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Holtmaat, H.M.T.; Boerefijn, I.; Coomans, F.; Goldschmidt, J.; Holtmaat, R.; Wolleswinkel, R.

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**TEMPORARY SPECIAL MEASURES**

**ACCELERATING *DE FACTO* EQUALITY OF  
WOMEN UNDER ARTICLE 4(1)**

**UN CONVENTION ON THE ELIMINATION OF ALL  
FORMS OF DISCRIMINATION AGAINST WOMEN**

Ineke Boerefijn  
Fons Coomans  
Jenny Goldschmidt  
Rikki Holtmaat  
Ria Wolleswinkel

(editors)

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Temporary Special Measures - Accelerating *de facto* Equality of Women  
under Article 4(1) UN Convention on the Elimination of All Forms of  
Discrimination Against Women

Ineke Boerefijn, Fons Coomans, Jenny Goldschmidt, Rikki Holtmaat,  
Ria Wolleswinkel (eds.)

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# **BUILDING BLOCKS FOR A GENERAL RECOMMENDATION ON ARTICLE 4(1) OF THE CEDAW CONVENTION**

**REPORT OF THE EXPERT MEETING IN MAASTRICHT  
(VALKENBURG) 10-12 OCTOBER 2002**

**Rapporteur: Rikki Holtmaat**

## **1. INTRODUCTION**

This report involves a summary of the main points raised in the discussions at the expert meeting<sup>1</sup> held in Maastricht, October 10-12 2002, intended to assist the CEDAW Committee in its efforts to draft a General Recommendation (from here on: GR) on Article 4(1) of the Convention.<sup>2</sup> Where necessary it offers some additional clarifications. While recognising that it is not within the competence of the participants of this meeting to tell the Committee how to draft a GR the participants believe that their views will be of value to the drafters. Thus, in this report the phrase 'the Committee *should* do .... (this or that)' reflects the participants' most sincere and highest recommendations.

## **2. SOME PRELIMINARY REMARKS (ABOUT THE AIM/STRUCTURE/STRATEGY) TO KEEP IN MIND WHEN DRAFTING THE GENERAL RECOMMENDATION**

The primary goal of the GR ought to be to clarify the concept of temporary special measures (from here on: TSMs). Since both governments and Non Governmental Organisations (from here on: NGOs) will make use of the GR clear and simple language (as opposed to overly juridical terminology) should be used. The GR should also contain

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<sup>1</sup> A draft-text of this report was discussed in the concluding session of the meeting and has been distributed afterwards among the participants. The rapporteur is very grateful for their comments. She also wishes to thank Sylvester (Danny) Ryan for his editorial comments and grammatical corrections. At some points the rapporteur has added her own thoughts and analysis to the report in order to clarify the background of the discussions in the meeting.

<sup>2</sup> The CEDAW Committee has the authority to evaluate Initial Reports and State Reports that are submitted to the UN under Article 18 of the Convention. The Committee, under article 21(1), also has the authority to draft so-called General Recommendations. Until 2003 the Committee has drafted 24 of such Recommendations.

a clause in which governments are urged to translate this GR and disseminate it widely.

The GR should send the clear message that the obligations of the CEDAW-Convention are legally binding, i.e. that human rights are enforceable rights and not merely aspirations. The CEDAW-Convention aims to eradicate discrimination and achieve equality of men and women. The CEDAW-Convention sets out legally binding norms for all governments that ratify this Convention.

The drafters must carefully chose their words in order to overcome the dominant view of 'positive action' or 'affirmative action' measures as special favours or preferential treatment of women, or which otherwise portray women as the problem and as the ones who need to change. To avoid these understandings the term disadvantage should be used judiciously in the GR. More accurate language, e.g. 'underrepresented' or 'excluded' ought to be used where appropriate. The GR should clearly reflect that the central problem is the existing privilege of men, rather than the 'disadvantage' (too often constructed as the 'impairment') of women.

Terms and concepts that have ambiguous meanings (such as formal and substantive equality) or that have different meanings in different legal contexts (such as affirmative action or special rights) should be avoided, unless they are clearly defined in the GR.<sup>3</sup> The participants of the meeting preferred using the term TSMs over using other related terms such as affirmative action and special rights precisely because the latter terms are contaminated with specific meanings that significantly differ from the concept embodied in the term TSMs in article 4(1) of the Convention.

TSMs must be tailored to deal with a variety of different situations involving discrimination. It is very important to clarify in the GR that sometimes women should not be treated as a single category. Differences among women should be recognised. Some TSMs are specifically needed for particular groups of women. And some women suffer from multiple forms of discrimination.

### **3. SOME HEADLINES OF THE DISCUSSIONS**

During the discussions the participants of the expert meeting reached a consensus on a number of conceptual and legal issues concerning the

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<sup>3</sup> For the purpose of clarifying the discussion some of these concepts are discussed in this Report.

nature of the provision at stake. Though quite abstract and general, these issues should be clarified in the GR.

The meeting agreed that the GR should evaluate the scope and meaning of Article 4(1) with regard to the overall objectives and purposes of the Convention (see below).

There was a common understanding that although an obligation exists for States to adopt and apply TSMs, this obligation does not stem from Article 4(1) as an isolated provision, but flows from the combined Articles 1-5 and 24, read together as the general interpretative framework of the Convention. The mandatory character of TSMs also appears from the wording of the other (substantive) Articles (6-16) in which States are required to ('shall') take *all appropriate measures* in certain fields.

From this perspective, Article 4(1) does not in itself impose a duty on States to adopt and apply TSMs. Rather, it makes clear that *if* a State does take such measures, and *if* these measures fall within the terms of this provision, there can (by definition) be no complaint of discrimination raised against by men. Thus, Article 4(1) is an *explanation* instead of an *exception* to the definition of discrimination.

The importance of Article 4(1) should not be underestimated. It makes clear that 'accelerating *de facto* equality' of men and women is one of the goals of the Convention. As such, it contributes to the understanding that the concept of substantive equality is prevalent in the Convention.<sup>4</sup> Article 4(1) contains a number of elements that need further clarification (see below).

The meeting further agreed that the GR should clearly distinguish between TSMs and 'general social policies' adopted and applied in order to improve the position of both women and men. Not all measures that potentially or actually (mainly) favour women qualify as TSMs. Providing favourable *general* conditions (ensured by the civil, political, social, economic and cultural human rights as such) for women and men

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<sup>4</sup> If the Committee wants to express this view it should explain what the concept of substantive equality entails. In this report that term is meant to imply that the principle of equality between men and women does not stop at granting men and women the right to equal treatment before the law, but also aims at bringing about equality in practice. Substantive equality is result-oriented. It is not the nature of the treatment as such that is important, but the result of the treatment in terms of achieving more *de facto* equality between men and women. Substantive equality means that a State does not only have the negative obligation to refrain from discrimination, but also a positive obligation to promote *de facto* equality.

that improves their situation can (nor should) not qualify as TSMs. Similarly measures that fall within the scope of article 4(2) do not qualify as TSMs.

The following objectives of affirmative action programs, positive action plans, or TSMs were discussed in the meeting:

- to *remedy* the effects of past or present discrimination against women and offer equal starting points or equal opportunities to women;
- to *accelerate* the process of equal participation of women in all fields of social, economic, political and cultural life and/or the process of redistribution of power and resources and the bringing about of social and cultural change that will improve the *de facto* position of women;
- to *neutralise* the advantages that men have in the existing social, economic, political and cultural systems.

In its Preamble the CEDAW-Convention recognises the fact that women were and continue to be victims of discrimination. However, great dangers arise if one stresses past discrimination as the (only) justification for TSMs. This approach means that statistical evidence of under-representation of women should be presented and also some proof that this situation has indeed been caused by sex-discrimination. Proof of causation is particularly difficult to establish since many factors may play a role. In addition under this approach one must establish that some (groups of) persons or institutions can be held responsible and should be obliged to offer an adequate repair.

The fault-based idea of remedying (past) discrimination misses the point of the general obligation of the Convention, which is to eliminate discrimination and to improve the position of women *by all appropriate means* (including TSMs). Article 4(1) does not even speak of remedying past discrimination at all. Thus, the obligation to act on behalf of women exists irrespective of any proof of past or present discrimination.

The second objective (to accelerate the process of equal participation of women, et cetera) takes as its starting point the present situation of women. From there, TSMs are seen as appropriate and necessary instruments to improve the position of women. This objective reflects more closely the wording of Article 4(1) itself. Additionally, this objective is more in line with recent changes in EC law where in Article 141(4) of the Treaty of Amsterdam the EC legislator uses the expression '(...) with a view to ensuring full equality in practice' and also speaks of the

'underrepresented sex'.<sup>5</sup> In all the expert meeting suggests that the Committee stress the second objective in the GR and perhaps not mention the first one at all.

The GR should point out that the problem to be addressed by way of TSMs is *not* the disadvantage that women suffer (through whatever cause), but rather the impact of the privileges that men have in existing social, economic, political and cultural structures. These advantages need to be *neutralised* by means of TSMs.

However, TSMs may need 'extra' justification in certain cases where such measures (that are by definition directed exclusively at women) are held to be detrimental to the fundamental rights of certain (individual) men. Only in such cases where there is a serious infringement of such a fundamental right, it is appropriate to examine whether the need for a TSM outweighs the individual right(s) of a man or group of men. In such cases one must determine whether the measure at stake does indeed qualify as a TSM, i.e. whether it serves the specific goal mentioned in Article 4(1) *and* whether the means chosen to reach this goal are appropriate and necessary to reach that goal.

The GR should clarify the differences between Articles 4(1) and 4(2) of the Convention. The State Reports indicate that States often confuse these two provisions. The main difference is that Article 4(2) applies to measures that are of a *permanent* nature. Another difference is that measures under Article 4(2) are directed at specific *biological* differences between men and women with respect to their reproductive capacities.

The GR should clarify that measures that fall within the scope of Article 4(2) should neither be seen as 'special' measures for women, nor as exceptions to the non-discrimination norm. Taking pregnancy and motherhood into consideration and ensuring specific rights to women on these grounds is simply a matter of doing justice to (biological) differences between the sexes. As such, this Article is an explanation of the concept of equality as embodied in the Convention, which comprises that there not only should be equal treatment of equals, but also that persons who are in different positions should be treated differently. This concept of equality requires that societies treat different biological

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<sup>5</sup> However, it would not be wise policy to copy the wording of this provision in full extend. First it is sex-neutral, also making possible positive actions in favour of men. Secondly, it speaks of 'special advantages' and 'to compensate for disadvantages'. This is a language that should be avoided when defining the concept of TSMs. See also Carol Bacchi's contribution to this Volume.

interests, such as pregnancy and childbirth, in such a way that those interests are reasonably accommodated in order that women have *de facto* equal rights and equal opportunities. Article 4(2) therefore, is of an explanatory nature rather than an exception to the equal treatment norm.

#### **4. THE STRUCTURE OF THE GENERAL RECOMMENDATION**

It has been suggested in the expert meeting that the GR should contain the following Sections<sup>6</sup>:

- The object and purpose of the Convention
- The meaning of TSMs in other human rights instruments/ constitutions/national legislation
- The meaning of the concept of TSMs in the CEDAW-Convention
- The mandatory nature of TSMs
- Article 4(1) in the reporting procedure
- Examples of TSMs in practice

The following pages present the recommendations of the expert meeting regarding the content of each of these Sections.

#### **5. THE OBJECT AND PURPOSE OF THE CONVENTION**

The GR should explain the role and function of Article 4(1), given the overall object and purpose of the CEDAW-Convention. Therefore, an explanation of the meaning of the Convention with respect to several issues is necessary. The Convention is a dynamic instrument. Given the progressive insights concerning the concept of equality of men and women and the instruments that are adequate and necessary to fight all forms of discrimination against women, it is only logical that 24 years after the adoption of the Convention there is a need for clarification of some of its central provisions.

##### **5.1. *The A-symmetrical Equality Norm of the Convention***

In its Preamble and its provisions the CEDAW-Convention clearly embraces a substantive<sup>7</sup> and an a-symmetrical approach to non-discrimination and equality of men and women. This is in marked

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<sup>6</sup> As suggested orally by Rebecca Cook at the meeting.

<sup>7</sup> See footnote 4.

contrast to the formal<sup>8</sup> and symmetrical concept of equality and discrimination that is dominant in sex equality legislation in many countries.

Often domestic legislation requires that there should be no unequal treatment or discrimination on the ground of *sex*. Thus, both men and women are *equally protected* against unfair and non-justifiable unequal treatment. It is irrelevant whether the claimant belongs to a group that is the victim of (past or present) discrimination or that he or she really is (structurally) in a disadvantaged position. Many men have won court cases under this legislation, often resulting in the abolishment of rules or practices that were comparably favourable to women. Governments often follow a policy of 'equally bad off is equal as well' and of 'levelling down' when implementing this formal and symmetrical sex equality norm.

In contrast to this symmetrical approach the CEDAW-Convention prohibits any policy that - under the guise of equal treatment (of men) - would hurt the position of women. Such policies would be in breach of the obligation to *improve* the position of *women* (as reads the second aim of the Convention; see below). The Convention recognises the fact that *women* are the ones that have suffered and still suffer from a variety of forms of discrimination.

## 5.2. *The Aims of the Convention*

The overall goal of the Convention (*elimination of all forms of discrimination against women*) can be 'subdivided' into three sub-aims. The CEDAW-Committee has already adopted this analysis in its Concluding Comments on the Netherlands of July 2001.<sup>9</sup> The Convention aims:

- to ensure that there is no discrimination against women in the laws and in public administration,
- to improve the *de facto* position of women and
- to address the issue of fixed gender stereotypes (or the dominant gender ideology); i.e. to bring about structural social and cultural changes that will facilitate diversity in gender roles.

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<sup>8</sup> The term formal equality is used here in the meaning of placing the accent on the nature of the treatment. Equal treatment of equals (consistency of treatment) is central in this approach. The second part of the classical Aristotelian formula - treating dissimilar cases differently in accordance to their difference - gets little or no attention in this approach, except as an excuse not to treat people equally. The formal approach places the accent on negative obligations (to refrain from discrimination).

<sup>9</sup> See: Concluding Comments in UN Doc. A/56/38, CEDAW/C/SR. 512 and 513, para .196.

These three aims are derived from the joint reading of the Articles 1-5 and 24, which form the general interpretative basis of the Convention. Thus, the threefold approach of CEDAW moves far beyond the scope of formal equal rights (or mere equal treatment of women *as compared to men*). The three objectives of the Convention should not be separated or ranked, but should be read as three aspects of one and the same general goal: the elimination of *all forms of discrimination against women*. They imply that three different strategies are necessary in order to reach this overall purpose of the Convention.

The Convention is concerned with far more than the individual right of women not to be discriminated against, which is embodied in Article 2. Rather, in Articles 3, 4 and 24 the Convention also emphasises the need for social support for women or certain groups of women in order to improve their position in society. Additionally, both the Preamble and Article 5a of the Convention recognise that fixed gender stereotypes are at the root of discrimination against women. The necessity to address this underlying cause of discrimination against women calls for a strategy for social and cultural change for the whole of society. This means that governments are obliged to bring about structural social and cultural changes that will facilitate diversity in gender roles. The combined approach of an individual rights strategy, a social support strategy and a strategy for structural change embodied in the CEDAW-Convention maximises its potential for putting an end to all forms of discrimination against women.

The three aims of the Convention are closely intertwined. It is not enough that the first goal (ensuring that there is no discrimination) has attained wide recognition in international and national legal documents about legal equality and equal rights. Although this aim has been translated in non-discrimination norms or equal treatment provisions in many international treaties, constitutions and national equal rights legislation, the way in which this norm has been implemented and interpreted is often too narrow and formalistic. The other two goals of the Convention must be addressed as well.

The second aim (improving the *de facto* position of women) has found expression in many legal and policy documents in which States oblige themselves to develop and implement general social and economic policies and/or specific positive action schemes or affirmative action plans. In fact, this GR about Article 4(1) ought to be chiefly concerned with ways in which such instruments or mechanisms could be developed further.

The third aim of the Convention (regarding stereotypes) is unique compared to other international and national legal instruments in the field of sex equality or gender equality and therefore needs some further explanation in this GR. (See below.)

### **5.3. *The Content of the Right not to be Discriminated Against***

As far as the first aim (the right not to be discriminated against) is concerned it should be explained that the non-discrimination norm in the Convention covers two sides of a coin. On the one hand this norm means that similar cases should be treated similarly, but on the other hand it also means that if cases are deemed to be dissimilar (from a certain perspective) they should be treated differently. In legal theory this double-sided approach is generally recognised as the classical formula of legal equality.<sup>10</sup>

In existing sex equality legislation the equality norm too often only focuses on the first part of this formula. According to such legislation, only in as far as women are equal as compared to men need they to be treated equally. Under such an approach no action need to be taken if there is a mere finding of some 'difference' between men and women. Positive action or affirmative action often appears as an exception to the equality norm in such legislation.<sup>11</sup>

Formal equal treatment of differently situated people results too often in inequality in social and economic life. Therefore, some unequal treatment is necessary to achieve a true state of equality. Implementing the second part of the classical formula of (legal) equality thus at times calls for 'special' measures that are appropriate and necessary to prevent inequality in social life. However, it should be stressed that there is nothing special about such measures in that they are included in the concept of equality according to the Convention. Both Articles 4(1) and 4(2) of the Convention demonstrate that such measures are allowed and even are mandatory from this perspective.

### **5.4. *Negative and Positive Duties***

The concept of equality under the CEDAW-Convention does not stop at merely refraining from unequal treatment or discrimination, but also involves the obligation to take some kind of action to address situations

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<sup>10</sup> Sometimes also called the Aristotelian formula. See footnote 8.

<sup>11</sup> This is certainly the case in EC sex equality law. See below, at footnote 17.

that are unequal.<sup>12</sup> These actions should be directed at achieving *de facto* equality of men and women.

The fact that the Convention embraces this more encompassing approach to equality can be read from Articles 2, 3, 4, 5 and 24, according to which Governments are obliged to eliminate all kinds of discrimination, to improve the position of women and to address the issue of gender stereotyping. Under this threefold approach the Convention not only prohibits discrimination *in strictu sensu*, but also entails the obligation to adopt and implement positive measures in order to ensure that women will have the full enjoyment of all their human rights. Since the CEDAW Convention contains both negative and positive obligations, TSMs are often appropriate and necessary simply in order to fulfil these positive duties.

### 5.5. *The Importance of Article 5a of the Convention*

The third aim of the Convention is to address the issue of fixed gender stereotypes (or the dominant gender ideology); i.e. to bring about structural social and cultural changes that facilitate diversity in gender roles. This aim is embodied in the Preamble and Article 5a of the Convention. Too often this Article has been understood merely as an instruction to campaign against stereotyped views about sex roles in the media and in teaching materials. Nowadays there is some acknowledgement – especially within the CEDAW Committee – that Article 5a aims beyond changing deeply rooted social and cultural *ideas* and *patterns of conduct* regarding ‘appropriate’ male and female behavior.<sup>13</sup> Such ideas often also play a role in the way social and economic practices, regulations and institutions are constructed.

For example, in a society where men are typically the breadwinners and women typically stay at home with the children, not only labor and social laws often reflect this gendered organisation of paid and unpaid work,

<sup>12</sup> Or in the wording of the ECHR: ‘The right not to be discriminated against ...is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.’ *Thlimmenos v. Greece* (2001) 31 EHRR 15, para. 44 (European Court of Human Rights).

<sup>13</sup> This can be deducted from GR 21 on the rights of women in family law, where the Committee in par. 44 states that ‘State parties should resolutely discourage any notion of inequality of women and men which are affirmed by laws, or by religious or private law or by custom (...).’ In its Concluding Comments the Committee often makes a link between the existence of gender stereotypes and existing legal structures. See for examples: Venezuela (1997), UN Doc. A/52/38, CEDAW/C/SR. 323 and 324, para. 223, Mexico (1998), A/53/38, CEDAW/C/Sr. 376 and 377, para. 398 and Thailand (1999), A/54/38, CEDAW/C/SR. 417 and 418, para. 244, 245.

but also school-times, opening hours of shops and civil services are determined by it, to cite but a few examples. All these legal, economic, social and cultural structures need to be changed in order to enable both men and women to take on caring responsibilities and to combine those activities with paid work. Thus, an effective implementation of Article 5a of the Convention demands that 'systemic discrimination' or 'structural discrimination' also be addressed. Governments should be aware that gender stereotypes are not only a matter of *ideology*, but are embedded in law and in the main economic, social, cultural and legal *structures* of each society. These structures must change in order to make it possible for both women and men to freely choose in what way they will give content and meaning to their personal (gender) identities and life styles. Thus, Article 5a calls for not only a *strategy for social and cultural change* but also a *strategy to facilitate diversity*. TSMs are mechanisms that can be used to bring this about.

### **5.6. The Relation between TSMs and the Need for Structural Change**

Because TSMs cannot alone solve all the instances of structural discrimination against women the GR should stress the fact that TSMs should never be considered in isolation, but always in relation to measures or mechanisms that are aimed at bringing about *structural change*.<sup>14</sup> For instance, the structural discrimination against women in a society that is organised around a male breadwinner model cannot effectively be addressed by means of adopting a TSM that gives women better opportunities to get access to paid labour. The prevalent breadwinner structures will prevent women from effectively using such opportunities. Additionally, macro-economic structures contribute to women's unequal position in society.<sup>15</sup> Therefore, other measures, in conjuncture with TSMs, are necessary, such as programs that aim at the structural development of society or programs aiming at combating the dominant gender ideology that lies at the basis of a social and cultural order that is repressive for women.

The GR should stress that governments must do more than adopt and implement a set of TSMs. The Committee will consequently examine what other permanent and structural measures are being taken. Governments cannot stop at 'opening doors' or at 'offering equal

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<sup>14</sup> This has already been stressed by the OECD in 1991 in its publication: *Shaping Structural Change: the role of women*. OECD, Paris 1991.

<sup>15</sup> For example, conditions set by the World Bank sometimes can have disastrous effects on the position of women.

opportunities' or 'equal starting points'. They have also to make sure that there will be structural adjustments that enable women to participate on a continuous basis and to take advantage of all the available resources.

## 6. OTHER INSTRUMENTS IN THE FIELD OF TSMs

The expert meeting stressed that the GR should both explain how related concepts such as positive action and affirmative action are defined in other important legal documents and also describe these various approaches. This Section of the GR could be brief and refer to the report of Mr. Marc Bossuyt to the Sub-Commission on Human Rights.<sup>16</sup> However, the CEDAW-Committee should not necessarily subscribe to any particular one of these approaches. Rather, the GR should explain that these various approaches derive from specific legal and historical contexts. Most of the (dominant) interpretations of affirmative action or positive action are clearly inspired by formal and symmetrical approaches to equality. Under such approaches TSMs often appear as some sort of exception to (or derogation from) the non-discrimination norm.<sup>17</sup> In contrast, the GR should explain that TSMs are indeed part of this norm. Instead of a purely individualistic and formal approach, the CEDAW-Convention underlines the context of the societal problems that groups of women experience trying to realise their fundamental human rights. The Convention gives an important place to TSMs, regarding such measures as one of the means to realise equality of men and women, and not merely as an *exception* to the principle of equality.

## 7. THE MEANING OF THE CONCEPT OF TSMs IN THE CEDAW CONVENTION

The participants of the expert meeting believe that the main objective of TSMs is *to accelerate the process of equal participation of women in all fields of social, economic, political and cultural life and / or the process of redistribution of power and resources and the bringing about of social and cultural change that will improve the de facto position of women*. The GR should clearly state that

<sup>16</sup> UN Doc. E/CN.4/Sub.2/2002/21, Prevention of Discrimination; The concept and practice of affirmative action. Final report submitted by Mr. Marc Bossuyt (...), 17 June 2002. Mr Bossuyt presented this report at the expert meeting.

<sup>17</sup> As a consequence of perceiving TSMs as an exception to the non-discrimination principle judges often are inclined to interpret this exception restrictively and not to allow any positive action or affirmative action scheme that is in favour of women and that could possibly harm the individual rights of men. An example of this approach is the judgement of the European Court of Justice in the *Kalanke* case. See ECJ 17 Oct. 1995, C-450/93. However, in EC law a (more) substantive approach to positive action plans can be detected as well. See for example the authoritative opinion of Advocate General Tesouro in the *Kalanke* case. See also the contribution by Joke Swiebel to this Volume.

mechanisms and instruments that fall within the scope of Article 4(1) are directed exclusively at *women* (or a specific group of women), and thus generally exclude men. This aspect makes TSMs potentially contestable and demonstrates why Article 4(1) is needed in some cases to defend such measures against the claim that (some) men are being discriminated against. As stated above such a claim can only be sustained when a serious infringement of the fundamental rights of (some) men is at stake.

Two elements are crucial to the concept of a TSM. First there is the element of *equal participation* of women in fields where women are under-represented (labour, education, healthcare, sports, politics, et cetera). Access to these fields should be improved, *and* the needs of women should be accommodated in such a way that they can remain (and participate) in those positions to which they have gained access. The mechanism of TSMs is not only about opening doors, it is also about making it possible for women to function behind those doors. Second is the element of *redistribution of power and resources* (economic resources, positions of power, et cetera).

Both elements demand that *concrete* targets and instruments must be set in TSM-plans regarding *how many* women should participate in a certain field, *how* the participation of women should be accommodated or facilitated, *how* women will be empowered and *what part* of the resources should be redistributed to women. In fields where participation and redistribution are not at stake TSMs might not be the adequate tool to put an end to discrimination of women.

In addition, in this Section the GR should clarify the meaning of Article 4(1) with special regard for the term TMS itself: (1) Temporary (2) Special and (3) Measures.

*Temporary* means that the measures are not deemed to be necessary on a permanent basis. They aim at achieving particular concrete results in response to certain concrete problems. Once the desired result has been reached, the measure can (and must) be abolished. The result can be described in terms of a certain redistribution of power or of resources or of a certain degree of participation of women. However, temporary need not mean 'short term'; some TSMs may stretch over quite a long time. Additionally, TSMs might be used to initiate pilot projects or policy schemes with a permanent character. The time during which a TSM is valid can be set in various ways (by specifying a date or by meeting certain criteria or goals). In all reports in which a State presents TSMs, the government should justify why these measures are temporary and how it

plans to evaluate whether the specific goals of the measures have been achieved pursuant to which the measures can then be abolished.

*Special* is a term that is problematic in the sense that it may suggest that women are somehow *deviant*, *undeserving* or belonging to a category that *needs* special measures to be able to participate or compete in the 'otherwise normal' society. But, the only things *special* about these measures are that they are directed exclusively at women and that they serve a special goal. The context of each TSM is crucial in order to evaluate the 'special' character thereof, as this context determines whether a TSM is appropriate and necessary to achieve the specific goal that is set in a specific situation.

*Measures* encompass a great variety of forms, ranging from outreach programs, to targeted hiring and to quota systems. The choice of a particular type of measure depends on *the nature of the problems* at hand, the *context* in which the program has to function and the specific *targets* that are set in the program. The GR should make clear that measures should always be appropriate and necessary in the light of the general goal of article 4(1), i.e. accelerating the improvement of the *de facto* position of women.

## 8. THE MANDATORY NATURE OF TSMs

The GR should make clear that States have a positive obligation to improve the position of women. This includes the abolition of discriminatory legislation and practices, the enactment of anti-discrimination legislation (including legislation that covers the private sector) and the removal of structural barriers. In each case States do have a broad choice of means. They can determine for themselves what to deem appropriate given the specific circumstances. However, States do not have the choice to remain inactive. The Convention requires States to explain what tools and mechanisms they have chosen to reach the overall aims of the Convention. The term appropriate requires that States justify their choice of means on the basis of verifiable research.

The mandatory nature of TSMs flows from the combined reading of the Articles 1-5 and 24<sup>18</sup> in which States are required to take all appropriate and necessary measures to effectively put an end to all forms of discrimination against women. The mandatory nature of TSMs is also expressed in the Articles (6-16) that require that States *shall* take all

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<sup>18</sup> See also section 3 above, in which it was explained that the mandatory nature of TSMs does not flow from Article 4(1) as such.

*appropriate* measures. TSMs can provide the appropriate and necessary mechanisms to accelerate the improvement of the *de facto* position of women. In so far as they can bring about this result and the result cannot be achieved otherwise, i.e. is *necessary*, they are also mandatory.

Whether a TSM is appropriate and necessary in a specific situation should be determined according to the facts and circumstances of that situation. States cannot refrain from enacting TSMs solely on the ground that they do not consider measures that are aimed exclusively at women to be appropriate at all. Article 4(1) of the Convention makes it clear that such measures can indeed be appropriate and necessary.

Additionally, in this Section the GR should also clarify that States cannot claim that they lack the power or the right to interfere with the private sector or with the internal affairs of e.g. political parties. As parties to the Convention States have the obligation to ensure that women have equal rights in all spheres of social, cultural, political and economic life. Consequently, freedom of contract and the freedom of private or political parties to chose their own internal regulations are not *per se* adequate arguments to refrain from taking TSMs. Non-state actors and institutions have to respect the non-discrimination principle and can not stay inactive as to the improvement of the position of women and the achievement of the necessary social and cultural change. The GR should underline that the Convention demands that States guarantee that private organisations, enterprises and political parties are each accountable for their discriminatory and exclusionary practices.<sup>19</sup>

## 9. ARTICLE 4(1) IN THE REPORTING PROCEDURE

First the GR should clarify that the Committee requires that States report (under article 2 of the Convention) on all national legislation applicable to TSMs. This includes answers to such basic and important questions as: Are such measures allowed under the Constitution or national law, and if so under what conditions? Are these measures mandatory, and if so, how is this obligation imposed and / or legally enforced? In fact, the GR should contain the recommendation that national Constitutions (or other national legislation) should at least contain a clause that *authorises* TSMs. Preferably, the Constitution or the equal rights law should go further and makes TSMs *obligatory* when circumstances so require in order to fully embrace the Convention's obligations.

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<sup>19</sup> See Article 2e of the Convention.

Although TSMs can be reported either under Article 4(1) or under other relevant substantive article(s), the participants of the expert meeting expressed a preference for reporting on TSMs under each of the substantive provisions. Such reporting would ensure a greater degree of compliance with the Convention.

The GR should set the standard for the kind of information that the Committee wants to receive with respect to TSMs in the State Reports. A State should report about:

- the nature of the situation of women, or a specific group of women, that the government aims to address with TSMs; the government should provide specific data about this situation;
- the plan of action, explaining why these specific measures are deemed appropriate and necessary to improve this situation;
- the degree of participation of women or women's NGOs in designing, implementing and monitoring the measures;
- an explanation of why the TSMs are deemed as instrumental and effective in the light of the goal of improving the *de facto* position of women;
- the specific goals and targets of the measures at stake and the time schedule set to meet them;
- the way in which the implementation of the plan and its effects are monitored;
- an explanation of the relationship between general non-temporary measures and the necessity of TSMs.

Within the Government, the drawing up, implementation, monitoring and enforcement of TSMs should be assigned to an institution that has expertise in the field of women's rights and gender issues. This independent institution should have a strong mandate to gather (statistical) materials necessary to design the plan, to evaluate the results and to call all parties involved (including government agencies) to account. At all levels of this process, women's NGOs and/or representatives of the (groups of) women that are targeted with a specific TSM should be actively involved.

## 10. EXAMPLES OF TSMs IN PRACTICE

There was consensus in the expert meeting that TSMs can have different contents - according to the context for which they are designed and applied and the specific situation of the targeted group(s) of women - and are not restricted to the most common example of affirmative action schemes in the sphere of paid employment. The actual situation in each

country regarding the *de facto* political, economic and social situation will determine what kind of measures are appropriate and necessary in each field covered by the Convention.

There has been considerable debate in the expert meeting over whether the GR should contain an examination of all the Articles of the Convention with respect to the question whether TSMs would be appropriate and necessary and what examples of (different forms of) TSMs could be given in any specific field. Several factors militate against the use of such specific examples.

One problem is that it is quite difficult to describe concrete examples in each and every field covered by the Convention. This may be due to the fact that increasing participation of women or the redistribution of power and resources to women is not always directly at stake. TSMs are only a useful mechanism when groups of women can be targeted and when the government has both the concrete power and sufficient resources to implement such measures.

A second problem is that a list of examples may actually limit the possibilities that States might otherwise entertain. The debate should be on the substantive parts of the GR and not on a non-exhaustive list of possible solutions.

Above it has been said that each TSM-program ought to be evaluated against the background of the specific situation in the country that has developed the program and in the light of the problems that it intends to address. Providing a set of specific examples in the GR might be seen as contrary to this guideline.

A better approach might be for the CEDAW-Committee to initiate a separate informational campaign about 'best practices' in the field of TSMs. The Committee could set up a special section on its web-site, containing examples from the State Reports, inviting input from NGOs and governments and open for discussion about these plans.

The GR might also merely offer a limited number of examples from the State Reports that have been submitted to the Committee. An evaluation of such examples in the light of the criteria set by this new GR could thus indicate how the Committee might act when confronted in the future with such programmes or the lack thereof.

## 11. SOME FINAL REMARKS

As the author of this report I want to take the opportunity to express my gratitude to all participants of the expert meeting for the constructive dialogue that took place during the three days we spent in Maastricht. Although participants came from a great variety of legal backgrounds it appeared to be possible to find a solid common ground for the discussions on the CEDAW-Convention. This UN-Human Rights document stimulated us to overstep particularities of our various legal systems and to have an open mind to solutions that are developed elsewhere. The overall goal of the Convention, to eliminate all kinds of discrimination against women and its multiple approach, inspired us to work very hard and to be creative and inventive. This experience reflects the positive role that an International Human Rights document may have in constructing effective legal protection against human rights violations.

Discrimination against women is still all-pervasive in today's world. After 24 years existence of the CEDAW-Convention it is necessary that the CEDAW-Committee makes clear that temporary special measures are necessary to effectively put an end to this discrimination and that such measures are not only acceptable but also mandatory under this Convention. The drafting of a GR on Article 4(1) therefor is of utmost importance for the further development of women's human rights on the global level. I sincerely hope that the work at this expert meeting and this report will be of assistance to the Committee to draft a GR that meets that goal.