

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**  
**(SAHRC)**

**SHADOW REPORT ON SOUTH AFRICA'S**  
**COMPLIANCE WITH THE PROVISIONS OF THE**  
**INTERNATIONAL CONVENTION AGAINST ALL**  
**FORMS OF RACIAL DISCRIMINATION**

**June 2006**

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**ABBREVIATIONS**

<b>CERD</b>	Committee on the Elimination of All Forms of Racial Discrimination
<b>DA</b>	Democratic Alliance
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESR</b>	International Covenant on Economic, Social and Cultural Rights
<b>NACHRET</b>	National Centre for Human Rights Education and Training
<b>NUMSA</b>	National Union of Metal Workers
<b>OBE</b>	Outcome Based Education
<b>PEPUDA</b>	Promotion of Equality and Prevention of Unfair Discrimination Act
<b>SAHRC</b>	South African Human Rights Commission
<b>SANDF</b>	South African National Defence Force
<b>SAPS</b>	South African Police Services
<b>UDHR</b>	Universal Declaration of Human Rights

## **PREFACE**

Racism and racial discrimination has been the defining feature of South African society for much of its history. Race was often the only factor that determined the level and extent of the benefits, privileges and rights an individual would enjoy and it was so pervasive and unyielding in its application that it tracked one virtually from the cradle to the grave. The historic democratic elections of 1994 represented a break from the past and a signal that the creation of a new nation required a new ethos, one that was premised on a shared humanity and a recognition that “South Africa belonged to all who lived in it, united in our diversity”.

Significant progress has been made over the past twelve years in the form of policy, legislative and programmatic interventions and we have gone some way in advancing the ideal of a society committed to substantial equality. At the same time there still remain some formidable challenges and foremost amongst these are dealing with the legacy of racism and racial discrimination that still persists and evidenced by inequality, sharp disparities in capital, skills and opportunities and intolerance. We have also come to learn that changing deep-seated attitudes and challenging harmful stereotypes and assumptions require more than legislative interventions – it requires concerted public education and advocacy, ongoing vigilance and constant dialogue.

South Africa’s return to the International community also means that we are able to discharge our human rights obligations with an understanding of the global context and indeed share and draw from the experience of other societies who face similar challenges. It is to this regard that South Africa’s report to the CERD Committee, this Shadow Report and the Response of the Committee in the form of advice, suggestions and recommendations it may make, take on an added significance.

The South African Human Rights Commission has since its formation some 10 years ago done extensive work in dealing with discrimination and its effects as well as proactively working to advance the imperatives of a nation committed to equality. Accordingly, it is an honour for us to submit this Report as a contribution to the work of the CERD Committee and to the collective efforts of millions of our people who tirelessly work to advance the ideals of a just and caring society.

**Jody Kollapen**  
**Chairperson**  
**SAHRC**

## I INTRODUCTION

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted and opened for signature and ratification by a General Assembly resolution of 21 December 1965.<sup>1</sup> The ICERD entered into force on 4 January 1969, in accordance with its article 19.

The ICERD expressly condemned the policy of apartheid practiced by the then government of the Republic of South Africa by rejecting the “doctrine of superiority based on racial differentiation” as “scientifically false, morally condemnable, socially unjust and dangerous” and stressing that there was “no justification for racial discrimination, in theory or in practice, anywhere”.<sup>2</sup> Accordingly, the apartheid government of South Africa could neither adopt nor ratify such a convention based on the condemnation of its official policy and ideology. No wonder that the ICERD was among the very first international Conventions signed by the first democratically elected government of the Republic of South Africa.

States Parties undertake to comply with its provisions and submit a report to the United Nations (UN) Secretary General for consideration by the Committee on the Elimination of Racial Discrimination (CERD) established by the Convention.<sup>3</sup> Such report should relate to the legislative, judicial, administrative or other administrative measures adopted to give effect to the Convention. It is to be submitted within one year after the entry into force of the Convention for the State concerned,<sup>4</sup> and thereafter every two years and whenever the CERD so requests.<sup>5</sup> South Africa signed the ICERD on 3 October 1994 and only ratified it around five years later, on 9 January 1999. As far as South Africa is concerned, the ICERD entered into force or became binding on 9 January 1999.

In terms of article 9, paragraph 1 of the Convention, South Africa’s initial periodic report was due on 9 January 2000 while the second and the third reports were due in 2002 and 2004 respectively. However, the Government decided to submit all these three reports in one document in 2002. These reports were to be examined during the 68<sup>th</sup> session of the CERD.<sup>6</sup> The examination was, however, postponed and the reports will now be examined during the 69<sup>th</sup> session of the CERD.<sup>7</sup> In line with this examination the CERD approached the South African Human Rights Commission (SAHRC), being a National Human Rights Institution, to comment on the government’s report on South Africa’s compliance with the provisions of the ICERD.

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<sup>1</sup> UN General Assembly Resolution 2106 (XX) of 21 December 1965.

<sup>2</sup> Preamble to the ICERD.

<sup>3</sup> Article 8 of the ICERD

<sup>4</sup> On the thirtieth day following deposit of the instrument of ratification of the Convention with the UN Secretary General.

<sup>5</sup> Article 9 (1) of the ICERD.

<sup>6</sup> 20 February - 10 March 2006.

<sup>7</sup> 31 July - 18 August 2006.

The present report is therefore a shadow report. Its aim is to review the government's report and investigate the extent to which South Africa has complied with its international obligations under the ICERD. It is also to identify the gaps left out by the Government and to provide the Committee with the relevant information on South Africa's compliance with the ICERD in order to assist the State Party in this regard.

Apart from this introduction (Part I), this report will consist of three other parts. The second part will give a brief overview of the work of the South African Human Rights Commission that is relevant to the ICERD. The third part will focus on the government's report, which will be reviewed in the light of articles 1 to 7 of the ICERD. Part IV will concentrate on South Africa's compliance with Article 9. Part V will conclude the report with a number of recommendations to the CERD to help South Africa fully comply with the provisions of the Convention.

## II. THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The end of apartheid in South Africa was marked by the adoption of an interim Constitution,<sup>8</sup> which was later superseded by the 1996 Constitution.<sup>9</sup> The Constitution is the supreme law of the Republic.<sup>10</sup> It provides that "South Africa is one sovereign, democratic state founded on values that include human dignity, the achievement of equality, and the advancement of human rights and freedoms as well as non-racialism and non-sexism and the supremacy of the Constitution and the rule of law."<sup>11</sup> The Constitution, in furtherance of this objective, establishes six institutions to strengthen constitutional democracy in the Republic, namely the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, and the Electoral Commission.<sup>12</sup>

The different institutions supporting constitutional democracy are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.<sup>13</sup> The Constitution provides that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness.<sup>14</sup> No person or organ of state may interfere with their functioning.<sup>15</sup>

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<sup>8</sup> The Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>9</sup> The Constitution of the Republic of South Africa, Act 108 of 1996, hereinafter the Constitution.

<sup>10</sup> Section 2 of the Constitution.

<sup>11</sup> Chapter 2 of the Constitution.

<sup>12</sup> Section 181 (1) of the Constitution..

<sup>13</sup> Section 181 (2) of the Constitution.

<sup>14</sup> Section 181 (3) of the Constitution.

<sup>15</sup> Section 181 (4) of the Constitution.



The South African Human Rights Commission (SAHRC) is one of the state institutions supporting constitutional democracy in South Africa. It has a clear mandate from the Constitution, which provides:

- (1) The Human Rights Commission must-
  - (a) promote respect for human rights and a culture of human rights;
  - (b) promote the protection, development and attainment of human rights; and
  - (c) monitor and assess the observance of human rights in the Republic.
- (2) The Human Rights Commission has the powers, as regulated by national Legislation, necessary to perform its functions, including
  - (a) to investigate and to report on the observance of human rights;
  - (b) to take steps to secure appropriate redress where human rights have been violated;
  - (c) to carry out research; and
  - (d) to educate.
- (3) Each year, the Human Rights Commission must require relevant organs of State to provide the commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
- (4) The Human Rights Commission has the additional powers and functions prescribed by national legislation.”<sup>16</sup>

The mandate to “promote the observance of, respect for and protection of fundamental rights” is central to the work of the SAHRC. At the same time, one of the priorities the Commission identified right from the early years of its existence was to contribute towards realizing the vision of a non racial society. In practice this has meant dealing with both the legacy and ongoing manifestation of racism and racial discrimination in South African society. Notwithstanding the numerous reforms that have taken place since the dismantling of apartheid, present day South Africa remains a divided society, characterized by systemic social, economic and cultural inequalities that run along racial lines. It is not surprising therefore that complaints of racial discrimination initially constituted the majority of cases brought before the Commission. This pattern has gradually changed during the last two years.

The SAHRC gives effect to its mandate to promote the protection of human rights by investigating human rights violations and securing appropriate redress. In addition, the Commission has, since its inception conducted public inquiries into racism in various areas of public life<sup>17</sup>. As a consequence, the

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<sup>16</sup> Section 184 of the Constitution

<sup>17</sup> Investigation into alleged violations of Farm workers’ human rights in Messina, SAHRC 1998; Racial integration in schools, SAHRC 1999; Inquiry into racism in the Media, SAHRC 2000; Inquiry into human rights violations in farming communities, SAHRC 2003;

<sup>18</sup> Para 55 of South Africa’s report.

ommission was best placed to organize a National Conference Against Racism in 2000<sup>18</sup>. The aim was to get South Africans talking together with discernment and empathy to promote better understanding across all divides

that characterize South Africa. The theme of the conference was “Combating racism: A nation in dialogue”. Recommendations coming out of this conference are encapsulated in the South African Millennium Statement and Programme of Action.

As part of South Africa’s commitment to promote racial equality and prohibit racial discrimination, the SAHRC’s constitutional mandate is supplemented by a number of powers and functions under the Promotion of Equality and Prevention of Unfair Discrimination Act. (PEPUDA)

The Act provides for the most comprehensive policy framework for eliminating all forms of racial segregation and other aspects of the social legacy of apartheid.<sup>17</sup> This The Act provides for the most comprehensive policy framework for eliminating all forms of racial segregation and other aspects of the social legacy of apartheid.<sup>18</sup> This Act establishes the specialist Equality Courts to deal with disputes over issues of equality and unfair discrimination. The Promotion of Equality Act even envisages the eventual transformation of all courts into “Equality Courts” for the purposes of its enforcement.<sup>19</sup> This Act is therefore the most important as far as the ICERD is concerned since one of its objects is to integrate the provisions of the latter into domestic law.<sup>20</sup> The SAHRC’s statutory obligations under the Act include:

- Instituting proceedings in an Equality court
- Serving as an alternative forum to resolve equality and discrimination disputes
- Assisting complainants wishing to institute proceedings in terms of the Act
- Conducting investigations into cases and
- Making recommendations as directed by the court regarding persistent contraventions.

On the basis of its mandate to monitor and assess the observance of human rights as well as its mandate to request information on measures relating to the achievement of equality, the SAHRC carried out an investigation on the functioning of Equality Courts in Gauteng province in June 2005. The scope of the investigation covered the number, nature and outcome of cases lodged, awareness of and accessibility of the courts, infrastructure, level of training given to court officials as well as administrative procedures. Among the findings was that contrary to expectation, few cases had been lodged before courts in the two years since they became operational. This finding indicated that a lot still needs to be done to make the courts known by the public. Furthermore, the inadequate training given to court officials and related administrative difficulties contributed to the courts not adequately providing the redress they were intended for.

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<sup>17</sup> *Idem*, pars 56, 88, 95, and 116.

<sup>18</sup> *Idem*, pars 56, 88, 95, and 116.

<sup>19</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, section 16 read with section 31 of the Act.

<sup>20</sup> South Africa’s Report, par 57.

Under general obligations to promote equality, the Act requires the SAHRC to assist the state in developing awareness programmes to promote equality. It further makes provision for government ministers to prepare and implement Equality plans which must be submitted to the SAHRC, to be dealt with in a prescribed manner. The SAHRC is also obliged to include in its annual report an assessment of the extent to which unfair discrimination persists in SA, the effects thereof and recommendations on how best to address the problems.

The promotional section of the Act is not yet operational. This is due to the continuing failure by government to promulgate regulations to give effect to the Act, a matter of grave concern to the SAHRC. To comply fully with Article 2 of ICERD, the Commission recommends that Government makes a firm commitment to ensure that the Act comes into full operation.

The Commission is constitutionally mandated to provide education on human rights. It established the National Centre for Human Rights Education and Training (Nachret) to give effect to this mandate.<sup>21</sup>

Nachret has gained considerable experience in anti-discrimination and equality training over the years. Recent outputs from this aspect of the Commission's work are:

- *Training Programmes and workshops*  
The Commission has developed sectoral anti racism programmes and regularly conducts training for public service officials. Training on diversity and anti-discrimination is also conducted with the non-governmental sector.
- *Public Education and Community Outreach*  
Over the years, the Commission has extended its education and advocacy interventions to rural and marginalized communities. This strategy has proved successful in reaching out to geographically remote parts of the country. The Commission utilizes this strategy when conducting its annual Human Rights Week activities.
- *Institutionalization of Human Rights Education* includes contributions to curriculum development, production of training material, training methodologies and policy documents

In its **General Recommendation XVII**, the CERD recommends that States Parties establish national commissions or other appropriate bodies to *inter alia* promote respect for the enjoyment of human rights without any discrimination, as expressly set out in Article 5 of the Convention, to review government's policy towards protection against racial discrimination, to monitor legislative compliance with the provisions of the Convention, to educate the public about the obligations of States Parties, and to assist the Government in the preparation of reports submitted to the Committee.<sup>22</sup> Where such commissions were already established, the CERD recommended that they should be associated with the preparation of reports and possibly included in governmental delegations.<sup>23</sup>

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<sup>21</sup> See Article 7 of the ICERD; Para 234 and 243 of South Africa's Report

<sup>22</sup> General Recommendation XVII, para 1 (a) - (e).

<sup>23</sup> General Recommendation XVII par 2.

In its **General Recommendation XXVIII**,<sup>24</sup> the CERD also recommends that national human rights institutions assist their respective States to comply with their reporting obligations and closely monitor the follow-up to its concluding observations and recommendations.

The SAHRC feels very much honoured and encouraged that the government's report acknowledges the work done by the Commission<sup>25</sup> to promote equality and combat all forms of racial discrimination in South Africa. It is against the background of its constitutional mandate and its activities that the CERD approached the SAHRC to review or comment on the government's report on the implementation of the ICERD which stresses the right to equality and the prevention of all forms of racial discrimination. However, this is also in line with its General Recommendations XVII and XXVIII.

### **III REVIEW AND COMMENTS ON THE GOVERNMENT'S REPORT ON SOUTH AFRICA'S COMPLIANCE WITH THE PROVISIONS OF THE INTERNATIONAL CONVENTION AGAINST ALL FORMS OF RACIAL DISCRIMINATION (ICERD)**

South Africa's 283-paragraph report starts with an introduction giving the political and historical background of racial discrimination. Such background is critically important to help understand the gravity of the problem and the long way the country has gone from colonialism and apartheid to the new democratic order. The report then provides information relating to South Africa's compliance with the provisions of the ICERD, namely articles 1, 2, 3, 4, 5, 6, and 7 as well as to the challenges of achieving substantive equality and eliminating all forms of racial discrimination in South Africa.

As we understand the CERD's invitation, the SAHRC was not requested to – and will not - duplicate the government's report. Nor will we take responsibility to answer questions arising from the report and fill the gaps left out by the government. The SAHRC will only review and comment on South Africa's report to the CERD. Our "shadow" report will follow almost the same format as the government's report. Accordingly, it will also be done article by article to critically assess South Africa's achievements and efforts to comply with its international obligations under the ICERD. However, comments will also be made on article 9 that deals with States Parties' reporting obligations, on which there is no word in South Africa's report.

The report will first give a brief summary of the contents of the provisions of each article. Reference will also be made to the relevant General Recommendations of the Committee, if any, to help understand the scope of the article. The report will then consider what South Africa has done as a State Party to comply with its provisions and assess South Africa's compliance.

<sup>24</sup> Adopted on 19 March 2002 during the 60<sup>th</sup> session of the CERD.

<sup>25</sup> South Africa's Report, pars 25, 55, 76, 93, 130-131, 234, 243, and 260.

## 1. Article 1 of the Convention: The Concept of Racial Discrimination

### 1.1. Scope of Article 1 of the ICERD and Relevant General Recommendations

**Article 1** of the ICERD deals with the definition of “racial discrimination” and the scope of the application of the Convention. Racial discrimination is defined 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”.<sup>26</sup> Distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens are excluded from the application of the Convention.<sup>27</sup> moreover, State Party’s legislation concerning nationality, citizenship or naturalisation should not discriminate against any particular nationality.<sup>28</sup>

Article 1 also states that “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 to 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.”<sup>29</sup> This provision expressly acknowledges affirmative action, a concept currently encouraged in South Africa. The interpretation of Article 1 of the ICERD was considered in six (6) General Recommendations of the Committee, namely recommendations VIII, IX, XIV, XXIII, XXIV, and XXIX.

**General Recommendation VIII**<sup>30</sup> relates to **identification** with a particular racial or ethnic group (article 1, paragraphs 1 and 4 of the Convention). In this Recommendation, the Committee held the view that if there is no justification to the contrary, such identification should be based upon self-identification by the individual(s) concerned.

**General Recommendation XI**<sup>31</sup> refers to discrimination against **non-citizens** (article 1, paragraphs 2 and 3 of the Convention). It reaffirms

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<sup>26</sup> Article 1 (1) of the ICERD

<sup>27</sup> Article 1 (2) of the ICERD

<sup>28</sup> Article 1 (3) of the ICERD

<sup>29</sup> Article 1 (4) of the ICERD

<sup>30</sup> Adopted on 22 August 1990 during the 38<sup>th</sup> session of the CERD.

<sup>31</sup> Adopted on 19 March 1993 during the 42<sup>nd</sup> session of the CERD.

that although the definition of discrimination does not apply to the differentiation by the State Party between citizens and non-citizens, the latter is nevertheless prevented from discriminating against non-citizens in its legislation concerning nationality, citizenship or naturalisation. It provides that non-citizens are entitled to rights and freedoms as enunciated in the ICERD and in other instruments, especially the Universal Declaration of Human rights (UDHR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Finally, General Recommendation XI invites States Parties to the ICERD to report fully on matters relating to legislation on foreigners and its implementation.

**General Recommendation XIV**<sup>32</sup> also comments on article 1, paragraph 1 of the Convention. It provides that a distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. The CERD observed that a differentiation of treatment would not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, were legitimate and fell within the scope of article 1, paragraph 4 of the Convention.

**General Recommendation XXIII**<sup>33</sup> relates to the situation of **indigenous peoples** that has always been a matter of close attention and concern. The CERD affirms that discrimination against indigenous peoples falls under the scope of the CERD and that all appropriate means should be taken to combat and eliminate such discrimination. Indigenous peoples have been and are still being discriminated against and deprived of their human rights and fundamental freedoms. They lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their cultural and historical identity was and is still jeopardised.<sup>34</sup>

**General Recommendation XXIV**<sup>35</sup> enjoins States Parties to include in their periodic reports relevant information on the **demographic composition of their population** in the light of the provisions of article 1 of the Convention, especially on race, colour, descent and national or ethnic origin different from the majority or from other groups within the population.

**General Recommendation XXIX**<sup>36</sup> was adopted in the aftermaths of the Durban World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. It also refers to article 1, paragraph 1 and condemns discrimination based on descent considered as including race and having a meaning and application which

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<sup>32</sup> Adopted on 22 March 1993 during the 42<sup>nd</sup> session of the CERD.

<sup>33</sup> Adopted on 18 August 1997 during the 51<sup>st</sup> session of the CERD.

<sup>34</sup> *Idem* par 3.

<sup>35</sup> Adopted on 27 August 1999 during the 55<sup>th</sup> session of the CERD.

<sup>36</sup> Adopted on 01 November 2002 during the 61<sup>st</sup> session of the CERD.

complements the other prohibited grounds of discrimination. The CERD recommends States Parties to adopt 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.

## 1.2 Comments on South Africa's compliance with Article 1 of the ICERD

The report contains specific information on South Africa's compliance with article 1.<sup>37</sup> This information relates to the policy framework on the elimination of discrimination,<sup>38</sup> South African concept of unfair discrimination,<sup>39</sup> approach by the courts,<sup>40</sup> protection of non-citizens from racial discrimination,<sup>41</sup> special measures to advance certain categories of persons,<sup>42</sup> some of the indicators of systemic residual racial discrimination,<sup>43</sup> and instances of overt racism.<sup>44</sup>

The conclusion of the report<sup>45</sup> is that through relevant provisions of the **Constitution**, particularly section 9, read with the Founding provisions (Chapter 1) and the entire **Bill of Rights** (Chapter II), the **Promotion of Equality and Prevention of Unfair Discrimination Act**, the **Employment Equity Act** and the **Preferential Procurement Policy Act**, South Africa has a comprehensive national policy for the elimination of all forms of racial discrimination. This constitutional and legislative framework was complemented by the **White Papers on Transforming the Public Service, Affirmative Action** and the **Reconstruction and Development Programme**. The framework also provides for remedies and specialist dispute resolution mechanisms to expedite enforcement of the rights protected in the Convention and the relevant domestic laws. Accordingly, the government's report suggests that South Africa has complied with its obligations under article 1 of the Convention.

The SAHRC commends the democratic government of the Republic of South Africa for the comprehensive constitutional, legislative, and administrative framework that has been put in place and a number of other measures and initiatives to combat all forms of racial discrimination. South Africa has a comprehensive national policy for the elimination of racial discrimination in all its forms. Our new government has demonstrated that it is committed to combating all forms of racial discrimination. As a result, South Africa has gone a long way from the fragmented and racially divided society it used to be

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<sup>37</sup> South Africa's Report, pars 30-57.

<sup>38</sup> Idem pars 30-33.

<sup>39</sup> Idem par 34.

<sup>40</sup> Idem pars 35-36 .

<sup>41</sup> Idem pars 37-40.

<sup>42</sup> Idem pars 41-44.

<sup>43</sup> Idem pars 45-52.

<sup>44</sup> Idem pars 53-55.

<sup>45</sup> Idem pars 56-57.

under apartheid to one in which human rights are recognised for all people without any discrimination. However, as it appears from the government's report itself and from a number of questions raised by Mr Raghavan Vasudevan Pillai, the CERD Rapporteur on his first comments on this report,<sup>46</sup> despite what South Africa has achieved, the State Party still has to comply fully with the provisions of Article 1 of the ICERD as well as the relevant General Recommendations of the CERD.

Regrettably, as also pointed out by the CERD Rapporteur<sup>47</sup> and in ignorance of **General Recommendation XXIV**, South Africa's report is silent on the demographic composition of the population. In a country, which was singled out by the CERD for its policy of racial segregation or apartheid, South Africa's report should have provided detailed information on the demographic composition of its population, including the number and demographic weight of the different ethnic or national communities. Descent-based groups or communities referred to in General Recommendation XXIX could also be identified in order to understand the extent to which they were marginalised under apartheid and are still discriminated against. The Report could also contain information on languages spoken, which have a bearing on ethnicity, minorities, immigrants, refugees and asylum seekers.

**General Recommendation XI** requests States Parties to report fully on matters relating to legislation on foreigners and its implementation. As stressed earlier, South Africa's report contains information on the protection of non-citizens.<sup>48</sup> However, this information is incomplete. It is here under Article 1 of the ICERD and not under Article 5,<sup>49</sup> that South Africa should provide information not only on legislation on foreigners (immigrants, asylum seekers and refugees) but also on its effective implementation to show how the State has complied with its obligations under the ICERD concerning non-discrimination against foreigners and respect for their rights as enshrined in human rights instruments such as the UDHR, the ICCPR and the ICESCR. The report stops short of commenting on this.

The ICERD prohibits and condemns "all forms of discrimination" but allows "differentiation" which should not be considered discriminatory as long as it complies with the purpose of the Convention and a number of criteria. South Africa admits that its use of terminology is slightly different from that which underpins the Convention since its legislation penalises "unfair discrimination" only.<sup>50</sup> On the other hand,

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<sup>46</sup> Questions put by the CERD Rapporteur Mr Raghavan Vasudevan Pillai in Connection with the consideration of the First to Third Reports of South Africa (CERD/C/461/Add.3), pars 1-4. Hereinafter Questions.

<sup>47</sup> *Idem* par 1

<sup>48</sup> South Africa's Report, pars 37-40.

<sup>49</sup> *Idem* pars 150-153.

<sup>50</sup> South Africa's Report par 34; Sect 9(4)-(5) of the Constitution.



affirmative action<sup>51</sup> seems to correspond to special measures provided for in the ICERD.<sup>52</sup>

In response to Rapporteur Pillai's question on "fair discrimination" associated with equality,<sup>53</sup> the government will certainly state that South Africa's approach to equality and prohibition of unfair discrimination is based on the Constitution and in line with the approach of the Constitutional Court to equality. In *Minister of Finance v Van Heerden*,<sup>54</sup> it was held that the approach to equality in section 9 of the Constitution "goes beyond formal equality and non-discrimination which requires identical treatment, whatever the starting point or impact."<sup>55</sup> The Constitutional Court developed a substantive equality approach which requires the equality right to be considered in its social context, including the recognition of past and existing social, political and economic disparities.<sup>56</sup> In this regard, the focus of substantive equality is the impact of consequences of the discriminatory measures rather than whether there is similar treatment between similarly situated groups of people. In *President of the RSA v Hugo*,<sup>57</sup> the court held:

"We need therefore to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."<sup>58</sup>

Flowing from this is the recognition that not all distinctions or differentiations are equally problematic.<sup>59</sup> In *Prinsloo v Van Der Linde*,<sup>60</sup> the Court observed that non-identical treatment of different groups is sometimes required to address the differences between them.

In *Harksen v Lane*,<sup>61</sup> the Court defined the criteria in terms of which differentiation could be distinguished from unfair discrimination. It was pointed out that in order to determine whether discrimination is unfair, a court should examine a number of factors, including the

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<sup>51</sup> Section 9(2) of the Constitution.

<sup>52</sup> Article 1 (4) of the ICERD.

<sup>53</sup> Questions par 2.

<sup>54</sup> 2004 (11) BCLR 1125 (CC), 2004 (6) SA.

<sup>55</sup> *Idem* par 26.

<sup>56</sup> See the arguments advanced in Murray C & O'Sullivan M, *Acta Juridica* 2005 (2005), 132.

<sup>57</sup> 1997 (6) BCLR 708 (CC).

<sup>58</sup> *Idem* par 41.

<sup>59</sup> Murray & O'Sullivan op cit 133.

<sup>60</sup> 1997 (6) BCLR 759 (CC) par 24

<sup>61</sup> 1997 (11) BCLR 1489 (CC).

situation of the complainants in society and whether they have suffered from past patterns of discrimination. Other considerations include the nature of the impugned provision and the purpose sought to be achieved by it, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity.<sup>62</sup>

The CERD Rapporteur rightly suggests that South Africa may consider bringing its prevention of discrimination (unfair) in line with that contained in article 1 of the ICERD which condemns all forms of discrimination implicitly considered “unfair”.<sup>63</sup> South Africa may well consider such a suggestion since the definition of discrimination in article 1 of the ICERD does not exclude special or affirmative action measures.<sup>64</sup> However, this would require an amendment of the Constitution, especially its section 9. One may well retain it since in the main, the aim is the same. The issue of affirmative action is also discussed under article 2 of the ICERD.

Recently, one of the South African trade unions, *Solidarity*, has become very critical about affirmative action. On 13 June 2006, *Solidarity* confirmed that they would request President Thabo Mbeki to call a referendum on whether young people should be exempted from affirmative action. According to *Solidarity*, affirmative action can only succeed if it redresses historical discrimination without creating new forms of discrimination. Another trade union, the *National Union of Metalworkers (NUMSA)* held that affirmative action should be maintained since poor “black children born in squatter camp were less privileged than white children.” “What of white children born in a squatter camp?”, asked *Solidarity* who maintain that the determining factor in the implementation should be socio-economic circumstances rather than race. The CERD may request more information from South Africa during the consideration of its periodic report.

South Africa also retains the colonial and apartheid classification of the population into two groups, namely the Black (comprising Africans, Indians and Coloureds including indigenous people like the Khoi and San groups) and White people.<sup>65</sup> This does not seem to be in line with **General Recommendation VIII** requesting that if no justification to the contrary, “such identification of the population should be based upon self-identification by the individual(s) concerned”. Such forced identification of the indigenous people tends to conceal the fact that they were and still remain the first group to be discriminated against and whose members should yet be the first beneficiaries of affirmative action measures.

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<sup>62</sup> *Idem*

<sup>63</sup> Questions par 2

<sup>64</sup> See article 1(4) of the ICERD read with Article 2 (2).

<sup>65</sup> See generally South Africa’s Report paras 3, 11 where a historical account of race classification in South Africa is given

The situation of indigenous people in South Africa is critical in that it prompted Mr Rodolfo Stavenhagen, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to pay an official visit to South Africa from 28 July to 8 August 2005, at the invitation of the Government of South Africa.<sup>66</sup> The fact that such a visit was official and at the invitation of the Government of South Africa is evidence of the Government's recognition of the discrimination against indigenous people and its willingness to combat all forms of discrimination against them. The Special Rapporteur found that the Khoi and San groups, the Nama and the Griqua continue to be discriminated against. The findings of a SAHRC Inquiry<sup>67</sup> into Human Rights violations in the Khomani San community in the Northern Cape province pointed to the need for drastic action by all spheres of government and by all stakeholders if the human rights and sustainable development of this community were to be upheld.

The Griqua communities of the Western and Northern Cape, who are also present in other parts of the country, lost their cultural identity as part of the Khoi-San people, having been unfairly included during apartheid in the amorphous category of "Coloured", which they contest. He therefore recommended "Actions should be undertaken towards the removal from all legitimate claimants to indigenous identity of the stigma attached to having been classified as "Coloured" during the apartheid regime".<sup>68</sup>

On the other hand, the following excerpts from South Africa's report suggest that the adoption of a constitutional, legislative, and administrative framework was not enough to combat discrimination and the government has not indeed complied fully with the provisions of the ICERD under Article 1:

- The major challenge to be confronted in compliance with the Convention is the issue of residual discrimination that is predominantly de facto and indirect in nature.<sup>69</sup>
- However, residual discrimination, manifest in the practices of the police and home affairs reveals that non-nationals of African origin are more likely to be subjected to harassment than non-nationals of other continents particularly, those of European descent.<sup>70</sup>
- The representation of black people in ownership, management, control and key professional positions within the private sector, has not improved dramatically since the process of democratisation began

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<sup>66</sup> See Report of the Special Rapporteur on the Situation of human rights and fundamental freedoms of Indigenous people. Addendum Mission to South Africa E/CN.4/2006/78/Add.2 15 December 2005 Commission on Human Rights Sixty-second session Item 15 of the provisional agenda. Hereinafter Special Rapporteur.

<sup>67</sup> See Report on the Inquiry into Human Rights Violations in the Khomani San Community, SAHRC, November 2004

<sup>68</sup> *Idem.*

<sup>69</sup> South Africa's Report par 33.

<sup>70</sup> *Idem* par 40.

- Black people and African people in particular are over-represented in unemployment and marginal employment statistics.<sup>71</sup>
- The Poverty Report confirmed South Africa's status as one of the most unequal societies in the world and that this inequality has deep race and gender dimensions.<sup>72</sup>
  - The education system, one of the cornerstones of the apartheid system retains many of the racial distortions that were institutionalised by apartheid.<sup>73</sup>
  - On a day to day basis, facially neutral provisions relating to access to bank loans, to housing and to quality education, including tertiary education, discriminate on the ground of race by feeding on and perpetuating the systemic patterns of racial inequality as result of privilege and exclusion under colonialism and apartheid.<sup>74</sup>
  - The attitudinal issues relating to racial supremacy and inferiority have not disappeared overnight from the South African social landscape with the introduction of South Africa's progressive and non-racial Constitution.<sup>75</sup>
  - In rural towns and particularly in the farms and in some of the conservative companies workers and passers-by are subjected to direct, brutal and cruel forms of racism. Newspapers abound on murdered farm labourers or brutally assaulted and verbally abused people.<sup>76</sup>

The government's report reveals that "systemic residual discrimination" and even "instances of overt discrimination" are still common in South Africa.<sup>77</sup>

Under Article 1, South Africa's report does not provide enough information on the discrimination against non-citizens, namely immigrants, asylum seekers and refugees who continue to suffer racism, racial discrimination, xenophobia and related intolerance and the measures to combat such discrimination and implement the Durban Statement and Programme of action agreed upon during the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in South Africa. A number of studies have demonstrated that "South Africa is a highly xenophobic society, which out of fear of foreigners, does not naturally value the human rights of non-nationals".<sup>78</sup>

A SAHRC survey found out that South Africans are generally uncomfortable with the presence of black non-nationals in the country.<sup>79</sup> Around 70% of Johannesburg South African residents identify immigrants as the group committing most crimes in the area.<sup>80</sup> Even government officials tend to paint

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<sup>71</sup> Idem par 45.

<sup>72</sup> Idem par 46.

<sup>73</sup> Idem par 49.

<sup>74</sup> Idem par 51.

<sup>75</sup> South Africa's Report par 52.

<sup>76</sup> Idem par 53.

<sup>77</sup> Idem pars 45-55.

<sup>78</sup> Dodson B *et al* SAMP Migration Policy Series, 2002, No 23, 1.

<sup>79</sup> SAHRC, *Background Document for Hearings on Xenophobia* (2004), 3.

<sup>80</sup> See Legget, T *Rainbow Tenement: Crime and Policing in inner Johannesburg*, Monograph No 78, Institute for Security Studies, Pretoria; Landau B, "Democracy and discrimination: Black African

a picture of non-nationals as the source of crime in South Africa. In 1997, the then Defence Minister, Joe Modise,<sup>81</sup> remarked:

“[As for crime, the army is helping the police get rid of crime and violence in the country. However, what can we do? We have one million illegal immigrants in our country who commit crimes and who are mistaken by some people for South Africans citizens. That is the real problem.”

Criminals along with police have learned to exploit foreigners’ vulnerability. As a result, foreign nationals are far less likely to feel secure on the streets, even during the day. In Johannesburg, 81% of foreigners felt unsafe compared to 38% of South Africans.<sup>82</sup>

The integration of black non-nationals could have been facilitated by the Immigration Act 2002 which repealed the offensive Aliens Control Act. Instead, the 2002 Immigration Act effectively authorises Department of Home Affairs officials to conduct searches, arrests and deportations without reference to other constitutional or legal protections.<sup>83</sup> The Department, owing to inadequacy of personnel to effect this resorts to the use of the South African Police Service (SAPS) and sometimes the South African National Defence Force (SANDF) to make arrests.

SAPS has exploited this law to legalise what would otherwise be illegal raids on buildings inhabited by suspected criminals and, potentially, illegal immigrants often conducted at night and away from oversight. Police officers force entry, demand identity documents, and arrest both non-nationals and South Africans without respect for normal legal provisions. In September 2003, for example, a joint operation launched by the City of Johannesburg and the Department of Home Affairs deployed helicopters and almost 1,000 private security officers in a thinly disguised effort to rid the city of unwanted foreigners in the name of crime prevention and urban renewal.<sup>84</sup>

Non-nationals may not be entitled to political rights, but the State must protect their rights as entrenched in the Constitution and international human rights instruments. Non-nationals include asylum seekers and refugees who are covered by the Refugee Act of 1998. Due to significant delays, many people wait more than the stipulated six months to have a decision on their case. In a recent national survey, 27% of asylum applicants who had applied before April 2000 were still waiting for their status to be determined by Home Affairs. Over half of the applicants have waited for more than four years.<sup>85</sup> The long delays have created opportunities for abuse.

The Refugee Act provides that refugees are entitled to the same rights as citizens, except for the right to vote. These rights are not respected by the

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Migrants in South Africa”, *Global Migration Perspectives*, No 5 (2004) 45.

<sup>81</sup> Cited in Human Rights Watch Report 1998, 124.

<sup>82</sup> Legget op cit 54.

<sup>83</sup> See section 3 (Powers of Department) in Immigration Act (2002)

<sup>84</sup> SAHRC op cit 28.

<sup>85</sup> Idem 16.

general public or even by some state officials. Refugees and Asylum seekers are not given any special privileges or assistance by the government.<sup>86</sup> Asylum seekers have limited access to state services and may not access emergency medical treatment unless they are able to pay additional fees. Until recently, asylum seekers were not allowed to work or study before they were granted refugee status. Such restrictions presented significant problems considering the long duration of status determination and the lack of assistance. In such instances, almost any act conducted to ensure applicants' survival - working or studying - was criminalised.

Under law, refugees are entitled to have access to the same basic health care as South African citizens, although other migrants are required to pay an additional fee of R1,800.00.<sup>87</sup> Section 27 (3) of the South African Constitution clearly states, however, that no one - regardless of nationality, documentation, or residence status - may be refused emergency medical treatment.

The inability or unwillingness of many hospital staff members to distinguish between different classes of migrants, coupled with xenophobia, often means migrants including refugees are denied access to basic health services or that they are all charged the fees meant for foreigners.<sup>88</sup> In one particular dramatic incident, a pregnant Somali woman was refused service on the grounds that (a) delivery, unless problematic, did not constitute an emergency and (b), she could not pay the additional fee levied on foreigners (which as a refugee she was not required to pay). As a result she ultimately delivered the child on the pavement outside the hospital.<sup>89</sup>

A SAHRC report also noted that refugees and asylum seekers were excluded from housing policy:

“Despite the fact that South Africa acceded to the 1951 Convention Relating to the Status of Refugees, none of the State's measures by the national government and the respective provincial departments make provision to provide transitional housing for refugees and asylum seekers... The Constitution requires that everyone be treated with care and concern irrespective of their country of origin or background, as long as they are within the Republic.”<sup>90</sup>

SAHRC's report also noted that asylum seekers and refugees were excluded from social security despite recognition by the South African Constitution<sup>91</sup> that “everyone” has the right to have access to sufficient food and water and to social security if they are unable to support themselves and their dependants. South Africa's social assistance programme restricts grants to South African citizens or permanent residents. Children and disabled refugees face greater

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<sup>86</sup> Idem 14.

<sup>87</sup> Section 27 (b) & (g) of the Refugees Act 130 of 1998.

<sup>88</sup> In terms of section 27 (g) of the Refugees Act, refugees have a legal right not to be charged health care rates applicable to foreigners.

<sup>89</sup> SAHRC op cit 26.

<sup>90</sup> SAHRC 4<sup>th</sup> *Socio-Economic Rights Report* (2000/2002).

<sup>91</sup> Section 27 (1) (b) of the Constitution.

risks and yet few have been able to access social assistance. Newly arrived asylum seekers fleeing war torn countries are often traumatised and impoverished and without family support to re-establish themselves.<sup>92</sup>

In view of the above, it may be suggested to the CERD to request more information from South Africa on how the country intends to deal with these challenges, to eradicate all forms of discrimination against citizens and non-citizens in order to comply with the provisions of Article 1 of the ICERD fully.

## **2. Article 2 of the Convention: Measures to eliminate discrimination and promote equality**

### **2.1 Scope of Article 2 of the ICERD and Relevant General Recommendations**

Under **Article 2** of the Convention, States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and to this end:

- to engage in no act or practice of racial discrimination, and ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;<sup>93</sup>
- not to sponsor, defend or support racial discrimination by any persons or organisations;<sup>94</sup>
- to take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations creating or perpetuating racial discrimination wherever it exists;<sup>95</sup>
- to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, groups or organisations;<sup>96</sup>
- to encourage, where appropriate, integrationist multi-racial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.<sup>97</sup>

States Parties also commit themselves, when the circumstances so warrant, to taking in the economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain

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<sup>92</sup> SAHRC op cit 22.

<sup>93</sup> Article 2 (1) (a) of the ICERD.

<sup>94</sup> Article 2 (1) (b) of the ICERD.

<sup>95</sup> Article 2 (1) (c) of the ICERD.

<sup>96</sup> Article 2 (1) (d) of the ICERD.

<sup>97</sup> Article 2 (1) (e) of the ICERD.

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 should not 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.<sup>98</sup>

The CERD found such article to be of an easy understanding since no General Recommendation has so far been made relating to its interpretation.

## 2.2 Comments on South Africa's Compliance with Article 2 of the ICERD

South Africa's report on compliance with the provisions of article 2 relates to "Measures to eliminate discrimination and promote equality", which include state condemnation and commitment to the elimination of racial discrimination,<sup>99</sup> state commitment not to engage in racial discrimination,<sup>100</sup> addressing the gap between policy and reality,<sup>101</sup> elimination of state sponsored or supported racial discrimination by persons or organisations,<sup>102</sup> review of governmental policies and laws to eliminate racial discrimination,<sup>103</sup> measures to eliminate discrimination by private persons, groups or organisations,<sup>104</sup> measures to encourage racial integration and to discourage segregation,<sup>105</sup> positive measures to promote full and equal enjoyment of all human rights by all,<sup>106</sup> equality and anti-discrimination jurisprudence, which has not, however, been consistent.<sup>107</sup>

As for the implementation of article 2 of the ICERD, South Africa's commitment to the elimination of racial discrimination cannot be questioned. A framework policy was adopted, which consists of the Constitution and a number of Acts of Parliament. The Preamble to the **Constitution** provides that the people of South Africa commit themselves to establishing a Republic founded *inter alia* on the values of non-racialism and non-sexism and to healing the divisions of the past. The **Bill of Rights** protects equality and prohibits discrimination.

Acts of Parliament aimed at eliminating racial discrimination include the **Promotion of Equality Act**, the **Employment Equity Act**, the **South African Schools Act**,<sup>108</sup> the **Film and Publications Act**,<sup>109</sup> the **Recognition**

<sup>98</sup> Article 2 (2) of the ICERD

<sup>99</sup> South Africa's Report pars 58-60.

<sup>100</sup> *Idem* pars 61-63.

<sup>101</sup> *Idem* pars 64-69.

<sup>102</sup> *Idem* pars 70-76.

<sup>103</sup> *Idem* pars 77- 78.

<sup>104</sup> *Idem* pars 79- 85.

<sup>105</sup> *Idem* pars 86-93.

<sup>106</sup> *Idem* pars 94-105.

<sup>107</sup> South Africa's Report pars 106-109. See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA); *Eskom v Heimstra No and Others* (1999) 20 ILJ 2362 (LC); *Correctional Services v Van Vuureen* (1999) 20 ILJ 2297 (LAC); *Mthembu v Letsela* 2000 (3) SA 867 (SCA); *Public servants Association of South Africa and Others v Minister of Justice and Others* 1997 (3) SA 925.

<sup>108</sup> Act 84 of 1996.



**of Customary Marriages Act,<sup>110</sup> the National Water Act,<sup>111</sup> the Divorce Courts Amendments Act,<sup>112</sup> the Basic Conditions of Employment Act,<sup>113</sup> the Labour Relations Act,<sup>114</sup> Preferential Procurement Policy Framework Act, the Pan South African Language Board Act,<sup>115</sup> the Culture Promotion Amendment Act,<sup>116</sup> and the National Empowerment Fund Act.<sup>117</sup>**

To respond to Rapporteur Pillai's question on the implementation of article 2 of the ICERD,<sup>118</sup> South Africa may easily demonstrate that "affirmative action" measures already referred to in our review of article 1, are consistent with the Convention since they aim at guaranteeing the full and equal enjoyment of human rights and fundamental freedoms to certain racial groups or individuals belonging to them who suffered discrimination in the past. These measures aim at achieving substantive equality, not a formal one and do not entail as a consequence the maintenance of unequal or separate rights for different groups. They must be reviewed periodically.

However, South Africa's report on compliance with its obligations under article 2 of the ICERD also contains the following statements:

- There is still a gap between policy and practice when it comes to de facto equality with regard to the enjoyment of government services without racial discrimination.<sup>119</sup>
- Black users of the justice system also frequently complain about racist attitudes of service providers, including the police, magistrates, judges and lawyers in the private profession.<sup>120</sup>
- The military is another area where the commitment of the state against racism has not fully translated into the reality of a racism free environment.<sup>121</sup>
- Generally, there are still significant gaps between policy and practice. For example, complaints regarding police collusion in cases of the brutal racist acts by farmers persist...Racially exclusive schools persist and some of the racially integrated schools continue to propagate in subtle manner, ideas of racial superiority and inferiority...The challenge for government over the next few years is to reduce the gap between policy and practice.<sup>122</sup>

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<sup>109</sup> Act 65 of 1996.

<sup>110</sup> Act 120 of 1998.

<sup>111</sup> Act 36 of 1998.

<sup>112</sup> Act 65 of 1997.

<sup>113</sup> Act 75 of 1997.

<sup>114</sup> Act 66 of 1995.

<sup>115</sup> Act 59 of 1995.

<sup>116</sup> Act 59 of 1998.

<sup>117</sup> Act 105 of 1998.

<sup>118</sup> Questions par 5.

<sup>119</sup> South Africa's Report par 64.

<sup>120</sup> Idem par 65.

<sup>121</sup> Idem par 66.

<sup>122</sup> Idem par 77.

- There are instances here and there, particularly in the sector of rental of accommodation, where overt forms of exclusion of black people persist.<sup>123</sup>
- However, de facto segregation persists on a significant scale in all spheres of South African life (judicial system, sports...) <sup>124</sup>
- Measures that promote racial integration have also dealt, albeit in a limited sense, with efforts to integrate immigrants, including refugees of African origin in the country...While the law no longer discriminates on a racial ground, residual discriminatory attitudes and behaviour persists among ordinary citizens and law enforcement agents. <sup>125</sup>
- Success of the training programmes for law enforcement officers has been limited due to limited resources that have made it impossible to subject all service providers to extensive training and the fact that the process of attitudinal changes takes a long time. <sup>126</sup>

It is true that black people continue to suffer discrimination as a legacy of apartheid, but Rapporteur Pillai is quite right to ask the question about other ethnic people.<sup>127</sup> As pointed out earlier, black people are also perpetrators of discrimination, particularly against the indigenous people of South Africa (Khoi and San groups) and against non-nationals. Moreover, some members of the white segment of South African society may and have also been victims of discrimination. Unfortunately, South Africa's report does not contain information about this discrimination against other groups. All this suggests that the legacy of apartheid cannot disappear overnight and despite what has been achieved South Africa still has a long way to go in eliminating discrimination and promoting equality for all. Since the government admits the failures and the challenges, the CERD may request information on effective and concrete measures South Africa has taken or intends to take in order to eliminate discrimination and comply with its obligations under Article 2 of the ICERD.

### **3 Article 3 of the Convention: Prevention, prohibition and eradication of racial discrimination and apartheid**

#### **3.1 Scope of Article 3 of the ICERD and Relevant General Recommendations**

In terms of **Article 3** of the Convention, States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature under their jurisdiction. This article specifically refers to the situation in South Africa and in some other Southern African countries. The CERD reaffirmed this international

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<sup>123</sup> Idem par 86.

<sup>124</sup> Idem par 87.

<sup>125</sup> Idem par 93.

<sup>126</sup> Idem par 102.

<sup>127</sup> Questions par 6.

condemnation of racial segregation and apartheid in its **General Recommendations III**<sup>128</sup> and **XIX**.<sup>129</sup>

General Recommendation XIX includes the condemnation of all forms of racial segregation in all countries and the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in any State Party or imposed by force outside the State. The Committee also recognises that segregation could also be an unintended by-product of the actions of private persons, without any initiative or direct involvement by the public authorities. States Parties were requested to monitor all trends, which could give rise to racial discrimination, to work for the eradication of any negative consequences that ensue, and to describe such action in their periodic reports. The report does not seem to contain full information on this.

### 3.1 Comments on South Africa's Compliance with Article 3 of the ICERD

South Africa's report contains information on efforts undertaken and measures taken by the democratic government to prevent, prohibit and eradicate racial segregation and apartheid.<sup>130</sup> Apartheid was formally abolished and virtually all laws enacted to enforce it repealed or replaced with new ones that promote equality without any discrimination. The report abundantly refers to the **Constitution** and its **Bill of Rights**, to the **Promotion of Equality and Prevention of Unfair Discrimination Act**, the **Employment Equity Act**, and the **Preferential Procurement Framework Act** as part of the framework to eliminate segregation and the rest of the social policy of apartheid.<sup>131</sup> However, "private apartheid" and the apartheid legacy persist.<sup>132</sup>

In its **General Recommendation IX**, the Committee observed that "in many cities residential patterns are influenced by group's differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds".

The social legacy of apartheid in South Africa also includes residual attitudes relating to white supremacy and black inferiority that persist among both the victims and perpetrators of racism.<sup>133</sup>

In its report, the government admitted the following:

"The key challenge facing South Africa today with regard to compliance with article 3 is the persistence of systemic socio-economic and cultural

<sup>128</sup> Adopted on 24 August 1973 during the 8<sup>th</sup> session of the CERD.

<sup>129</sup> Adopted on 18 August 1995 during the 47<sup>th</sup> session of the CERD.

<sup>130</sup> South Africa's Report pars 110-116.

<sup>131</sup> Idem par 116.

<sup>132</sup> Idem par 79.

<sup>133</sup> Idem par 115.

patterns of racial inequality and accumulated disadvantages on the one hand and accumulated social power on the other. Not surprisingly, these patterns resemble the patterns of legalised injustices during apartheid and manifest themselves in the control of the South African economy, employment opportunities, ownership of property including land, access to finance, and social services such as health, education, housing, nutrition, clean water, energy and justice related services.”<sup>134</sup>

These residential patterns are not highlighted in the report.

During the forthcoming consideration of South Africa’s periodic report, the CERD may request more information on the specific measures that the State Party will consider to tackle this challenge and bring *de facto* racial segregation and apartheid to an end.<sup>135</sup>

#### **4 Article 4 of the Convention: Measures to eliminate all propaganda and organisations based on theories of racial superiority**

##### **4.1 Scope of Article 4 of the ICERD and Relevant General Recommendations**

Article 4 provides:

“States Parties should condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this convention, inter alia

- (a) Shall declare an offence punishable by law dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

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<sup>134</sup> Idem par 114.

<sup>135</sup> Questions par 7.

The provisions of article 4 were considered in General Recommendations I, VII and XV.

In **General Recommendation I**,<sup>136</sup> the CERD recommended that States Parties whose legislation was deficient in this respect should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of article 4 (a) and (b) of the Convention, with regard to acts of racial discrimination.

In terms of **General Recommendation VII**,<sup>137</sup> States Parties should enact and implement legislation combating racial discrimination and provide in their periodic reports more information on specific cases dealing with the implementation of article 4 and concerning decisions taken by the competent national tribunals and other State's institutions regarding acts of racial discrimination and in particular those offences dealt with in article 4 (a) and (b).

**General Recommendation XV**,<sup>138</sup> recalled General Recommendation VII in which the Committee explained that the provisions of article 4 were of a mandatory character and States Parties had not only to enact appropriate legislation but also ensure that it was effectively enforced. Such legislation should actually criminalise and penalise four categories of misconduct: (i) dissemination of ideas based upon racial superiority and hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.

#### **4.2 Comments on South Africa's Compliance with Article 4 of the ICERD**

South Africa's report contains information relating to measures taken to eliminate propaganda and organisations based on theories of racial superiority.<sup>139</sup> The new democratic government has taken concrete legislative, judicial and other policy measures to give effect to State's obligations under Article 4 of the ICERD.

The Constitution provides that freedom of expression does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, that constitutes incitement to cause harm.<sup>140</sup> These constitutional provisions are reinforced by the Promotion of Equality and the Prevention of Unfair Discrimination Act,<sup>141</sup> the Regulation of Gatherings Act,<sup>142</sup> and

<sup>136</sup> Adopted on 25 February 1972 during the 5<sup>th</sup> session of the CERD.

<sup>137</sup> Adopted on 2, 3 August 1985 during the 32<sup>nd</sup> session of the CERD.

<sup>138</sup> Adopted on 23 March 1993 during the 42<sup>nd</sup> session of the CERD.

<sup>139</sup> South Africa's Report pars 117-131.

<sup>140</sup> Section 16(2) of the Constitution.

<sup>141</sup> Section 7 of the Promotion of Equality Act.

<sup>142</sup> Act 205 of 1993.

the Films and Publications Act.<sup>143</sup> In essence, these provisions comply with article 4 of the ICERD<sup>144</sup> although no direct language may have been used to declare it an “offence” all dissemination of ideas based on racial superiority or hatred, all acts of violence or incitement to racial discrimination, assistance to racist activities, including their financing,<sup>145</sup> and despite that organisations which promote and incite racial discrimination are not formally declared illegal and prohibited.<sup>146</sup>

There is no doubt that the constitutional, legislative and judicial framework exists for the implementation of the provisions of article 4 of the ICERD. South Africa also adopted “A South African Millennium Statement on Racism and Programme of Action during a national conference on racism held in 2000. With the promulgation of the Promotion of Equality and the Prevention of Unfair Discrimination Act, the criminal justice was equipped to prevent and punish racist offences. However, between policy and practice, there is still a huge gap.

Rapporteur Pillai is quite right to indicate that South Africa’s report unfortunately does not provide statistical data on investigations, prosecutions and convictions of perpetrators of acts of racial discrimination and their victims.<sup>147</sup> The report does not contain information on the South African jurisprudence on racist hate speech as it does on equality and prevention of unfair discrimination.<sup>148</sup> On the other hand, there is no information on how the State Party acted against public authorities or institutions, national or local, which directly or indirectly promoted or incited racial discrimination. Statements such as the one by Minister Modise referred to earlier was not disapproved of by the Cabinet and gave the impression that it was in line with the governmental policy vis-à-vis non-nationals in South Africa. Moreover, under article 4(c) of the ICERD, public authorities at all administrative levels, including municipalities, should act against violence based on ethnic origin. South Africa’s report does not refer to any case of political violence or incitement to violence against any race or group of persons of another colour or ethnic origin.

South Africa’s report rightly refers to the work done by the SAHRC, which initiated investigations into racism on farms and in some schools or universities.<sup>149</sup> The government’s report could contain information on what SAHRC’s recommendations were and whether the government implemented them. One of the most significant interventions by the SAHRC relates to an appeal brought before the

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<sup>143</sup> Act 65 of 1996, Section 29.

<sup>144</sup> See Questions pars 8 & 9.

<sup>145</sup> Article 4 (a) of the ICERD.

<sup>146</sup> Article 4 (b) of the ICERD.

<sup>147</sup> Questions par 10.

<sup>148</sup> South Africa’s Report par 108.

<sup>149</sup> Idem pars 130-131.

Chairperson of the Commission in the matter between *The Freedom Front (Appellants) and The South African Human Rights Commission and the Freedom of Expression Institute (Respondents)*. The chairperson of the Commission was called upon to determine whether the slogan “*Kill the Boer, Kill the farmer*” as chanted at the ANC Youth Rally in Kimberley and at the funeral of Peter Mokaba at Polokwane constituted hate speech as defined in section 16(2)(c) of the Constitution.

In its ruling, the Commission looked at the history of the slogan, the context in which it was used, and opined that the slogan had been used to mobilize people during the apartheid era in furtherance of the objectives of defeating apartheid. However, the new democratic government has through the Constitution ushered in a new democratic order which is founded on the recognition of human rights, democracy and peaceful co-existence irrespective of colour, race, class, belief or sex. Judged against this, the Commission asserted that the slogan, given its content, its history and the context in which it was chanted, would harm the sense of well being, contribute directly to a feeling of marginalisation and adversely affect the dignity of Afrikaners. The Commission held that the slogan exacerbates the fault lines of our society and thus runs counter to the spirit and vision underlying South Africa’s constitutional order. It held therefore that the slogan as chanted amounted to hate speech as defined by section 16(2)(c) of the Constitution.

A persisting problem with South Africa’s report, is that where it contains information on acts of racism or racial discrimination,<sup>150</sup> it gives the false impression that the authors of all acts of propaganda, racist hate speech or violence are always whites while the victims are always black people. This can hardly be true. Due to the apartheid legacy, one may understand that the majority of the victims are black people but there are also isolated instances in which the victims are white and the perpetrators black. With the persistence of “private apartheid” at schools, on farms and at other work places, the government should be requested to reveal its plans to combat such apartheid and related hate speech and to educate the people in this regard.

**5. Article 5 of the Convention : Measures to promote equality and non-discrimination in the enjoyment of civil, political, economic, social and cultural rights**

**5.1 Scope of Article 5 of the ICERD and Relevant General Recommendations**

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<sup>150</sup> Idem pars 128-133.

Under **Article 5** of the ICERD, States Parties, in compliance with **Article 2** undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, particularly in the enjoyment of the rights to:<sup>151</sup>

- Equal treatment before the tribunals and all other organs administering justice<sup>152</sup>; the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution<sup>153</sup>.
- Political rights, in particular the right to participate in elections –to vote and to stand for election–on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service<sup>154</sup>;
- Other civil rights such as the right to freedom of movement and residence within border of the State<sup>155</sup>, the right to leave any country, including one’s own, and to return to one’s own country<sup>156</sup>, the right to nationality<sup>157</sup>, the right to marriage and choice of spouse<sup>158</sup>, the right to own property alone as well as in association with others<sup>159</sup>, the right to inherit<sup>160</sup>, the right to freedom of thought, conscience and religion<sup>161</sup>, the right to freedom of opinion and expression<sup>162</sup> and the right to freedom of peaceful assembly and association<sup>163</sup>.
- Economic, social and cultural rights, such as<sup>164</sup> the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration<sup>165</sup>, the right to form and join trade unions<sup>166</sup>, the right to housing<sup>167</sup>, the right to public health, medical care, social security and social services<sup>168</sup>, the right to education and training<sup>169</sup>, the right to equal participation in cultural activities<sup>170</sup>, and the right of access to any

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<sup>151</sup> Article 5 of the ICERD.

<sup>152</sup> Article 5 (a) of the ICERD.

<sup>153</sup> Article 5 (b) of the ICERD.

<sup>154</sup> Article 5 ( c ) of the ICERD.

<sup>155</sup> Article 5 (d (i) of the ICERD.

<sup>156</sup> Article 5(d)(ii) of the ICERD.

<sup>157</sup> Article 5(d)(iii) of the ICERD.

<sup>158</sup> Article 5(d)(iv) of the ICERD.

<sup>159</sup> Article 5(d)(v) of the ICERD.

<sup>160</sup> Article 5(d)(vi) of the ICERD.

<sup>161</sup> Article 5(d)(vii) of the ICERD.

<sup>162</sup> Article 5(d)(viii) of the ICERD.

<sup>163</sup> Article 5(d)(ix) of the ICERD.

<sup>164</sup> Article 5(e) of the ICERD.

<sup>165</sup> Article 5(e)(i) of the ICERD.

<sup>166</sup> Article 5(e)(ii) of the ICERD.

<sup>167</sup> Article 5(e)(iii) of the ICERD.

<sup>168</sup> Article 5(e)(iv) of the ICERD.

<sup>169</sup> Article 5 (e)(v) of the ICERD.

<sup>170</sup> Article 5(e)(vi) of the ICERD.



place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks<sup>171</sup>.

The interpretation of **Article 5** of the ICERD is discussed in **General Recommendation XX**<sup>172</sup>. States Parties are obliged to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. Rights and freedoms mentioned in article 5 do not constitute an exhaustive list, but are derived from the Charter of the United Nations and the Universal Declaration of Human Rights and from other international agreements on Human Rights. However, the manner in which these obligations are translated into legal orders of the States Parties may differ<sup>173</sup>.

Article 5 of the ICERD, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights. It merely assumes the existence of these rights<sup>174</sup>. The Convention obliges States Parties to prohibit and eliminate racial discrimination in the enjoyment of such human rights.<sup>175</sup>

The rights and freedoms referred to in Article 5 may be achieved in various ways, be it by the use of public institutions or through the activities of private institutions. In any case, it is the obligation of the State Party concerned to ensure the effective implementation of the Convention. To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.<sup>176</sup>

## 5.2 Comments on South Africa's Compliance with Article 5 of the ICERD

South Africa's report on compliance with Article 5(b) "**the right to security of persons and protection by the state against violence or bodily harm**"<sup>177</sup> refers specifically to **section 12 of the Constitution**, and other Acts of Parliament, namely the **Domestic Violence Act**<sup>178</sup> and the **Abolition of Corporal Punishment Act**<sup>179</sup>.

Other measures undertaken by the government to buttress its obligations under the Convention include the establishment of the Independent Complaints Directorate within the Department of Safety and Security to investigate any acts of violence against anyone by the

<sup>171</sup> Article 5(e)(f) of the ICERD.

<sup>172</sup> Adopted on 15 March 1996 during the 58<sup>th</sup> session of the CERD.

<sup>173</sup> General Recommendation XX par 1.

<sup>174</sup> General Recommendation XX par 1.

<sup>175</sup> *Idem* par 1.

<sup>176</sup> General Recommendation XX par 5.

<sup>177</sup> South Africa's Report pars 136-137.

<sup>178</sup> Act No. 116 of 1998.

<sup>179</sup> Act No. 33 of 1997.

police. The report also refers to Constitutional Court decisions of *S v Makwanyane*<sup>180</sup>, abolishing capital punishment, *S v Williams*,<sup>181</sup> outlawing juvenile whipping and *S v Baloyi*<sup>182</sup> upholding the constitutionality of interdicts against perpetrators of domestic violence, thereby enhancing the protection of potential victims of domestic violence<sup>183</sup>.

A reading of the report does show a willingness and preparedness on the part of the government to meet its obligations under the Convention. However, the government should have given a balanced report by also mentioning challenges it is facing in translating these protections to reality especially among women, children and farm dwellers.

There is still a huge gap between policy and practice. Despite the existence of legislation there are numerous media reports of incidents of domestic violence, rape alcoholism, trafficking, prostitution and sexual abuse of children and women perpetrated by SAPS and private persons<sup>184</sup>. Although victims cut across all racial groups, the majority belong to the previously marginalised groups, and are poor. In most cases, victims are vulnerable because of their gender, sex and economic status.

Statistics show that 52, 425 rapes and attempted rapes were reported to the South African Police between April 2002 and March 2003.<sup>185</sup> The South African government has taken significant steps to try to combat violence against women, including introducing the Sexual Offences Bill. Police have received in some instances training in handling rape cases, and special courts have been established. The Sexual Offences and Community Affairs unit and the Department of Health and the South African Police Services, have established several multidisciplinary centres for survivors of sexual offences and domestic violence at hospitals in some provinces. Unfortunately violence against women and children is still rife and conviction rates remain low despite all of these efforts.

Indeed abuse (including domestic violence) especially of children has become a national crisis second only to, if not equal to, the AIDS crisis. In fact, the war against AIDS can never be won as long as incidents of rape against women and sexual abuse of children are not contained. The Democratic Alliance (DA) drew public attention to 22 486 incidents of rape of children in South Africa in the year 2004. The DA presented statistics which showed that one woman or child is raped

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<sup>180</sup> 1995 (7) SA 391 (CC).

<sup>181</sup> 1995 (7) BCLR 861(CC).

<sup>182</sup> 2000 (2) SA 425 (CC).

<sup>183</sup> South Africa's Report pars 136 -137.

<sup>184</sup> See also South Africa's Report pars 53-54. It also expresses the same sentiments.

<sup>185</sup> Human Rights Watch Report 2003/12/31 accessed on 2006/06/16

every ten minutes.<sup>186</sup> The South African government should be asked to provide information on specific measures it has adopted to prevent these phenomena and to indicate measures or plans to implement the Durban Declaration and Programme of Action<sup>187</sup>. It is increasingly becoming clear that legislation per se will not solve the problem. It is essential that measures be put in place to change people's mindsets and attitudes. South Africa needs strong legislative action coupled with vigilant monitoring and action by community based organisations, local governments, educators etc.<sup>188</sup>

**CERD General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system** recalled the provisions of Article 5(a) of the Convention under which States Parties have an obligation to guarantee the right of everyone without any discrimination to equality before the law. Determined to combat all forms of discrimination in the administration and functioning of the criminal justice system, which may be suffered, in all countries of the world by, among others, indigenous peoples, the Committee formulated certain recommendations to be addressed by States Parties. The South African report does not make any reference to these recommendations and they do not seem to have been taken into account in determining South Africa's compliance with Article 5 of the ICERD.

In terms of General Recommendations XXX1, States Parties are required to take necessary steps to ensure that police services have an adequate and accessible presence in neighbourhoods and regions. They also have to ensure that competent authorities are instructed to receive the victims of acts of racism in police stations in a satisfactory manner, so that complaints are recorded immediately and investigations are pursued without delay. Any refusal by police to accept a complaint involving an act of racism should lead to disciplinary or penal sanctions and those sanctions should be increased if corruption is involved. Nonetheless, South Africa's report does not make any reference to these recommendations. There are, however, alarming incidents of assault and other forms of violence perpetrated against farm dwellers by farm owners and various security structures. Allegations of torture and the use of vicious dogs in some provinces have been levelled against private security persons and commandos. The lack of prosecutions compared to the high numbers of reports of assault indicates that the criminal justice system is not operating effectively in protecting victims in farming and rural communities<sup>189</sup>.

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<sup>186</sup> SAHRC 6<sup>th</sup> Socio-Economic Rights Report ( 2005).

<sup>187</sup> See Question par 14. Under Par 69 of the Durban Declaration States Parties are urged to implement laws against trafficking in persons, especially women and children and are encouraged to create, if they do not exist, mechanisms to combat such practices and to allocate adequate resources to ensure enforcement and the protection of the rights of victims.

<sup>188</sup> Kamau "South Africa: A Scary Picture of Childhood" *Business Day* June 2006.

<sup>189</sup> SAHRC, *Final Report on the inquiry into the Human Rights violations in farming communities*, (August 2003)

Incidents of violence are racially motivated, farm dwellers feel that the South African Police Services (SAPS) have failed them, in some cases police have refused to receive their cases, and in some instances victims have not been accorded the necessary respect<sup>190</sup>.

The South African Report is silent on both the incidents of violence and recommendations under **General Recommendation XXXI**. South Africa has not fully complied with its obligations under ICERD. In its forthcoming report, South Africa should be required to indicate and elaborate on measures it has undertaken to address these problems.

Further under Article 5 (b) of ICERD, General Recommendation XXX emphasises that the right to security of persons should ensure the security of non-citizens in cases of arbitrary arrest. Differential treatment based on immigration status thus constitutes discrimination if the criteria for differentiation are not proportional to the achievement of a legitimate aim. Such differential treatment is reflected in the provisions of the Immigration Act, 2002, where an immigration officer or police officer can take a person into custody if not satisfied that the person is legally in the country. There is no provision in the Act for the grounds that must exist prior to the officer requesting a person to identify him or herself, or procedures to be followed to avoid having to deprive the person of his or her freedom. Such identification on demand harks back to the days of Apartheid when black South Africans had to constantly assert their right to be in South Africa. Since 1994, there have been numerous dawn raids by South African police Services into areas known to be inhabited by immigrants, both documented and undocumented, and in which many immigrants have been arrested due to their failure to immediately produce the necessary identification papers. The SAHRC has on a number of occasions drawn the attention of government to violations of the rights of immigrants that are referred to in General Recommendation XXX<sup>191</sup>.

**Article 5(d)(iv)** of the Convention relates to the right to marriage and choice of spouse and **Article 5(d)(vi)** relates to the right to inherit. The South African report does not give detailed information on the **Recognition of Customary Marriages Act**<sup>192</sup>. Provisions of the Act were referred to in passing under **Article 2**, on measures undertaken to eliminate racial discrimination under the ICERD. CERD should request South Africa to provide data regarding the number of customary marriages that have been registered in order to determine whether the Act is being implemented and also request information on the status of Hindu and Muslim marriages. The South African Law Reform Commission<sup>193</sup> is presently reviewing marriage laws and other

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<sup>190</sup> Idem.

<sup>191</sup> Adopted on 01/10/2004. See generally, SAHRC, *Everything is not ok. We are not treated like people* (1999); SAHRC, *At the crossroads for detention and repatriation* (2000)

<sup>192</sup> Act 120 of 1998.

<sup>193</sup> Discussion Paper 104 Project 118- Domestic Partnership.

domestic partnerships. The aim is to harmonize family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity.<sup>194</sup>

In *The v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the Republic of South Africa*<sup>195</sup> the Constitutional Court put to rest the long-ranging dispute about the constitutionality of a principle which underlies the indigenous law of succession<sup>196</sup>. In this case, the Constitutional Court had to decide on the constitutionality of the rule of male primogeniture as it applies in the indigenous law of succession<sup>197</sup>. The relevant legislative provisions, which entrench the indigenous rule of male primogeniture, prevented the applicants in the courts a quo from inheriting<sup>198</sup>. The parties were respectively the two daughters of a deceased father, and sister of a deceased brother. In addition, the South African Human Rights Commission and the Women's Legal Trust were granted direct access to the Constitutional Court to bring a class action in the public interest and on behalf of all women and children excluded from inheriting by this legislation and the relevant rule of indigenous law<sup>199</sup>. The Constitutional Court found the traditional rule of primogeniture as it applies in relation to the succession of property unconstitutional and invalid because it discriminates unfairly against women and extra marital children. To this end, the cases herald the end of discrimination of women and children's rights of inheritance under the indigenous law of succession<sup>200</sup>.

South Africa's compliance with the provisions of **Article 5(d)(v)** of the Convention (relating to the right to own property alone as well as in association with others) is expressed in various Acts of Parliament, the **Constitution** and Government's policies on land reform. The Department of Land Affairs has the responsibility of developing and implementing a policy of land reform; the **White Paper on South African Land Policy** was adopted in 1997. The **Restitution of Land Rights Act**<sup>201</sup>, the **Land Reform (Labour Tenants) Act**<sup>202</sup>, the **Communal Property Associations Act**<sup>203</sup>, the **Extension of Security Tenure Act**<sup>204</sup> the **Housing Act**<sup>205</sup> are all Acts of Parliament that were

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<sup>194</sup> South African Law Reform Commission.

<sup>195</sup> 2005 1 BCLR 1 (CC).

<sup>196</sup> Van Niekerk "Succession, Living Indigenous Law and Ubuntu in the Constitutional Court" *Obiter* No3 (2005) 474.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> Van Niekerk 475

<sup>200</sup> See Question par 18.

<sup>201</sup> Act No 22 of 1994.

<sup>202</sup> Act No 3 of 1996.

<sup>203</sup> Act No 28 of 1996.

<sup>204</sup> Act No 62 of 1997.

<sup>205</sup> Act No 107 of 1997.

enacted to give meaning and content to South Africa's constitutional and policy principles and directives<sup>206</sup>.

The Report concludes by stating "land and property ownership and use are critical in determining social power relations in society. It is no wonder then that the exclusion of the majority Black people from any reasonable ownership, control and use of land was one of the pillars of the colonial apartheid system of racial domination. *It is a central policy of the Government to reverse these injustices of the past*"<sup>207</sup>. Can it be said that the Government is succeeding in reversing *injustices of the past*?

The SAHRC<sup>208</sup> research on land reform established that there have been no significant shifts in land ownership patterns in South Africa to date. Less than two percent of land has been redistributed through the reform programme (one percent through restitution and one percent through redistribution). The majority of the land is still in the hands of a white, male, landowning class, and class, race, and gender relations have been further entrenched<sup>209</sup>. Research undertaken has also revealed serious problems in the quality of land being delivered to the recipients of restorative land restitution. These problems are exacerbated by lack of post-settlement support, lack of infrastructure and services on restored land. Some claims are settled through alternative forms of compensation, which would not necessarily include land transfer<sup>210</sup>.

It is in light of the above that Rapporteur Raghavan Vasudevan Pillai's<sup>211</sup> enquiry should be read. Indeed the SAHRC supports his request for information on pending and rejected claims of land restitution of indigenous groups, this information will assist in determining South Africa's success or lack thereof of reversing injustices of the past. The government has committed itself to a 30% land distribution target by 2008 and complete restitution by 2014. Numerous complaints were received from the Landless People's Movement, the South Africa Communist Party and Congress of South African Trade Unions about the slow pace of the delivery of land reform. The result was the five-day Land and Agrarian Reform Summit held at Nasrec on 27-31 July 2005. The objectives of the summit were to determine the progress and challenges facing land and agrarian reform in South Africa and to find solutions in addressing the same.

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<sup>206</sup> South Africa's Report pars 162 164.

<sup>207</sup> South Africa's Report par 165.

<sup>208</sup> SAHRC *6th Socio-Economic Rights Report* (2005).

<sup>209</sup> Festus M Land Reform in South Africa (Interfund Developmental Update) 2003; hereafter referred to as Land Reform Update 2003).

<sup>210</sup> Section 27(2) of the Constitution makes provision for 'just and equitable' compensation to current property owners.

<sup>211</sup> Questions par 16.

The challenges outlined at the summit include, the expensive and tardy legal processes, lack of resources on the part of the government to fast-track the implementation process, lack of integration and collaboration between Government Departments, the inefficiency of current laws in regulating evictions and protecting farm dwellers, the tension between protecting property rights and the obligation of the state to undertake land reform with insufficient resources, lack of technical skills and capital which prevent new farmers from utilising their land to its fullest potential<sup>212</sup>.

South Africa's report discusses various measures it has undertaken to meet its obligations under **Article 5(e)(iii): the right to housing** of the ICERD. Section 26 of the Constitution guarantees for everyone the right to access to housing. The state in terms of section 26(2):

-“must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right”.

Reasonableness provides the yardstick against which measures must be tested. It requires measures to be coherent, comprehensive, and co-ordinated towards the progressive realization of the right and ensure that public money is spent on the realization of these rights. Although these rights are conditional the government is responsible for creating an enabling environment that will ensure that the enjoyments of these rights flourish.

The government through legislation, in particular the **Housing Act**<sup>213</sup>, the **Extension of Security of Tenure Act (ESTA)**<sup>214</sup>, the **Land Reform(Labour Tenants) Act**<sup>215</sup>, the **Rental Housing Act**<sup>216</sup>, the **Interim Protection of Informal Land Rights Act**<sup>217</sup>, the **Prevention of Illegal Evictions from Unlawful Occupation of Land Act**<sup>218</sup>, the **Housing Consumer Protection Measures Act**<sup>219</sup> and the **Home Loan and Mortgage Disclosure Act**<sup>220</sup> and other strategic delivery mechanisms has indeed shown a commitment towards the progressive realization of the right to adequate housing. However, the state's inability to tailor its housing policies to address the needs of the poor and vulnerable suggests that the government still has to comply with its obligations. There has been widespread acknowledgement that land reform in South Africa is not going as fast or as well as it should. The achievements of the Government are being undermined by the continued dispossession of black people from land through evictions on the farms. Most black households have lost access to land through

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<sup>212</sup> SAHRC *Equality update*, January 2006.

<sup>213</sup> Act No 107 of 1997.

<sup>214</sup> Act 62 of 1997.

<sup>215</sup> Act 3 of 1996.

<sup>216</sup> Act 50 of 1999.

<sup>217</sup> Act 31 of 1996.

<sup>218</sup> Act 19 of 1998.

<sup>219</sup> Act 95 of 1998.

<sup>220</sup> Act 63 of 2000.

being evicted than have gained land through land reform programmes<sup>221</sup>.

According to the 2001 census, 2.9 million black South Africans still live on farms owned by others, mostly white owners. Farm workers continue to live under deplorable conditions<sup>222</sup>. Housing is provided to farm workers as long as they continue to be employed on such farms. Key findings from the National Evictions Survey<sup>223</sup> established that women and children are the most vulnerable as they are often treated by landowners and the courts as secondary occupiers. Although farm workers are included in programmes relating to housing and the Constitution, they are unable to take advantage of these programmes because of the nature of the demands of their profession. In some instances, farm dwellers are unaware of their socio-economic rights and of the necessary steps that can be taken to access these rights<sup>224</sup>.

In its report, the government states, “It is still early to judge the full impact of the above legislation and other related pieces of legislation. Nonetheless, it can be pointed out that legacies of apartheid still weigh heavily in the area of housing”. Unfortunately, the report does not elaborate on how apartheid has impacted on the right to housing. It may be suggested to CERD to request South Africa to indicate on its forth coming periodic report the impact legislation has on the right to housing, and how and to what extent the consequences of apartheid still have on the right to housing.

South Africa’s compliance with **Article 5(e)(v)**, (“**the right to education and training**”) of the Convention is expressed in the Constitution, the latter guarantees a bundle of rights concerning the right to education and training<sup>225</sup>. For example, S 29 guarantees:

-That every person shall have the right to basic education and equal access to educational institutions;

-The right to be instructed in the official or other language of one’s choice, where practicable

The constitutional commitment to ensure that basic education is realized is incorporated in the **South African Schools Act**<sup>226</sup>, where the government expresses its commitment to promoting democratic values that recognise diversity and tolerance within the education system in its policy document on **Values, Education and**

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<sup>221</sup> Ibid.

<sup>222</sup> SAHRC *6th Socio-Economic Rights Report* (2005).

<sup>223</sup> A summary of Key Findings from the National Evictions Survey. (A study of farm dwellers who have been evicted from 1984-2004).

<sup>224</sup> SAHRC *6th Socio-Economic Rights Report* (2003-2006 to be published).

<sup>225</sup> South Africa’s Report par 211.

<sup>226</sup> Act No 84 of 1996.



**Democracy.**<sup>227</sup> The report observes that: “Given the short period of constitutional democracy in South Africa, it is not surprising that isolated cases of unofficial racist incidents, policies and intentions continue to manifest themselves. Where these occur, firm measures, including the use of courts, are and will continue to be taken”.<sup>228</sup> The report, however, stops short of elaborating on these incidents, or measures that have been taken by the courts to address them.

The SAHRC compiled a report triggered by complaints concerning the right to basic education<sup>229</sup>. In its general findings, the report observed that there was no synergy between the law and practice. Moreover, children from disadvantaged backgrounds still lack the means and the social muscle to speak out and claim their rights. The SAHRC conceded that much was being done by the government to improve enjoyment of the right to basic education but unfortunately not all of these interventions have resulted in the outputs that were anticipated. States Parties have an obligation to ensure that obstacles in the enjoyment of the right to basic education are removed, yet findings revealed that there are unacceptably high levels of violence particularly sexual violence, which has a disproportionate impact on girl learners, occurring in South African schools<sup>230</sup>.

In some provinces there are a few schools for children with disabilities and some schools do not have basic infrastructure such as water, electricity, toilets and adequate classrooms<sup>231</sup>. Although access to public schooling for children is widely available and enrolment has increased since 1994, there are wide disparities in schools’ resources; about 40% of state-run schools in rural areas having no electricity. Physical access to education centres in rural areas is of particular concern. Some learners have to walk long distances each day to and from school, exposing them to dangers such as sexual violence.<sup>232</sup>

The Declaration and Programme of Action document was the end product of **World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance** held in Durban in 2001. The declaration made various recommendations to States Parties, on education. States Parties are required to review and develop their educational systems to allow for learning and instruction to be pursued in mother-tongue languages, and to ensure that access to education is not denied to vulnerable groups on the basis of linguistic ability and criteria. States Parties are also compelled to increase the recruitment and promotion of members of minority groups as teachers, trainers and care providers and guarantee effective equality of access to the teaching profession. The South African report does not refer at all

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<sup>227</sup> South Africa’s Report par 215.

<sup>228</sup> Ibid par 218.

<sup>229</sup> SAHRC, *Report of the Public hearings on the right to basic education, 2006*

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Human Rights Watch Report March /12/31.

to this Declaration and there is no indication on the report on measures undertaken to meet its recommendations.

The issue of language is very contentious in South Africa especially in the light of the fact that English and Afrikaans are still enjoying preference and privileged status above other indigenous African languages. To date, the medium of instruction in secondary schools and tertiary institutions is either English or Afrikaans. In response to Rapporteur Pillai's<sup>233</sup> enquiries regarding measures to promote all official languages, including the Khoi, Nama, San and other indigenous languages, the government will state that measures are already taking place. Such measures include the setting up of the Pan South African Language Board (PANSALB), charged with the duty to protect the language rights of citizens and it is also required to promote and create conditions for the development and use of all official languages including the Khoi, Nama and San languages. PANSALB has established a number of sub-committees. For instance, a sub-committee on the development of literature and previously marginalised languages has been established. Another sub-committee on language and education provided advice to the Department of Education and provincial departments. It also played a key role in translating the OBE syllabus into different languages.

South Africa's compliance with **Article 5 (e)(iv); the right to public health and medical care, social security and social services** is given expression in S27 of the Constitution, it provides:

- '(1) Everyone has the right to have access to:
- (a) health services, including reproductive health care;
  - (b) no one may be refused emergency medical treatment.'

Other provisions of the Bill of Rights reinforce the governments' obligation under section 27<sup>234</sup>. Section 24 guarantees the right of everyone "to an environment that is not harmful to health or well-being" and section 28 guarantees children the right to "basic health care services". The governments' constitutional obligations are given meaning by detailed statistics, policies and the **Health Act**,<sup>235</sup> and the **National Health Care Act**.<sup>236</sup> South Africa's commitment to providing basic health care, as a fundamental right cannot be questioned, and the government has indeed taken positive steps in this regard. Be that as it may, many South Africans still do not enjoy affordable and adequate access to health care facilities. The government's main challenge is that of implementation and monitoring

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<sup>233</sup> See questions pars 23-24.

<sup>234</sup> South Africa's Report par 197.

<sup>235</sup> Act No 63 of 1997.

<sup>236</sup> Act No 61 of 2003.

of legislation, policies and programmes particularly the extent to which they ensure the availability, accessibility and affordability of quality health care services.<sup>237</sup>

Realization of the right to health requires the government to ensure equality of access to a system of health care and provide health services without discrimination. Accessibility, in turn, has to go hand in hand with non-discrimination, physical accessibility, and economic accessibility (affordability) and information accessibility<sup>238</sup>. Nevertheless, in South Africa the legislative and policy frameworks at national level do not correspond with the dynamics at play in farming and rural communities. Underlying causes that inhibit the realization of access to health include but are not limited to; lack of access to telephones to contact emergency health service, lack of affordable transport; lack of emergency vehicles such as ambulances and lack of knowledge on health related matters.

Over five million of South Africa's 45 million people are estimated to be living with HIV, one of the highest national totals in the world.<sup>239</sup> The pandemic poses a serious challenge to the government. The governments' response to the pandemic has been ambivalent and inadequate.<sup>240</sup> Access to life-prolonging antiretroviral (ARV) medication for people living with HIV and post-exposure HIV prevention services for sexually assaulted persons have been severely restricted.<sup>241</sup> The government's decision in November 2003 to approve a plan for treatment and care for HIV/AIDS, which includes the provision of ARV's is long overdue.<sup>242</sup> The provision of affordable medication, necessary information, adequate nutrition, support services, particularly for women and children is essential<sup>243</sup>.

It is suggested to the CERD to request information from South Africa regarding measures it has undertaken to effectively deal with HIV/AIDS, the report is silent on this matter in spite of its importance. In addition, South Africa should be asked to provide information on progress made in complying with the recommendations of the World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance. Finally, South Africa should indicate how the government intends, or is dealing with challenges discussed under **Article 5** above.

**6. Article 6 of the Convention: Provision of effective protection and remedies, including adequate reparation and satisfaction, through**

<sup>237</sup> SAHRC *6th Socio-Economic Rights Report* 2005.

<sup>238</sup> Human Rights Watch Report March 2004, accessed on 2006-06-16.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

## competent tribunals and other State institutions

### 6.1 Scope of Article 6 of the ICERD and Relevant General Recommendations

State Parties are required to assure to everyone within their jurisdiction effective protection and remedies, through competent tribunals and Other State institutions, against any acts of racial discrimination which violate his/her human rights and fundamental freedoms contrary to the Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination<sup>244</sup>.

In **General Recommendation XXVI**<sup>245</sup> CERD expresses the view that the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his or her own worth and reputation is often underestimated<sup>246</sup>.

In CERD's opinion therefore, the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by the victim, whenever appropriate<sup>247</sup>.

**General Recommendation XXXI**<sup>248</sup> recalled article 6 of the ICERD, and convinced that, even though the system of justice may be regarded as impartial and not affected by racism, racial discrimination or xenophobia, when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect.

Determined to combat all forms of discrimination in the administration and functioning of the criminal justice system which may be suffered in all the countries of the world by persons belonging to racial or ethnic groups as well as other vulnerable groups which are particularly exposed to exclusion, marginalization and non-integration in society, paying attention to the situation of women and children belonging to the aforementioned groups, who are susceptible to multiple discrimination because of their race and because of their sex or their

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<sup>244</sup> Article 6 of the ICERD.

<sup>245</sup> Adopted on 24 March 2000 during the 56<sup>th</sup> session of the CERD.

<sup>246</sup> *Idem* par 1.

<sup>247</sup> *Idem* par 2.

<sup>248</sup> *Op cit* discussed under Article 5 of the Convention.

age, the CERD formulated various recommendations addressed to States Parties.

CERD recommends that State Parties should **in order to gauge the existence and extent of racial discrimination in the functioning of the criminal justice system:**

-embark on regular and public collection of information from police, judicial and prison authorities and immigration services, while respecting standards of confidentiality, anonymity and personal data<sup>249</sup>;

-In particular, States Parties should have access to comprehensive statistical or other information on complaints, prosecutions and convictions relating to acts of racism and xenophobia, as well as on compensation awarded to the victims of such acts, whether such compensation is paid by the perpetrators of the offences or under State compensation plans financed from public funds<sup>250</sup>.

**-Regarding strategies to be developed to prevent racial discrimination** in the administration of justice CERD recommends that:

State Parties should make an assessment of the level of satisfaction among all communities concerning their relations with the police and the system of justice, and recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups<sup>251</sup>

**-Regarding access to justice and the law**, CERD recommends that State Parties should strive to supply the requisite legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights<sup>252</sup>. In this regard, State Parties should promote, in the areas where such persons live, institutions such as free help and advice centres, legal information centres and centres for conciliation and mediation<sup>253</sup>. CERD also recommends that states should expand their cooperation with associations of lawyers, university institutions, legal advice centres and non-governmental organisations specializing in protecting the rights of marginalized communities and in the prevention of discrimination.

## 6.2 Comments on South Africa's Compliance with Article 6 of the ICERD

Compliance by South Africa with provisions of **Article 6** is found in specific provisions of the Constitution. The governments'

<sup>249</sup> Chapter 1, General steps par 2.

<sup>250</sup> Idem par 3.

<sup>251</sup> Chapter 2B par (i)

<sup>252</sup> Chapter 2 A par 7.

<sup>253</sup> Idem par 8.

constitutional obligations are expressed in section 38 of the Bill of Rights. It relates to the enforcements of rights and identifies persons who may approach the court for relief where a right in the Bill of Rights has been infringed or threatened<sup>254</sup>.

Section 38 is to be read with section 34 (guarantee of access to courts or independent or impartial tribunals or forums), section 33 (right to administrative actions that is lawful, reasonable and procedurally fair), sections 35 and 28 (the right of access to courts and legal representation for arrested, detained, accused persons and children)<sup>255</sup>. In addition, the report identifies other specialised statutory dispute resolution courts, forums, and tribunals that may be approached by victims of racism and racial discrimination; such as:

- The Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court and Labour Appeal Court;<sup>256</sup>
- The South African Human Rights Commission;
- The Commission on Gender Equality, the Land Claims Court<sup>257</sup>
- The Truth and Reconciliation Commission.<sup>258</sup>

By its own admission, the government states in its report that the effectiveness of measures taken in compliance with **Article 6** of the Convention depend largely on the ‘mechanisms and instruments of enforcement, and the adequacy and effectiveness of the remedies available to those whose rights and freedoms may be threatened or violated’<sup>259</sup>. Nevertheless, allegations of violence by members of the SAPS on citizens persist;<sup>260</sup> in ignorance of CERD’s recommendations XXXI there is no indication from the report whether the government has made a determination of the level of satisfaction among communities concerning their perceptions about the SAPS and their relations with them.

The NGO forum of the World Conference against Racism, urges States Parties in its declaration and programme of action to ensure that officials working in the criminal justice system, including the SAPS, judicial and correctional personnel, do not escape with impunity acts of racial discrimination or differentiation. The states were called upon to establish internal and external independent complaints, monitoring

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<sup>254</sup> South Africa’s Report par 223.

<sup>255</sup> South Africa’s Report par 224.

<sup>256</sup> Established under the Labour Relations Act No 66 of 1995.

<sup>257</sup> Established under the Restitution of Land Rights Act, No 22 of 1994.

<sup>258</sup> Established under the Restitution of Land Rights Act, No 34 of 1995. See South Africa’s Report par 226.

<sup>259</sup> South Africa’s Report par 223.

<sup>260</sup> Op cit Article 5(b), see also South Africa’s Report pars 53-54.

mechanisms and investigations, and impose adequate disciplinary and criminal sanctions for transgressions<sup>261</sup>.

The judicial system is still facing the challenge of totally overcoming the legacy of apartheid.<sup>262</sup> The judiciary has been accused of dragging its feet by not vigorously pushing forward the transformation agenda. The South African Human Rights Commission was approached by the Minister of Justice to investigate claims of racism and other forms of differentiation in the Department of Justice. In its findings, the SAHRC noted that the objective of judicial transformation had not succeeded the gender composition of both the magistrate's bench and prosecutors were skewed. In 1994 there were 229 female and 977 male magistrates. In 1997 the magistracy had 34 male chief magistrates and 2 female chief magistrates, 489 black male magistrates and 86 black female magistrates. By 1998, 46% of all the magistrates were white males, 32% black, 15% white females and 7% black females. Overall, 78% were males and 62% were white. This statistics is outdated but gives a glimpse of the racial composition of the judiciary after the democratic government was established. CERD should ask the government of to provide the current statistics.

CERD recommends that State Parties should promote, in the areas where vulnerable persons live institutions such as free help and advice centres, free help in South Africa is done through the Legal Aid system. One of its main objectives is to remove obstacles to equal access to legal protection<sup>263</sup>. The importance of legal aid in South Africa cannot be overemphasized especially in the face of research findings confirming that most people live beyond the poverty line.

Indeed the provision of legal representation and access to courts is crucial to the poor and marginalised. Unfortunately, the South African report<sup>264</sup> has made perfunctory reference to legal aid services and has failed to highlight the important role legal aid plays in keeping with constitutional imperatives for the accused persons to "have a legal practitioner assigned to the detained person by the State, and at State expense, if substantial injustice would otherwise result".<sup>265</sup>

The report states<sup>266</sup> that 'efforts are under way to improve on the system of delivery of legal aid through the "Justice Centres Model"'.

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<sup>261</sup> NGO Forum Programme of Action Par 253.

<sup>262</sup> See Questions par 26.

<sup>263</sup> Vawda YA, "Access to Justice: From Legal Representation to Promotion of Equality and Social Justice-Addressing the Legal Isolation of the Poor" *Obiter* No 2 (2005) 234 at 236, see also Bodenstein J, "Access to Legal Aid in Rural South Africa: In Seeking a Coordinated Approach" *Obiter* No 2 (2005) 304.

<sup>264</sup> South Africa's Report par 227.

<sup>265</sup> Vawda Y A, "Access to Justice: From Legal Representation to Promotion of Equality and Social Justice-Addressing the Legal Isolation of the Poor" *Obiter* 26 (2005) 234 at 236.

<sup>266</sup> South Africa's Report par 227.

The report does not elaborate on these measures and on the efficacy or limitations of the Justice Centres Model.<sup>267</sup>

The SAHRC supports Rapporteur Pillai's<sup>268</sup> request to the government for information on measures undertaken to improve access to justice by members of vulnerable groups, ethnic minorities and indigenous peoples and information on the specific training programmes and/or courses for members of the judiciary, law enforcement officials and other public officials and the efficacy or otherwise of these programmes.

**7. Article 7 of the Convention: Measures adopted in the field of teaching, education, culture and information to combat prejudices and promote understanding, tolerance and friendship**

**7.1 Scope of Article 7 of the ICERD and Relevant General Recommendations**

In **Article 7** States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, to combat prejudices which lead to racial discrimination and to promote understanding tolerance and friendship among nations and racial or ethnic groups.

Furthermore, States Parties undertake to propagate the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and ICERD.

The interpretation of **Article 7** of the ICERD is explored in **General Recommendations V**<sup>269</sup>, **XIII**<sup>270</sup> and **General Recommendation XXV111**<sup>271</sup> of the CERD.

In **General Recommendation XIII** CERD States Parties are told to take recognizance of the fact that the fulfilment of their obligations under **Articles 2 and 5** of the ICERD are dependent upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their state has entered into under the Convention.

Moreover, CERD recommends that law enforcement officials should receive intensive training to ensure that in the performance of their

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<sup>267</sup> Justice Centres Model have been found to be effective in cities and towns and not in rural areas.

<sup>268</sup> Questions par 27.

<sup>269</sup> Adopted on 14 April 1977 during the 15<sup>th</sup> session of the CERD.

<sup>270</sup> Adopted on the 21 March 1993 during the 42<sup>nd</sup> session of the CERD.

<sup>271</sup> Follow-up to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001).



duties they respect as well as protect human dignity and maintain and uphold the human rights of all citizens without distinction as to race, colour or national or ethnic origin<sup>272</sup>.

In implementing **Article 7** State Parties are urged to review and improve the training of law enforcements officials so that the standards of the ICERD and the Code of Conduct for Law Enforcement Officials (1979) are fully implemented.<sup>273</sup>

In terms of **General Recommendation V** State Parties are required to include in their reports when submitting their periodic reports in accordance with **Article 9** of the ICERD adequate measures they have adopted and which give effect to the provisions of **Article 7**<sup>274</sup>.

**In General Recommendation XXVIII** States Parties are urged to take into account the relevant parts of the Durban Declaration and Programme of Action when implementing the Convention in the domestic legal order, in particular in respect of article 2 and 7 of the Convention<sup>275</sup>.

CERD recommends to States Parties the dissemination of the Durban Declaration and Programme of Action in an appropriate manner and to provide the Committee with information on the efforts in this respect under the section of their period reports concerning article 7 of the Convention.

## 7.2 **Comments on South Africa's Compliance with Article 7 of the ICERD**

The report refers to specific measures adopted in the field of teaching, education, culture and information to combat prejudices that lead to racial discrimination and to measures adopted to promote the principles of the Convention.

This information relates to the development of the country's **National Programme of Action on the implementation of the Convention on the Rights of the Child**, the process of developing the **National Action Plan to improve the Protection and Promotion of Human Rights**, the process leading to the **National Conference on Racism**<sup>276</sup> and the process of developing the **Promotion of the Equality Act**<sup>277</sup>.

Although the government has generally complied with **Article 7**, it is also not clear from the report whether there are any monitoring mechanisms in place to ensure compliance with the Convention, and

<sup>272</sup> General Recommendation XIII par 2.

<sup>273</sup> Ibid par 3.

<sup>274</sup> General Recommendations V par 1.

<sup>275</sup> General Recommendation XXV111 par 6.

<sup>276</sup> South African Report pars 229-230.

<sup>277</sup> Ibid par 230.

the effectiveness and sustainability of the programmes. The government should be requested by CERD to provide information on the training of law enforcement officials to ensure compliance with the provisions of ICERD and the Code of Conduct for Law Enforcement Officials (1979) in terms of **General Recommendation XIII**.

In addition, the government should provide information on the follow-up measures to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, on plans to implement the Durban Declaration and Programme of Action at national level.

## IV STATES PARTIES' REPORTING OBLIGATIONS

### 8. Article 9 of the Convention

#### 8.1 Scope of Article 9 of the ICERD and Relevant General Recommendations

As stressed earlier, under **article 9** of the Convention, States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee established under article 8, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of the Convention. These reports should be submitted within one year after the entry into force of the Convention for the State concerned and thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.<sup>278</sup>

In **General Recommendations VI**<sup>279</sup> and **X**<sup>280</sup> the Committee noted with regret that many reports required in terms of the provisions of article 9 of the Convention were long overdue.

In a number of other General Recommendations, especially General Recommendations IV (information in the reports), V (adequate information on "immediate and effective measures" to implement article 7 of the ICERD), VII (information on the implementation of article 4 of the ICERD), XI (non-citizens), XIII (information on the training of law enforcement officials), XX (non-discriminatory implementation of rights in article 5 of the ICERD), XXIII (indigenous peoples), XXIV (demographic composition of the population), XXVI (information on perpetrators of acts of racial discrimination and financial compensation to the victims), XXVIII (information on follow-up actions and measures to the Durban Declaration and Programme of Action against Racism, Racial Discrimination, Xenophobia, and Related Intolerance), XXIX (information on descent-

<sup>278</sup> Article 9 (1) of the ICERD.

<sup>279</sup> Adopted on 19 March 1982 during the 25<sup>th</sup> session of the CERD.

<sup>280</sup> Adopted on 24 March 1991 during the 39<sup>th</sup> session of the CERD.

based groups or communities), the Committee reminded States Parties of their reporting obligations under article 9 of the ICERD.

## **8.2 Comments on South Africa's Compliance with Article 9 of the ICERD**

Arguably, South Africa has failed to comply with its reporting obligations by submitting two years later (2002) its initial periodic report due on 9 January 2000,

The CERD should request information on how it may assist the State Party to comply with its reporting obligations under the ICERD. Compliance with the provisions of article 9 may require training of officials involved in the reporting process (General Recommendation X) and greater collaboration with national commissions. Such collaboration was requested in a number of General Recommendations, especially General Recommendations XVII and XXVIII. General Recommendation XVII invited national commissions to assist the Government in the preparation of its reports to the CERD.

General Recommendation XXVIII went as far as requesting national commissions to monitor closely the concluding observations and recommendations made by the CERD to their States Parties. These General Recommendations were addressed to States Parties to help them understand the ICERD and comply with its provisions.

Unfortunately, they do not seem to have been considered as the SAHRC was not involved in the preparation of South Africa's reports to the CERD despite our eagerness and commitment to working closely with the Government to honour the SAHRC's mandate under the Constitution, to comply with General Recommendations XVII and XXVIII and also help the Government comply with its own reporting obligations under the ICERD.

The SAHRC hopes that the consideration of the governmental report will be concluded with some observations and recommendations to the Government to reinforce its collaboration with national institutions such as SAHRC and assist in the training of officials to ensure that South Africa complies with its reporting obligations under the ICERD fully and timely.

## **IV CONCLUSION**

South Africa should be commended for submitting its report. However, as emphasised earlier, this report is outdated and South Africa has failed to comply with its reporting obligations. Moreover, some information provided in the report is incomplete and should be updated by the State Party. There are many gaps left out and below are some areas on which the Committee may request detailed and more accurate

information from South Africa or advise the State Party for better presentation and timely submission of its reports.

The attention of the South African Government may be drawn to the following:

- Its reports should be “as informative as possible” and contain detailed and accurate information on the demographic composition of the population (Article 1 of the ICERD & General Recommendation IV).
- South Africa should further explain its concept of “fair discrimination”, which is allowed, and “unfair discrimination” outlawed but may be saved under the limitation clause (section 36(1) of the 1996 Constitution. The State Party should also elaborate on its affirmative action policy and programmes comply with the provisions of the ICERD, how they are implemented, whether affirmative action does not result into reverse discrimination against those who benefited during apartheid, and what the Government thinks about its future.
- The reports should be as documented as possible and refer to all forms of racial discrimination, whether they continue to affect those who were discriminated against apartheid or those who benefited from it and their descents, whether the victims and perpetrators are nationals or non-nationals.
- They should provide information on the identification of the members of the population (racial or ethnic groups) which should preferably be based on self-identification by the concerned people (Article 1 & General Recommendation VIII).
- They should contain information on legislation on foreigners (immigrants, asylum seekers and refugees), how it complies with international instruments such as the UDHR, the ICCPR and the ICESCR, and on its effective implementation (Article 1 & General Recommendation XI).
- They should contain detailed and accurate information on the situation of indigenous people, their self-identification and the protection of their rights under the ICERD and other international human rights instruments (Article 1 & General Recommendation XXIII). The CERD may also ask whether or not the State Party intends to ratify Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (1969) of the International Labour Organisation as recommended by the Special Rapporteur *ad hoc*.
- They should include data on the ethnic or national origin of citizens or other persons living on the territory, their race, colour, descent, languages, and culture and how different they are from other groups or the rest of the population (Article 1 & General Recommendation XXIV). Data, which have been categorised by race or ethnic origin, should be disaggregated by gender within those racial or ethnic groups (General Recommendation XXV).
- Detailed and accurate information should be provided on the decisions taken by the competent national tribunals and other State Institutions regarding acts

of racial discrimination and in particular those offences dealt with in article 4 (a) and (b) of the ICERD (Article 4 & General Recommendation VII).

- Detailed and accurate information should also be provided on the status and response to organised violence based on ethnic or racial origin (data organisations peoples outlawed, and people prosecuted or sentenced) and measures taken against public authorities at all administrative levels, including municipalities, involved in those acts (Article 4 & General Recommendation XV).
- Data should be provided on investigations, prosecutions and condemnations of perpetrators of acts of racial discrimination and victims compensated for by courts and other competent authorities (Article 6 & General Recommendation XXVI).
- State Party's reports should contain adequate information on immediate and effective measures taken to give effect to the provisions of article 7 of the ICERD, particularly in the fields of teaching, education, culture and information (General Recommendation V).
- Information should be given on the training of law enforcement officials to ensure that the ICERD as well as the Code of Conduct (1979) are implemented fully (General Recommendation XIII).
- Information should be provided on the follow-up measures to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which was organised in South Africa, on plans and other measures to implement the Durban Declaration and Programme of Action at the national level (Article 7 & General Recommendation XXVIII).
- South Africa may be requested to indicate whether national training courses and workshops for reporting officials are needed (Article 9 & General Recommendation X).
- South Africa should be called upon to comply with its reporting obligations under the ICERD by submitting documented and timely reports to the CERD (Article 9 of the ICERD & General Recommendations VI and X).
- South Africa should provide information on measures undertaken to combat all forms of discrimination in the administration and functioning of the criminal justice system (General Recommendation XXXI).
- Finally, the attention of the Government should be directed to the reinforcement of its collaboration with national commissions such as SAHRC in the preparation of its reports and their possible inclusion in governmental delegations to intensify dialogue between the Committee and the State Party (General Recommendations XVII & XXVIII).

As far as we are concerned, as one of the State's institutions established to strengthen constitutional democracy in South Africa with a specific mandate

to promote respect for human rights and a culture of human rights and a national commission requested by the CERD to assist the Government in the preparation of its reports, the SAHRC reaffirms its commitment to collaborate fully with the Government and ensure that South Africa complies fully and timely with its obligations under the ICERD.

In response to a question raised by Rapporteur Pillai on the status of the ICERD in South African domestic law,<sup>281</sup> international human rights law is given a pride of place in the new South African constitutional order as both an interpretative tool and substantive law.

As an interpretative tool, the Constitution dictates that when interpreting the Bill of Rights, a court, tribunal or forum must *inter alia* consider international law.<sup>282</sup> The Constitution also recommends that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with it.<sup>283</sup> The use of “must” is particularly significant.

International law is also used as substantive law in South Africa both as customary international law and conventional international law. The Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>284</sup> Moreover, an international agreement such as the ICERD binds the Republic after it has been signed by the national executive<sup>285</sup> and approved by resolution in both the National Assembly and the Senate, unless it is an agreement of a technical, administrative or executive nature or an agreement which does not require ratification of accession.<sup>286</sup> If it requires ratification, as in the case of the ICERD, it becomes law in the Republic when it has been enacted into law by national legislation.<sup>287</sup> The ICERD having been signed, ratified, and enacted into law by domestic legislation, especially by the Promotion of Equality Act, it is therefore law in South Africa and binding on South Africa. South Africa has therefore no choice but comply with its provisions. On the other hand, the SAHRC remains committed to assist the Government and work with the CERD to ensure that the country that suffered racism and racial discrimination for so many years adequately complies with the provisions of the ICERD and the struggle for the eradication of racism and racial discrimination does not result in the entrenchment of discrimination against some other groups, including the ethnic or racial minorities, indigenous people and non-nationals.

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<sup>281</sup> Questions par 3 & 4.

<sup>282</sup> Section 39 (1) (b) of the Constitution.

<sup>283</sup> Section 233 of the Constitution.

<sup>284</sup> Section 232 of the Constitution.

<sup>285</sup> Section 231 (1) of the Constitution.

<sup>286</sup> Section 231 (2) of the Constitution.

<sup>287</sup> Section 231 (4) of the Constitution.

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