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STATEMENT

BY

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DIRECTOR-GENERAL

**DEPARTMENT OF TRADITIONAL AFFAIRS OF THE
REPUBLIC OF SOUTH AFRICA**

**AT THE 13TH SESSION OF THE UNITED NATIONS
PERMANENT FORUM ON INDIGENOUS ISSUES**

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**SOUTH AFRICA'S NATIONAL STATEMENT DELIVERED AT THE
13TH SESSION OF
THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS
ISSUES (UNPFII)
12 – 23 MAY 2014**

Chairperson,

Esteemed members of the Permanent Forum

Ladies and gentlemen

Let me first congratulate you Chairperson on your election to preside over the 13th Session of the United Nations Permanent Forum on Indigenous Issues. The South African delegation, which includes the Chairperson of the National Khoi and San Council, would like to assure you of its full support and confidence in your stewardship.

Thank you once again for giving us this opportunity to share the South African story of indigenous people. Please note that detailed reports on how the South African Government has dealt with the issues as contained in the UN-DRIP and recommendations of the former Special Rapporteur, Rodolfo Stravenhagen during his visit to South Africa, has been prepared for purposes of this meeting.

I would like to remind this esteemed house, the words spoken by the father of our democracy, and the former Statesman, Nelson Mandela in 1963 and again reiterated during his release in 1990 regarding non-discrimination of the vulnerable by the others more privileged when he said that **"I have fought against White domination and fought against Black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and equal opportunity. It is an ideal I hope to live for and to achieve but if needs be, it is an ideal I am prepared to die for."**

The 1996 Constitution of the Republic of South Africa gives effect to Madiba's dream of a non-racial and equal society on two historic occasions. It states that "South Africa is **one**, sovereign and democratic State founded on the following values:

- Human dignity, the achievement of equality and the advancement of human rights and freedoms; as well as
- Non-racialism and non-sexism..."

These values were demonstrated during our first democratic elections on 27 April 1994 after many years of marginalization and discrimination. It was on this historic day that millions of South Africans came out from all walks of life to cast their votes for the first time and it was through this vote that human dignity for all our people was restored.

This year marks 20 years of freedom and it will be celebrated throughout the whole year as a constant reminder of our painful past. Once again,

on 7 May 2014, South Africans voted in large numbers to exercise their democratic right to establish their fifth democratic Government.

The values and principles referred to above guide our democratic Government in South Africa. It is also within this context that there is a need to appreciate how South Africa has moved in 20 years of our democracy to accommodate the needs of those who were historically marginalised and discriminated against by the successive colonial and apartheid Governments.

The Constitution as indicated earlier, is the supreme law of the Republic of South Africa based on the principle of non-discrimination. Furthermore, it does not allow vulnerability and marginalisation of its citizens. Indigenous peoples and communities in South Africa are not discriminated on the basis of race, culture, religion or origin. This is elaborated in Chapter 2 of the Constitution, the Bill of Rights, which is the *magna carta* of our democracy in South Africa enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and fundamental freedoms.

South Africa is on course in building a common national identity for all built on respect for one another in our colourful diversity and rainbow nation. This goal will ensure that we make considerable progress in moving South Africa forward and building a better life for all our people.

As a country, we are still committed and morally obliged to uphold Mandela's legacy to eradicate the triple challenges of poverty, inequality and unemployment encompassing all our affected downtrodden people.

The majority of historically disadvantaged people in South Africa were deprived of basic and elementary human rights for centuries. These communities experienced extreme levels of deprivation and subjugation. As we focus on principles of good governance at this Forum, it is important to paint a clearer picture of indigenous people in South African. The South African Human Rights Commission explores the notion of "indigenous peoples" to further shed more light on this elusive and intractable concept. The Commission maintains that "reference to indigenous peoples in South Africa should refer to those indigenous peoples whose rights in relation to other African indigenous peoples are not adequately addressed."

In this regard, the South African Government has identified the following priorities and provided resources for the medium term period (2014-2019 and beyond): education, health care, economic development and job creation, safety and security:

Education

On education, all South Africans have the right to basic education including adult based education and higher education. South Africa has one of the highest rates of public investment in education in the world. At about 7% of GDP and 20% of total state expenditure, Government

spends more on education than any other sector. Government has improved access to basic education to promote universal access to education whereby

8 million children attend no-fee paying schools. In addition, 9 million orphans and vulnerable children receive social grants in an effort to fight poverty and to build healthy future generations.

Healthcare

On healthcare, Government has registered significant improvements in access to health care such as:

- More than 1,500 new health facilities, including clinics have been built and others refurbished;
- Most clinics are now open 24 hours a day and services are for free;
- Improved HIV and AIDS programmes have increased life expectancy and many children have been saved due to improved mother-to-child HIV transmission prevention programme; and
- Thousands of people are receiving treatment and more than 20 million people responded positively to the 2011 HIV test campaigns.

Basic services

On basic services,

- Access to proper sanitation has increased from 50% in 1994 to 83% in 2012;

- Access to water has increased from 64% in 1994 to well over 95% in 2012; and
- Access to electricity has increased from 50% in 1994 to 86% in 2012.

Human settlement

On human settlement, Government has built over 3 million houses and over 80 000 serviced sites were delivered. 50% of all subsidy allocations have been given to women-headed households.

Land distribution

As part of land restitution, Government has distributed 9.4 million hectares of land to almost a quarter of a million beneficiaries as part of developing sustainable rural communities as well as contributing towards restorative justice.

Safety and security

Since 1994 the levels of serious and property crimes have declined. Furthermore Government is still committed to building safer communities, especially to fight crimes against vulnerable groups such as women, children and the aged.

Lastly, during the past 20 years, South Africa has moved faster in creating employment and employment opportunities for approximately 5.6 million people both in formal and informal sectors

Chairperson,

South Africa supports the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and its objectives. This is the reason why the South African Government found it easy in 2007 to support the UNDRIP because our Constitution gives effect to its provisions. To this end, the South African Government is consistent in many ways with the provisions of the Declaration.

Chairperson,

In 2009, the South African Government established a dedicated Department of Traditional Affairs (DTA) to deal exclusively with indigenous/traditional affairs, underpinned by the following 5 pillars:

- Indigenous leadership.
- Governance
- Culture
- Administration of justice, and
- Socio-cultural and economic development

It is these pillars that give effect to the mandate of the established department. This department is the national custodian of the rights of the indigenous people of South Africa who observe cultural practices and customs.

Chairperson

The Traditional Affairs Bill which was intended to affirm the rights of indigenous people was developed in 2010. Extensive pre-Cabinet consultations were conducted from June 2011 covering all the sparsely populated areas. **To ensure free, prior and informed consent**, the Department of Traditional Affairs worked in collaboration with the National House of Traditional Leaders and the National Khoi and San leadership.

Domestic consultative processes approved by the Cabinet have been finalised. At the moment, public inputs are being considered as well as consolidated and the revised Bill will be re-submitted for tabling in Parliament during the fifth Administration which is starting on 24 May 2014. We acknowledge that it has taken longer than anticipated to finalise the Bill. In the interim, the coordinating structure called the National Khoi and San Council has been increased to make it more representative of each of the five Khoi and San communities. This structure continues to interface with Government to discuss issues of development and other related matters.

Furthermore, there are other pieces of legislation that have been promulgated in the past twenty years to deal with the rights of previously marginalised communities. Amongst others, we have the Transformation of Certain Rural Areas Act, 1998 (TRANCRA) and the Land Restitution

Act, 1994 which deal with issues of land rights of various historically disadvantaged communities in South Africa.

A further key area of Government intervention is the review of the 1913 Natives' Land Act to deal with redress and land restitution.

Chairperson,

In addition to all this, we would like to bring to the attention of the Forum that South Africa has State Institutions that support Constitutional Democracy (Chapter 9 Institutions) and keeping Government in check and accountable to its citizens.

The Commission for the Promotion and Protection of the Rights of Cultural, Linguistic and Religious Communities is one of such institutions. It is fully functional and caters for amongst others, the promotion and the protection of the rights of the indigenous communities.

In addition, the South African Government has established the Pan South African Language Board which focuses on the development and promotion of the 11 official languages as well as the Khoi, San and Nama languages. However, we acknowledge that more work still needs to be done in the area of previously marginalised languages.

There are additional efforts on annual basis to empower and further inform relevant Government officials and indigenous people on the promotion, protection and practical enjoyment of the rights of indigenous people through the involvement of the Higher Education Institutions in partnership with International Labour Organisation and African Human and People's Rights Commission. The course is intended to deepen our understanding of Africa's approach to the rights of indigenous peoples, capturing best practices within the Continent as well as the international human rights developments.

We have indeed come a long way from 1994. Our Constitution propels us towards reconciliation, inclusivity, unity and nation building when it says:

"We, the people of South Africa

Recognize the injustice of the past

South Africa belongs to all who live in it, united in diversity".

Chairperson,

The Government of South Africa is committed to continue addressing the challenges faced by its citizens. Let me conclude by these profound words said by the father of our nation President Mandela in his "Long Walk to Freedom"- words which continue to inspire us every day, when he says:

"I have taken a moment here to rest, to steal a view on the glorious vista that surrounds me, to look back on the distance I have come. But I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

Esteemed members, Madiba reminds us about the "long walk" to rebuilding and reconstruction of our country. We are determined and committed to overcome the remaining obstacles to ensure improved life for all our people!

I thank you!!!

ANNEXURE A TO THE MAIN SOUTH AFRICAN STATEMENT

THE IMPLEMENTATION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

On 13 September 2007 the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples. South Africa supported and canvassed support from other African State for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007:

The General Assembly refers to the status and importance of the 2007 Declaration as follows:

"A non-binding text, the Declaration states that native peoples have the right 'to the recognition, observance and enforcement of treaties' concluded with States or their successors. It also prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them".

The Declaration imposes a number of obligations on member states, although these obligations are, legally speaking not of an obligatory nature, they are of a strong persuasive nature.

In the table below comparison is drawn between the contents of the 2007 UN Declaration on the Rights of Indigenous Peoples with the various provisions of the Constitution of the Republic of South Africa, 1996. This therefore, demonstrates the unwavering commitment by the South African government to redress the injustices of the past colonial and apartheid racially discriminatory laws, policies and practices.

2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
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2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
Art. 1	All indigenous people have the right to fully enjoy all human rights and fundamental freedoms.	Clauses 1 and 9	These are general applicability clauses that relate to all citizens of South Africa; and the equality clause provides for non-discrimination
Art.2	Indigenous people are equal to other people and have the right to exercise their rights (particularly those based on indigenous origin or identity) free from discrimination.	Clause 9	Equality is applicable to all citizens of South Africa irrespective of their racial origins or station in life. This is a non-discriminatory clause.
		Clause 6	This clause deals with the development, promotion and protection of languages of all ethnic people of South Africa. For purposes of this Forum, clause 6(5)(ii) puts emphasis amongst other languages on the Khoi, San and the Nama languages. The Pan South African Language Board is a creature of legislation established to give effect to clause 6 of the Constitution
		Clauses 30 and 31	The two clauses deal with the promotion and protection of heritages, cultures and cultural communities of people of South Africa, which includes the customary laws and customs of such people. The Commission on the Protection and Promotion of Cultural, Religious and Linguistic Communities

2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
			is a creature of legislation that gives effect to Clauses 31 and 235 of the Constitution.
Art. 3	All indigenous people have the right to self-determination.	Clause 235	Self-determination within a unitary State is envisaged by this clause. Clause 235 read with clauses 9, 6, 30 and 31 provides any cultural group with the right to non-discrimination, the development and promotion and protection of each cultural group language, heritage, culture, customary law and customs within a unitary State. All this has been given effect to in applicable pieces of legislation promulgated since 1994.
Art. 4	Indigenous people have the right to autonomy with regard to matters relating to their own internal affairs, as well as in financing their autonomous functions.	Clauses 6, 30, 31 and 235	Same as above. The Commission on the Protection and Promotion of Cultural, Religious and Linguistic Communities is a creature of legislation that gives effect to Clauses 31 and 235 of the Constitution.
Art. 5	Indigenous people have the right to maintain their own political, legal, economic, social and cultural institutions, while also retaining their rights to participate in the political, economic, social and cultural life of the State.	Clause 31	Same as above. The Commission on the Protection and Promotion of Cultural, Religious and Linguistic Communities is a creature of legislation that gives effect to Clauses 31

2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
			and 235 of the Constitution.
Art. 6	Every indigenous individual has the right to a nationality.	20 read with clauses 1 and 9	This clause recognises the citizenship of very South African irrespective of racial origin or station in life within the broad framework set out in clauses 1 and 9.
Art. 7	Indigenous individuals have the rights to life, physical and mental integrity, and liberty and security of person.	Clauses 11 and 12 read with clauses 1 and 9	Life Freedom and security of the person
Art. 8	The culture of indigenous people may not be forcefully assimilated or destroyed.	31	Cultural, religious and linguistic communities
Art. 9	All indigenous people have the right to belong to an indigenous community or nation.	Clauses 30, and 31	Language and culture Cultural, religious and linguistic communities and enjoyment of customary law and customs
Art. 10	Indigenous people shall not be forcibly removed from their territories and no relocation shall take place without the proper consent of the indigenous people concerned.	Clause 21	Freedom of movement
Art. 11	Indigenous people have the right to practice and to the revitalisation of their cultural traditions and customs.	Clauses 30 and 31	Language and culture cultural, religious and linguistic communities
Art. 12	Indigenous people have the right to practice and develop their spiritual and religious traditions, customs and ceremonies.	Clauses 30 and 31	Language and culture cultural, religious and linguistic communities
Art. 13	Indigenous people have the right to develop and transmit their histories, languages, oral traditions, philosophies, writing systems and literature to future generations. They also have the right to designate and retain their own names for communities, places and persons.	Clause 30 and 31	Language and culture Cultural, religious and linguistic communities
Art. 14	Education: Indigenous people have the right to manage their educational systems and institutions	Clause 31	Cultural, religious and linguistic communities

2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
	which provides education in their own languages in a manner appropriate relative to their cultural methods of teaching. They also have the right to all forms of education of the State without discrimination.	Clause 29	Education
Art. 15	Indigenous people have the right to the dignity and diversity of their cultures which shall also be reflected in education and public information.	Clauses 31 and 10	Cultural, religious and linguistic communities and dignity
Art. 16	Media: Indigenous people have the right to establish their own media and have access to all forms of other media without being discriminated against.	16	Freedom of expression. The Nama people in Northern Cape have established their own Radio Station using their own resources. Furthermore, they have a newspaper of their own that is circulated to all Khoi and San in South Africa.
Art. 17	Indigenous individuals have the right to enjoy all rights established under applicable international and domestic labour law.	Clauses 22 and 23	Freedom of trade, occupation and profession Labour relations
Art. 18	Participation of indigenous people in decision-making in matters which concern them. They have the right to participate through representatives as well as through maintaining their own indigenous decision-making institutions.	Preamble to the Constitution, Clauses 1 and 31	Founding provisions of the Constitution and the cultural, religious and linguistic communities
Art. 19	States should cooperate with concerned indigenous people through their own representatives, in order to obtain their consent before the implementation of legislative or administrative measures.	Clause 1	Founding provisions of the Constitution
Art. 20	Subsistence and development. Indigenous people have the right to maintain and develop their political, economic and social systems or institutions and to be secure in enjoying their own means of subsistence and development.	Preamble to the Constitution and Clause 31	Cultural, religious and linguistic communities Customary law and customs

2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
Art. 21	Indigenous people have the right to the improvement of their economic and social conditions which include areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.	Preamble to the Constitution and Clauses 29, 22, 23, 26, and 27	Education Freedom of trade, occupation and profession Labour relations Housing Health care, food, water and social security
Art. 22	Special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.	Clause 9	Equality. This is a non-discrimination clause
Art. 23	The right to development of indigenous people: Indigenous people have the right to determine and develop priorities and strategies for exercising their right to development.	Clause 235	Self-determination within a unitary State
Art. 24	Concerns the right of indigenous people to their traditional medicines and health practices which include the conservation of their vital medicinal plants, animals and minerals. Indigenous people also have the right to access all other social and health services.	Clause 27	Health care, food, water and social security
Art. 25	Indigenous people have the right to maintain their spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources, and to uphold their responsibilities towards future generations in this regard.	Clause 31	Cultural, religious and linguistic communities Customary laws and customs
Art. 26	Indigenous people have the right to own and use lands, territories and resources that they possess by reason of traditional ownership or occupation as well as those they acquired otherwise.	Clause 25	Property clause
Art. 27	States shall establish and implement a proper process (with due recognition of indigenous people's laws, traditions, customs and land tenure systems), to recognise the rights of indigenous people pertaining to their lands, territories and resources	Clause 31	Cultural, religious and linguistic communities Customary laws and customs
Art. 28	Indigenous people have the right to redress for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been taken away without their consent.	Clauses 25, 34 and 33	Property clause Access to courts Just Administrative Action
Art. 29	Indigenous people have the right to have the	24	Environment

2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
	environment of their lands, territories and resources protected and conserved.		
Art. 30	Military activities shall not take place in the lands or territories of indigenous peoples unless justified by a relevant public interest or otherwise with the proper consent of the indigenous people concerned.	Clause 25	Property clause
Art. 31	Indigenous people have the right to maintain and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as manifestations of their sciences, technologies and cultures.	Clause 31	Cultural, religious and linguistic communities Customary laws and customs
Art. 32	Indigenous people have the right to determine priorities and strategies for the development of their territories and other resources.	Preamble to the Constitution and clause 31	Cultural, religious and linguistic communities
Art. 33	Indigenous people have the right to determine their own identity or membership according to their customs and traditions.	Clauses 30 and 31	Language and culture Cultural, religious and linguistic communities Customary laws and customs
Art. 34	Indigenous people have the right to develop and maintain their institutional structures, their distinctive customs and juridical systems or customs in accordance with international human rights standards.	Clause 31	Cultural, religious and linguistic communities Customary law and customs
Art. 35	Indigenous people have the right to determine the responsibilities of various individuals in their communities.	Clause 31	Cultural, religious and linguistic communities
Art. 36	Indigenous people, especially those divided by international borders, have the right to develop contacts, relations and cooperation, which include spiritual, cultural, political, economic and social activities, with their own members as well as other people across borders.	Clause 31	Cultural, religious and linguistic communities
Art. 37	Indigenous people have the right to recognise, observe and enforce treaties, agreements and other constructive arrangements which were concluded with States or their successors and to have those treaties, agreements and other constructive arrangements respected by States.	NHTL Act	NHTL Act ????????
Art. 38	States and indigenous people shall cooperate and consult in taking the appropriate measures, which includes legislative measures, in order to achieve the ends of this Declaration.	Chapter 3 of the Constitution	Cooperative governance

2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES		RSA CONSTITUTION	
ART.	CONTENTS	SECTION	CONTENTS
Art. 39	Indigenous people have the right to financial and technical assistance from the States and through international cooperation, for the enjoyment of the rights as contained in this Declaration.		
Art. 40	Where conflicts and disputes are concerned, indigenous people have the right to access to and prompt decision through the proper procedures for the resolution thereof.	Clause 34	Access to courts
Art. 41	Organs and specialised agencies of the United Nations system and other intergovernmental organisations shall contribute to the realisation of the provisions of this Declaration through the mobilisation of financial cooperation and technical assistance.		
Art. 42	United Nations, and its bodies such as the Permanent Forum on Indigenous Issues, and specialised agencies (also at country level), and States, shall all promote respect for and the full application of the provisions of the Declaration.		
Art. 43	The rights as contained in the Declaration constitute the minimum standards for the survival, dignity and well-being of the indigenous people of the world.	Clauses 1, 6, 9, 30 and 31	These clauses have been dealt with above
Art. 44	All rights as recognised in the Declaration apply to both male and female indigenous individuals equally.	Clause 9	Equality clause applies to all citizens of South Africa
Art. 45	Nothing that has been contained in the Declaration may be interpreted as diminishing or extinguishing the rights indigenous people have or may acquire in the future.	Clause 9	Equality clause applies to all citizens of South Africa
Art. 46	The provisions of the Declaration shall be interpreted in accordance of justice, democracy, and respect for human rights, equality, non-discrimination, good governance and good faith.	Preamble to the Constitution, clauses 1 and 9	Founding of provisions Equality

As indicated above, the Constitution provides an extensive framework for the protection, enforcement, and advancement of the interests of all South Africans. As such, the Constitution recognises the right of all people indigenous to the South African territory. The Constitution does not provide preferential treatment to any racial or ethnic identity. It provides equal treatment to all South Africans.

As regards the constitutional framework in respect of cultural, religious and language rights, the 1999 **South African Human Rights Commission Report** states as follows:

"The Constitution of South Africa provides for the right of cultural, religious and linguistic communities to enjoy their culture, practice their religion, use their language and form, join and maintain necessary and appropriate associations and other relevant organs of civil society. The challenge, therefore, for the post-apartheid South Africa and its people with their diverse ethnic, religious, linguistic and cultural make up, is to: translate these constitutional provisions into reality and thus attain "unity in diversity" within a constitutional framework that is based on the respect and promotion of human rights, and in the process, reverse the effects of decades of domination and, subjugation of mainly the indigenous communities by more powerful and dominant groups."

The South African Constitution places considerable value on both the principles of unity and diversity. It contains specific features that recognise the right of communities to engage in unique cultural, linguistic and religious forms of expression.

In addition to the Bill of Rights' recognition of the right to exercise the individual rights to culture and language as well as the right to identify with others who subscribe to the same values, the recognition of eleven official languages and the promotion of the Khoi, Nama and San languages are provided for in the Constitution. To this end, provision is made in clause 185 of the Constitution for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

The said Commission is already functional. It promotes respect for the rights of all South Africans including the rights of those who were previously disadvantaged because of the colonial and apartheid racially discriminatory laws, policies and practices. Furthermore, it promotes peace and friendship amongst the respective communities in South Africa and lobbies the State and other sectors to respect the rights of the cultural, linguistic and religious communities. The Commission may report the State (in this instance the designated Department or Minister) to the SAHRC for non-compliance.

It is also clear that while certain African traditional communities, governance structures and leadership positions have therefore been recognised by law in compliance with the Constitutional prescripts, there has never before been statutory recognition of the Khoi-San, communities, leaders and governance structures. The African traditional communities, governance structures and leadership positions were recognised by the colonial legislative and policy frameworks. In 1996, it was imperative to recognise this phenomenon that already existed in terms of the previous legislation.

The formal recognition of the Khoi-San communities, leaders and structures was not possible in 1996 because the existence of such communities, leaders and governance structures had not been made possible by the successive colonial and apartheid governments. Such recognition is only possible now not by way of a constitutional amendment but through enabling national legislation. There is absolutely no need to amend the Constitution of the Republic of South Africa to accommodate the recognition of the Khoi and San communities and leaders if one has regard to Schedules 4 and 5 of the Constitution.

It is important to note that Schedule 4 to the Constitution of the Republic of South Africa deals with concurrent legislative competences between National Government and Provincial Governments. Schedule 5 to the Constitution on the other hand deals with the exclusive legislative competences of Provincial Governments. This means that anything that is not in Schedule 4 or 5 to the Constitution is a national legislative competence. The Khoi and San matters do not appear in schedules 4 and 5. By virtue of this constitutional make up, the Khoi and San matters are a national legislative competence. It is in this regard that national government has sought to come up with national legislation to deal with the Khoi and San matters in an integrated manner.

The national government through the Department of Traditional Affairs has drafted a single Bill called the Traditional Affairs Bill. This has been achieved by

consolidating two pieces of legislation, namely, the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003)(Framework Act), and the National House of Traditional Leaders Act, 2009 (Act No. 23 of 2009)(National House Act).

The said Bill seeks amongst other things to make provision for the recognition of the Khoi-San, communities, leaders and structures for the first time in the history of South Africa.

ANNEXURE A TO THE MAIN SOUTH AFRICAN STATEMENT

May 2014

SOUTH AFRICA'S RESPONSE TO THE REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE

The South African Government welcomes the report of the Special Rapporteur. We thank Mr Rodolfo Stavenhagen for the work undertaken in our country in 2005, and for acknowledging the need to consult as widely as possible. We also acknowledge, that the consultative process was not as inclusive as it could have possible been. We have noted that his mission lasted for only twelve days.

South Africa was ruled by oppressive, minority, colonial and apartheid regimes over decades. The majority of our people, of which the Khoi-San form a segment, were deprived of basic and elementary rights. This resulted in levels of deprivation which many in the world have not witnessed. Thus it is important to acknowledge that the majority of South Africans who were oppressed by these regimes included other communities, other than the Khoi-San.

When South Africans freed themselves from the yoke of colonialism, imperialism and apartheid oppression they agreed on a number of basic values which would underpin the South African constitutional democracy. These values are embodied in the Constitution of the Republic of South Africa, 1996. Section 7 (1) of the Constitution provides that:

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of **all people** in our country and affirms the democratic valued of **human dignity, equality** and freedom."

Section 9 of the Constitution deals with the principle of equality, as follows:

1. **"Everyone** is equal before the law and has the right to **equal protection and benefit of the law.**
2. Equality includes the full and equal enjoyment of all rights and freedoms. **To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.**

3. The state may **not unfairly** discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, **ethnic or social origin, colour**, sexual orientation, age, disability, religion, conscience, belief, **culture, language and birth.**"

Chairperson, these are the values and principles which guide the decisions and activities of our Government in South Africa. It is also within this context that we need to caution against the use of the term "Bantu", which the apartheid rulers used, to refer to the African majority in our country. This term appears in paragraphs 12 and 23 of the Rapporteur's report.

The report deals primarily with two issues, namely:

- a) the notion of "indigenous" status; and
- b) menu of programmes and projects which the Rapporteur suggests should be implemented or introduced.

Our comments on these issues appear below.

The South African Government has not given consideration yet to the possible ratification of the ILO Convention No. 169 (1989). The report we are considering today provides our country with the opportunity to give a finite and conclusive response in the near future to this issue. Whilst one cannot pre-empt the decision of Government, two observations need to be made. Firstly, South Africa is a constitutional democracy, and the Constitution is the supreme law of our land. Section 2 of the Constitution provides that any law, conduct, decision or act which is inconsistent with the Constitution, is invalid.

In this regard, our Government has to follow the Equality Clause in the Constitution when considering this matter. Secondly, the current wording used by United Nations Organs to define the term indigenous", discriminates against other indigenous citizens of South Africa. It needs to be pointed out that this is a subject, which evokes a lot of debates and emotions in our country. For this reason, we need to tread cautiously as we move towards building one and indivisible nation and one national identity. It is thus imperative that we should move away from an approach which is the antithesis of nation building in South Africa

Regarding that part of the report dealing with projects and programmes, we wish to indicate that these are being considered through the existing governmental programmes and processes. Our country has, through legislation and other means introduced transparent and

participatory mechanisms regarding the identification of the basic needs of the various communities. These needs are taken into account by all the spheres of government through, amongst others, the annual Integrated Development Planning (IDPs) processes. It must be noted further that there are government programmes, currently, which target the Khoi-San. Such programmes include the legislative measures contemplated in the Traditional Affairs Bill to recognise the Khoi and San communities, leaders and governance structures, the current Land Restitution Act which is used to process the land claims applications that complied with the cut-off date of 31 December 1988 and the current policy process aiming to accommodate the pre- June 19, 1913 land dispossessions of the Khoi and San Communities to mention only a few of such legislative and policy measures. The report before us thus constitutes an important reference tool, and will assist in the planning processes moving forward.

We now turn to deal with the rest of the report.

- We accept the outline and evaluation of our history as set out in paragraphs 9 and 10 of the Special Rapporteur's report;
- We have noted that the recommendations are divided into four parts, and we would welcome an indication as to whether this Forum will take it upon itself to attend to the implementation of Parts B, C and D of the Rapporteur's recommendations; and, lastly-
- The majority of the issues raised in the report are receiving attention already within various government departments, but not necessarily in the manner suggested in the report.

In conclusion, we wish to register our commitment to the upliftment of the standard of living of all our citizens, in particular all those who were disadvantaged in the past as a result of colonial and apartheid racially discriminatory laws, policies and practices. To this end, the reconstruction and development process will be a long and challenging one. Secondly, the Special Rapporteur's report and recommendations continue to be evaluated against the various government's programmes and processes. Once the evaluation processes have been completed, a comprehensive communiqué will be formulated. This Forum will be duly appraised of the Government's final response to the various issues dealt with in the Special Rapporteur's report and recommendations.

We thank you.