



**International Convention on
the Elimination
of all Forms of
Racial Discrimination**

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COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Sixty-ninth session

SUMMARY RECORD OF THE 1767th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 7 August 2006, at 10 a.m.

Chairperson: Mr. de GOUTTES

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The meeting was called to order at 10.15 a.m.

CONSIDERATION OF REPORTS, COMMENTS AND INFORMATION SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION (agenda item 4) (continued)

Initial to third periodic reports of South Africa (CERD/C/461/Add.3; HRI/CORE/1/Add.92; written replies of the Government of South Africa to the questions raised in the list of issues, document without a symbol distributed in the meeting room in English only) (continued)

1. At the invitation of the Chairperson, the members of the delegation of South Africa resumed their places at the Committee table.
2. The CHAIRPERSON, speaking in his capacity as an expert of the Committee, asked what measures had been taken to combat the racist attitudes of service providers in the justice system described in paragraphs 65 to 68 of the report. Drawing attention to the Committee's general recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, he requested information on standards for the recruitment of judges and human rights training for law enforcement and criminal justice personnel. He also wished to know whether judges displaying racist attitudes were subject to disciplinary proceedings.
3. Ms. MABANDLA (South Africa) said that her delegation had prepared written replies to the questions raised by Committee members during the previous session, which addressed, in particular, racial and ethnic relations in South Africa; efforts to promote tolerance, equal treatment and dignity for all; special measures for redress and the promotion of equality; the situation of the Khoisan; and issues relating to land, education, HIV/AIDS, access to justice and security.
4. The current political system was underpinned by the commitment to redress the legacy of apartheid and promote a non-racist, non-sexist, democratic governmental structure. Dismantling systemic racial segregation was paramount to South Africa's quest for social justice and the basis for the new Constitution. Despite the Government's efforts to promote the principle of equality, certain population groups such as the Khoisan continued to suffer discrimination. In response, special measures had been taken to preserve threatened languages, including Khoisan; to provide schooling for Khoisan and Nama children; to set up a radio station catering for those communities; and to promote Khoisan and Nama crafts. The new coat of arms celebrated the Khoisan language and culture, and Khoisan land restitution claims had been among the first to be successful. Detailed information on land restitution programmes and the provision of infrastructures such as housing, electricity and schools was contained in the written replies.
5. During the days of apartheid, the Government had imposed a system of ethnic hierarchy informed by prejudice. Differentiation had been used as a tool to divide the African people. The new political system categorized citizens merely as "black" or "white" in the hope that, one day, any differentiation between South Africans would become obsolete.

6. Xenophobia, which was particularly prominent in urban areas, was primarily motivated by competition over resources. The most frequent reports concerned South Africans assaulting other nationals in order to gain access to State-sponsored housing. Under apartheid, South Africans had had little exposure to other Africans and the new situation sometimes caused tension. The Government recognized the need to bring about attitudinal changes and the South African Human Rights Commission, in cooperation with the relevant governmental departments and NGOs, had launched a campaign entitled: "Roll Back Xenophobia" to address the problem.

7. Replying to the questions raised by the Chairperson at the beginning of the meeting, she said that considerable progress had been made towards eliminating institutional racism in law enforcement and the justice system during the time period covered in the report. Training in human rights and gender issues had been incorporated in training programmes for judges. Although there had been a gradual increase in the number of black judges and magistrates, including women, many South Africans felt that more needed to be done to foster a culture of human rights in the justice system. The appointment of new judges and lawyers to the Constitutional Court had changed the nature of the Court's judgements; many members of the human rights community viewed them as progressive. That transformation was expected to have a trickle-down effect on other members of the judiciary.

8. Ms. CHETTY (South Africa) said that a detailed report on the Comprehensive HIV and AIDS Care, Management and Treatment Plan for South Africa was available on the Department of Health website. Building public-private partnerships to promote the broadest possible involvement in efforts to combat HIV/AIDS had been made a priority. The Inter-Ministerial Committee on AIDS, the Interdepartmental Committee on AIDS and the South African National Health Council all cooperated to address the HIV/AIDS challenge, with special focus on prevention. Beyond treatment, the Comprehensive HIV and AIDS Care, Management and Treatment Plan included a healthy lifestyle campaign, life skills education for children and youth, a condom distribution programme, measures to reduce mother-child transmission, and the promotion of voluntary testing and counselling. The prevalence of sexually transmitted diseases in general had been reduced significantly. Measures had also been taken to reduce the risk of transmission through blood transfusion. Service points had been set up in every health district that provided assistance in areas such as prevention, nutrition, management of opportunistic infections and antiretroviral treatment. Investment in health infrastructure had been increased to facilitate capacity building in all areas.

9. Ms. MKHWEBANE-TSHEHLA (South Africa) said that the Refugees Act of 1998 was modelled after the 1951 Convention on the Status of Refugees. South African refugee policy focused on integration. Consequently, there were no refugee camps. Persons who had been granted refugee status were entitled to engage in employment and other remunerating activities. Unfortunately, South Africa's asylum system was being abused by visitors who applied for temporary asylum permits, thus obtaining authorization to work or study.

10. In July 2005, the Department of Home Affairs had launched a project to tackle the backlog of over 100,000 asylum applications; 178 temporary staff had been employed to process all pending requests by 2007. Unsuccessful asylum applicants were handed over to the immigration authorities. The Department of Home Affairs cooperated with the South African

Human Rights Commission and NGOs to address xenophobia and related issues. In that context, human rights training was provided for immigration officials and other public servants working with refugees and asylum-seekers.

11. Mr. MAKHUBELE (South Africa) said that descent was not explicitly included among the Constitution's grounds for discrimination, because the list of possible grounds in section 9 (3) was intentionally non-exhaustive. In any case, "descent" was considered equivalent to "birth" or "origin". A person might suffer discrimination for many reasons beyond his/her control, including physical attributes or religious or cultural factors. Everyone in South Africa was entitled to the rights laid down in the Bill of Rights, with the exception of political rights, which only South African citizens enjoyed.

12. The case of Harksen v. Lane NO and Another of 1998 illustrated the concept of "fair discrimination" (document CERD/C/461/Add.3, para. 35). Three factors were taken into account: did the discrimination seek to address the rights of a vulnerable group; was there a good reason for the discrimination; to what extent did the discrimination affect the rights, interests and human dignity of the complainants? Further, in the case of a legislative act, the discrimination must be reasonable and justified in an open and democratic society based on human dignity, equality and freedom, and the action taken must be proportionate to the intended effect. "Fair" discrimination was intended to address the imbalances left over from the apartheid regime. For instance, the Government's affirmative action policy in the public service had now almost succeeded in matching the profile of public service staff with that of the general population in terms of both race and gender. However, more work remained to be done, especially in the private sector.

13. The Convention could not be invoked directly before domestic courts. Enabling legislation was required before international agreements became binding: the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 went some way towards implementing the Convention, but it provided only for civil remedies. In addition, domestic courts commonly used international treaty law in their interpretation of domestic legislation, provided that it was consistent with the Constitution.

14. Mr. ABOUL-NASR asked for more information about the concept of "fair discrimination". Surely discrimination could never be fair, whatever form it took? He noted that a representative of the South African Human Rights Commission was due to address the Committee shortly. What status did the representative have, and on whose behalf would she be speaking? Under which rule of the Committee's rules of procedure would she be permitted to speak?

15. Mr. SHAHI commended the South African delegation on its comprehensive, candid and self-critical report. The Government had eliminated de jure racial discrimination and apartheid, but it acknowledged that racist attitudes persisted among law enforcement personnel, in the administration and even in the judiciary, and it was taking steps to eradicate them by means of appropriate training.

16. There were a number of positive factors, including the creation of the South African Human Rights Commission, whose report had shown up a number of areas where the next periodic report required updating. He asked for more information concerning the demographic

composition of the population, the extent to which the Government's affirmative action complied with the Convention, the legislation relating to aliens, the situation of indigenous people and the protection of their human rights. He welcomed the provision for defence of the rights of disadvantaged people by third parties afforded by section 38 of the Constitution.

17. He noted that the Constitution restricted the right to freedom of expression in order to prevent advocacy of racial hatred, and that civil remedies were available to victims of racial hate speech under the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. To what extent was the criminal justice system equipped to prevent and penalize such offences?

18. The problem of xenophobia, especially against Blacks from neighbouring countries, should be addressed more vigorously. He asked for more accurate figures relating to the number of economic migrants in the country, which had been variously quoted at between 500,000 and 2 million, and noted the steps which the Government was taking to clear the backlog of asylum applications.

19. Affirmative action was needed to reduce the persisting gaps between Whites and non-Whites. Issues such as the restoration of indigenous people's land and mineral rights, which had been the subject of a landmark decision by the Constitutional Court (Alexkor Limited and the Government of South Africa v. The Richtersveld Community and Others), should be a priority.

20. He called upon the Government to pay greater attention to the Committee's general recommendation XXIII on Indigenous Peoples and to ratify the International Labour Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169). Established indigenous communities should be recognized under the Constitution, as recommended by the Special Rapporteur of the Commission on Human Rights on the situation of human rights and fundamental freedoms of indigenous people in his 2005 report (E/CN.4/2006/78/Add.2, para. 27).

21. He asked for further information on the following points: court decisions in cases of racial discrimination; implementation of the Declaration and Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, South Africa, 31 August-8 September 2001); and anti-discrimination measures in the criminal justice system.

22. Ms. MABANDLA (South Africa) said that members' comments would be very useful for the preparation of the next periodic report. The concept of "fair discrimination" had been developed by the Constitutional Court during the negotiation of the political settlement in South Africa. The negotiators had been determined to eradicate the systemic inequalities which existed in South Africa and improve the lives of those who had been excluded, which necessarily meant that special measures had to be initiated on their behalf. The affirmative action policy had been criticized at the time and even more vocally subsequently. There was still a debate in legal circles about what constituted legitimate affirmative action ("fair discrimination") and whether it could itself be considered discriminatory.

23. The question of ethnic identity was a delicate one in South Africa, owing to its use in the past as an instrument of division between peoples. The Constitution concentrated primarily on the rights of the individual. Two of the most vulnerable and least visible minority groups were the Khoi and San peoples, many of whom had been killed in colonial and post-colonial battles and whose history still remained to be written. Other peoples, such as the Nama, had regained more of their rights. Her Government would try to give a more complete picture of that complex situation in its next report.

24. Mr. SICILIANOS recalled that to a great extent the Convention had been drafted in response to the apartheid regime in South Africa and that there were those who would say that with the end of the apartheid regime the Convention had lost its *raison d'être*. He believed, however, that the report showed the vitally important role the Convention could play in promoting the transition to a multiracial society.

25. He agreed with Mr. Aboul-Nasr that concepts such as fair discrimination or positive discrimination were difficult to comprehend. He believed they were based on an incorrect interpretation of articles 1 (4) and 2 (2) of the Convention, which permitted objectively necessary and reasonable differential treatment that was proportional and temporary and aimed at the elimination of discrimination against a vulnerable group. He fully approved of the approach taken by the Government of South Africa and the domestic courts on the need for special measures to promote the transition to a multiracial society.

26. Mr. VALENCIA RODRIGUEZ noted that according to the report (para. 39), the Constitutional Court had ruled that the freedom of non-citizens to choose their profession was not guaranteed by the Constitution; he requested information on the practical effect of that court decision and on employment opportunities for non-citizens. With regard to article 4, he welcomed measures such as section 16 of the Constitution and articles 7 and 10 of the Promotion of Equality and the Prevention of Unfair Discrimination Act but requested information on any measures adopted to implement article 4 (b) of the Convention on the prohibition of organizations which promote and invite racial discrimination. He also welcomed legislative measures to address the problem of land ownership and the establishment of the Commission on the Restitution of Land Rights but would welcome more information on practical results achieved. Finally, he asked for more information on any efforts undertaken to eliminate discrimination against black female domestic workers.

27. Mr. THORNBERRY said that discrimination was a pejorative term and it seemed paradoxical to speak of fair or positive discrimination but he stressed that non-discrimination did not require uniform treatment if circumstances differed. Special measures aimed at remedying a specific situation were not discriminatory under the Convention and in the appropriate circumstances were even mandatory pursuant to article 2 (2).

28. With regard to the Khoisan people, he found the delegation's remarks on identity very interesting and relevant and, in that context, recalled the ILO's Indigenous and Tribal Peoples Convention (No. 169), specifically article 1 identifying indigenous peoples, and the Committee's general recommendation XXIII on Indigenous Peoples. In recent years new international standards had been developed with regard to minority groups and indigenous peoples that raised the difficult question of the relationship between special measures in favour of such groups, which were by their very nature temporary, and the establishment of an enduring system of

rights needed to protect them. He pointed out that the adoption of special measures under the Convention did not exclude the adoption of further measures pursuant to other relevant international standards.

29. The CHAIRPERSON said that, provided that the South African delegation had no objection, he would invite the representative of the South African Human Rights Commission to take the floor. There was an increasing trend for such institutions to be invited to speak, and their remarks were generally welcomed, both by Committee members and by delegations.

30. Ms. MAJODINA (Deputy Chairperson, South African Human Rights Commission) said that the establishment of a national human rights commission had been an early priority in the efforts to promote a non-racial and non-sexist society and to overcome the legacy of racial discrimination in South Africa. Although many reforms had been undertaken and the apartheid system no longer existed, there was still systemic social, cultural and economic inequality along racial lines. The South African Human Rights Commission nevertheless commended the Government of South Africa for its commitment to ending direct and indirect racial discrimination and for implementing a national policy to that end.

31. The commitment of the Government of South Africa to implementation of article 2 of the Convention was evidenced by an extensive legal framework for promoting equality, healing the divisions of the past and eliminating discrimination. The implementation of special measures pursuant to article 2 of the Convention was aimed at promoting the full enjoyment of human rights by all, achieving substantive and not merely formal equality, and eliminating special treatment for different groups.

32. She agreed that the key challenge with regard to implementation of article 3 of the Convention was the persistence of systemic racial inequality and accumulated disadvantages on the one hand and accumulated social power on the other that resembled the legalized injustices of the past, such as racially segregated residential areas. An adequate legal framework existed for implementation of article 4 but she regretted that the Government still had not promulgated regulations on the application of the Promotion of Equality and the Prevention of Unfair Discrimination Act of 2000. That should be done on an urgent basis in order to prevent and punish racist offences.

33. The implementation of article 5 of the Convention was dealt with at length in the report and in the Commission's shadow report. In response to a question from Mr. Kjaerum on the influence of non-State actors on the exercise of human rights, she stressed that the Government had an obligation to work with civil society to ensure that non-State actors did not contribute to discrimination. In that regard, she recalled that following the brutal murder of two Senegalese refugees in a crowded train in 1998, the Human Rights Commission, the Office of the High Commissioner for Human Rights and the National Consortium on Refugee Affairs had organized a conference on xenophobia which had led to the establishment of the Roll Back Xenophobia campaign at the end of that year. Beginning in 1999, workshops had been organized for government officials, including police, health and education workers, the media and refugees themselves. At the end of 2004 a review of the effectiveness of the campaign had concluded that while progress had been made, continued progress would require the combined efforts of the State and civil society.

34. Provision of effective protection and remedies pursuant to article 6 of the Convention was guaranteed by section 38 of the Constitution but she stressed that adequate legal representation and access to the courts for the poor and the marginalized remained a concern.

35. Progress towards implementation of article 7 of the Convention had generally been good but she said the report did not clearly indicate what monitoring mechanisms existed or were planned to ensure the effectiveness and sustainability of measures adopted. The next periodic report should also provide more information on follow-up to and implementation of the Durban Declaration and Programme of Action.

36. She commended the Government of South Africa for producing such a comprehensive report and for integrating the provisions of the Convention in domestic law. The Convention was therefore binding on the State party and she stressed that the South African Human Rights Commission would continue to work with the Government to ensure that South Africa became a model for the implementation of the Convention. She hoped the Committee's concluding observations would include a reference to the need for the Government to continue to collaborate with national institutions such as the South African Human Rights Commission and to meet its reporting obligations on time.

37. Mr. YUTZIS said that contributions such as that made by the representative of the South African Human Rights Commission were exactly the type of dialogue which helped the Committee and improved the mechanism for compliance with the Convention. The fact that the presentation had included a number of criticisms demonstrated the independence of the Commission.

38. He welcomed the use of the term "systemic" throughout the report, as he believed that racism and the concept of race were a systemic construction. He looked forward to seeing the results of the difficult process of dismantling one systemic structure in order to construct another one. He agreed that identity was a crucial problem, but pointed out that identities were not fixed but rather in a continual state of construction.

39. He would be interested to hear about the connection between xenophobia and the role of the media, particularly in the light of the possibility of greater tension or conflictiveness due to the influx of refugees and economic migrants into South Africa. Since the media had the power to form public opinion, he would be interested to hear who controlled the media and what mechanisms were applied in that regard.

40. Mr. SHAHI commended the fact that the Government was taking measures to revive a number of indigenous languages that were at risk of extinction. He had noted with interest the clarification that the issue of descent was covered in the Constitution, which explained its omission from the definition of racial discrimination. He had also noted the explanation in the Harksen v. Lane case on the new concept of fair discrimination. He welcomed the fact that there were plans to draft legislation that criminalized racism, which was a necessary development, as article 4 of the Convention stipulated that it should be a punishable offence. He wished to know what the powers of the institution of traditional leadership were, and whether there was any conflict between traditional leadership and practices under customary law and the system of democratic government.

41. Ms. MABANDLA (South Africa), referring to traditional leadership, said that in moving towards an unracial democratic society the aim was to have the Constitution as the overarching standard-setter for the country. There were contradictions in the South African system. The system of traditional leadership remained intact, but the reforms of the traditional courts sought to remove elements of traditional practice that undermined the rights of women, for example. The practice of traditional leaders needed to conform to the values of the Constitution.
42. The media was sympathetic in its reporting and did not stereotype refugees and migrants, which was most probably thanks to the South African Human Rights Commission's "Roll Back Xenophobia" campaign. Collaboration between African journalists was increasing. It should be borne in mind that the media was not State-owned.
43. The Government would take account of the criticisms made by the South African Human Rights Commission, particularly in the area of monitoring.
44. Mr. PILLAI said that the Committee was encouraged by the delegation's assurances that the State party would submit more comprehensive reports in future and ensure greater participation of the South African Human Rights Commission in the preparation of reports. The increased participation of national human rights institutions in the work of the treaty bodies, not only in the form of shadow reports, was a positive trend.
45. No nation had suffered as much as South Africa on account of an institutionalized Government mechanism for racial segregation and discrimination. The tasks before the country were huge and challenging, as illustrated in the country report. The Committee watched with interest the country's efforts and wished it success.
46. He welcomed a number of positive responses to questions raised by Committee members, particularly regarding the transposition of the Convention into domestic law, which clarified that there were plans to develop legislation criminalizing racism, and the acknowledgement that the Equality Courts were still in their formative stages but that information on their functioning would be provided in due course. However, other responses, such as the statement that statistics on the ethnic composition of the different wings of the judicial system were not applicable, were unclear. In view of the Government's proposals on affirmative action and the conclusions of the South African Human Rights Commission on the prevalence of racial discrimination in the judicial system, it would appear necessary to collect such statistics. The Committee would welcome more carefully considered answers in future. There was a lack of conceptual clarity in answers on the ethnic composition of the population, for example the use of the term "nationalities" when referring to "Blacks, Whites, the Khoi and San, Indians and Coloureds".
47. The CHAIRPERSON thanked the delegation for the positive dialogue, which he hoped would assist the State party when drafting its next report.

The meeting rose at 12.55 p.m.