Comment

South Africa as a Party to the ICERD: a briefing paper*

Michael Banton
michael@banton.demon.co.uk

International aversion to doctrines and practices of apartheid was one of the influences that led the United Nations General Assembly, by a unanimous vote on 21 December 1965, to adopt the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD). In the drafting process it had been decided to make no reference to specific forms of racial discrimination, yet on only the previous day the drafting committee had made an exception, since Article 3 condemns ‘segregation and apartheid’.

Adoption of the Convention was a major advance in at least two respects. Firstly, it was an advance upon the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, because it included an enforcement process. States Parties to the ICERD undertook to submit to the UN, every two years, reports on what they were doing to implement the obligations they had undertaken. The States Parties were to elect a committee of 18 experts, to be known as the Committee on the Elimination of Racial Discrimination (CERD). This committee was to report annually to the General Assembly. It was empowered ‘to make suggestions and general recommendations based on the examination of the reports and information received from the States Parties’.

* A special number of the journal Theoria for December 2013 has assembled a set of articles on Theorising Race. Michael Banton was invited to contribute an essay. Suspecting that many readers interested in these matters might not be well acquainted with UN actions in this field, he prepared a briefing paper for other contributors. The editors of Transformation believe that some of our readers might like to see it.
Secondly, the ICERD provided in Article 14 that a state might, by a separate declaration, authorise CERD to issue an advisory opinion on any communication from an individual within that state’s jurisdiction who claimed to be a victim of a violation by the State Party of any of the rights set forth in the Convention.

In 1960 the United Nations had ‘condemned colonialism and all practices of segregation and discrimination associated therewith’ (as quoted in the fourth of the ICERD’s preambular paragraphs). So it was not surprising that CERD’s task (starting in 1970) was seen as political, and that many of the experts elected to it were diplomats. Since then, and particularly since the ending of the so-called Cold War, CERD’s activities have expanded (Banton 1996). I was a member of CERD from 1986 to 2001. By 2012, 170 of the UN’s 193 states had become parties to the ICERD, although so far only 47 have made a declaration permitting communications under Article 14.

In late 1992, as a member of CERD, and as representing the UN High Commissioner for Human Rights, I participated in a conference in the University of Pretoria on De Facto Racial Discrimination (Heyns et al 1994). Arrangements were made for me to visit the head of the South African diplomatic corps at the Ministry of Foreign Affairs. I put it to him that the ICERD provided a means of protecting certain rights of all persons. Ratification at that time would entail an acceptance by future South African governments of obligations to protect the rights of persons who in 1992 might not feel the need for additional protections. My representations were courteously received but I was given no indication about whether they might win favour with the government of the day.

On 10 December 1998 a different government of South Africa ratified the ICERD and, at the same time, made the declaration permitting communications under Article 14.

To follow the resulting proceedings, it is best to consult the UN Human Rights website and to look for the Treaty Bodies database. There, one can select CERD (as the convention), South Africa (as the country) and go to ‘type of document’. Under ‘State Report’, one can locate CERD/C/46/Add.3. This is a document of December 2, 2004 that contains the initial, second and third periodic reports of South Africa submitted as one document. Under ‘Summary Record’, one can locate CERD/C/SR.1766 and 1768, being a record of the examination of that report in Geneva on August 6-7, 2006. In the future one may be able to consult the ‘Core Document’, a state
report bringing together basic constitutional and demographic information relevant to all the human rights conventions to which the state is a party. South Africa is yet to submit a Core Document.

On the same website, under ‘the committees’ and ‘annual reports’, one can locate CERD’s 2006 report A/61/18. In that, at pages 73-79 in the English language version, can be found CERD’s observations consequent upon its examination of the state report.

South Africa’s only report to date is a document of 283 paragraphs. The first 29 cover the history of the state and the structure of its report. Paragraphs 30-57 relate to the obligations stemming from Article 1 of the ICERD. They explain that ‘the South African Constitution and the Promotion of Equality and Employment Equity Acts, distinguish between unfair discrimination and discrimination’. They cite the case of *Harksen v. Lane NO and Another* (1998(1) SA 300(CC)) as illustrative. They provide indicators of systemic residual racial discrimination. Paragraphs 58-116 describe the legislation adopted to discharge the obligations under Articles 2 & 3 of the ICERD to eliminate racial discrimination and eradicate apartheid.

Paragraphs 117-131 describe actions to prevent the dissemination of doctrines of racial superiority and incitement to racial hatred. They report briefly on the ‘numerous cases in which justice is seen to be done’ and the sentences passed. Paragraphs 132-222 describe actions taken to ensure that, in accordance with ICERD Article 5, the enjoyment of civil, political, economic, social and cultural rights is protected from discrimination. They include reference to the Roll Back Xenophobia campaign and detail outstanding ‘challenges’. Paragraphs 223-227 cover the provision of effective remedies. Paragraphs 227-279 cover measures in education and the promotion of understanding, tolerance and friendship. The Conclusion (paragraphs 280-283) states that the report has sought both to provide a baseline and to outline key policy interventions. It emphasises ‘the constraints under which the compliance measures are being implemented, the key ones being limits on the state budget and the obscene racial disparities in resources including income, human development, distribution of land and other forms of capital or resources’.

According to the Summary Report of CERD’s 1766th meeting (available only in French), the State Report was presented by Ms Mabandla. Consideration of the report was opened by Mr Raghavan Vasudevan Pillai, a national of India, who served as CERD’s country rapporteur. Mr Pillai
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observed that the Committee could not be satisfied with the classification of the population as consisting of Blacks, Whites and Asians. The Guidelines for the CERD-Specific Document to be submitted by States Parties under Article 9, paragraph 1, of the Convention (UN document CERD/C/2007/1) state:

10. The ethnic characteristics of the population, including those resulting from a mixing of cultures, are of particular importance in relation to the Convention…

11. Many States consider that, when conducting a census, they should not draw attention to factors like race, lest this reinforce divisions they wish to overcome or affect rules concerning the protection of personal data. If progress in eliminating discrimination based on race, colour, descent, or national or ethnic origin (hereinafter racial discrimination) is to be monitored, some indication is needed in the CERD-specific document of the number of persons who might be treated less favourably on the basis of these characteristics…

12. The Committee is also interested in information indicating whether groups, and if so which groups, are officially considered to be national or ethnic minorities, or indigenous peoples in the State Party. It also recommends that descent-based communities, non-citizens and internally displaced persons be identified.

Mr Pillai, like other members of the Committee, queried the distinction between unfair discrimination and discrimination, as mentioned in paragraph 34 of the report. Other members asked for further information about xenophobia, the enforcement of laws against discrimination in housing, equitable representation in the institutions for the administration of justice, the racial or ethnic origin of persons convicted of offences of racial discrimination and the cases in question. Some members of CERD, referring to the historic character of the first report from South Africa, spoke more like the diplomats (which some of them were) than as experts on action against racial discrimination.

In its ‘Concluding Observations’ on the report, CERD made 17 specific recommendations. The first of these was that, in its next periodic report, South Africa endeavour to include ‘a qualitative description of the ethnic composition of its population’ as described in the guidelines mentioned above. Another was ‘that the State Party include in its next periodic report statistical information on prosecutions launched, and penalties imposed, in cases of offences which relate to racial discrimination…’
CERD concluded with the recommendation ‘that the State Party submit its fourth periodic report jointly with its fifth and sixth periodic reports in a single report by 9 January 2010, and that it address all points raised in the present concluding observations’.

To an overseas reader, the South African report suggests that the government does not know how best to define race or to differentiate distinctions based on phenotype from distinctions based on socio-economic or cultural differences. This impression is strengthened by the first section of the Constitution; it states that the Republic is ‘founded on the following values: (a) Human dignity, the achievement of inequality and the advancement of human rights and freedoms; (b) Non-racialism and non-sexism’. The second subsection adds nothing that is not comprehended in the first.

Nor have the government’s lawyers considered with sufficient care the text of Article 1 in the ICERD. It reads:

In this Convention, the term ‘racial discrimination’ shall mean 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.

The distinction that the South African government has drawn between unfair discrimination and discrimination, parallels the distinction drawn in some countries, such as Sweden, between legal and illegal discrimination.

However, the trend of judicial opinion has been to reject such a distinction. For example, in the case of Abdulaziz the European Court of Human Rights recognised what might be considered lawful discrimination, but chose to call it differentiation. It held that differential treatment may be permitted where there is:

1. a reasonable and objective justification,
2. the differential treatment is in pursuit of a legitimate aim; and
3. there is proportionality between the effects of the measures and the objectives.

(Abdulaziz, Cables and Balkandali v. UK [1985] 7 EHRR 471)

The UN Committee on Human Rights, which monitors implementation of the International Covenant on Civil and Human Rights, in its General Comment No. 18, paragraph 13, has similarly observed that not every
differentiation of treatment will constitute discrimination, as if to exclude the possibility of lawful discrimination.

According to a recent UN study (Bossuyt 2000, para 52):

Nowadays it is universally accepted that the term ‘discrimination’ has to be reserved for arbitrary and unlawful differences in treatment. ‘Distinction’, on the other hand, is a neutral term, which is used when it has not yet been determined whether a differential treatment may be justified or not. The term ‘differentiation’ on the contrary, points to a difference in treatment, which has been determined to be lawful.

On this reasoning, what South Africa regards as justifiable discrimination should be considered either distinction or differentiation.

The trend is to regard ‘discrimination’ as illegal by definition, but to except from such a definition actions and policies like those called ‘affirmative action’, ‘positive action’, or – in the wording of ICERD Article 2(2) – ‘special measures’. That article also specifies that ‘These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved’.

The ICERD distinction between cause and effect has been followed in other jurisprudence and legislation. In the case law of USA it is a distinction between disparate treatment and disparate impact. In the UK statute it is a distinction between direct and indirect discrimination; this has been the inspiration for a similar distinction in the European Union Council Directive 2000/43/EC.

Many policies distinguish disadvantage from discrimination. Racial disadvantage can spring from sources other than discrimination; it is often thought necessary to combat disadvantage lest it be transmitted to the next generation.

The legal concept of discrimination differs from the philosophical conception. The latter is traced to Aristotle’s doctrine that equals are entitled to equal things. Discrimination is then the unequal treatment of equals. This sets an abstract and universal standard against which behaviour may be judged. The legal conception, by contrast, has to provide a practical standard. It is usually restricted to the prohibition of unequal treatment in specific relationships (such as those of public life) and to actions based on specific criteria (such as race). Things that might constitute discrimination from a philosophical standpoint may not be prohibited in law. On the other hand, in Europe the prohibition of dismissal on grounds of pregnancy has
been included in the prohibition of discrimination; since males and females are not equals in respect of pregnancy, this would not constitute discrimination from a philosophical standpoint.

It is possible that in the future the consideration of communications (or complaints) under Article 14 may be as important a function of CERD as the examination of state reports under Article 9. Up to 2011, CERD had received 48 complaints concerning 54 states parties. Some of these complaints were found inadmissible. No admissible complaints have been received from persons in African countries. It is also possible, however, that in the future such complaints will more frequently be dealt with by regional institutions such as, in this case, those of the African Union (see, eg, Wilson 2011).

Communications under Article 14 could also stimulate improvements in South Africa’s legislation. If, for example, a person in Natal of Indian origin had grounds for believing that, because of descent (eg, ascription to a low-ranking jati within the Hindu system of caste), he or she had suffered less favourable treatment in employment or any other field of public life, he or she could bring a legal action. If the person were told that South African law provided no remedy, he or she could file a complaint with the UN Commissioner for Human Rights. If CERD found that the complainant had exhausted all available domestic remedies, it might find the complaint admissible. It would refer the complaint to the State Party and consider all representations from the State. If it found that the complainant’s rights under the Convention had not been protected, it would issue an advisory opinion. The State Party would then be expected to modify or extend its legislation.

The same would apply if the complainant alleged that he or she had been treated less favourably because he or she was a Zulu, a Xhosa or a Zimbabwean.

It may also be noted that in 2010 CERD decided to hold, at the beginning of each week, informal meetings with representatives of Non-Governmental Organisations from reporting states (Banton 2012). Institutions of civil society now exercise an influence that could not have been contemplated in 1965.
References


——— (2012) ‘States and civil society in the campaign against racial discrimination’, *Nationalism and Ethnic Politics* 18(4) (December).

