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the Elimination
of all Forms of
Racial Discrimination**

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COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Sixty-eighth session

SUMMARY RECORD OF THE 1749th MEETING

Held at the Palais Wilson, Geneva,
on Friday, 3 March 2006, at 3 p.m.

Chairman: Mr. de GOUTTES

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The meeting was called to order at 3.10 p.m.

CONSIDERATION OF REPORTS, COMMENTS AND INFORMATION SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION (agenda item 6) (continued)

Fifteenth and sixteenth periodic reports of Botswana (CERD/C/495/Add.1)

1. At the invitation of the Chairman, the members of the delegation of Botswana took places at the Committee table.
2. Mr. SKELEMANI (Botswana), introducing his country's joint fifteenth and sixteenth periodic reports (CERD/C/495/Add.1), said that the document had been compiled with input from State institutions and NGOs, and with the assistance of the Committee and UNDP. An Inter-Ministerial Committee on Treaties, Conventions and Protocols had been established to monitor compliance with reporting obligations and ensure the implementation of international instruments.
3. Botswana was a young country that continued to grapple with the issue of nation-building; efforts to promote national unity had thus been given priority over action to encourage cultural diversity. However, his Government was taking measures to promote the culturally prominent area of language. Removing discrimination from age-old law and practice took time. Various sectors had voiced their discontent with the slow progress being made, and measures taken to rectify the situation were described in the report.
4. Clarifying apparent confusion over certain terms contained in the report, he said that citizens of Botswana were referred to as "Motswana" in the singular and "Batswana" in the plural. For the purpose of the report, those terms had been used in the generic sense without denoting ethnic identity or origin. Setswana was the national language spoken by the majority of the population, including non-Tswana, and taught in schools. A policy had been adopted to provide for minority-language teaching in schools, but had yet to be implemented.
5. Access to employment and education was based on merit, not ethnicity. The exclusion of certain groups from economic development had no racial grounds; rather, it was a result of their lifestyle and remoteness. The Government had launched the Remote Area Dwellers Programme to address those populations' special needs. Marginalization affected the Basarwa disproportionately and programmes introduced to improve the situation had yielded few results. The Government continued to seek ways to remedy the problem, but certain sectors had criticized its action, suggesting that the groups concerned should be left to their own devices.
6. In Botswana, no groups had exclusive land rights. Land was not allocated on the basis of ethnic or tribal origin, but on the basis of legislation guaranteeing freedom from discrimination.
7. Turning to the questions from the Country Rapporteur, he explained that the terms "principal" and "minority" tribes were derived from the categorization of persons who qualified to be in the House of Chiefs as established in section 77 of the Constitution prior to its amendment; the amendment had endeavoured to remove discriminatory provisions of that nature (question 1).

8. The Government recognized that sections 3 and 15 of the Constitution were not fully compatible with the Constitution (question 2).
9. The perceived discriminatory nature of the term “dominant tribe” did not translate into discrimination in practice. The current Chieftainship Act made no reference to “paramount chiefs”. Certain discriminatory provisions had been removed from the Constitution, and the Chieftainship Act was currently being reviewed to bring its provisions into line with the constitutional amendments (questions 3 to 5).
10. Bill No. 34 (2004) amending sections 77 to 79 of the Constitution had been the result of extensive national consultations involving the general public, the House of Chiefs and Parliament. It enjoyed the broad support of all communities (question 6).
11. Botswana had over 40 tribes or ethnic groups and several groups of naturalized citizens representing diverse countries of origin. It was thus unrealistic to appoint members of the House of Chiefs on the basis of ethnicity alone. As a result of the introduction of the system of representation based on geographic regions, the representation of any particular ethnic group had been minimized, thus ensuring equal representation of all communities. Further improvements were admittedly necessary (questions 8 to 10).
12. The provisions of Bill No. 34 had been drafted so as to enable the President to determine interests that needed to be catered for (question 11).
13. The report contained detailed information on judicial remedies against the use of discriminatory expressions (question 12).
14. All cases of ill-treatment were investigated, irrespective of the victim’s ethnicity. Widely publicized allegations of ill-treatment of Basarwa had been thoroughly investigated and no evidence of ill-treatment had been found thus far (question 13).
15. Botswana had over 500 customary courts, some of which were located in very small communities. Customary law was unique to a particular tribe or community and was applicable to all persons who were part of that community (question 14).
16. Government employees in Botswana were recruited on the basis of merit, not ethnicity (question 15). He had already addressed questions 16, 17 and 20.
17. The Basarwa had been relocated from the Central Kalahari Game Reserve after a decade of consultations. Allegations that they had been forcibly removed were untrue. The relocation of the people living in the Reserve, most of whom were Basarwa, had made section 14 (3) of the Constitution obsolete. The practice of requiring non-citizens to pay for certain services was not unique to Botswana (questions 18, 19 and 21).
18. Complaints about the conduct of the media were handled by the Media Complaints and Appeals Committee, which was an independent body and did not disclose information on its proceedings to the Government. Efforts by the Government to promote the culture and music of Botswana included the broadcasting of cultural performances (questions 22 to 24).

19. Mr. SICILIANOS, Country Rapporteur, said that since the submission of the previous report, the Committee had maintained a continuous dialogue with the State party on important matters such as constitutional reform. He commended the reporting State for involving NGOs in the preparation of periodic reports and for establishing the Inter-Ministerial Committee on Treaties, Conventions and Protocols.

20. The principle of non-discrimination embodied in section 3 of the Constitution of Botswana did not fully cover all aspects referred to in article 1 of the Convention. Moreover, section 15 of the Constitution contained a long list of exceptions to that principle permitting, inter alia, differential treatment based on race or tribal affiliation in customary law. Such provisions were incompatible with the Convention and international law, which stipulated that domestic legislation could not be invoked to justify departure from international obligations.

21. The main purpose of Bill No. 34 (2004), namely to ensure equal representation of the people of Botswana in the House of Chiefs, was commendable. However, the differences in the nomination of members were discriminatory. While Chiefs of Tswana-speaking tribes continued to be designated in accordance with their custom of permanency at the district level, representatives of non-Tswana Crown Lands were not designated according to the customs of their tribes and did not represent a particular tribe. Although the Bill referred to them as “Dikgosi” (chiefs), they in reality were sub-chiefs. The third category of members were so-called “Dikgosana” (lesser chiefs): they were paid headmen who did not represent tribes but regions. Rather than being elected by the people of the region, they were appointed by other headmen in the presence of the Tswana Chief. Five other members were appointed by the President himself.

22. He deduced from the Chieftainship Act that the term “tribe” only applied to the eight Tswana tribes categorized as such, while non-Tswana groups were referred to as “tribal communities”. Accordingly, only the Tswana were eligible to be Chiefs, while members of other tribal groups could only be sub-chiefs or headmen. Similarly, according to the Tribal Territories Act, only territories belonging to the dominant tribes appeared to be categorized as “tribal territories”.

23. The High Court of Botswana had ruled that the Chieftainship Act was discriminatory and thus incompatible with section 3 (a) of the Constitution, and had ordered that section 2 of the Act should be amended in such a way as to remove the discriminatory provisions and give equal protection and treatment to all tribes. The Court had further stated that any discriminatory provisions contained in other legislation should also be removed.

24. While he had taken note that the amendment of the Chieftainship Act was currently under consideration, thus far no concrete measures had been taken to implement the Court’s decision. Bill No. 34 (2004) modified sections 77 to 79 of the Constitution and had thus no effect on the compatibility between the Chieftainship Act and section 3 of the Constitution.

25. The issue of the relocation of the Basarwa had already been dealt with in the Committee’s previous concluding observations concerning Botswana’s sixth to fourteenth periodic reports (A/57/18, paras. 282-314). He wished to know why the Government had not suspended its programme to relocate the Basarwa from the Central Kalahari Game Reserve, given that a complaint in connection with the matter was pending before the High Court and that

such suspension was needed in order to avoid prejudicing the effectiveness of the remedy provided for by article 6 of the Convention. He requested additional information on reports that the Government had reduced basic services in the Reserve and that there had been instances of ill-treatment by the police.

26. It would be useful to have a full account of the situation of non-Setswana-speaking ethnic groups regarding access to education, which was apparently hampered by the fact that education was provided only in English and Setswana.

27. He would be grateful for clarification of a number of aspects relating to asylum-seekers and refugees. Those included: the fact that the process of determining refugee status could take years, and not 28 days, as stipulated in the Refugee Act; that asylum-seekers, including minors, were thus subject to systematic and protracted detention, which was incompatible with international law standards; that persons recognized as refugees were precluded by law from working in the formal sector of employment and therefore did not benefit from any standard legal safeguards; and that refugees were excluded from the national antiretroviral therapy programme and the prevention of mother-to-child transmission programme.

28. He would be grateful for additional information on reports that antagonism had been expressed towards immigrants from Zimbabwe and that there had been some cases of ill-treatment, mainly by the police. He asked whether it was possible to contest before the courts a presidential decree declaring a foreign resident or visitor to Botswana persona non grata.

29. He had received reports that the complexity of the dual legal system, which consisted of common law and customary law, made it difficult for members of non-Setswana-speaking tribes to gain access to it. There did not appear to be legal aid in Botswana, with one exception, which was the possibility of appointing a pro deo counsel in capital cases. In 1999, the High Court had recognized that the lack of appropriate legal representation in a case involving non-Setswana-speaking defendants had constituted denial of a fair trial. In that connection, he drew the delegation's attention to the Committee's general recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

30. Mr. AVTONOMOV said it was commendable that refugees were entitled to free education and asked what languages were used to impart such education. He requested information on the socio-economic status of the various ethnic groups, including levels of income. Such information would help the Committee to assess the interrelationships between the various ethnic groups and tribes and whether they were developing harmoniously. Although at the time of drafting of the Botswana Constitution in 1965, the concern had been for unity and efforts had been made to play down tribal affiliations, the Government had recognized that the realities prevailing at the time of independence had changed. He asked whether there were any sociological reasons for the tensions that had arisen over the fact that the national media did not broadcast in minority languages and that those languages were not taught in schools.

31. He enquired whether a solution could be found for the problem of the Basarwa without resorting to their relocation. In that particular case, the right to own land should be viewed, not from the contemporary standpoint of ownership, but rather from the standpoint of the Basarwa's traditional place of residence and worship.

32. Mr. AMIR commended the Government for establishing an Inter-Ministerial Committee on Treaties, Conventions and Protocols. Botswana had one of the highest rates of HIV/AIDS in the world; he therefore called on agencies and donors worldwide to come to the assistance of the Government by providing technical and financial resources aimed at eliminating that scourge.

33. Although parliamentarians were elected on the basis of their individual political affiliation, and not their tribal affiliation, a system of proportional representation would seem to be more equitable for the numerous ethnic groups in Botswana. The delegation should comment on the fact that customary courts apparently could not rule on cases involving allegations of racial discrimination at the village level. He asked whether the Office of the Ombudsman had received any complaints of racial discrimination.

34. Mr. THORNBERRY said that although one of the main justifications for the relocation of the Basarwa from the Central Kalahari Game Reserve had been that of wildlife conservation, it was possible, through negotiation, to reconcile the presence of the Basarwa with that of the goal of conservation. He recalled the Committee's general recommendation XXIII on indigenous peoples, and especially paragraph 5, which called on States to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and to take steps to return those lands and territories in cases in which they had been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent. That article was in conformity with article 16 of ILO Convention No. 169. There was no concept of ancestral title in Botswana and no group rights to land. Yet in many other common-law countries there were examples of the principle of native title, which existed without fragmenting the State. Increasingly in international law, it was being recognized that traditional occupation of land gave rise to title to land.

35. The Committee was concerned that the hunter-gatherer culture was under threat. The reporting State should indicate whether that was an accurate perception. While Vision 2016 (report, paras. 98-103) aspired to a society in which all nationals could contribute meaningfully to development, the Government's current development policy appeared to exclude the traditional way of life of the Basarwa people. Echoing its previous concluding observations, therefore, the Committee recommended that negotiations with that community should be resumed and a rights-based approach to development adopted.

36. Mr. PILLAI commended the State party for the participation of NGOs in the preparation of the report, and their cooperation with the Government in promoting local cultures. He would, however, welcome further details of reports that passports had been confiscated from members of the First People of the Kalahari organization, preventing them from attending the current meeting.

37. The delegation should be more specific about the Government's assessment of the effect the shift from hunting on foot, with bows and arrows, to hunting on horseback or in motor vehicles, using traps, spears, dogs and guns, would have on the genuine survival of the traditional hunter-gatherer culture. In that connection, it would be useful to learn whether the application by some Basarwa to return to the Central Kalahari Game Reserve had been based on attachment to their ancestral lands, or whether the facilities the Government had provided elsewhere had proved inadequate.

38. In the light of the Government's admission that the lack of disaggregated data made it impossible to know how many people belonged to each tribe, the delegation should indicate how it planned to make a more accurate assessment of the size of so-called "minority" tribes. That was a matter of some urgency, as it could seriously affect the Government's policy on issues such as language and representation in the House of Chiefs.

39. According to NGO reports, the Bill currently before Parliament proposing amendments to sections 77 to 79 of the Constitution would hinder judicial consideration of the relevant provisions of the Chieftainship Act and the Tribal Territories Act. It would be useful to know whether the two alternatives an NGO had proposed in order to address that situation had been considered.

40. Given that the language of the courts was English, the delegation should indicate whether knowledge of English was uniform among different sectors of the population. If not, how could the Government ensure that all persons had equal access to justice?

41. Ms. DAH commended the State party for its regular reports to the Committee, and for the level of contact it maintained between sessions. The participation of the media and NGOs in preparing the report was also praiseworthy. It would be useful to learn whether the NGOs that had been involved in the reporting process worked solely in the field of application of the Convention or if they had a broader mandate.

42. Further details should be provided on the measures the Government planned to take in order to harmonize domestic legislation with the provisions of the Convention, particularly regarding the definition of racial discrimination.

43. It was difficult to understand why the State party had established a hierarchy of tribes, some of which were principal tribes, and others minority tribes. Those terms themselves seemed highly discriminatory.

44. The plight of the Basarwa people, who appeared to suffer marginalization and discrimination, had been under consideration by the Committee since 2002. Several other international and regional human rights bodies had concluded that the constant displacement and resettlement of those people amounted to discrimination, even if that had not been the Government's intention. The lack of consultation with those affected by the resettlement programmes had served only to exacerbate that state of affairs. Given the changes that had taken place in the region, particularly since the end of the apartheid regime, it would be interesting to have a full account of the Government's vision for the tribal chiefs system, indigenous people and lands. Constitutional amendments should address issues such as the hierarchical nature of the tribal chiefs system, the desire of some groups to have their chiefs attached to lands and greater representation of all peoples. The delegation should indicate whether it planned to ratify ILO Convention No. 169, in line with the recommendation of the African Commission on Human and People's Rights.

45. The delegation should indicate whether the 2004 Act abolishing the previous structure of marital power under common law was sufficient to ensure non-discrimination on grounds of gender. It would be useful to know how the Act had affected proceedings brought before customary law tribunals.

46. It was unclear whether the dual legal system resulted in problems with the administration of justice. Since the common law system had been inherited from both the Dutch and British systems, it would be interesting to learn whether there were any difficulties involved in applying that system. How did the State party facilitate Remote Area Dwellers' access to justice? Had there been any cases in which people had required the services of an interpreter in a common-law court? Had those services been provided by the State? It was difficult to understand why the pluralism applied in the administration of customary law was not also invoked in other institutions.

47. Mr. KJAERUM commended the delegation for the high quality of its report, and said that the initial paragraphs describing the process of preparing the report and interaction with various stakeholders were particularly useful.

48. With regard to the relocation of residents of the Central Kalahari Game Reserve (CKGR), who were mostly of Basarwa origin, he pointed out the discrepancy between the information provided by the Government and other reports, inter alia by the former residents themselves, that the methods used during the relocation process had included force and the destruction of property and infrastructure. He was concerned that the issues involved should be clarified and resolved through a participatory process and not be allowed to escalate in the long run. Legal means should be considered a last resort. The Government should adopt a rights-based approach since existing international human rights instruments maintained the correct balance between the needs of vulnerable groups and those of the society at large. He therefore asked the delegation to explain what strategy the Government envisaged for achieving progress in that regard.

49. He also asked for clarification on the policy for granting hunting licences and the use of weapons in designated reserves. He was interested in knowing what regulations were in force, and how they were applied with respect to the current and former residents of the CKGR.

50. The fact that schoolchildren were not taught in the minority languages had reportedly led to a high dropout and failure rate among the population groups that did not speak Setswana or English. Such reports contradicted the contents of paragraphs 296 and 335 of the periodic report on the right to the free use of minority languages and language policy. He therefore asked the delegation to explain the legislation governing the languages used in schools, and how such legislation was implemented in everyday practice.

51. On the subject of refugees and asylum-seekers, he asked whether refugees were accommodated elsewhere than in the Dukwi refugee camp, and if so, whether social services were provided in the locations concerned. He also suggested that the Government should consider issuing work permits at the same time as it granted residence status to refugees, in order to facilitate their access to the labour market. In addition, he wished to know whether there was a mechanism in place to appeal negative decisions handed down by the Refugee Advisory Committee. He was surprised that there were no statistics on the number of Zimbabweans who had been granted political asylum. Given the political situation in that country, he would have expected the data to show that some Zimbabweans had been granted asylum status in Botswana.

52. He asked whether the Office of the Ombudsman had handled cases relating to the implementation of the Convention, and whether the Government was contemplating the establishment of a national human rights institution, conforming to the Paris Principles, that would fulfil a broader mandate than that of the Ombudsman.

53. Mr. TANG Chengyuan, noting that both customary law and common law were applied in Botswana, asked how the Government handled issues involving a conflict of laws. Which system of law was applied for the resolution of matters in general, and specifically when members of tribes that each practised its individual customary law moved to an area in which other customs were predominant?

54. With reference to expressions of anti-Indian sentiments reportedly aroused by a controversy over the sale of chickens, he asked for further information on the progress of police investigations into that case, and on the enforcement of anti-discrimination policies. Commenting on the composition of the House of Chiefs, he proposed that the Government should consider improving opportunities for small tribes to be represented in Parliament, alongside members of the “principal tribes”.

55. Mr. SKELEMANI (Botswana) said that in a democracy, differences and disagreements between groups would inevitably arise, but his Government attached great importance to maintaining openness to dialogue.

56. As a preliminary response to the questions raised by members of the Committee, he said that up to the fifth grade, instruction was offered to children in their mother tongues in their local areas. However, with its mobile population, Botswana was not at the moment able to guarantee that children would be taught in each individual mother tongue used by the diverse population found, for example, in the capital. His Government was interested in addressing the issue in order to minimize the risk of certain groups being put at a disadvantage, and welcomed international support in that area. He expressed the Government’s willingness to learn from the experience of other countries that had dealt with similar situations.

57. On the issue of Zimbabwean refugees, he explained that the statistics given in the report had not been updated, but he was sure that Zimbabweans had been granted political asylum.

58. With regard to the conflict of laws, he said that customary law was administered by customary courts in the communities and tribes. It was the legal system in the location in question that applied to all residents.

59. No one suffered disadvantages in the dispensation of justice because of language differences; Botswanan courts adhered strictly to the provision of interpretation in court proceedings where necessary.

60. The powers of the Ombudsman under the Ombudsman Act covered the investigation of complaints of injustice and poor administration on the part of government bodies and also human rights violations.

The meeting rose at 5.30 p.m.