

# The universality of human rights: Challenges for Namibia

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## **Introduction**

This paper discusses Namibia's adherence to its international human rights obligations with regard to civil and political rights as well as to women and children's rights. The paper will outline a number of recommendations that the state can utilise in order to fully implement and enforce international human rights instruments in its domestic laws. The instruments to be discussed here include –

- the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment (CAT)
- the Convention on the Elimination of Discrimination against Women (CEDAW), and
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

Looking at Namibia in general, the country has in many ways failed to fulfil its international obligations in terms of failing to report to the Committees set up for each Convention, and in many cases by failing to implement and enforce the obligations set out in the instruments concerned in its domestic laws.

## **Civil and political rights**

Articles 7 and 26 of the International Covenant on Civil and Political Rights (ICCPR) deal with the prohibition of torture, and freedom from discrimination based on race, sex or colour, respectively.<sup>414</sup> Namibia is a signatory to this Covenant, as well as to CERD and CAT, which deal specifically with the aforementioned freedoms. These two Conventions will be dealt with separately

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<sup>414</sup> These Articles are based on the UN Declaration on Human Rights and are enshrined in the Namibian Constitution in Articles 8 and 10, respectively.

below in order to establish how Namibia has implemented them into its domestic law.

### ***Convention on the Elimination of All Forms of Racial Discrimination***

The main objective of this Convention was to guarantee equality amongst people by trying to eliminate racial discrimination at all costs. Namibia became a party to this Convention on 11 November 1982, when the UN Committee for Namibia ratified it on behalf of the Namibian people.<sup>415</sup>

The Committee for the Elimination of All Forms of Racial Discrimination is charged with monitoring states' compliance with CERD. As part of this compliance, states are expected to report to the Committee on measures taken by them to bring their respective countries in line with their legal obligations under international law. The latest report handed in by Namibia is the combined report<sup>416</sup> of its 8th to 12th periodic reports, spanning the years from 1997 to 2005.

Historically, Namibia was a victim to the apartheid era that took place in South Africa. As a result of this ideology, a number of discriminatory laws were transplanted into Namibian domestic law. Examples of such laws are the Administration of Estates Act,<sup>417</sup> the Intestate Succession Ordinance,<sup>418</sup> and the Native Administration Proclamation.<sup>419</sup> These laws regulated the administration of and succession in deceased persons' estates. Problematic was the distinction made between the administration of the estates of whites and so-called coloureds,<sup>420</sup> on the one hand, and blacks on the other. The law applicable to testate succession – that is, where the deceased left a valid will – for whites and coloureds was the Administration of Estates Act; where the aforementioned

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415 The UN Committee on Namibia was formed in 1955. Its main task was to represent the aspirations of Namibia at international fora since South Africa's illegal occupation of Namibia left the country with no legitimate international representation.

416 CERD/C/NAM/12. At the time of writing this article, the UN Committee had not yet made any comments on the report; so, for the purposes of this article, the combined 3rd to 7th reports handed in in 1996, namely CERD/C/275/Add.1, will be referred to. See also Appendix 2.

417 No. 66 of 1965.

418 No. 12 of 1946.

419 No. 15 of 1928.

420 People of mixed descent.

racial group(s) did not leave a valid will, the estate was regulated by the Intestate Succession Ordinance. For blacks, the Native Administration Act applied to both testate and intestate succession. These statutes were racially discriminatory, not least in that the system dealing with the affairs of whites and coloureds was clear and straightforward compared with that for blacks. For example, the estates of whites and coloureds were administered under the supervision of the Master of the High Court. For blacks, there was no proper system of administration, especially where the deceased left no valid will. Since the abolition of these discriminatory laws in an independent Namibia, all deceased persons' estates are dealt with under the Estates and Succession Amendment Act.<sup>421</sup>

After independence, the Namibian government adopted a policy of national reconciliation whereby people were expected to forgive one another for the wrongs committed in the past and forge ahead in a conciliatory tone. This can be seen throughout the Constitution, which is the supreme law of the country. At the onset of the Government's policy of national reconciliation, Namibian society seemed to have fully accepted the differences that were so blatant during the colonial era. They seemed to have accepted that the race or colour of a person was not important in the quest of the country's progress. However, despite the country's efforts to curb racial discrimination, it continues to be a problem in Namibia. There remains an undertone of unspoken segregation between blacks and whites. Another particular problem is the existence of severe tribalism, which extends to marriages as well as politics. For example, Namibia's 1995 country report to the Committee for the Elimination of All Forms of Racial Discrimination stated that there was no visible discrimination along racial lines in trade unions or political parties. Nevertheless, this was not entirely true: the ruling party, SWAPO, predominantly comprises Owambo-speaking people, whilst the National Unity Democratic Organisation (NUDO) is run by the Herero-speaking people, the United Democratic Front (UDF) by Damaras, and the Monitor Action Group (MAG) and the Republican Party (RP) by Afrikaans-speaking whites.

The first case arising out of allegations of racial discrimination was in 1995. Racist statements had allegedly been directed at white police officers who had beaten black persons engaged in a peaceful demonstration. Charges were brought against the then Director of the Namibian Broadcasting Corporation (NBC), a

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421 No. 15 of 2005. There are currently some cases at the Master of the High Court that deal with black estates.

journalist employed by the NBC, and a certain Mr Hans Goagoseb, who had made the statements. The prosecution that was brought under the 1991 Act was withdrawn in September 1995. Namibia's CERD country report for 1995 stated that proceedings had only been instituted in protection of a specific sector of society, namely white police officers, although they had actually violated the human rights of peaceful demonstrators.

A similar case is that of *Kauesa v Minister of Home Affairs*,<sup>422</sup> where Kauesa appeared on national television and made racial comments against white police officers. In *casu*, the High Court stated that freedom of speech can be limited by the fundamental rights relating to dignity, equality and non-discrimination and legislation enacted in accordance with the Constitution, namely the Racial Discrimination Prohibition Act, and that a corollary to these was a prohibition on *hate* or *racist speech*, which the court defined as speech inciting hatred and prejudice on the grounds of race, colour, ethnic origin, creed or religion. The Court gave a number of compelling reasons why hate speech was not protected under the mantle of the freedom of speech and expression. These included that

- it could break down public order
- it could give rise to an atmosphere of racial hatred and insensitivity, fostering acts of palpable violence and discrimination
- it diminished and denied equality and dignity to the target of vilification, and
- not only was it offensive, it also caused real harm to the target group and to society as a whole, leading to discrimination and violence.

Therefore, the above case shows that freedom of speech and expression is guaranteed only to the extent that it does not curb the rights of others or create a state of instability in the country. The rights of all persons are guaranteed and, as such, no particular person or group of persons is in a position of superiority over others.

A final case was that brought against Hannes Smith, Editor of the *Windhoek Observer* newspaper, who published an advertisement on 17 August 1994 in which the seventh anniversary of the death of Rudolf Hess, Adolf Hitler's deputy, was glorified. Smith was charged with contravening the Racial Discrimination Prohibition Act, given the history of Nazism.

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422 1995 NR 102 (HC).

Namibia's 1995 CERD country report also expressed the hope that the Racial Discrimination Prohibition Act would not be used to stifle criticism where it was necessary, unless it amounted to crude racist speech or incitement.

### ***Implementation of the CERD in Namibia***

Namibia has succeeded in enacting some legislation that is in line with this Convention, as follows:

#### *Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991)*

This Act caters for the criminal punishment of certain acts and practices of racial discrimination and apartheid in relation to public amenities, and so on. The Act does not adequately cover the provisions of the Convention, however. For example, it does not define what is meant by the term *racial discrimination*.<sup>423</sup> What it does define is *racial group*, which refers to –<sup>424</sup>

*... a group of persons defined by reference to colour, race, nationality or ethnic or national origin.*

Another example of the inadequacy of the Act becomes clear if one compares it with Article 6 of the Convention. Article 6 states, inter alia, that –

*State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*

Generally speaking, the Namibian Constitution offers various remedies to aggrieved persons under Article 25(2), Article 78 (through the courts), and Article 12 on fair trial. However, section 18 of the Act provides that –

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423 In terms of Article 1, *racial discrimination* means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

424 Section 1.

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*No trial for an offence under this Act shall be instituted without the written authority given personally by the Prosecutor-General in each case.*

In its concluding remarks and observations on the combined report handed in by Namibia,<sup>425</sup> the Committee were of the opinion that this provision places a severe and unusual obstacle in the way of persons wishing to institute criminal proceedings. This went against the very issue that the Committee was trying to address in terms of effective and adequate remedies to aggrieved persons. Taking into account the number of cases that the Prosecutor-General's office received for prosecution, it would be impossible to have a matter set on the roll if only the Prosecutor-General in person could allow for prosecution to take place. The Committee concluded that, if section 18 were deleted and a few changes were made to the Act, then this statute would be an effective remedy for all aggrieved persons and it would comply with the Convention.

In addition to the above Act, the following statutes are also applicable in combating racial discrimination in Namibia:

- The Affirmative Action (Employment) Act, 1998 (No. 29 of 1998): This legislation provides for the achievement of equal opportunity in employment in accordance with Articles 10 and 23 of the Constitution
- The Cultural Institutions Act, 1969 (No. 29 of 1969): This legislation provides for the payment of government subsidies to cultural institutions, and
- National Art Gallery of Namibia, 2000 (No. 14 of 2000): This Act provides for the establishment of the NAGN and for the objects therein, which ensures the preservation of Namibia's cultural heritage; the NAGN houses works from cross-sections of Namibian society.

In addition to these pieces of legislation, the Constitution of the Republic of Namibia provides further relief for aggrieved persons in Article 23(2), Article 10 and Article 25(2). Namibia has also signed, ratified or acceded to the following international instruments pertaining to racial discrimination and culture:

- Convention concerning the Protection of the World Cultural and National Heritage 1972: Namibia acceded to the Convention in April 2000, and
- The SADC Protocol on Culture, Information and Sport, 2001: Namibia ratified the Protocol in December 2002.

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<sup>425</sup> *Concluding observations and remarks by the Committee on the Elimination of All Forms of Racial Discrimination for Namibia, CERD/C/304/Add.16.*

Following on the above international and domestic laws ratified and/or enacted by the Namibian government, the Committee had the following observations to make about Namibia's country report:<sup>426</sup>

- The Committee commended the government for its frankness in the report, and for its general compliance with the guidelines for the preparation of state party reports. However, the Committee noted that the report lacked economic, social and demographic indicators that would have assisted in evaluating the country's situation with regard to racial discrimination.
- The Committee also noted that some discriminatory social attitudes that were prevalent and tolerated in certain parts of the population were one of the factors impeding the implementation of the Convention.
- Some of the positive aspects of the report included the following:
  - That, despite the social and economic difficulties being faced by the country, important steps had been taken by the government since independence to eliminate racial discrimination, notably through the policy of national reconciliation
  - The policy of affirmative action in sectors such as education and employment
  - The inclusion of a Bill of Rights in the Constitution, the Racial Discrimination Prohibition Act and subsequent legislation passed to reinforce this Act, such as the Agricultural (Commercial) Land Reform Act, 1995 (No. 6 of 1995), and
  - Recognition of the efforts being made by the Master of the High Court and the Law Reform and Development Commission to amend and repeal outdated or discriminatory legal provisions.
- The Committee expressed the following concerns about the situation in Namibia:
  - That, despite the affirmative action measures taken to eliminate social and economic disparities, black people and coloureds, who comprised approximately 95% of the population, still faced discrimination in areas such as access to property, employment, and health care
  - The persistence of a dual legal system regulating personal status such as marriage and succession (this dual system has since been abolished and all cases are treated equally in a non-racial manner),<sup>427</sup>

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426 (ibid.).

427 All reported cases are now dealt with under the Administration of Estates Act.

- The lack of information relating to the implementation in law and practice of Article 5 of the Convention, as well as on the situation of vulnerable groups, particularly the San/Bushmen<sup>428</sup>
- That not enough is being done in Namibia concerning the implementation of the CERD. This is evident in that Namibia has failed to fulfil its reporting obligations under CERD. Consequently, the Committee had to hold a session without having received Namibia's report in 2006.<sup>429</sup> The Committee wrote a letter dated May 2006 addressed to Martin Andjaba of the Permanent Mission of the Republic of Namibia to the UN, which suggested that the state may actually need to resort to seeking outside help in order to comply with its obligations under the CERD. Looking at the letter, one notices that Namibia still has many issues to address regarding the implementation of this Convention. One of the issues that arises is that the Namibian government still has not provided adequate information on how ethnic minorities such as the San and the people of the Caprivi Region are integrated into the implementation process of the Convention. Another problem that the Committee brought to light was the issue of affirmative action as postulated in Article 23(2) of the Namibian Constitution. The constitutional provision alone is not sufficient to guarantee that racial discrimination is prohibited.

### *Recommendations*

- There needs to be supplementary legislation to echo the provision on affirmative action.
- The Racial Discrimination Prohibition Act also does not deal adequately with racial discrimination. One of the shortcomings of this piece of legislation, in the words of Nico Horn,<sup>430</sup> is that it only caters for public conduct or display of discriminatory behaviour, and not those actions carried out by persons outside the public eye. Also, from the language of the Act, it is difficult to establish whether such a complaint is catered

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428 Despite recent efforts by the Deputy Prime Minister, Dr Libertine Amathila, to bring some sort of development to the San, they still remain the most neglected group in Namibia.

429 See Annexure 1; note also the questions that the Committee raised in connection with the failure of the state to report.

430 Footnote 32, *supra*.



for and can be adjudicated on in the courts of law. There is, therefore, a strong need for a specific anti-hate-speech clause in legislation that will cater for all forms of racial discrimination and its subsequent elimination in Namibia.

- Namibia should emulate the South African example of the elimination of racial discrimination. The majority of South Africans suffered at the hands of a white minority government during the apartheid era, where racial superiority of whites over blacks was rampant. After democratisation in 1994, the state made tremendous efforts to eradicate racial discrimination at all costs. This involved the Human Rights Commission, the Office of the Ombudsman, the state itself, and other key stakeholders in South Africa. In addition to the aforesaid, and in addition to the constitutional provisions and the Bill of Rights, South Africa has other Acts of Parliament aimed at eradicating racial discrimination. The framework that the South African government has created also provides for remedies and specialised dispute resolution mechanisms to expedite the enforcement of the rights protected in the Convention and in relevant domestic laws.<sup>431</sup> Accordingly, the South African government's report to the CERD suggests that the country has complied with its obligations under Article 1 of the Convention to date. Accumulatively, South Africa has succeeded in creating a national policy for the eradication of racial discrimination – even though there is still a gap between the actual state of affairs in South Africa and what the law stipulates.
- Namibia should seriously consider the recommendations brought forward by the Committee on measures to be taken, and should also seek the counsel of the Office of the Commissioner of Human Rights in South Africa in complying with its reporting obligations.
- Another issue that the state should address in its policies and legislative implementations is that of eliminating xenophobia as a particular kind of racism aimed specifically at foreigners. It seems to me that black-on-black racism is the worst kind of racism there is, although most times when the word *racism* is used one only thinks of whites against blacks and vice versa. Namibia also needs to be applauded for its efforts to eliminate racial discrimination, but must go the extra mile to eradicate racism totally or deal more firmly with cases that surface.

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431 An example is the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No. 4 of 2000).

## ***Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment***

To prohibit and prevent torture and other acts of cruel, degrading and inhumane treatment or punishment, CAT was adopted and opened for signature, ratification and accession by UN General Assembly Resolution 39/46 of 10 December 1987. Namibia acceded to the Convention on 28 November 1994. It is pertinent at this point to mention that the provisions in this Convention are only applicable to persons who have been deprived of their liberty and are in detention.

To monitor the implementation of the Convention by all state parties, Article 17 of the Convention established a Committee against Torture. As a consequence of this body, state parties are obliged to make periodic reports to the Committee. Namibia submitted its initial report in 1995; a subsequent report was due in 1999, but no report has been put forward to date and there seems to be hardly any effort to bring existing legislation in line with the Convention or to enact new legislation.

In other jurisdictions where the so-called War on Terror has taken root, anti-terror legislation has been enacted to curb terrorism and to punish perpetrators of terrorism for their acts, regardless of the fact that some of the methods of interrogation used amount to torture. Namibia has also joined in the fight against terrorism through the introduction of a Terrorism Bill.<sup>432</sup> An attempt will be made in this paper to ensure that anti-torture legislation is enacted in Namibia, tailored to honour the Torture Convention, and that any incidents of torture do not become as pronounced as those in the USA with its policy on the War on Terror.

It is no secret that torture has been a part of Namibia's history and is still going on in post-independence Namibia.<sup>433</sup> According to the state report submitted by

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432 *New Era*, 22 May 2007; "Anti-terrorism workshop held in Windhoek", by a staff reporter. The article reported that the Ministry of Justice had held a workshop to address the issue of enacting legislation on terrorism in Namibia in support of the War on Terror around the world since the 11 September 2001 attacks in the US.

433 Reports show that prison inmates were allegedly tortured or treated in a cruel, inhumane and degrading manner, or that they had been brutalised by Police and the Special Field Force. For example, the National Society for Human Rights reported in February 2006 that nine members of the Namibian Police were accused of torturing five suspects at the Keetmanshoop police precinct. The suspects claimed they had been beaten repeatedly and shocked with an electric device during the interrogation.

Namibia to the Committee against Torture,<sup>434</sup> Namibians were routinely tortured and assaulted by South African and South West Africa Territory Force soldiers and by members of the South West African Police during the illegal occupation of Namibia by South Africa. However, after independence, and in accordance with the government's policy of national reconciliation, many of the Namibian members of these forces were taken up in the employ of the Namibian Defence Force and the Namibian Police Force. The report also states that it was —<sup>435</sup>

*... to cure the mischief of the erstwhile colonial experience that Article 8(2)(b) of the Namibian Constitution was included ...*

This Article provides that —<sup>436</sup>

*No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*

In addition to this Article being in the Bill of Rights and being wholly justiciable, freedom from torture is entrenched by way of Article 24(3). This means that, even in a state of war or after a declaration of emergency, a suspension of this right is prohibited. In practice, however, this has not been respected. During the Caprivi secession attempt,<sup>437</sup> several of the secessionists claimed to have been tortured and there was evidence to support this.<sup>438</sup> It seems that the right was indeed suspended during that period in order to extract answers from the group accused of disrupting peace and stability in the country.

The report prepared by the government for the Committee against Torture included information on, inter alia, —<sup>439</sup>

*... article 8 of the Constitution which prohibits torture; the justiciable Bill of Rights; measures and laws related to extradition and expulsion; training for law enforcement, defence and prison service personnel; medical services in prisons; safety checks and*

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434 CAT/C/28/Add.2: Namibia's country report handed in in 1997.

435 (ibid.).

436 Republic of Namibia. 1990. *The Constitution of the Republic of Namibia*. Windhoek: Ministry of Information and Broadcasting.

437 The uprising took place from late 1999 to early 2000.

438 Amnesty International. 2003 (online). *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*. <http://www.amnesty.org/en/library/info/AFR42/001/2003>; last accessed 12 March 2008.

439 <http://www.hri.ca/forthecord1997/vol2/namibia.htm>; last accessed 23 May 2007.

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*other procedures in police detention and prisons; police conduct and misconduct; complaints, investigations, proceedings and compensation; rules of evidence and the admissibility of “confessions” obtained through pressure.*

The report also includes a summary commentary on a number of individual cases illustrating violations, complaints, investigations, and the results of proceedings, where undertaken.

As already stated above, Namibia has failed in its international obligations pertaining to CAT. Even though the Constitution outlaws torture in terms of Article 8(2), and Article 144 allows for the direct application of international law instruments to which Namibia is a party, *torture* is still not defined or expressly prohibited in any legislation in Namibia as per the requirements of Article 1 of the Convention. The Constitution merely makes mention of its prohibition and that the right to freedom from torture is inviolable. In the NSHR’s 2006 *Human Rights Report*,<sup>440</sup> it adopted the definition of *torture* offered by the International Committee of the Red Cross, which includes –<sup>441</sup>

*... any other prohibited active or passive methods of abuse or severe deprivation, including inhuman, cruel, humiliating, and degrading treatment, outrages upon personal dignity and physical or moral coercion.*

This definition to a certain extent broadens the definition of *torture* contained in CAT in that it includes moral coercion, for example. This initiative taken by a human rights body to entrench the definition of *torture* in the Namibian context is applauded.

In Namibia’s country report to the Committee against Torture,<sup>442</sup> the state submitted that even though there was no express definition for *torture* in the Constitution or other legislation, –

*... it can safely be assumed that in a case in which the definition of torture becomes an issue, the definition in Article 1 of the Convention will be given judicial recognition and will be used as an aid to interpretation.*

To reiterate the state’s disapproval of torture or acts related to it, in the landmark case of *Ex parte Attorney-General, Namibia: In re corporal punishment by*

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440 NHSR. 2006: *Namibia Human Rights Report*. Windhoek: NSHR.

441 (ibid.:107).

442 CERD/C/NAM/12.

*organs of the State*,<sup>443</sup> the Supreme Court declared corporal punishment imposed or inflicted by or upon the authority of a state organ to be illegal.

In terms of Article 2 of CAT, state parties are obliged to take administrative, judicial or legislative measures to prevent acts of torture from occurring within their jurisdictions. Provision also needs to be made for torture never being justified – whether it be under a state of emergency or war, or on the basis that it came from superior orders. All in all, each state is obliged to take effective measures to prevent torture. The character of these measures is at the discretion of the state, but whatever measures are taken have to be effective. Thus, the obligation under Article 2 is not only to prohibit acts of torture, but also to prevent them. This Article is said to be an umbrella provision, in that many of the provisions in CAT are elaborations of the general obligation of Article 2(1) to take measures to prevent torture.<sup>444</sup>

Namibia's country report noted that, under Article 2 of CAT, torture is considered to be a serious criminal or civil wrong that is capable of attracting either criminal or civil proceedings. This is the case in that either the state or the victim of the offence can institute an action. When it comes to state-sponsored torture, law enforcement agencies have been observed to be the ones most in need of control in that most reports that arise are due to acts perpetrated by these agencies. Therefore, the government has laid down administrative directives aimed at preventing torture from occurring in the Police.<sup>445</sup> These instructions are used as teaching materials during the training of police officers. The first question that comes to mind is whether these directives are effective, and whether they are actually being followed by the Police. After having observed numerous incidents and having read various reports of alleged cases of people being tortured by the Police, I believe the measures taken are not effective: despite the 'training' that the Police go through, cases of torture and other cruel, degrading and inhuman treatment are on the rise and occur more frequently now. A further problem is that one never hears about these offences being prosecuted. In this regard, see for example the Caprivi secessionists' case, where a number of the accused alleged

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443 1991 NR 178.

444 Inglese, C. 2001. *The UN Committee against Torture: An assessment*. The Hague: Kluwer Law International, p 242.

445 Basic training of police recruits in Namibia; see also the Namibian Police Manual. This manual was compiled by the Legal Assistance Centre and was used at a workshop to instruct police officers. It contains and explains provisions from major international conventions, including CAT.

that they had been tortured while the case was being investigated. To date, the alleged perpetrators have not been prosecuted because the actual treason case was given precedence as being more serious and thus requiring more attention.

Namibia's country report to the Committee against Torture highlights the existence of a Complaints and Discipline Division within the Namibian Police Force. This Division is responsible for investigating charges of assault and inhuman treatment brought against police officers. A major problem being experienced by this Division is the lack of personnel to promptly and efficiently investigate cases. The Legal Assistance Centre also expressed its concern about the inadequacy of the existing procedure for investigating and prosecuting complaints against members of the Police. The LAC suggested that the government should look into the establishment of an independent authority dealing with complaints against the Police, with sufficient funds and personnel to deal with all the complaints that are laid.<sup>446</sup> Since such a body would be impartial, cases of alleged torture would actually take off and be prosecuted without fear or prejudice. The independent body, with its own personnel and resources, would be preferable to the Police investigating state-sponsored torture whilst being supported financially by the state: this would simply amount to the Police biting the hand that feeds them, and crimes would in all likelihood not be prosecuted.

Article 24(3) on derogation states, inter alia, that –

*[n]othing contained in this Article shall permit a derogation from or suspension of the fundamental rights and freedoms referred to in Articles ... 8 ... .*

This Article is in line with Article 2(2) of CAT, in that it does not permit derogation from the right to freedom from torture under any circumstances: it is an inviolable right. According to Article 1(6) of the Constitution, the latter is the Supreme Law of Namibia – and, as such, it ought to be adhered to at all times regardless of there being a state of war or unrest in the country. Thus, the alleged torture of the Caprivi secessionists and all other similar incidents by law enforcement officers contravenes both international and domestic law.

Torture has not been formally criminalised in Namibia. Hence, perpetrators of this atrocious crime are prosecuted under common law. Indeed, Namibia's country report to CAT stated that all acts of torture or cruel, inhuman or degrading

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<sup>446</sup> *Concluding observations and comments of the Committee against Torture, CAT/C/XVIII/CRP.1/Add.4.*

treatment or punishment were considered common law offences,<sup>447</sup> that is, not regulated by statute. According to the report, the law that regulates attempts to commit crime and conspiracies to commit crime apply to both common law and statutory crimes.

In accordance with Article 2 of the Convention, the courts in Namibia have the discretion to sentence a person convicted of torture to either a prison term or a fine. The severity of the punishment usually depends upon the degree of gravity of the act that was committed.<sup>448</sup> I believe this is still not enough, in that it still does not follow fully the provisions of this Article. Torture is not a common law offence: it should – and, indeed, ought – to be regarded in terms of specific legislation so that the proper and appropriate punishment is given for it.

It also follows that our courts, by prosecuting acts of torture under the common law offence of assault, only cater for physical torture. Referring to the definition of *torture* in Article 1 of CAT, the act of torture constitutes the infliction of both severe mental and physical pain. This shows that, where a victim alleges that s/he has suffered mental torture, the prosecutorial team would have nowhere to turn in order to submit their claim; in turn, the Namibian courts would not have an appropriate punishment for the crime. Even if, by implication, the courts decided to make use of the provision in Article 1 of CAT by virtue of Article 144 of the Namibian Constitution, CAT is not self-executing, and it does not contain any punitive measures. As a result, state parties to the Convention are obliged to devise a strategy that will prevent and prohibit torture through criminalising it. Since Namibia does not have a penal code that could regulate such matters, perpetrators of this atrocious crime get off scot-free since the principle of legality finds application.

### *Concerns raised*

Some of the concerns raised by the Committee against Torture in their concluding observations and recommendations for the initial report submitted by Namibia in 1994 are repeated here so that the stakeholders involved in the enactment of laws take due regard of the issues at hand. The concerns are as follows:

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447 The prosecutorial body opts to prosecute alleged offenders for assault or assault with intent to do grievous bodily harm.

448 In *State v Michael Matroos* 1992 NR, the accused, a police officer, was charged with torturing a suspect to death. The High Court in this case felt bound to order a custodial sentence “... in order to emphasise the strong disapproval” of the court.



- That torture is still rampant in Namibia: There are a number of reported cases of human rights abuses by members of the Special Field Force and the Namibian Defence Force.
- That no specific definition of *torture* exists in any penal legislation; as a matter of fact, Namibia does not have penal legislation.
- That no specific legislation deals with torture: As a result, the Committee was of the opinion that the Namibian courts could not adhere to the principle of legality or to Article 4 of CAT. This is evidenced by the fact that the prosecutorial authority prosecutes alleged offenders based on assault because no specific legislation on torture exists.
- That there still seems to be a backlog of cases due to a lack of judicial personnel: As a result, the pre-trial detention of accused persons is lengthy.
- That there has been a failure to impartially and promptly investigate and prosecute perpetrators of torture that occurred before or after independence.

### *Recommendations*

In the light of the above concerns, the Committee made the following recommendations:<sup>449</sup>

- Namibia should enact legislation that clearly defines the crime of torture as envisaged in Article 1 of CAT.
- Not only should torture be criminalised, it should also take into account that evidence obtained by means of torture is inadmissible.
- Since there is never any justification for torture, the Terrorism Bill should take this into account and strike that balance between the fight against terrorism and the fight against torture.
- Law enforcement personnel, medical personnel such as doctors and nurses, and other related personnel should be educated about and trained in respect of the prohibition of torture and other cruel, inhuman and degrading treatment or punishment in accordance with Article 10, and with regard to the criminal liability of those that commit acts of torture. In Denmark, it was found that medical personnel were involved in the whole torturing process, in that they knew which methods would be most effective and would have the most effect on victims. Government

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449 CAT/C/XVIII/CRP.1/Add.4: The Concluding observations and comments on the initial report by Namibia to the Committee against Torture.



and stakeholders should look into this so as to ensure that our medical personnel are not involved in the commission of this horrific crime, and if they are, then they should be prosecuted for it.

- The Prisons Act, 1998 (No. 17 of 1998) permits certain members of the judiciary, public service and religious leaders to visit and inspect detention centres and make observations. Such visits should be done on a regular basis so as to keep constant checks on the situation in prisons. Also, instead of leaving the comments, recommendations and observations with the officer in charge at the detention centre, these should be made known to an independent authority dealing specifically with complaints against the Police.
- A national human rights commission should be established as a separate body from the Office of the Ombudsman. The Human Rights Advisory Committee, as an extension of the latter Office, is not enough. Such national human rights commission ought to be independent with its own budget and personnel, and should deal specifically with human rights violations. The public should have access to this commission, and its existence should be made known so that people can lodge their complaints.
- The backlog of cases at the Prosecutor-General's office should be looked into so as to ensure prompt and impartial justice to all victims, and particularly victims of torture. This is in view of the number of reported cases of alleged torture by the Police and the Namibian Defence Force.
- The state should ratify the Optional Protocol to the Convention against Torture. Article 1 of the Protocol states its objective as being –

*... to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.*

This will be in addition to the visits that are already allowed by the state to specified people. This will ensure that a second opinion of the situation in the detention centre is obtained in the event of cover-ups.

- The state should further make a declaration in terms of Article 22(1) of CAT, namely that –

*[a] State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall*

*be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.*

Such declaration would make the prosecution of torture a speedy process, in that individuals could have the opportunity to take their cases directly to the Committee against Torture instead of waiting for the Namibian courts to prosecute – something which might never happen.

- The Committee also called for a prompt and impartial investigation into the disappearance of former members of SWAPO in terms of Article 12 of CAT. Furthermore, where it was reasonably believed that those disappearances amounted to torture or other cruel, degrading or inhuman treatment, then the dependants of the deceased victims should be afforded fair and adequate compensation. This statement is akin to the one made by the NSHR Director, Phil ya Nangoloh, in his submission to the International Criminal Court.<sup>450</sup> This controversial topic has sparked various debates, including one in Parliament.
- Rehabilitation centres should be established so that victims of torture can be given the necessary help they need to get over their psychological problems and recover from the abuse they suffered at the hands of the perpetrators of torture.

### *Conclusion*

In conclusion, Namibia still has a long way to go before it fully complies with its international obligations under CAT. In terms of legislation, the lawmakers have huge lacunae to fill in order to bring the law in line with the Convention. This will essentially involve the amendment of some legislation and the enactment of new legislation dealing particularly with torture. It may also be important that the country enact legislation that can draw the line between the War on Terror and the need to protect the right of persons not to be subjected to torture.

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450 The submission was that the Founding President of Namibia, Dr Sam Nujoma, should be tried and charged with human rights violations that were allegedly perpetrated against Namibians during the liberation struggle.

## **Women and children's rights**

### ***Optional Protocol on the Sale of Children***

The Optional Protocol on the Sale of Children (OPSC) was adopted and opened for signature, ratification and accession by UN General Assembly Resolution A/RES/54/263 of 25 May 2000, and entered into force on 18 January 2002. Namibia ratified the Protocol on 16 April 2002. Its first and subsequent country reports were due from 2004 onwards, but none have been submitted to date.

The Protocol is one of two such instruments to the Convention on the Rights of the Child. The OPSC deals specifically with preventing the exploitation of children with particular regard to trafficking, prostitution and pornography. In its Preamble, the Protocol declares that state parties to the Protocol need to recognise that, amongst the vulnerable groups at risk of sexual exploitation, the girl child ranks as most at risk, and is disproportionately represented among the sexually exploited.

The following factors were considered to be the main contributors to the problems sought to be resolved by the OPSC: underdevelopment, poverty, economic disparities, dysfunctional families, lack of education, and gender discrimination. These factors are a particular burden on many developing countries, and need to be addressed in order to overcome these problems. Also, member states believed that raising public awareness of this hazard, i.e. the sale of children for prostitution or pornography, is needed in order to reduce consumer demand for the sale of children, child prostitution and child pornography.

Although Namibia has not yet filed its country report with the Committee on the Rights of the Child concerning this Protocol, a number of legislative measures can be said to be directly applicable and in line with this instrument. These include the following:

- **The Labour Act, 2004 (No. 15 of 2004):** The Act clearly states that children under the age of 18 are not allowed to do any form of skilled work.
- **The Extradition Act, 1996 (No. 11 of 1996):** The use of children for the purposes stated above is an extraditable offence, and perpetrators of such offences can be dealt with under this Act.
- **The International Cooperation in Criminal Matters Act, 2000 (No. 9**

**of 2000):** This Act facilitates the provision of evidence and the execution of sentences in criminal cases, as well as the confiscation and transfer of the proceeds of crime.

- **The Indecent Photographic Matter Act, 1967 (No. 37 of 1967):** This Act makes it an offence to possess indecent or obscene photographic materials.
- **The Combating of Immoral Practices Act, 1980 (No. 2 of 1980):** The Act deals with the prohibition of prostitution and other issues pertaining to immoral practices such as the possession of pornographic material.
- **The Children’s Act, 1960 (No. 33 of 1960):** This Act makes it an offence for a parent, guardian or custodian of a child to “cause or conduce or allow a child to reside in a brothel”. The Act could be said to be instrumental in combating the demand for child prostitutes.
- **The Criminal Procedure Act, 2004 (No. 25 of 2004):** As provided in the Protocol, children need to be protected in the criminal process because of their vulnerability. Section 189 of this Act provides for the protection of children as vulnerable witnesses. The children envisaged under the said section are those under the age of 18 who have suffered sexual or indecent offences, and against whom domestic violence offences have been committed, as well as those who, as a result of physical or mental disabilities, fear intimidation by the accused or any other person. In addition to this, whenever children are involved in the criminal process, court sessions are usually held in camera not only to protect the identity of the child, but also to avoid the usual publicity of court cases.

However, even with these pieces of legislation in place, the OPSC has not been fully complied with. There are still some lacunae that need to be filled by specific legislation that will deal specifically with the provisions set out in this instrument. A commendable action that the country has taken is its involvement with the Southern African Regional Network against Trafficking and Abuse of Children (SANTAC).<sup>451</sup> SANTAC deals mainly with the issue of human trafficking within the southern African region, especially the trafficking of children for sexual abuse. SANTAC’s mission is –

*[t]o build synergies amongst Southern African institutions or individuals to fight all manifestations of child abuse, in particular child sexual abuse, commercial sexual exploitation, child labour and trafficking of children for any exploitative purpose, through advocacy, education, awareness, law reform, rehabilitation and services for the victims.*

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451 [www.againstchildabuse.org/en/why\\_santac](http://www.againstchildabuse.org/en/why_santac); last accessed 12 November 2007.

It is highly commendable that Namibia is a part of this initiative as it shows the country's commitment to protecting its children against abuse. This is, of course, in addition to national laws already in place.

There are, however, some problems which Namibia faces, namely child labour and suspected child trafficking. There have been reports of suspected child labour in the country, especially in rural areas. This is despite the labour laws in place, and it is in contravention of International Labour Organisation Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Labour. The Ministry of Labour and Social Welfare is currently conducting research to unearth the truth of this suspected exploitation of children.

Another issue of concern, especially in southern Africa, is human trafficking. It has been widely reported that human trafficking seems to be a lucrative business in the region, with South Africa being the main destination in most cases. Although not exclusively, the girl child has been identified as the main victim in this business. The unsuspecting girls, due to poverty, are lured into this dangerous circle by the prospects of finding greener pastures that will enable them to take care of themselves and their families. Upon arrival in South Africa, they are sold and forced into prostitution and other forms of labour. Though there are no confirmed reports of human trafficking in Namibia, particularly of children, the combined second and third country reports by Namibia to the Committee for the Elimination of Discrimination against Women stated that two girls had reportedly been abducted from Swakopmund while on their way to Windhoek for the holidays.<sup>452</sup> The girls were apparently held as sex slaves at separate shacks east of Johannesburg. This incident ought to set off alarms bells for the legislative bodies as well as the government so as to prevent future incidents.

According to SANTAC's assessment of the situation in Namibia, the government has taken the following steps to bring national legislation in line with its commitments to children in respect of the UN Convention on the Rights of the Child:

- A special course in gender sensitivity has been introduced at the Police training centre

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452 CEDAW/C/NAM/2-3, handed in in 2005.

- Safe houses have been opened
- NGOs have opened centres for counselling, places of safety, and court preparations, amongst other things, and
- NGOs have trained and sensitised the Police and the judiciary to crimes of sexual exploitation and assault.

### *Recommendations*

- The government needs to take into account the growing concern that child trafficking is high in the SADC region, and should investigate whether children in Namibia are at risk and if any incidents have occurred.
- The government should look into the issue of so-called street kids. There is an increasing number of street kids in the capital, and I believe they are the most at risk of being trafficked for prostitution or manual labour.
- Public awareness campaigns should be launched so that people are made aware of this problem and that their children need to be protected.
- The government should look into the adoption laws that are in place in the country because it has been observed that traffickers have found loopholes in the adoption laws that enable them to ‘adopt’ children and then sell them for exploitation purposes.

### ***Convention on the Elimination of Discrimination against Women***

For the purposes of the discussion on the enforcement of women’s rights in this paper, I will concentrate on the issue of gender-based violence, which is a particular problem in Namibia. Though such violence is also perpetrated against men, the main victims of crimes such as rape and domestic violence are women, and the perpetrators are predominantly male. The legislature has, in terms of Article 3 of CEDAW, taken the following legislative measures to ensure the –

*... full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

### ***Combating of Rape Act, 2000 (No. 8 of 2000)***

As rape is a violent reality in Namibia and only a small percentage of rape or attempted rape cases are reported to the Police, it is sometimes difficult to

prosecute the perpetrators. With the enactment of this legislation, however, sexual offenders are being brought to book almost every day. However, despite the Act – which, in my opinion, is the strictest piece of legislation Namibia as a state has enacted in respect to sexual offences – rape is an ever-increasing phenomenon in our communities. Statutory rape is a strict liability crime and so it is not necessary to prove, for example, that the victim was a minor: it only matters that s/he in fact was raped or subjected to attempted rape. There seems to be no leniency where rape is concerned, especially where children are involved, and this is very commendable on the part of the judiciary.

*Combating of Domestic Violence Act, 2003 (No. 4 of 2003)*

Domestic violence is another prevalent crime in Namibia. The local newspapers usually carry at least one article a day on domestic violence. Husbands beat up their spouses and their children, and the one place that people ought to feel safe in, the home, has become the most dangerous place to be. The Act sets out how the law should be applied, but because victims of domestic violence do not always report the abuse, perpetrators cannot be made accountable for their actions.

The Act stipulates that protection orders can be applied for by any person in a domestic relationship. This proves that the Act is gender-neutral, albeit the majority of domestic violence cases are against women. The problem is that women still do not report cases of abuse to the Police because it goes against tradition (since marriage is seen as a private thing), they are ignorant of the law and their rights, they fear being killed, or even because the man is the breadwinner of the house – and if he is locked up, there will be no income in the household.

A problem that I see with this Act is that it does not appear strict enough. One wonders what happens when application is made for a protection order: even if the offender is ordered to maintain a certain distance from the victim, s/he is still free to roam the streets and still poses a threat. Also, many victims of domestic violence tend to forgive their partners, who return to them under the pretext of change. This is the time when most women are at a higher risk of being killed. Women do not receive adequate protection either under this Act or by the government, since the issue of domestic violence is trivialised: governments across the globe do not give this crime due recognition as a serious human rights violation.

Some of the cases of domestic violence are so egregious that the relevant Act cannot even be applied. For example, a woman had been shot seven times by her partner and upon noticing that she had not yet died, the man proceeded to get a panga<sup>453</sup> to finish her off by cutting her throat. Although she was saved by someone and rushed to hospital, she later succumbed to the injuries and died. It is my submission that such cases should be treated as torture instead of domestic violence *strictu sensu*. This submission is based on international trends that seek to broaden the definition of *torture* to include domestic violence. It is argued that the two crimes share essential elements, so domestic violence can be said to be a form of torture. I agree with this contention, and strongly urge that this be taken into consideration.

### *Inheritance under customary law*

Another area that needs to be addressed to ensure the enjoyment of rights by women is the issue of inheritance under customary law. The government has failed to adequately address this problem, but it is imperative that it be discussed for the furtherance of women's rights.

### *Recommendations*

On paper it seems that women's rights have been advanced and that they are increasingly enjoying such rights. However, many would agree with me that the majority of women are still unaware of their rights and, as such, are not enjoying them. For example, I believe that government policies and laws should target women in the rural areas in particular. Awareness campaigns need to be organised in the various local languages so that legislation is presented to these women in a familiar medium, so as to better educate them about their entitlements. The Police should also be sensitised about the seriousness of the problem being faced, and their obligation to act on information that is given to them. The Women's Conference held in June 2007 suggested that a campaign be launched to signal zero tolerance for gender-based violence, in an effort to curb the spurt of cases of violence against women and children in the country. Furthermore, all Namibian stakeholders should work together to deal with the problems the state is facing.

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453 Bladed African tool like a machete; *Concise Oxford English Dictionary* (2002).



## **Conclusion**

In conclusion, I can safely say that Namibia needs to put more effort into its implementation and enforcement of international human rights instruments. The argument that Article 144 of the Constitution allows for direct application of international law is not sufficient to cater for all the Conventions. If one looks at any one of the Conventions discussed above, it is clear that none of them contains a punitive clause; neither do they prescribe proper and appropriate punishment for the contravention of the provisions therein. These measures are left to the discretion of states, and hence, it is vital that effective administrative, judicial and legislative measures are taken by states to prevent the various prohibited acts.