



**International Convention
On the Elimination
Of all Forms of
Racial Discrimination**

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

Sixty-eighth session
20 February – 10 March 2006

**CONSIDERATION OF REPORTS SUBMITTED BY STATES
PARTIES UNDER ARTICLE 9 OF THE CONVENTION**

**Concluding observations of the Committee on the
Elimination of Racial Discrimination**

BOTSWANA

1. The Committee considered the fifteenth and sixteenth periodic reports of Botswana, submitted in one document (CERD/C/495/Add.1), at its 1749^h and 1750th meetings (CERD/C/SR.1749 and 1750), held on 3 and 6 March 2006. At its 1757th meeting (CERD/C/SR.1757), held on 9 March 2005, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes with satisfaction the report submitted by Botswana, which has been elaborated in compliance with the reporting guidelines, and was submitted on time. The Committee appreciates the attendance of a high ranking delegation and expresses its satisfaction at the good quality of the dialogue held with Botswana since 2002, due in particular to the State party's willingness to respond in a frank manner to issues raised by the Committee, including within the framework of the follow-up procedure.

B. Positive aspects

3. The Committee welcomes the setting up of an Inter-Ministerial Committee on Treaties, Conventions and Protocols, with the mandate to facilitate the implementation of the reporting obligations of Botswana under the international instruments to which it is a party.

4. The Committee commends the State party for having consulted civil society organizations in the compilation of its report.

5. The Committee welcomes the efforts made by the State party to acknowledge in its periodic report the existence of on-going debates at the domestic level on the implementation of the Convention.

C. Concerns and recommendations

6. The Committee regrets the sparse information provided by the State party regarding the ethnic and linguistic composition of its population. It recalls that information on population composition enables a better assessment of the implementation of the Convention at the national level, by the Committee as well as by the State party itself.

The Committee reiterates its recommendation that more precise information be included in the next periodic report on the ethnic and linguistic composition of the population, giving due consideration to paragraph 8 of the Committee's reporting guidelines.

7. The Committee notes that the Botswana Court of Appeal, in the case *Unity Dow v. the Attorney General* (1992), interpreted Section 3 of the Constitution as a guarantee of the equal protection of the law for all. It remains concerned, however, that the definition of discrimination provided under this provision does not explicitly prohibit discrimination based on descent and national or ethnic origin, nor indirect discrimination.

The Committee recommends to the state party that it review Section 3 of the Constitution with a view to adopting a definition of racial discrimination which fully complies with article 1 of the Convention.

8. The Committee reiterates its concern that some exceptions to the prohibition of discrimination provided under section 15 of the Constitution cannot be justified under the Convention. In particular, subsection 4 (b) authorizes exceptions in relation to non-citizens to an extent not compatible with the Committee's General Recommendation 30 (2004) on non-citizens. The Committee is also concerned that, by virtue of subsections 4 (c) and (d), the prohibition of non discrimination on the basis of ethnic origin or tribe does not apply in matters of personal and customary law, and that subsection 9 authorizes the implementation of discriminatory laws in force before the coming into operation of the Constitution.

The Committee recommends to the State party that it review section 15 of the Constitution in order to ensure its full compliance with articles 1 and 2, paragraph 1 (c) of the Convention. In this context, the State party should take into consideration the principle that, under the Convention, differential treatment constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and/or are not proportional to the achievement of this aim.

9. The Committee is concerned that the State party's objective to build a nation based on the principle of equality for all has been implemented in a way detrimental to the protection of

ethnic and cultural diversity. The Committee notes in particular the State party's reluctance to recognize the existence of indigenous peoples on its territory. (Articles 2 and 5)

The Committee, recalling that the principle of non-discrimination requires that the cultural characteristics of ethnic groups be taken into consideration, urges the State party to respect and protect the existence and cultural identity of all ethnic groups within its territory. The Committee also invites the State party to review its policy regarding indigenous peoples and, to that end, to take into consideration the way in which the groups concerned perceive and define themselves. The Committee recalls in this regard its General Recommendations 8 (1990) on self-identification and 23 (1997) on the rights of indigenous peoples.

10. The Committee, while taking note of the willingness of the State party to ensure better representation in the House of Chiefs, remains concerned that Bill 34 (2004) amending sections 77 to 79 of the Constitution reproduces discriminatory rules relating to the participation of ethnic groups in this institution. (Articles 2 and 5)

The Committee notes the information provided by the delegation that the debate over this issue is not closed and recommends that the State party adopt necessary measures to ensure the participation of all ethnic groups in the House of Chiefs on an equal basis.

11. The Committee reiterates its concern about the discriminatory character of the Chieftainship Act, as recognized by the High Court of Botswana in the case of *Kamanakao and others versus Attorney General of Botswana*, of 23 November 2001. It notes with concern that the State party has not yet amended the Chieftainship Act and other laws where necessary, as ordered by the High Court. (Articles 2 and 5)

The Committee reiterates its recommendation to the State party that it amend the Chieftainship Act and other laws where necessary, in particular the Tribal Territories Act, in order to remove their discriminatory character against non-Tswana ethnic groups and in order to provide equal protection and treatment to all tribes.

12. The Committee notes with concern the discrepancy between the information provided by the State party that residents of the Central Kalahari Game Reserve have been consulted and have agreed to their relocation outside the Reserve, and persistent allegations that residents were forcibly removed, through, in particular, such measures as the termination of basic and essential services inside the Reserve, the dismantling of existing infrastructures, the confiscation of livestock, harassment and ill-treatment of some residents by police and wildlife officers, as well as the prohibition of hunting and restrictions on freedom of movement inside the Reserve. (Articles 2 and 5)

The Committee reiterates its recommendation to the State party that it resume negotiations with the residents of the Reserve, including those who have been relocated, as well as non-governmental organizations, with a view to finding a solution acceptable to all. The Committee, while welcoming the delegation's statement that there is no legal impediment to such process, recommends that a rights-based approach be adopted during the negotiations. To that end, the State party should, in particular, (a) pay particular attention to the close cultural ties that bind the San/Basarwa to their ancestral land; (b) protect the economic activities of the San/Basarwa that are an essential element of their culture, such as hunting and gathering practices, whether conducted by traditional or modern means; (c) study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned.

13. The Committee expresses concern about the repeal of section 14 (3) c of the Constitution, which may impact on the on-going court case brought by some residents of the Central Kalahari Game Reserve against the Government to challenge their relocation from the Reserve. The Committee notes with concern the State party's position that there was no point in maintaining this provision since the residents of the Reserve had been persuaded to be relocated. (Articles 2 and 5)

The Committee recommends the State party to refrain from taking action that would prejudge the results of the on-going court case. In that context, the Committee draws the attention of the State party to the fact that special measures for the advancement of disadvantaged ethnic groups, such as section 14 (3) c of the Constitution, are fully compatible with the letter and spirit of the Convention. (Articles 1 paragraph 4, and 2 paragraph 2)

14. The Committee is concerned by the reported difficulties experienced by poor people, many of whom belong to San/Basarwa groups and other non-Tswana tribes, in accessing common law courts, due in particular to high fees, the absence of legal aid in most cases, as well as difficulties in accessing adequate interpretation services. (Article 5)

The Committee recommends to the State party that it provide adequate legal aid and interpretation services, especially to persons belonging to the most disadvantaged ethnic groups, to ensure their full access to justice. In that context, the Committee draws the attention of the State party to its General recommendation 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

15. The Committee, while welcoming the State party's willingness to provide primary education in the main mother tongues of non-Tswana tribes, notes with concern the difficulties

of many children belonging to these tribes to benefit from the educational curricula on account of linguistic barriers. (Articles 5 and 7)

The Committee recommends that the State party implement its above policy, in particular in regions inhabited traditionally or in substantial numbers by persons belonging to non-Tswana tribes. The Committee also recommends that the State party consult with the concerned tribes in this regard.

16. The Committee is concerned by information according to which the school curricula do not include reference to the history, culture and traditions of non-Tswana ethnic groups. (Articles 5 and 7)

The State party is requested to provide information, in its next periodic report, about measures adopted in the field of education aimed at encouraging knowledge of the history, culture and traditions of all tribes.

17. The Committee notes with concern that the decrees by the President of Botswana declaring a non-citizen as a “prohibited migrant”, cannot be effectively appealed before a judicial body, as demonstrated in the decision of the Court of Appeal in the case of *Kenneth Good*. (Article 5)

The Committee recommends to the State party that any person declared as a “prohibited migrant” be granted an effective remedy before a judicial body.

18. The Committee is concerned that in practice, asylum seekers are automatically detained in prison-like conditions until their status is determined, a process which in some cases can last up to three to four years, and that they cannot appeal the decision denying them refugee status before a judicial body. (Article 5)

The Committee recommends that asylum seekers be detained only when necessary, for a limited period of time, under other regulations than the Prisons Act and in accordance with UNHCR guidelines. The Committee also recommends to the State party that it recognize the right of asylum-seekers to appeal the decision denying them refugee status before a judicial body.

19. The Committee notes with concern that refugees have access neither to the Anti Retroviral (ARV) Therapy Programme nor the Prevention of Mother-to-Child Transmission of HIV Programme. (Articles 2 and 5)

The Committee recommends to the State party that it respect the right of refugees to an adequate standard of health by, *inter alia*, refraining from denying or limiting their access to preventive, curative and palliative

health services, and that it grant access of refugees to the Anti Retroviral (ARV) Therapy Programme and the Prevention of Mother-to-Child Transmission of HIV Programme.

20. The Committee is concerned by information according to which there is a growing hostility against undocumented immigrants in Botswana, in particular Zimbabweans, and that some undocumented immigrants have been ill-treated by police officers. It further regrets that insufficient information was provided by the State party on the inquiries made into the allegations of such ill-treatment by police officers. (Articles 4, 5 and 6)

The Committee draws the attention of the State party to its General Recommendation 30 (2004) on non-citizens. It recommends that the State party ensure that its competent authorities proceed to a prompt and impartial investigation into complaints of ill-treatment and in cases in which there are reasonable grounds to believe that ill-treatment has been committed by state agents, in particular when such acts seem to have been racially motivated. The State party is invited to provide the Committee with detailed information on the results of such investigations. The Committee also recommends that the State party increase its efforts to provide adequate training in the field of human rights, including on the prohibition of racial discrimination, to its law enforcement personnel.

21. The Committee notes that the State party has not yet established an independent institution with the mandate to monitor and promote human rights, including on issues relating to the prohibition of racial discrimination and the promotion of tolerance amongst ethnic groups. (Articles 2, 6 and 7)

The Committee invites the State party to consider establishing an independent national human rights institution, in accordance with the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (General Assembly resolution 48/134).

22. The Committee recommends to the State party that it invite the Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights and fundamental freedoms of indigenous peoples and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, for a visit on its territory.

23. The Committee recommends that the State party 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 articles 2 to 7 of the Convention, and that it include in its next periodic report information on action plans or other measures taken to implement the Durban Declaration and Programme of Action at the national level.

24. The Committee notes that the State party has not made the optional declaration provided for in article 14 of the Convention, and recommends that it consider the possibility of doing so.

25. The Committee strongly recommends that the State party ratify the amendments to article 8, paragraph 6, of the Convention, adopted on 15 January 1992 at the Fourteenth Meeting of States Parties to the Convention and endorsed by the General Assembly in its resolution 47/111. In this connection, the Committee refers to General Assembly resolution 59/176 of 20 December 2004, in which the Assembly strongly urged States parties to accelerate their domestic ratification procedures with regard to the amendment and to notify the Secretary-General expeditiously in writing of their agreement to the amendment.

26. The Committee recommends that the State party's reports be made readily available to the public from the time they are submitted and that the observations of the Committee on these reports be similarly publicized, in the official languages and in the main minority languages.

27. Pursuant to article 9, paragraph 1, of the Convention, and article 65 of the Committee's rules of procedure, as amended, the Committee requests the State party to inform it of its implementation of the recommendations contained in paragraphs 11, 12, 15 and 19 above, within one year of the adoption of the present conclusions.

28. The Committee recommends to the State party that it submit its seventeenth and eighteenth periodic reports in a single document on 22 March 2009.
