures in place more frequently. Although the Committee's Concluding Observations have at times expressed concern over special measures that have remained in place longer than necessary, or otherwise raise issues under Article 1(4), it is much more common for the Committee to express concern about a State party's failure to take special measures where they seem warranted. And the Committee's Concluding Observations rarely express views about the appropriateness of particular types of special measures as compared to others.

To conclude, let me summarize the nature of States parties' obligations under the Convention: Article 2(2), as the General Recommendation makes clear, means that it is mandatory – not discretionary – for States parties to employ special measures «when circumstances so warrant. » States parties must initially determine whether the circumstances warrant special measures, and this is to be done by assessing whether there is a disparate enjoyment of human rights by persons or groups within the State party on the basis of race, colour, descent, or national or ethnic origin, and an ensuing need to correct such imbalance. This assessment is to be made on the basis of disaggregated data. Once the need for special measures has been determined, the State party must choose among the various types of special measures that might conceivably be employed. This determination must, inevitably, be sensitive to the particular situation of the various racial and ethnic groups in the State party, and must be done in consultation with such

groups and other «affected parties. » As the General Recommendation notes, the Convention must be interpreted in a context-sensitive manner, and «context-sensitive interpretation . . . includes taking into account the particular circumstances of States parties without prejudice to the universal quality of the norms of the Convention. » The Committee recognizes that « [t]he nature of the Convention and the broad scope of the Convention's provisions imply that, while the conscientious application of Convention principles will produce variations in outcome among States parties, » although we have also stressed that «such variations must be fully justifiable in light of the principles of the Convention. » In the end, the selection of special measures inevitably requires sensitive judgments by the State parties, but these judgments are to be exercised within the parameters and in compliance with the requirements of the Convention, as elaborated in General Recommendation 32.