THE SPECIAL MEASURES MANDATE OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: LESSONS FROM THE UNITED STATES AND SOUTH AFRICA

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The International Convention on the Elimination of all Forms of Racial Discrimination¹ (CERD) is the United Nations main treaty

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elaborating on Article 1 of the Charter of the United Nations which emphasizes the importance of the prohibition of racial discrimination. CERD has been ratified by 173 countries, which is evidence of its importance in the protection of human rights.

CERD went beyond the non-discrimination language of the Charter in two very important ways: 1) it established a requirement for special measures aimed at ensuring the development and protection of certain racial groups or individuals belonging to them to guarantee them the full and equal enjoyment of human rights, as well as, prohibiting and preventing racial discrimination; and 2) it established equality as a goal alongside the prohibition of racial discrimination. With respect to the prohibition and prevention of racial discrimination, Article 2 sets forth a series of affirmative steps that State Parties must take towards its elimination. The means that State Parties must take for condemning and eliminating racial discrimination include: not participating in acts or practices of racial discrimination and ensuring that public institutions at all levels act in conformance with this obligation; taking effective measures to review local and national policies and amending, rescinding or nullifying laws that have the effect of creating or perpetuating racial discrimination; prohibiting and taking steps to prohibit racial discrimination by persons, groups or organizations; and undertaking means for eliminating barriers between races.

However, it goes on to provide a very specific requirement for ensuring equality, not only of individuals but of groups. More specifically, Article 2(2) provides:

States Parties shall, when 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.\(^5\)

Article 3 includes specific obligations for condemning and prohibiting racial discrimination and apartheid.\(^6\) Article 4 requires specific measures for condemning propaganda and organizations that promote racial hatred, discrimination, or theories based on the superiority of any race.\(^7\) Article 7 also requires that specific measures be undertaken in the fields of teaching, education, culture, and information to combat prejudices that lead to racial discrimination.\(^8\)

The guarantee of equality in human rights is mentioned in Article 2(2) and is further elaborated on in Article 5, which provides among other things that State Parties undertake to guarantee equality before the law and in the enjoyment of a list of rights.\(^9\) The latter include political, civil, and economic social and cultural rights. Governments are required to use special measures not only to prevent racial discrimination, but to achieve equality in the enjoyment of these rights.

Despite the clear language of these mandates, special measures have been controversial in many countries, though such manifestations have been varied. For example, in the United States a number of states have prohibited the use of race in making decisions about admissions to universities, and the courts have restricted use of race in both employment and education cases unless to remedy intentional discrimination.\(^10\) In South Africa, questions have been raised regarding the effectiveness of some affirmative action programs as discussed below,\(^11\) and a huge debate

\(^{5}\) Id. art. 2(2).
\(^{6}\) Id. art. 3.
\(^{7}\) Id. art. 4.
\(^{8}\) Id. art. 7.
\(^{9}\) CERD, supra note 1, art. 5.

\(^{11}\) One problem has been “fronting” where companies that are not genuinely black owned claim to be so under false pretenses in order to get contracts with the government. See Zibonele Ntuli, *Govt gets tough on BEE fronting*, SOUTHAFRICA.INFO, Aug. 3, 2005, available at http://southafrica.info/business/trends/empowerment/beepublic-works-030805.htm (last visited Mar. 14, 2010).
resulted from an article written by Professor Benatar from the University of Cape Town whose questions about the benefits of affirmative action include the concern that it does not benefit those who are most disadvantaged from injustice. In Brazil, conflicts arise from the fact that a large percentage of the population is of mixed race with the result that the use of quotas is highly controversial.

The controversies that surround the issue may benefit from the elaboration of the obligations by the Committee on the Elimination of Racial Discrimination (Committee). Clarification of the requirements may aid governments as they develop and implement programs that are more focused on the goals set forth in the treaty. Further, de facto discrimination along with the continued existence of bias are reasons for continuing to use race-based affirmative action programs in education and employment even if they do not necessarily help the most disadvantaged. This does not mean that other measures aimed at helping the most disadvantaged should not be pursued at the same time.

Part 1 of this article reviews the major issues related to the CERD mandate of special measures. These include an overview of the reasons for having them, which embody the necessity for addressing the effects of economic structural inequality as noted by the Committee. It is postulated that special measures are but one tool for addressing the lack of equality in the enjoyment of rights and fundamental freedoms and that it is important to distinguish them from measures aimed at remedying past discrimination, which are covered as a separate obligation under Articles 2(1) and 6. Thus, special measures do not necessarily have to be tied to providing a remedy only to the victims of specific racial discrimination, and therefore, are more than simply a remedy—they are a separate obligation of the State


14. Other means for addressing inequality that are beyond the scope of this article include addressing the gaps in wealth that are increasing around many parts of the world and which are impacting minority groups in many of them and fighting the effects of corruption on human rights. See, C. Raj Kumar, Corruption and its Impact on Human Rights and the Rule of Law: Governance Perspectives, in HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT 153 (2007), arguing that corruption impacts the equal enjoyment of human rights. See also C. Raj Kumar, Corruption and Human Rights—Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India, 17 COLUM. J. OF ASIAN L. 31 (2003), for further reading on a human rights based approach for addressing corruption in India.
Parties. This is clear from the requirement in Article 2(2) that calls for the development and protection of racial groups, as well as, the individuals belonging to them. This necessarily means that beneficiaries of the measures may not be in fact the ones who suffered the specific discrimination—and indeed they may not be the most disadvantaged in the affected groups—so long as the programs are designed to ensure the adequate development and protection of those groups. It is also important to keep in mind that these special measures are only one part of the obligations under the treaty and that they alone cannot help resolve racial discrepancies that have resulted from historical discrimination.

Parts II and III of the article will focus on the experience of the United States and South Africa in addressing affirmative action programs or special measures. Both countries are parties to CERD and have been reviewed by the Committee, and thus their experiences are relevant to the topic. Further, both countries continue to struggle with the existence of structural race based inequality and bias, and provide interesting contrasts of how these issues can continue even in societies where impacted racial groups are not necessarily minorities.

The United States provides an interesting look at a society that began to end official policies of discrimination in the education arena over fifty years ago with the case of *Brown v. Board of Education* and in public employment with the passage of the Equal Employment Opportunity Act of 1972. Nevertheless, inequality based on race exists and is increasing, and some argue that “black Americans enjoy less opportunities in higher education than they did a generation ago.” Despite that fact, severe limits have been placed on affirmative action programs in education and employment, primarily on the ground that the programs must be specially tailored to address specific past discrimination. Even though that

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16. 347 U.S. 483, 495 (1954). The U.S. Supreme Court struck down the concept of “separate but equal” in primary and secondary education. A year later, the Court held that K–12 schools did not have to end *de jure* discrimination immediately but “with all deliberate speed.” *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).


18. *Id.* at 4 (emphasis added).
jurisprudence is in conflict with the requirements of CERD,\textsuperscript{19} some valuable lessons can be gleaned from it: that it is important to focus special measure programs on the goals they seek to attain, and the concept that diversity is an important goal as well. These lessons would be useful in a more detailed formulation of what the special measures requirement in CERD entails.

South Africa has been more committed to affirmative action programs after abolishing apartheid and its first election in 1994. However, due to lack of carefully enunciated standards, some programs have not helped end inequality and sometimes have resulted in the enrichment of a very small minority, hampering the overall goal of achieving equal enjoyment of human rights and fundamental freedoms. A recent study by the government of the effects of the Broad Based Black Economic Empowerment Act (BEE)\textsuperscript{20} indicates that out of forty-five companies that it reviewed, fifteen used fronting companies that had little effect on the distribution or diversification of ownership.\textsuperscript{21} Indeed, even under the laws that have been in effect for longer periods of time, the Labour Relations Act\textsuperscript{22} and the Employment Equity Act,\textsuperscript{23} the employment gap between Black and White workers has increased.\textsuperscript{24} Nonetheless, valuable lessons can be garnered from this country, which provide the basis for the clarification of the requirements under CERD.

The structural racial inequality and resulting lack of equal opportunity in both countries support the continued need for race-based affirmative action. Both countries also provide illustrations of the effect that bias has on the attainment of equality, and thus a reason to support special measures

\textsuperscript{19} See, e.g., Committee on the Elimination of Racial Discrimination, \textit{Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination}, Communication No. 31/2003, Slovakia 10/03/2005, U.N. Doc. CERD/C/66/D/31/2003 (2005). The Committee held that State parties are responsible for acts that have discriminatory effects even if they are not committed with discriminatory intent. \textit{Id.}, ¶ 10.8, 10.9. In that case, a local government took action that had the effect of canceling a project to build low cost housing for the local Roma even though there was no reference to a racial group. \textit{Id.}, ¶ 3.1.


\textsuperscript{21} Ntuli, \textit{supra} note 11.

\textsuperscript{22} Labour Relations Act, No. 66 (1995) (S. Afr.).

\textsuperscript{23} Employment Equity Act No. 55 (1998) (S. Afr.).

\textsuperscript{24} Mich Brookes & Timothy Hinks, \textit{The Racial Employment Gap in South Africa}, 72 S. AFR. J. OF ECON. 573–89 (2004). Indeed, the latest reports indicate that “the unemployment rate for blacks is five times higher than that for whites—and on average white households earn five times the incomes of black households.” Barry Bearak, \textit{A Stir Over a Faraway View of Black and White}, N.Y. TIMES, Sept. 10, 2009, at 18.


for more than just remedying past discrimination. A look at some specific areas of employment, such as certified public accountants, demonstrates that the effect of bias is similar in both countries. The presence of bias provides support for the need to pay more heed to the mandates of Article 7, which requires that specific measures be undertaken in the fields of teaching, education, culture, and information to combat prejudices that lead to racial discrimination. Individual and societal bias also provides strong justifications for special measures that go beyond simply compensating victims of past discrimination. The examples from both countries of the racial structural inequality and the on-going existence of bias perhaps provide the greatest justification for the continued need for race-based special measures, despite the call for moving affirmative action programs to those based on class. They also highlight the need for more refinement of the obligations under CERD.

In Part IV, this article will conclude with suggestions of language for general recommendations that might be enacted by the Committee in order to provide more guidance for countries trying to implement their obligations under CERD.

I. THE SPECIAL MEASURES STANDARDS UNDER CERD AND INTERNATIONAL LAW

This part will review the requirements of CERD and the implementation of those standards by the Committee, which is charged with reviewing reports submitted by the State Parties, and making suggestions and general recommendations based on the examination and information received from them.25 In the absence of a general recommendation by the Committee, an analysis of the Committee’s country reports is instructive on its views on the topic.

While the main goal of CERD is to prohibit racial discrimination, it is clear that the attainment of equality is on par with the first objective. In Article 1(4), the treaty provides:

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.26

As discussed above, the treaty goes on in Article 2 to emphasize the need to take special measures, not only to prohibit and end racial discrimination as discussed above, but to achieve equality in the attainment and enjoyment of human rights and fundamental freedoms. Despite these mandates, the Committee has not issued any general recommendations regarding the measures taken under these two provisions. That is in part the result of its focus on the obligation in Article 4 to end racial segregation and apartheid, as is evident by General Recommendations 1 and 7.27 In the latter, the Committee notes that the requirement that State Parties “undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination” is mandatory in nature and asks for specific reporting on the steps that they have taken in this regard.28 Interestingly, in the General Recommendation on Article 1, Paragraph 2 which addresses the possibility of differentiation between citizens and non-citizens, the Committee notes that “[d]ifferentiation . . . relating to special measures is not considered discriminatory.”29

While the initial emphasis on the directives of Article 4 were needed to address the more blatant examples of racial discrimination, the Committee may now want to move on to address the more subtle forms of racial discrimination that result in racial and ethnic inequality in a general recommendation in order to provide guidance to the State Parties about what the specific requirements of the treaty entail, and therefore, what the Committee will review in the country reports. It is hoped that in the long run this will help to attain the goals of the treaty.

26. CERD, supra note 1, art. 1(4).
The Committee has started making some specific comments in its review of country reports regarding specific special measures it considers necessary under the treaty. In the 1996 review of the sixth and seventh reports of Colombia, the Committee expressed concern over the lack of provisions addressing the persistent structural discrimination relating to "the right to life and security of persons, political participation, educational and occupational opportunities, access to basic public services, the right to health, the right to adequate housing, the application of the law, and land ownership and use." The Committee recommended that Colombia "strengthen its efforts to improve the effectiveness of measures and programmes aimed at guaranteeing to all groups of the population the full enjoyment of their political, economic, social and cultural rights."

In its 2001 review of the second and third periodic reports of the United States, the Committee commented favorably on the 1997 "Initiative on Race" and the Minority Business Development Agency and noted the increase in the number of minorities "in fields of employment previously predominantly occupied by Whites," particularly within the police forces. The Committee, however, noted its concern with the continued disparate enjoyment of the rights contained in Article 5 of CERD. The Committee also expressed concern with the United States' position "that the provisions of the convention permit, but do not require States parties to adopt affirmative action measures ... ."

The next report on the United States took place in 2008 when the Committee reviewed the fourth, fifth, and sixth periodic reports of the United States. In that report, the Committee noted:

[W]ith concern that recent case law of the U.S. Supreme Court and the use of voter referenda to prohibit states from adopting race-based affirmative action measures have further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms.

31. Id. ¶ 53.
33. Id. ¶ 398.
34. Id. ¶ 399.
It went on to reiterate that the adoption of special measures “when the circumstances warrant” is an obligation arising from the Convention and called upon the United States to use such measures when warranted to “eliminate the persistent disparities in the enjoyment of human rights and fundamental freedoms. . .”36 It reiterated its concern from the 2001 review that definitions of racial discrimination at both the state and federal level are not always in compliance with the CERD definition which requires State Parties to eliminate not only intentional, but indirect or de facto discrimination as well.37 It went on to note that:

[I]ndirect—or de facto—discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.38

In its comments on the sixth through fifteenth periodic reports of Fiji in its 2003 report, the Committee commended the inclusion of the Social Justice Chapter in the 1997 Constitution which calls “for the elaboration of programmes designed to achieve, for all groups or categories of persons who are disadvantaged, effective equality of access to education and training, land and housing, and participation in commerce and all levels and branches of State public services.”39 The Committee noted its general concern that none of the affirmative action measures abrogate the rights of any ethnic group after the purpose for which they were adopted have been achieved,40 reaffirming the mandates of Article 1(4). Further, the measures must “respect the principle of fairness, and [be] grounded in a realistic appraisal of the situation. . .”41 In addition, the Committee recommended that affirmative action programs benefit all Fijian citizens, rather than just indigenous Fijians and Rotumans who were the target of the Social Justice Act of 2001.42 This result would be commendable if there was evidence that other Fijian citizens had either been discriminated against or had not attained equality in the enjoyment of human rights or fundamental

36. Id.
37. Id. ¶ 10.
38. Id.
40. Id. ¶ 84.
41. Id.
42. See id.
freedoms. It would be helpful if the Committee explicitly required data on that point before making that recommendation.

In its 2004 report on Brazil, the Committee commended Brazil for its adoption of the National Affirmative Action Programme in 2002. The Committee, however, renewed its concern with the de facto segregation of black, mestizo, and indigenous peoples in rural and urban areas. The Committee requested specific additional information on the implementation of measures taken to eliminate structural inequalities.

Several of the Committee’s views of the normative standards regarding special measures can be garnered from these reports. They include the following:

a) The Committee views the affirmative measures as mandatory, which is certainly supported by the text of the treaty which uses “shall” in Paragraph 2(2) with respect to special measures;

b) The measures should be aimed at guaranteeing to all groups in a country the full enjoyment of their political, economic, social, and cultural rights;

c) The measures should be taken to eliminate structural inequalities within the country;

d) The measures should not abrogate the rights of any group after the purpose for which they were adopted have been achieved, tracking the language of article 1(4);

e) The measures should benefit all groups that have not attained equal enjoyment of human rights and fundamental freedoms; and

f) The special measures should be undertaken to address both de facto as well as de jure discrimination.

It would be useful to incorporate these standards into a General Recommendation on Special Measures or Affirmative Action. Other human rights treaty bodies have addressed special measures and they provide some guidance on the development of international standards on this topic, but since the focus of CERD is on race, a General Recommendation dedicated to this topic would be particularly useful in giving State Parties guidance in implementing programs in that area.


44. Id. ¶ 57 (citing to CERD Committee on the Elimination of Racial Discrimination, 49th Sess., Concluding Observations of the Committee on the Elimination of Racial Discrimination, Brazil, CERD/C/304/Add.11 (Sept. 27, 1996)).

45. Id. ¶ 57–58.
Nonetheless, the Committee should take guidance from the standards developed by other treaty and U.N. bodies.

The Committee on Economic, Social and Cultural Rights in General Comment No. 1 notes that not only is it important for State Parties to be aware of which rights are being enjoyed by individuals within its territory, compliance with the treaty “also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged.”46 Presumably, the identification of disadvantaged groups would be for the purpose of enabling State Parties to take steps to ensure that they are able to enjoy the rights under the treaty.

In its General Comment 18, the Human Rights Committee interprets the equality provisions of Article 26 of the International Covenant on Civil and Political Rights (ICCPR)47 as follows:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.48

Article 2(2) of the ICCPR includes the obligation for State Parties to “take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”49 The Human Rights Committee has also considered whether distinctions based on race are permissible under the Covenant which

49. ICCPR, supra note 47, art. 2(2).
requires implementation of rights without regard to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The Committee recognized that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."


12. Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them. 53

The Recommendation goes on to clarify what is meant by "specific temporary measures," focusing on achieving substantive equality for women and girls through "affirmative" or "positive" action. The CEDAW Committee has gone on to note that pursuant to these requirements under the treaty, Norway's radical quota system in the area of education "is in line with the Women's Convention, wherein access to a radical quota system is available when the purpose is to further real gender equality."

50. Id. art. 2(1).

51. CCPR General Comment No. 18, supra note 48, ¶ 13.

52. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 at 193, No. 46, U.N. GAOR Supp., U.N. Doc. A/34/180 (Sept. 3, 1981). Article 4(1) provides that "temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination. . . . these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." Id.


Of interest is the fact that in the arena of the rights of women to participate in government a number of countries have adopted electoral gender quotas.55 The introduction of quota systems represents a change in "public equality policy, from 'equal opportunities' to 'equality of results.'"56

The Committee Against Torture which oversees implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,57 has recently released a report embracing the concept of preventative measures in the context of sexual violence and violence against women.58 Preventative measures may be another form of special measures that may be used to put a stop to on-going treaty violations.

At the broader international level, the Sub-Commission on Promotion and Protection of Human Rights, the expert group under the Commission on Human Rights, commissioned a study on affirmative action in 1998.59 In 2002, the last progress report, submitted by Mr. Bossuyt, the Special Rapporteur, summarized a number of issues that had been identified in the prior reports.60 The report contains the most detailed analysis of international standards of affirmative action, as well as, the practice of nations and it is worth reviewing it in detail.

Mr. Bossuyt recognizes that affirmative action is a legal concept at both the national and international level, but notes that it lacks a generally accepted legal definition.61 He thus provides his own: "Affirmative action is a coherent packet of measures, of a temporary character, aimed


61. Id. ¶ 6.
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."62

He notes that the policies can be carried out by both the public and private sector, can be voluntary and encouraged, or compulsory and subject to sanction. Such policies are not limited to employment and education, but can be extended to other rights, such as housing, transportation, voting, training, appointments to political, executive and judicial posts, and the awards of contracts and scholarships.63

He notes that affirmative action is directed at groups of individuals who share a trait in common and who are disadvantaged because of that trait.64 The trait is often innate and inalienable, but does not have to be.65 The report notes that there is a great deal of disagreement surrounding the issue of "how to decide which groups are sufficiently disadvantaged to deserve special treatment."66 Problems in special measures programs arise from both under and over inclusiveness of groups and because they tend to benefit the least deprived members of the target group.67 This is an important issue that will be addressed below. In the view of this author, bias and structural inequality will necessarily require that special measures focus not only on the most disadvantaged if the goals of CERD are to be attained.

There are also difficulties in defining who belongs in a particular group and he notes that some advocate the establishment of "new law on personal and ethnic racial status," while others prefer deference to self-identification and societal perception.68 On this issue he concludes that international law prefers the latter.69

Some of these concerns addressed in the report pinpoint the need to focus on the goals of the programs. For example, if the goal is to increase the participation of a particular group in a particular occupation, it does not matter that a program benefits the least deprived members of a target group. It might matter, on the other hand, if the goal is to provide restitution to a group that has been discriminated against. Indeed, one commentator has noted that the Special Rapporteur’s Report on Affirmative Action has

62. Id.
63. See id. ¶ 7.
64. Id. ¶ 8.
66. Id. ¶ 9.
67. Id. ¶ 11.
68. Id. ¶ 14.
69. Id.
narrow equality premises which resulted in the silencing of the issue at the World Conference on Racism.  

The report identifies a number of justifications used by states in support of national legislation, which include: remedies for historical injustices; remedies for structural discrimination; create diversity or proportional group representation; social utility; preemption for social unrest; promotion of better economic efficiency; and nation building for countries divided by ethnic conflict or recovering from colonization. An earlier progress report observed that scholars have noted that the transformation of South Africa could not have occurred without a modification of the status quo and it presents itself as the first case of affirmative action applied to the majority.

There are both arguments in favor and against these justifications both in their reasoning as well as in their effect. For example, the report notes that the civil rights legislation in the 1960s in the United States had the effect of preempting conflict, but had the opposite effect in Malaysia where only a small group of elites benefitted from special measure programs.

The report also identifies the difficulties with transforming the objectives into legal policies, which can take many forms. One category of programs, which Mr. Bossuyt calls “affirmative mobilization,” recruits from disadvantaged groups and may include job training, outreach, and other skills-building or empowerment programs in order to “place those who have been disadvantaged in a condition of competitiveness.” A second category, labeled “affirmative fairness,” seeks to ensure that individuals are treated and evaluated fairly in the distribution of social goods and include complaint, review, and examination procedures.

A third category is called “affirmative preference,” and those programs allow the consideration of a disadvantaged person’s status in the granting or withholding of social goods. This form has been more controversial than


74. *Id.* ¶ 72.

75. *Id.* ¶ 73.

76. *Id.* ¶ 75–77.
the other two, has met with the most resistance, and in some cases, added stigmatization.\textsuperscript{77} The report refers to commentaries that argue that this problem stems from the conception of rights as belonging to the individual, in contrast to the goals of affirmative preference programs which attempt to provide justice for the group.\textsuperscript{78} Because such programs treat people differently based on a particular trait, many consider them to be discriminatory and create problems under international law, Mr. Bossuyt observes.\textsuperscript{79}

Nonetheless, many countries adopt special measures that are focused on benefitting particular groups that have been discriminated against in the past without attempting to provide remuneration to those specifically discriminated against. In a recent report prepared for the General Assembly regarding the follow-up to the Durban Declaration and Programme of Action, a number of countries reported on measures aimed at helping groups in general without specifically identifying those who were the victims of discrimination.\textsuperscript{80} Greece, for example, reported on the provision of services in a number of areas, including education for the Roma, a group that has suffered discrimination in the past.\textsuperscript{81} France created the High Authority to Fight Discrimination and Promote Equality to assess discrimination and equality claims as well as play a role in disseminating information on combating racism and promoting equality.\textsuperscript{82} Thus, while governments were asked to report on action plans to combat racism, many included the broader need to address the effects of past discrimination of group rights as well as the need to promote equality in general.

Under the International Labour Organization system, Articles 2 and 3 of the Employment and Occupation Convention of 1958 (No. 111) mandate States to adopt special measures in their national policies.\textsuperscript{83} It also

\textsuperscript{77} Id. \S 78–79.
\textsuperscript{78} Sub-Commission Report, supra note 60, \S 78.
\textsuperscript{79} Id. \S 79.
\textsuperscript{81} Id. \S 22.
\textsuperscript{82} Id. \S 16.
encourages States to influence the participation of other sectors of their national economies to give effect to such measures.\footnote{Id.}

These treaties and the interpretation by their treaty bodies as well as by countries, support the concept that affirmative action measures are mandatory as long as they are needed to achieve the goals of equal enjoyment in the exercise of all rights and the criteria are reasonable and objective. They are needed not only to combat intentional discrimination, but to promote equality as well. A look at the experience of the United States and South Africa exemplifies these and other criteria that might be used to further refine these standards.

II. AFFIRMATIVE ACTION IN THE UNITED STATES

This part will look at the demographics in the United States related to race. It will follow with an analysis of the legal framework that addresses affirmative action and conclude with lessons that can be garnered from the practice and experience in that country.

A. Demographics

The United States' population is predominantly White, with an overall racial breakdown of 79.8 percent White, 12.8 percent Black, 1 percent American Indian and Alaska Natives, 4.5 percent Asian, 0.2 percent Native Hawaiian and Pacific Islander, 15.4 percent Hispanic or Latino, 65.6 percent White non-Hispanic, and 1.7 percent persons reporting two or more races.\footnote{State & County QuickFacts, U.S. Census Bureau (2008), http://quickfacts.census.gov/qfd/states/00000.html (last visited Mar. 14, 2010). Because people listed as Hispanic or Latino may also be included in other racial groups, the numbers exceed 100 percent.} There are, however, clear distinctions based on race. For example, in 2006, 10.5 percent Whites, 24.7 percent Blacks (African-Americans), and 21.2 percent of Hispanics (Latinos) lived in poverty.\footnote{Poverty Status in the Past 12 Months, U.S. Census Bureau (2006), http://factfinder.census.gov (follow “data sets” to “American Community Survey” to “subject tables” to “nation”) (last visited Mar. 14, 2010).} Greater racial discrepancy is demonstrated when considering the group of people living in “severe poverty,” which is defined as those living below 50 percent of the poverty line. Of the total U.S. population in 2007, 5.2 percent lived in severe poverty and almost all of them were non-white: 11.2 percent of Blacks (15.1 percent of Blacks between the ages of 5–17); 8.2 percent of
Hispanics of any race (10.3 percent of those aged 5–17); and 3.4 percent (3.7 percent of those aged 5-17) of non-Hispanic Whites.87

Comparisons of just Blacks and Whites provide for some striking contrasts. In 2007, the median family income for White families was $52,115, while for Black families it was $34,091.88 A study on employment discrimination revealed that the income gap between Black and White men with college degrees doubled between 1980 and 2000.89 Seventy-one percent of White households but only forty-six percent of Black households live in owner-occupied homes.90 In 2000, the median net worth of a White, non-Hispanic householder was $79,400, while it was $7500 for a Black householder.91 The life expectancy rate also reflects racial inequality. There is a fifty-year life expectancy gap between Asian American men who have the highest life expectancy and African American men who have the lowest.92

These statistics exist in the context of a growing gap between rich and poor. In 2005, the top one percent (those with incomes greater than $348,000) and the top ten percent (those with incomes greater than $100,000) of Americans of received their largest share of national income since 1928.93 While one out of every eight Americans is living below the


official poverty line, it is estimated that close to one-third of the population is struggling to make ends meet.\textsuperscript{94} The studies on this phenomena suggested that the poverty rate could be cut in half by implementing basic human rights such as adequate compensation, ensuring the right to collective bargaining, easing access to higher education for poor youngsters, a more equitable unemployment compensation system, and housing policies that make it easier to move from areas of concentrated poverty to areas with better employment opportunities.\textsuperscript{95} Because, as was found in a United Nations report, the poverty rates are so disproportionate based on race,\textsuperscript{96} that these initiatives could be "special measures" that would result in ensuring greater equality in enjoying the rights enumerated in CERD. However, as discussed below, it is not sufficient to simply base all special measures based on class or wealth, and indeed, CERD requires that they be based on "race, colour, descent, or national or ethnic origin."\textsuperscript{97}

The situation varies greatly throughout the United States, but California presents an interesting place from which to look at affirmative action programs, both because of the diversity of its population as well as the fact that in 1996 a law was passed by initiative that severely limited the use of affirmative action in higher education.\textsuperscript{98} The population in California is 43.8 percent White, 35 percent Hispanic, 12 percent Asian, 6 percent Black, 3.2 percent other or declined to answer.\textsuperscript{99} It is estimated that by the year 2042, Hispanics will make up a majority of the California population.\textsuperscript{100}

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\textsuperscript{95} \textit{Id.}


\textsuperscript{97} CERD, supra note 1, art. 1.


\textsuperscript{100} Meredith May, \textit{Hispanics expected to be state's majority by 2042}, \textit{S. F. CHRON.}, July 10, 2007, at Cl.
However, despite the fact that Latinos, Blacks, and Native Americans are 44.8 percent of high school graduates, they comprise only 15.3 percent of the premier public university U.C. Berkeley's entering class. A further breakdown shows the discrepancy: Latinos are 36.5 percent of high school graduates but only 11.7 percent of the freshman class; Blacks are 7.6 percent of high school graduates but only 3.1 percent of that class.

These statistics are not surprising considering the poor elementary and secondary schools in many minority communities, the lack of resources that African Americans and Latinos have for preparing for tests and other programs, and the fact that due to a much lower median family income, students from those families have much less ability to finance college. Further, following the passage of Proposition 209, which prohibits race-based affirmative action programs, California schools have become more segregated. This is the case at the national level as well. After a quarter century of increased integration, a process of re-segregation began in American schools in the late 1980s that continued through the late 1990s. This is hardly surprising since the segregation index was over eighty percent in the largest Northern cities through the 1980s.

Not surprisingly, the lack of equality in the education field is having a clear impact on certain professions. At the national level, Blacks are ten percent of the work force, four percent of the lawyers, three percent of the architects, five percent of the pharmacists, but twenty-five percent of refuse


102. *Fall 2007 entering class*, supra note 101. These figures are even more disproportional if one takes into account that the school dropout rate for African Americans is 42 percent and 30 percent for Latinos in California, in comparison with 12 percent for Whites and 8 percent for Asian Americans. Nanette Asimov, *24 percent Likely to Drop out at State's High Schools*, "S.F. CHRON., July 17, 2008, at A1; Nanette Asimov, *California's high school dropout rate at 20 percent*, SFGATE.COM, May 13, 2009.

103. Brown et al., supra note 88, at 104–31. The 1996 data showed that at UC Berkeley “the median family income of Anglo students was about $80,000, for Asian American students it was $70,000, and for African American and Latino students it was less than $35,000.” Id. at 117. And one of the most important predictors of college graduation is the net worth of the student’s household. Id.

104. See, e.g., Editorial Desk, *Proposition 209 Shuts the Door*, N.Y. TIMES, Apr. 4, 1998, at A12 (noting the significant decline in admissions of minority students at the University of California Berkeley and the University of California Los Angeles following the passage of Proposition 209).


106. Brown et al., supra note 88, at 42 n.36.
In California, despite the fact that Whites are only 43.8 percent of the population, they make up 84.4 percent of the attorneys; Latinos are 35 percent of the population but only 3.8 percent of the lawyers; Blacks are 6 percent of the population but only 1.7 percent of the lawyers; and Asians are 12 percent of the population but only 5.3 percent of the lawyers.\(^{107}\)

The lack of equality in certain professions, especially high-paying ones, is not new. A study done on African American certified public accountants (CPAs) in the United States documents the difficulties African Americans had in entering that profession from 1921 to 1989.\(^{109}\) The author of the study reached the following conclusions: prior to the Civil Rights Act of 1964, African Americans were excluded from the profession; in the late 1960s, the CPA profession made some effort to change its past discriminatory practices; through the 1980s, when pressure to integrate the profession had evaporated, gains in recruitment and retention of African Americans deteriorated.\(^{110}\)

The author looked at the three most predominantly White professions: lawyers, doctors, and CPAs. As bad as representation of African Americans has been in the first two, they pale in comparison with the third. In 1930, African Americans were 0.8 percent of the lawyers, 2.5 percent of the doctors, but only 0.03 percent of the CPAs.\(^{111}\) By 1960, the representation had risen slightly to 1 percent of lawyers, dropped to 2 percent of doctors, and risen to 0.1 percent of CPAs.\(^{112}\) In 1997, the numbers were 2.7 percent of lawyers, 4.2 percent of doctors, and between 0.75 and 0.99 percent of CPAs, despite the fact that they constituted 13 percent of the population.\(^{113}\)

The author notes that "[t]he dearth of African Americans among CPAs is not only a result of exclusion of well-paying professional positions but also the consequence of African Americans' exclusion from the financial sector."\(^{114}\) All three professions have shared characteristics that make it difficult for entry: a specified area of expertise, a government granted


\(^{108}\) McCarthy, supra note 99, at 1.


\(^{110}\) Id. at 136.

\(^{111}\) Id. at 2.

\(^{112}\) Id.

\(^{113}\) Id. at 2, 135.

\(^{114}\) Hammond, supra note 109, at 2.
monopoly, and strict rules of entry and conduct.\textsuperscript{115} However, CPAs are completely dependent on the business sector for their work, unlike doctors and lawyers who can get jobs meeting the needs of the African American community.

In addition to the traditional exclusion from the professions based on race, Ms. Hammond attributes the lack of jobs for African American CPAs to various levels of bias in the business community and the apprenticeship requirement for a license. She notes that “[f]or most of the twentieth century, virtually no Whites would hire and train an African American to become a CPA, justifying this by claiming that clients would not tolerate an African American’s involvement in their financial affairs.”\textsuperscript{116} In a 1968 survey of the few African Americans in the profession, three-quarters of the respondents believed that race discrimination by clients as well as by firm members were major barriers to them. In a similar survey in 1990, a third perceived client bias as a major reason for limited professional growth and one-half attributed the lack of opportunity to bias on the part of the CPA employers.\textsuperscript{117} Interestingly, the negative reaction of clients diminished faster than the bias within the firms themselves.\textsuperscript{118}

In this hostile environment, the low numbers of African American CPAs made it impossible for other African Americans to get their licenses because they could not meet the experience requirement since it was difficult to obtain apprenticeships with White CPAs.\textsuperscript{119} In addition, economically disadvantaged African Americans had a difficult time affording the apprentice requirements.\textsuperscript{120}

Another reason preventing entry into the profession included the fact that some states would not allow African Americans to even take the CPA exam. Underlying everything, was the historical deprivation of education, the right to vote, and housing for African Americans.\textsuperscript{121} Nonetheless, on average, African American CPAs have been better educated than their White peers\textsuperscript{122} and history is rife with the extraordinary effort that was made by those who were able to make it into the profession.

The experiences of CPAs in the United States highlight the need for special measures to address not only past discrimination but the bias that

\begin{itemize}
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} See id. at 3.
  \item \textsuperscript{117} Id. at 137.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Hammond, supra note 109, at 3.
  \item \textsuperscript{120} Id. at 4.
  \item \textsuperscript{121} See id. at 29.
  \item \textsuperscript{122} Id. at 139.
\end{itemize}
resulted in the lack of equality in the profession. Simple remedies aimed at compensating specific discrimination against specific persons cannot address the lack of equality of employment that continues to exist. Governments must be vigilant when enacting certification requirements that will continue to impact negatively and in a disproportionate manner on minorities. For example, the American Institute of Certified Public Accountants (AICPA) voted to recommend that states adopt a 150-hour educational requirement. This requirement would have resulted in another obstacle for the typically disadvantaged African Americans as well as historically Black colleges and universities. It was this same organization that suspended its annual report on minority representation in the profession which it had produced from 1976 to 1989 after the reports showed several years of decline in African American representation.

Research indicates that racial inequality with respect to numerous rights is caused by bias. In one nation-wide experiment in which equally qualified job seekers sought entry-level jobs, White applicants were two to three times more likely to be offered jobs than Black applicants. A study on employment discrimination against Blacks and its impact on their earnings found that ninety percent of the workers interviewed “were subject to discrimination that was so severe that there was only one chance in a hundred that it occurred by accident.” Another study showed that employers were more likely to hire White men with a prior criminal conviction than Black men without any conviction. A series of housing audits disclose that: Blacks are far less likely to be offered the opportunity to rent available apartments and less likely to be offered the opportunity to purchase homes than equally qualified Whites; and real estate sales and rental agents steer Whites away from Black neighborhoods and Blacks

123. Id. at 137.
125. Id. at 136.
128. Gaboury, supra note 89.
129. Racial Discrimination continues to play a part in hiring decisions, ECONOMIC POLICY INSTITUTE, Sept. 17, 2003, available at http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_archive_09172003/ (last visited Mar. 14, 2010). Seventeen percent offered the job to the White ex-con while fourteen percent offered the job to the Black high school grad. Id.
away from White neighborhoods. The bias permeates almost every aspect of everyday life in the United States: from buying cars to the level of health care.

Affirmative action programs aimed at getting more African Americans and other underrepresented groups into particular professions are one avenue for addressing not only the past discriminatory practices towards those particular racial groups, but also for countering the bias that continues to exist. Governments must ensure that the avenues for these special measures are encouraged and made available. This is the case despite the fact that the Supreme Court has made such measures more difficult, as discussed in the next part. Nonetheless, both the state and federal governments are under an obligation under CERD to continue to find ways to comply with CERD, and indeed, they should make use of that obligation when they need to do so before the courts.

B. The History of Affirmative Action and the Supreme Court's Response in the United States

While the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution were passed between 1865 and 1870, affirmative action programs did not emerge until the 1960s. The move to prohibit discrimination in the public sector began in the late 1930s and early 1940s in the United States, but it was Executive Order 10,925 issued by President Kennedy on March 6, 1961 that is considered the first affirmative action program. The Executive Order required government contractors to take steps to hire minorities and established sanctions for non-compliance.


131. See Oppenheimer, supra note 126, at 978–88. Critical race theorists have argued that there is a need to address the different perspectives various racial groups have for reading the different data regarding the reasons behind those discrepancies and have made recommendations to address those different stories through education, including legal education. See, e.g., Rhonda v. Magee, Competing Narratives, Competing Jurisprudences: Are Law Schools Racist? and the Case for an Integral Critical Approach to Thinking, Talking, Writing, and Teaching About Race, 43 U.S.F. L. Rev. 777 (2009).

132. See Lara Hudgins, Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease, 47 Baylor L. Rev. 815, 819 (1995); see also James E. Jones, Jr., The Rise and Fall of Affirmative Action, in Race in America: The Struggle for Equality 345, 347 (Herbert Hill & James E. Jones eds., 1993) (noting that Congress had adopted numerous social welfare plans delineating racial groups that were entitled to benefits).


Four years later, Congress enacted the Civil Rights Act to address some of the issues related to discrimination.\footnote{Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).} It included Title VI\footnote{Title VI, 42 U.S.C. § 2000d et seq (West 2010).} which prohibits discrimination on the basis of race, color, or national origin by recipients of federal funds, including schools, and Title VII,\footnote{Title VII, 42 U.S.C. § 2000e et seq (West 2010).} which makes it unlawful for any employer or labor union to discriminate in employment on the basis of race, color, religion, sex, or national origin and created the Equal Employment Opportunity Commission for enforcement in the public sector. The Act was followed by a series of measures aimed at increasing minority participation in government contracting and in 1967 the Office of Federal Contract Compliance (OFCC) was created giving enforcement authority to the Secretary of Labor.\footnote{Johnson, supra note 134, at 312.}

The OFCC spelled out more specific standards for compliance in the construction industry over the course of the next decade. Initially, the plans required statements of goals, but the set of guidelines in 1969 established ranges within which the contractors’ goals had to fall and recommended filling vacancies and new jobs on a one-to-one basis between minority and non-minority craftsmen.\footnote{Id. at 313.} A dispute arose between the administration and Congress on whether the plan was illegal because it constituted a quota system, but the Nixon administration lobbied hard and saved the so-called Philadelphia Plan.\footnote{Id. at 314.} The Philadelphia Plan and the Department of Labor guidelines became the model for other civil rights enforcement agencies and were followed by the courts.\footnote{Id. at 314.} During the 1970s, administrative changes strengthened affirmative action and the OFCC was given enforcement responsibility over all contractors.\footnote{Id. at 314.} Under the Reagan Administration in the 1980s, there was an attempt to weaken affirmative action by criticizing the goals and timetables and calling them “quotas” in public.\footnote{Id.} However, the President’s

\footnote{Johnson, supra note 133, at 314.}
attempt to prohibit numerical hiring goals was stopped, but his administration whittled away at the policy. While the first President Bush was not as opposed on ideological grounds, his administration continued to oppose affirmative action for political tactical reasons. During his first administration, President Clinton backed down from supporting Lani Guinier for director of the Civil Rights Division of the Justice Department when she was portrayed by the media as the “quota queen,” but during his second administration talked more publicly in support of the issue. During the 1999 campaign, George W. Bush referred to the term “affirmative access” but relatively minor attention was paid to the issue in that election. However, it has become clear that his administration has taken a number of steps against affirmative action, including mandating that the American Bar Association issue an accreditation rule for law schools based on their bar passage rate.

In the late 1970s, opponents of affirmative action began to challenge affirmative action programs in the employment and education areas through the courts. Title VI of the Civil Rights Act of 1964 requires affirmative action steps to be taken to remedy past discrimination in admissions programs. Title IX of the Educational Amendments of 1972, prohibits discrimination on the basis of sex, but also provides that affirmative steps should be taken to remedy “past exclusion.” However, most minority admissions programs at universities were self-imposed.

It was one of those self-imposed programs at the University of California at Davis Medical School that was challenged and became the

144. Id.
145. Id.
146. Id. at 314–15.
147. Id. at 315.
148. Report to the House of Delegates, ABA Standards for the Approval of Law Schools: Interpretation 306–1 and Commentary, A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR (Feb. 2008), available at http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Interpretation percent20301-6.pdf (last visited Mar. 14, 2010) (explaining and adopting the Department of Education’s Interpretation 301-6 of the Standards for Approval of Law Schools). A number of groups expressed concern regarding the requirement by the Department of Education that the ABA adopt accreditation standards based on the bar passage rate of the schools. The concern focused on the reliability of the bar passage rate for assessing overall lawyering competency and the effect that the new rules would have on schools that were attempting to diversify their student bodies.
150. 34 C.F.R. § 106.17 (1972).
first attempt by the U.S. Supreme Court to address the legality of affirmative action in the case of *Regents of the University of California v. Bakke*. The challenge was to an admissions program that reserved sixteen of its 100 places for Black, Hispanic and Asian students by a White applicant who had been denied entry twice by a dozen medical schools. The case was brought in 1973 and since the Davis Medical School was founded in 1968 there were no claims that the school was using affirmative action to remedy past discrimination.

There was no majority in the *Bakke* case. Four Justices, in an opinion written by Justice Stevens, held that the quota system violated the non-discrimination clause of Title VI of the Civil Rights Act of 1964. In an opinion written by Justice Brennan, four other Justices argued that the quota system did not violate either the Fourteenth Amendment or Title VI. Justice Powell’s opinion determined the outcome of the case. He ruled that strict scrutiny analysis applies to all race-based classifications, not just those that discriminate against minorities. In this case, he held that the University’s racial quota failed the strict scrutiny analysis and therefore violated the Equal Protection Clause of the Constitution. However, he also held that affirmative action programs can be constitutional. Thus, the stage was set with this splintered decision for the lack of clarity and consensus of the standards for determining the constitutionality of special admissions programs, which continued to change with the composition of the Court.

The second major affirmative action case was *Fullilove v. Klutznick* which involved a challenge to the Public Works Employment Act that granted at least ten percent of federal funds for public works projects to minority business enterprises. A 6–3 majority of the Court upheld the federal program, but the Justices were split regarding the underlying rationales. The first group of Justices (Burger, White and Powell) that upheld the program used a two part test that inquired about whether its objectives were within the power of Congress and whether racial and ethnic criteria were permissible means for achieving the congressional objectives. The three concurring justices (Marshall, Brennan, and

154. See *Bakke*, 483 U.S. at 299.
155. See *id.* at 316–19.
156. See *de la Vega*, *supra* note 10, at 462–63.
158. For a more detailed analysis, see *de la Vega*, *supra* note 10, at 463, ¶ 64.
Blackmun) stated that race-based, remedial, governmental action should be upheld if it was substantially related to attaining an "important governmental objective . . . ."\textsuperscript{160}

In \textit{Wygant v. Jackson Board of Education}, the Court held that a layoff plan for teachers that retained Black teachers who did not have seniority to accomplish racial balancing violated the Equal Protection Clause.\textsuperscript{161} The majority was split in their reasoning and filed three different opinions.

That decision was followed by \textit{City of Richmond v. J.A. Croson}, which invalidated the city's minority business plan under the strict scrutiny standard.\textsuperscript{162} The Court noted that states are subject to a stricter standard of review than Congress because the latter is acting under a specific mandate to enforce the Fourteenth Amendment and, therefore, is held to a laxer standard of review. The distinction between the stricter standard for state and local law and the lesser standard for federal action was reaffirmed in \textit{Metro Broadcasting, Inc. v. FCC}.\textsuperscript{163} If the Congressional mandate was valid under the 14\textsuperscript{th} Amendment, then the distinction does not make sense since states' voluntary programs to achieve equality provisions of the Constitution should likewise be valid.

That distinction was removed, however, in \textit{Adarand Constructors, Inc. v. Peña}.\textsuperscript{164} Justice O'Connor, writing for another splintered majority, held that strict scrutiny is the proper standard for analysis of all racial classifications under both the Fifth and Fourteenth Amendments and overruled the special deference standard articulated in \textit{Metro Broadcasting} and other decisions.\textsuperscript{165} Under \textit{Adarand}, strict scrutiny is the standard for all racial classifications.

Justice Stevens, who was joined by Justice Ginsberg, wrote a scathing dissent. He noted that there is a difference in racial classifications that are used for the purpose of discrimination and those that have the goal of remedying discrimination.\textsuperscript{166} He also questioned the assumption that there

\begin{thebibliography}{9}
\bibitem{160} \textit{Id.} at 518–19.
\bibitem{161} 476 U.S. at 267 (1986).
\bibitem{162} 488 U.S. at 469 (1989).
\bibitem{163} 497 U.S. at 547 (1990).
\bibitem{164} \textit{Adarand Constructors}, 515 U.S. at 200 (1995).
\bibitem{165} \textit{Id.} at 227; see de la Vega, \textit{supra} note 10, at 465–66 for a more detailed analysis of the opinions in that case.
\bibitem{166} In addition to disagreeing with the majority on the substantive issues, Justice Stevens commented on the Court's failure to adhere to the doctrine of \textit{stare decisis}. \textit{Adarand Constructors}, 515 U.S. at 251–59 (Stevens, J., dissenting).
\end{thebibliography}
was no difference between Congressional legislation and similar decisions by states or municipalities.  

Both of those points were relevant to the treaty obligations that the United States government had agreed to in 1994 by ratifying CERD. First, the special measures were clearly mandated under the Treaty not only to remedy past discrimination but to promote equality in the enumerated rights. The Treaty, as noted above, specifically exempted measures designed to protect and develop certain racial groups from the definition of racial discrimination. Further, the United States government had undertaken the obligation to take special measures to ensure the equal enjoyment of those rights, which include employment, housing, health care, and education. The treaty obligations themselves could constitute the means for meeting the compelling state interest test asserted by the Court in "Croson." However, those points were not addressed by the parties and therefore not mentioned by the Court.

In 2003, the Court reconsidered the holding in "Bakke" in the cases of "Grutter v. Bollinger" and "Gratz v. Bollinger." The cases involved challenges to the University of Michigan’s affirmative action programs for both the undergraduate and law school campuses. The Court upheld the law school’s program in the "Grutter" ruling that the “narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body [was] not prohibited by the equal protection clause.” Thus, the Court upheld the affirmative action program on the grounds that diversity is an important goal rather than as a means for achieving equality. In "Gratz," the Court struck down the undergraduate admissions program because it gave minority applicants twenty points out of 100 when it considered their applications. While the disadvantage suffered by Blacks and other

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167. Id. at 255 (Stevens, J., dissenting).
168. CERD, supra note 1, art. 5(e).
169. See de la Vega, supra note 10, at 466–68.
171. 539 U.S. 244 (2003).
173. Professor Brooks has questioned the diversity rationale on the grounds that it “can send the wrong message to students - namely, that the primary reason for having black, Latinos, Asians, and Native Americans on college campus is for the benefit of white students.” Brooks, supra note 17, at 6 n.28. He urges use of the lingering-effects argument as the compelling interest to justify race-based admissions. This theory centers on the fact that Black high school graduates have less access to elite colleges and less opportunity to complete their college education than their White counterparts.
174. Gratz, 539 U.S. at 244, 275.
minorities and their lack of equality in educational opportunity has been well-documented\textsuperscript{175} and could have served as the compelling reason to justify the program, the court disagreed.

Justice Ginsberg did refer to CERD in her concurring opinion in \textit{Grutter} and her dissenting opinion in \textit{Gratz}. In the former, she noted that the Court’s decision was consistent with the international understanding of affirmative action and cited to both Articles 1(4) and 2(2) of CERD as well Article 4(1) of CEDAW.\textsuperscript{176} In \textit{Gratz}, she noted that “the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.”\textsuperscript{177} She went on to note that “contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate \textit{de facto} equality.”\textsuperscript{178} The majority did not address the U.S. treaty obligations raised by \textit{amicus curiae} but not by the parties.\textsuperscript{179}

In 2007, the Supreme Court struck down desegregation plans that used race as a factor in determining enrollment in two local school districts, but a majority of the Justices recognized that educational diversity and eliminating segregation remains a compelling governmental interest.\textsuperscript{180} In his concurring opinion, Justice Kennedy, while agreeing with the majority that public schools should not make school assignments on the basis of the race of the individual students, noted that the ruling “should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.”\textsuperscript{181} The Court did not define the options involving race that remain open to school districts in light of the two programs that were struck down, but four of the Justices would have outlawed all use of race. None of the Justices addressed the international and treaty standards that were raised by \textit{amicus curiae}.\textsuperscript{182}

\begin{flushright}
175. \textit{See generally} Brooks, \textit{supra} note 17.
178. \textit{Id}.
179. \textit{Id}. at 798.
181. \textit{Id}. at 798.
\end{flushright}
Not surprisingly, the CERD Committee in 2008 noted concern regarding the persistence of segregation in the United States and the fact that the decision in Seattle limits "the ability of public school districts to address de facto segregation by prohibiting the use of race-conscious measures as a tool to promote integration." The Committee went on to recommend that the United States undertake "studies to identify the underlying causes of de facto segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school desegregation and providing equal educational opportunity in integrated settings for all students." The Committee emphasized that Article 2, Paragraph 2 of the Convention mandates "carefully tailored special measures" including legislation to promote school integration.

Since the decision in Meredith, some school districts have been moving to diversify their schools on the basis of poverty or class. While studies have shown that in the long run racial integration has helped Black students move up the social ladder due to cross-racial friendships and access to White social networks, a short term gain has also been found from diversifying schools based on income. However, this is not always true depending on demographic patterns, and some school districts, such as that in San Francisco, have returned to substantial racial resegregation since emphasizing socioeconomic factors in its diversity plan. Further, some cities' demographics preclude desegregation by either race or class due to their demographics. Thus, the move towards class-only integration is not necessarily going to end segregated school districts.

It is clear that while there may no longer be massive intentional discrimination in the United States by governmental entities, the equal enjoyment in certain rights is still lacking. As highlighted by the statistics above regarding education and employment, a lack of equality in the enjoyment of those rights continues in the United States. While the judicial system has attempted to address some of those structural disparities by

183. CERD Consideration, Concluding Observations, supra note 35, ¶ 17.
184. Id.
185. Id.
187. Id. at 40.
188. Id. at 41.
189. Id. at 42.
190. Id.
allowing programs that use race for purposes of increasing diversity, it has become clear that use of that measure will not be sufficient to achieve equality. Diversity is a laudable goal, and perhaps one that the CERD Committee should recognize in its jurisprudence on special measures. However, as it has been noted, "[d]iversity is important, but it does not do the same work as integration." It is clear that the increasing segregation in the United States evidences the need to do more to meet its treaty obligations. The CERD Committee has identified that some of those measures need to address *de facto* discrimination, but it also needs to recognize that measures are also needed to address bias, such as that described in certain professions in the United States, as one source of racial discrimination.

III. AFFIRMATIVE ACTION IN SOUTH AFRICA

A. Demographics

South Africa has a population of approximately 47 million people of whom 79.6 percent are Black, 9.1 percent are White, 8.9 percent are Colored, and 2.5 percent are Indian/Asian. The racial architecture created under *apartheid* that included large discrepancies in funding education for the different racial groups, as well as regulations that prevented Blacks, Colored and Indian/Asians from participating in the economy has left its mark in present day South Africa. The history and that legacy affected the participation by Blacks in the economy and education well past the end of *apartheid*. However, this history and legacy also resulted in the drafting of constitutional provisions that attempted to address those discrepancies. Thus, while Section 9 of the


194. *Id*. at 26. It is beyond the scope of this article to review the long history of discrimination that preceded the establishment of the official policy of *apartheid* by the (Afrikaner) Nationalist Party in 1948 or the various policies and laws that created the background for the structural divide that still exists today. However, a good summary can be found in Teresa Hammond et al., *The Role of Multinationals in the Transition of Apartheid: Black Empowerment in the South African Accounting Industry, 1976–2000* (2007), at 6–10 (Boston College, Working Paper 2007) (on file with author) [hereinafter Hammond et al.].
South African Constitution establishes the right to equality and equal protection of the law it also provides that discrimination on the basis of race is allowed if “it is established that the discrimination is fair.”

Implementing legislation did increase the level of Black participation in government, but a 2006 audit found that there has been unsatisfactory Black representation in middle management. Further, outside of government employment, disparities continue. Whites are still more likely to be employed than Blacks, a discrepancy that continues to be attributed to the structural inequalities of the past. There have been minimal increases in the representation of Blacks at top management positions that submitted reports to the Annual Audit Report by the Commission on Employment Equity. The Commission has noted that there is insufficient mentoring and development of employees’ potential.

Despite the repeal of the discriminatory laws passed under apartheid, high profile jobs are still held by Whites and they still receive higher salaries. A study of economically active adults in South Africa from 1995 to 2002 concluded that Whites are more likely to be employed than Coloreds or Blacks. Indeed, observed and predicted employment gaps between Whites and non-Whites increased over that eight-year period. The authors of that study attributed the unexplained White advantage to employer nepotism which resulted in overcoming the affirmative action legislation in place during that time period. The authors note that it is difficult to ascertain bias in the model “due to missing or inconsistent data on variables such as ability, attitude, pre-labour market discrimination (e.g. schooling quality), parent’s occupations and social networks.” Studies have shown that schooling quality in South Africa during apartheid was much poorer for Blacks than for Whites due to the Bantu Education Act
that encouraged minimal learning and schooling and lower job expectations.  

The authors conclude that the reverse discrimination employment hiring policies have been ineffective in addressing the inequalities in both education and employment policies of the past as well as the nepotistic hiring employment policies that continue in the present.

Whether it is simply nepotistic hiring practices or whether they involve some level of bias in hiring is addressed in part by a study done on the accounting industry in South Africa from 1976 to 2000. While the study is focused on the role of multi-nationals, the authors include the South African accounting system. They found that while state intervention produced greater visibility for Blacks within the major accounting firms, patterns of discrimination continued to exist in the post-1995 era and that the discrimination was perpetuated not only by the South African firms but by the multi-national firms as well.

Interestingly, while underlying studies supported the finding that in part the hiring practices are based on nepotism—"acceptance and advancement within accounting firms is more a matter of 'fitting in' than of acquiring professional knowledge or expertise, that exclusion based on 'fit' is often rationalized by blaming client attitudes," This is similar to the attitudes Ms. Hammond found in the United States.

Underlying the structural problems that continue in South Africa is the ongoing lack of equality in education. The ongoing segregation in education is particularly troublesome. One example that helps to highlight the problem is the premier public high schools in Cape Town—

205. Id. A recent article affirms the various ways in which the legacy under apartheid continues to affect the lack of effective schools for the Black population, but also notes that South African schools have other problems which cannot be blamed on history, such as teacher absenteeism and inadequate time spend on instruction. Celia W. Dugger, Eager Students in South Africa Fall Prey to Apartheid's Legacy, N.Y. TIMES, Sept. 20, 2009, at 1, 14.

206. Brookes & Hinks, supra note 24, at 577.

207. See Hammond et al., supra note 194.

208. Id. at 58–59.

209. Id. at 14 (citing studies conducted by Dirsmith & Covaleski (1985) and Grey (1998)).


the South African College School, the oldest school on the continent. Seventy percent of the students are White and the teaching staff was still largely White in 2006.212 Interestingly, this problem is in part due to the fact that the government cut funding to what were primarily White schools in order to focus on education in the Townships.213 Blacks, Asians, and Colored parents could not afford the high tuition that resulted at that school and with few scholarships offered, even if admitted, students from those groups found it difficult to attend.214 This is but another example of well-intentioned government policies perpetuating the structural inequalities that resulted from apartheid.

The low participation by the mostly Black population in the higher ranked public schools carried on to the universities. South Africa has twenty-two universities with the participation rate of approximately ten to fifteen percent of the population (compared to sixty percent of the population in the United States that participate in the 3500 institutions of higher learning).215 The low participation rate is made worse by the fact that there is still racial disparity among the higher ranked schools. For example, the University of Cape Town has maintained a fifty–fifty balance between Black and White students which is not reflective of the racial breakdown of the population.216 At Stellenbosch University, enrollment by race comparison for the years 2003 and 2007 shows a slight increase in White student enrollment, a significant increase for Colored student enrollment, and a slight decrease in Indian and Black enrollment.217 White students still outnumber Black, Colored, and Indian students combined, with approximately 2.5 White students to 1 non-White student.218

As is the case with the public high school, the faculty figures are even more striking. In 2005, seventy-eight percent of the faculty was White and twenty-two percent was Black—a two percent improvement from 2004.219

213. Id.
214. Id.
218. Id.
In light of the education and employment statistics, it is not surprising that despite an increase in average personal income in South Africa, the majority of the Black population continues to live in poverty, and this rate continues to rise. Further, there is a growing income disparity. This disparity has clear racial components. While Whites comprise almost ten percent of the population, they occupy approximately eighty percent of all corporate positions. The per capita income of Black South Africans was thirteen percent of that of Whites, fourteen years after the end of the apartheid government according to the Institute for Justice and Reconciliation.

Incomes in South African Black households fell by nineteen percent between 1995 and 2000, while White household incomes rose by fifteen percent, according to the development research body id2.

The University of Cape Town has attempted to address the racial discrepancies in its admissions procedure by creating different score cut-offs for applicants based on the racial groupings. While this may appear discriminatory on its face, when one looks at the vast disparities in education, it is clear that steps needed to be taken to address those discrepancies. Indeed, the Admissions Policy for the University in general recognizes the problem with the use of race as a criterion for admissions, but notes that it is necessary as a “transitional mechanism for giving effect to the requirements of redress and as the best initial broad basis to measure past inequalities and for redress for past discrimination.” It also cites to the Higher Education Act that requires that “the admissions policy of a public higher education institution must provide appropriate measures for

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220. Bosch, supra note 200 (citing South African Institute of Race Relations (2003)).


226. Id. at 24.
the redress of past inequalities and may not unfairly discriminate in any way.\textsuperscript{227} The law school takes the scores into consideration as part of other criteria and admission is not guaranteed by applicants meeting the minimum scores.\textsuperscript{228} Further, the University notes that it will move beyond race alone by seeking ways to differentiate on grounds of disadvantage such as social class and educational experience, or a combination of both.\textsuperscript{229} Thus, there is an attempt to both benefit those who belong to a group of people that were discriminated against, as well as those who are now disadvantaged.

B. The History of Affirmative Action and the Constitutional Court’s Response in South Africa

As indicated above, Section 9 of the Constitution of South Africa provides for differential treatment if it is established that the “discrimination is fair.”\textsuperscript{230} This concept has been implemented in a number of legislative measures: the Labour Relations Act,\textsuperscript{231} its successor the Employment Equity Act,\textsuperscript{232} the Promotion of Equality and Prevention of Unfair Discrimination Act,\textsuperscript{233} and the Broad Based Black Economic Empowerment Act (BEE).\textsuperscript{234} The goals of the BEE, for example, are to achieve a “substantial change in the racial composition of ownership and management structures, increasing ownership and management” by Blacks, with numerical diversity its clear goal.\textsuperscript{235} The approach of these statutes, which has been reinforced by the Constitutional Court, is that affirmative action does not constitute discrimination.\textsuperscript{236}

Despite these clear mandates, the Constitutional Court of South Africa has also struggled with how to implement these affirmative action provisions. In its first case addressing affirmative action, the Court struggled to ensure that the preferential treatment did not discriminate

\begin{itemize}
\item \textsuperscript{227} The Higher Education Act, No. 101, s. 37 (1997) (S. Afr.).
\item \textsuperscript{228} Undergraduate Prospectus, \textit{supra} note 225, at 56–58.
\item \textsuperscript{229} \textit{Id.} at 24.
\item \textsuperscript{230} \textit{S. AFR. CONST. 1996, Ch. 2, art. 9, § 2.}
\item \textsuperscript{231} Labour Relations Act, \textit{supra} note 22.
\item \textsuperscript{232} Employment Equity Act, \textit{supra} note 23.
\item \textsuperscript{234} BEE, \textit{supra} note 20.
\item \textsuperscript{235} Bosch, \textit{supra} note 200.
\item \textsuperscript{236} \textit{Id.}
\end{itemize}
against the non-beneficiaries by requiring a public plan that was clear, rational and coherent in order to create awareness and the opportunity for public monitoring of its implementation.\footnote{237}

In 2004, the Constitutional Court established a three-fold test for meeting the requirements of Article 9(2) of the Constitution which provides for differential treatment.\footnote{238} The particular measure must target persons or categories of persons who have been disadvantaged by unfair discrimination; it must be designed to protect or advance those persons or categories of persons; and it must promote equality.\footnote{239} If the statute meets these requirements, it is not deemed to be unfairly discriminatory and indeed the affirmative action measures may be seen as “part of equality, and thus ‘fair’ discrimination, and not as a discrimination which needs to be justified,”\footnote{240} unlike what is required under the jurisprudence of the United States Supreme Court. Furthermore, since the measures can target specific persons or categories of persons, presumably there is no need to establish that the specific persons who benefit from them was intentionally discriminated against. The three-part test might be useful for the Committee to consider in drafting the General Recommendation on Special Measures.

Despite the ruling in \textit{van Heerden}, the Labour Court recently ignored this approach and ruled that an applicant alleged a \textit{prima facie} case of race discrimination when the employer failed to hire him in light of its equity plan because he had been differentiated on the basis of race.\footnote{241}

At least three other issues of import have arisen out of the South African cases. First, a question has emerged as to whether there is a right to affirmative action. Thus far, the courts have ruled that the Employment Equity Act does not provide an entitlement to affirmative action.\footnote{242} Therefore, failure to comply with the Act can only result in a fine which is

\begin{thebibliography}{99}
\footnotesize
\item 239. \textit{Id.} ¶ 37.
\item 240. Bosch, \textit{supra} note 200.
\end{thebibliography}
determined by a court. This is an interesting issue that has thus far not been addressed at the international level. Whether the CERD affirmative action requirement gives specific rights to individuals would depend on whether the obligation was deemed to be self-executing. Nonetheless, it might be helpful if the CERD Committee addressed this issue in a general comment.

The second issue that has arisen in South Africa is whether foreign nationals can be the beneficiaries of affirmative action programs. This issue has been answered in the negative by the Court which has ruled that affirmative action policies are limited to South African nationals. While the Court did not refer to the Constitution, this ruling is consistent with its goal of redressing past discrimination. However, that does run counter to the goal of the Employment Equity Act which is focused on creating a more racially representative business world. This is an issue which might also be addressed differently under CERD which refers to the promotion of racial groups and defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin." While the treaty also provides that it should not be interpreted to affect the legal provisions of State Parties concerning nationality, the Committee has issued a General Recommendation that the provision only applies to issues of citizenship and nationality and not to the other human rights and fundamental freedoms.

An interesting side issue related to categories of beneficiaries was recently decided by the Pretoria High Court. In June 2008, that court ruled that South African ethnic Chinese people are included in the definition of Black people under Section 1 of the Employment Equity Act and the BEE. In so ruling, Judge Pretorius accepted the Chinese as a "previously disadvantaged" group under past laws. This being the case, it would


245. Bosch, supra note 201.

246. CERD, supra note 1, art. 1(1).

247. CERD, supra note 1, art. 1(3).

248. CERD General Recommendation No. 30, supra note 29.


make sense to include the 10,000 ethnic minorities in the coverage of the laws aimed at remedying the past discrimination.

The third issue is whether the particular beneficiaries have to be specifically disadvantaged themselves in order to benefit from the affirmative action programs. One commentator has noted that the Employment Equity Act aims to promote the advancement of Blacks regardless of their economic situation.251 This emphasis could leave the majority of Black South Africans poor and disadvantaged even if the employment sector becomes more representative of the population.252 It is suggested that a test similar to that used in India be used to eliminate affluent or professional families from affirmative action programs.253 This might in fact be appropriate in the employment arena if there are sufficient numbers of qualified applicants from the various races for the positions. While the historical discrepancies remain, affirmative action based on race is still needed. Indeed, that is what CERD requires in order to ensure full and equal enjoyment of human rights and fundamental freedoms.

Because of the past history under apartheid, the government has taken a serious approach to monitoring affirmative action. The monitoring form required of companies regarding their compliance with the Employment Equity Act is instructive on the wide variety of categories that the government considers relevant in determining compliance with the Act. It breaks down what companies must report on to the following areas: recruitment procedures, advertizing positions, selection criteria, appointments, job classification and grading, remuneration and benefits, terms and conditions of employment, job assignments, work environment and facilities, training and development, performance and evaluation systems, setting numerical goals, promotions, transfers, demotions, succession and experience planning, disciplinary measures, diversity program and sensitization, community investment and bridging program, retention measures, and reasonable accommodation.254 By requiring reporting on such a variety of categories, it is hoped that businesses will take the task of affirmative action seriously.

251. Bosch, supra note 200.
252. Id.
253. Id.
IV. RECOMMENDATIONS TO CERD

The experiences with affirmative action programs in the United States and South Africa help to highlight the difficulties and complexities surrounding the topic. These help to highlight the need for a more comprehensive set of definitions and standards of the obligations for special measures in CERD. These could be helped by a General Recommendation by the CERD Committee. Elements of the General Recommendation should include issues that the Committee has already addressed while reviewing country reports. These include the following:

a) The mandatory nature of the special measures obligation under Article 2(2);
b) The special measures are not considered discriminatory if they are within the scope of fulfilling the obligations of the treaty;
c) The measures should have the goal of guaranteeing to all groups the full enjoyment of their civil, political, economic, social, and cultural rights;
d) The measures should be taken to eliminate structural inequalities within a country;
e) The measures should not abrogate the rights of any group after the purposes for which they were adopted have been achieved;
f) The measures should benefit all groups that have not attained equal enjoyment of human rights and fundamental freedoms; and
g) The special measures should be undertaken to address both de facto as well as de jure discrimination.

The CERD Committee can also benefit from the efforts of other treaty bodies and sub-commissions that have addressed these issues. These elements include:

a) The need to identify disadvantaged sectors. As the Sub-Commission report notes, there is also a need to define who belongs to the groups as well, recommending that this be done by self-identification;
b) The fact that not all differentiation equates to discrimination, especially when the goal is aimed at remedying the latter;
c) There are multiple forms of discrimination suffered by members of some groups such as women. These need to be recognized;
d) There is a need to better define what are specific temporary measures; and
There is a need to differentiate between restitution and other goals such as increasing the need to increase the participation of specific groups in certain occupations. The latter means that the beneficiaries of the programs do not have to have been the victims of specific discrimination themselves, and indeed may not be the most disadvantaged in a group.

The experiences from the United States and South Africa also help to highlight other factors to address in the Special Recommendation. First and foremost, while there may be other means for addressing inequality, such as those based on social status or wealth, so long as racial disparities exist in education and other rights race-based measures should continue to be used. As the situations in both the United States and South Africa demonstrate, disparities between the races continue in the provision of various rights including education and employment. Until the structural inequalities reflected by these disparities are addressed, affirmative action will be needed.

Second, bias needs to be addressed, both as a reason for using race-based measures as well as something that needs to be the focus of special measures. Thus, the Committee might want to make more explicit the relationships between Article 2(2) and Article 7. Educational programs are needed to address bias under Article 7. Until that is done, affirmative action measures should be continued to increase the participation of underrepresented racial groups in both the educational and employment sectors.

Third, the use of diversity as a goal might be helpful as a means for achieving equality, though it should not replace the goal of attaining equality in the enjoyment of human rights and fundamental freedoms. As the experience in the United States has shown, universities have been successful in promoting racial minorities through the concept of promoting diversity.

Fourth, it is important that the special measures enacted be carefully tailored to the specific goals being sought. Recognition must be given to the fact that group-based goals necessarily mean that in some contexts the most disadvantaged members of the group may not be the direct beneficiaries of the special measures. Nonetheless, without specifying what

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255. However, Professor Dupper has cogently argued for a more nuanced approach to affirmative action that takes into account the complexity of disadvantage as well as the continuous shifts taking place in society and the economy. Dupper, supra note 13, at 438–43. Such an approach might well require reassessing disadvantage in terms of class as well as race in South Africa, which could lead to the need for permanent special measures. Id. at 443.
the goals of a particular program are, problems might result similar to those created by the BEE in South Africa where very little, real change in ownership and decision-making resulted from the mandates of the law. Specific government guidance such as that provided in the South African Department of Labour’s Employment Equity Form might be recommended.

Finally, it is important to note that measures such as affirmative action are only one means for addressing discrimination. The elimination of discriminatory laws, retribution and remedies for discrimination, and equal funding of programs must go hand-in-hand with affirmative action programs.

A number of other issues also need to be addressed that have not been discussed above. First, it is important, in order to achieve equality, that a government keep statistics related to the enjoyment of the enumerated rights by race. Without these, it would be impossible to ascertain whether the goals of CERD have been achieved. A proposition in California that would have prevented keeping statistics was defeated in 2003.256 If it had passed it would have made it very difficult to determine the de facto discrimination that exists in California. In France, where race statistics are not gathered, it is difficult to address the inequality that has arisen with respect to the ethnically diverse, low-income population which has resulted in rioting in 2005.257 Indeed, the prohibition against keeping statistics on race makes it difficult to monitor the progress of anti-discrimination programs as well as address the structural inequality that exists in that country.258

Second, the issue of equality needs to be more clearly defined. Is it simply numerical or are there other aspects to it? The concept of equality of opportunity might be helpful in this regard.259

Third, the issue of support for those who are the beneficiaries of affirmative action programs should be addressed. If persons from certain


groups are accepted into schools or employment for purposes of achieving affirmative action goals, it may be that due to past discrimination or inadequate education those persons may need programs to help them compete with others admitted through the regular process. Often times the additional training required might be minimal, but necessary nonetheless. For example, in a lawsuit involving discrimination by the United States Postal Service it was discovered that the Postal Service was refusing to hire minorities because they needed one half-hour of extra training. The case was settled shortly after this information was discovered, but it exemplifies how minimal additional training can help promote the hiring of minorities.

V. CONCLUSION

The experiences of the continuing racial inequality and the experiences and results from affirmative action in the United States and South Africa exemplify the need for more guidance regarding the Special Measures mandate of CERD and in particular affirmative action. Structural inequalities continue in both countries who have taken divergent approaches toward the use of affirmative action—in the United States by severely restricting it and in South Africa by its broad use. While some progress has been attained in both countries, statistics for participation in institutions of higher education and in higher paid professions indicate a continuing and sometimes worsening racial gap. In addition to considering its own interpretations of the CERD Special Measures mandate and the interpretations of other treaty and UN bodies, the CERD Committee should consider the experiences of those two countries, with histories of overt racial discrimination in their past, in drafting a General Recommendation that will further give State Parties guidance in implementing their obligations under the treaty.

POST SCRIPT

At its seventy-fifth session in August 2009, the CERD Committee adopted General Recommendation 32. Many of the above recommendations were included. Its most important points include:

Paragraph 6 notes that the principle of equality “combines formal equality before the law with equal protection of the law, with substantive or de facto equality in the enjoyment and exercise of human rights . . . .”

Paragraph 7 refers to “intersectionality” which addresses double or multiple discrimination. It also notes that it is important to “distinguish special measures from unjustifiable preferences.”

Paragraph 8 provides that differential treatment will constitute discrimination unless it is for a legitimate aim and is not disproportional in the achievement of the aim. On the other hand, equal treatment can constitute discrimination if it is applied to persons or groups whose situations are different, as will “unequal treatment of persons whose situations are objectively the same.” “[N]on-discrimination requires that the characteristics of groups be taken into consideration.”

Paragraph 9 affirms that the Convention protects a broad scope of rights and non-discrimination not only by public agencies but “by any persons, group or organization.”

Paragraph 11 notes that special measures are but one component of the means for eliminating discrimination.

Paragraph 12 lists various terms that are used in the context of special measures, such as “affirmative measures, affirmative action, or positive action”, but it urges the avoidance of terms such as “positive discrimination” as a contradiction in terms.

Paragraph 13 notes that measures include a variety of legislative, executive, administrative, budgetary, and regulatory measures at all levels of national, regional, and local government.

Paragraph 14 emphasizes that the obligation to take special measures is distinct from the obligation to secure human rights and fundamental freedoms in a non-discriminatory manner.

Paragraph 17 mandates that “special measures should be [enacted] on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporat[e] a gender perspective.”

Paragraph 18 notes that State Parties should consult with the affected communities prior to enacting special measures.

Paragraphs 19, 20 and 21 reaffirm that special measures do not constitute race discrimination when taken for the sole purpose of ensuring equal enjoyment of human rights and fundamental freedoms.

Paragraph 22 notes that programs should 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.” They should address structural and de facto inequality, which can include those resulting from historical circumstances, but it is not necessary to prove historical discrimination to validate a program. The emphasis should be on “correcting present disparities and on preventing further imbalances from arising.”
Paragraph 23 notes that protection against discrimination is from any source including private persons. Special measures can be preventative as well as corrective.

Paragraph 26 emphasizes the limitations of Article 1, paragraph 4 that includes the prohibition against the maintenance of separate rights for different racial groups and specifically disapproves of apartheid which was imposed by the State. It cautions of the need to distinguish those measures from those that secure the existence and identity of certain groups that are recognized within the framework of human rights, such as minorities and indigenous peoples.

Paragraph 27 notes that the second limitation is that special measures should not be continued after their objectives have been achieved. The length of time will vary in light of the objectives, the means used to achieve them, and the results of their application. It notes that for this reason they should be “carefully tailored to meet the particular needs of the groups or individuals concerned.”

Paragraph 30 emphasizes the mandatory nature of the obligation that governments have to undertake special measures.

Paragraph 31 re-emphasizes the application to all levels of government, whether unitary or federal or decentralized states. In federal states, the federal government is “responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary.”

Paragraph 32 again emphasizes the “obligation of States parties to adopt measures tailored to fit the situations to be remedied and capable of achieving their objectives.”

Paragraph 34 also emphasizes that the “beneficiaries of special measures . . . may be groups or individuals belonging to such groups.” It also provides for the self-identification of the individual concerned unless there is a justification to the contrary.

Paragraph 35 addresses the similarity in limitations in both Article 1, Paragraph 4, and Article 2, Paragraph 2. It mentions that the time limitations necessarily involves monitoring of their application and results by using both quantitative and qualitative methods of appraisal. It also notes that State Parties should assess what the human rights consequences might be upon an abrupt withdrawal of special measures, especially those that have been established for a lengthy period of time.261

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261. General Recommendation No. 32, supra note 27.