an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (Eur. Ct. H.R. (GC), *Thlimmenos* v. *Greece* (Appl. No. 34369/97), judgment of 6 April 2000, §42). But the notion has progressed further in recent case law.

European Court of Human Rights (GC), *D.H. and others* v. *Czech Republic* (Appl. No. 57325/00), judgment of 13 November 2007:

[The applicants are eighteen Czech nationals of Roma origin who were born between 1985 and 1991 and live in the Ostrava region (Czech Republic). Between 1996 and 1999 they were placed in special schools for children with learning difficulties who were unable to follow the ordinary school curriculum. Under the law, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology centre, and required the consent of the child's legal representative. Fourteen of the applicants sought a review of their situation by the Ostrava Education Authority on the grounds that the tests were unreliable and their parents had not been sufficiently informed of the consequences of giving consent. The Authority found that the placements had been made in accordance with the statutory rules. Twelve of the applicants appealed to the Constitutional Court. They argued that their placement in special schools amounted to a general practice that had resulted in segregation and racial discrimination through the co-existence of two autonomous educational systems, namely special schools for the Roma and 'ordinary' primary schools for the majority of the population. Their appeal was dismissed on 20 October 1999. They then turned to the European Court of Human Rights, arguing that, as a result of their Roma origin, they were assigned to special schools. On 7 February 2006 a Chamber held by six votes to one that there had been no violation of Article 14 of the Convention (non-discrimination), read in conjunction with Article 2 of Protocol No. 1 (right to education). In its view, the Government had established that the system of special schools in the Czech Republic had not been introduced solely to cater for Roma children and that considerable efforts had been made in those schools to help certain categories of pupils to acquire a basic education. In that connection, the Chamber had observed that the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children.

Following the judgment delivered by the Chamber, the applicants then requested that the case be referred to the Grand Chamber.]

182. The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority ... As the Court has noted in previous cases, they therefore require special protection ... As is attested by the activities of numerous European and international organisations and the recommendations of the Council of Europe bodies ..., this protection also extends to the sphere of education. The present case therefore warrants particular attention, especially as when the applications were lodged with the Court the applicants were minor children for whom the right to education was of paramount importance.

183. The applicants' allegation in the present case is not that they were in a different situation from non-Roma children that called for different treatment or that the respondent State had failed to take affirmative action to correct factual inequalities or differences between them

[*Thlimmenos* v. *Greece* [GC], No. 34369/97, §44, E.C.H.R. 2000–IV; and *Stec and others* v. *United Kingdom* [GC], No. 65731/01, §51]. In their submission, all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.

184. The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group [*Hugh Jordan* v. *United Kingdom*, No. 24746/94, 4 May 2001, §154; and *Hoogendijk* v. *Netherlands* (dec.), No. 58461/00, 6 January 2005]. In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC ... and the definition provided by ECRI ..., such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent.

(a) Whether a presumption of indirect discrimination arises in the instant case 185. It was common ground that the impugned difference in treatment did not result from the wording of the statutory provisions on placements in special schools in force at the material time. Accordingly, the issue in the instant case is whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children – including the applicants – being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage.

186. As mentioned above, the Court has noted in previous cases that applicants may have difficulty in proving discriminatory treatment (*Nachova and others* v. *Bulgaria* [GC] [judgment of 6 July 2005] Nos. 43577/98 and 43579/98, §145, ECHR 2005–VII, §§147 and 157). In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.

187. On this point, the Court observes that Council Directives 97/80/EC and 2000/43/EC stipulate that persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish, before a domestic authority, by any means, including on the basis of statistical evidence, facts from which it may be presumed that there has been discrimination ... The recent case law of the Court of Justice of the European Communities ... shows that it permits claimants to rely on statistical evidence and the national courts to take such evidence into account where it is valid and significant.

The Grand Chamber further notes the information furnished by the third-party interveners that the courts of many countries and the supervisory bodies of the United Nations treaties habitually accept statistics as evidence of indirect discrimination in order to facilitate the victims' task of adducing prima facie evidence.

The Court also recognised the importance of official statistics in [*Hoogendijk*] and has shown that it is prepared to accept and take into consideration various types of evidence (*Nachova and others*, cited above, §147).

188. In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.

189. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory

(see, *mutatis mutandis, Nachova and others*, cited above, §157). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (*ibid.*, §147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.

190. In the present case, the statistical data submitted by the applicants was obtained from questionnaires that were sent out to the head teachers of special and primary schools in the town of Ostrava in 1999. It indicates that at the time 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%. According to the Government, these figures are not sufficiently conclusive as they merely reflect the subjective opinions of the head teachers. The Government also noted that no official information on the ethnic origin of the pupils existed and that the Ostrava region had one of the largest Roma populations.

191. The Grand Chamber observes that these figures are not disputed by the Government and that they have not produced any alternative statistical evidence. In view of their comment that no official information on the ethnic origin of the pupils exists, the Court accepts that the statistics submitted by the applicants may not be entirely reliable. It nevertheless considers that these figures reveal a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question.

192. In their reports submitted in accordance with Article 25 §1 of the Framework Convention for the Protection of National Minorities, the Czech authorities accepted that in 1999 Roma pupils made up between 80% and 90% of the total number of pupils in some special schools ... and that in 2004 'large numbers' of Roma children were still being placed in special schools ... The Advisory Committee on the Framework Convention observed in its report of 26 October 2005 that according to unofficial estimates Roma accounted for up to 70% of pupils enrolled in special schools. According to the report published by ECRI in 2000, Roma children were 'vastly overrepresented' in special schools. The Committee on the Elimination of Racial Discrimination noted in its concluding observations of 30 March 1998 that a disproportionately large number of Roma children were placed in special schools ... Lastly, according to the figures supplied by the European Monitoring Centre on Racism and Xenophobia, more than half of Roma children in the Czech Republic attended special school.

193. In the Court's view, the latter figures, which do not relate solely to the Ostrava region and therefore provide a more general picture, show that, even if the exact percentage of Roma children in special schools at the material time remains difficult to establish, their number was disproportionately high. Moreover, Roma pupils formed a majority of the pupils in special schools. Despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools.

194. Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services, it is not necessary in cases in the educational sphere (see, *mutatis mutandis*, *Nachova and others*, cited above, §157) to prove any discriminatory intent on the part of the relevant authorities (see paragraph 184 above).

195. In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

(b) Objective and reasonable justification 196. The Court reiterates that a difference in treatment is discriminatory if 'it has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised (see, among many other authorities, *Larkos* v. *Cyprus* [GC], No. 29515/95, §29, ECHR 1999–I; and *Stec and others*, cited above, §51). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.

197. In the instant case, the Government sought to explain the difference in treatment between Roma children and non-Roma children by the need to adapt the education system to the capacity of children with special needs. In the Government's submission, the applicants were placed in special schools on account of their specific educational needs, essentially as a result of their low intellectual capacity measured with the aid of psychological tests in educational psychology centres. After the centres had made their recommendations regarding the type of school in which the applicants should be placed, the final decision had lain with the applicants' parents and they had consented to the placements. The argument that the applicants were placed in special schools on account of their ethnic origin was therefore unsustainable.

For their part, the applicants strenuously contested the suggestion that the disproportionately high number of Roma children in special schools could be explained by the results of the intellectual capacity tests or be justified by parental consent.

198. The Court accepts that the Government's decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes.

199. The Grand Chamber observes, further, that the tests used to assess the children's learning abilities or difficulties have given rise to controversy and continue to be the subject of scientific debate and research. While accepting that it is not its role to judge the validity of such tests, various factors in the instant case nevertheless lead the Grand Chamber to conclude that the results of the tests carried out at the material time were not capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention.

200. In the first place, it was common ground that all the children who were examined sat the same tests, irrespective of their ethnic origin. The Czech authorities themselves acknowledged in 1999 that 'Romany children with average or above-average intellect' were often placed in such schools on the basis of the results of psychological tests and that the tests were conceived for the majority population and did not take Roma specifics into consideration ... As a result, they had revised the tests and methods used with a view to ensuring that they 'were not misused to the detriment of Roma children' ...

In addition, various independent bodies have expressed doubts over the adequacy of the tests. Thus, the Advisory Committee on the Framework Convention for the Protection of National

Minorities observed that children who were not mentally handicapped were frequently placed in these schools '[owing] to real or perceived language and cultural differences between Roma and the majority'. It also stressed the need for the tests to be 'consistent, objective and comprehensive' ... ECRI noted that the channelling of Roma children to special schools for the mentally-retarded was reportedly often 'quasi-automatic' and needed to be examined to ensure that any testing used was 'fair' and that the true abilities of each child were 'properly evaluated' ... The Council of Europe Commissioner for Human Rights noted that Roma children were frequently placed in classes for children with special needs 'without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin' ...

Lastly, in the submission of some of the third-party interveners, placements following the results of the psychological tests reflected the racial prejudices of the society concerned.

201. The Court considers that, at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.

[For the discussion of the relevance of parental consent, see chapter 4 (section 2.4.) above.]

(c) Conclusion 205. As is apparent from the documentation produced by ECRI and the report of the Commissioner for Human Rights of the Council of Europe, the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European States have had similar difficulties. The Court is gratified to note that, unlike some countries, the Czech Republic has sought to tackle the problem and acknowledges that, in its attempts to achieve the social and educational integration of the disadvantaged group which the Roma form, it has had to contend with numerous difficulties as a result of, *inter alia*, the cultural specificities of that minority and a degree of hostility on the part of the parents of non-Roma children ... [T]he choice between a single school for everyone, highly specialised structures and unified structures with specialised sections is not an easy one. It entails a difficult balancing exercise between the competing interests. As to the setting and planning of the curriculum, this mainly involves questions of expediency on which it is not for the Court to rule (*Valsamis* v. *Greece*, judgment of 18 December 1996, *Reports* 1996–VI, §28).

206. Nevertheless, whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see *Buckley* v. *United Kingdom*, judgment of 25 September 1996, *Reports* 1996–IV, §76; and *Connors* v. *United Kingdom*, judgment cited above, §83).

207. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class ... Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or

helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.

208. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. In that connection, it notes with interest that the new legislation has abolished special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools.

209. Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.

210. Consequently, there has been a violation in the instant case of Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1, as regards each of the applicants.

7.6. Questions for discussion: defining indirect discrimination

1. In its General Comment No. 20, *Non-discrimination* (2009), the Committee on Economic, Social and Cultural Rights defines indirect discrimination as referring to 'laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates' (para. 10). Do you agree that this is an adequate definition of indirect discrimination?
2. What are the respective advantages and limitations of each of the two understandings of indirect discrimination discussed above – the 'disparate impact' model and the 'suspect measure' model? Does one of these models include the other and therefore is more encompassing, or should we rather see them as complementary? Is one model more suitable for certain grounds of prohibited discrimination, such as gender or race, and one model more appropriate for other grounds, such as religion or sexual orientation?

3.2 Reasonable accommodation

The notion of reasonable accommodation was already briefly referred to above, in the presentation of the State's obligation to respect human rights: there, the reference to the Canadian Supreme Court cases of *Eldridge* v. *British Columbia* [1997] 3 S.C.R. 624 and *Multani* v. *Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256 served to illustrate the point that certain rules, while adequately justified as general measures,

may nevertheless be questioned as they apply to specific individual cases, for which certain exceptions may have to be provided in order to restrict any interference with the rights of individuals to the minimum inevitable (see chapter 3, section 3.5.).

The notion of reasonable accommodation is particularly important in the context of non-discrimination, where it fulfils a similar function. The 2006 Convention on the Rights of Persons with Disabilities (CRPD) recognizes that the refusal to provide reasonable accommodation may constitute a specific form of discrimination. The notions of equality and non-discrimination are defined as follows in this instrument:

Convention on the Rights of Persons with Disabilities (2006)

Article 5 – Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Reasonable accommodation serves to designate the obligation for private parties or public services to adopt certain measures, on an individualized basis, that accommodate the specific needs of the individual with a disability, without imposing a disproportionate burden on the other party – i.e. one which it would be unable to afford. Article 2 CRPD defines 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. The notion seems to be increasingly influencing jurisdictions confronted with allegations of discrimination on grounds of disability. In a judgment of 30 April 2009 in the case of *Glor* v. *Switzerland* (Appl. No. 13444/04), the European Court of Human Rights held that the Swiss Government had violated Mr Glor's rights under Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to private and family life) ECHR. Mr Glor had diabetes and, because of his medical condition, could not carry out compulsory military service, as he was deemed medically unfit. His condition, according to the Swiss authorities, posed a problem on account of the particular restrictions related to military service including limited access to medical care and medication, the significant physical efforts required and psychological pressure exerted. However, the authorities decided that Mr Glor's diabetes was not severe enough to relieve him

from paying a non-negligible military service exemption tax on his annual earnings for several years to come: they thus levied a tax for exemption from military service. Although Mr Glor wanted to do his military service, he was thus prohibited both from doing so and from carrying out alternative civil service, this being available only to conscientious objectors. Invoking Article 14 together with Article 8 ECHR, Mr Glor argued that he had been subjected to discrimination on the basis of his disability because he had been prohibited from carrying out his military service, and was obliged to pay the exemption tax as his disability was judged not to be severe enough for him to forgo the tax. The Court condemns the Swiss authorities for failing to provide reasonable accommodation to Mr Glor in finding a solution which responds to his individual circumstances. It takes note of the fact reasonable accommodation could have been provided by, for example, filling posts in the armed forces which require less physical effort by persons with disabilities. In highlighting the failure of the Swiss authorities, the Court points to legislation in other countries which ensure the recruitment of persons with disabilities to posts which are adapted to both the person's (dis)ability and to the person's professional skills (para. 94).

The notion of reasonable accommodation is particularly well suited to the situation of persons with disabilities. As illustrated by *Multani*, however, the usefulness of the notion is not limited to the integration of persons with disabilities. Consider also the following case:

Supreme Court of Canada, *Central Okanagan School District No. 23* v. *Renaud* [1992] 2 S.C.R. 970:

[Larry Renaud, a Seventh-Day Adventist, was a unionized custodian working a Monday to Friday job for the respondent school board (Board of School Trustees, School District No. 23 (Central Okanagan)). The work schedule, which formed part of the collective agreement, included a Friday afternoon shift from 3.00 p.m. until 11.00 p.m. during which only one custodian was on duty. Renaud's religion, however, prevented his working on his Sabbath, which began on sundown Friday to end on sundown Saturday. Renaud was reluctant to accept a further alternative, that he work a four-day week, as this would result in a substantial loss of pay. Although he proposed the creation of a Sunday to Thursday shift, something which would have been agreeable to his employer, such an accommodation involved an exception to the collective agreement and required union consent, which the union would not give. After further unsuccessful attempts to accommodate the appellant, the school board eventually terminated his employment when he refused to complete his regular Friday night shift. The appellant filed a complaint pursuant to section 8 of the British Columbia Human Rights Act against the school board and pursuant to section 9 against the union.]

The judgment of the Court was delivered by Sopinka, J.

The duty resting on an employer to accommodate the religious beliefs and practices of employees extends to require an employer to take reasonable measures short of undue hardship. In [*Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd* [1985] 2 S.C.R. 536], McIntyre J. explained that the words 'short of undue hardship' import a limitation on the

employer's obligation so that measures that occasion undue interference with the employer's business or undue expense are not required.

The respondents [the school board and the union] submitted that we should adopt the definition of undue hardship articulated by the Supreme Court of the United States in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). In that case, the court stated at pp. 84–85: 'To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship ... to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off ... would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs'.

This definition is in direct conflict with the explanation of undue hardship in *O'Malley*. This Court reviewed the American authorities in that case and referred specifically to Hardison but did not adopt the 'de minimis' test which it propounded.

Furthermore there is good reason not to adopt the 'de minimis' test in Canada. *Hardison* was argued on the basis of the establishment clause of the First Amendment of the U.S. Constitution and its prohibition against the establishment of religion. This aspect of the *Hardison* decision was thus decided within an entirely different legal context. The case law of this Court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry. The approach of Canadian courts is thus quite different from the approach taken in U.S. cases such as *Hardison* and more recently *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

The *Hardison* 'de minimis' test virtually removes the duty to accommodate and seems particularly inappropriate in the Canadian context. More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words 'reasonable' and 'short of undue hardship'. These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. Wilson J., in *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at p. 521, listed factors that could be relevant to an appraisal of what amount of hardship was undue as: '... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations'. She went on to explain at p. 521 that '[t]his list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case'.

The concern for the impact on other employees which prompted the court in *Hardison* to adopt the 'de minimis' test is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

[The risks of hostile reactions or reprisals from other employees] The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were ad idem with their employer. It was in this context that Wilson J. referred to employee morale as a factor in determining what constitutes undue hardship.

There is no evidence in the record before the Court that the rights of other employees would likely have been affected by an accommodation of the appellant. The fact that the appellant would be assigned to a special shift may have required the adjustment of the schedule of some other employee but this might have been done with the consent of the employee or employees affected. The respondents apparently did not canvass this possibility. The union objected to the proposed accommodation on the basis that the integrity of the collective agreement would be compromised and not that any individual employee objected on the basis of interference with his or her right. In my opinion, the member designate came to the right conclusion with respect to this issue.

[The duty of the complainant] The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated: 'Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.'

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the

complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

[The Court concludes that the appellant Renaud was victim of discrimination and unlawful dismissal.]

7.7. Questions for discussion

1. Should the 'burden' imposed on employers, as a result of an obligation to offer reasonable accommodation, vary in accordance of the size of the undertaking, or according to whether the organization is private or public?
2. How should reasonable accommodation be conceived for persons with mental disabilities?
3. Could reliance on an understanding of the non-discrimination requirement as including an obligation to provide reasonable accommodation have changed the result in the case of *Karnel Singh Bhinder* v. *Canada*, presented to the Human Rights Committee (above, section 3.1.)?

3.3 Positive action

(a) The notion of positive action or 'temporary special measures'

In his 2002 study on the concept of affirmative action prepared at the request of the UN Sub-Commission on the Promotion and Protection of Human Rights, the Special Rapporteur Bossuyt defines 'affirmative action' as consisting in 'a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality' ('The concept and practice of affirmative action', Final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Resolution 1998/5 of the Sub-Commission for the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2002/21, 17 June 2002, para. 6). In general, the distinctive feature of such measures is that they seek to promote *de facto* equality between different categories of persons, by granting specific treatment to the disadvantaged category (treatment often referred to as 'preferential'), in order to compensate for existing inequalities or to counter their effects. The legal technique of positive action is thus based on an explicit recognition that, in order to ensure effective equality, the mere prohibition

of individual acts of discrimination, combined with the guarantee of formal equal treatment (equal protection of the law, in the meaning referred to above in section 2.2.), may not be sufficient. In certain cases, however, positive action measures may be adopted without any reference to pre-existing inequalities, and rather with the explicit aim of achieving diversity in certain settings where it matters that all segments of the population are represented.

In the international law of human rights, the expression 'temporary special measures' is usually preferred: it appears in Article 1(4) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination and in Article 4(1) of the 1979 International Convention on the Elimination of All Forms of Discrimination against Women, and the Committee on the Elimination of Discrimination against Women has advocated reliance on this expression. As conveyed by the expression 'temporary special measures', a clear distinction should be made between such measures that seek to accelerate the achievement of *de facto* equality by treating differently the members of certain disadvantaged or under-represented groups (often referred to as 'positive action'), on the one hand, and measures which improve the situation of such groups by transforming the environment which they inhabit, but which do not imply differential treatment – although they do imply the recognition of the specific needs of the members of those groups. For instance, after stating in Article 4(1) that 'Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved', the Convention on the Elimination of All Forms of Discrimination against Women adds that 'Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory' (Art. 4(2)). The Committee on the Elimination of Discrimination against Women described the relationship between the two provisions thus:

Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, *Article 4, paragraph 1, of the Convention (Temporary Special Measures)*, adopted at the thirtieth session of the Committee (2004) (HRI/GEN/1/Rev.7, 12 May 2004, at 282), paras. 15–16:

There is a clear difference between the purpose of the 'special measures' under article 4, paragraph 1, and those of paragraph 2. The purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their *de facto* or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation. These measures are of a temporary nature.

Article 4, paragraph 2, provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature, at least until such time as the scientific and technological knowledge ... would warrant a review.

Similarly, the 1995 Council of Europe Framework Convention for the Protection of National Minorities guarantees to persons belonging to national minorities the right of equality before the law and of equal protection of the law and prohibits any discrimination based on belonging to a national minority (Art. 4(1)). It adds that the States parties 'undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities' (Art. 4(2)), and makes clear that the measures adopted in accordance with this latter provision shall not be considered to be an act of discrimination (Art. 4(3)). The positive action measures thus deemed allowable under the Convention should, however, not be confused with the prohibition imposed on the States parties to aim at the forced assimilation of persons belonging to national minorities. The identity (religious, ethnic or linguistic) of national minorities must be fully respected at all times: under Article 5(1), the States parties are to 'undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage'. The special measures referred to in Article 4(2) will only be acceptable insofar as they are 'adequate', that is 'in conformity with the proportionality principle, in order to avoid violation of the rights of others as well as discrimination against others', and provided they 'do not extend, in time or in scope, beyond what is necessary in order to achieve the aim of full and effective equality' (para. 39 of the Explanatory Report); instead, the prohibition of assimilation of members of national minorities against their will is permanent, and not subject to this limitation.

In contrast, in its General Comment No. 20 on *Non-discrimination*, the Committee on Economic, Social and Cultural Rights notes that '[e]liminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations'. It then goes on to state:

Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-discrimination in Economic, Social and Cultural Rights* (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/20, 2 July 2009), para. 9:

In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that

perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

This presentation is misleading, however. It confuses the prohibition of adopting or maintaining measures which, although apparently neutral, may result in indirectly discriminating against certain groups, in particular in the absence of reasonable accommodation, with positive action; these are measures aimed at improving the situation of certain groups by temporary measures which are justified by the need to ensure equitable representation or to overcome legacies of inequality, rather than by the need to respect the specific characteristics of such groups or individuals. In contrast, the Committee on the Elimination of Discrimination against Women emphasizes the difference between the two categories of measures:

Committee on the Elimination of Discrimination against Women, General Recommendation No. 5, *Temporary Special Measures*, adopted at the seventh session of the Committee (1988), in Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, at p. 235, para. 19:

States parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1, to accelerate the achievement of a concrete goal for women of *de facto* or substantive equality, and other general social policies adopted to improve the situation of women and the girl child. Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures.

The remainder of this section examines the contribution of positive action (or 'temporary special measures') to the promotion of equality (b), as well as the limits that are imposed to this tool by the requirements of formal equality (c). It relies on the views adopted on these issues by the UN human rights treaty bodies, but also on the position of judicial and quasi-judicial bodies at regional level.

(b) The contribution of temporary special measures to the promotion of equality

Both the Convention for the Elimination of All Forms of Racial Discrimination (CERD) and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) allow for the adoption of affirmative action, under certain

conditions. The International Convention for the Elimination of All Forms of Racial Discrimination defines in Article 1(1) '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'. However, Article 1(4) adds:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

While this provision appears to allow for the adoption of certain positive action measures by the States parties to ICERD, Article 2(2) adds that the adoption of such measures may be required under certain conditions:

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

In its General Recommendation XXVII on discrimination against Roma adopted in 2000, the Committee for the Elimination of Racial Discrimination, although not making explicit reference to Article 2(2) CERD, encourages the States parties to 'take special measures to promote the employment of Roma in the public administration and institutions, as well as in private companies', and to 'adopt and implement, whenever possible, at the central or local level, special measures in favour of Roma in public employment such as public contracting and other activities undertaken or funded by the Government, or training Roma in various skills and professions' (paras. 28–9). Similarly, in its General Recommendation XXIX on Article 1, para. 1, of the Convention (Descent), adopted in 2002, the CERD Committee recommends the adoption of 'special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education', as well as to 'educate the general public on the importance of affirmative action programmes to address the situation of victims of descent-based discrimination' and to take 'special measures to

promote the employment of members of affected communities in the public and private sectors' (paras. 1(f) and (h), and 7(jj)).

Similar provisions are contained in the Convention for the Elimination of All Forms of Discrimination against Women. Article 4(1) CEDAW states:

> Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

As we have seen, the purpose of this provision is to 'accelerate the improvement of the position of women to achieve their *de facto* or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation' (General Recommendation No. 25, Article 4, paragraph 1, of the Convention (temporary special measures) (2004), para. 15). In its fifth General Recommendation adopted in 1988, the Committee on the Elimination of Discrimination against Women encouraged States parties to 'make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment' (General Recommendation No. 5, *Temporary Special Measures*, adopted at the seventh session of the Committee (1988)). In the specific context of participation of women in public and political life, the CEDAW Committee noted the following:

Committee on the Elimination of Discrimination against Women, General Recommendation No. 5, *Temporary Special Measures*, adopted at the seventh session of the Committee (1988) (HRI/GEN/1/Rev.7, 12 May 2004, at p. 235), para. 15:

While removal of *de jure* barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 [relating to the elimination of discrimination against women in political and public life] and 8 [concerning the opportunity women must be provided to represent their Governments at the international level and to participate in the work of international organizations]. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented, including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies. The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the

public life of their societies are essential prerequisites to true equality in political life. In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens.

Three characteristics of the Convention for the Elimination of All Forms of Discrimination against Women encourage the shift from the possibility to adopt positive action measures without this being considered discriminatory to an obligation, in certain instances, to adopt such measures in the name of real and effective equality. First, CEDAW does not simply prohibit discrimination on grounds of sex: it is aimed specifically at the protection of women. Other equality clauses such as, in particular, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) or Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the latter, in the enjoyment of the rights guaranteed under the ICESCR – ensure a symmetrical protection of equality between women and men; in contrast, CEDAW focuses on discrimination against women, thus 'emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women' (Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, Article 4, paragraph 1, of the Convention (temporary special measures) (2004), para. 5). Second, Article 24 CEDAW imposes on the States Parties to 'adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention'. Third, a number of specific articles of the Convention also mention that States are to 'take all appropriate measures' in order to fulfil the rights guaranteed. On the basis of these arguments, as well as a dynamic interpretation of the Convention for the Elimination of All Forms of Discrimination against Women, the CEDAW Committee concludes in the General Recommendation it adopted in 2004 on Article 4, para. 1 of the Convention, that the adoption of certain positive action measures may be required under that instrument: 'States parties' obligation is to improve the *de facto* position of women through concrete and effective policies and programmes ... Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women' (paras. 7–8). Indeed, States parties may have to 'provide adequate explanations with regard to any failure to adopt temporary special measures. Such failures may not be justified simply by averring powerlessness, or by explaining inaction through predominant market or political forces, such as those inherent in the private sector, private organizations, or political parties' (para. 29).

Typically, positive action measures granting special (or 'preferential') treatment to the members of certain groups who have been historically discriminated against or

are in a position of structural disadvantage, are seen as an exception to the principle of formal equality: such measures are therefore only allowed under well-defined circumstances, and they must be limited to what is necessary, both in scope and in time. However, positive action measures may also be seen as a contribution to the promotion of substantive equality. This is the view of the Committee on the Elimination of Discrimination against Women under the CEDAW:

Committee on the Elimination of Discrimination against Women, General Recommendation No. 5, *Temporary Special Measures*, adopted at the seventh session of the Committee (1988) (HRI/GEN/1/Rev.7, 12 May 2004, at p. 235), paras. 14 and 18:

14. The Convention targets discriminatory dimensions of past and current societal and cultural contexts which impede women's enjoyment of their human rights and fundamental freedoms. It aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their *de facto* or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realize *de facto* or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.

18. Measures taken under article 4, paragraph 1, by States parties should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field. The Committee views the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of *de facto* or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms. While the application of temporary special measures often remedies the effects of past discrimination against women, the obligation of States parties under the Convention to improve the position of women to one of *de facto* or substantive equality with men exists irrespective of any proof of past discrimination. The Committee considers that States parties that adopt and implement such measures under the Convention do not discriminate against men.

The view according to which, in certain circumstances, the adoption by a State of positive action measures may be not only acceptable, but even obligatory, is shared by the Human Rights Committee, under the ICCPR (General Comment No. 18, *Non-discrimination* (1989), para. 10), and by the Committee on Economic, Social and Cultural Rights, under the ICESCR (General Comment No. 20, *Non-discriminaiton in the Enjoyment of Economic, Social and Cultural Rights* (2009), para. 9). Indeed, the Committee on Economic, Social and Cultural Rights already took the view in its first General Comment that 'special attention [should] be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged' (General Comment No. 1, *Reporting by States Parties* (1989), para. 3). In its General Comment No. 5, *The Rights of Persons with Disabilities*, adopted in 1994, the Committee noted that 'appropriate measures [may] need to be taken to undo existing discrimination and to establish equitable opportunities for persons with

disabilities', and considered that 'such actions should not be considered discriminatory in the sense of article 2(2) of the International Covenant on Economic, Social and Cultural Rights as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective' (para. 18). It also noted:

Committee on Economic, Social and Cultural Rights, General Comment No. 5, *The Rights of Persons with Disabilities* (1994) (HRI/GEN/1/Rev.7, 12 May 2004, at p. 25), para. 9:

The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly 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. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.

Other examples could be given in the doctrine of the Committee on Economic, Social and Cultural Rights (see, e.g. General Comment No. 4, *The Right to Adequate Housing* (Art. 11(1) of the Covenant) (1991), para. 11; see, generally, M. Craven, *The International Covenant on Economic, Social and Cultural Rights, a Perspective on its Development* (Oxford: Clarendon Press, 1995), p. 126 (emphasizing the obligation of States to focus their efforts on the most vulnerable and disadvantaged groups in society, which may include preferential treatment in favour of the members of these disadvantaged groups)). For instance, it noted in its General Comment No. 13, *The Right to Education* (Art. 13), that the adoption of 'temporary special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups' is not a violation of the right to non–discrimination with regard to education, 'so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved' (para. 32). It therefore considered – citing in this respect Article 2 of the UNESCO Convention against Discrimination in Education of 14 December 1960 – that separate educational systems or institutions for groups defined by the grounds listed in Article 2(2) of the Covenant shall be deemed not to constitute a breach of that instrument.

7.8. Question for discussion: temporary special measures and separate educational facilities

Is the reference made by the Committee on Economic, Social and Cultural Rights to Article 2 of the UNESCO Convention against Discrimination in Education of 14 December 1960 appropriate?

In its relevant part, this provision states that '[t]he establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians [shall not constitute discrimination in the meaning of the Convention], if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level' (Art. 2(b)). Marc Bossuyt argues that this provision 'does not refer to special measures, but only determines when separate educational systems will not be deemed to constitute discrimination' ('The concept and practice of affirmative action', Final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Resolution 1998/5 of the Sub-Commission for the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2002/21, 17 June 2002, para. 56).

In the conclusions to his report, Marc Bossuyt notes that 'a persistent policy in the past of systematic discrimination of certain groups of the population may justify – *and in some cases may even require* – special measures intended to overcome the sequels of a condition of inferiority which still affects members belonging to such groups' ('The concept and practice of affirmative action', Final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Resolution 1998/5 of the Sub-Commission for the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2002/21, 17 June 2002, para. 101 (emphasis added)). At the same time, while the principle seems to be agreed that positive action measures may be required from the State in order to ensure real and effective equality under its jurisdiction, it will be typically difficult for any individual seeking to benefit from such scheme to impose on the State to take an initiative in this regard, considering the broad margin of appreciation which the State authorities have available as regards the choice of means through which to achieve substantive equality and the broad panoply of measures they have at their disposal. It is significant in this regard that, when they adopted Additional Protocol No. 12 to the ECHR (see above, section 1.2.), the signatories reaffirmed that 'the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures', but added:

Explanatory Report of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, H (2000) 11 prov., 29 August 2000, para. 16:

The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of *de facto* inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected ... However, the present Protocol does not impose any obligation to adopt such

measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justifiable.

A deepening of the debate on the notion of 'structural discrimination' might serve in the future to clarify the conditions under which, under the international law of human rights, a State may be obliged to adopt positive action measures (for a detailed exploration of this notion, see C. McCrudden, 'Institutional Discrimination', *Oxford Journal of Legal Studies*, 2(3) (1982), 303–67). In the meaning attached to this notion here, structural discrimination is not simply a particularly serious form of discrimination. Instead, its defining characteristic would be that it cuts across different spheres (education, employment, housing and, in particular, access to health care), resulting in a situation where the prohibition of discrimination in any one of these spheres or, indeed, in all of them, will not suffice to ensure effective equality. For instance, it will not be sufficient to prohibit discrimination in employment if inequalities persist in access to education or vocational training, thus leading to a situation of under-representation of the group concerned in employment, in spite of the effective prohibition of (direct or indirect) discrimination in that sphere. And it will not be sufficient to prohibit discrimination in education if, due to segregated housing, the children of one particular minority community are disproportionately represented in certain educational establishments and never or almost never have access to other establishments attended by children from the majority group (for instance due to the lack of public transportation enabling these minority children to travel from their neighbourhood to the mainstream schools). Structural discrimination should be understood as a situation where, due to the extent of the discrimination faced by a particular segment of society, more is required in order to achieve effective equality than to outlaw direct and indirect discrimination.

7.9. Question for discussion: tackling structural discrimination

According to which modalities could we define an obligation to adopt positive action measures (or 'temporary special measures') in order to promote substantive equality and overcome historical legacies of discrimination or existing inequalities? For example, could a mechanism be devised according to which, where certain statistical imbalances are found in defined domains (such as at certain levels of the educational system or of the professional hierarchy), special measures will be taken to improve the position of under-represented groups?

The idea according to which temporary special measures may be obligatory under well-defined conditions, and that such measures should be seen as contributing to the promotion of the principle of equality rather than as mere derogations to the rule of formal equality, is also expressed in other contexts. In its General Comment No. 20

on *Non-discrimination in the Enjoyment of Economic, Social and Cultural Rights*, the Committee on Economic, Social and Cultural Rights states that:

Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-discrimination in Economic, Social and Cultural Rights* (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/20, 2 July 2009), para. 39:

States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Another illustration is provided, in a regional context, by the European Social Charter. Article 1 para. 2 of the European Social Charter of 1961 imposes on the States parties an obligation to 'protect effectively the right of the worker to earn his living in an occupation freely entered upon'. This, according to the European Committee on Social Rights, requires the elimination in practice of all discrimination in employment: 'although a necessary requirement, appropriate domestic legislation that is in conformity with the Charter is not sufficient to ensure the principles laid down in the Charter are actually applied in practice. It is not sufficient therefore merely to enact legislation prohibiting discrimination ... as regards access to employment; such discrimination must also be eliminated in practice' (Concl. XVI–1, vol. 2 (Spain), pp. 602–6). Where the employment situation of women or certain minorities remains unsatisfactory, the Committee considers that this demonstrates that the measures taken to date are not sufficient. Indeed, as the ECSR examines on the basis of that provision of the Charter not only the adequacy of the *legal framework* prohibiting discrimination, but also the *results* which are achieved in the integration of certain target groups traditionally excluded from the employment market, providing training and education to the members of those groups constitutes a means for the States parties to comply with their obligations under that provision (see, with respect to the need to provide training and education to the Roma population, under-represented in the employment market, Concl. XVI–1, vol. 1, pp. 125–9). This insistence on the effectiveness of measures ensuring the integration of certain traditionally disadvantaged groups has been reiterated under Article E of the 1996 Revised European Social Charter:

European Committee of Social Rights, Collective Complaint No. 13/2002, *Autisme-Europe* v. *France*, decision (merits) of 4 November 2003:

[The complainant non-governmental organization alleged before the Committee that France had violated Article 15 para. 1 (obligation to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes whenever possible) and Article 17 para. 1 (right to education by the provision of sufficient and adequate institutions and services) of the revised European Social Charter, either alone or in combination with Article E (non-discrimination), because the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled, and because of the chronic shortage of care and support facilities for autistic adults. The Committee cited the judgment of the European Court of Human Rights in *Thlimmenos* v. *Greece* to the effect that the principle of non-discrimination 'is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different', and continued:]

52. ... In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.

In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.

53. The Committee recalls, as stated in its decision relative to Complaint No. 1/1998 (*International Commission of Jurists* v. *Portugal*, §32), that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.

54. In the light of the afore-mentioned, the Committee notes that in the case of autistic children and adults, notwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education for persons with autism. It specifically notes that most of the French official documents, in particular those submitted during the procedure, still use a more restrictive definition of autism than that adopted by the World Heath Organisation and that there are still insufficient official statistics with which to rationally measure progress through time. The Committee considers that the fact that the establishments specialising in the education and care of disabled children (particularly those with autism) are not in general financed from the same budget as normal schools, does not

in itself amount to discrimination, since it is primarily for States themselves to decide on the modalities of funding.

Nevertheless, it considers, as the authorities themselves acknowledge, and whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled. It is also established, and not contested by the authorities, that there is a chronic shortage of care and support facilities for autistic adults.

For these reasons, the Committee concludes by 11 votes to 2 that the situation constitutes a violation of Articles 15§1 and 17§1 whether alone or read in combination with Article E of the revised European Social Charter.

This decision illustrates how the requirement of non-discrimination may provide guidance for the realization of socio-economic rights such as the right to education by identifying the categories which, because of their particular vulnerability, deserve special attention. It also shows how the shift from the prohibition of indirect discrimination (understood, as in the case of *Thlimmenos*, as a failure to take due account of relevant differences) to the obligation to adopt positive action measures (i.e. to take into account the need to redress or compensate for the situation of the most vulnerable or disadvantaged segments of society) may be more gradual than radical.

Similar positive obligations to adopt measures in the face of entrenched inequalities may be derived from the Council of Europe Framework Convention on the Protection of National Minorities, which entered into force in 1998. As already noted, under Article 4 of the Framework Convention, States parties are to adopt 'adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority', taking due account in this respect of 'the specific conditions of the persons belonging to national minorities' (Art. 4(2)); such measures are specifically designated as not being discriminatory in character (Art. 4(3)). The Advisory Committee of the Framework Convention encourages the introduction of positive measures in favour of members of minorities, which are particularly disadvantaged (see, e.g. Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, para. 28; Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, para. 27; Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para. 38). Thus, in an Opinion on Croatia, the Advisory Committee 'considers that one key to reaching full and effective equality for persons belonging to national minorities is the launching of additional positive measures in the field of employment and it supports efforts to seek financing for such measures. In this regard, the situation of persons belonging to the Serb minority merits particular attention, taking into account the past discriminatory measures, stirred by the 1991–1995 conflict, aimed at curtailing their number in various fields of employment, ranging from law-enforcement to education' (Opinion on Croatia, 6 February 2002, ACFC/INF/OP/I(2002)003, para. 26). In an Opinion on the Czech Republic, the Advisory Committee 'notes with deep concern that many Roma in the Czech Republic

face considerable socio-economic difficulties in comparison to both the majority and other minorities, in particular in the fields of education, employment and housing ... The situation calls for the preparation and implementation of specific measures to realise full and effective equality between Roma and persons belonging to the majority as well as to other minorities' (Opinion on the Czech Republic, 25 January 2002, ACFC/INF/OP/I(2002)002, para. 29). A very similar observation was made with respect to the situation of the Roma in Hungary.

Advisory Committee on the Protection of National Minorities (Council of Europe), Opinion on Hungary adopted on 22 September 2000, (ACFC/INF/OP/I(2001)004), at paras. 18–19:

[The Advisory Committee] notes with concern, that, as the Government openly recognises, the Roma/Gypsies in Hungary face a broad range of serious problems to a disproportionate degree, be it in comparison to the majority or in comparison to other minorities. This state of affairs certainly justifies that specific measures be designed and implemented to tackle these problems. [Therefore the Advisory Committee welcomes the decision of the Hungarian authorities to develop medium and long-term plans of action towards improving the living conditions of the Roma/Gypsy minority and is encouraged by] the determination of the Government to resolve the problems of the Roma/Gypsy minority and considers that this gives rise to high expectations. The Advisory Committee stresses that the commitment to long term approaches should not lead to a delay in achieving improvements that can be secured in a short or medium term. Furthermore, a long-term approach requires that a consistent and sustained policy is designed, implemented and evaluated throughout this period and that appropriate resources are made available and maintained, even where there may be setbacks and disappointments. In the view of the Advisory Committee the Hungarian Government is to be commended and to be taken seriously for its initiative and its intentions. It is only consistent with this view that the future results of Hungary are to be evaluated in the light of the standards it has committed itself to. Finally, the Advisory Committee underlines that, when implementing special measures, particular attention should be paid to the situation of Romany women.

The Opinion it adopted on Ireland on 22 May 2003 offers another example of the Advisory Committee's insistence on combating identified instances of structural discrimination through positive action measures – in this case, in order to improve the situation of the Travellers' community:

Advisory Committee on the Protection of National Minorities (Council of Europe), Opinion on Ireland, 22 May 2003, ACFC/INF/OP/I (2004)003:

34. The Advisory Committee notes ... that progress in the area of legislation and institution building has not always been matched by implementation in practice. A number of important concerns remain, notably in relation to the Traveller community. Travellers continue to suffer discrimination in a wide range of societal settings including education (see under Article 12

below), employment, health care, accommodation (see under Article 5 below) and access to certain goods and services, including access to places of entertainment.

35. The Advisory Committee is particularly concerned about the high level of unemployment of persons belonging to the Traveller community. Travellers have also seen their traditional areas of economic livelihood (scrap metal, horse trading, market trading, etc.) hit by changing economic and social climates. They consider that certain aspects of changes in legislation (such as in the Control of Horses Act (1996) and the Casual Trading Act (1995)) unduly hinder their ability to earn a living. In view of the impact that this legislation has had on Travellers, the Advisory Committee considers that the Government should examine how to promote further both traditional and new economic activities of Travellers.

36. Notwithstanding the efforts made by the authorities to support the entrance of Travellers into the labour market, the Advisory Committee considers that more needs to be done in order to improve the situation. It is clear that the lack of statistics on Traveller employment makes it difficult to monitor the situation, and that such statistics are essential to the design, implementation and monitoring in this field ...

37. Concerning employment in the public service, the Advisory Committee supports the recommendations in this field made by the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community and in particular the need for setting targets to include Travellers in general recruitment strategies.

These statements by the Advisory Committee established under the Framework Convention for the Protection of National Minorities and by the European Committee of Social Rights monitoring the European Social Charter remain unclear as to the precise conditions under which the adoption of positive action measures may constitute an obligation for the States parties to these instruments. In this respect, the Council of Europe bodies have not gone further than the human rights treaty bodies established within the United Nations. Insofar as these bodies primarily seek to facilitate the adoption of States of adequate strategies for the implementation of their international obligations, in a spirit of co-operation with those States, this may not be particularly problematic. It may become an impairment, however, when these bodies assume quasi-judicial functions, as when the United Nations human rights treaty bodies receive individual communications or when the European Committee of Social Rights acts under the mechanism allowing non-governmental organizations or unions to file collective complaints.

The attitude of the bodies of the American Convention on Human Rights towards positive action is similar to that of the human rights bodies discussed above. The Inter-American Court, in its advisory opinion on the *Status of Undocumented Migrants* (OC-18/03) established an obligation to adopt positive measures to counter persistent patterns of discrimination:

104. ... States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This

implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.

The opinion decided unanimously:

1. That States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.
2. That non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility.

In 1999, the Inter-American Commission on Human Rights adopted a set of *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*:

Inter-American Commission on Human Rights, *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*, 1999 Annual Report (OEA/Ser.L/V/II.106, Doc. 6 rev., April 13, 1999):

In principle, examining the compatibility of special measures of affirmative action designed to promote the political participation of women with the principles of equality and non-discrimination set forth in the American Convention and Declaration requires analyzing a series of questions. Three questions are of central importance. First, does the measure bring about a difference in treatment that falls within the sphere of application of the American Convention or Declaration, respectively? Second, assuming that it does, does that difference in treatment pursue a legitimate aim? This analysis looks to the interest the state seeks to serve and the objectives sought to be accomplished. Third, are the means employed proportional to the end sought? In other words, is there a reasonable balance of interests between the end sought and any restriction of rights imposed? If there is a restriction involved, is it the least restrictive measure possible to accomplish the objective sought? Is the treatment involved arbitrary or unfair in any case? The evaluation of these questions must take into account that a distinction based on status, such as sex, gives rise to heightened scrutiny.

As a general matter, the regional and international communities have recognized that, while the existence of formal *de jure* equality is a fundamental prerequisite for overcoming discrimination, it does not necessarily lead to equality in practice. To the contrary, while the constitutions of our region guarantee equality between women and men, women remain severely under-represented in virtually all aspects of political life. Nor is it the case that apparently gender-neutral legislation and policies necessarily produce gender-neutral outcomes.

Consequently, instruments and policies adopted at both the regional and universal levels require the adoption of special measures where necessary to promote the equal access of women to participation in public life. The goal of bringing about the effective equal access of women to participation in public life is clearly, in and of itself, a legitimate and necessary goal. As referred to above, the regional and international human rights obligations of states must be made effective at the national level through domestic legislation and practice. Accordingly, where discrimination in law or in fact constrains women from fully exercising their right to participate in the government and public affairs of their country, that inconformity must be addressed through concrete action. One of the concrete ways the duty to respect and ensure the rights at issue can be realized is through the adoption of measures of affirmative measures to promote the participation of women in this sphere.

How this goal of promoting the equal access of women to political participation is pursued and implemented is, at first instance, necessarily a function of national law and policymaking, and integrally related to the specific situation and history in the country. The considerations reviewed above provide general guidance in examining the compatibility of a particular measure of affirmative action adopted by an OAS member state with the obligations of equality and non-discrimination. The specific measure must then be analyzed in light of those considerations, its precise characteristics, and the national context. In particular, the regional and international dispositions calling for and/or requiring the adoption of special measures of affirmative action to promote the political participation of women contemplate that the need for and appropriateness of such measures will be evaluated in relation to the actual existence of discriminatory treatment. They are, moreover, intended to be temporary, in the sense that, once equality of access and outcome are achieved, such measures are no longer required. These elements of analysis are, by definition, inextricably linked to the national context.

[Conclusion]

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. Achieving the free and full participation of women in political life is a priority for our hemisphere …

The under-representation of women in government throughout the Americas demonstrates the need for further state action, in conjunction with initiatives of civil society, to bring about true respect for the right of women to participate in political life in compliance with international norms. As the regional and international communities have recognized, achieving the free and full participation of women in all spheres of public life is an obligation which may well require the adoption of special measures of affirmative action designed to effectuate equality of opportunity for women and men.

(c) The compatibility of temporary special measures with the non-discrimination requirement

It is still the dominant view that positive action measures shall only be compatible with the non-discrimination requirement under certain well-defined conditions. In the following communication, the author complained of the preferential treatment, regarding reinstatement to the public service, of former public officials who had previously been unfairly dismissed on ideological, political or trade union grounds. The author complained that

this preferential treatment unfairly prejudiced his own chances of gaining a public-service job. The Human Rights Committee, however, found the alleged discrimination to be permissible affirmative action in favour of a formerly disadvantaged group.

Human Rights Committee, *R. D. Stalla Costa* v. *Uruguay*, Communication No. 198/1985 (Supp. No. 40 (A/42/40) at 170 (1987)), final views of 9 July 1987:

The main question before the Committee is whether the author of the communication is a victim of a violation of article 25(c) of the Covenant because, as he alleges, he has not been permitted to have access to public service on general terms of equality. Taking into account the social and political situation in Uruguay during the years of military rule, in particular the dismissal of many public servants pursuant to Institutional Act No. 7, the Committee understands the enactment of Act No. 15.737 of 22 March 1985 by the new democratic Government of Uruguay as a measure of redress. Indeed, the Committee observes that Uruguayan public officials dismissed on ideological, political or trade-union grounds were victims of violations of article 25 of the Covenant and as such are entitled to have an effective remedy under article 2, paragraph 3 (a), of the Covenant. The Act should be looked upon as such a remedy. The implementation of the Act, therefore, cannot be regarded as incompatible with the reference to 'general terms of equality' in article 25 (c) of the Covenant. Neither can the implementation of the Act be regarded as an invidious distinction under article 2, paragraph 1, or as prohibited discrimination within the terms of article 26 of the Covenant.

This generally favourable attitude towards positive action was made even more explicit in the later case law of the Human Rights Committee:

Human Rights Committee, *Guido Jacobs* v. *Belgium*, Communication No. 943/2000 (CCPR/C/81/D/943/2000 (2004)), final views of 7 July 2004:

[Under the Belgian Act of 22 December 1998 amending certain provisions of part two of the Judicial Code concerning the High Council of Justice, the nomination and appointment of magistrates and the introduction of an evaluation system, the High Council of Justice is to comprise forty-four members of Belgian nationality, divided into one twenty-two-member Dutch-speaking college and one twenty-two-member French-speaking college. Each college comprises eleven justices and eleven non-justices. It is also provided that the group of non-justices in each college shall have no fewer than four members of each sex (Art. 259*bis*-1, para. 3 of the Judicial Code). The author of the communication had applied to be elected as a non-justice to the High Council of Justice, but failed to be elected, following a second call for applications, since the first call had not led to a sufficient number of women applying.
Mr Jacobs claims that the introduction of a gender requirement, namely that four non-justice seats in each college be reserved for women and four for men, makes it impossible to carry out the required comparison of the qualifications of candidates for the High Council of Justice, and that, since such a condition means that candidates with better qualifications may be

rejected in favour of others whose only merit is that they meet the gender requirement, it constitutes a form of discrimination on grounds of sex, in violation of Articles 25(c) and 26 of the International Covenant on Civil and Political Rights. According to Article 25 ICCPR: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: ... (c) To have access, on general terms of equality, to public service in his country.' Article 26 contains a general requirement of non-discrimination. The claim based on these provisions is rejected by the Human Rights Committee.]

9.3 The Committee recalls that, under article 25(c) of the Covenant, every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. State parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men. The Committee must therefore determine whether, in the case before it, the introduction of a gender requirement constitutes a violation of article 25 of the Covenant by virtue of its discriminatory nature, or of other provisions of the Covenant concerning discrimination, notably articles 2 and 3 of the Covenant, as invoked by the author, or whether such a requirement is objectively and reasonably justifiable. The question in this case is whether there is any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex.

9.4 In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies. The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there. On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies such as the High Council of Justice, and the need for taking measures in this regard. In the present case, it appears to the Committee that a body such as the High Council of Justice could legitimately be perceived as requiring the incorporation of perspectives beyond one of juridical expertise only. Indeed, given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments. Accordingly, the Committee cannot conclude that the requirement is not objective and reasonably justifiable.

9.5 Secondly, the Committee notes that the gender clause requires there to be at least four applicants of each sex among the 11 non-justices appointed, which is to say just over one third of the candidates selected. In the Committee's view, such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. Furthermore, and contrary to the author's contention, the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience. With regard to the author's argument that the gender requirement could give rise to discrimination between the three categories within

the group of non-justices as a result, for example, of only men being appointed in one category, the Committee considers that in that event there would be three possibilities: either the female applicants were better qualified than the male, in which case they could justifiably be appointed; or the female and male applicants were equally well qualified, in which case the priority given to women would not be discriminatory in view of the aims of the law on the promotion of equality between men and women, as yet still lacking; or the female candidates were less well qualified than the male, in which case the Senate would be obliged to issue a second call for candidates in order to reconcile the two aims of the law, namely, qualifications and gender balance, neither of which may preclude the other. On that basis, there would appear to be no legal impediment to reopening applications. Lastly, the Committee finds that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied and its modalities, as described above; and one of the principal aims of the law, which is to establish a High Council made up of qualified individuals. Consequently, the Committee finds that paragraph 3 of article 295*bis*-1 of the Act of 22 December 1998 meets the requirements of objective and reasonable justification.

Although this is not cited by the Human Rights Committee, it is probable that the conclusion which it arrives at in the case of *Jacobs* has been influenced by the position of the Committee on the Elimination of Discrimination against Women, which, in its 1997 General Recommendation No. 23, *Political and Public Life*, recommends to the States parties 'the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body'. Any other conclusion by the Human Rights Committee in *Jacobs* would have potentially placed Belgium before two conflicting requirements, at least if we consider the general recommendations adopted by the CEDAW Committee as authoritative for the States parties to the Convention on the Elimination of All Forms of Discrimination against Women.

The position adopted by the Human Rights Committee in *Jacobs* v. *Belgium* is premised, arguably, on two considerations: (1) in employment matters, the principle of meritocracy (or 'qualifications') constitutes the baseline, and any departure from this principle requires a special justification; (2) positive action in favour of a disadvantaged group is only acceptable to the extent that it is strictly tailored to the need to combat existing inequalities, since it constitutes a derogation from the principle of formal equality, requiring that decisions are made only based on individual merit, rather than on characteristics such as the sex, race or ethnic origin, or age of the individual concerned. These are also the premises underlying the position of the European Court of Justice in the large number of judgments it has delivered on this issue. Box 7.4 provides a brief recapitulation of this case law.

A judgment delivered by the European Free Trade Association (EFTA) Court on this issue, on the basis of the same provisions of EU law as those referred to in box 7.4., offers an excellent summary of the ECJ's position on the issue. The EFTA Surveillance Authority considered that Norway was in violation of its obligations under the EEA

Box 7.4. **'Positive action' in the case law of the European Court of Justice on equal treatment between women and men**

When it was initially adopted, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (O.J. 1976 L39/40), after defining the principle of equal treatment as the absence of any discrimination on grounds of sex, whether direct or indirect, provided in Article 2(4) that the Directive 'shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities'. Moreover, on 13 December 1984, the Council adopted Recommendation 84/635/EEC on the promotion of positive action for women. Emphasizing that 'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures', this Recommendation encouraged the Member States to 'adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment' (O.J. 1984 L331/34).

Nevertheless, when it was confronted with affirmative action policies adopted by the Member States, the European Court of Justice considered that 'as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly' (Case C-450/93, *Kalanke* v. *Freie Hansestadt Bremen* [1995] E.C.R. I–3051). In *Kalanke*, its first judgment on this issue, delivered on 17 October 1995, the Court arrived at the conclusion that the provision of the 1990 Bremen Law on Equal Treatment for Men and Women in the Public Service which provided that women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented, went beyond what was authorized by Article 2(4) of Directive 76/207/EEC. 'National rules which guarantee women absolute and unconditional priority for appointment or promotion', said the Court, 'go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive', and furthermore 'in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, ... [the Bremen Law] substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity' (paras. 23–4).

The tension was manifest between, on the one hand, the limitations to positive action imposed by the Court's reading of Directive 76/207/EEC and, on the other hand, continued political support for positive action as a tool to encourage the professional integration of women. Following the judgment, the Governments of the Member States considered that there was a need to reaffirm the freedom of the national authorities to adopt positive action schemes, despite the limits imposed by the *Kalanke* case law. In 1997, the Treaty of Amsterdam amended Article 119 EEC (Art. 141 EC, now Art. 157 TFEU), introducing a new para. 4 providing that 'With a view to ensuring full equality in practice between men and women in working life, the

principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.' While the language used is symmetrical, applying identically to both women and men, Declaration No. 28 on Article 141(4) of the Treaty establishing the European Community, annexed to the Treaty of Amsterdam, states: 'When adopting measures referred to in Article 141(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life.'

This made little difference, however. Although the Court considered that the insertion of this provision in the Treaty of Rome might in principle lead to finding compatible with EU law a provision in the national law of a Member State which would conflict with Article 2(1) of Directive 76/207/EEC and would not be protected by Article 2(4) of that Directive (Case C-158/97, *Badeck and others* [2000] E.C.R. I–1875, para. 14), in practice, and despite the differences in wording between the two provisions until the original text of the Directive was modified in 2002, they have been interpreted similarly by the Court of Justice (see Case C-407/98, *Abrahamsson and Anderson* [2000] E.C.R. I–5539, paras. 54–5; Case C-319/03, *Briheche* [2004] E.C.R. I–8807, para. 31). Directive 76/207/EEC and the formulation in Article 141(4) EC (now 157 TFEU) have now been fully reconciled, as the Directive has been amended to refer to that provision of the Treaty. Indeed, after the 1976 Equal Treatment Directive was first amended in 2002 in order to make a direct reference to Article 141(4) of the Treaty, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (O.J. 2006 L204/23) now states in Article 3 that 'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women'.

The strong signal sent by the Treaty of Amsterdam may have influenced the Court of Justice in the case of *Marschall*, which it delivered on 11 November 1997 (Case C-409/95, *Marschall* v. *Land Nordrhein-Westfalen* [1997] E.C.R. I–6363). In this second affirmative action case, the Court distinguished *Kalanke*, on the basis that the challenged provision contained a 'savings clause' (*Öffnungsklausel*), to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour (para. 24). Indeed, the 1981 Law on Civil Servants of the Land of Nordrhein-Westfalen, as last amended in 1995, provided that 'Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, *unless reasons specific to an individual [male] candidate tilt the balance in his favour*' (emphasis added), a decisive element in the view of the Court, since the advantage conferred to women was neither 'automatic' nor 'unconditional', as it was (in its reading) in the previous *Kalanke* case. The judgment also illustrated the willingness of the Court to adopt a less formalistic stance towards the situation of women in the employment market and the virtues of equality of opportunities. It recognized that 'even where male and

female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances' (para. 33).

The approach of the ECJ remains based on the idea that positive action in favour of women aimed at achieving equal 'opportunity' for men and women, cannot go beyond this objective and pursue equal 'results'. The latter objective would be contrary to the principle of equal treatment whereby each person has the right not to be disadvantaged on grounds of his/ her sex. According to the interpretation given by the Court, this limit is exceeded when affirmative action gives preference to women in the acquisition of a *result* (access to employment, obtaining a promotion) which has an *absolute* character, that is to say, which does not allow the rejected male candidate to bring forward the arguments that are likely to tilt the balance in his favour. Absolute preference in this sense would be considered discriminatory, since it establishes a non-rebuttable presumption in favour of women in cases where the candidates from both sexes are equally qualified, unless it is based on an 'actual fact' such as the proportion of men and women among the persons with such a qualification. On the other hand, the preferential treatment that is accorded to women in terms of access to certain *opportunities* (vocational training, calls to job interviews) will be considered with less severity: even when absolute, such preferential treatment is aimed at achieving equal opportunity for men and women, and on this account should be considered as covered by the exception provided for in Article 2(4) of Directive 76/207/EEC (now, Article 3 of the Gender (Recast) Directive 2006/54/EC).

The ECJ's suspicion of rules guaranteeing preferential treatment to women which are absolute and unconditional, i.e. which do not provide for the possibility to assess objectively all competing candidates in order to take into account their specific personal circumstances, leads it to insist that any affirmative action measure seeking to eliminate or reduce actual instances of inequality should be strictly proportionate to that end. Consistent with this view, the Court did not object to a national rule for the public service which, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, on the basis that 'the quota applies only to training places for which the State does not have a monopoly, and therefore concerns training for which places are also available in the private sector, [so that] no male candidate is definitively excluded from training' (Case C-158/97, *Badeck and others* [2000] E.C.R. I–1875, para.53). The requirement of proportionality imposed by the Court thus appears to be interpreted to ensure that the positive action measures developed by the Member States do not sacrifice individual justice (the right of each individual to be treated on the basis of his/her personal situation) in the name of group justice (the automatic and absolute preference given to the members of one group, e.g. women, simply because of that membership).

Agreement, Annex XVIII of which identifies the EU rules relating to equal treatment between men and women among the obligations of the Parties. Article 30(3) of the Norwegian Act No. 22 of 12 May 1995 relating to Universities and Colleges (the University Act) stipulated that 'If one sex is clearly under-represented in the category of post in the subject area in question, applications [for academic posts] from members of that sex shall be specifically invited. Importance shall be attached to considerations of equality when the appointment is made. The Board can decide that a post shall be advertised as only open to members of the underrepresented sex.' On the basis of this provision, a number of permanent and temporary academic positions were earmarked for women either by direction of the Norwegian Government or by the University of Oslo. The Norwegian Government in 1998 allocated forty so-called post-doctoral research grants, funded through the national budget, to universities and university colleges, twenty of which were assigned to the University of Oslo. Although such scholarships are designed to be a temporary position with a maximum duration of four years, they are intended to improve the recruitment base for high-level academic positions. Pursuant to Article 30(3) of the University Act, the University earmarked all of these positions for women. Moreover, of the 179 post-doctoral appointments at the University 1998–2001, 29 were earmarked for women. Of the 227 permanent academic appointments during that period, 4 were earmarked for women. And under the University's Plan for Equal Treatment 2000–4, another ten post-doctoral positions and twelve permanent academic positions were to be earmarked for women. According to the Plan, the University intended to allocate the permanent positions to the faculties by way of an evaluation of, *inter alia*, academic fields where women in permanent academic positions are considerably under-represented, giving priority to fields with less than 10 per cent female academics; and academic fields where women in permanent academic positions are under-represented as compared to the number of female students. Excerpts of the judgment delivered on 24 January 2003 follow:

European Free Trade Association (EFTA) Court, Case E-1/02, *EFTA Surveillance Authority* v. *Kingdom of Norway*, judgment of 24 January 2003:

[Pursuant to the positive action provision of the Norwegian Act No. 22 of 12 May 1995 relating to Universities and Colleges, a number of permanent and temporary academic positions are earmarked for women either by direction of the Norwegian Government or by the University of Oslo. The EFTA Surveillance Authority challenges the compatibility of this policy with the requirements of Council Directive 76/207/EEC, made applicable to Norway by point 18 of Annex XVIII to the EFTA Agreement. The Court holds that, by maintaining in force a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations as defined by Articles 2(1), (4) and 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement:]

37 The Court of Justice of the European Communities has ... consistently held that Article 2(4) of the Directive permits measures that although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality that may exist in the reality of social life. Measures relating to access to employment, including promotion, that give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men come within the scope of Article 2(4) of the Directive (Case 312/86 *Commission* v. *France* [1988] ECR 6315, at paragraph 15; C-450/93 *Kalanke* v. *Freie Hansestadt Bremen*, [1995] ECR I-3051, at paragraphs 18–19; C-409/95 *Marschall* v. *Land Nordrhein-Westfalen* [1997] ECR I-6363, at paragraphs 26–27; [Case C-158/97, *Badeck and others* [2000] E.C.R. I-1875] cited above, at paragraph 19 ...). In *Kalanke* however, the Court of Justice of the European Communities found that Article 2(4), as a derogation from an individual right, had to be interpreted strictly and that the national rules at issue guaranteeing women in the case of equal qualifications absolute and unconditional priority for appointment or promotion in the public service were incompatible with the Directive. The Court, following the Opinion of Advocate General Tesauro, found that such measures went beyond promoting equal opportunities and substituted equality of representation for equality of opportunity (*Kalanke*, cited above, at paragraphs 21–23).

38 In *Marschall*, the Court of Justice of the European Communities considered the impact of prejudices and stereotypes concerning the role and capacities of women in working life and found that the mere fact that a male and a female candidate are equally qualified does not mean that they have the same chances (see *Marschall*, cited above, at paragraphs 29–30). Preferential treatment of female candidates in sectors where they are under-represented could therefore fall within the scope of Article 2(4) of the Directive if such preferential treatment was capable of counteracting the prejudicial effects on female candidates of societal attitudes and behaviour and reducing actual instances of inequality. However, such a measure may not guarantee absolute and unconditional priority for women in promotion, but should be subject to a savings clause (flexibility clause), guaranteeing an objective assessment of all candidates, taking into account their individual circumstances. Such an assessment, which should not be based on criteria that discriminate against women, could then override the priority accorded to women if the assessment tilted the balance in favour of the male candidate (*Marschall*, cited above, at paragraph 35; see also *Badeck*, cited above, at paragraph 23).

39 At issue in *Badeck* was national legislation where binding targets were set for the proportion of women in appointments and promotions. The Court of Justice of the European Communities found that such a rule that gave priority to equally qualified women in a sector where women are under-represented, if no reasons of greater legal weight were opposed, and subject to an objective assessment of all candidates, fell within the scope of Article 2(4) of the Directive. The Court of Justice of the European Communities further indicated that in assessing the qualifications of candidates, certain positive and negative criteria could be used, which, while formulated in gender neutral terms, were intended to reduce gender inequalities that occur in practice in social life. Among such criteria were capabilities and experiences acquired by carrying out family work. Negative criteria that should not detract from assessment of qualifications included parttime work, leaves and delays as a result of family work. Family status and partner's income should be viewed as immaterial and seniority, age and date of last promotion should not be given undue weight (*Badeck*, cited above, at paragraphs 31–32).

40 In *Badeck*, the Court of Justice of the European Communities held that a regime prescribing that posts in the academic service are to be filled with at least the same proportion of women as the proportion of women among the graduates and the holders of higher degrees in the discipline in question is compatible with the Directive. The Court of Justice of the European Communities thereby followed Advocate General Saggio's Opinion according to which such a system does not fix an absolute ceiling, but fixes one by reference to the number of persons who have received appropriate training, which amounts to using an actual fact as a quantitative criterion for giving preference to women (*Badeck*, cited above, at paragraphs 42–43; Opinion of Advocate General Saggio in *Badeck*, point 39).

41 In *Badeck*, the Court of Justice of the European Communities further accepted a rule according to which women are to be taken into account to the extent of at least one half in allocating training places in trained occupations in which women are under-represented. The Court of Justice of the European Communities found that the allocation of training places to women did not entail total inflexibility. The state did not have a monopoly on training places, as they were also available in the private sector. No male was therefore definitely excluded (*Badeck*, cited above, at paragraphs 51and 53).

42 In [Case C-407/98, *Abrahamsson* [2000] E.C.R. I-5539], the Court of Justice of the European Communities considered a Swedish statutory provision under which a candidate for a professorship who belongs to the under-represented gender and possesses sufficient qualifications for that post may be chosen in preference to a candidate of the opposite gender who would otherwise have been appointed, where this would be necessary to secure the appointment of a candidate of the under-represented gender, and the difference between the respective merits of the candidates would not be so great as to give rise to a breach of the requirement of objectivity in making appointments. It was found that this provision was incompatible with Article 2(1) and (4) of the Directive. The portent of the savings clause relating to the requirement of objectivity could not be precisely determined, implying that the selection would ultimately be based on the mere fact of belonging to the underrepresented gender.

43 As the case law outlined above shows, the Court of Justice of the European Communities has accepted as legitimate certain measures that promote substantive equality under Article 2(4) of the Directive. In determining the scope of a derogation from an individual right, such as the right to equal treatment of men and women laid down by the Directive, regard must, however, be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued ...

44 The Court will now deal with the invocation of the case law of the Court of Justice of the European Communities as it applies to the arguments of the Defendant.

45 In the light of the homogeneity objective underlying the EEA Agreement, the Court cannot accept the invitation to redefine the concept of discrimination on grounds of gender in the way the Defendant has suggested. The Directive is based on the recognition of the right to equal treatment as a fundamental right of the individual. National rules and practices derogating from that right can only be permissible when they show sufficient flexibility to allow a balance between the need for the promotion of the under-represented gender and the opportunity for candidates of the opposite gender to have their situation objectively assessed. There must, as a matter of principle, be a possibility that the best-qualified candidate obtains the post. In this context the Court notes that it appears from the Defendant's answer to a written question from

the Court that it cannot be excluded that posts may be awarded to women applicants with inadequate qualifications, if there is not a sufficient number of qualified women candidates.

46 The Defendant's submission to the effect that Article 2(2) of the Directive applies in the present case, as gender constitutes a genuine occupational qualification to ensure the quality of the occupational activity and thus constitutes a determining factor for carrying out the activities in question, cannot be accepted. Such an interpretation does not find support in the wording of the Directive nor in the case law of the Court of Justice of the European Communities. The provision, which allows Member States to exclude from the field of the Directive certain occupational activities has primarily been applied in instances where public security calls for the reservation of certain policing or military activities for men only (see, for instance, Cases 222/84 *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; C-273/97 *Sirdar* [1999] ECR I-7403) ...

49 The Defendant has highlighted the training aspects of the contested post-doctoral positions. These positions, which are limited in time, are intended to offer holders of doctoral degrees the possibility to qualify for permanent academic posts and develop the necessary competence to compete for higher academic positions. The postdoctoral positions are further described as research posts, where teaching and administrative obligations are at a minimum. The Defendant has in this respect sought to rely on the principles developed by the Court of Justice of the European Communities in *Badeck*.

50 As the Commission of the European Communities has emphasized, the Court of Justice of the European Communities has drawn a distinction between training for employment and actual places in employment. With regard to training positions, it has relied on a restricted concept of equality of opportunity allowing the reservation of positions for women, with a view to obtaining qualifications necessary for subsequent access to trained occupations in the public service (*Badeck*, cited above, at paragraphs 52 and 55). The Court finds that even for training positions, the law requires a system that is not totally inflexible. Moreover, alternatives for postdoctoral positions in the private sector appear to be rather limited.

51 In the Court's view, the Norwegian rule goes further than the Swedish legislation in *Abrahamsson*, where a selection procedure, involving an assessment of all candidates was foreseen at least in principle. Since that Swedish rule was held by the Court of Justice of the European Communities to be in violation of the principle of equal treatment of women and men, the Norwegian rule must fall foul of that principle *a fortiori*.

52 It has been argued that the positions in question are new posts and that male applicants are not in a more difficult position with respect to career advancement than they would be without the earmarking scheme. The Court notes, however, that it is unlikely that newly created professorship posts would be allocated to specific disciplines, subjects or institutions without an evaluation of already existing posts, or without regard to future needs and expected consequential adjustments of teaching or research staff. It therefore appears that the earmarking scheme will have an impact on the number of future vacancies open to male applicants in any field in which it has been applied. The Defendant has not even alleged that in the case at hand the situation could be different.

53 The argument that the permanent professorships set up and earmarked for women are temporary in nature since they will lapse at the latest when such a professor retires cannot be accepted.

54 On the principles laid down in the foregoing, the Norwegian legislation in question must be regarded as going beyond the scope of Article 2(4) of the Directive, insofar as it permits earmarking of certain positions for persons of the under-represented gender. The last sentence of Article 30(3) of the University Act as applied by the University of Oslo gives absolute and unconditional priority to female candidates. There is no provision for flexibility, and the outcome is determined automatically in favour of a female candidate. The Defendant has argued that the criteria of unconditional and automatic priority do not exhaust the scope of the proportionality principle. The Court notes, in this respect, that other aspects of the Norwegian policy on gender equality in academia – including target measures for new professorship posts, priority in allocation of positions to fields with less than 10 percent female academics and in fields with high proportion of female students and graduates – have not been challenged by the EFTA Surveillance Authority, except with regard to the earmarking of positions exclusively for female candidates ...

56 The Court notes ... that since the entry into force of the Directive substantial changes have occurred in the legal framework of the Community, providing *inter alia* for increased Community competences in matters relating to gender equality. Under Article 2 EC the Community shall have as its task to promote equality between men and women. Article 3(2) EC states that the Community shall, in carrying out the activities referred to in the first paragraph of that provision, aim to eliminate inequalities and to promote equality between men and women. Article 13 EC gives the Council the competence to take appropriate action to combat discrimination based on sex. According to Article 141(4) EC, the principle of equal treatment shall, with a view to ensuring full equality in practice between men and women in working life, not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Inevitably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates.

57 Under the present state of the law, the criteria for assessing the qualifications of candidates are essential. In such an assessment, there appears to be scope for considering those factors that, on empirical experience, tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Furthermore, giving weight to the possibility that in numerous academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women, which concern lies at the core of the Directive.

58 The Defendant cannot justify the measures in question by reference to its obligations under international law. CEDAW, which has been invoked by the Defendant, was in force for Community Member States at the time when the Court of Justice of the European Communities rendered the relevant judgments concerning the Directive. Moreover, the provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for derogations from obligations under EEA law.

59 Based on the foregoing, the Court holds that by maintaining in force a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under ... Articles 2(1), 2(4)

and 3(1) of Directive 76/207/EEC of 9 February on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement.

7.10. Question for discussion: the relationship between positive action (temporary special measures) and the principle of equality

While certain jurisdictions, such as the ECJ in the field of gender equality law, conceptualize positive action as measures that derogate from the principle of (formal) equality and thus as exceptions to an individual right to equal treatment that must comply with strictly defined conditions, other bodies instead see positive action (or temporary special measures) as implementing the principle of equality, albeit in a substantive rather than in a formal sense. But how much does it really matter how we frame the issue? Are we not in both cases bound to seek a balance between the individual right of the person who is negatively impacted by a positive action scheme, and the broader social aim of substantive equality, which may correspond to the fulfilment of the rights of the members of the group benefiting from the scheme? In which respect precisely does the understanding of positive action as contributing to the promotion of substantive equality differ from an understanding which sees it as an exception to the principle of equal treatment?

4 SYSTEMATIZING ANTI-DISCRIMINATION LAW

In section 2 of this chapter, taking Article 26 ICCPR as a departure point, we have seen that the requirement of non-discrimination in fact imposes on States four separate obligations. They should (1) guarantee equality before the law, by ensuring that law enforcement authorities shall treat all people without discrimination; (2) guarantee the equal protection of the law, by removing any discriminatory provision from applicable laws and regulations; (3) prohibit any discrimination in private relationships; and (4) guarantee to all persons equal and effective protection against discrimination, if necessary, by the adoption of positive action measures in response to situations of structural discrimination. These four obligations may be combined with the different understandings of discrimination described in section 3, in order to describe the full content of the non-discrimination requirement.

This table also helps to understand the reasons why the collection of data relating to the situation of different categories of persons, for instance women or racial, ethnic or religious minorities, may constitute an essential tool in the adoption of effective anti-discrimination laws or policies. Such data primarily serve to build and improve

	Direct discrimination	Indirect discrimination resulting from the adoption of suspect measures	Indirect discrimination highlighted by statistics (disparate impact)	Discrimination as a failure to provide for reasonable accommodation	Structural discrimination
Equality before the law Equal protection of the law Prohibition of discrimination in private relationships Positive action in order to acheive substantive (real) equality					

anti-discrimination policies on the basis of an adequate mapping of the groups exposed to discrimination, the areas in which discrimination occurs as well as the nature and scale of discrimination. But the collection and processing of such data also have a potentially important role to play in the implementation of anti-discrimination law, particularly under the third and the fifth columns of the table presented above. Third, they may contribute to private or public organizations monitoring the impact of their practices, for instance their recruitment or promotion policies or their allocation of subsidies, on different categories: they may thus determine which remedial measures can be taken in order to correct manifest imbalances. Indeed, the collection of data relating to the membership of specific individuals in certain categories, such as racial, ethnic, or religious minorities, may be required for the implementation of equality schemes aimed at remedying imbalances. This may take the form of positive action measures implying preferential treatment of certain individuals: 'Whether or not they are linked to measures encouraging self-assessment of practices (in particular in the employment sector), positive action schemes granting preferential treatment to individuals in order to improve the representation of under-represented groups require the collection and processing of data, linking specific individuals to the relevant categories.' Fourth, 'statistical data may be crucial to enable victims to prove discrimination

in legal proceedings, in legal systems which treat "disparate impact" as a form of prohibited discrimination' (J. Ringelheim and O. De Schutter, *Ethnic Monitoring. The Processing of Racial and Ethnic Data in Anti-discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights* (Brussels: Bruylant, 2009).

The Durban Declaration and Plan of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (September 2001), urges States to collect, analyse and disseminate reliable statistical data to assess regularly the situation of individuals and groups victims of racial discrimination (Durban Declaration and Plan of Action, para. 92). Indeed, a number of human rights bodies have called upon States to collect data regularly in order to improve their anti-discrimination policies and to strengthen the effectiveness of their equality legislation. Referring to its previous general comments on specific rights of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights notes for instance:

Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-discrimination in Economic, Social and Cultural Rights* (Art. 2, para. 2 of the Covenant) (E/C.12/GC/20, 2 July 2009), para. 41:

States parties are obliged to monitor effectively the implementation of measures to comply with article 2, paragraph 2, of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.

The same requirements are being imposed in regional settings. In its general policy Recommendation No. 1 on combating racism, xenophobia, anti-Semitism and intolerance, the European Commission against Racism and Intolerance (ECRI), an expert body of the Council of Europe, recommends that governments 'collect, in accordance with European laws, regulations and recommendations on data-protection and protection of privacy, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, anti-Semitism and intolerance' (4 October 1996, CRI (96) 43 rev.). The Advisory Committee on the Council of Europe Framework Convention on the Protection of National Minorities expects States to provide 'factual information ... such as statistics and the result of surveys' in their reports, adding that 'where complete statistics are not available, governments may supply data or estimates based on *ad hoc* studies, specialized or sample surveys, or other scientifically valid methods, whenever they consider the information so collected to be useful' (Outline for reports to be submitted pursuant to Art. 25 para. 1 of the Framework Convention for the Protection of National Minorities, adopted by the Committee of Ministers on 30 September 1998 at the 642nd meeting of the Ministers' Deputies; see also, *inter alia*, the second Opinion

of the Advisory Committee on Denmark, 9 December 2004, ACFC/INF/OP/II(2004)005, para. 60 and its first Opinion on Spain, 27 November 2003, ACFC/INF/OP/I(2004)004).

However, this may be in conflict with the requirements of the right to respect for private life, both because of the restrictions imposed on the processing of sensitive personal data (such as data relating to the race or ethnicity, or to religion), and because of the requirement of 'self-identification', according to which – as stated by the UN Committee on the Elimination of Racial Discrimination – the identification of individuals as being members of a particular racial or ethnic group 'shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned' (General Recommendation VIII, thirty-eighth session, 1990 (A/45/18 at 79 (1991)); see also, for instance, Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-discrimination in Economic, Social and Cultural Rights*, para. 16).

This latter rule is emerging as a general requirement. It can be derived from the Council of Europe Framework Convention on the Protection of National Minorities (1995), which lays down that every individual shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and that no disadvantage shall result from this choice (Art. 3(1)). Accordingly, States cannot in principle treat individuals against their will as members of a national minority group (H.-J. Heinze, 'Article 3' in M. Weller (ed.), *The Rights of Minorities in Europe – a Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, 2005), pp. 107–37 at p. 119). In the view of the Advisory Committee for the Framework Convention, the right not to be treated as a person belonging to a national minority extends to census situations and entails that questions on one's ethnicity cannot be made mandatory (see, e.g. Opinion of the Advisory Committee of the Framework Convention on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, para. 19 and Opinion on Poland, 27 November 2003, ACFC/INF/OP/I(2004)005, para. 24). The European Commission against Racism and Intolerance (ECRI) has consistently recommended, in its General Policy Recommendations and country reports, that ethnic data be collected in accordance with three principles: confidentiality, informed consent and voluntary self-identification (ECRI, Seminar with national specialized bodies to combat racism and racial discrimination on the issue of ethnic data collection (Strasbourg, 17–18 February 2005), Report, CRI(2005)14 at 4). Likewise, the 2001 Durban Declaration and Plan of Action states that information documenting racism, racial discrimination, xenophobia and related intolerance shall be collected with the explicit consent of the victims and be based on their self-identification: such information, it stated, shall be collected 'with the explicit consent of the victims, based on their self-identification and in accordance with provisions on human rights and fundamental freedoms, such as data protection regulations and privacy guarantees' (Durban Declaration and Plan of Action, para. 92(a)).

However, reliance on self-identification creates a risk of manipulation, which in practice may make this inapplicable and put in jeopardy the very possibility of strategies aiming at correcting imbalances between groups. Positive action schemes in particular

are adopted in order to substitute a notion of group justice to a notion of individual justice. The efficacy of such schemes can hardly be reconciled with the possibility, for each individual potentially concerned, not to be classified for instance according to race or ethnicity, or to religion – whether that individual belongs to the traditionally disadvantaged group which the scheme intends to benefit, or whether he/ she belongs to the traditionally advantaged group, whose members will bear the cost of the positive action scheme. In box 7.5., the dilemma this creates for policy-makers is illustrated in the context of the Northern Ireland employment equality legislation.

Box 7.5.

Determining community affiliation in Northern Ireland

A controversy followed a proposal to include, in the Bill of Rights for Northern Ireland then under discussion, a provision identical to Article 3(1) of the Council of Europe Framework Convention for the Protection of National Minorities. That provision states that every person shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and that no disadvantage shall result from this choice. The effect of the insertion of such a clause in the Northern Ireland Bill of Rights would have been to render inapplicable the implementation in Northern Ireland of the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO), legislation adopted as part of the Belfast (or 'Good Friday') Agreement of the same year that sought to put an end to the strife between the Protestant and Roman Catholic communities in Northern Ireland. The FETO aimed at improving the representation of the under-represented group in employment, by obliging employers to send 'monitoring returns' to the Equality Commission, breaking down the workforce according to the community affiliation of its members. While, in principle, the community affiliation is to be determined by each individual in answer to a direct question of the employer, a 'residuary method' applies where the answer is not determinative: the employer may then use any information transmitted to him by the employee (such as the surname and other names; address; educational background or training; leisure activities; the clubs, societies or other organizations to which he/she belongs; or the occupation as a clergyman or minister of a particular religious denomination or as a teacher in a particular school, of any referee nominated by the employee when he/she applied for the job), in order to determine whether the employee should be treated as a member of the Protestant or the Roman Catholic community. That determination is notified to the employee, however, who has seven days to object to the information received; if he/she does object, the monitoring return sent to the Equality Commission should reflect that response.

This arrangement was largely supported as one of the key elements resulting from the 1998 Belfast Agreement. It worked satisfactorily in practice. Whether it could be considered compatible with the requirement of Article 3(1) of the Council of Europe Framework Convention for the Protection of National Minorities, however, was intensely debated when the Northern Ireland Human Rights Commission proposed to include in the draft Bill of Rights for Northern Ireland a provision incorporating the substance of Article 3(1) of the Framework Convention. The Council of Europe was asked to provide an opinion on the issue. An ad hoc group of experts was set up

for that purpose. It delivered an opinion where they stated that 'the inclusion of such a clause could open the way for challenges to be made to current equality provisions that would undermine recent gains in equality over past years'. They continued:

Aalt W. Heringa, Giorgio Malinverni, Josef Marko, 'Comments by the Council of Europe experts on certain aspects of a future Bill of Rights for Northern Ireland', Council of Europe, DG II (2004) 4 (3 February 2004):

64. Notwithstanding that the experts see that there may be an issue concerning the compatibility of certain equality provisions with the right to self-identification, they consider that this is not a matter that should be definitively solved in a bill of rights, but rather be addressed in ordinary legislation.

65. ...[A] bill of rights should be the product of a broad societal consensus. From the discussions held in Belfast it is clear that there is no such broad societal consensus concerning the inclusion of this provision. Furthermore, it can be said that it is rare for a bill of rights or for a constitution to treat such matters ...

66. The experts consider that it is important to note that the issue does not disappear if it is not specifically included in the Bill of Rights. The right remains to be implemented in the context of the application of Article 3 of the Framework Convention for the Protection of National Minorities. Furthermore, it can be argued that aspects of the right to self-identification may also be linked to Article 8 (right to privacy) of the ECHR for which redress procedures are already available under the Human Rights Act and under the ECHR itself ...

67. The experts note that if a review of the legislation is to take place, it will require an examination of the application of positive measures to ensure equality as this is a central element of the issue in question. It can be noted that there could well be a clash of rights, for example between the right of self-identification on the one hand and the need to ensure equality on the other.

68. The experts consider that this issue could be better and more fully discussed or advanced, *inter alia*, in the context of discussions concerning the reform of the equality legislation and proposals to have a single equality act. There may also be other forums in which this matter can be raised, including the Advisory Committee on the Framework Convention during the second monitoring cycle under the Framework Convention for the Protection of National Minorities.

69. The experts are therefore of the view that the issue of self-identification should not be examined in the context of the Bill of Rights project, but rather outside of the project in a more appropriate forum.

The recognition that the principle of self-identification to a national minority might jeopardize the implementation of equality schemes aimed at achieving social cohesion is an important one. It should also be read in the light of the comment contained in the Explanatory Protocol to the Council of Europe Framework Convention on the Protection of National Minorities, which states that Article 3(1) of this instrument 'does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably

linked to objective criteria relevant to the person's identity.' Precisely because reliance on the 'subjective' criterion of self-identification could make the implementation of equality legislation difficult if not impossible, the position of the Council of Europe experts seems to be that certain restrictions to the right to self-identification should be allowable. In the second Opinion it adopted on the United Kingdom, the Advisory Committee on the Framework Convention for the Protection of National Minorities seemed to endorse this view. It stated:

Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, second Opinion on the United Kingdom (ACFC/OP/II(2007)003) (adopted on 6 June 2007 and made public, alongside the response by the UK Government, on 26 October 2007), at paras. 47–8:

The Advisory Committee takes note of the duties placed on employers by Northern Ireland's fair employment legislation as regards work force monitoring (see also comments under Article 4 below). Under this legislation, employers are required to submit annually a monitoring return giving details of the 'community background' of their employees, trainees and applicants, meaning their affiliation to the Protestant or Roman Catholic community in Northern Ireland. Whereas the principal method for collecting this data relies on the free self-identification of each employee, trainee or applicant, where the latter do not respond to a direct question on their 'community background', employers are encouraged to make such a determination themselves based on written information supplied by the person concerned. Persons belonging to minority ethnic groups are also subject to these monitoring requirements and have the option of indicating that they are not a member of either community.

The Advisory Committee notes that the data collected under the fair employment legislation remain anonymous and may be used purely for statistical purposes, in order to determine whether members of each community are enjoying fair participation in employment and, if not, to identify additional measures that could be adopted to secure fair participation. The Advisory Committee reminds the Government that restrictions on the right to free self-identification by persons belonging to national minorities are not consistent with Article 3 of the Framework Convention. However, the Advisory Committee considers that, in the specific context of Northern Ireland, and at this particular moment in time, the determination by employers of the community background of their employees, trainees and applicants may be relevant in order to secure the fair participation of under-represented groups.

The Advisory Committee did recommend that the Government regularly review the authorization given to employers in Northern Ireland to make a determination of the 'community background' of employees, trainees and applicants, when the latter do not provide this information, in order to ensure its continuing relevance to the objective of securing equality in the field of employment.

5 SELF-DETERMINATION AND MINORITY RIGHTS

This section explores the relationship between the prohibition of discrimination and rights which, while distinct, are sufficiently inter-related with this prohibition to justify their exposition here. These are the right to self-determination of peoples and the rights of minorities. Although the right to self-determination is mentioned in the Charter of the United Nations, both that right and minority rights were ignored in the drafting of the Universal Declaration of Human Rights: while attempts were made to include a reference to the right to self-determination, these efforts foundered both on the United States' and France's views about assimilation – both being hostile to the recognition of separate group rights – and on the idea that the Declaration should include only rights of the individual, and not group rights such as rights of minorities or of peoples (see M. A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), pp. 119–20).

5.1 The right to self-determination

(a) General principles

The era of decolonization in the 1960s and the insistence of newly independent, developing countries, particularly in the 1970s, on reclaiming not only their political, but also their economic sovereignty, led to the right to self-determination being revived in the instruments adopted during that period (see, among the most important contributions on this right, A. Cassese, *Self-determination of Peoples: a Legal Reappraisal* (Cambridge University Press, 1995); A. Cassese, 'The Self-determination of Peoples' in L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p. 92; B. Kingsbury, 'Claims by Non-State Groups in International Law', *Cornell International Law Journal*, 25 (1992), 481; R. McCorquodale, 'Self-determination: a Human Rights Approach', *International and Comparative Law Quarterly*, 43 (1994), 857; C. Tomuschat (ed.), *Modern Law of Self-determination* (Dordrecht: Martinus Nijhoff, 1993)).

International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, Article 1:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), UN Doc. A/5217 at 121 (1970):

[This Declaration lists in its annex a number of principles, the codification and development of which, according to the Declaration, should contribute to promote the realization of the purposes of the United Nations. The listed principles are: (a) the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (b) the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (c) the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; (d) the duty of States to co-operate with one another in accordance with the Charter; (e) the principle of equal rights and self-determination of peoples; (f) the principle of sovereign equality of States; (g) the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. The principle of self-determination is explained as follows:]

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

Human Rights Committee, General Comment No. 12, *The Right to Self-determination of Peoples* (Art. 1) (13 March 1984):

4. With regard to paragraph 1 of article 1 [of the ICCPR, quoted above in this section], States parties should describe [in their reports to the Human Rights Committee] the constitutional and political processes which in practice allow the exercise of this right.

5. Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to 'dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.' This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination ... The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/23, 12 July 1993):

2. All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

International Court of Justice, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 88, 119–22, and 159:

88. The Court would recall that in 1971 it emphasized that current developments in 'international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]'. The Court went on to state that 'These developments leave little doubt that the ultimate objective of the sacred trust' referred to in Article 22, paragraph 1, of the Covenant of the League of Nations 'was the self-determination ... of the peoples concerned' *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52–53). The Court has referred to this principle on a number of occasions in its jurisprudence *(ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court indeed made it