Comments by Solidarity Trade Union to the Committee of Experts on South Africa's application of Convention 111

Submitted by Solidarity Trade Union

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1. The history of South Africa and the need for special measures

1.1 Solidarity supports the need for special measures, such as affirmative action, on account of the legacy of the system of apartheid.

1.2 As a responsible organisation, committed to the protection and advancement of our constitutional democracy, Solidarity seeks to ensure that affirmative action measures applied by the state and the private sector are within the parameters and the spirit of the Constitution.

1.3 Solidarity is keenly aware of the need to attain a more equal society through, amongst others special measures, without creating new forms of racial discrimination that are not justifiable in terms of the Constitution and international law.

2. Solidarity's inability to make representations on South Africa's latest reports to the ILO

2.1 Every two years governments must submit reports detailing the steps they have taken in law and practice to apply any of the eight fundamental and four priority conventions they may have ratified.

2.2 During September 2015 a delegation of Solidarity visited the offices of the ILO in Genève, where it was established that the South African government did file its reports (albeit late) on its adherence to the contents of the core conventions ratified by South Africa.

2.3 Governments are required to submit copies of their reports to employers' and workers' organizations. These organisations may comment on the governments' reports; they may also send comments on the application of conventions directly to the ILO.

2.4 This was never done by the South African government. On the contrary, as will become evident, the government is unwilling to provide its reports to Solidarity.

2.5 During September 2015, Solidarity requested a copy of South Africa's report from the ILO, but was advised that it should be requested from the government itself, as this should be readily made available and provided.

2.6 Solidarity's intention was to submit representations to the Committee of Experts, specifically on South Africa's failure to comply with certain provisions of Convention 111.

2.7 During October 2015, a letter requesting a copy of the report, was directed to the Minister of Labour. This request was not responded to.

2.8 During early 2016, a further request for the report was directed to the Minister of Labour. The Minister of Justice and Constitutional Development as well as the Department of International Relations and Cooperation (Dirco) were also requested for a copy of the rapport, but to no avail.

2.9 During February 2016, after no response to Solidarity's response was forthcoming, Solidarity filed an application for information in terms of the Access to Information Act, which was served on the Minister of Labour, The Minister of Justice and Constitutional Development and Dirco.

2.10 The government should have given a response to Solidarity's request within 30 days. Again, the request was met with silence from all parties. Solidarity, in terms of the Access to Information Act, followed the appeal mechanisms in terms of the Act, but this was once again met by silence.

2.11 Solidarity had no other option than to approach the High Court of South Africa during July 2016, to seek an order that the report should be made available. The State Attorney is opposing the application and the matter is still being heard by the court.

2.12 As such, Solidarity had not been allowed to have access to South Africa's reports and thus had not been in a position to make representations to the Committee of Experts before publishing its report during early 2016.

2.13 Solidarity therefore takes this opportunity to directly comment to the Committee on South Africa's compliance with Convention 111 and we request that the Committee consider making certain observations and direct requests.

3. 2016 Report by the Committee

3.1 In its 2016 Report, the Committee of Experts reported amongst others the following on South Africa:

> *"…The Committee requests the Government to provide information on the implementation in practice of the Employment Equity Act, 1998, as amended in 2013, the Employment Equity Regulations, 2014, and the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value with respect to the aspects covered by the Convention. The Committee also requests the Government to provide information on any other arbitrary ground considered by administrative or judicial decisions, as well as any discrimination cases addressed by the Commission on Human Rights, the Commission for Employment Equity, the Labour Court and the Commission for Conciliation and Arbitration with respect to the principle of equality and non-discrimination in employment and occupation. (Own emphasis)*
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> *The Committee is raising other matters in a request addressed directly to the Government."*

3.1 Government is rightly called upon by the Committee to report on matters of discrimination that have been adjudicated upon by various for a, including the Labour Court.

3.2 In this document, Solidarity seeks to point out to the Committee that the more than 35 cases that it has instituted against government regarding the lawfulness and validity of certain affirmative action and black economic empowerment measures, aptly demonstrate the case that Solidarity seeks to bring to the Committee. This will be fully ventilated later in this document.

4 Comments on the contravention of Convention 111

4.1 Article 1 of the Convention states that the term ***discrimination*** includes—

"(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;"

4.2 The South African Government has been found guilty of discrimination (as contemplated in article 1 of the Convention) by the Constitutional Court on the basis of race on account of the system of demographic racial representivity. This practice has been described in the preceding parts of this document and is elaborated upon in the parts below.

4.3 The following are quotes from an ILO Report released during 2003[1]:

"197. The expression "affirmative action" refers to: "a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality" (emphasis added).

"*199. A common feature of affirmative action measures is their temporary nature. This presupposes a regular and objective evaluation of affirmative action programmes aimed at ascertaining their effectiveness, redefining regularly their scope and content and determining when to bring them to an end. In some countries, however, they may be discontinued or their effectiveness reduced as a result of cuts in social spending, economic downturns or economic restructuring. In other countries, such as* ***India****, they have acquired a permanent or semi-permanent character."*

[1] Time for equality at work, Global Report under the Follow – up to ILO declaration on Fundamental Principles and Right at Work, International Labour Conference, 91st session 2003, pp 63-64.

4.4 These quotes underline at least two important principles laid down by the ILO:

4.4.1 Affirmative action should be aimed at correcting the position of the target group (remedial); and

4.4.2 Affirmative action should be temporary in nature.

4.5 In the following parts of this document, Solidarity points out that the current affirmative action programme of Government, based on representivity, falls foul of these two principles.

5 South African Government is constructing a future based on race

5.1 The Constitution requires equality before the law, bars discrimination on racial grounds and requires those who discriminate on the basis of race to prove the fairness of their conduct – in line with the fact that 'non-racialism'[2] (see annexure A) is explicitly identified as a core value of post-apartheid South Africa. It is no surprise that non-racialism should be a core value of the South African transformation project: the legitimate pain of those who suffered from race discrimination in the past cannot be cured by imposing yet more race-based benefit, and the perpetuation of race consciousness is to the detriment of all. Significant progress has been made over the past 21 years, but formidable challenges remain, not least because South Africa struggles to unshackle itself from its race-conscious past.

[2] As opposed to neo-racialism

5.2 With this document, Solidarity seeks to bring to the attention of the Committee facts and submissions relevant to the critical evaluation of the South African affirmative action programme.

5.3 The South African government on all platforms, proclaims its commitment to the development of a society that is non-racial and non-sexist. It continuously proclaims that the elimination of all forms of racial discrimination remains high on their agenda.

5.4 By means of such pronouncements the South African hopes to bring itself within the legitimate scope of Convention 111. Whether the South African Government appreciates it or not, however, the stance being adopted is false. In fact, the South African Government pursues policies that are overtly race-based in order to produce a society that is 'demographically representative'. Its policies, in short, are not non-racial, but at best neo-racial and at worst nakedly racialist: society is structured in silos based on race and gender, with baneful effects (*see box*).[3] The system is not concerned with remedial affirmative action, but with race.

5.5 The problem permeates every facet of the regulatory framework of South Africa. No statute governing the distribution of societal benefits or privileges is without a structure designed to give preferment to black people, and the executive branch of government uniformly grants licences and permits on the same basis. This is nothing less than institutionalised racism. In the face of entrenched rights to equality in the Constitution, these policies are pursued with impunity since the courts, whose powers have repeatedly

[3] Demographic statistics constitute a movable target, and the ideology is divorced from the reality of available skills. The attention is on demographic outcomes, rather than empowerment through education and training.

been invoked, are either unable or unwilling to take a stand that would give proper effect to the rhetoric of non-racialism they simultaneously employ.

5.6 Of the statutes, the most profoundly racialistic is the Broad Based Black Economic Empowerment Act (BEE). It creates a structure that makes government procurement depend upon the extent to which a prospective supplier is, in racial terms, 'transformed'.[4] Points are awarded for black equity and asset ownership, black representation within the managerial and staff hierarchy, and the awarding of contracts on preferential terms to black contractors. In her comprehensive and compelling book *BEE: Helping or Hurting* (2014) chapter 10, renowned political commentator Dr Anthea Jeffery considers the woeful consequences of this policy on liberty and race relations; on integrity, efficiency, investment, and small business; and on the poor, who arguably suffer most from its effect. In the course of describing the social costs of BEE, she recites[5] an impassioned plea from a 2014 article by Jonathan Jansen, a so-called coloured person who heads up the University of the Free State:

> 'I hope that race-obsessed policies can come to an end as we continue on the critical path of nation-building in the long shadows of apartheid …. The hated race categories conjured up by apartheid [that is, White, Coloured, Indian and Black] cannot be instruments for transforming a new country …. In our obsession with demographic correctness, we privilege crude numbers over transformed minds; we re-inscribe offensive apartheid categories on post-apartheid mentalities; and we risk social cohesion by generating alienation, division and bitterness.'

[4] For the government, 'transformed' means that the employees of every firm reflect the national racial demographics at every level.
[5] At 367.

5.7 The quote describes every bit as aptly the consequences of the State's policies in the workplace, where race norming and race-preferencing are pursued. In supposed pursuit of the Employment Equity Act, enacted to give effect to the constitutional imperative of substantive equality, plans are devised by government departments that universally determine matters of employment and promotion by reference to race. Applicants for employment or promotion are placed into one of the racial categories devised by the apartheid State (to repeat: White, Coloured, Indian and African) and then distributed by gender. The current distribution of staff in each of the resulting eight categories per grade is then assessed against demographic statistics, typically national, that are regarded as apposite to determine degrees of so-called under- and over-representivity. Candidates who are over-represented in the category to which they have been assigned by reason of their race and gender are treated as ineligible for appointment or promotion unless the Department's operational requirements emphatically dictate otherwise. Given the nature of the system, therefore, white males (a category no one would characterize as disadvantaged by past discrimination) receive preferment whenever this subset is under-represented within the given grade. Manifestly this is not a system of affirmative action; rather it is a system of neo-racialism (overlain by gender considerations) that has been allowed to run rampant. Providing redress for disadvantage is completely ignored in this mathematical system.

5.8 The consequences of this policy are starkly illustrated by the undisputed facts in *Solidarity & 10 others v Department of Correctional Services*,[6] one of the many cases in which the trade union Solidarity has gone to court on behalf of members belonging to various 'race groups' to stem the tide of race norming within the public service. Applications for promotion by ten members of the prison staff, recommended on merit by a non-racial selection committee, were rejected by the head of the department on the basis that the race and gender groupings into which they fell were over-represented at the levels in question.

5.9 In an interlocutory application concerning the position of Mr Christo February, the State argued that he should have to move away from the Western Cape to some other part of the country if he wanted to pursue his career ambitions, since so-called 'Coloureds' were 'over-represented' in that province.[7]

5.10 In the ensuing main litigation, the Labour Court judge declared that the refusal to promote the nine applicants who are 'Coloured' (and so 'previously disadvantaged') was unfair on the grounds that the demographic grid utilized by the Department was based exclusively on national demographics and so took absolutely no account of the preponderance of Coloured people in the region[8], the Western Cape, in which they lived and, naturally, wished to work. However, the court declined to endorse the *principle* that a system based on race norming is objectionable: Solidarity's arguments based on the unlawfulness of

[6] (2014) 35 ILJ 504 (LC).
[7] The argument was reminiscent of the views of Mr Jimmy Manyi, former Director-General of Labour: 'This overconcentration of coloureds in the Western Cape is not working for them. They should spread in the rest of the country. There is a requirement of coloureds in Limpopo and all over the country. They should stop this overconcentration. Because they are in oversupply where they are. So you must look into the country and see where you can meet the supply'.
[8] Coloured individuals make up for 51% of the economically active population of the Western Cape, however in terms of the Departments Employment Equity Plan they can only make up for 8.8% of the workforce, within the province.

race and gender based quotas in SA's constitutional dispensation were brushed aside as facile.[9] That judgment has been upheld on appeal to the Labour Appeal Court, and was considered by the Constitutional Court on 3 November 2015.

5.11 On the 15th of July 2016, the Constitutional Court handed down judgment, attached hereto as annexure "B". Clear from the judgment is that the highest court in our country endorses the following "special measures";

- A raced-based system in which people are classified as either African, Coloured, Indian or White and in terms of which the need for "preferential" treatment are solely based on their respective representation within the economically active population[10] in the country as compared to their representation within that specific organisation;
- A system which is aimed at ensuring that all spheres of live, be it public or private transforms so to be reflective of the economically active population of the country;
- The outright refusal to appoint and or promote any individual if it is shown that the group to which such individual belongs are "over-represented" within the organisation in which it seeks appointment or promotion.(Such over - representation is determined with reference to economically active population and is applicable to all race groups and has been termed the *Barnard principle* by our Constitutional Court);

[9] The case is currently on appeal.
[10] Based on the 2014 statistics from Stats-Sa the difference between the national racial demographics and the economically active population can be summarised as follows: National racial demographics: African 80.2%, Coloured 8.8%, Indian 2.5%, White 8.4%; EAP: African 76.4%, Coloured 10.4%, Indian2.8%, White 10.3%

- That there are, and should be, a raced based hierarchy for applying preference between the specific race groups;

5.12 We quote some of the relevant paragraphs of the judgment in support of the above arguments:

"[38] The important question that arises is, therefore, whether the Barnard principle applies to African people, Coloured people, Indian people, people with disabilities as well as women or whether its application is limited to White people. Ms Barnard was refused promotion on the basis that White people were already overrepresented in the occupational level to which she wanted to be appointed. This Court upheld this reason. The question is, therefore, whether an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people or Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in the occupational level to which the particular African, Coloured or Indian candidate seeks appointment. The question also arises whether the Barnard principle applies to gender with the result that a man or woman could be denied appointment to a position at a certain occupational level on the basis that men or women, as the case may be, are already adequately represented or overrepresented at that level."

"[40] In my view the application of the Barnard principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the Barnard principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce. For example, a workforce that consists of only White and Indian managers and, thus, excludes Coloured people and African people or a senior management that consists of African people and Coloured people only and excludes White people and Indian people or a senior management that has men only and excludes women. If, therefore, it is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the level of representation of each group must broadly accord with its level of representation among the people of South Africa."

"[49] The EE Act, like all legislation, must be construed consistently with the Constitution. Properly interpreted the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. The result is that all the groups that fall under "Black" must be equitably represented within all occupational levels of the workforce of a designated employer. It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up for the absence or insignificant presence of another group or of the other groups. Therefore, a designated employer is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in that level. On the basis of the same principle an employer is entitled to refuse to appoint a man or woman to a post at a particular level on the basis that men or women, as the case may be, are already overrepresented or adequately represented at that occupational level. However, that is if the determination that the group is already adequately represented or overrepresented has a proper basis. Whether or not in this case there was a proper basis for that determination will be dealt with later."

5.13 As such there can be no doubt that affirmative action in South Africa is nothing other than a mathematical racial formula which is applied irrespective of the social and economic characteristics of an individual. As such an African individual who applies for appointment or promotion and who has been fortunate to come from a wealthy family with private schooling and the like will be afforded preference over the Coloured, Indian or White individual who was raised in an orphanage simply because the system and *Barnard principle* is aimed at achieving a workforce which is reflective of the economically active population and nothing else. The effect of such a system, which is also clearly illustrated below, is that an individual's constitutional right to exercise the profession of his or her choice is dependent on the level of representivity which the racial group to which he or she belongs has achieve in that specific profession.

5.14 The affirmative active system applied by the South African Government, described above, has now received judicial approval and Solidarity has exhausted all internal remedies so to ensure that the "special measures" applied by the Government are aligning with those of this Convention and other international Conventions similar to it.

5.15 In the South African Police Service (SAPS), where a comparable race-norming plan[11] was, by common consent, used to deny promotion to an Indian woman who was recommended by the selection panel as best suited for the post in question, is presented as but one other illustration of the effect which this raced based system has. Her fate was determined by the application of a demographic grid that showed that the number of posts at this senior level are so few that Indians, who comprise less than three per cent of the country's population, can *never* meet the threshold for appointment. The SAPS witness explained that the 'ideal' number of Indian females to be appointed at this particular level was zero. The evidence led by SAPS reads as follows:

> *"19 positions on level 14 are multiplied by the national demographic figure for a specific race group, e.g. 19 positions x 79% Africans = 15 of 19 posts must be filled by Africans, then 15 x70% = 11 positions to be filled by African males minus the current status of seven, meaning there is a shortage of four African males. For Indian females the calculation is 19 x 2, 5% = 0, 5 positions to be filled by Indians, then 0, 5 x 30% = 0, 1 Indian females and that is rounded off to zero. Of the five available positions 0,125 could go to Indians x 30% gender allocation means 0,037 could be allocated to Indian females and that is rounded to zero'.*

[11] The SAPS Employment Equity Plan 2010-2014 states that:
"[d]uring promotion all the available posts will be distributed in terms of the national demographics amongst all race groups. This will ensure that no absolute barrier is placed with regard to the advancement of any group with the SAPS"

5.16 The Labour Court judge roundly condemned the plan as unfair[12] but the SAPS, unrepentant, continued to apply its policy of race norming. The Labour Appeal Court has upheld the decision not to appoint Ms Naidoo.

5.17 The SAPS' attitude is partly a product of the uncertainties and ambiguities of the governing law. When, twenty years ago, South Africa became a democratic state, the framers of the new constitutional order were confronted with a country beset by the divisions caused by patriarchy, colonialism and apartheid. In deciding how best to resolve the deep-seated problems caused by these hegemonic systems, they rejected a solution in which race and gender would cease to play a structural role in the governance of the State and transformation would be realized through welfare and other race-neutral measures. The pursuit of formal equality, they concluded, would undermine the achievement of substantive equality, which could be attained only by the countervailing use of precisely the criteria that had served to create the discrimination in the first place.

5.18 Likewise rejected was a neo-racial model in which the groupings would be separately conceived, developed and regulated in an effort to create parity between them. Resistance to this model was scarcely surprising: it was nothing but an expression of the 'separate but equal' doctrine and so was a variant of the very policy - separate development – that the drafters were rightly determined to overturn. What they eventually chose, perhaps unsurprisingly, was the *via media* of a non-racial dispensation in which provision was made for redress through affirmative action. In the process, however, they employed language that, while apparently clear on its face, provided scope

[12] *Naidoo v SAPS* (2013) 34 ILJ 2279 (LC).

for the process of social engineering through race norming that has become endemic in the country.

5.19 Section 9 of the Constitution begins with the important principle that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. Elaborating on this proposition, it stipulates that no one 'may 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'. But then, in making provision for affirmative action, it countenances measures designed to protect or advance not just individuals but also 'categories of persons disadvantaged by unfair discrimination'.[13] In a thoughtful and measured commentary on the section, Laurie Ackermann, one of the founding judges of the SA Constitutional Court, has valiantly argued that:

> '"Categories" of persons are not "groups" (endowed with legal personality) but individuals with a common denominator as far as their identities or experiences are concerned; [and the] policy is "directed towards individuals actually discriminated against as opposed to one directed towards groups as such". [Were it otherwise] "individuals that are not 'needy' will in fact receive benefits at the expense of those who have been handicapped most by the effects of discrimination and thus are in most need of 'advancement'". To this one must add that an individual, though suffering no disadvantage because of discrimination could perversely be entitled to restitution.'[14]

[13] The provision reads:

> '(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.'

[14] L Ackermann *Human Dignity* Juta 357.

5.20 Regrettably, this is not the way the legislature has construed the provision. Instead, using the reference to categories as a cloak, it has enacted a raft of legislation that sanctions the implementation and evaluation of affirmative action initiatives by reference to race and gender criteria. Of these, the most important for present purposes is the Employment Equity Act. While prohibiting unfair discrimination, it mandates 'affirmative action measures designed to ensure that suitably qualified people from designated groups [ie, everyone except white males] have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'. Echoing the ambiguities of the Constitution, it requires employers beyond a certain size to formulate employment equity plans that, by employing numerical targets to eliminate race and gender under-representation, will create equity in the workplace. The numerical targets, it goes out of its way to emphasize, should not amount to quotas.

5.21 The Act's rejection of quotas shows an acceptance that race and gender based social engineering is constitutionally impermissible. So is its use of the modifier 'equitable' in the expression 'equitable representation' – the word, which is obviously more nuanced and absolute than 'equal', implicitly recognizes that current race or gender disparities are not axiomatically the consequence of past discrimination. But the benign aspects of the statute are undermined by making race and gender parity the determinative goal. This provides just the platform that state officials, now already overwhelmingly black African, need to deal with choices on a mechanical basis. Force of numbers provides the scope for promoting kith and kin almost at will, and the majority, far from exercising the 'particular care in formulating and applying remedial measures'[15] that should guide its actions, embraces with abandon the opportunities so produced. Representation, not

[15] L Ackermann, above, 344.

reparation, is the object, and quotas not targets provide the means. One consequence of this approach is that, although South Africa is in an electricity crisis adversely affecting all, Eskom, the State-owned electricity supplier, remains committed to a system of appointments and promotions dependent on a strict race formula.[16] Yet the achievement of these race quotas can only result in the departure of still more 'white' skilled engineers and technicians to the detriment of all South Africans.

5.22 Efforts to invoke the protections of the courts have, to say the least, yielded very mixed results[17]. To be sure, the courts generally demonstrate an understanding of the basic principles and commonly employ the right rhetoric. In the leading case of *Barnard v SAPS*, for instance, the judges of the Constitutional Court stressed the importance of striking appropriate balances between group and individual interests,[18] cautioned against the implementation of remedial measures that unduly invade human dignity,[19] and made it plain that 'beneficiaries of affirmative action must be equal to the task at hand' so as 'not to sacrifice efficiency and competence at the altar of remedial employment[20] and let affirmative action measures become a 'refuge for the mediocre or incompetent'.[21] Yet, when they turn to the facts of the instant case, the courts use a range of devices for wriggling off the hook.

[16] Even in the face of a suggestion by the Deputy President that, extraordinarily, skills will be sought without reference to race

[17] Seeing that the lower courts are bound by the judgment of the Constitutional Court in the DCS matter it is expected that the these courts will similarly endorse the principles and measures mentioned at paragraph 5.11 above.

[18] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 ('*Barnard*').

[19] *Barnard* at para 32.

[20] *Barnard* para 41.

[21] *Barnard* para 41.

5.23 In the *Correctional Services* case, mentioned above, Mr Davids a white male, who had suffered the same racial discrimination as his Coloured colleagues[22] was denied any relief simply because the Constitutional Court determined that white males were "over-represented" and as such the Department's decision not to promote him was legitimate. The Constitutional Courts finding with regards to Mr Davids is irreconcilable with the factual finding by the same Court that the Department made use of an incorrect benchmark to determine the over and under representation of individuals and is a clear illustration of the lip service the Court pays to the statutory prohibition on the use of quotas seeing that he was the only candidate eligible for appointment. Without explaining themselves the judges only reasoning for not granting Mr Davids the relief he was clearly entitled to was based on the one liner argument that white males were over represented.

5.24 A minority judgment in this case by Constitutional Court Judge Nugent (Cameron J concurring) raised an important flag: unlawful targets cannot be applied lawfully, even in the instance of a white male. In these circumstances, a white male should also be entitled to relief. The following quotes from the judgment illustrates the view of the minority:

> *"[132] The Department has provided no rational explanation for reserving posts to the various race groups with reference alone to their proportions as part of the national population, with no regard to their distribution, and I see none. It seems the Department considers the "demographic profile" of the nation to be solely its racial proportions. In that the Department is wrong. The racial proportions of the population*

[22] The Court found in favour of seven of the nine Coloured applicants, whose factual situation was identical to that of Mr Davids namely that he was the best candidate for the position and that there was no other candidate who could be appointment and that the sole reasons for the refusal to appoint him was due to his race.

are not its demographic profile. They are but one characteristic of the demographic profile, and in themselves they do not provide a coherent basis upon which to measure employment representivity. That is no doubt why the EE Act, and the 1999 Code of Good Practice issued under the EE Act, expressly directs designated employers to take account of the regional profile of the population. But regional distribution is in any event inherent in the country's demographic profile. On that ground, too, the conclusion must follow that the Plan is irrational and in consequence unlawful."

and

"[134] So far as the proposed orders are concerned, having found the Plan was unlawful, it follows that it offers no defence to the claims of discrimination of all the applicants, including Mr Davids, and he, too, is entitled to relief. As this is a minority judgment I need not elaborate upon the relief I would grant to him."

5.25 Using these techniques, the Constitutional Court was able to conclude in *Barnard* that the applicant, though a woman and so a member of the designated group, was not the victim of discrimination when the SAPS Commissioner decided that, though she had been recognized by the selection committee as a quite outstanding candidate, the post in question was better left unfilled until a suitable black person might one day emerge. The fact that she had previously been turned down in comparable circumstances was regarded as relevant, not to show that the discrimination was egregious, but to demonstrate that nothing would prevent her from applying for promotion when the post was advertised once more.

5.26 The Employment Equity Act on which this document has so far focused, is close to the heart of Solidarity since, as a trade union, it is principally concerned with labour and employment relations. In fairness to the drafters of the Act, it should be repeated that they manifestly tried to give effect to the imperatives of the equality clause in the

Constitution. The same can scarcely be said of the Broad-Based Black Economic Empowerment Act, fleetingly referred to above, that now deserves a little more elaboration. Its racialist object is spelt out in no uncertain terms in its opening clauses: it is to 'establish a legislative framework for the promotion of black economic empowerment'[23] by fostering black ownership of business enterprises. Proponents of the statute naturally justify it by referring to the exclusion of blacks from the economy under apartheid. To remedy the problem, the statute seeks to effect a more equitable distribution of economic wealth by denying state tenders to suppliers whose 'scorecards' reveal too low a level of black participation in the firm.[24]

5.27 The so-called BEE Commission, which helped formulate thinking on black empowerment, defined the policy as 'an integrated and coherent socio-economic process … which aims to address past imbalances by transferring and conferring ownership, management and control of South Africa's financial and economic resources to the majority of its citizens and ensure broader participation of Black people in the economy in order to achieve sustainable development and prosperity'.[25] Its true rationale is described as driving 'transformation from all levels as opposed to waiting for it to happen on a purely free-market basis, which would need more time than is politically available'.[26]

[23] BBBEE Act Long Title.
[24] T Balshaw & J Goldberg *Broad-Based Black Economic Empowerment Final Codes and Scorecard* 2008 p 16.
[25] See V Jack *Broad-Based BEE – The Complete Guide* 2007 p 21.
[26] V Jack *Broad-Based BEE – The Complete Guide* 2007 p 22.

5.28 In short, the commission's concern is not with past disadvantage as such, but with the inclusion of middle class blacks in the economic framework of the country. Its beneficiaries comprise a handful of favoured members of the black bourgeoisie, not a few of whom have over the period since 1994 become fabulously wealthy. Its justification is redress, but this is a piety. Its recipients are scarcely 'disadvantaged' and a cursory examination of the policy shows that it was implemented in order to aggrandize select individuals. This being its objective, it would have been adopted and implemented whether or not its beneficiaries were the victims of past discrimination.

5.29 The re-racialization of the post-apartheid state by these means – legislative, executive and judicial – might be justified on grounds of expediency if it were creating a more inclusive society. Tragically, the very opposite is true. Old divisions are being perpetuated and, indeed, aggravated as the struggle for resources becomes more acute in this woefully misgoverned country. The instances of racial friction, which are a daily source of concern, are deftly woven into themes in the book by Anthea Jeffery to which we have already referred. To try even to summarize them in this memorandum would be an exercise of futility and we must content ourselves by saying, simply, that no good can possibly come from policies so riven by division, fraught with racial hostility, and inimical to economic growth and wider prosperity.

5.30 South Africa, as a member state of the United Nations, is part of the broader international community. Recognizing as much, the SA Constitution requires that, when interpreting the Bill of Rights, a court must consider international law,[27] and, when construing statutes, must heed the country's international law obligations.

[27] Constitution s 39(1)(*b*).

5.31 The United Nations Charter ('the Charter'), which codifies the major principles of international relations, exacts a pledge from member states to promote 'respect for, and universal observance of, human rights and fundamental freedoms'.[28] It reaffirms faith in human rights, in the dignity and worth of human beings and in the equal rights of men and women.[29] The UN's Universal Declaration of Human Rights ('the Declaration') picks up the theme. Pledging to promote universal respect for and observance of human rights as 'fundamental freedoms',[30] it sets out three main categories of human rights, namely freedom, equality and dignity. These rights are regarded as 'inalienable' and must be respected without distinction of any kind.[31]

5.32 In deciding what this permits, recourse can be had to the guidelines framed by UNESCO in order to evaluate affirmative action policies.[32] As a point of departure, the guidelines state that differentiation on the basis of sex, race, colour, language, religion, political or other opinion, membership of a racial minority, or birth or other status is illegitimate. Measures based on such criteria can, however, become legitimate if their object is to redress past systemic discrimination practised over many years on the self-same grounds, provided they do not disadvantage any person arbitrarily. The proviso is important. Affirmative action programmes, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality-of-outcome objectives, and must be kept

[28] Charter Article 55(*c*).
[29] Charter Chapter 1 Article 1(1).
[30] Declaration Preamble.
[31] A Chaskalson 'The third Bram Fischer lecture human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 197.
[32] UNESC 'Prevention of discrimination: the concept and practice of affirmative action' Final Report submitted by Mr Marc Bossuyt, special rapporteur in accordance with Sub-Commission Resolution 1998/5 17 June 2002 ('UNESC Final Report') at paras 81 to 100 and 112.

under constant scrutiny to ensure that this principle is observed. [33] Not every measure taken in pursuit of affirmative action should be accepted as legitimate merely because the object of the distinction is to improve the situation of the disadvantaged group[34] - a legal rule is not necessarily legitimate because it pursues a legitimate goal. Affirmative action policies are thus permissible under international instruments only insofar as they do not contravene the principle of non-discrimination.[35]

5.33 Taking all of the above into consideration it is clear that the raced based system of affirmative action in South Africa is not of a limited duration but clearly permanent. As illustration both the Department of Correctional Services as well as the South African Police Services has over the last 16 year implemented no less than four affirmative action plans so to transform the demographic composition of the respective organisations. With each new plan the proverbial goal posts shift so to be aligned with the national demographics which is ever changing and as such it is clear that we will never be able to achieve the objective which the current systems is aimed at achieving. Notwithstanding the fact that nearly 80% of the public services comprises of people who are from the so called Black African group and that the Constitutional objective of "broadly represented" public services has been achieved the current raced based system is still vigorously pursued by the Government with no end in sight.

[33] UNESCO 'Prevention of discrimination and protection of indigenous peoples and minorities' progress report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 26 June 2001 at para 91(*a*).
[34] UNESC) 'Comprehensive examination of thematic issues relating to racial discrimination: the concept and practice of affirmative action' preliminary report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 19 June 2002 at para 62.
[35] UNESCO Final Report para 112.

6. Compulsory racial demographic representivity in South African sport

6.1 South African sport has not escaped the Government's intention to transform all spheres of life so to reflect the national racial demographics. On 25 April 2016 the Minister of Sport and Recreation, Mr. Fikile Mbalula, announced that the four major sports federations'[36] privileges to host and/or bid for major and mega international tournaments in the Republic of South African were revoked due to their failure to meet specific racial targets within their respective sports teams.[37] This action is in total contrast to the words of the African National Congress spoken on 25 May 1971 and prepared for the United Nations Unit on Apartheid in 1971:

> *"The moral position is absolutely clear. Human beings should not be willing partners in perpetuating a system of racial discrimination. Sportsmen have a special duty in this regard in that they should be first to insist that merit, and merit alone, be the criterion for selecting teams for representative sport. Indeed non-discrimination is such an essential part of true sportsmanship that many clubs and international bodies have express provisions to this effect. For example, the first fundamental principle of the Olympic Charter states: "No discrimination is allowed against any country or person on grounds of race, religion or political affiliation*".

6.2 Today we are faced with a totally different moral position within South Africa. "Merit and merit alone" is not the criterion for selecting teams for representative sport; the national racial demographics are. This the Minister of Sport and Recreation confirmed in his speech on 25 April 2016 (quoted as published):

[36] Cricket South Africa, Athletics South Africa, Netball South African and South African Rugby
[37] See attached hereto the official press release of the Minister as annexure "D".

"The Transformation Charter, is the loadstar of the sport movement that draws our attention to the immediate and inevitable necessity for the Sport System to Transform for both Moral and Strategic imperatives:

Morally: Because it is "the right thing to do" considering the grave injustices of the past;

and

Strategically; because of the reality that 84% of the country's under 18 year old population grouping is Black African and only 16% is white, Coloured and Indian. To ignore this strategic reality from sustainability perspective alone would be suicidal. Thus the reasons for sport organisations to transform rapidly have not only become compelling it had become fundamental.

6.3 The moral integrity of the ANC, so vigorously sold to the international community, of "merit and merit alone" has now been replaced by a carefully crafted racial ideology where sports, schools, businesses and all forms of public and private life must conform to the racial composition of the country – a social engineering scheme unique in the world.

6.4 The racial quotas, which are compulsory and falls foul of the Employment Equity Act which governs the employment relationship between professional sportsmen and women and a sporting body, can best be illustrated by referring the Committee to the Transformation Plan of the South African Rugby Union.[38] This plan is evidence of how

[38] Annexed hereto as annexure "B".

this ideology of "absolute representivity" has corrupted the public opinion so crucial to the survival of our Constitution and this Convention.

8 Refusal of the executive branch to comply with court orders.

8.1 This section speaks to the South Africa's respect for their constitutional obligations and is included for consideration by the Committee before releasing its next report on South Africa.

8.2 Government continues to undermine the constitutional obligations of non-racialism[39], the right to equality[40] through the system of racial reprsentivity.

8.3 Government also continues to undermine the constitutional principle of the binding effect of judgments on organs of state[41].

8.4 We have indicated that the effort to invoke the protection of the court have yielded very mixed results, however in the instances where the court has seen it fit to denounce the "absolute representivity" affirmative action measures implemented by certain state departments we have been faced with an utter reluctance by these departments to conform their affirmative action measures and adhere to these judgments.

[39] Section 1(b) of the Constitution of South Africa.
[40] Section 9 of the Constitution of South Africa.
[41] Section 165(5) Constitution of South Africa.

8.5 So as to highlight the aforementioned practice, and although there are many examples, we refer below to the actions of the Department of Labour, who is the custodian and guardian for the implementation of affirmative action measures within the labour sector. We also refer to the Department of Correctional Services and the South African Police Services as apt examples of not – adhering to court orders, although this is common practice in most state departments.

9. Department of Labour

9.1 Even though South Africa is faced with an electricity crisis which has an adverse impact on all, the state-owned electricity supplier Eskom remains committed to a system whereby appointments and promotions depend on a strict race-based formula, with the aim of achieving a workforce that directly reflects the Economically Active Population of South Africa[42] by 2020. At the time when Eskom had to consult on its new employment equity plan (affirmative action plan), Solidarity requested both Eskom and the Department of Labour to indicate whether Eskom would take into account factors other than the economically active population in setting its numerical targets. The response by the Department of Labour was clear (own emphasis):[43]

"Please note that any factors that may be taken into account when setting numerical goals and targets must be justifiable and should not deviate from the National and Regional economically active population."

[42] Based on the 2014 statistics from Stats SA, the difference between the national racial demographics and the economically active population can be summarised as follows: National racial demographics: African 80.2%, Coloured 8.8%, Indian 2.5%, White 8.4%; EAP: African 76.4%, Coloured 10.4%, Indian2.8%, White 10.3%
[43] The above correspondence is attached hereto as annexure "A".

9.2 Evident from the aforementioned is the fact that notwithstanding our constitutional values of non-racialism and non-sexism and the Employment Equity Act's aim of achieving "equitable" representivity, the Department of Labour forces public and private institutions to transform their workforce demographics in order to reflect the economically active population or be faced with penalties[44]. We reiterate that in doing so the department forces employers to create silos for the four race groups (so designed by the apartheid system), and effectively thereby ignores crucial factors such as skills, competency and whether a specific candidate is in need of advancement. All that is considered is the racial composition of the country vs the racial composition of the employer, irrespective of any other relevant factor.

9.3 Each year the Employment Equity Commission[45] submits a report to the Minister of Labour. It is clear from this report (as from the abovementioned response by the Department of Labour) that the aim is representivity in line with the economically active population. Thus all designated employers[46], be they religious organisations, cultural organisations, sports federations or highly skilled institutions, will be measured against the economically active population so as to determine whether they have complied with the Act.

[44] Note that in terms of the EEA the maximum penalty an employer can face is up to 10% of its annual turnover.
[45] The Commission for Employment Equity (CEE) is a statutory body established in terms of Section 28 of Employment Equity Act (No 55 of 1998) (EEA). The role of the CEE is to advise the Minister of Labour on any matter concerning the Act, including policy and matters pertaining to the implementation towards achieving the objectives of the EEA. The CEE is required to submit an annual report to the Minister of Labour in terms of Section 33 of the Act to monitor and evaluate progress towards achieving the objectives of the Act.
[46] Who in terms of the EEA are employers who employ more than 50 employees or who have fewer than 50 employees but have an annual turnover exceeding that indicated in schedule 4.

9.4 The South African Government has unfortunately put in place measures that exclude, restrict and prefer an individual based on considerations of race, colour, descent and/or ethnic origin, which clearly has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the economic, social, cultural and employment fields. The Government's objective that all spheres of life, especially the private sector, in South Africa should reflect the national racial demographics cannot be said to be warranted or justified. There is no justification, even if the condemned past from which our democracy has risen is taken into consideration, for the view that "were it not for our past, this is what our present and/or future would have looked like".

9.5 While we support our Constitutional objective[47] of a public service that is "broadly reflective" of the people of South Africa, as it provides a service to a "broadly reflective" community, we argue that the measures in furtherance of this objective should, *inter alia*:

- take into consideration all relevant factors as embodied by the current legislation which give effect to this objective;
- take into consideration the ability of the candidates to do the work; and
- be objective and fair, which includes being sensitive to the specific demographics of the diverse community it serves.

[47] Section 195(1)(i) of our Constitution states that: "Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

9.6 The abovementioned measures implemented by our Government are not aimed at adequate development or protection of certain race groups; they simply aim to achieve representivity in line with the national demographics.

9.7 The department still persists in its use of the national racial demographics of each province. The refusal of the department to take into account other relevant factors, such as the regional racial demographics of the Western Cape, will continue to see hundreds of Coloured candidates being overlooked for appointment and promotion in the Western Cape, purely due to their race.

10. South African Police Service

10.1 During 2012 Solidarity instituted legal action against the South African Police Service in which we requested the Court to declare the affirmative action plan of the SAPS unlawful on the ground of non-compliance with the EEA and the Constitution. The arguments presented in this case by Solidarity were mostly based on the arguments presented to this Committee, namely that the plan itself was aimed at achieving representivity in line with the national racial demographics at all costs, without considering any other relevant factors such as:

- the pool of suitably qualified candidates;
- that the plan was creating silos for each of the race groups that limited their chances of appointment or promotion to their respective racial percentage of the national demographics;[48] and

[48] This plan also forms part of the bundle submitted together with the main report.

- whether or not a person has experienced past disadvantagement.

10.2 The sole objective is a workforce that directly reflects the national racial demographics.

10.3 The plan itself expressly stated that:

"[d]uring promotion all the available posts will be distributed in terms of the national demographics amongst all race groups. This will ensure that no absolute barrier is placed with regard to the advancement of any group with the SAPS".

10.4 This plan came to an end[49] in December 2014, and notwithstanding the legal challenge to the validity of the previous plan the SAPS went ahead and implemented[50] a subsequent plan based on the same objectives and measures that formed the basis of the legal challenge to the previous plan.

10.5 On 26 January 2016 judgment was handed down in the Labour Court and the affirmative action plan of the SAPS for the period 2010-2014 was declared unlawful. However, as with the situation in the DCS matter, the Court neither provided substantive relief for any of the individuals negatively affected by the plan nor instructed the SAPS not take corrective measures. By the time the judgment was handed down, the subsequent plan was already in place and operational. Solidarity wrote to the SAPS and requested that the current plan be reviewed and corrected so as to comply

[49] Note that in terms of the EEA, an affirmative action plan may not be shorter than one year and not longer than five years; there are, however, no limits to the number of subsequent plans an employer may implement.
[50] Note that Solidarity brought an urgent application in Court to compel the SAPS to include Solidarity in the consultation process. This application was dismissed by the Court, stating that Solidarity was not a recognised union within the SAPS and as such had no right to be consulted, notwithstanding the fact that at that point in time Solidarity had nearly 20 unfair discrimination disputes pending against the SAPS.

with the judgment of the Labour Court, seeing that the previous plan and the current plan were identical.

10.6 This time around it was the SAPS that failed to give effect to the judgment of the court. The SAPS indicated to Solidarity that the matter would be taken on appeal, and if need be they would proceed to the Constitutional Court. Once again Solidarity had no alternative than to approach the Court on an urgent basis on 23 March 2016 so as to interdict the SAPS from making any appointment and/or promotion based on the current (unlawful) plan. On 23 April 2016 the Court handed down judgment and prohibited the SAPS from making any appointment and/or promotion based on the current plan pending the outcome of the Constitutional Court ruling in the DCS matter referred to above. The victory was short lived, however, as the SAPS filed an application for leave to appeal and information was received that notwithstanding the interdict, the SAPS was proceeding with appointments and promotions.

10.7 These are but some examples; countless others exist. The *de facto* situation is that the South African Government, having unlimited resources as opposed to the limited resources of an individual or trade union, is abusing the legal system. We mentioned in the main report the countless petitions to parliament to open up a debate on the issue of affirmative action and what its legitimate objectives should be; but rather than engaging the people of South Africa in debate, the Government forces individuals to litigate, well knowing that the success will be limited, if any, and that such a process will be costly.

11.8 The costs for an individual to take a matter to trial, instructing one attorney and one counsel, is on average no less than R250 000,00. If such an individual then loses the case, he or she might well be ordered to pay the costs of the State, which adds a further R250 000, 00. An individual earning no more than R400 000, 00[51] per annum will therefore be highly reluctant to challenge any discriminatory practices by the State, especially knowing that the State has unlimited resources and will not hesitate to take any judgment on appeal up to the Constitutional Court.

12. Proposed direct requests and questions to the South African Government

12.1 Before dealing with the possible observations we submit this Committee should make, we invite the Committee to make direct requests to the South African Government which will best confirm the views and statements made by Solidarity. The response to these questions, we submit, will enable the Committee to make recommendations that will best serve the people of South Africa.

12.2 The following are but some of the relevant questions to put to the South African government:

- Solidarity proposes that the Committee further interrogates the use by the South African government of race classifications employed by the South African government to reserve economic opportunities.

[51] This is the average income earned by the individuals represented by Solidarity against the SAPS.

- Statutes such as the Employment Equity Act signify the perpetuation of precisely the institutionalized race consciousness that had already proved so divisive and destructive in our country. The statute is concerned not with disadvantage, but with racial representativeness, which it uses as its organizing concept.

- A further question could be posed to government requesting information on effective and concrete measures South African has taken to eliminate discrimination and comply with its obligations under Article 2, with particular emphasis on efforts to promote true equality rather than mere representation.

- What the aim and objective of affirmative action is in terms of the Employment Equity Act, and specifically whether it is aimed at ensuring that all workplaces, public or private, directly reflect the national racial demographics of the country;

- Whether the affirmative action measures adopted by the South African Government, specifically in the DCS and the SAPS, are aimed at ensuring that each province of the country directly reflects the national racial demographics;

- Whether in terms of broad-based black economic empowerment legislation it is justifiable to reject a company's application for (amongst others) mining rights on the ground of that company's failure to have a specific percentage of black ownership and/or representation within the company;

- Whether there are specific requirements for racial representation in South African sport and what these entail;

- To what extent the legislation mentioned above takes into consideration the individual's social and economic needs when giving him/her preference under the legislation, and whether it is purely based on the fact that the individual belongs to a group that was previously disadvantaged;

- How many unfair discrimination cases are currently pending against the South African Government, what the nature of these disputes is, what the outcome of previous court cases was and to what extent the Government has complied with these judgments;

- Whether there is any order of preference in terms of this legislation, i.e. whether Africans outrank Coloureds or Indians;

- To what extent the affirmative action measures adopted by the South African Government discriminate against minority groups who previously also suffered under Apartheid;

- Whether any "sunset clause" and/or end date is envisaged for affirmative action in South Africa and when that will be. This report shows that the court system functions well, but that victims of race-based discrimination under the Employment Equity Act are not afforded redress or remedies. The Correctional Services case illustrates this particularly well.

- South Africa should be called upon to explain its concept of the differences between legitimate 'fair discrimination' and illegitimate 'unfair discrimination'. The government must be asked to explain whether its affirmative action policy and BEE systems do not result in reverse discrimination against those who benefited during apartheid (or who were 'less' discriminated against under the system). Especially South Africa should come and explain the effect its current affirmative action program has on minority groups, specifically those who also suffered under apartheid.

- If the Committee concludes that Solidarity's objections have merit, it asks the Committee to recommend the appropriate steps to remedy the problem. Solidarity believes that Judge Ackerman provides, with his customary eloquence and lucidity, a context for the investigation and recommendation when he states:[52]

> '… [N]o country where serious and systemic discrimination has occurred can – for administrative and other financial reasons – be expected to devise and administer a remedial system that has, in all cases, to consider the awarding of a remedy on a case-by-case, individual-by-individual basis. The logistics and costs might make this impossible. No legislation or comprehensive administrative measure can always operate with the surgeon's scalpel, given the vast number of cases involved. It is, in appropriate circumstances, compelled to use a broader sword, but *where an individualised remedy is reasonably possible it should be employed*.' The greatest challenge facing the remedial challenge of s 9(2) [ie the affirmative action provision] is finding the appropriate balance in this regard. In trying to determine what this is, a number of features should be borne in mind. The overarching goal is not limited to establishing, progressively, a society in which the consequences of past discrimination are eliminated, but a society in which the dignity of all is equally respected. Remedies are not justified which would turn the white 'category of persons' into an underclass.'

[52] At 358, emphasis supplied.

13. Possible observations to be considered by the Committee

13.1 That the government should adopt a nuanced approach to affirmative action (as opposed to a rigid system of representivity) by taking into account:

13.1.1 Both the national and regional demographics;

13.1.2 the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

13.1.3 economic and financial factors relevant to the sector in which the employer operates;

13.1.4 present and anticipated economic and financial circumstances of the employer; and

13.1.5 the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

13.2 That the government should prove to the committee why its mathematical approach to racial representivity does not amount to the creation of institutionalised silos for different races.

13.3 That the government should report on the various court cases concerning racial discrimination against the state.

13.4 That the government should report on the non-compliance with court orders concerning judgments on racial discrimination.

13.5 That the government should indicate whether its policy on quotas in sports is in line with the principles of this convention and international practice on racial quotas and interference in sports.

DJ HERMANN
CHIEF EXECUTIVE OFFICER: SOLIDARITY

May 2017

Annexure “A”

NON-RACIALISM V NEO-RACIALISM

Dividing people up into races and deciding how they should consequentially be treated may look similar in form but it is very different in substance

- Neo-racialism, seeing races as separate, creates silos in which races are expected to be representative. Affirmative action within a non-racial society, in contrast, creates no silos, employs class-based considerations wherever possible, and uses race only where absolutely necessary.
- Neo-racialism institutionalizes race norming and heralds a socially engineered future. By contrast, affirmative action within a non-racial society, seeks to redress past discrimination and is wholly compensatory in nature.
- Inherited from apartheid, neo-racialism used race divisions as the basis for decision-making. But affirmative action within a non-racial society is wary of invoking such debased distinctions and particularly wary of distinguishing between races who were all the victims of apartheid.
- Neo-racialism is wholly insensitive to past disadvantage. Affirmative action within a non-racial society is concerned exclusively with past disadvantage and gives the currently privileged no preference.
- Neo-racialism has no sunset clause but keeps redistributing whenever disparities are evident. Affirmative action foresees a time when redress will be completed and longs for the moment when individuals will finally be judged on merit.
- Neo-racialism, typically if not axiomatically, makes representativeness a threshold precondition for advancement. Affirmative action within a non-racial society postulates a consideration of the triad of imperatives: equity, individual merit, and institutional need.
- Neo-racialism focuses on mathematical outcomes. Affirmative action focuses on training and development.
- Neo-racialism employs race quotas irrespective of the effects on service delivery. Non-racial affirmative action aims to improve service delivery to all, but particularly the poor and disadvantaged.