


Affirmative Action:
A Global Perspective

GLOBAL RIGHTS

Partners for Justice

GLOBAL RIGHTS is a human rights advocacy group that partners with local activists to challenge injustice and amplify new voices within the global discourse. With offices in countries around the world, we help local activists create just societies through proven strategies for effecting change.

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- We help local activists to engage with the international community, including the United Nations, to further their human rights objectives at home in Asia, Africa, Latin America, Europe, and the United States.

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The format of the document reflects the manner in which Global Rights would like to present affirmative action — from a global perspective with a human rights focus. Though some countries continue to struggle with the overall concept of creating special measures to promote equality, many are looking to learn from other country models in order to create their own effective affirmative action policies. We hope that this submission will stimulate further debate and highlight the importance of international legal standards and the exchange of models from around the world in the continued effort to level the "playing field" for traditionally marginalized and excluded population groups.

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PREFACE

Racism and racial discrimination exist throughout the world. These problems manifest themselves in the unequal and unfair treatment of certain groups through economic marginalization, bias within the criminal justice system, denial of cultural rights or control of ancestral lands, and unequal access to education, jobs, and other opportunities.

Numerous international agreements have denounced racial discrimination as a human rights violation. In particular, the International Convention on the Elimination of All Forms of Racial Discrimination, widely ratified, clearly defines the obligations of governments to combat discrimination and to protect the rights of all people, regardless of race or ethnicity. The International Covenant of Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights, and the Convention on the Elimination of Discrimination against Women address these issues as well.

Throughout its 27 years, Global Rights has combated racial discrimination by using strategic litigation and amplifying the voices of activists in countries around the world through its international advocacy efforts. Today, Global Rights works to strengthen the collaboration between social justice groups in different countries working on similar concerns and, among other things, aims to link organizations defending the rights of people of African descent across the Americas. Global Rights is also leading a campaign to draft and adopt a regional human rights treaty combating racial discrimination throughout the Americas.

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PART A: INTERNATIONAL LEGAL STANDARDS

I. INTRODUCTION

In 2001, representatives from throughout the Americas gathered to develop strategies to remedy racial discrimination. Chief among the group's tactics was the adoption of "affirmative or positive actions and strategies" aimed at "creating conditions for all to participate effectively in decision-making and realize civil, cultural, economic, political, and social rights in all spheres of life on the basis of non-discrimination."[1] These ideas found significant support at the World Conference Against Racism, whose Declaration and Programme of Action recognize affirmative action as a key element in the international struggle against racism and racial discrimination.

As the results of these meetings might indicate, affirmative action is strongly endorsed by international law, as seen through the language of regional and international treaties and the decisions of global and regional institutions. Countless norms mandate equality and non-discrimination, while additionally requiring states to take active measures to guarantee these rights. Certain norms implicitly require affirmative action where inequalities are present. Some norms mention affirmative action to note that such actions would be permissible under non-discrimination provisions. Others explicitly mandate affirmative action. While the contours of these norms differ slightly, one thing is certain: Where there is proven inequality among people of different races, international law—either implicitly or explicitly—requires states to engage in affirmative action.

II. REGIONAL AND INTERNATIONAL GROUPS RECOGNIZE AFFIRMATIVE ACTION AS A CENTRAL TOOL IN COMBATING RACIAL DISCRIMINATION

A. REGIONAL ACTIVITIES PRIOR TO THE WORLD CONFERENCE

The regional meetings in preparation for the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (World Conference) focused heavily on affirmative action. The end product of these meetings was the Santiago Proposal, which is a Declaration and Plan of Action articulating a detailed agenda for fighting race discrimination, xenophobia, and related intolerance in the Americas.[2] This document calls for the full enjoyment of civil and political rights without discrimination of any kind, "including…more effective access to the political, judicial and administrative functions of institutions" and "protection of the economic, social and cultural rights of [marginalized groups]…."[3] The Declaration specifically urges states to:

> Establish national programmes, including affirmative action measures, to promote the access of indigenous peoples, people of African descent, migrants and other ethnic, racial, cultural, religious, and linguistic groups or minorities to education, medical care, and basic social services.[4]

B. THE WORLD CONFERENCE

The World Conference brought together groups from all corners of the world,

transforming domestic and regional agendas into strategies to be applied globally. The Declaration and Programme of Action emerging from the conference stress the importance of full and effective racial and ethnic equality, noting the need for special measures for victims of racism, racial discrimination, xenophobia, and related forms of intolerance.[5]

In addition, the Declaration repeatedly asks that special attention be devoted to, and funding be provided for, marginalized groups. It also provides a mandate for "[a]ction-oriented policies and action plans, including affirmative action to ensure non-discrimination, in particular as regards access to social services, employment, housing, education, health care etc."[6] The Programme recommends "affirmative or positive actions and strategies" aimed at "creating conditions for all to participate effectively in decision-making and realize civil, cultural, economic, political, and social rights in all spheres of life on the basis of non-discrimination."[7] The Programme calls on states to:

> Establish, on the basis of statistical information, national programmes, including affirmative or positive measures, to promote the access of individuals and groups of individuals who are or may be victims of racial discrimination to basic social services, including primary education, basic health care, and adequate housing.[8]

C. THE URUGUAY FOLLOW-UP WORKSHOP

The regional follow-up meetings to the World Conference further confirmed the demand for affirmative action at the regional level. For instance, the 2003 regional workshop in Montevideo, Uruguay produced Conclusions and Recommendations that resoundingly support race-conscious programs.[9] The workshop points out that "affirmative action is a means of addressing and overcoming injustice and inequities based on racism and discrimination, and must be incorporated into domestic policies."[10] Among the main strategies for combating discrimination are "national action plans to promote diversity, equality, equity, social justice, equality of opportunity, and…participation."[11] The workshop's general recommendations include urging states to establish permanent monitoring programs for implementation of their affirmative action policies, including development of valid markers of advancement.[12]

III. INTERNATIONAL LAW STRONGLY SUPPORTS AFFIRMATIVE ACTION TO COMBAT INEQUALITY OR DISCRIMINATION

As the conclusions of these international meetings suggest, international law provides strong support for affirmative action measures to combat racially discriminatory laws and practices. Non-discrimination is a cornerstone concept in international human rights, as international norms are virtually unanimous in requiring that states take specific steps to support the right to non-discrimination and equality before the law.

Non-discrimination provisions are fundamental to major international human rights norms, and these norms compel affirmative action in certain cases. As the United Nations Human Rights Committee declared, "non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."[13] Important regional treaties and universal norms like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) repeatedly emphasize the importance of non-discrimination. These and other norms also affirm the need to take measures to make this obligation effective.[14] As described below, certain norms specify that race-conscious affirmative action policies do not violate non-discrimination provisions, while others explicitly call for affirmative action to combat discrimination.

A. REGIONAL NORMS

Non-discrimination is a core principle of the Organization of American States (OAS) system.[15] The OAS Charter (Charter), the American Declaration of the Rights and Duties of Man (American Declaration), and the American Convention on Human Rights (American Convention), which collectively comprise the principal documents shaping the Inter-American system, contain strong emphases on non-discrimination. Inter-American norms and jurisprudence also mandate that states take effective action to guarantee these rights, thereby suggesting the need for affirmative measures. Although the Commission and Court have not yet stated a position on race-based affirmative action, they have endorsed it whole-heartedly in the context of gender discrimination.

1. The Importance of Non-Discrimination

The OAS Charter sets forth the purposes of the organization and the basic principles upon which it is founded; among them is that fundamental rights be respected without any distinction as to race, nationality, creed, or sex.[16] The Charter also stresses equality of opportunity[17] and asserts that all human beings have the right to material well-being and spiritual development, under circumstances of dignity and equality, without distinction as to race, sex, nationality, creed, or social condition.[18]

The American Declaration, in Article 2, and the American Convention, in Article 1, both mandate equality before the law, asserting that rights should be guaranteed without distinctions made on the basis of race.[19] Specifically, Article 1 of the Convention requires states to:

> Respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

In addition, the American Convention, in Article 24, explicitly guarantees equal treatment before the law; this principle of non-

discrimination is non-derogable, meaning it cannot be suspended, even in times of war. The Additional Protocol to the Convention, known as the Protocol of San Salvador, which is the primary treaty addressing economic, social, and cultural rights in the Americas, further mandates state action to prevent discrimination.[20]

2. The Obligation to Take Necessary Measures

Regional norms require aggressive action by states to implement the commitments made therein. In a provision echoing the language in universal norms, Article 2 of the Protocol of San Salvador specifies that:

> [Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured] by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this [Convention], such legislative or other measures as may be necessary [to give effect to those rights or freedoms].

Article 1 of the Convention reinforces these obligations and expressly applies them to the non-discrimination context, noting that states must "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex [etc.]." Moreover, Articles 1 and 2 of the Protocol of San Salvador require states to adopt measures to achieve those rights recognized in the Protocol and to enact legislation to make those rights a reality.[21] The Protocol charges states with "undertak[ing] to adopt the necessary measures" to achieve "full observance of the rights recognized in this Protocol."[22] Furthermore, it mandates "such legislative or other measures as may be necessary for making those rights a reality."[23]

The jurisprudence of the Inter-American Court (the Court) also confirms such a requirement. In its hallmark case, Velásquez Rodriguez, the Court described the Article 1(1) obligation, noting:

> The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.[24]

This requires not only taking action through legislative and other means, but involves engaging in activities that influence the acts of private individuals. Indeed, as several opinions have suggested:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[25]

3. Support for Affirmative Action

The Court also has made clear that non-discrimination provisions in regional norms do not preclude all differences in treatment. For example, in considering Costa Rica's establishment of different citizenship requirements for people from Central America and Spain, and Ibero-Americans, the Court held that a distinction based on "reasonable and objective criteria" more than passes muster under Article 24.[26]

The Commission has gone further in its endorsement of affirmative action, stating that "In principle, affirmative measures are fully in compliance with the principle of non-discrimination and the applicable provisions of human rights law; in fact, such measures may well be required to bring about substantive equality of opportunity."[27] Although made in the context of a careful study of laws aimed at increasing women's political participation and their compatibility with non-discrimination norms, this view would very likely apply to race-conscious affirmative action measures as well.

Also, just as they informed the Commission's analysis of gender-based affirmative action, universal human rights norms, discussed below, should likewise shape the analysis of race-based affirmative action. In fact, in Advisory Opinion OC-1/82, the Inter-American Court asserted its right to interpret other treaties when evaluating a state's human rights obligations.[28] The Commission echoed this approach in assessing Guatemala's obligations under the American Convention and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), applying the definition of discrimination from CEDAW to find violations of the American Convention.[29]

B. THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

ICERD provides the international community's most specific treaty-based guidance on affirmative action. ICERD defines racial discrimination as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[30]

The treaty also enumerates a host of rights to be enjoyed without discrimination. These include the right to equal treatment before the law, numerous civil and political rights, and a variety of economic, social, and cultural rights.[31]

1. The Obligation to Take Action

Taking action is a critical component of ICERD. Even in its preamble, the Convention notes its "resolv[e] to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations."[32] ICERD also requires states to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races."[33] The same article also requires states to review their legislation[34] and "prohibit and to bring an end, by all appropriate means, including legislation

as required by circumstances, racial discrimination by any persons, group or organization."[35] ICERD also expressly requires states to take "special and concrete measures." Finally, it requires states to guarantee the adequate development and protection of certain racial groups so as to promote full enjoyment of human rights and fundamental freedoms.[36]

Notably, ICERD's reach is not just to prohibit discrimination, but to eliminate it altogether. The preamble targets "racial discrimination in all its forms and manifestations" and the phrase "racial discrimination in all its forms" is repeated throughout the Convention.[37] Accordingly, ICERD addresses a panoply of fields — from employment to the media — and targets different manifestations of racism. ICERD also establishes the state's obligation to address laws and regulations "which have the effect of creating or perpetuating racial discrimination wherever it exists."[38] Other provisions reiterate this, referring to racial discrimination by state actors but also by "any persons, group or organization."[39] And still other provisions reference "all practices" of segregation or apartheid, "all acts of violence," "all dissemination of ideas," and "all propaganda activities."[40] ICERD's provisions thus cover matters of public life but also certain private matters that other human rights norms do not expressly address and arguably might not cover.

2. Direct Support for Affirmative Action

The Convention thus compels aggressive action to combat discrimination. It also incontrovertibly asserts that making distinctions among groups is not inherently impermissible discrimination. On the contrary, whether or not any given racial or ethnic classification constitutes prohibited discrimination depends on its purpose and effects. Article 1, paragraph 4, states that "special measures" adopted only to secure "adequate advancement" of marginalized racial or ethnic groups requiring such protection, and to ensure equal enjoyment of human rights and basic freedoms, do not constitute invidious racial discrimination. The same provision sets forth limitations on such special measures, noting that they must not result in "the maintenance of separate rights for different racial groups," and that the measures shall cease when the objectives that led to their creation have been achieved.[41]

In General Recommendation 14, the Committee on the Elimination of All Forms of Racial Discrimination (the Committee) further clarifies the contours of permissible racial or ethnic distinctions, taking care to note that "a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of [A]rticle 1, paragraph 4, of the Convention."[42] The General Recommendation stipulates that when ascertaining whether an action has an effect contrary to the Convention, one must look to see whether that action has an "unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." The Committee's country reports also point to affirmative action as a means of promoting compliance with treaty provisions. In numerous reports, the Committee has recommended implementation of affirmative action measures to benefit certain groups.[43]

Notably, in a 2001 report on the United States, the Committee rejected the United States' position that ICERD only permits, but does not require, affirmative action.[44] The Committee categorically stated otherwise, explaining:

> The adoption of special measures by States parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2 of the Convention.[45]

C. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR also mandates non-discrimination and state action to promote equality, and supports affirmative action in certain circumstances. Articles 2, 25, and 26, among others, contain specific non-discrimination provisions.[46] Article 2(1) precludes discrimination, Article 26 establishes equality before the law without discrimination, and Article 25 mandates the right to political participation absent discrimination. Although the ICCPR permits derogation of certain rights, it mandates that such measures not involve discrimination "solely on the grounds of race, colour, sex, language, religion or social origin."[47]

1. The Obligation to Take Action

Article 2(2) of the ICCPR affirms that these norms require state action, noting that:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[48]

Precisely what the required measures might be is fact-specific, but the obligation is an objective one. It is further explained in the context of race discrimination by General Comment 18. Here, the Human Rights Committee notes:

> The 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.[49]

The ICCPR also suggests a duty to combat private discrimination.[50] The Committee notes that many states report on legislative, administrative, and judicial decisions on

discrimination, "but they very often lack information which would reveal discrimination in fact."[51] Accordingly, the Committee requires that states not only provide information on articles 2(1), 3, and 26 with regard to their constitution or equal opportunity laws, but that they also report on "any problems of discrimination in fact, which may be practiced either by public authorities, by the community, or by private persons or bodies" because "[t]he Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination."[52]

This position is supported by the Committee's decision in the Nahlik case, where the Committee rebuffed an admissibility challenge because of employment discrimination arising from a private agreement. The Committee observed that:

> Under [A]rticles 2 and 26 of the Covenant[,] the State party is under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment.[53]

2. Direct Support for Affirmative Action

The Human Rights Committee has declared that the adoption of special measures in another arena—addressing equality in political participation—complies with Article 25. The Committee stated that "affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens."[54]

The Committee's individual case decisions and comments on country reports submitted under Article 40 also reflect its welcomed approach to affirmative action. In Stalla Costa v. Uruguay, the Committee considered special measures benefiting public officials who were previously dismissed from their posts for ideological, political, union-related, or arbitrary reasons.[55] The Committee scrutinized carefully the purpose of the measures in question, ultimately opting against any finding of violations of Articles 2, 25, and 26, since the law could not "be regarded as incompatible with the reference to 'general terms of equality' in article 25(c)" and its implementation could not be considered "invidious distinction under article 2, paragraph 1," or "prohibited discrimination" under Article 26.[56]

Moreover, in numerous comments in country reports, the Committee has recommended that certain nations adopt affirmative action measures, while praising others' efforts in this regard. In its comments on the United States' report in 1995, the Committee stated that "when determining whether currently permitted affirmative action programmes for minorities and women should be withdrawn, the obligation to provide Covenant's rights in fact as well as in law [should] be borne in mind."[57]

The Committee also suggested that Ireland undertake "affirmative action aimed at improving the situation of the 'Traveling Community' and, in particular, facilitating and enhancing the participation of 'travelers' in public affairs, including the electoral process."[58]

D. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (ICESCR)

The ICESCR similarly contains numerous non-discrimination provisions. The Convention requires states to guarantee the rights in the Covenant "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."[59] It further mandates equal opportunity in employment under Article 7(c), and requires that higher education "be made equally accessible to all, on the basis of capacity, by every appropriate means...."[60] Moreover, the General Comments and related articles of the Convention indicate affirmative action's crucial role in promoting effective non-discrimination.

1. The Obligation to Take Action

The ICESCR also expressly mandates that states take measures to make effective the rights it guarantees. Article 2, paragraph 1, mandates taking "steps" with respect to all rights under the treaty, while other articles reiterate that obligation with respect to specific rights like the right to work, the right to a decent standard of living, and the right to education. Article 2, paragraph 1, mandates that:

> [E]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 6(2) mandates work-related measures like "technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment...." Article 11(1) requires steps to guarantee the right to an adequate standard of living, including "adequate food, clothing and housing, and to the continuous improvement of living conditions." And Article 13, paragraph 2, requires particular steps to guarantee the right to education at various levels, to encourage education and develop school systems.

The Committee on Economic, Social and Cultural Rights' (CESCR) General Comment 3 clarifies these obligations.[61] The CESCR indicates that "steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."[62] It further notes that the steps should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." They can include legislative and judicial measures, as well as administrative, financial, educational and social ones.[63]

General Comment 5 builds on this idea in the context of people with disabilities, noting that the Covenant:

> Requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the

> case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.[64]

2. Direct Support for Affirmative Action

Elaborating on this view in its General Comment addressing education, the CESCR provides direct support for affirmative action, establishing that adoption of "special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the non-discrimination [principle]."[65] Such measures, however, must not "lead to the maintenance of unequal or separate standards for different groups" nor be "continued after the objectives for which they were taken have been achieved."[66]

CESCR comments to state party reports similarly speak out in favor of affirmative action. In a report on Guatemala's compliance, the Committee recommends affirmative action measures to benefit indigenous communities.[67] Specifically, the Committee stated that:

> All legislative and other reforms should take into account the need to promote equality and reverse the devastating affects of discrimination against the indigenous populations, in particular through affirmative action.[68]

Similarly, the Committee recently applauded Brazil's establishment of "affirmative action programs for Afro-Brazilians, in particular women."[69]

E. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW unquestionably establishes that affirmative action measures are an integral part of combating discrimination.[70] Although CEDAW does not contain provisions specific to racial discrimination, reasoning by analogy, it should be interpreted as supporting affirmative action based on race.

1. The Obligation to Take Action

Article 1 of CEDAW defines discrimination, while Article 2 requires states to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women." The remaining provisions of Article 2 make clear that the end goal is to abolish discriminatory "laws, regulations, customs and practices…against women by any person, organization or enterprise." Article 3 notes that measures toward this end be taken in "political, social, economic and cultural fields." Further provisions target specific rights and outline more concrete measures.[71]

2. Direct Support for Affirmative Action

CEDAW states that "adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination."[72] General Recommendation 5 of the Committee on the Elimination of Discrimination Against Women further suggests that, despite progress already achieved, "there is still a need for action to be taken to implement fully the Convention by

introducing measures to promote de facto equality between men and women."[73] The Committee specifically recommends "temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment."[74]

General Recommendation 23 addresses women's political participation and contains a targeted discussion on the role of temporary special measures.[75] The comment suggests that removal of de jure barriers "is necessary, [but] it is not sufficient," and that temporary special measures can give effect to non-discrimination provisions.[76] Such strategies have included recruiting, financially assisting, and training women candidates; amending electoral procedures; developing campaigns; setting numerical goals and quotas; and targeting women for appointment to public positions.[77]

F. OTHER INTERNATIONAL NORMS AND INSTITUTIONS

The International Labor Organization's (ILO) Discrimination Convention also decisively precludes discrimination and endorses affirmative action.[78] The Convention defines discrimination in two ways. First, it is "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[79] Second it is any "other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation…."[80] The Convention also commits all state parties to formulate and implement national policies to promote equal opportunity in employment, to eliminate discrimination in this area, and to strive to achieve cooperation between industry and labor, as well as among other relevant organizations.[81] Here, the Convention mandates that:

> [E]ach Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

To this end, Article 5 expressly authorizes "special measures of protection or assistance" oriented toward satisfying particular needs of people who, for reasons of sex, age, disability, family obligations, social, or cultural background, require it.

The United Nations' Economic and Social Council's Human Rights Subcommittee has also articulated its support of affirmative action. The Subcommittee's Special Rapporteur on Racial Discrimination has issued multiple reports on specific states and on affirmative action in general. In the Special Rapporteur's 1995 report following a visit to the United States, he recommended that the United States "revitalize 'affirmative action programmes…in order to offset the negative consequences of the policy pursued during the 1980s in the fields of health, housing, education and employment.'"[82]

The Special Rapporteur also drew the General Assembly's attention to the importance that

attaches to maintaining affirmative action programmes in order to guarantee by law an effective equality of opportunity for members of ethnic and racial minorities.[83]

The Special Rapporteur's 2002 report on affirmative action describes carefully the concept of affirmative action, its target groups, justifications, and limitations. It also details the many sources of law supporting affirmative action measures and distinguishes them from impermissible discrimination.[84]

G. EUROPEAN NORMS

The European system similarly rejects discrimination, and the norms and jurisprudence of both the European Union and the Council of Europe buttress the practice of affirmative action. The major norms of the European Union preclude discrimination based on "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[85] The European Council Directive 2000/43/EC (Jun. 29, 2000) also targets race discrimination and affirms the rights established in international norms like ICERD, ICCPR, ICESCR, and CEDAW.[86] The Directive affirms that:

> The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.[87]

The operative provisions of the directive call for "positive action" and note "equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."[88] Similarly, Directive 2000/78/EC (Nov. 27, 2000) establishes equal treatment in employment and occupation and also precludes discrimination, without prejudice, to "measures intended to prevent or compensate for disadvantages suffered by a group of persons . . . where their main object is the promotion of the special needs of those persons."[89]

European Court of Justice (ECJ) decisions have not directly addressed race-based affirmative action, but they repeatedly have acknowledged the legitimacy of "positive actions" to combat discrimination against women.[90] For example, in Marschall v. Land Nordrheim-Wesstfalen, the ECJ upheld a German statute favoring women for positions in fields where they were underrepresented. The court reasoned that preferencing women was legitimate in this instance, provided it was based on objective criteria and was subject to a rebuttable presumption.[91] Likewise, in Re: Badeck, Case C-158/97, 2000 E.C.R. I-1875 (Mar. 28, 2000), the ECJ affirmed that affirmative action favoring women in employment was allowed so long as it was based on objective criteria and was not automatic. The court also upheld quotas for government training programs, interview opportunities, and internal administrative bodies, as the quotas were not directly for employment, were not mandatory, and the presumption in favor of women was rebuttable. Presumably, the ECJ would expand this jurisprudence to also recognize

positive actions aimed at addressing discrimination based on race and ethnicity.

The Council of Europe also strongly favors non-discrimination, and its jurisprudence suggests that distinctions between groups are permissible in limited situations. The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), the central human rights norm in the European human rights system, establishes that:

> The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[92]

Although the European Convention does not contain a provision identical to Article 2 of the ICCPR and other instruments, the language of Article 1 comes rather close. In lieu of stating that people have certain rights under the treaty, Article 1 requires that the state, "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[93] The treaty does not specify how a state might go about securing such rights, but the provision makes clear that some active effort on the part of the state is required.

The European Court of Human Rights (the European Court) has recognized states' positive efforts to re-establish equality and has interpreted Article 14 to permit affirmative action, noting that it precludes only "distinctions of a 'discriminatory' character," and that "[a] distinction designed 'to re-establish rather than destroy equality' or based on 'valid reasons' is therefore completely 'legitimate.'"[94] As a general matter, the European Court finds violations of Article 14 where there is "no objective and reasonable justification" for the distinction and there is no "proportionality between the means employed and the aim sought to be realized."[95]

PART B: AFFIRMATIVE ACTION AROUND THE WORLD

INTRODUCTION

Despite the international and regional guarantees discussed in Part A, discrimination against members of certain racial, ethnic, or national groups has persisted around the globe. While many countries have sought to address this by passing anti-discrimination laws prohibiting the use of invidious distinctions among individuals because of their race, ethnicity, or national origin, it has become clear that such laws alone are often insufficient to equalize opportunities among members of these groups. Rather, where certain groups have long been disadvantaged, affirmative action is needed to level the playing field. There are numerous innovative ways this can be done, depending on the unique needs and concerns of the country affected.

Affirmative action has had many different immediate goals. Specifically, affirmative action programs can be designed, in stages, to:

- Eliminate present discrimination
- Remedy past discrimination
- Equalize opportunities between groups
- Embrace and promote diversity[96]

Among other things, affirmative action may take the form of:

- Trainings and complaint resolution mechanisms
- Outreach and counseling to certain types of applicants
- Self-studies to determine if discrimination exists
- Special admissions standards for certain people
- Allowing preferences for members of specific groups
- Establishing quotas or numerical set asides for members of these groups[97]

And affirmative action programs may be used both:

- In the public sector when seeking more proportionate numbers of under-represented government legislators, employees, contractors, or students at government-run universities and schools and
- In the private sector when seeking to diversify private workplaces, universities, schools, and other non-governmental settings.

This section offers a survey of some affirmative action programs that have been employed around the world. By considering the experiences of the United States, Brazil, India, South Africa, Malaysia, and Canada, this section demonstrates how a number of different countries have shaped affirmative action policies to meet their particular needs and concerns, and shows some of the many models that may be used to equalize opportunity for all citizens. Throughout this section, Global Rights has employed the terminology used in the country being discussed.

II. AFFIRMATIVE ACTION IN THE UNITED STATES

A. BACKGROUND

Affirmative action programs have been created in the United States to address the country's longstanding and deeply entrenched prejudice against racial and ethnic minorities and women.[98] While anti-discrimination laws were adopted as part of the civil rights movement of the 1950s and 1960s, it soon became clear that these laws could not, on their own, undo the effects of years of

inequality and oppression.[99] To address this continuing pattern of discrimination, race and gender-specific affirmative action programs were therefore created.[100]

The U.S. Constitution guarantees the equality of all persons, mandating in the Equal Protection Clause of the 14th Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[101] But the question of whether equality before the law is consistent with the use of affirmative action has been widely debated. To date, the U.S. Supreme Court has said that affirmative action is constitutional if it is applied in certain ways and for certain purposes.

Specifically, the Court has said that first, affirmative action programs must be fashioned to remedy past discrimination or to improve educational diversity.[102] This applies to the states[103] as well as to the federal government.[104] Second, while expanding the pool of applicants is permissible, quotas, set-asides, or other rigid numerical requirements must be avoided.[105] Third, race-specific programs must be looked at through a lens of "strict scrutiny" to ensure that the measures taken have been narrowly tailored to meet compelling governmental interests. Fourth, programs must avoid unnecessary disruptions and burdens to the majority group.[106] And finally, affirmative action programs must be limited in time and reviewed periodically to assess whether they remain necessary.[107]

In terms of international obligations, the United States has ratified ICERD and the ICCPR, and has signed the ICESCR and CEDAW. But the treaties have been identified as "non-self-executing," which means that Congress must pass implementing legislation before their provisions may be enforced as law.[108] To date, this has not happened.

B. AFFIRMATIVE ACTION IN PRACTICE

1. In the Private Sector Workplace

Under certain circumstances, private sector workplaces in the United States can legally create affirmative action programs to benefit members of certain racial groups.[109] In 1979, the Supreme Court considered the legality of a company policy that attempted to increase the number of black skilled workers by reserving 50 percent of the openings in a training program for them.[110] When the plan was adopted, nearly all of the company's craft workers were white—a result of the fact that blacks had been excluded from craft unions and few had the necessary experience to be hired into craft positions. The company made clear that it planned to institute the affirmative action plan until the percentage of black craft workers at the company was proportional to the percentage of blacks in the local labor force.[111]

The Supreme Court held that this was legal, writing that Title VII of the Civil Rights Act of 1964 "does not prohibit such race-conscious affirmative action plans."[112] It said that the plan "falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[113] So long as such an affirmative action program is limited in time and does not preclude whites from possible employment, the Court said, it is legal.[114]

2. In the Distribution of Government Contracts

Similarly, if certain criteria are met, affirmative action may be used when determining who receives government contracts. In 1989, the Supreme Court considered whether it was legal to require contractors who had won city construction contracts to subcontract a percentage of their project out to a minority business enterprise (a business at least 51 percent owned or controlled by minorities).[115] The court established that racial classifications must be reviewed using "strict scrutiny" to determine their constitutionality and, using this standard, ruled that for affirmative action programs to be legal, there must have been a clear history of discrimination and the program must further a compelling state interest. The program in question did not meet these criteria.

The use of strict scrutiny for "all racial classifications, imposed by whatever federal, state or local government actor," was confirmed in 1995 by the Supreme Court in another case about the use of government contracts.[116] Here, too, the Court explained that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[117] While the Court again found that the particular program in question was illegal, they left open the possibility that other race-based programs could be constitutional.[118] That same year, the U.S. Department of Justice made clear that affirmative action was still permissible "as a tool to aid in breaking down barriers to equal employment opportunity for women and minorities without impinging on the rights and expectations of other members of the workforce."[119]

3. At Public Universities

The Supreme Court has held that public universities can use race as one factor among many when deciding who to admit to their schools.[120] As before, the Court has required a "strict scrutiny" test to determine whether the policies in question further a "compelling governmental interest" and, if so, whether they are also "narrowly tailored" to meet that interest. Using this standard, the Court found that educational institutions have a compelling governmental interest in fashioning a diverse student body.[121]

The Court also found that while "universities cannot establish quotas for members of certain racial groups," "put members of those groups on separate admissions tracks," or "insulate applicants who belong to certain racial or ethnic groups from the competition for admission,"[122] they can "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[123] Said another way, "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application" for the race-conscious policy to be constitutional. In addition, workable race-neutral alternatives must have been considered, members of non-minority racial groups must not be unduly harmed, and the policy must be limited in time. Based on these requirements, an admissions program that considers race as one factor among many is thus fine, the Court found, while a program that automatically gives members of certain groups a specific number of points on an admission scale is not.[124]

4. In Kindergarten-12th Grade Public Education

In 1954, the Supreme Court determined that the existence of racially segregated schools was unconstitutional because these schools were inherently unequal, and mandated that their use be stopped.[125] In 1968, the Supreme Court made clear that school boards had an affirmative duty to integrate their schools.[126] And over the next years, the Court mandated that if a constitutional violation was found, an affirmative remedy, such as busing, could be employed to make schools more racially diverse.[127] In 1974, however, the Court determined that desegregation did not require any specific racial balance in individual schools and thus said that students from predominantly-white suburban schools could not be forced to attend predominantly-black inner-city schools.[128] Requiring affirmative action to integrate public schools has been on the wane ever since, although voluntary plans remain permissible.

Recently, for example, a case challenging Berkeley, California's voluntary plan to desegregate public schools came before California's Supreme Court.[129] The plaintiffs claimed that the desegregation plan violated California's Proposition 209, which forbids racial discrimination or the use of preferences in education (among other fields).[130] Importantly, however, California had previously adopted other legislation that defined "racial discrimination" as the phrase is used in ICERD.[131] The defendants argued that because ICERD states that "special measures" taken to "secure adequate advancement of certain racial…groups…shall not be deemed racial discrimination," the state had, by approving of this language, demonstrated its approval of affirmative action. As such, they argued, the voluntary desegregation plan was not discriminatory.[132] The judge reasoned, with explicit reference to ICERD, that because the desegregation plan does not have "the purpose or effect of nullifying or impairing the recognition…on an equal footing of human rights and freedoms of any student," it should stand.[133]

5. In Housing

Public housing for poor citizens in the United States can not legally be constructed solely in racially segregated neighborhoods, and when this has occurred affirmative action may be needed to remedy the problem, the Supreme Court has said. This decision came about after the Chicago Housing Authority, between 1954 and 1967, built more than 10,300 public housing units — only 63 of them outside of poor, racially segregated neighborhoods.[134] In response, a number of residents claimed that it was a violation of the constitutional guarantee of equality to require poor residents to live in racially segregated areas.[135] In 1969, a federal judge held that new public housing could be built in predominantly African American areas only if a similar number of housing units were built in racially diverse areas.[136] An appeals court found that the Federal Department of Housing and Urban Development was liable for the city's actions, a decision that the Supreme Court affirmed.[137]

6. In Voting Rights

In 1965, after the U.S. Congress came to believe that the existing federal anti-discrimination laws were not, in themselves, proving successful in forcing states to comply with the constitutional guarantee of the right to vote, it took the step of passing the Voting Rights Act.[138] This Act, signed into law that

same year, buttressed the constitutional guarantee that no person would be denied the right to vote because of his or her race or color.[139] When the Act was adopted, just one-third of eligible African Americans were registered to vote in some states, compared to two-thirds of eligible whites.[140] Over time, this law made possible the creation of minority voting districts, through which minorities were better able to elect representatives of their own choosing. The Supreme Court has since said that such districts, which use race as a factor in their creation, can be constitutional provided that race is not the predominant factor considered.[141]

C. EFFECTIVENESS

Affirmative action programs in the United States have been successful in reducing, but not eliminating, discriminatory practices.[142] For example, studies have shown that affirmative action programs lead employers to hire more minority employees and to pay them higher wages.[143] Specifically, before the Civil Rights Act of 1964, a black male worker earned only 60 percent of that of a white male worker; in 1993, this was raised to about 75 percent.[144] And while blacks made up 1.2 percent of the country's judges and lawyers in 1978; by 2000, this number had risen to 5.1.[145] The figure rose from 2 percent to 5.6 percent for physicians, from 1.1 percent to 5.5 percent for engineers, and 2.6 percent to 6.1 percent for professors.[146] In the context of university admissions, when affirmative action programs were dismantled in Texas, the number of blacks admitted to the University of Texas School of Law for the fall of 1997 fell to only eleven compared to sixty-five the year before.[147] All eleven chose not to attend because of rumors of declining minority enrollment.[148]

Still, these facts, while showing that affirmative action has increased opportunities, indicate that racial discrimination persists in the United States. Differences in education and work experience account for only about 50 percent of the wage gap between black and white men, and 33 percent of the gap between black and white women.[149] And affirmative action measures in the United States have "not sufficiently compensated for past discrimination because they have not produced a significant redistribution of resources and power."[150] While some claim that affirmative action has meant reverse discrimination on whites, in fact white privilege remains intact.

The United States' self-image as a meritocracy has also hindered acceptance of affirmative action programs. The idea of merit suggests that value-neutral measures, such as standardized tests, job histories, and educational credentials should be utilized to determine who gets access to scarce educational and professional positions.[151] However, such "neutral" measures of accomplishment are deceptive.[152] The tests and practices upon which meritocracy is based are often those of the dominant group, growing out of their experiences, viewpoints, and cultures.[153] As such, affirmative action remains necessary to truly equalize opportunity for all.

III. AFFIRMATIVE ACTION IN BRAZIL

A. BACKGROUND

Brazil has long harbored a national myth that the country's various races live in harmony and equality — an untruth that has prevented the full incorporation of Afro-descendants, indigenous peoples, and members of other

discriminated groups into society at large.[154] Instead of pursuing a policy of national colorblindness, however, Brazil's focus on race has led to the social and economic exclusion of members of certain racial groups.[155] According to one study, whites earn 57 percent more than blacks with equal levels of education, whites attend an average of two years more school than blacks, and more than 90 percent of the country's diplomats and judges are white.[156]

These inequalities exist despite Brazil's constitutional prohibition on racial discrimination. The Constitution also guarantees equal access to education and mandates that university admission be based on merit. Specifically, it makes clear that the country aims "to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination."[157] Education is to be based on "equal conditions of access and permanence in school,"[158] and the state guarantees "access to higher levels of education, research and artistic creation according to individual capacity."[159]

Brazil has ratified ICERD, the ICCPR, the ICESCR, and CEDAW, and the country's constitution provides that international treaties have the force of law, noting, "The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party."[160] In addition, in May 2003, the Brazilian government established a new ministry, called the "Special Secretariat for Devising Policies for the Promotion of Racial Equality."[161]

B. AFFIRMATIVE ACTION IN PRACTICE

1. At Public Universities

Brazil has begun to experiment with affirmative action only recently. In 2000 and 2001, the state legislature of Rio de Janeiro passed laws mandating that two public universities over which it had jurisdiction set aside 50 percent of their seats for applicants from public high schools, 40 percent for students who identified themselves as black or pardo (mixed race) and 10 percent for students with disabilities.[162] The system was implemented for the 2002 admissions process, and the first class of students admitted under this rule entered the universities in 2003.[163]

These laws led to an onslaught of legal challenges, with plaintiffs claiming that they were unconstitutional. Most significant was a challenge brought by the National Confederation of Educational Establishments (CONFENEN) before the Supreme Court.[164] CONFENEN alleged that the laws violated the constitutional guarantees to equal protection and access to education and, because the program's burdens were greater than its benefits and other less severe measures could have been used, violated the principle of proportionality.[165] A congressman from Rio state filed two constitutional challenges before the Rio Court of Appeals as well.

Before these cases were decided, the laws were modified. A new law, passed in 2003, lowered the quota percentages to 20 percent for people who identified themselves as black, 20 percent for those people who went to public schools, and 5 percent for disabled persons or "other minorities."[166] All students admitted to these seats were further required to have a family income that fell below a certain maximum

(approximately $200/month, or $110 for each working member of the person's household).[167]

CONFENEN has since filed challenges to the new law as well,[168] while a group of organizations has jointly filed an amicus curiae brief to the Supreme Court defending the practice of affirmative action.[169] The congressman from Rio state also has filed suit challenging the revised legislation. All of these cases are currently pending. A number of challenges to the affirmative action laws are pending in Rio state trial courts as well.

Elsewhere, the state of Mato Grosso do Sul has adopted its own affirmative action policy. Its program sets aside 20 percent of the incoming public university spaces for blacks and 10 percent for Indians.[170] Those students who apply for the seats for blacks are required to submit a personal photograph and to sign a declaration concerning their color.[171] Those applying for the Indian seats are required to show an indigenous identification card and a declaration of indigenous descent from the country's Agency for Indian Affairs.[172]

Other state universities have adopted their own quota systems as well. The State University of Bahia began to reserve 40 percent of seats for students of African descent from the public school system in 2002.[173] In 2003, the State University System of Rio de Janeiro started to hold 20 percent of its places for poor students of African descent and 20 percent for students from public schools.[174] As of 2004, the Federal University of Brasilia began to reserve 40 percent of its seats for students who identified themselves as of African descent and sent a photograph as confirmation; the Federal University of Paraná started to hold 40 percent of seats for students who declared themselves of African descent and another 20 percent for public school students.[175] The Federal University of Bahia will begin to set aside 43 percent of its seats for students who are of African descent and from public schools in 2005.[176] As of May 2004, five federal universities and four state universities have adopted and maintain quotas systems.[177]

2. At Private Universities

On January 13, 2005, Brazil adopted a law that will provide private universities tax breaks if they reserve as many as 20 percent of their seats for poor students.[178] "We're not doing people favors," President Luiz Inacio Lula da Silva reportedly explained.[179] "We're paying a debt build up over 500 years."[180] The law encourages universities to provide scholarships for admitted students, something not done by public universities. Although this program may open university doors for many students who might not otherwise be able to attend, it remains to be seen whether this will ultimately segregate poor students in private — and less prestigious — schools.

3. In the Government

In September 2001, Brazil's Minister of Agriculture issued an order mandating that 20 percent of his staff be black and that firms with which his agency had contracts be made up of 20 percent African descendents and another 20 percent women.[181] The federal Supreme Court soon followed, establishing a similar affirmative action hiring target.[182] At the same time, the president of the Court publicly spoke out about the constitutionality of affirmative action, explaining that affirmative action programs were necessary to fulfill guarantees of equality.

In December 2001, then-President Fernando Henrique Cardoso brought affirmative action to his own governmental agencies, mandating that 20 percent of the positions that did not require civil service examinations would be reserved for blacks and browns.[183] The Ministry of Justice, too, made clear that it would only contract with those firms with 20 percent black or brown employees. The Labor Ministry reserved 20 percent of its job-training budget for courses targeting Afro-Brazilians.[184]

The Ministry of Foreign Relations also has instituted its own affirmative action program at the Instituto Rio Branco diplomatic training school. This program, however, did not establish a quotas system, but created a scholarship (2,500 Brazilian Real monthly — approximately US$850) for students of African descent instead. In 2002, of the 20 scholarship recipients, only one student, a black woman, passed the last of the three-stage selection process. That same year, only .7 percent of the total population of incoming students passed the final selection stage.[185] The school increased its scholarship numbers to 40 in 2004 and created an internal mentoring system to provide guidance for students throughout their careers.[186]

In 2003, President Luiz Inacio Lula da Silva established a National Policy for the Promotion of Racial Equality, which has set out to establish quotas for certain government jobs. That same year, the Sao Paulo City Council approved a law to develop quotas for people of African descent in the city government.[187]

C. EFFECTIVENESS

While affirmative action is relatively new in Brazil, some preliminary effects may be noted. First, critics of the program have argued that some students admitted under the quota system may be unprepared to compete academically; others, by contrast, argue that quota students are able to thrive once in the university setting.[188] Recent data released by the University of the State of Bahia suggests that with opportunity, students are prepared to compete and succeed. Students who entered in 2003 under the quotas program earned grades on average of 7.7 out of 10 (just .2 percent lower than the average of students overall) and Portuguese language majors who entered under quotas actually performed .4 percent higher than their non-quota counterparts at 8.8 out of 10.[189] Second, and perhaps more critically, many of the students admitted to quota seats remain unable to attend school due to a lack of financial resources and a dearth of scholarship funds.[190]

IV. AFFIRMATIVE ACTION IN INDIA

A. BACKGROUND

Affirmative action in India is used to address the discriminatory effects of the caste system, in which groups were seen hierarchically according to their traditional roles in society.[191] Outside this system were the "untouchables," who suffered serious prejudice and who now are one of the primary beneficiaries of affirmative action (along with other groups who have been systematically marginalized).[192] Although the caste system has long been officially abolished, its effects persist and, as such, affirmative action is critical for equalizing opportunity for members of all groups.[193]

The Indian Constitution guarantees equality for all citizens by making clear that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[194] At the same time, it explicitly allows for affirmative action

programs, providing that "Nothing…shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."[195] In the field of public employment, the Constitution says "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."[196] Part XVI of the Constitution specifically lays out in detail the affirmative action, or "reservation," program for Scheduled Castes and Scheduled Tribes.[197] In addition, India has ratified ICERD, the ICCPR, the ICESCR and CEDAW.

B. AFFIRMATIVE ACTION IN PRACTICE

1. In University Admissions and the Public Sector

In 1953, a Backward Classes Commission was established with a mandate to create a list of groups it believed to be "backward" and to require an improvement in status.[198] (Despite the fact that affirmative action in India is often referred to as a way to help "backward" groups, this term, as used in this paper, should not be seen as pejorative.[199]) In 1963, the Indian Supreme Court made clear that a maximum of 50 percent of seats could be reserved for these Backward Classes.[200]

A second Backward Classes Commission, known as the Mandal Commission, issued a subsequent report in 1980.[201] Using the Supreme Court's decision as guidance, this Commission recommended that a total 49.5 percent of federal government jobs should be set aside for scheduled castes,[202] scheduled tribes[203] and other backward classes (OBCs).[204] Stressing that a lack of discrimination and stated policy of equal opportunity were insufficient to remedy the negative effects of the caste system, the Commission said: "People who start their lives at a disadvantage rarely benefit significantly from equality of opportunity. Equality of opportunity is also an asocial principle, because it ignores the many invisible and cumulative hindrances in the way of the disadvantaged."[205] It was not until 1992, after months of hearings by the Supreme Court, that this report was implemented.[206] Many people were unhappy about the benefits that affirmative action would provide to certain groups, and took to the streets in violence.[207]

Today, scheduled castes and scheduled tribes are reserved seats in universities, the civil service, and the legislature, in rough proportion to their percentages in the population. Specifically, the Scheduled Caste quota for government service is 15 percent and the Scheduled Tribe quota is 7.5 percent.[208] Similarly, seats in the Lok Sabha (House of the People) and in the state legislative assemblies are reserved for members of Scheduled Castes and Scheduled Tribes in proportion to their populations in each state.[209] Twenty seven percent of seats in government jobs and at universities are reserved for OBCs, though they are reserved none in legislatures (since in many states they make up a majority of the population and are already represented in politics).[210]

Because the Indian Constitution explicitly charges the government with implementing affirmative action programs for backward classes, Indian courts have not heard challenges on the use of affirmative action per

se.[211] Instead the courts have been more concerned with determining who falls within protected classes.[212] In one prominent case, for example, the Supreme Court held that implementation of the Mandal Commission recommendations was constitutional.[213] Importantly, it also held that the financially well-off portion of the population must be excluded when determining which members of a class should get affirmative action benefits.[214]

According to the Court, both class and caste are important in determining who should benefit from affirmative action. They held that no potential beneficiary could have parents that earn above a certain income, and insisted that children whose parents had reached high-rank in government or military could not claim reserved positions.[215] This decision also made clear that "a permanent body, in the nature of a Commission or a Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes, and sections in the list of OBCs can be made," should be established.[216] The government has since established a National Commission for Scheduled Castes and Scheduled Tribes, which was later split into two separate Commissions.

C. EFFECTIVENESS

Today, affirmative action, in the form of reservations, is available for approximately 65 percent of the population.[217] Although problems remain, India's reservation system has brought affirmative action's beneficiaries into the middle class and has increased the mobility of members of the scheduled castes, scheduled tribes, and other backward classes.[218] It also has given members of these groups opportunities to participate in government at all levels.[219]

V. AFFIRMATIVE ACTION IN SOUTH AFRICA

A. BACKGROUND

When South Africa's apartheid era came to a close, whites, who comprised 13 percent of the population, earned 55 percent of the country's personal income.[220] Black South Africans, who made up 76 percent of the population, earned just 29 percent.[221] And whites held a disproportionate number of management positions as well, with one survey showing them in 80 percent of such posts.[222]

To remedy these types of discrepancies, the South African Constitution guarantees equality among persons, and prohibits discrimination on the grounds of "race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[223] At the same time, it explicitly permits affirmative action. According to Chapter 2, Section 9(2), "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." Affirmative action is thus not seen as an exception to the requirement of equality, but a means by which equality may be brought about. In addition, South Africa has ratified ICERD, the ICCPR, the ICESCR, and CEDAW.

Two South African laws, in particular, support the use of affirmative action. The Promotion of Equality and Prevention of Unfair Discrimination Act recognizes the constitutional requirement of equality and notes that "this implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and

social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences."[224] At the same time, the Employment Equity Act aims to "achieve equity in the workplace by: a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."[225] Designated groups include "black people, women, and people with disabilities."[226]

The Employment Equity Act requires, among other things, that "Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act."[227] According to Article 15 of this Act:

> 1. Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.
>
> 2. Affirmative action measures implemented by a designated employer must include:
>
> a. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
>
> b. measures designed to further diversity in the workplace based on equal dignity and respect of all people;
>
> c. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
>
> d. Subject to subsection (3), measures to:
>
> i. ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
>
> ii. retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.
>
> 3. The measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.
>
> 4. Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.[228]

In addition, the Employment Equity Act requires employers to provide information, disaggregated by race and gender, showing the compensation and benefits provided for each job category and, if differentials exist between employees, to take remedial measures to address this.[229] It also makes clear that a person's lack of relevant experience is not an adequate reason for not hiring them if they have the "capacity to acquire, within a reasonable time, the ability to do the job."[230]

Finally, South Africa has adopted "black empowerment charters," which designate, for various industries, the number of shares in that industry that must be held by blacks.[231] These charters indicate that approximately one quarter of shares held in South Africa should be owned by blacks within about a decade.[232]

B. AFFIRMATIVE ACTION IN PRACTICE

1. In Employment

South Africa's Constitutional Court has repeatedly affirmed the need for affirmative action to give weight to the country's constitutional guarantees of equality.[233] Similarly, in a case about whether an individual could bring suit alleging a violation of affirmative action obligations, the country's Labor Court provided its own backing.[234] Here, the Labor Court held that the Employment Equity Act "indicates a role for affirmative action that goes beyond the passivity of its status as a defense" to "pro-activeness and self-activity on the part of the employer."[235] The Court said that it must develop "a concept of discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved." In essence, the Court concluded that an individual employee may have a cause of action against an employer for failing to institute affirmative action measures.

But in 2004, the Labor Court seemed to reverse itself. In this case, the plaintiff, a black woman doctor who applied for the position of the city's director of health and was not selected for the post, sued the city alleging it failed to comply with its affirmative action obligations.[236] But this time, the Labor Court held that the Employment Equity Act does not provide an individual right to affirmative action and distinguished between provisions of the Act that deal with unfair discrimination and can be enforced by an aggrieved individual, and others that involve affirmative action and can only be fulfilled on a collective level.[237] The plaintiff applied for leave to appeal directly to the Constitutional Court, a request that was denied.[238] It remains to be seen how these two cases will be squared.

C. EFFECTIVENESS

As of 2004, approximately one half of those people in South Africa's middle management positions and one quarter in its top management positions were black, a significant improvement from a decade earlier.[239] In particular, blacks have increased their numbers in top posts within the government in great numbers.[240] The South African government has reported that the country's Public Service is now "very close to achieving perfect representation, edging its way to matching the population profile in both race and gender."[241] Despite these successes, however, many challenges remain, including, among other things, the practice of white-owned companies

propping up black-owned companies and the fact that for the empowerment charters, it remains to be seen how the transfer of shares will be funded. [242]

VI. AFFIRMATIVE ACTION IN MALAYSIA

A. BACKGROUND

Malaysia achieved independence in 1957. However, despite constituting a majority of the country's population, Malays and other indigenous groups, known as Bumiputera (sons of the soil), enjoyed few of the economic successes of the Chinese minority population and, to a lesser extent, the Indian minority population.[243] The Constitution thus set out to provide special rights for ethnic Malays to help remedy this imbalance, while also granting citizenship to the country's Chinese and Indian residents.[244]

Specifically, the Malaysian Constitution provides that "All persons are equal before the law and entitled to the equal protection of the law."[245] It also states that "Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."[246] At the same time, the Constitution makes clear that it does not prohibit "any provision for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service."[247] Malaysia has not signed or ratified ICERD, the ICCPR, or the ICESCR; it has ratified CEDAW.

B. AFFIRMATIVE ACTION IN PRACTICE

1. In Business

The above-mentioned constitutional provisions made possible the creation of affirmative action programs to benefit ethic Malays.[248] Such programs began to proliferate after Malaysia experienced ethnic riots in 1969, and violence against the country's economically dominant Chinese population became rampant.[249] To curb the simmering ethnic conflicts, the government announced a "New Economic Policy," a goal of which was to increase the economic standing of ethnic Malays in the hopes that this would decrease tensions between them and the ethnic Chinese.[250]

Under this new policy, Malaysian Chinese companies were required to set aside 30 percent of their corporate equity for ethnic Malays.[251] This meant that a company that wanted to expand or to receive an export license was required to sell 30 percent of its shares to ethnic Malays or issue new shares to ensure a similar ownership percentage.[252] In addition, 30 percent of government construction contracts were required to come from Malay firms.[253] And banks increased their lending to the Malay population.[254]

2. In Education

After the ethnic riots of 1969, the Malaysian government amended the constitution in a way that was able to increase the percentage of Malay students in university programs from 39.7 percent in 1970 to 52.7 percent just three years later.[255] Specifically, Malaysian universities were required to reserve a "reasonable proportion of places" for ethnic Malay students and faculty members.[256] Schools that had used English as the language

of instruction were changed to use Malay.[257] And different educational standards for Malays and non-Malays were set.[258]

C. EFFECTIVENESS

The effects of Malaysia's experiment with affirmative action are somewhat ambiguous, as many factors have contributed to changing demographics within the country over the years and, in turn, in its business and educational sectors. In the field of education, for example, fewer than 10 percent of university undergraduates in the 1970s were ethnic Malay and approximately 70 percent were Chinese; today the percentages are reversed.[259] This reversal was due to a number of developments, some related to the affirmative action policy and some not. In the latter category is the fact that Singapore, a majority-Chinese city-state once part of Malaysia, separated into its own sovereign entity in 1965, increasing the proportion of ethnic Malays in Malaysia and decreasing the overall percentage of ethnic Chinese in the country.

On top of this, however, the introduction of affirmative action also had a significant effect on the changing educational demographics, increasing the number of ethnic Malays in universities through a strict set-aside system that provided for the admissions of ethnic Malay students and the hiring of ethnic Malay teachers. The exclusiveness of this program led approximately 30,000 Malaysian students, most of them ethnically Chinese, to go abroad for university degrees every year.

Three years ago, Malaysia's affirmative action program came under attack when the country's minister of education announced that few ethnic Malays had met the minimum academic standards needed to gain university admission, a claim he would later take back.[260] Nonetheless, by June 2003, Malaysian universities had dismantled their official affirmative action programs, and they now make admissions decisions without taking ethnic origin into account.[261]

VII. AFFIRMATIVE ACTION IN CANADA

A. BACKGROUND

As of 1996, people of aboriginal ancestry made up two percent of Canada's population, and visible minorities comprised another 11 percent.[262] These people, along with women and people with disabilities, are provided affirmative action, known in Canada as "employment equity," in a number of ways. The purpose of employment equity is to make the Canadian workforce reflective of the population at large and to correct conditions of employment disadvantage.

Canada's constitution guarantees equality among citizens, providing that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability."[263] It also makes clear, however, that affirmative action is permissible by stating that the above guarantee "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or physical disability."[264] Canada has ratified ICERD, the ICCPR, the ICESCR, and CEDAW.

B. AFFIRMATIVE ACTION IN PRACTICE

1. In the Public and Private Sectors

Canada's Employment Equity Act aims to bring about equality in the workplace and, in so doing, "to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences."[265] The act applies to employers in the private sector, and select employers in the public sector, including those with more than 100 employees.[266]

Among other things, the Employment Equity Act requires employers to take positive steps to ensure that people in the designated groups are represented in the workplace in proportion to their representation in the Canadian workforce, or the sector of the Canadian workforce from which the employer can be expected to hire.[267] Employers must analyze their organizational practices to determine whether designated groups are underrepresented, and develop employment equity plans to lay out remedial policies where needed.[268] A finding that certain groups are underrepresented should lead to the use of "short term numerical goals for the hiring and promotion of persons in designated groups in order to increase their representation in each occupational group in the workforce."[269]

The Canadian Human Rights Commission, established under section 26 of the Canadian Human Rights Act, is charged with enforcing the Employment Equity Act.[270] Tribunals may be convened to review potential non-compliance and order remedial action, and employers who breach the Act may be fined a maximum of C$10,000 for one violation or C$50,000 for continued violations.[271]

C. EFFECTIVENESS

Data collected through the requirements of the Employment Equity Act shows that the number of people employed from the designated groups increased between 1987 and 2000.[272] Employers surveyed also indicated that while they did not believe they met the Act's requirements when it was enacted, 37 percent say they now feel that they do and 5 percent say they have come to exceed the standards set.[273] Despite these positive reports, 59 percent of employers surveyed said improvement in this area was still needed.[274]

VIII. CONCLUSIONS

As Part B of this report has shown, there are a number of different ways in which affirmative action programs may be instituted, and a number of reasons why they might be needed. Countries must therefore take into account their own unique histories and concerns to determine what type of affirmative action programs could best accomplish their goals. But despite the vast number of ways these programs may be applied, it remains clear that they are often critically needed to make real any promises of equality.

ENDNOTES

[1] Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference of the Americas, Santiago, Chile 5-7 December 2000, A/CONF.189/PC.2/7 paragraph 98 (April 24, 2001).

[2] Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference of the Americas, Santiago, Chile, 5-7 December 2000, A/CONF.189/PC.2/7 (Apr. 24, 2001).

[3] *Id.* paragraphs 16-17.

[4] *Id.* paragraph 86.

[5] 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, Agenda item 9, adopted on Sept. 8, 2001 in Durban, South Africa.

[6] Programme, paragraphs 98-99 (text in heading).

[7] *Id.* paragraph 99.

[8] *Id.* paragraph 100.

[9] Report of the Regional Workshop for the Adoption and Implementation of Affirmative-Action Policies for People of African Descent in the Latin American and Caribbean Region, E/CN.4/2004/17/Add.3 (Jan. 8, 2004).

[10] *Id.* at 2.

[11] *Id.* at 4.

[12] *Id.* at 5.

[13] Human Rights Committee, General Comment 18, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) paragraph 1.

[14] *See, e.g.,* International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16 paragraph 2) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, Art. 2 (referencing the obligation to take "such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant").

[15] Considerations on the Compatibility of Affirmative Action to Promote Women's Political Participation with Principles of Equality and Non-Discrimination, Annual Report of the Inter-American Commission on Human Rights (1999), OEA Ser. L/V/II/106, Doc. 6, rev. April 13, 1999 at 3.

[16] Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951, Art. 3.

[17] *Id.* at Art. 34.

[18] *Id.* at Art. 45(a).

[19] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) ("American Declaration"), OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978 ("American Convention"), OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[20] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S. Treaty Series No. 69 (1988), entered into force November 16, 1999 ("Protocol of San Salvador"), OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992), 3.

[21] Protocol of San Salvador Articles 1-2.

[22] *Id.* at Art. 1.

[23] *Id.* at Art. 2.

[24] Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988) paragraph 167.

[25] Velasquez Rodriguez Case, paragraph 172; Godínez Cruz Case, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989) paragraphs 181-182.

[26] Advisory Opinion, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), paragraph 54.

[27] Considerations on the Compatibility of Affirmative Action to Promote Women's Political Participation with Principles of Equality and Non-Discrimination, Annual Report of the Inter-American Commission on Human Rights (1999), OEA Ser. L/V/II/106, Doc. 6, rev. April 13, 1999.

[28] "Other Treaties" Subject to the Advisory Jurisdiction of the Court, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 1 (1982) paragraph 37.

[29] María Eugenia Morales de Sierra v. Guatemala, Case 11.625, Report No. 4/00, OEA/Ser.L/V/II.111 Doc. 20 rev. at 929 (2000) paragraph 83.

[30] International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

[31] Art. 1 paragraph 1.

[32] *Id.* at Arts. 2, 5.

[33] *Id.* at Preamble paragraph 9.

[34] *Id.* at Art. 2(1).

[35] *Id* at Art. 2(1)(c).

[36] *Id.* at Art. 2(1)(d).

[37] *Id.* at Art. 2(e).

[38] *See, e.g., id.* at Preamble paragraph 9, Art. 2(a).

[39] *Id.* at Art. 2(1)(c).

[40] *Id.* at Art. 2(1)(d).

[41] *Id.* at Arts. 3, 4.

[42] *Id.* at Art. 1 paragraph 4.

[43] Committee on the Elimination of Racial Discrimination, General Recommendation XIV on Article 1 of the Convention (Forty-second session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 67 (1994).

[44] *See, e.g.,* Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bulgaria (Apr. 23, 1997) paragraph 14 (recommending strengthening of affirmative actions to benefit the Roma people); Concluding Observations of the Committee on the Elimination of Racial Discrimination: The Former Yugoslav Republic of Macedonia (Oct. 15, 1997) paragraph 13 (recommending affirmative action to increase the representation of ethnic minorities in political life); Concluding Observations of the Committee on the Elimination of Racial Discrimination: Colombia (Aug. 20, 1999) paragraph 23 (recommending affirmative action to ensure increased employment opportunities for minority and indigenous communities); Concluding Observations of the Committee on the Elimination of Racial Discrimination: Romania (Apr. 12, 2001) paragraph 15 (recommending affirmative action measures to assist the Roma population, especially in education and vocational training); Concluding Observations of the Committee on the Elimination of Racial Discrimination: Uruguay (Apr. 12, 2001) paragraph 13 (encouraging adoption of specific protection measures for members of Afro-Uruguayan and indigenous communities).

[45] Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America (Aug. 14, 2001).

[46] *Id.* at paragraph 399.

[47] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

[48] *Id.* at Art. 4.

[49] ICCPR, Art. 2(2).

[50] Human Rights Committee, General Comment 18, paragraph 10.

[51] Sarah Joseph et al., International Covenant on Civil and Political Rights 561 (2001).

[52] General Comment 18, paragraph 9.

[53] *Id.*

[54] Franz Nahlik v. Austria, Communication No. 608/1995, U.N. Doc. CCPR/C/57/D/608/1995 (1996), paragraph 8.2.

[55] Human Rights Committee, General Comment 25 (57), General Comments under Art. 40, paragraph 4, of the International Covenant on Civil and Political Rights, adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996) at paragraph 24.

[56] R. D. Stalla Costa v. Uruguay, Communication No. 198/1985 (July 9, 1987), U.N. Doc. Supp. No. 40 (A/42/40) paragraph 10.

[57] *Id.*

[58] Human Rights Committee, Comments on the United States of America, U.N. Doc. CCPR/C/79/Add 50 (1995) at paragraph 38.

[59] Concluding Observations of the Human Rights Committee, Ireland (Aug. 3, 1993) paragraph 23. *See also* Concluding Observations of the Human Rights Committee, Zambia (Apr. 3, 1996) paragraph 21. ("Comprehensive anti-discriminatory laws covering both the private and the public spheres should be introduced as well as, where appropriate, affirmative action measures."); Concluding Observations of the Human Rights Committee, Costa Rica (Aug. 4, 1999) (taking note of measures to enhance equality between men and women and welcoming the development of affirmative action plans).

[60] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, Art. 2, paragraph 2.

[61] *Id.* at Art. 13 paragraph 2(c).

[62] CESCR General Comment 3, The nature of States parties' obligations (Art. 2, par.1), E/1991/23 (Dec. 14, 1990) paragraphs 1-2.

[63] *Id.* at paragraph 2.

[64] *Id.* at paragraphs 3-5, 7.

[65] CESCR General Comment 5, Persons with Disabilities, E/1995/22 (Dec. 9, 1994) paragraph 9.

[66] General Comment 13, The Right to Education (Art. 13) E/C.12/1999/10 (Dec. 8, 1999) paragraph 32.

[67] *Id.*

[68] Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Art. 16 and 17 of the Covenant, Guatemala (1996) at paragraph 27.

[69] *Id.*

[70] Concluding Observations of the Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Arts. 16 and 17 of the Covenant, Brazil (2003) paragraph 7.

[71] Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

[72] *See e.g., id.* at Arts. 11, 13.

[73] *See id.* at Art. 4.

[74] Committee on the Elimination of Discrimination against Women, General Recommendation 5 (Seventh session, 1988), Temporary Special Measures, U.N. Doc. HRI\GEN\1\Rev.1 at 73 (1994).

[75] *Id.*

[76] Committee on the Elimination of Discrimination against Women, General Recommendation 23 (16th Session, 1997) Art. 7 (Political and Public Life), U.N. Doc. A/52/38.

[77] *Id.* paragraph 15.

[78] *Id.*

[79] Discrimination (Employment and Occupation) Convention (ILO No. 111), 362 U.N.T.S. 31, entered into force June 15, 1960.

[80] *Id.* at Art. 1(a).

[81] *Id.* at Art. 1(b).

[82] *Id.* at Arts. 2-3.

[83] United Nations General Assembly (Transmission of Report of Special Rapporteur), Elimination of Racism and Racial Discrimination, A/50/476 (Sept. 25, 1996) paragraph 151(b).

[84] *Id.* at paragraph 152.

[85] *See* Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: the Concept and Practice of Affirmative Action, Progress Report Submitted by Mr. Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5. E/CN.4/Sub.2/2001/15/26 June 2001, paragraphs 21-45; Prevention of Discrimination: the Concept and Practice of Affirmative Action, Final Report Submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5. E/CN.4/Sub.2/2002/21/17 June 2002 paragraphs 16-29.

[86] *See, e.g.,* Treaty of Amsterdam, Oct. 2, 1997, Art. 2 paragraph 7., in Consolidated Version of the Treaty establishing European Community, available at http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf (visited Feb. 10, 2004).

[87] *Id.* paragraph 3, European Council Directive 2000/43/EC (Jun. 29, 2000).

[88] *Id.* paragraph 17.

[89] *Id.*, Art. 5.

[90] *Id.* paragraph (26).

[91] *See* Sean Pager, Strictness and Subsidiary: An Institutional Perspective on Affirmative Action at the European Court of Justice, 26 Boston College Int'l and Comp. L. Rev. 35 (2003).

[92] *Compare* Kalanke v. Frei Hansestadt Bremen, Case 450/93, 1995 E.C.R. I-3051 (overruling statute where preference was automatic and did not allow for consideration of other relevant factors that favored male candidate); see Pager at 38-48 (discussing Kalanke).

[93] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, Art. 14.

[94] *Id.* at Art. 1

[95] Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium, Eur. Ct. H.R., Judgment of July 23, 1968, Series A, No. 6 (Merits) § A(4) (upholding Belgium's policies favoring Dutch languages in certain regions, given that the policies are aimed at achieving "linguistic unity" and avoiding discord).

[96] *Id.* § B(10). See Mazurek v. France, Eur. Ct. H.R. (Feb. 1, 2000) I(B) paragraphs 54-56 (finding a violation based on proportionality where a child out of wedlock was denied equal rights to his parents' assets).

[97] john a. powell, *Transformative Action: A Strategy for Ending Racial Hierarchy and Achieving True Democracy* in Beyond Racism: Race and Inequality in Brazil, South Africa, and the United States 389-390 (2001).

[98] *Id.* at 390.

[99] *See* Affirmative Action Review: Report to the President, Clinton White House Staff, July 19, 1995, available at http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa-index.html.

[100] *See id.*

[101] *See id.*

[102] U.S. Const. 14th Amend.

[103] *See* powell, *supra* note 96 at 391, Grutter v. Bollinger, 539 U.S. 306 (2003).

[104] City of Richmond v. J. A. Croson Co., 488 U.S. 469, 498 (1989).

[105] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995).

[106] *See generally,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1987), Grutter v. Bollinger, 539 U.S. 306 (2003). *See also* powell, supra note 96.

[107] *See, e.g.,* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-281 (1985). *See also* powell, supra note 96.

[108] *See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). *See also* powell, supra note 96.

[109] *See* U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

[110] *See* United Steelworkers v. Weber, 443 U.S. 193 (1979). Title VII of the Civil Rights Act of 1964 prohibited racial discrimination, but made no exception for the "affirmative" use of race.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Despite the Court's holding, white workers have at times challenged affirmative action programs, claiming they have been denied jobs because of racial bias.

[116] City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

[117] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, (1995).

[118] *Id.*

[119] *Id.*

[120] Office of Federal Contract Compliance Programs, U.S. Dept. Labor Employment Standards Administration, OFCCP Notice Reaffirming Affirmative Action Goals in Light of Adarand Decision, Administrative Review (Aug. 2, 1995), reprinted in Daily Lab. Rep. (BNA) No. 155, at E-1 (Aug. 11, 1995), cited in Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale?* 44 Wm and Mary L. Rev. 1521, 1540 (2003).

[121] *See* Univ. of Calif. Regents v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[122] *See* Univ. of Calif. Regents v. Bakke, 438 U.S. 265 (1978) and Grutter v. Bollinger, 539 U.S. 306 (2003). In Bakke, Justice Powell, who crafted the majority's crucial fifth vote, struck down an admissions policy that reserved 16 out of 100 available seats for disadvantaged minority applicants as too rigid, but held that race could be considered as one of many factors in the admissions process.

[123] Grutter v. Bollinger, 539 U.S. 306 (2003). It is important to note that quotas may still be used to remedy past discrimination, though not to promote educational diversity. *See* Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases, A Joint Statement of Constitutional Law Scholars, The Civil Rights Project, Harvard Univ., July 2003.

[124] Grutter v. Bollinger, 539 U.S. 306 (2003).

[125] In *Grutter, v. Bollinger et al.* the policy in question expressed a commitment to enrolling a "critical mass" of underrepresented minority students in the school's student body, and to that end, considered race as one factor among many when deciding whom to admit. The Court found this was constitutional. In *Gratz v. Bollinger et al.* admissions officers employed a point system to determine who would be offered a space in the school's entering class; members of underrepresented minority groups automatically received 20 points, out of a total of 150, under the system. The Court found this was not permissible. It is important to note that when these cases were argued, several groups submitted friend of the court briefs laying out the societal benefits of affirmative action. The General Motors company asserted, for example, that "the Nation's interest in safeguarding the freedom of academic institutions to select racially and ethnically diverse student bodies is indeed compelling: the future of American business and, in some measure, of the American economy depends upon it." Brief of General Motors Corporation as Amicus Curiae at 2, Grutter (No. 02-241), Gratz (No. 02-516). Leaders of the Armed Forces also filed a brief arguing that "broad access to the education that leads to leadership roles is essential to public confidence in the fairness and integrity of public institutions, and their ability to perform their vital functions and missions." Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., as Amici Curiae, at 9, Grutter (No. 02-241), Gratz (No. 02-516). Notably, however, some states, including California, Washington, Florida, and Texas, still ban the consideration of race in certain areas, including university admissions. A number of these states have admissions policies whereby any student graduating at the top of his or her class is automatically admitted to a state university. For example, in California, the top 4 percent of all graduating students are automatically accepted to one of the University of California campuses. In Florida, the top 20 percent of students graduating from public schools are automatically accepted to one of the state schools. In Texas, the top 10 percent of all graduating students are automatically accepted to the Texas state university of their choice. Unfortunately, these programs have decreased, rather than increased, the number of underrepresented minority students enrolled in state universities. *See* Catherine L. Horn and Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experience*, The Civil Rights Project, Harvard Univ., Feb. 7, 2003. *See also* Marta Tienda et. al., *Closing the Gap? Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action*, Woodrow Wilson School of Public and Int'l Affairs, Jan. 21, 2003.

[126] Brown v. Board of Education, 347 U.S. 483 (1954).

[127] Green v. County School Board, 391 U.S. 430 (1968).

[128] Swann v. Charlotte-Mecklenburg Board of Education 402 U.S. 1 (1971).

[129] Milliken v. Bradley, 418 U.S. 717 (1974).

[130] Avila v. Berkeley Unified School District, No. RG03-110397, Cal. Sup. Ct. Alameda, Apr. 6, 2004 (unreported opinion, available at http://www.naacpldf.org/landing.aspx?sub=24).

[131] *Id.*

[132] Cal. Gov't. Code § 8315 (2004).

[133] Avila v. Berkeley Unified School District, No. RG03-110397, Cal. Sup. Ct. Alameda, Apr. 6, 2004 (unreported opinion, available at http://www.naacpldf.org/landing.aspx?sub=24), Defendants' Memorandum of Points and Authorities in Support of their Demurrer to plaintiff's Complaint for Declaratory and Injunctive Relief and Damages, at 12.

[134] Avila v. Berkeley Unified School District, No. RG03-110397, Cal. Sup. Ct. Alameda, Apr. 6, 2004 (unreported opinion, available at http://www.naacpldf.org/landing.aspx?sub=24) at 9 (internal quotes removed).

[135] *See e.g.*, Business and Professional People for the Public Interest at www.bpichicago.org/pht/gautreaux.html.

[136] *See id.*

[137] *See id.*

[138] Hills v. Gautreaux, 425 U.S. 284 (1976).

[139] *See* U.S. Dept. of Justice at http://www.usdoj.gov/crt/voting/intro/intro_b.htm.

[140] *See* U.S. Dept. of Justice at http://www.usdoj.gov/crt/voting/intro/intro.htm.

[141] *See id.*

[142] Hunt v. Cromartie, 532 US 234 (2001).

[143] *See* powell, *supra* note 96 at 394.

[144] *See id.*

[145] *See id.*

[146] United Nations Development Program, Human Development Report 2004, at 71.

[147] Id.

[148] john a. powell and Marguerite L. Spencer, *Remaking the Urban University for the Urban Students: Talking About Race,* 30 Conn. L. Rev. 1247, 1273 (1998).

[149] *Id.*

[150] *See* powell, *supra* note 96 at 395.

[151] *See id.* at 394.

[152] *See* Francis Schrag, Back to Basics: Fundamental Questions Reexamined 118 (1995). Iris Marion Young, Justice and the Politics of Difference 193 (1990).

[153] *See id.*

[154] *See* Sharon Bailin, Education, Knowledge and Critical Thinking in Education, Knowledge and Truth: Beyond the Postmodern Impasse 217, David Carr, ed. (1998).

[155] *See* Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties under Article 9 of the Convention, CERD/C/431/Add.8, 16 October 2003.

[156] *See id.*

[157] Study by the Brazilian Institute of Geography and Statistics, cited in Marion Lloyd, *In Brazil, a New Debate over Color,* Chronicle of Higher Education, Feb. 13, 2004.

[158] Brazil Const. 1988, Art. 3(IV).

[159] Brazil Const. 1988 Art. 206 (I).

[160] Brazil Const. 1988 Art. 208 (V).

[161] Brazil Const. 1988, Art. 5(LXXVII)(2).

[162] Marcelo Pereira, *Brazil: New Racial Equality Minister Favors Affirmative Action*, Inter Press Service, May 9, 2003.

[163] *See* Global Rights: Partners for Justice, Affirmative Action Affinity Group, Afro-Descendants in Brazil and Uruguay, Background Information. *See also* Marion Lloyd, *In Brazil, a New Debate over Color*, Chronicle of Higher Education, Feb. 13, 2004.

[164] *See id.*

[165] *See* Global Rights: Partners for Justice, Affirmative Action Affinity Group, Afro-Descendants in Brazil and Uruguay, Background Information.

[166] *See id.*

[167] *See* Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 Conn. L. Rev. 787, 816 (2004). *See also* Marion Lloyd, *In Brazil, a New Debate Over Color*, Chronicle of Higher Education, Feb. 13, 2004 and Global Rights: Partners for Justice, Affirmative Action Affinity Group, Afro-Descendants in Brazil and Uruguay, Background Information.

[168] *See* Seth Racusen, Making the *"Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 Conn. L. Rev. 787, 816, 825 (2004). *See also* Marion Lloyd, *In Brazil, a New Debate over Color*, Chronicle of Higher Education, Feb. 13, 2004.

[169] *See* Global Rights: Partners for Justice, Latin America Program, Affirmative Action Affinity Group, Policy Updates—Brazil, July 2003-April 2004.

[170] *See id.*

[171] *See* Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 Conn. L. Rev. 787, 817 (2004).

[172] *See id.*

[173] *See id.*

[174] *See* Global Rights: Partners for Justice, Latin America Program, Affirmative Action Affinity Group, Policy Updates—Brazil, July 2003-April 2004.

[175] In 2002, a quota of 40 percent for each of these groups had been introduced.

[176] *See* Global Rights: Partners for Justice, Latin America Program, Affirmative Action Affinity Group, Policy Updates—Brazil, July 2003-April 2004.

[177] *See id.*

[178] Folha de Sao Paulo, May 14, 2004.

[179] *See* Andrew Hay, *Brazil's Poor to Get Private University Quotas*, Reuters, Jan. 13, 2005.

[180] *See id.*

[181] *See id.*

[182] *See* Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 Conn. L. Rev. 787, 811-812 (2004).

[183] *See id.*

[184] *See id.*

[185] *See* Global Rights: Partners for Justice, Affirmative Action Affinity Group, Afro-Descendants in Brazil and Uruguay, Background Information.

[186] Brazilian Ministry of Foreign Relations- Institito Rio Branco Affirmative Action Program: Scholarships for Diplomacy descriptions and results http://www2.mre.gov.br/irbr/irbr/cartabolsapremio.htm.

[187] *See id.*

[188] Global Rights: Partners for Justice, Latin America Program, Affirmative Action Affinity Group, Policy Updates—Brazil, July 2003-April 2004.

[189] *See* Marion Lloyd, *In Brazil, a New Debate over Color*, Chronicle of Higher Education, Feb. 13, 2004.

[190] Antonio Gois, *Com Boa Nota Quotista Preciso de Recurso,* Folha de Sao Paulo, December 13, 2004.

[191] *See id.*

[192] *See* Clark D. Cunningham, *Affirmative Action: India's Example*, Civil Rights Journal, Fall 1999.

[193] *See id. See also* United Nations Development Program, Human Development Report 2004, at 70.

[194] *See* Clark D. Cunningham, *Affirmative Action: India's Example*, Civil Rights Journal, Fall 1999.

[195] Indian Const. Art. 14.

[196] *Id.* at Art. 15(4).

[197] *Id.* at Art. 16(4).

[198] *Id.* at Part XVI.

[199] *See* Lan Cao, *The Diaspora of Ethnic Minorities: Beyond the Pale?* 44 Wm. and Mary L. Rev. 1521, 1545 (2003).

[200] *See* Clark D. Cunningham, *Affirmative Action: India's Example*, Civil Rights Journal, Fall 1999.

[201] Balaji v. State of Mysore, 50 A.I.R. (S.C.), 649, 663 (1963), cited in Lan Cao, *The Diaspora of Ethnic Minorities: Beyond the Pale?* 44 Wm. and Mary L. Rev. 1521, 1545 (2003).

[202] *See* Clark D. Cunningham, *Affirmative Action: India's Example*, Civil Rights Journal, Fall 1999.

[203] Scheduled Castes include people previously known as "untouchables," which had been considered the lowest caste. *See* Clark D. Cunningham, *After Grutter Things Get Interesting! The American Debate Over Affirmative Action is Finally Ready for Some Fresh Ideas from Abroad*, 36 Conn. L. Rev. 665, 673 (2004).

[204] Scheduled Tribes include those tribes isolated by geography, language, and culture. *See id.*

[205] Other Backward Classes include those people from lower caste groups, whose ancestors were not untouchables, but were still significantly disadvantaged. *See* Lan Cao, *The Diaspora of Ethnic Minorities: Beyond the Pale?* 44 Wm. and Mary L. Rev. 1521, 1545 (2003).

[206] *See* Clark D. Cunningham, *Affirmative Action: India's Example*, Civil Rights Journal, Fall 1999.

[207] *See* id.

[208] *See* Lei Cao, *The Diaspora of Ethnic Minorities: Beyond the Pale?* 44 Wm. and Mary L. Rev. 1521, 1547 (2003).

[209] *See e.g.*, Laura Dudley Jenkins, *Race, Caste, and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 Conn. L. Rev. 747, 756 (2004).

[210] *See id.*

[211] *See* United Nations Development Program, Human Development Report 2004, at 71.

[212] *See* Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions,* 9 Wash. & Lee R.E.A.L. J. 73, 78 (2003).

[213] *See id.*

[214] *See* Indira Sawhney v. Union of India, 80 A.I.R. 1993 S.C. 477, 558-60, cited in Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions,* 9 Wash. & Lee R.E.A.L. J. 73, 98 (2003).

[215] *See id.*

[216] *See* Jason Morgan-Foster, From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions, 9 Wash. & Lee R.E.A.L. J. 73, 98.

[217] *See* Indira Sawhney v. Union of India, 80 A.I.R. 1993 S.C. 477, 558-60, cited in Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions,* 9 Wash. & Lee R.E.A.L. J. 73, 98 (2003).

[218] *See* United Nations Development Program Human Development Report 2004 at 70.

[219] *See* United Nations Development Program Human Development Report 2004 at 71.

[220] *See id.*

[221] *See id.* at 70.

[222] *See id.*

[223] *See id.*

[224] South African Const., Ch. 2, §9(3).

[225] Promotion of Equality and Prevention of Unfair Discrimination Act, preamble.

[226] Employment Equity Act, Art. 2.

[227] *Id.* at Art. 1.

[228] *Id.* at Art. 13(1).

[229] *Id.* at Art. 15.

[230] Employment Equity Act at Art. 27.

[231] Employment Equity Act at Art. 20.

[232] *See* United Nations Development Program, Human Development Report 2004, at 70.

[233] *See id.*

[234] *See* Saras Jagwanth, *Affirmative Action in a Transformative Context: The South African Experience,* 36 Conn. L. Rev. 725, 732 (2004).

[235] Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC) (unreported case).

[236] *Id.*

[237] *See* Dudley v. City of Cape Town, CCT 5/04, May 2004 (unreported case), cited at http://www.deneysreitz.co.za/news/news.asp?ThisCat=2&ThisItem=446.

[238] *See id. See also* www.worklaw.co.za (July 2004 public newsletter).

[239] *See id.*

[240] *See* United Nations Development Program, Human Development Report 2004, at 70.

[241] *See id.*

[242] South African government press release (on file with Global Rights).

[243] *See* United Nations Development Program Human Development Report 2004 at 70.

[244] *See id.*

[245] *See id.*

[246] Malaysia Const. Art. 8(1).

[247] Malaysia Const. Art. 8(2).

[248] Malaysia Const. Art. 8(5)(c).

[249] *See* United Nations Development Program, Human Development Report 2004, at 70. *See* also Lan Cao, *The Diaspora of Ethnic Minorities: Beyond the Pale?* 44 Wm. and Mary L. Rev. 1521, 1552 (2003).

[250] *See id* at 1553.

[251] *See id.*

[252] *See id.* at 1554.

[253] *See id.* at 1554.

[254] A Malay firm is defined as one that is at least 51 percent owned by Malays. *See id.*

[255] *See id.* at 1555.

[256] *See id.* at 1556.

[257] See David Cohen, *In Malaysia, the End of Quotas*, Chronicle of Higher Education, Feb. 13, 2004.

[258] *See id.*

[259] *See id.*

[260] *See* David Cohen, *In Malaysia, the End of Quotas*, Chronicle of Higher Education, Feb. 13, 2004.

[261] *See id.*

[262] *See id.*

[263] *See* Employment Equity Act, Art. 2 (1995). "Aboriginal peoples" means persons who are Indians, Inuit or Métis. Id. at Art. 3. "Members of visible minorities" means persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in color."

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