



NAMRIGHTS

NAMIBIA DOSSIER CONTAINING EVIDENCE OF:

**COMPLICITY IN  
AND IMPUNITY FOR  
TORTURE AND ILL-TREATMENT**

**WHY PROSECUTOR-GENERAL OLYVIA MARTHA IMALWA MUST BE REMOVED FROM OFFICE**

**WINDHOEK NAMIBIA MAY 5 2014**

## **COPYRIGHT NOTICE**

© 2014 NamRights Inc. All materials contained in this dossier are protected by Namibian and international copyright law. The right to download and store or in any event output the contents of dossier is granted for the user's personal, noncommercial use only. All other users must preserve any copyright or other notices contained in or associated with these contents. Any other reproduction, transmission, performance, display or editing of this dossier by any mechanical or electronic means, without express written permission of NamRights, is strictly prohibited.

## ABOUT NAMRIGHTS

NamRights is a private, independent, non-partisan and non-profit making human rights monitoring and advocacy organization. Founded on December 1 1989 by concerned citizens, the Organization envisages a world free of human rights violations. Its mission is to stop human rights violations in Namibia and the rest of the world.

NamRights bases its legal existence on the provisions of Article 21(I) (e) of the Namibian Constitution as well as Article 71 of the UN Charter, read with Economic and Social Council Resolutions 1296 (XLIV) and E/1996/31. The Organization is lawfully registered in terms of Section 21(a) of the Companies Act 1973 (Act 61 of 1973), as amended, as an association incorporated not for gain. African Commission on Human and Peoples' Rights of African Union (in 1993) and UN Economic and Social Council (in 1997) recognize NamRights as a *bona fide* human rights organization truly concerned with matters in their competence. The organization can be reached via this address:

**NamRights Inc**  
Liberty Center  
116 John Meinert Street  
Windhoek-West  
P. O. Box 23592  
Windhoek  
Namibia

Tel: +264 61 236 183/+264 61 253 447/+264 61 238 711

Fax: +264 88 640 669/+264 61 234 286

Mobile: +264 811 406 888

E-mail1: [nshr@iafrica.com.na](mailto:nshr@iafrica.com.na)

E-mail2: [nshr@nshr.org.na](mailto:nshr@nshr.org.na)

Web: [www.nshr.org.na](http://www.nshr.org.na)

*“Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”*

**Article 4**

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

# TABLE OF CONTENTS

EVIDENCE OF PREMEDITATION AND VENGEFULNESS	06
PROOF OF LEGAL IMPUNITY AND IMMUNITY	07
LIST OF ABBERRIATIONS	08
I. EXECUTIVE SUMMARY	09
II. INTRODUCTION	14
A.    TCIDT As Grave Crime	15
B.    TCIDT Has Been Widespread or Systematic	19
C.    Real Motive for State of Emergency	21
D.    Exterminatory Order to Destroy Secessionists	24
E.    State of Emergency Repugnant to Rights Protection	26
F.    CHTT Part of Policy to Deny Secessionists Fair Trial	30
G.    Evidence Fruit of Poisonous Tree	37
H.    Prosecution's Complicity in TCIDT	38
I.    Imalwa Unfit and Improper Person	46
J.    Conspiracy to Stifle Professional Standards	51
K.    Removal of Imalwa as Prosecutor-General	53
III. UNIVERSAL JURISDICTION AND OBLIGATION <i>ERGA OMNES</i>	54
IV. CONCLUSIONS	55
V. SELECTED BIBLIOGRAPHY	57

## EVIDENCE OF PREMEDITATION AND VENGEFULNESS

*“I have decided to address the nation this time on a matter of national concern. I want to inform you on the roots and the purpose of the armed rebellion in the Caprivi Region. It is a rebellion which has been in the making for a long period of time [...] From the past days of the struggle for liberation and national independence, these political misfits and traitors have been hatching a diabolical plot to delay Namibia’s independence by sowing the seeds of disunity and strife along vicious tribal and regional considerations. At the very core of this rebellion is none other than Mishake Muyongo. Mishake Muyongo and his misguided henchmen have reached too far. They have committed a serious act of treason and cold-blooded murder in the Republic of Namibia. We will not allow them to get off scot free this time. They have [...] armed themselves against the government and the Namibian people as a whole. We will make them pay for this.”*

Sam Nujoma, Windhoek  
November 7 1998

## PROOF OF LEGAL IMPUNITY AND IMMUNITY

*“The State, the President, the Minister responsible for any Government Ministry, a member of a security force, any other person in the service of the State or any person acting by direction or with the approval of any such person or authority shall not be liable by reason of any act in good faith advised, commanded, ordered, directed or performed by any person in the carrying out of any duty, or the exercise of any power or the performance of any function in terms of these regulations with intent to ensure the safety of the public [and] the maintenance of public order or the termination of the state of emergency in the declared area, or in order to deal with circumstances which have arisen or are likely to arise as a result of the state of emergency in the declared area.*

*If in any proceedings brought against [the State, the President, the Minister responsible for any Government Ministry, a member of a security force, any other person in the service of the State or any person acting by direction or with the approval of any such person], or the question arises whether any act advised, commanded, ordered, directed, or performed by any person was advised, commanded, ordered, directed or performed by him in good faith, it shall be presumed, in the absence of evidence to the contrary proven, that such act was advised, commanded, ordered, directed or performed by the person concerned in good faith”.*

Limitation of liability  
Section 12 of State of Emergency Proclamation 1999 (No.24 of 1999)

## LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AI	Amnesty International
CAH	crime(s) against humanity
CANU	Caprivi African National Union
CAT	Committee against Torture
CCPR	Committee on Civil and Political Rights
CHTT	Caprivi High Treason Trial
CPT	European Convention for the Prevention of Torture
CRC	UN Convention on the Rights of the Child
DAT	UN Declaration against Torture
ECHR	European Court of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Convention on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
IT	ill-treatment
JSC	Judicial Service Commission
JSCA	Judicial Service Commission Act
LPA	Legal Practitioners' Act
LSN	Law Society of Namibia
NC	Namibian Constitution
NLA	Namibia Law Association
NSHR	National Society for Human Rights (of Namibia)
SA	South Africa
SoE	State of Emergency
SWAPO	South West Africa People's Organization
TCIDT	Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
TRC	truth and reconciliation commission
UDHR	Universal Declaration of Human Rights
UDP	United Democratic Party
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
VCLT	Vienna Convention on the Law of Treaties

## I. EXECUTIVE SUMMARY

1. In his rancorous nationally televised speech delivered on November 7 1998, then Namibian President, Sam Nujoma, announced that he has ‘decided to address and inform the nation about the armed rebellion in the Caprivi Region’.<sup>1</sup>It is extremely significant to point out that this nationally televised diatribe came nine months before the alleged secessionist “attack” in Caprivi Strip on August 2 1999. Following that rather mysterious incident, President Nujoma swiftly imposed an exterminatory state of emergency<sup>2</sup> (“SoE”) in that disputed volatile territory. In order to effectively implement this clearly predetermined state policy to “mete out an appropriate punishment to the terrorists [as well as] to combat and destroy the secessionists without mercy”<sup>3</sup>, Nujoma issued security forces implementing SoE with unrestricted powers and immunity. He said SoE is to “ensure the safety of the public [and] maintenance of public order”<sup>4</sup> in Caprivi Strip.
2. What has ensued has been widespread or systematic commission of large-scale and gross human rights violations over a period of more than ten years.<sup>5</sup> The violations have included summary executions,<sup>6</sup> mass arbitrary arrests and

---

<sup>1</sup>“Nujoma Denounces Caprivi Secessionists”, *New Era*, November 13-15 1998, p.8; “Muyongo must pay, says the President”, *The Namibian online*, November 9 1998; and “Namibia leader vows to crush rebels”, *Associated Press (AP) online*, August 8 1999

<sup>2</sup>The term “State of Emergency” is reference to Proclamation 1999 (No. 23 of 1999) of August 2 1999 and Proclamation 1999 (No. 24 of 1999) of August 3 1999

<sup>3</sup>“Namibia leader vows to crush rebels”, *Associated Press (AP) online*, August 8 1999; “Muyongo must pay, says the President”, *The Namibian online*, November 9 1998; and “Nujoma Denounces Caprivi Secessionists”, *New Era*, Friday, November 13-15 1998

<sup>4</sup>“Limitation of liability”, Emergency Regulations Applicable to the Caprivi Region: Article 26 of the Namibian Constitution, Section 21 of Proclamation 1999 (No.24 of 1999) of August 3 1999, Government Gazette of the Republic of Namibia no.2157, August 3 1999, p.7

<sup>5</sup>“Katima nightmare: Human rights abuses widespread”, *The Namibian online*, August 11 1999

<sup>6</sup>“Churches alarmed: Urge Govt to act”, *The Namibian online*, August 23 1999; “Atrocities ‘ruining Namibia’s imagine’”, *The Namibian online*, August 25 1999; “Caprivi concern..”, *The Namibian online*, August 25 1999 and “Dead Rebel was key commander”, *The Namibian online*, September 9 1999; “NDF kills alleged rebels”, *The Namibian online*, November 6 2002; “Alleged crimes in Caprivi” *Press Release*, NamRights, May 12 2010; “Woman remembers 1999 Caprivi Killings”, *Press Release*, NamRights, June 3 2010 and “Capriviian secretly buried in Katima Mulilo” *Press Release*, NamRights February 18 2014

prolonged detention<sup>7</sup> and enforced disappearances<sup>8</sup> as well as torture and other cruel, inhuman or degrading treatment or punishment (“TCIDT”).<sup>9</sup> These violations have been committed mercilessly in blatant disregard for international instruments prohibiting their perpetration.<sup>10</sup> The primary victims of the violations have been ethnic baFwe tribesmen as well as members and or supporters of United Democratic Party (“UDP”) of Caprivi Strip.<sup>11</sup> The victims were demonized as “the secessionists”.<sup>12</sup>

3. In the premises, there is very little, if any, doubt to conclude that SoE is entirely an unlawful measure and or act and or a proceeding. The measure has been deliberately and carefully crafted and or adopted and or instituted as an incentive for the wholesale commission of TCIDT and other international crimes.<sup>13</sup> *Ipso facto* SoE is entirely consistent with a state policy to commit

---

<sup>7</sup>*John Samboma et al. v. Namibia*, Working Group on Arbitrary Detention, Opinion No. 48/2005, U.N. Doc. A/HRC/4/40/Add.1 at 45 (2006)

<sup>8</sup>“Enforced Disappearances: Discovery of ‘No Name’ Gravesites“, NamRights, August 30 2008; “Angola/Namibia: Human rights abuses in the border area”, Amnesty International, March 1 2000, Index Number: AFR 03/001/2000, and CCPR/CO/81/NAM, 2004, paragraph 12

<sup>9</sup>“Katima nightmare: Human rights abuses widespread”, *The Namibian online*, August 11 1999; “Caprivi accused tell of torture”, *The Namibian online*, September 21 1999; “Mwilima ‘assaulted: allegations of abuses grow’”, *The Namibian online*, August 10 1999; “Hospital ‘gagged’ on Mwilima”, *The Namibian online*, August 11 1999; “Govt admits abuses: We’ve made mistakes, says Minister”, *The Namibian online*, August 12 1999; “Nam falling foul of international law”, *The Namibian online*, August 13 1999; “Geingob acknowledges mistakes”, *The Namibian online*, August 19 1999; “Churches alarmed: Urge Govt to act”, *The Namibian online*, August 23 1999; “Atrocities ‘ruining Namibia’s image’”, *The Namibian online*, August 25 1999; “Don’t test us, warns Shalli”, *The Namibian online*, August 27 1999; “Caprivi torturers may avoid censure”, *The Namibian online*, August 31 1999; “NSHR slams ‘Gestapo tactics’”, *The Namibian online*, September 1 1999; “Soldiers ‘ignored’ order on torture”, *The Namibian online*, September 1 1999; “Torture continues: More claims surface in Caprivi”, *The Namibian online*, September 3 1999; “Cops probe torture”, *The Namibian online*, September 7 1999 and “Lawyers question Govt’s commitment to rights”, *The Namibian online*, September 14 1999

<sup>10</sup>UN Document E/CN.4/Sub.2/1993/10, June 8 1999, paragraphs 23-25

<sup>11</sup>“Anti-Mafwe terror continues in Caprivi”, *Press Release*, NamRights, October 18 2002; “Media Briefing: Two Caprivians acquitted”, *Press Release*, NamRights, June 14 2007; “The Caprivi Trial” *Press Release*, NamRights, August 7 2009; “SWAPO Party lies exposed”, *Press Release*, NamRights, October 19 2009; “Rekindle persecution fear plagues Caprivi village”, *Press Release*, August 2 2010; “Police must say about Caprivians”, *Press Release*, NamRights, January 31 2011; “Furtive tripartite talks over refugees held at Katima”, *Press Release*, March 15 2011; “Fresh torture charges plague tripartite efforts”, *Press Release*, March 23 2011; “‘Swapo is very good but..’”, *Press Release*, May 16 2011; “Defense counsel exposes fatal irregularities in treason trial”, *Press Release*, NamRights, October 15 2013; and “Caprivians secretly buried in Katima Mulilo mass grave?”, *Press Release*, February 18 2014; “Mwilima ‘assaulted’: Allegations of abuses grow”, *The Namibian online*, August 10 1999; “NSHR claims 500 rounded up” *The Namibian online*, August 13 1999; and “Caprivi accused tell of torture”, *The Namibian online*, September 21 1999

<sup>12</sup>Nujoma Denounces Caprivi Secessionists”, *New Era*, February, November 13-15 1998

<sup>13</sup>*vide* UN Doc. A/HRC/25/60, paras. 23-30 as well as “The Exclusionary Rule: International Law Prohibits the Use of Evidence Contained Through Torture”, *APT Background Bulletin*, July 27 2012

ethnic cleansing and or other crimes against humanity (“CAH”).<sup>14</sup> These heinous crimes have been committed under the subterfuge of ‘ensuring safety of the public and maintenance of law and order’.<sup>15</sup>

4. The overall purpose of this dossier is to demonstrate that the overarching aim of SoE was ‘to mete out an appropriate punishment to the terrorists as well as to combat and destroy the secessionists without mercy’.<sup>16</sup> Ostensibly, this state of affairs is deemed necessary in order to suppress the struggle for the realization of the absolute right of the people of Caprivi Strip to self-determination and independence. This dossier thus seeks to achieve several indivisible, interconnected, interrelated and interdependent specific objectives:
5. The first specific objective of this document is to show how and or why TCIDT and or complicity in, and conspiracy to commit, TCIDT constitute very grave violations as well as crimes against humanity.<sup>17</sup> All and any torturers and all their accomplices as well as their accessories are deemed *hostis humani generis* who must be prosecuted in all and by all States wherever and whenever they may be found.<sup>18</sup>
6. The second specific aim of this file is to prove that, notwithstanding its absolute and inviolable prohibition, TCIDT has deliberately been committed with maleficent and extreme impunity on a widespread or systematic basis against alleged Caprivi secessionists.

---

<sup>14</sup>For the purposes of this report, “CAH” means any of the acts listed under Article 7 of the Rome Statute (“Rome Statute”) of the International Criminal Court (“ICC”) when or if such acts have been committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack

<sup>15</sup>*vide* footnote 4 *supra*

<sup>16</sup>*vide* Footnote 3 *supra*

<sup>17</sup>Article 7 of Rome Statute

<sup>18</sup>I.C.J. Reports, 1970, Barcelona Traction, Light and Power Company, Limited (*Belgium v. Spain*) (1962–1970), Second Phase, Judgment, I.C.J. Reports 1970; *Filartiga v. Pena-Irala* 630 F.2d 876 (30 June 1980), <http://uniset.ca/other/cs5/630F2d876.html>; *Prosecutor v Furundzija* (ICTY) Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, paras. 151 and 153-154; *Prosecutor v Delalic and others* (ICTY) IT-96-21-T (November 16 1998), para.484; and UN Doc. E/CN.4/1986/15 (February 19 1986, para.3

7. The third specific objective hereof is to demonstrate that the real motive behind the declaration of SoE was to pursue, further, facilitate or create an incentive for State policy to ‘mete out an appropriate punishment to the terrorists as well as combat and destroy the secessionists without mercy’.<sup>19</sup>As a matter of fact, this state of affairs inherently constitutes a legislative and or administrative measure deliberately adopted in order to commit *inter alia* TCIDT!
8. The fourth specific objective of this dossier is show that SoE was also intended as an exterminatory decree in order to destroy ‘the secessionists’ in part or as a whole.<sup>20</sup>
9. The fifth specific aim of this report is to illustrate how and why SoE is entirely repugnant to, and incompatible and inconsistent with, national and international law governing States obligations, not only to prevent, prosecute and punish TCIDT, but also to respect, protect and fullfil all other human rights for all during emergency situations.<sup>21</sup>
10. The sixth specific purpose hereof is to demonstrate that the marathon Caprivi High Treason Trial (“CHTT”) was intended to be part of the state policy and or conspiracy to deny the alleged secessionists the right to a fair and public trial.
11. The seventh specific purpose of this dossier is to illustrate that the ‘crown evidence’ before CHTT is prohibited *fruit of a poisonous tree*.

---

<sup>19</sup>*vide* footnote 3 *supra*

<sup>20</sup>*vide* footnote 11 *supra*

<sup>21</sup>This is as contemplated under Articles 24(1) and 24(3) of Namibian Constitution (“NC”) and Articles 4, 7 and 10 of the International Covenant on Civil and Political Rights (“ICCPR”) as well as Committee on Civil and Political Rights (“CCPR”) General Comment on.29 of August 31 2001

12. The eighth specific objective of this file is not only to show how and or why incumbent Prosecutor-General, Olyvia Martha Imalwa, and or her CHTT subordinates are extensively involved in the aforesaid policy and conspiracy ‘to mete out an appropriate punishment to the terrorists as well as to combat and destroy the secessionists without mercy’<sup>22</sup>, but also to demonstrate why and how Prosecutor-General Imalwa and or her subordinates are deeply complicit in, and conspiracy to commit, TCIDT against the alleged Caprivi Strip secessionists.
13. The ninth specific aim of this document is to indicate how and or why--notwithstanding the fact that she had lacked the requisite academic qualifications and appropriate practical experience to become Prosecutor-General--Imalwa has been appointed as Namibia’s Prosecutor-General. The ninth specific purpose of this dossier is also to illustrate how and or why--owing to the circumstances which prevailed at the time of her appointment and or which led to such appointment--Prosecutor-General Imalwa was neither a fit nor a proper person to be entrusted with the responsibilities of Prosecutor-General.
14. The tenth objective of this file is to conclude that Prosecutor-General Imalwa has been deliberately appointed in order to stifle or undermine those standards and principles which are generally recognized as *sine qua non* for the promotion and maintenance of independent, impartial, objective, competent and professional prosecutorial services.
15. The eleventh specific goal this document is to show that the office of Prosecutor-General in Namibia is accountable to no one and further that the Judicial Service Commission (“JSC”) is the only body in the country that can

---

<sup>22</sup>vide footnote 3 *supra*

recommend for the removal for of Prosecutor-General from office.<sup>23</sup> Hence, JSC is the only body that can recommend for the removal of Prosecutor-General Imalwa for complicity in, and conspiracy to commit, TCIDT and or gross misconduct.

16. The twelfth and final goal of this dossier is to show cause that, in any event, all other States are under the obligation *erga omnes* to promptly prevent, prosecute and punish all and any acts of TCIDT by *inter alia* bringing to justice anyone held responsible for committing such acts.<sup>24</sup>

## II. INTRODUCTION

17. Caprivi Strip has been occupied by Namibia since March 21 1990 in contravention of the principles and purposes enshrined in the Charter of the United Nations.<sup>25</sup> Again, the overall purpose of this dossier is to show that the overarching aim of SoE was to ‘mete out an appropriate punishment to the terrorists as well as to combat and destroy the secessionists without mercy’.<sup>26</sup> Clearly, this scheme of things was deemed necessary in order to quell the struggle for the inalienable right of the people of Caprivi Strip to self-determination and independence. There is also clear and convincing evidence showing that SoE was intentionally and knowingly enacted to facilitate the commission, with extreme impunity, of TCIDT and other large-scale and

---

<sup>23</sup>Lovisa Indongo, “The uniqueness of the Namibian Prosecutor-General”, The Independence of the Judiciary in Namibia, Konrad Adenauer Stiftung, 2008, p.106

<sup>24</sup>*vide* footnote 18 *supra*

<sup>25</sup>Article 1(2) of UN Charter

<sup>26</sup>*vide* footnote 3 *supra*

gross violations<sup>27</sup> of human rights in Caprivi Strip as well as to immunize the perpetrators thereof from prosecution.<sup>28</sup>

## A. TCIDT AS GRAVE CRIME

18. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”) sets out an internationally-recognized definition of all acts constituting TCIDT in the following terms:

*“the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.*<sup>29</sup>

19. In its December 10 1998 *Prosecutor v Furundzija case* International Criminal Tribunal for the former Yugoslavia (“ICTY”) defines TCIDT under international humanitarian law in the following terms:

*“the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for the purpose of obtaining information or a confession or of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating on any ground against the victim or a third person. For such an act to*

---

<sup>27</sup>According to UN Document E/CN.4/Sub.2/1993/10, June 8 1999, paragraph 14, “large-scale and gross violations of human rights” include at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination

<sup>28</sup>vide footnote 4 *supra*

<sup>29</sup>Articles 1 and 1 of UNCAT and UN Declaration against Torture (i.e. UNGA Resolution 3452 (XXX) of December 9 1975)

*constitute torture, one of the parties thereto must be a public official or must, at any rate, act in a non-private capacity, e.g. as a de facto organ of a State or any other authority wielding entity.”*

20. The exact boundaries between *torture per se* (“torture”) and *other cruel, inhuman or degrading treatment or punishment* (“ill-treatment”) are often difficult to determine as this may depend on the particular circumstances of the case and characteristics of a particular victim. However, both *torture* and *other ill-treatment* (“IT”) terms cover mental and physical pain that has been intentionally inflicted by, or with the consent or acquiescence of State authorities or public officials. Under UNCAT, the essential elements of *torture* include: (1) the infliction of severe mental or physical pain or suffering; (2) by or with the consent, tolerance or acquiescence of state authorities and or public officials; and, (3) for a specific purpose, such as gaining information, punishment or intimidation.<sup>30</sup>
21. IT refers to all acts that do not need to be inflicted for a specific purpose as long as there is intent to expose the victim to conditions amounting to or resulting in IT. Exposing a person to pain or suffering which is less severe than *torture* and which usually involve humiliation and debasement of a victim also constitutes IT. The essential elements of IT include: (1) intentional exposure to significant mental or physical pain or suffering; (2) with the consent, tolerance or acquiescence of state authorities and or public officials.<sup>31</sup> Hence, even where a treatment is not considered severe enough to amount to *torture*, it still amounts to prohibited IT.<sup>32</sup>

---

<sup>30</sup>Article 1 of UNCAT

<sup>31</sup>Article 2(1), 5, 11, 12 and 13 of UNCAT

<sup>32</sup>Only the practice of the European Court of Human Rights explicitly uses the notion of relative severity of suffering as relevant to the borderline between ‘torture’ and ‘inhuman treatment’. The usual approach is to use the existence or otherwise of the purposive element to determine whether or not the behavior constitutes torture

22. The international community has designated and defined TCIDT as a specific crime of utmost gravity as well as a crime against humanity which is absolutely prohibited under public international law. Specifically, TCIDT is absolutely forbidden in terms of Articles 2-4 of UN Declaration against Torture (“DAT”); Universal Declaration of Human Rights<sup>33</sup> (“UDHR”); UNCAT;<sup>34</sup> International Covenant on Civil and Political Rights<sup>35</sup> (“ICCPR”); Convention on the Rights of Child<sup>36</sup> (“CRC”); four Geneva Conventions<sup>37</sup> and Protocols Additional thereto; Rome Statute;<sup>38</sup> African Charter on Human and Peoples Rights<sup>39</sup> (“ACHPR”); European Convention on Human Rights<sup>40</sup> (“ECHR”); and, Inter-American Convention on Human Rights<sup>41</sup> (“IACHR”).
23. TCIDT is also absolutely prohibited in terms of the Inter-American Convention to Prevent and Punish Torture<sup>42</sup> (“IACPPT”) as well as European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (“CPT”).
24. Statutory public international law strictly prohibits TCIDT and emphasizes that no exceptional circumstances, such as a state of war or armed conflict of international or non-international nature or threat thereof, martial law, state of national defense, internal political instability or any other public emergency or any threat of terrorist acts or violent crime, whatsoever, may be invoked to justify acts of TCIDT in any territory under the *de facto* or *de jure* jurisdiction

---

<sup>33</sup>Article 5 of UDHR

<sup>34</sup>Articles 2(1) and 15 of UNCAT

<sup>35</sup>Articles 7 and 10(1) of ICCPR

<sup>36</sup>Article 37 (a) of CRC

<sup>37</sup>Article 3 common Geneva Conventions

<sup>38</sup>Articles 7(1)(f) and 8 (2)(ii) of Rome Statute

<sup>39</sup>Article 5 of ACHPR

<sup>40</sup>Article 3 of ECHR

<sup>41</sup>Article 5(2) of ACHR

<sup>42</sup>Article 5 of IACPPT

of any State.<sup>43</sup> Nor may an order from a superior officer or a public authority be invoked as a justification for TCIDT.<sup>44</sup>

25. Justification of TCIDT as a means to protect public safety, avert any emergencies or maintain law and order is also absolutely prohibited.<sup>45</sup>The same applies to amnesties or immunities or statutes of limitations as well as all and any other obstacles intended to preclude public authorities from instituting prompt prosecution and punishment of perpetrators of TCIDT.<sup>46</sup>UN Committee against Torture (“CAT”) specifies that the obligations consecrated in Articles 2, 15 and 16 of UNCAT “must be observed in all circumstances”.<sup>47</sup>
26. In addition to statutory public international law, the prohibition of TCIDT has achieved the character of a peremptory norm of *jus cogens*.<sup>48</sup> Therefore torturers, their accomplices and or their accessories are prohibited as *hostis humani generis*.<sup>49</sup>The customary international law rules of *jus cogens* are strictly binding on all States, even if they have not ratified a particular treaty.<sup>50</sup> Moreover, in terms of Article 27 of Vienna Convention on the Law of Treaties (“VCLT”), no state may invoke the provisions its internal law as justification for its failure to perform a treaty.
27. The right of every human being to protection against TCIDT includes the right not to be returned (i.e. *refouler*) to a country where there are substantial grounds for believing that a fugitive is at risk of being subjected to *inter alia*

---

<sup>43</sup>Article 2, 15 and 16 of UNCAT

<sup>44</sup>Article 2, 15 and 16 of UNCAT as well as Articles 2-4 of UN Declaration against Torture

<sup>45</sup>Articles 2 and 7 of UNCAT and ICCPR, respectively

<sup>46</sup>CAT General Comment no.2 of November 23 2007 or UN Doc. CAT/C/GC/2/CRP.1/Rev.4(2007)), paragraph 5

<sup>47</sup>CAT General Comment no.2 of November 23 2007 or UN Doc. CAT/C/GC/2/CRP.1/Rev.4(2007)), paragraph 6

<sup>48</sup>*Prosecutor v Furundzija* (ICTY) Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317

<sup>49</sup>*vide* footnote 18 *supra*

<sup>50</sup>Articles 53, 64 and 71 of the Vienna Convention on the Law of Treaties of 1969

TCIDT. Hence *refoulement* is also strictly forbidden even if a fugitive has not yet been recognized as a *bona fide* refugee.<sup>51</sup>

## B. TCIDT HAS BEEN WIDESPREAD OR SYSTEMATIC

28. Notwithstanding its absolute and non-derogable prohibition, TCIDT has occurred on a widespread or systematic<sup>52</sup> basis both before and after Namibian independence on March 21 1990. Before independence TCIDT and other large-scale human rights infractions have been perpetrated by both SWAPO and South African security forces between 1966 and 1989.<sup>53</sup> German colonial forces have also committed genocide against ethnic Hereros and Namas between 1904 and 1908. Unlike in South Africa (“SA”) where a truth and reconciliation commission (“TRC”) has been established, in Namibia a TRC has been vehemently rejected by Nujoma.<sup>54</sup> Thus impunity reigns supreme in the country as pre-independence perpetrators have never been brought to justice.<sup>55</sup> After Namibian independence, TCIDT and many other large-scale and gross human rights violations have also been perpetrated with impunity in some parts of Ohangwena and Kavango regions between 1994 and 2003.<sup>56</sup>

29. There is ample indicary and other tangible evidence for proving that TCIDT has been committed with utmost impunity during the punitive SoE as well as long after the alleged “secessionist attack” in Caprivi Strip on August 2 1999.<sup>57</sup> Corroborative evidence indicating *inter alia* that systematic TCIDT has really been perpetrated include in these situations:

---

<sup>51</sup> Articles 3 and 33 of UNCAT and UN Convention relating to the Status of Refugees, respectively

<sup>52</sup> *vide* footnotes 5 and 9 *supra*

<sup>53</sup> <http://www.hrw.org/reports/1992/06/01/accountability-namibia>

<sup>54</sup> “Nujoma rejects calls for truth commission”, *The Namibian online*, November 28 2005 and “World: Africa: Namibia opposes truth commission”, *BBC News online*, Tuesday, July 13 1999 Published at 17:47 GMT 18:47 UK

<sup>55</sup> [http://www.ediec.org/fileadmin/user\\_upload/Namibia/Impunity\\_still\\_reigns\\_in\\_Namibia.pdf](http://www.ediec.org/fileadmin/user_upload/Namibia/Impunity_still_reigns_in_Namibia.pdf)

<sup>56</sup> “Enforced Disappearances: Discovery of ‘No Name’ Gravesites”, *NamRights*, August 30 2008; “Angola/Namibia: Human rights abuses in the border area”, *Amnesty International*, March 1 2000, Index Number: AFR 03/001/2000, and CCPR/CO/81/NAM, 2004, paragraph 12

<sup>57</sup> *vide* footnote 9 *supra*

- where ‘the secessionists’ have been held at unofficial or secret places<sup>58</sup>
- where ‘the secessionists’ have been held *incommunicado*<sup>59</sup>
- where ‘the secessionists’ have been held in isolation or solitary confinement<sup>60</sup>
- where custody records about the injuries inflicted upon ‘the secessionists’ have not been maintained or where significant discrepancies exist in these records
- where ‘the secessionists’ have not been informed of their Miranda rights at the start of their arrests as well as before any interrogations while in custody<sup>61</sup>
- where ‘the secessionists’ have been denied early access to lawyers<sup>62</sup>
- where foreign national ‘secessionists’ have been denied consular visits<sup>63</sup>
- where the alleged Caprivi Strip secessionists have been denied immediate medical examinations and regular examinations thereafter<sup>64</sup>
- where medical records about injured ‘secessionists’ have not been kept or they have been improperly interfered with or falsified or concealed<sup>65</sup>

---

<sup>58</sup>“Violations of pre-trial rights”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>59</sup>*vide* footnote *supra* 58

<sup>60</sup>“ICRC struggles to gain access to detainees”, *The Namibian online*, August 13 1999; “Nam falling foul of international law”, *The Namibian online*, August 13 1999; “Worried US praises Minister on rights”, *The Namibian online*, August 18 1999 and “ICRC finally gets green light”, *The Namibian online*, August 19 1999

<sup>61</sup>*Calvin Malumo & 116 Others v State* (Case No.: CC 32/2001) (1 March 2010); and “Treason ‘confessions’ thrown out”, *The Namibian online*, March 4 2010

<sup>62</sup>“Detainees being denied key right”, *The Namibian online*, August 11 1999; “Detainees ‘must have access to lawyers’”, *The Namibian online*, August 12 1999; “Detainees haven’t asked for lawyers says Shalli”, *The Namibian online*, August 13 1999; “Government, lawyers at odds on Caprivi”, *The Namibian online*, August 16 1999; and “‘It’s a supreme outrage!’”, *The Namibian online*, August 17 1999

<sup>63</sup>“Detention of 2 Nigerian teachers sparks concern”, *The Namibian online*, August 25 1999

<sup>64</sup>“Caprivi torture cases settled out of court”, *The Namibian online*, October 2 2008 and “Introduction”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>65</sup>“Hospital ‘gagged’ on Mwilima”, *The Namibian online*, August 11 1999

- where statements have been extracted from ‘the secessionists’ by the investigating authorities in the absence of ‘the secessionists’ lawyers<sup>66</sup>
- where the circumstances in which statements have been taken from ‘the secessionists’ have not been recorded and or where the statements themselves have not been transcribed contemporaneously<sup>67</sup>
- where statements allegedly made by ‘the secessionists’ have been subsequently improperly altered<sup>68</sup>
- where ‘the secessionists’ have been blindfolded, hooded, gagged, manacled or subject to other physical restraint or they have been stripped naked at any point during detention<sup>69</sup>
- where independent visits to the place of detention by *bona fide* human rights organizations or experts have been blocked, delayed or otherwise interfered with<sup>70</sup>

### C. REAL MOTIVE FOR STATE OF EMERGENCY

30. The real motive for the promulgation of SoE was in order to ensure the pursuance, furtherance, facilitation or creation of an incentive for the vengeful state policy ‘to ensure that an appropriate punishment has been meted out to the terrorists as well as to combat and destroy the secessionists without mercy’.<sup>71</sup> There is no doubt that the term “appropriate punishment” includes TCIDT!

---

<sup>66</sup>*vide* footnote 55

<sup>67</sup>*vide* footnote 61 *supra*

<sup>68</sup>*vide* footnote 61 *supra*

<sup>69</sup>“Caprivi accused tell of torture”, *The Namibian online*, September 21 1999; “Court shocked at sjamboked suspects”, *The Namibian online*, September 22 1999; and “Caprivi torture cases settled out of court”, *The Namibian online*, October 2 2008

<sup>70</sup>“ICRC struggles to gain access to detainees”, *The Namibian online*, August 13 1999; “Nam falling foul of international law”, *The Namibian online*, August 13 1999; “Worried US praises Minister on rights”, *The Namibian online*, August 18 1999 and “ICRC finally gets green light”, *The Namibian online*, August 19 1999

<sup>71</sup>*vide* footnote 3 *supra*

31. Part of the evidence about the primary motive for SoE is found in Nujoma's rancorous public pronouncements and other vengeful diatribes prior to, during and after, his nationally televised special address on November 7 1998.<sup>72</sup> Firstly, Nujoma's invective is entirely consistent with, and was actuated by, his usual autocratic and acrimonious diatribes towards his political opponents.<sup>73</sup> Secondly, his campaign of hatred towards "the secessionists" can be traced back to 1964 to the dispute relating to the terms and conditions of a merger agreement in exile in Zambia.<sup>74</sup> The said agreement was entered into between Caprivi African National Union ("CANU"), represented by Mishake Muyongo, and South West Africa People's Organization ("SWAPO"), represented by Nujoma.<sup>75</sup>
32. Muyongo and other nationalists founded CANU in 1962 in order to liberate Caprivi Strip from British and or South African colonialism.<sup>76</sup> On the other hand, SWAPO was founded to free Namibia from apartheid South African occupation.<sup>77</sup> Following the merger agreement Muyongo remained Vice-President of CANU and became Acting Vice-President<sup>78</sup> of SWAPO under Nujoma as President.
33. Thirdly, documents on the merger clearly and convincingly demonstrate that its purpose was to create a united front "in a different name" and "for the

---

<sup>72</sup>vide footnote 3 *supra*

<sup>73</sup>"Founding Father Talks War Again", *Press Releases*, NamRights, September 22 2009; and by Lauren Dobell, "The Ulunga Moment: SWAPO and Dissent", SAR, Vol 14 No 1, December 1998, <http://www.africafiles.org/article.asp?ID=3774>

<sup>74</sup>"Secret' Nujoma-Muyongo document surfaces, *The Namibian online*, January 24 2007; Bennett Kangumu Kangumu, "CANU: 1964 and After", *Contestations over Caprivi Identities: From Pre-Colonial Times to the Present*, University of Cape Town, p.289-292; and Sam Nujoma, *Where Others Wavered*, p.136

<sup>75</sup>"Secret' Nujoma-Muyongo document surfaces, *The Namibian online*, January 24 2007; Bennett Kangumu Kangumu, "CANU: 1964 and After", *Contestations over Caprivi Identities: From Pre-Colonial Times to the Present*, University of Cape Town, p.289-292; and Sam Nujoma, *Where Others Wavered*, p.136

<sup>76</sup>Press Statement made by Sam Nujoma, President, South West Africa People's Organization (SWAPO) and Albert Muyongo Vice President Caprivi African National Union (CANU), Lusaka, Zambia, November 5 1964

<sup>77</sup>vide footnote 76 *supra*

<sup>78</sup>In this position, Muyongo was acting in the place of CANU President Brendan Kangongolo Simbwaye, who, together with Mishake Muyongo founded CANU in order to liberate Caprivi Strip from foreign domination

interest of our struggle of our two peoples and freedom and independence of our fatherlands Caprivi Strip and South West Africa”.<sup>79</sup>The immediate objective of the united front was therefore to fight against one common enemy.<sup>80</sup>

34. However, Nujoma argues that the aim of the merger was solely to dissolve CANU permanently, presumably because Caprivi Strip is part of Namibia’s territorial integrity.<sup>81</sup> Muyongo and other Caprivi Strip nationalists, on the other hand, vehemently disputes Nujoma’s version of the purpose of the merger agreement.<sup>82</sup>Hence, in an apparent attempt to destroy CANU, Nujoma resorted to oppressive and punitive measures, which included systematic arrests and detention as well as summary executions and enforced disappearances of CANU members and supporters in exile between 1964 and 1989.<sup>83</sup>The strong disagreement between SWAPO and CANU has culminated in the “expulsion” of Muyongo and other Caprivi Strip nationalists from SWAPO in 1979.<sup>84</sup>

35. Fourthly, therefore Nujoma’s vendetta for “Muyongo and his cohorts” persisted even after Namibian independence on March 21 1990. Moreover, during his nationally televised special address on November 7 1998, Nujoma announced that in 1980 SWAPO’s Central Committee in exile had found “Mishake Muyongo guilty of an unforgivable and fundamentally anti-revolutionary crime of planning the secession of the Caprivi Strip and the

---

<sup>79</sup>*vide* footnote 76 *supra*

<sup>80</sup>Bennett Kangumu Kangumu, “CANU: 1964 and After”, *Contestations over Caprivi Identities: From Pre-Colonial Times to the Present*, University of Cape Town, p.314-322

<sup>81</sup>Bennett Kangumu Kangumu, “CANU: 1964 and After”, *Contestations over Caprivi Identities: From Pre-Colonial Times to the Present*, University of Cape Town, p.314-326; and “Retracing the footsteps of a liberations struggle icon: Where Others Wavered, the Autobiography of Sam Nujoma”, *New Era online*, February 11 2014

<sup>82</sup>*vide* footnote 80 *supra*

<sup>83</sup>*vide* footnote 98, Continuing Violation Doctrine Gains Universal Recognition, NamRights, December 5 2013, p. 20

<sup>84</sup>“Nujoma Denounces Caprivi Secessionists”, *New Era*, February, November 13-15 1998, p.8

proclamation of the so-called Republic of Itenge”.<sup>85</sup>Saying “this time Mishake Muyongo and his misguided henchmen have gone too far”, Nujoma also described Muyongo as “the notorious ringleader of the armed rebellion in Caprivi”.<sup>86</sup>Swearing vengeance at his former SWAPO deputy, he accused Muyongo and “his cohorts [of being] guilty of treason and cold-blooded murder in the Republic of Namibia” adding: “We will make them pay for this”.<sup>87</sup>

36. Hence, SoE was, for all intents and purposes, enacted in the pursuance or furtherance of the retributive state policy ‘to mete out an appropriate punishment to the terrorists as well as to combat and destroy the secessionists without mercy’.<sup>88</sup>The ensuing widespread commission of TCIDT and other internationally wrongful acts against the alleged Caprivi secessionists during and after SoE should be understood against that background.

#### D. EXTERMINATORY ORDER TO DESTROY ‘SECESSIONISTS’

37. There is also clear and convincing indicary evidence to demonstrate that SoE was deliberately instituted as an exterminatory decree in order to ‘destroy the secessionists without mercy’ in part or as a whole with impunity.<sup>89</sup> Consider the following commissions or omissions:

- Exterminatory and other rancorous public statements by Nujoma prior to, during and even after SoE that “the secessionists” are *inter alia* guilty of high treason and should therefore be destroyed<sup>90</sup>

---

<sup>85</sup>vide footnote 84 *supra*

<sup>86</sup>vide footnote 84 *supra*

<sup>87</sup>vide footnote 84 *supra*

<sup>88</sup>vide footnote 3 *supra*

<sup>89</sup>vide footnote 3 *supra*

<sup>90</sup>vide footnote 3 *supra*

- Summary executions of real or perceived members or supporters of UDP and or ethnic baFwe tribesmen<sup>91</sup>
- The fact that SoE constitutes a statute of limitations which expressly and effectively immunizes the perpetrators from prosecution<sup>92</sup>
- *Refoulement* of those ‘secessionists’ who fled to neighboring countries<sup>93</sup>
- Attacks on UN High Commissioner for Refugees for recognizing ‘terrorists’ as refugees<sup>94</sup>
- The claim by Prosecutor-General Imalwa that the charge of high treason is ‘more serious’ than TCIDT<sup>95</sup>
- Denial of medical treatment<sup>96</sup>
- Enforced disappearances<sup>97</sup>
- Testimony by ‘the secessionists’ as well as media reports about what Police Officer Patrick Liswani had said to ‘the secessionists’ during pre-trial arrests, detention and interrogations<sup>98</sup>
- Testimony by Police Sergeant Eimo Dumeni Popyeinawa during bail applications at Grootfontein in 1999<sup>99</sup>

---

<sup>91</sup>*vide* footnotes 6 and 11 *supra*

<sup>92</sup>*vide* footnote 4 *supra*

<sup>93</sup>“Shalli denies ‘deportation’ of separatists from Zambia”, *The Namibian online*, August 11 1999; “9 Caprivians abducted”, *Breaking News*, NamRights, December 13 2003; “Repatriation agreement violated”, Press Release, December 17 2003 and “Return of eight (8) Caprivians”, *Press Statement on Namibians from the Caprivi Region*, Ditshwanelo. December 29 2003

<sup>94</sup>“Governor defends arrests”, *The Namibian online*, August 6 1999; and “Limitation of liability”, Emergency Regulations Applicable to the Caprivi Region: Article 26 of the Namibian Constitution, Section 21 of Proclamation 1999 (No.24 of 1999) of August 3 1999, Government Gazette no.2157, August 3 1999, p.7

<sup>95</sup>*vide* footnote 67 *supra*

<sup>96</sup>“Heyman to decide on torture prosecutions”, *The Namibian online*, October 5 1999

<sup>97</sup>“Enforced Disappearances: Discovery of ‘No Name’ Gravesites“, NamRights, August 30 2008; “Angola/Namibia: Human rights abuses in the border area”, Amnesty International, March 1 2000, Index Number: AFR 03/001/2000, and CCPR/CO/81/NAM, 2004, paragraph 12

<sup>98</sup>“Caprivi accused tell of torture”, *The Namibian online*, September 21 1999

<sup>99</sup>Sergeant Eimo Dumeni Popyeinawa, who is one of the alleged most notorious torturers, has confirmed as much when he testified in the Grootfontein Magistrate’s Court against the bail applications that, according to his investigations: “*It’s only one group, one tribe (that) wants to overthrow the Government*”, “High treason suspects to hear ruling on bail today”, *The Namibian online*, September 23 1999

- Complaints by detained “secessionists” and human rights as well as media reports that members of the Namibian security force deliberately targeted ethnic baFwe and or UDP members<sup>100</sup>
- Application of, and or reliance by the CHTT Prosecution Team upon, the so-called “common purpose” doctrine<sup>101</sup>
- The fact that the absolute majority of the between 300 and 500 direct victims of summary executions, arbitrary deprivation of liberty, TCIDT and or enforced disappearances were either baFwe tribesmen or members or supporters of UDP or both<sup>102</sup>
- The fact that the absolute majority of those “secessionists” charged with *inter alia* high treason is either members of UDP or ethnic tribesmen or both<sup>103</sup>
- Mysterious and hitherto unexplained deaths in police custody of so many detained ‘secessionists’<sup>104</sup>

## E. STATE OF EMERGENCY REPUGANT TO RIGHTS PROTECTION

38. There is clear and convincing indicia to prove that SoE was entirely inconsistent and incompatible with, and totally repugnant to, national and international law governing States’ obligations, not only to prevent, prosecute and punish TCIDT, but also to respect, protect and fulfill all and any other basic human rights and fundamental freedoms because:

---

<sup>100</sup> See footnote 11 *supra*

<sup>101</sup>This one-size-fits-all doctrine virtually exempts Prosecutor-General Imalwa and or her subordinates from their obligation to prove, beyond reasonable doubt, that each and every one of the initially 147 alleged Caprivi secessionists has committed each one of the 278 acts or counts which have a causal effect on the alleged attempt to secede Caprivi Strip from Namibia

<sup>102</sup>vide footnote 11 *supra*

<sup>103</sup>vide footnote 11 *supra*

<sup>104</sup>“The Systematic Killings of Caprivian Political Prisoners by the Namibian Government”, *Caprivi Freedom online*, June 5 2010, <http://www.caprivifreedom.com/news.i?cmd=view&nid=1109>

39. Firstly, strict adherence to the provisions of Articles 4, 7 and 10 of ICCPR is of overriding importance for any system of ensuring respect for, protection and realization of, basic human rights and fundamental freedoms during state of emergency conditions because, on the one hand, the said provisions allow State parties unilaterally to derogate temporarily from some of their obligations under public international law, while, on the other hand, Articles 4, 7 and 10 of ICCPR subject both this very measure of derogation and its material consequences, to a specific regime of internationally recognized safeguards and requirements.<sup>105</sup> These safeguards and requirements are absolutely essential for the maintenance of the principles of legality and rule of law at times when strict adherence thereto is most needed. Hence, the restoration of normalcy whereby full respect for public international law can again be secured must be the predominant objective of any State derogating from international human rights law.
40. Secondly, SoE manifestly contravenes *inter alia* the provisions Articles 24(I) and 24(3) of NC, Articles 4, 7 and 10 of ICCPR and CCPR General Comment 29 of August 31 2001 as well as Articles 12 and 15 of DAT and UNCAT, respectively.
41. Thirdly, SoE also breaches internationally recognized safeguards and requirements that all measures derogating from *inter alia* the provisions of Article 4 of ICCPR and CCPR General Comment 29 of August 31 2001 must: (1) be of an exceptional and temporary nature; and (2) only be invoked in cases of public emergencies threatening the life of a nation.
42. Fourthly, during armed conflict, whether international or non-international, rules of international humanitarian law must be made strictly

---

<sup>105</sup>CCPR General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), paragraph 1

applicable.<sup>106</sup>This is in addition to the provisions of Articles 4, 5(I), 7 and 10 of ICCPR as well as Articles 5, 22, 24(I), 24(3) and 25(I)(a) of NC. This requirement is absolutely necessary in order to prevent abuse of a State's emergency powers and or regulations. Even during an armed conflict, measures derogating from ICCPR are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.<sup>107</sup>Unfortunately, this requirement has also been flouted with impunity during SoE and even long thereafter.

43. Fifthly, SoE violates the fundamental requirement that any measures derogating from the provisions of Articles 24(I) and 24(3) of NC as well as Article 4 of ICCPR must be "limited to the extent strictly required by the exigencies of the situation".<sup>108</sup>This requirement relates to the duration, geographical coverage and material scope of any state of emergency as well as any other measures of derogation resorted to because of such an emergency.
44. Sixthly, in terms of NC<sup>109</sup> and ICCPR<sup>110</sup>, no derogation, whatsoever, is permitted from:(1) the right to life; (2) freedom from TCIDT; (3) the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment must be limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty;<sup>111</sup>(4) the right to be recognized as a person before the law);<sup>112</sup>(5) the

---

<sup>106</sup>This is reference to especially Article 3 common to the four Geneva Conventions of 1949 and the two Protocols Additional thereto of 1977

<sup>107</sup>CCPR General Comment no. 29 of August 31 2001, paragraph 3

<sup>108</sup>Article 4(1) of ICCPR and CCPR General Comment.29 of August 31 2001, paragraph 4

<sup>109</sup>Article 24(3) of NC

<sup>110</sup>Article 4(2) of ICCPR and CCPR General Comment 29 of August 31 2001, paragraph 7

<sup>111</sup>Article 15 of ICCPR

<sup>112</sup>Article 16 of ICCPR

right to freedom of thought, conscience and religion;<sup>113</sup> (6) the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person;<sup>114</sup>(7) the right to all persons: (a) not be subjected to abductions, (b) not to held in unacknowledged detention, and (c) not to be subjected to enforced disappearance;<sup>115</sup>(8)the right to all persons to equality and to non-discrimination;<sup>116</sup>(9) the right of all persons not be subjected deportation or forcible transfer of population in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, without grounds permitted under international law;<sup>117</sup>(10) the right of all persons not to be subjected to propaganda for war, or to advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence;<sup>118</sup>(11) the right of all accused persons to a fair trial;<sup>119</sup> (12) the right to all persons accused of criminal offenses to be presumed innocent until proved guilty through trial in an independent, impartial and competent court established lawfully because only a court of law may try and convict a person for a criminal offense;<sup>120</sup>(13) the right to effective remedy in case of violations of human rights;<sup>121</sup>and (14) the right to equality and non-discrimination solely on the ground of race, color, sex, language, religion or social origin.<sup>122</sup>SoE is also totally repugnant to, and inconsistent with, all those provisions, however!

---

<sup>113</sup>Article 18 of ICCPR

<sup>114</sup>Articles 7 and 10(1) of ICCPR and CCPR General Comment 29 of August 31 2001

<sup>115</sup>Article 4(2) of ICCPR and CCPR General Comment no. 29 of August 31 2001, paragraph 13(b)

<sup>116</sup>Articles 4(1) and 18 of ICCPR

<sup>117</sup>Articles 7(1)(d) and 7(2)(d) of Rome Statute

<sup>118</sup>Article 20 of ICCPR

<sup>119</sup>CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) and Article 12(1)(a) of NC

<sup>120</sup>CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) and Article 12(1)(d) of NC

<sup>121</sup>Article 2 (3) of ICCPR and CCPR General Comment no.29 of August 31 2001, paragraph 14

<sup>122</sup>Articles 2, 3, 14(1), 23(4), 24(1), 25 and 26 of ICCPR and CCPR General Comment 29 of August 31 2001, paragraph 8

45. Seventhly, in imposing SoE, Nujoma has failed to immediately notify or inform other States parties, through UN Secretary-General, of the provisions he has derogated from and of the reasons for such measures as well as on the date upon which SoE was to be terminated. Such notification is essential, not only for the discharge of CCPR's functions, in particular, in assessing whether the measures he has taken were strictly required by the exigencies of the situation, but also to enable other States to monitor compliance with the provisions of public international law.<sup>123</sup>
46. Eighthly, SoE was deliberately instituted for the purpose of *inter alia* systematic commission of TCIDT in order to extract information, statements and or confessions from 'the secessionists'. Moreover, SoE creates conditions for absolute immunity from prosecution and punishment of direct perpetrators of TCIDT, their accomplices and or accessories.<sup>124</sup>In summary, SoE was entirely repugnant to, and inconsistent with, international law in that it was a measure instituted to: (1) derogate from virtually all human rights and fundamental freedoms, (2) it was discriminatory in that it targeted ethnic baFwe and members and supporters of UDP, and, (3) then President Nujoma failed to immediately inform the other State parties to UNCAT on the derogations he has made and the reasons therefore as well as on the date on which the derogations will be terminated.

#### **F. CHTT PART OF POLICY TO DENY SECESSIONISTS FAIR TRIAL**

47. There is strong circumstantial and judicial evidence showing that the marathon CHTT was not only intended to be part of the comprehensive policy and or conspiracy to ensure that 'an appropriate punishment has been

---

<sup>123</sup>CCPR General Comment 29 of August 31 2001, paragraph 17

<sup>124</sup>*vide* footnote 4 *supra*

meted out to the terrorists as well as to combat and destroy the secessionists without mercy',<sup>125</sup> but it was also intended to be part of a conspiracy to deny the alleged secessionists the right to a fair and public trial. This scheme of things becomes evident in the fact that CHTT seeks not only to deny 'the secessionists' the right to fair and public hearing, but also to see to it that those 'the secessionists', who have been charged with *inter alia* high treason, have been found guilty at all cost. Furthermore, CHTT is also intended to see to it that Caprivi Strip separatists have remained in jail for as long as possible or even for the rest of their lives. Firstly, this indicary and judicial evidence include:

- The public announcement before and or on November 7 1998 by then President Nujoma that 'Mishake Muyongo and his henchmen are guilty of treason and cold-blooded murder'<sup>126</sup>
- The fact that Nujoma has announced that in 1980 SWAPO's Central Committee had found Muyongo 'guilty of an unforgivable and fundamentally anti-revolutionary crime'<sup>127</sup>
- Boisterous demonstrations by ruling SWAPO Party leaders and members at Grootfontein on July 31 2000 in order to intimidate Magistrates and other judicial officers into denying 'the secessionists' bail and or to sentence them to life imprisonment<sup>128</sup>
- Ruling SWAPO Party verbal attacks on CHTT trial judge<sup>129</sup>
- SWAPO Party Youth League-issued threats to kill 'the secessionists' should they be released on bond<sup>130</sup>

---

<sup>125</sup>vide footnote 3 *supra*

<sup>126</sup>vide footnote 3 *supra*

<sup>127</sup>vide footnote 3 *supra*

<sup>128</sup>“The State of the Judiciary and the non-adherence of the Constitution”, *Press Release*, NamRights, August 8 2000; “The hour has come, say Caprivi trialists”, *The Namibian online*, April 10 2001; and “Political agitation against judiciary under fire”, *The Namibian online*, July 22 2004

<sup>129</sup>“Political agitation against judiciary under fire”, *The Namibian online*, July 22 2004

- Prolonged detention of ‘secessionists’<sup>131</sup>
- Persistent and undue delays in trial proceedings<sup>132</sup>
- Reluctance by Government to provide ‘the secessionists’ with legal aid<sup>133</sup>
- Decision to by Prosecutor-General to promptly prosecute the alleged Caprivi Strip secessionists on the crime of high treason instead of promptly prosecuting the perpetrators of TCIDT<sup>134</sup>
- Manipulation, alternation and corruption of evidence and other similar irregularities by, among others, CHTT Prosecution Team<sup>135</sup>
- Systematic attempts by CHTT Prosecution Team to introduce and or rely on TCIDT-tainted evidence against accused ‘secessionists’<sup>136</sup>
- Reliance by CHTT Prosecution Team on TCIDT perpetrators to gather, process and produce evidence against ‘the secessionists’<sup>137</sup>
- Widespread failure on the part of several magistrates to *inter alia* warn the detained ‘secessionists’ about their Miranda rights and or in terms of Judges Rules<sup>138</sup>
- The fact that the acquittal on February 11 2013 of altogether 43 of the alleged Caprivi secessionists on all the 278 charges came long after they

---

<sup>130</sup>*S v Moses Limbo Mushwena* (Case No.: SA 6/2004) and “The State of the Judiciary and the non-adherence of the Constitution”, *Press Release*, NamRights, August 8 2000

<sup>131</sup>“Violations of pre-trial rights”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>132</sup>“Undue delay in trial proceedings”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>133</sup>“Lone lawyer to represent 125 high treason suspects”, *The Namibian online*, July 21 2001; “Treason trial row in Namibia”, *NewAfrican.com*, Thursday, August 2 2001; “Treason suspects ‘stranded’”, *The Namibian online*, August 2 2001 and “Struggle for state provision of legal aid”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>134</sup>“Caprivi torture cases ‘on the back burner’”, *The Namibian online*, October 29 2002; “Caprivi torture cases settled out of court”, *The Namibian online*, October 2 2008; and “Failure to investigate allegations of torture”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>135</sup>“A fight over pictures in Caprivi high treason trial”, *The Namibian online*, May 18 2008; “Photo tussle in Caprivi treason trial”, *The Namibian online*, June 1 2006 and *Calvin Malumo & 116 Others v State* (Case No.: CC 32/2001) 1 March 2010

<sup>136</sup>*vide* footnote 61 *supra*

<sup>137</sup>“Fruit of poisonous tree”, *Press Release*, NamRights, August 29 2006; “Forced to testify in treason case”, *Press Release*, NamRights, January 30 2006; “Another indication of tainted testimony surfaces in treason trial”, *Press Release*, NamRights, February 6 2006 and “Re: Request of NSHR for Chief Justice to order a separate trial to determine the admissibility of evidence allegedly obtained by coercive means from accused in Caprivi high treason trial”, *Press Release*, Registrar of Supreme Court, January 18 2006

<sup>138</sup>*vide* footnote 61 *supra*

have been held in Police custody virtually without trial for some 13 years<sup>139</sup>

48. Secondly, there is also abundant circumstantial and even judicial evidence for proving that TCIDT has extensively been committed during pre-trial proceedings, including:

- Claims by the detained ‘secessionists’ themselves in magistrate’s court in 1999 that they have been subjected to TCIDT<sup>140</sup>
- Testimony by detained ‘secessionists’ themselves in High Court in 2004 that they have been subjected to *inter alia* TCIDT<sup>141</sup>
- Testimony by at least 26 of the detained ‘secessionists’ that they have been subjected to *inter alia* TCIDT in order to force them to falsely incriminate others and or themselves<sup>142</sup>
- Testimony by, among others, Police Inspector Mukena that TCIDT has indeed occurred<sup>143</sup>
- Extensive scars all over the bodies of detainees<sup>144</sup>
- Widespread human rights and media reports that TCIDT and other serious violations of human rights have been occurring under SoE<sup>145</sup>
- Public admission by then Defense Minister Erkki Nghimtina and then Prime Minister Hage Geingob, albeit under pressure from especially

---

<sup>139</sup>*Malumo v State* (CC 32/2001) [2012] NAHCMD 33 (11 February 2013) and “43 acquitted in treason trial”, *The Namibian online*, February 12 2013

<sup>140</sup>*vide* footnote 69 *supra*

<sup>141</sup>“Caprivi torture cases settled out of court”, *The Namibian online*, October 2 2008

<sup>142</sup>*vide* footnote 61 *supra*

<sup>143</sup>*vide* footnote 61 *supra*

<sup>144</sup>*vide* footnote 69 *supra*

<sup>145</sup>*vide* footnotes 61 and 141 *supra*

<sup>145</sup>“Namibia: Thematic Reports, UN Human Rights Council, <http://www.hri.ca/fortherecord2000/vol12/namibiatr.htm>; E/CN.4/2000/9, paragraph 797; “NSHR claims 500 rounded up” *The Namibian online*, August 13 1999

NamRights, that TCIDT has occurred on a widespread scale in Caprivi Strip especially during SoE<sup>146</sup>

- An *ad hoc* letter dated February 9 2006 which NamRights has deliberately addressed to Prosecutor-General Imalwa strongly urging her without success to immediately prosecute the alleged torturers of Caprivi Strip secessionists<sup>147</sup>
- The existence of the so-called Torture Docket based on a belated Namibian Police investigation into the allegations of TCIDT which Prosecutor-General Imalwa has in her possession and which she deliberately ignores<sup>148</sup>

49. Thirdly, there is also clear and convincing evidence proving that one of the objectives of SoE was to conceal and cover-up evidence of *inter alia* the commission of TCIDT, including:

- Denial of the detained ‘secessionists’ of access to legal representation<sup>149</sup>
- Missing by Government of 14-day Constitutional deadline for publishing particulars of detained ‘secessionists’ as well as the provisions under which detainees have been detained<sup>150</sup>
- Failure by Government to release names and other personal particulars of detained ‘secessionists’<sup>151</sup>

---

<sup>146</sup>“Govt admits abuses: We ve made mistakes”, *The Namibian online*, August 12 1999; “Introduction”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003; and “Geingob acknowledges mistakes”, *The Namibian online*, August 19 1999

<sup>147</sup>“SUBJ; In Relation to the Caprivi Treason Trial, Letter of NamRights addressed to Prosecutor-General Martha Imalwa-Ekandjo, February 9 2006; “Freedom of Speech and Expression, including Freedom of the Press and Other Media, does not permit Contempt of Court”, *Media Release: For Immediate Release*, Office of the Prosecutor-General, February 15 2006; and “Is Office of Prosecutor General Impartial?”, *Press Release*, NamRights, February 20 2006

<sup>148</sup>*vide* footnote 61 *supra*

<sup>149</sup>“Detainees being denied key right”, *The Namibian online*, August 11 1999; “Detainees ‘must have access to lawyers’”, *The Namibian online*, August 12 1999; “Detainees haven’t asked for lawyers says Shalli”, *The Namibian online*, August 13 1999; “Government, lawyers at odds on Caprivi”, *The Namibian online*, August 16 1999; and “‘It’s a supreme outrage!’”, *The Namibian online*, August 17 1999

<sup>150</sup>“Govt ‘misses’ Caprivi deadline”, *The Namibian online*, August 14 1999

<sup>151</sup>“59 released, but ‘they can be rearrested ..’”, *The Namibian online*, August 17 1999

- Government rejection of NamRights call for an independent commission of enquiries into the allegations of TCIDT and other grave breaches<sup>152</sup>
- Denial of ICRC personnel of prompt access to ‘the secessionists’<sup>153</sup>
- Detention *incommunicado* of ‘the secessionists’ for long periods<sup>154</sup>
- Refusal to allow ‘the secessionists’ family visits as well as refusal to give information on the fate or whereabouts of ‘the secessionists’<sup>155</sup>
- Gagging of medical personnel to conceal TCIDT evidence<sup>156</sup>
- Systematic Government verbal attacks on NamRights and media for publishing information on TCIDT and other gross violations of human rights in *inter alia* Caprivi Strip<sup>157</sup>
- Veiled ‘contempt of court’ threats issued by office of Prosecutor-General directed at NamRights for issuing a series of *Press Releases* revealing that a large number of alleged State witnesses have been assaulted and forced to incriminate “the secessionists”<sup>158</sup>
- Declaration of so many “State witnesses” as “hostile witnesses”<sup>159</sup>
- Failure by Government to operationalize the Advisory Board referred to in NC<sup>160</sup>

<sup>152</sup>“State of emergency to be lifted—Shalli”, *The Namibian online*, August 24 1999 and “Caprivi concern...”, *The Namibian online*, August 25 1999

<sup>153</sup>“ICRC struggles to gain access to detainees”, *The Namibian online*, August 13 1999; “Nam falling foul of international law”, *The Namibian online*, August 13 1999; “Worried US praises Minister on rights”, *The Namibian online*, August 18 1999 and “ICRC finally gets green light”, *The Namibian online*, August 19 1999

<sup>154</sup>“Prosecution nixes secessionist arrests”, *Press Release*, NamRights, January 14 2006 and “Violations of pre-trial rights”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>155</sup>see also footnote 153 above

<sup>156</sup>“Hospital ‘gagged’ on Mwilima”, *The Namibian online*, August 11 1999; Katima nightmare: Human Rights abuses widespread”, *The Namibian online*, August 11 1999; and “Mwilima ‘assaulted: allegations of abuses grow’”, *The Namibian online*, August 10 1999

<sup>157</sup>“Worrisome situation in Kavango and Caprivi Regions”, *Media Release*, Ministry of Home Affairs, December 20 1999; “The Print Media in Namibia Should not Behave as if they are a ‘Fifth Columnist’: No Namibians are Recruited as Mercenaries”, January 10 2000; and “Freedom of Speech and Expression, including Freedom of the Press and Other Media, does not permit Contempt of Court”, *Media Release: For Immediate Release*, Office of the Prosecutor-General, February 15 2006

<sup>158</sup>“Freedom of Speech and Expression, including Freedom of the Press and Other Media, does not permit Contempt of Court”, *Media Release: For Immediate Release*, Office of the Prosecutor-General, February 15 2006 and “Is Office of Prosecutor General Impartial?”, *Press Release*, NamRights, February 20 2006

<sup>159</sup>“High treason trial witnesses under fire”, *Namibian Sunonline*, September 12 2012 and “‘Hostile witnesses’ at root of treason trial media gag bid”, *The Namibian online*, October 11 2004

- Reluctance by Prosecutor-General Imalwa to immediately prosecute state officials implicated in systematic TCIDT against “the secessionists”<sup>161</sup>
50. Fourthly, there is also clear and convincing evidence to demonstrate that the primary objective of TCIDT was to force “the secessionists” to sign self-incriminating statements authored by torturers.<sup>162</sup> This state of affairs manifestly violates the provisions of Articles 7, 10 and 14 of ICCPR and CCPR General Comment 32 as well as Articles 12 and 15 of DAT and UNCAT, respectively. These atrocious acts included but were not limited to:
- Severe and systematic beatings with sjamboks<sup>163</sup>
  - Spartan and extensive assaults with rifle butts<sup>164</sup>
  - Grievous beating with rubber batons<sup>165</sup>
  - Forced confessions and intimidation to sign unread or false statements as well as failure to supply copies to defendants<sup>166</sup>
  - Persistent punching with fists<sup>167</sup>
  - Removal of finger or toe nails<sup>168</sup>
  - Banging of ‘secessionists’ heads against walls<sup>169</sup>

---

<sup>160</sup>In terms of Articles 24(2)(c) and 26(5)(c) of Namibian Constitution (NC), the primary function of the Advisory Board is to review the cases of *inter alia* respect for human rights of persons detained without trial

<sup>161</sup>*vide* footnote 61 *supra*

<sup>162</sup>“Caprivi Treason Trial: New Forced confessions”, *Press Release*, NamRights, May 7 2001; Namibia: NSHR Accuses State of Forcing Witnesses by *Frederick Philander*, *New Era online*, August 30 2006; *Calvin Malumo & 116 Others v State* (Case No.: CC 32/2001) 1 March 2010; “High Treason ‘Witness’ Fears for his life”, *Press Release*, NamRights, February 22 2006; “Prosecution nixes secessionist arrests”, *Press Release*, NamRights, January 14 2006; “Fear haunts alleged torture victim”, *Press Release*, NamRights, March 1 2006; “New arrests in secessionist plot alleged”, *Press Release*, NamRights, June 12 2006; “Fruit of poisonous tree”, *Press Release*, NamRights, August 29 2006; “‘Willing’ witness accuses GoN of torture”, *Press Release*, NamRights, November 16 2006; “Namibian court nixes tainted evidence”, *Press Release*, NamRights, March 4 2010; and “Watchdog unsurprised by treason ruling”, *Press Release*, NamRights, March 8 2010; and “High treason torture allegations resurface”, *Namibian Sun online*, September 6 2012

<sup>163</sup>*vide* footnote 69 *supra*

<sup>164</sup>*vide* footnote 61 *supra*

<sup>165</sup>*vide* footnote 61 *supra*

<sup>166</sup>see footnote 162 *supra*

<sup>167</sup>“Katima nightmare: Human Rights abuses widespread”, *The Namibian online*, August 11 1999; “Govt admits abuses: We’ ve made mistakes, says Minister”, *The Namibian online*, August 21 1999; “Mwilima’s horror”, *The Namibian online*, August 20 1999; and “Fear and loathing at Katima”, *The Namibian online*, August 23 1999

<sup>168</sup>“Opinion: The Caprivi case and absolute prohibition of torture”, *Press Release*, NamRights, January 11 2006

<sup>169</sup>*vide* footnote 69 *supra*

- Application of electric shocks to genitals<sup>170</sup>
- Splashing with beer, salt and water onto fresh wounds<sup>171</sup>
- Blindfolding<sup>172</sup>
- Death threats against suspects and mock executions<sup>173</sup>
- Stripping and holding ‘secessionists’ naked for days<sup>174</sup>
- Denial of food and water as well as deprivation of sleep<sup>175</sup>
- Demonstration by defense counsel that CHTT Prosecution Team’s witnesses who have testified had extensively been tortured, have falsified statements and have essentially been forced implicate the accused persons<sup>176</sup>
- Monumental failure by CHTT Prosecution Team to reject TCIDT-tainted evidence<sup>177</sup>

## G. EVIDENCE IS FRUIT OF POISONOUS TREE

51. There is clear and convincing as well as irrefutable indicia illustrating how and why the ‘crown evidence’ before CHTT, having been obtained during SoE, is prohibited fruit of a poisonous tree. The evidence to substantiate why this is the case characterizes and or permeates this dossier as a whole!

---

<sup>170</sup>“Caprivi torture cases settled out of court”, *The Namibian online*, October 2 2008

<sup>171</sup>*vide* footnote 69 *supra*

<sup>172</sup>*vide* footnote 69 *supra*

<sup>173</sup>“Fear and loathing at Katima”, *The Namibian online*, August 23 1999; “Caprivi accused tell of torture”, *The Namibian online*, September 21 1999; and “Court shocked at sjamboked suspects”, *The Namibian online*, September 22 1999

<sup>174</sup>“Heyman to decide on torture prosecutions”, *The Namibian online*, October 5 1999; “Mwilima’s horror”, *The Namibian online*, August 20 1999; “No lies, I did what was best”, *The Namibian online*, August 23 1999; “Fear and loathing at Katima”, *The Namibian online*, August 23 1999; “Caprivi torture cases settled out of court”, *The Namibian online*, October 2 2008; and “Mwilima ‘recovering’”, *The Namibian online*, August 23 1999

<sup>175</sup>“Violations of pre-trial rights”, *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*, Amnesty International August 2003, AI Index: AFR 42/001/2003

<sup>176</sup>“High treason trial witnesses under fire”, *Namibian Sun online*, September 12 2012 and “‘Hostile witnesses’ at root of treason trial media gag bid”, *The Namibian online*, October 11 2004

<sup>177</sup>This is in gross contravention of the provisions of Articles 7 and 15 of UNCAT, Article 12 of Declaration against Torture, Guideline 16 of UN Guidelines of Role of Prosecutors, Articles 7 and 10(1) of ICCPR and CCPR General Comment 20, paragraph 12

## H. PROSECUTION'S COMPLICITY IN TCIDT

52. The international community has developed peremptory legal mechanisms, norms and standards not only to protect all persons against TCIDT<sup>178</sup> but also to criminalize complicity in TCIDT. The international community has also adopted mandatory standards, norms and guidelines on *prompt, effective, impartial* prosecution of *inter alia* TCIDT as well as standards of professional responsibility and statement of the essential duties and rights of prosecutors.<sup>179</sup> These standards apply in all legal systems worldwide and prosecutors, in particular, have the responsibility to ensure that they are strictly adhered to within the framework of their respective legal systems.<sup>180</sup>
53. Prosecutors also have a particular responsibility of ensuring that all and any evidence gathered in the course of criminal investigations have been properly obtained and that the fundamental rights of all criminal suspects have not been violated in the process. This means that when prosecutors come into possession of evidence against suspects that they know, or believe on reasonable grounds, was obtained through recourse to unlawful methods, notably TCIDT, they must: (1) summarily and categorically reject all such evidence;<sup>181</sup> (2) inform the court *a quo* accordingly;<sup>182</sup> and (3) take all

---

<sup>178</sup>These include: (1) 1990 UN Guidelines on the Role of Prosecutors; (2) 1990 UN Basic Principles on the Role of Lawyers; (3) 1999 International Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors; (4) 2011 UN Addendum to the Standards of Professional Responsibilities and Statement of the Essential Duties and Rights of Prosecutors; Strengthening the rule of law through improved integrity and capacity of prosecution services, ECOSOC Doc. E/CN.15/2011/8 of January 24 2011; (5) UN Commission on Crime Prevention and Criminal Justice resolution 17/2 entitled *Strengthening the rule of law through improved integrity and capacity of prosecution services*; and (6) 2013 ICC Code of Conduct for the Office of the Prosecutor

<sup>179</sup>vide footnote 178 *supra*

<sup>180</sup>Guideline 16, UN Guidelines on the Role of Prosecutors

<sup>181</sup>Articles 12 and 15 of DAT and UNCAT, respectively, (see also *Dhaou Belgacem Thabti v Tunisia*, para.10.4; *Bouabdallah Ltaief v Tunisia*, para.10.4; *Imed Abdelli v Tunisia*, para.10.4; *Bati and others v Turkey*, para. 133) as well as Sections 217 and 219A of the Criminal Procedure Act 1977 (“CPA”) (Act 51 of 1977), as amended; and UN Doc. A/HRC/25/60, paras 17-22

<sup>182</sup>Guideline 16, 1990 UN Guidelines on the Role of Prosecutors

necessary steps to ensure that those responsible are *promptly* brought to justice.<sup>183</sup>

54. International law and jurisprudence as well as standards oblige all prosecutors to pursue all perpetrators of criminal offenses. This obligation includes the duty to *promptly, impartially and effectively* investigate all allegations of TCIDT, to prosecute all and any law enforcement officials implicated in TCIDT or any other felonies, and to punish all and any law enforcement officials found guilty of TCIDT or any other felonies.<sup>184</sup> There is no need for prosecutors to receive a formal complaint before they can act, as prosecutors, in any event, have automatic legal duty to take action if information comes to their attention and or if there is real risk that TCIDT has occurred.<sup>185</sup> UN Guidelines on the Role of Prosecutors *inter alia* state that:

*“When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”*<sup>186</sup>

55. Prosecutors must also ensure strict compliance with all the elements as contained within the check-list<sup>187</sup> of good practice concerning interrogations.

---

<sup>183</sup>see footnote 182 above

<sup>184</sup>Articles 12, 13 and 16 of UNCAT (see also *Bati and others v Turkey*, para. 136 and *Mikheyev v Russia*; *Cantoral Benavides v Peru* and other cases)

<sup>185</sup>*vide* also Articles 12 and 13 of UNCAT, CAT/C/SR.145 para. 10, CAT/C/SR.168 paragraph 40 and paragraph 2 of UN Principles on the Effective Investigation of TCIDT as well as Istanbul Protocol: Manual for the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<sup>186</sup>Guideline 16, 1990 UN Guidelines on the Role of Prosecutors

<sup>187</sup>Report of the Special Rapporteur on Torture, 2001, UN Doc.A/56/156, July 2001, para 39

The check-list is based on recommendations by, among others, UN Special Rapporteur on Torture. It stipulates *inter alia* that:

- all interrogations must take place only at official centers and any evidence obtained from a detainee in an unofficial place of detention and or which has not been confirmed by the detainee cannot be relied upon and, as such, must not be admitted as evidence in any proceedings against the detainee
- all detainees have the right to have a lawyer present before and throughout any interrogations
- prior to any interrogations, all suspects should have been informed of the identities (name and or serial number) of all persons present
- the identities of all persons present should have been noted in a permanent record which details the time at which interrogations start and end and any request made by the detainee during such interrogations
- blindfolding and or hooding are forbidden as they can render detainees vulnerable, involve sensory deprivation and may themselves amount to TCIDT
- all interrogation sessions must be video-recorded or transcribed and the detainee or, when provided by law, his or her counsel should have access to these records

56. However, there is clear and convincing corroborative evidence demonstrating that Prosecutor-General Imalwa and or her CHTT subordinates have been directly or indirectly involved in the commission, instigation, incitement, aiding, abetting, encouragement, tolerance, consent to, acquiescence in or otherwise participation and or complicit in the commission of TCIDT which

has been meted out against alleged Caprivi Strip secessionists'.<sup>188</sup>This indicia includes but not limited to these commissions and omissions:

57. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have either ordered or solicited or induced or tolerated the commission of TCIDT or the fact that Prosecutor-General Imalwa and or her CHTT subordinates have aided, abetted or encouraged or otherwise assisted in the commission of TCIDT against "the secessionists".<sup>189</sup>
58. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have intentionally failed to take into account widespread and well-founded allegations that the alleged Caprivi Strip secessionists have been systematically subjected to TCIDT.<sup>190</sup>
59. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have betrayed and or are still betraying the professional duty they are under mandatory obligation to perform and fulfill in order to protect the alleged Caprivi Strip secessionists against TCIDT.<sup>191</sup>
60. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have deliberately failed to ensure that the alleged Caprivi Strip secessionists have been made aware of their right to claim compensation for moral and physical suffering.<sup>192</sup>

---

<sup>188</sup>Complicity in TCIDT is strictly proscribed in terms of *inter alia* Articles 4 and 16 of UNCAT and Article 7 of ICCPR as well as in terms of *Prosecutor v Furundzija* (ICTY) (ICTY) Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317

<sup>189</sup>*vide* footnotes 48 and 162 *supra*

<sup>190</sup>These allegations were contained in *inter alia* so many prominent national and international human rights reports as well as in local and international media reports as indicated under footnote 9 *supra*. See also paras. 47 to 49 of this dossier

<sup>191</sup>This scheme of things has been proved by *inter alia* Prosecutor-General Imalwa's failure to act against the alleged torturers of 'the secessionists'

<sup>192</sup>This is required in terms of Article 14 of UNCAT

61. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have either intentionally used or have vigorously sought to use TCIDT-tainted information, statements or confessions, in manifest disregard for the letter and spirit of the absolute and inviolable exclusionary rule.<sup>193</sup>
62. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have deliberately ignored plausible reasons for believing that there was a real risk that the information, statements or confessions which the CHTT Prosecution Team has relied upon throughout CHTT have been made or obtained through TCIDT.<sup>194</sup>
63. Moreover, CAT has consistently ruled that the burden of proof rests with the State, stating that the general nature of the absolute nature of the prohibition of TCIDT imposes an absolute obligation on each and every State party to ascertain whether or not there is a real risk that a confession or other evidence was not obtained by lawful means, including TCIDT.<sup>195</sup> Similarly, in its case of *El Haski v Belgium*, ECtHR also held that it would be necessary and sufficient for a complainant to show that there was a “real risk” that the impugned statement was obtained under TCIDT.<sup>196</sup> Also, ACHPR held that “once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should

---

<sup>193</sup>*S v Calvin Liseli Malumo + 116 Others* Case No.: CC 32/21 (June 26 2008) and also footnote 162 *supra*

<sup>194</sup>These plausible reasons are based *inter alia* upon widespread human rights and media reports that ‘the secessionists’ were being systematically subjected to TCIDT and see also footnotes 11 and 190 *supra*

<sup>195</sup>*Ktiti v Morocco*, para. 8.8 and A/61/259, paras. 63 and 65. See also E/CN.4/2001/66/Add. 2, paras. 102 and 169 (in); A/56/156 para. 39 (d) and (j); A/48/44/Add.1, para. 28; CCPR General Comment No. 32, para. 41; E/CN.4/1999/61 Add. 1, para. 113 (e); *Cabrera García and Montiel Flores v. México*, para. 176

<sup>196</sup>*El Haski v Belgium*, para. 88; see also *Othman (Abu Qatada) v the United Kingdom*, application no. 8139/09, European Court of Human Rights (“ECtHR”) judgment of January 17 2012

not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment”.<sup>197</sup>

64. The fact that Prosecutor-General Imalwa is in possession of TCIDT-tainted information, statements and or confessions which have been made in order to deliberately inculcate the alleged Caprivi Strip secessionists and or which Prosecutor-General Imalwa knows or, on reasonable grounds, believes have been established to have been obtained through resource to TCIDT and other unlawful methods.<sup>198</sup>
65. The fact that Prosecutor-General Imalwa has failed with impunity to *promptly, impartially and effectively* prosecute the perpetrators of TCIDT.<sup>199</sup> There are also reasonable grounds to believe that Prosecutor-General Imalwa and or her CHTT Prosecution Team subordinates have deliberately failed to inform CHTT trial court that the evidence before it is forbidden fruit of a poisonous tree.<sup>200</sup>
66. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have vigorously argued that the crime of TCIDT is less serious than the crime of high treason and that the prosecution of ‘the secessionists’ on *inter alia* high

---

<sup>197</sup>*Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, communication No. 334/06, African Commission on Human and Peoples’ Rights (“ACHPR”), March 2011. See also *Singarasa v Sri Lanka*, comunicación No. 1033/2001, para. 7.4

<sup>198</sup>Most of the evidence regarding the existence of TCIDT-tainted information, statements and confessions is contained in the Torture Docket which is in Prosecutor-General Imalwa’s possession. See also footnotes 9, 61, 147, 158, 190 and 194 *supra*

<sup>199</sup>This gross violation of *inter alia* Article 12 of UNCTAT is established by *inter alia* the Torture Docket which is in Imalwa’s possession contains statements and other indicatory evidence to the effect that the alleged Caprivi Strip secessionists have been systematically subjected to TCIDT during pre-trial interrogations. See also footnotes 5 and 9 above

<sup>200</sup>This state of affairs blatantly contravenes *inter alia* the Exclusionary Rule Doctrine and Guideline 16 of UN Guidelines on the Role of Prosecutors. Moreover, Articles 8(2) (b) and 12(1) (f) of NC as well as Sections 217 and 219A of the Criminal Procedure Act 1977 (“CPA”) (Act 51 of 1977), as amended all of which absolutely preclude tainted evidence to be admitted as evidence or testimony in any legal proceedings in the country. Hence, in terms of both national and international law, confession or written admission by an accused person is admissible as evidence against that accused ONLY if it had been proven that the statement had been made freely and voluntarily by a person in his or her sound and sober senses and without the person having been unduly influenced to make such a statement and or if the confession or statement has been made by a person deprived of his or her liberty in the presence of his or her lawyer and or a magistrate and or judge

treason must precede the prosecution of members of the Namibian security force implicated in the commission of TCIDT.<sup>201</sup>

67. The fact that Prosecutor-General Imalwa has willingly failed in her mandatory responsibility to ensure that her CHTT subordinates do not participate in interrogations in which TCIDT and or any other coercive methods have been used to extract confessions or information.<sup>202</sup>
68. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have also dismally failed in their obligation to exclude all TCIDT-tainted evidence by satisfying themselves and or ascertaining whether or not statements before CHTT have been made as a result of TCIDT.<sup>203</sup>
69. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have deliberately failed to ensure that all and any information or confession offered has been given freely.<sup>204</sup>
70. The fact that Prosecutor-General Imalwa and or her CHTT subordinates have deliberately ignored signs of physical or mental distress, take all allegations of TCIDT seriously, and they have even returned ‘the secessionists’ to the custody of the very same law enforcement officials who had tortured them.<sup>205</sup>
71. In the premises there is clear and convincing indicary evidence to prove that Prosecutor-General Imalwa and or her CHTT subordinates have either committed or attempted to commit TCIDT jointly with Police and other

---

<sup>201</sup>*vide* footnote 134 *supra*

<sup>202</sup>*vide* footnotes 48 and 162 *supra*

<sup>203</sup>This obligation is required under *inter alia* Article 12 of DAT; Articles 2, 15 and 16 of UNCAT; Articles 7 and 14 of ICCPR; and Guideline 16 of the 1990 UN Guidelines on the Role of Prosecutors as well as the Exclusionary Rule Doctrine (see also “The Exclusionary Rule: International law prohibits the use of evidence obtained through torture”, *APT Background Bulletin*, July 27 2012, as well as footnotes 13 and 200 *supra*)

<sup>204</sup>*vide* footnote 203 above

<sup>205</sup>This practice or conduct is manifestly violation of the provisions of *inter alia* Articles 4, 7 and 10 of ICCPR as well as CCPR General Comment 21 (1992) relating to UN safeguards against TCIDT for those deprived of their liberty. See also footnotes 200 and 203 *supra*

torturers or that through her CHTT subordinates Imalwa has ordered, solicited or induced the commission of TCIDT or attempted TCIDT or that she has aided, abetted or otherwise assisted in commission or attempted commission of TCIDT or that she has in any other way contributed to the commission of TCIDT or attempted commission of TCIDT.

72. There is also ample evidence to show that Prosecutor-General Imalwa and or her CHTT subordinates have failed to prevent TCIDT from being carried out by Police officers and other perpetrators of TCIDT with whom CHTT Prosecution Team has extensively and closely collaborated.<sup>206</sup> Moreover, there is widespread direct and circumstantial evidence to demonstrate that CHTT Prosecution Team either knew, or owing to the circumstances which had prevailed at the time, should have known, that TCIDT was systematically taking place but, nevertheless, they have intentionally failed to *promptly, impartially and effectively* prosecute the perpetrators.<sup>207</sup>
73. There is also strong evidence to demonstrate that the alleged secessionists have been extensively subjected to TCIDT especially during pre-trial interrogations<sup>208</sup> and further that Prosecutor-General Imalwa and or her CHTT subordinates have been physically present during at least some of the time of the commission of TCIDT.<sup>209</sup> Thus Prosecutor-General and or her CHTT Prosecution Team either should be charged jointly or severally with having carried out TCIDT or with having participated therein and or in any event with having aided and abetted the commission of TCIDT or with failing to protect the alleged Caprivi Strip secessionists from TCIDT.<sup>210</sup>

---

<sup>206</sup>vide footnote 61 *supra*

<sup>207</sup>vide footnotes 9 and 134 above

<sup>208</sup>vide footnote 9 *supra*

<sup>209</sup>vide footnote 162 above

<sup>210</sup>vide footnote 48 *supra*

## I. IMALWA UNFIT AND IMPROPER PERSON

74. International law and standards on the rule of law and integrity, independence and impartiality and capacity of prosecution services as well as on the promotion of human rights dictate that ONLY fit and proper as well as persons of high moral character and recognized experience and competence must be appointed as Prosecutors-General.<sup>211</sup>The principles, norms and standards--on equality before the law; right to a fair and public hearing or trial by a competent, independent, impartial tribunal established by law; the right to a speedy trial and effective remedy; and, the right to be presumed innocent until proved guilty--also dictate that ONLY fit and proper persons must be entrusted with the responsibilities of Prosecutor-General.
75. NC also makes provision for the appointment of ONLY a fit and proper person to be entrusted with the powers and functions to prosecute, subject to the provisions of NC, in criminal proceedings as well as to perform all other functions relating to such powers in the name of Republic of Namibia.<sup>212</sup>Thus no person may be appointed as Prosecutor-General unless he or she possesses appropriate legal qualifications and or unless he or she--by virtue of his or her experience, conscientiousness and personal integrity--is a fit and proper person to be entrusted with the responsibilities of the office of Prosecutor-General.<sup>213</sup>
76. Furthermore, NC requires that, in the performance of his or her powers and functions, a Namibian Prosecutor-General must be independent and must not subject to any superintendence or direction by anyone or organ.<sup>214</sup>A Namibian

---

<sup>211</sup>*vide* footnote *supra* 178

<sup>212</sup>Article 88(2) of NC

<sup>213</sup>Article 88(1) of NC

<sup>214</sup> Lovisa Indongo, "The uniqueness of the Namibian Prosecutor-General", *The Independence of the Judiciary in Namibia*, Konrad Adenauer Stiftung, 2008, p.103

Prosecutor-General is also expected to be naturally and truly an independent person of high moral character and recognized competence who, in practice, is not likely to brook or tolerate undue influence from any quarter, whatsoever. Hence the only charges that can be brought against a Namibian Prosecutor-General are those directed at him or her *ratione personae*. For example, he or she can face charges that, in the performance of his or her responsibilities, he or she has acted with malice or ulterior motives or that he or she is incompetent.<sup>215</sup>

77. However, there is clear and convincing evidence to show cause how and or why Prosecutor-General Imalwa--owing to the circumstances which prevailed at the time of her appointment and or which led to such appointment--was neither a fit nor a proper person to be entrusted with the responsibilities of Prosecutor-General because:

78. Firstly, Legal Practitioners Act 1995 (Act 15 of 1995) (“LPA”) had to be deliberately amended in 2002 to make it possible for Olyvia Martha Imalwa to become Prosecutor-General.<sup>216</sup> This amendment also made it possible for *inter alia* legal officials in the employ of the Executive Branch to become members of the statutory professional legal associations and subsequently also to qualify to be appointed to become members of JSC. According to NC, JSC consists of Chief Justice, a judge directly nominated by President; Attorney-General (a political appointee); and two persons nominated by the statutory professional legal associations.<sup>217</sup>

---

<sup>215</sup>Lovisa Indongo, “The uniqueness of the Namibian Prosecutor-General”, *The Independence of the Judiciary in Namibia*, Konrad Adenauer Stiftung, 2008, p.106

<sup>216</sup>*Ekando-Imalwa v The Law Society of Namibia and Another* and or *The Law Society of Namibia and Another v Attorney General of the Republic of Namibia and Others* 2003 NR 123 (HC) and “Concern over Judicial Independence and Integrity”, *Press Release*, NamRights, July 22 2004

<sup>217</sup>Article 85(1) of NC

79. Secondly, *ad hoc* certificates--exempting public prosecutors, legal aid practitioners and magistrates from attending prescribed practical training programs and or from writing requisite legal practitioners' qualifying examinations--were deliberately issued by then Minister of Justice and Attorney-General Pendukeni Iivula-Ithana.<sup>218</sup> The controversial amendment of LPA was unsuccessfully challenged in High Court by two professional legal associations, viz. Law Society of Namibia ("LSN") and Namibia Law Association ("NLA") on the ground that such amendment was 'unconstitutional' and that it had limited objective to allow a specific candidate to qualify for appointment as Prosecutor-General.<sup>219</sup>
80. Thirdly, the said amendment was preceded by *inter alia* years of systematic verbal attacks by high-ranking members of the Executive Branch and ruling SWAPO Party leaders and activists on 'white' High Court judges as well as then incumbent 'white' Prosecutor-General Adv. Hans Heyman in particular.<sup>220</sup>
81. CHTT was also preceded by widespread pressure and threats on judiciary by both the executive authorities and leading members of the ruling SWAPO Party not to release the alleged Caprivi secessionists on bail but, rather, to sentence them to life imprisonment.<sup>221</sup>
82. Fourthly, this Imalwa-specific amendment to LPA was soon followed by the steamrolling by then incumbent Justice Minister and Attorney-General Pendukeni Iivula-Ithana and the eventual bulldozing of the amendment in

---

<sup>218</sup>Clive L Kavendjii and Nico Horn, "A joint challenge: The Independence of the Legal Profession in Namibia", *The Independence of the Judiciary in Namibia*, Konrad Adenauer Stiftung et al, 2008, p.298

<sup>219</sup>*Ekando-Imalwa v The Law Society of Namibia and Another* and or *The Law Society of Namibia and Another v Attorney General of the Republic of Namibia and Others 2003 NR 123 (HC)*

<sup>220</sup>Namibia: The Judiciary under Siege: Special Report for 1995; NamRights, January 5 1996; "Attacks on Judges must be condemned", *Press Release*, NamRights, January 14 2010; "Minister Attacks judiciary", *Press Release*, NamRights, August 18 2005; and "Dignity of Judiciary attacked again", *Press Release*, NamRights, March 29 2001

<sup>221</sup>*vide* footnote 128 *supra*

Parliament.<sup>222</sup>At the time of the steamrolling, Parliamentary Opposition parties as well as LSN and NLA warned that the said amendment, not only eroded the standards required of the legal profession, but also constituted “political interference” in judicial matters.<sup>223</sup>

83. Fifthly, the aforementioned steamrolling and bulldozing process came soon after then Justice Minister and Attorney-General Iivula-Ithana had led a systematic campaign to pressurize then incumbent Prosecutor-General Adv Hans Heyman into early retirement.<sup>224</sup>Characterized by repeated verbal attacks and calls for Adv Heyman to be removed campaign has been ongoing since January 2002. Imalwa was reportedly favored by Executive Branch but did not qualify for the position in terms of Article 88 of the Constitution.
84. Sixthly, Adv Heyman has on several occasions warned that if any detainees were being tortured to reveal possible evidence to interrogators, that information would be useless once that person went on trial. He explained that only evidence voluntarily produced by detained persons could be used in court.<sup>225</sup>Said Adv Heyman:

*“If someone has made a confession, but he’s been beaten to make it and that’s the only evidence against him, then there is no case against him. Then that confession means nothing as evidence against himself and against others who he could have implicated”*<sup>226</sup>

85. Seventhly, there has been grave concern about the conduct of JSC itself. Section 4 (2) of the Judicial Service Commission Act 1995 (“JSCA”) (Act 18 of 1995) makes it obligatory for JSC to conduct its procedures and functions

---

<sup>222</sup>“Concern over Judicial Independence and Integrity”, *Press Release*, NamRights, July 22 2004

<sup>223</sup>see footnote 222 above

<sup>224</sup>see footnote 222 above

<sup>225</sup>“Detainees being denied key right”, *The Namibian online*, August 11 1999

<sup>226</sup>“Caprivi suspects appear in court: 67 face treason, murder charges”, *The Namibian online*, August 24 1999

in accordance with rules and regulations made in terms of Article 85(3) of the Constitution. All appointments made by JSC must *ipso facto* be made in terms of rules and regulations made in terms of JSCA. However, since 1995 and despite numerous appointments to judicial office having been made, no rules or regulations have been promulgated.<sup>227</sup> Instead, the operations of JSC are conducted and held *in camera* or *sub rosa* and appointments are merely announced in the press once they have been made.

86. Eighthly, concerned at the imminent Executive Branch penetration of JSC and the eventual erosion of country's judicial independence and integrity, then UN Special Rapporteur on the Independence of the Judiciary and Lawyers, Dato Cummarassamy, on May 29 1995, directed a letter to the Executive Branch, requesting detailed clarification of the stated amendment to LPA. However, on June 16 1995, then Minister of Justice Dr. Ernest N Tjiriange responded by claiming that the provisions of the Bill did not objectively violate the universally accepted norms for the protection of the independence and integrity of the judicial system and legal profession.<sup>228</sup>

87. Ninthly, expressing grave concern about the erosion of the independence of the judiciary, NamRights said it was "deeply disturbed that the Executive Branch had over the years successfully managed to insidiously and systematically rid this country of an independence judicial system through a triangular strategy: (1) public pressure, including systematic verbal attacks; (2) passage of crippling and incursive legislation; and (3) the maintenance of acting judicial officer system."<sup>229</sup>

---

<sup>227</sup>see footnote 222 above

<sup>228</sup>see footnote 222 above

<sup>229</sup>see footnote 222 above

## J. CONSPIRACY TO STIFLE PROFESSIONAL STANDARDS

88. There is ample indicary evidence strongly showing that Prosecutor-General Imalwa has been deliberately appointed, with or without her knowledge, in order to undermine an independent, impartial, objective, competent and professional prosecutorial service in Namibia. This evidence includes these intertwined, interdependent and interrelated commissions and or omissions:
89. Firstly, the fact that Imalwa's appointment was virtually a political one, considering the fact that certain high-ranking Cabinet Ministers have openly and vigorously campaigned for her appointment as Prosecutor-General.<sup>230</sup>
90. Secondly, the fact that Imalwa has been recommended as Namibia's new Prosecutor-General within a week after she had been admitted as a practicing lawyer.<sup>231</sup>
91. Thirdly, the fact that not a single one of the several high profile corruption cases, in which either former Namibian President Sam Nujoma or his family members have been implicated, have so far been prosecuted.<sup>232</sup>
92. Fourthly, the fact that the commission of white-collar and other grave crimes-- in which high-ranking ruling SWAPO Party politicians and or their cronies have been implicated--have yet to be prosecuted. For example, key corruption

---

<sup>230</sup>“Concern over Judicial Independence and Integrity“, *Press Release*, NamRights, July 22 2004 and “PG Imalwa’s reappointment comes under fire“, *Namibian Sunline*, November 4 2013

<sup>231</sup>“Namibia: Imalwa Bound for Top Post“, *The Namibian online*, November 6 2003 and “Namibia: Lawyers take government to court“, *International Legal Brief, Issue No 13* February 3 2003

<sup>232</sup>“Fugitives hole up in Namibia: Businessmen deny using ties with leading figures in the country to resist extradition“, *Mail and Guardian online*, February 7 2014 and “Namibia shouldn’t be home to global fugitives“, <http://www.informante.web.na/node/2249>

cases, involving millions of taxpayer dollars, have been gathering dust in Prosecutor-General Imalwa's office awaiting decisions.<sup>233</sup>

93. Fifthly, the fact that a large number of high profile foreign criminal fugitives-- all of them closely associated with, among others, Nujoma, his chosen successor, President Lucas Hifikepunye Pohamba, or their relatives--seem to have found safe refuge in Namibia.<sup>234</sup>

94. Sixthly, careful examination of Prosecutor-General Imalwa's prosecutorial performance reveals a consistent pattern of unexplained delays occurring at different stages of criminal investigations<sup>235</sup> in the country. These delays include:

- Indecision and or inaction after a complaint has been made laid
- Formal opening of an investigation without any further action being taken
- Opening of an investigation only to be discontinued soon thereafter
- Re-opening, closing and re-opening of an investigation resulting in long delay
- Inaction following completion of investigation
- Substantial gaps between completion of investigation and indictment of high-profile suspects
- Long delays in initiating prosecutions
- Frequent and systematic postponements of prosecutions
- Reluctance or failure to prosecute high-ranking officials

---

<sup>233</sup>“Namibia’s corruption bigger than crime, fraud”, *Press Release*, NamRights, December 6 2011; “Shortage of manpower hampering PG’s office”, *The Namibian online*, May 20 2005; and “PG Imalwa’s reappointment comes under fire”, *Namibian Sunline*, November 4 2013 and see also paragraphs 74 to 87 of this dossier

<sup>234</sup>“Fugitives hole up in Namibia: Businessmen deny using ties with leading figures in the country to resist extradition”, *Mail and Guardian online*, February 7 2014 and “Namibia shouldn’t be home to global fugitives”, <http://www.informante.web.na/node/2249>

<sup>235</sup>This has been the case with regard to virtually all the high-profile corruption cases which have been unearthed since 2004

- Lack of transparency in the manner in which prosecutorial decisions or non-decisions are made
95. Seventhly, since assuming office in January 2004, Prosecutor-General Imalwa has persistently blamed the country's huge criminal case backlog<sup>236</sup> on *inter alia* the chronic shortage of experienced prosecutors coupled with huge influxes of cases, lengthy court adjournments, limited court resources and organization.<sup>237</sup> Nonetheless, regarding lack of progress in the prosecution of high profile corruption and other serious criminal cases in Namibia, most if not all fingers point to indecisions and inactions by Prosecutor-General Imalwa.<sup>238</sup>
96. The absolute and inviolable prohibition of all and any acts of TCIDT as well as the fact that this prohibition has *jus cogens* status impose an obligation *erga omnes* upon JSC to recommend for the removal of Prosecutor-General Imalwa!

#### K. REMOVAL OF IMALWA AS PROSECUTOR-GENERAL

97. The Namibian Prosecutor-General is appointed by President acting on the recommendation of JSC to perform the powers and carry out functions referred to under Article 88(2) of NC. However, with the exception of Article 32(6), read with Article 32(4) (a) (cc), of NC, there are no other legal principles in NC or any other subordinate law which directly and or explicitly making provision for the removal of Prosecutor-General from office. Hence, in the performance of his or her powers, Namibian Prosecutor-General is accountable to no one *ratione materiae*. Nor can his or her decisions be

---

<sup>236</sup>“Overstretched courts cause backlog”, *New Era online*, April 1 2014; “Namibia: Alarm Over High Court's Criminal Case Load”, *The Namibian online*, January 17 2014; “Community Courts to unburden Magistrates”, *Namibian Sunonline*, September 1 2011; and “PG to deal with dragging court cases”, *Namibian Sunonline*, January 16 2014

<sup>237</sup>“Shortage of manpower hampering PG's office”, *The Namibian online*, May 20 2005 and “PG to deal with dragging court cases”, *Namibian Sun online*, January 16 2014

<sup>238</sup>“Public workers take issue with PG on GIPF”, *The Namibian online*, January 10 2012; and “Prosecutor General has it all wrong on GIPF”, *Namibian Sunonline*, January 10 2012

challenged by anyone, except by a party that has been directly aggrieved by such decisions.<sup>239</sup>

98. Nonetheless, JSC has the power and obligation to investigate a Namibian Prosecutor-General on the account that he or she has acted maliciously and or with ulterior motives and or that he or she is incompetent and or that he or she is guilty of gross misconduct in relation to her complicity in, and conspiracy to commit, systematic TCIDT against the alleged Caprivi Strip secessionists and, hence, gross misconduct.<sup>240</sup>

### III. UNIVERSAL JURISDICTION AND OBLIGATION *ERGA OMNES*

99. There is ample evidence to show cause why charges of *inter alia* complicity in, and conspiracy to commit, TCIDT or charges of gross misconduct must immediately be brought against Prosecutor-General Imalwa *ratione personae* on the grounds of, among other things, the commissions and or omissions listed under *inter alia* paragraphs 56 to 73 as well as paragraphs 88 to 96 of this dossier.<sup>241</sup>

100. Articles 4 and 5 of UNCAT impose upon all and any States parties to UNCAT worldwide the obligation to 'take such measure as may be necessary to establish jurisdiction over all TCIDT offenses referred to in Articles 4 and 16 of UNCAT in order to prosecute all such offenses in cases where and or when an alleged TCIDT offender is present in any territory under their jurisdiction'.<sup>242</sup>

---

<sup>239</sup>Lovisa Indongo, "The uniqueness of the Namibian Prosecutor-General", *The Independence of the Judiciary in Namibia*, Konrad Adenauer Stiftung, 2008, p.99-111

<sup>240</sup>Lovisa Indongo, "The uniqueness of the Namibian Prosecutor-General", *The Independence of the Judiciary in Namibia*, Konrad Adenauer Stiftung, 2008, p.99-111

<sup>241</sup>This state of affairs should be taken as evidence that Prosecutor-General Imalwa and or her CHTT Prosecution Team have effectively condoned TCIDT against 'the secessionists'

<sup>242</sup>*vide* Articles 4-9 of UNCAT and CCPR General Comment 31 para. 18

101. Articles 6 and 7 of UNCAT also require states ‘under whose jurisdiction a TCIDT perpetrator is found to prosecute or extradite.’<sup>243</sup>This obligation *erga omnes* must be carried out regardless of where and or when TCIDT has been committed, nationalities of TCIDT victims and nationalities of alleged perpetrators.<sup>244</sup>Similarly, the four Geneva Conventions require States to exercise universal jurisdiction and to haul perpetrators of TCIDT and other ‘grave breaches’ before their own national courts.<sup>245</sup>

#### IV. CONCLUSIONS

102. SoE is a premeditated act of vengeance rooted not only in the bitter and chronic disagreement about the terms and conditions of the 1964 merger between SWAPO and CANU, but also in the autocratic and highly intolerant nature of then SWAPO Party leader and erstwhile Namibian President Sam Nujoma.

103. Therefore, SoE is an entirely unlawful measure and or act and or a proceeding which has been deliberately and carefully crafted and or adopted and or instituted as an incentive for the wholesale commission of TCIDT and other international crimes. *Ipsa facto* SoE is entirely consistent with a state policy to commit or conspiracy to commit ethnic cleansing and or other crimes against humanity.

104. The overarching aim of SoE was to ‘mete out an appropriate punishment to the terrorists as well as to combat and destroy the secessionists without mercy’ and with maximum impunity and immunity in order suppress the struggle for

---

<sup>243</sup>This is compliance with the principle of general customary law of *aut dedere aut judicare*, that is, the obligation of all states to extradite or prosecute perpetrators of universally condemnable crimes irrespective of the context in which they occur

<sup>244</sup>*vide* footnote 18 *supra*

<sup>245</sup>Roger O’Keefe, “The Grave Breaches Regime and Universal Jurisdiction”, *Oxford Journals: Law Journal of International Criminal Justice*, Volume 7, Issue 4 pp. 811-831, <http://jicj.oxfordjournals.org/content/7/4/811.short>

the realization of the inalienable right of the people of Caprivi Strip to self-determination and independence.

105. TCIDT and other internationally wrongful acts of terror have been committed on a wide scale and with impunity against all the alleged Caprivi Strip secessionists.

106. All and any evidence before CHTT--which has been obtained under SoE and or under any other related situation after SoE--constitutes prohibited fruit of a poisonous tree and, as such, it is inadmissible in all and any proceedings.

107. CHTT is part of the comprehensive state policy and or conspiracy to ensure that 'an appropriate punishment has been meted out to the terrorists as well as to combat and destroy the secessionists without mercy'.<sup>246</sup> CHTT is also intended to be part of a conspiracy to deny the alleged secessionists the right to a fair and public trial as well as to see to it that those 'the secessionists', who have been charged with *inter alia* high treason, have been found guilty at all cost. Alternatively, CHTT is intended to see to it that Caprivi Strip separatists have remained in jail for as long as possible or even for the rest of their lives.

108. Prosecutor-General Olyvia Martha Imalwa and or her subordinates are extensively complicit in the wholesale commission of *inter alia* TCIDT against the alleged Caprivi Strip secessionists. As such, Prosecutor-General Imalwa and or her subordinates are *hostis humani generis* who are liable to face prosecution for their complicit in TCIDT against the alleged Caprivi Strip secessionists.

---

<sup>246</sup>vide footnote 3 *supra*

109. Prosecutor-General Imalwa has been deliberately appointed, with or without her knowledge, in order to undermine an independent, impartial, objective, competent and professional prosecutorial service in Namibia.

## V. SELECTED BIBLIOGRAPHY

1. Conor Foley, “Combating Torture: A Manual for Judges and Prosecutors”, [www.essex.ac.uk/combatingtorturehandbook/manual/](http://www.essex.ac.uk/combatingtorturehandbook/manual/)
2. Juan E. Mendez, Report of the Special Rapporteur on torture and other cruel, Inhuman or degrading treatment or punishment, UN Human Rights Council, 25th Session, Agenda Item 3, UN Doc. A/HRC/25/60, March 4 2014
3. “End Impunity: Justice for the Victims of Torture”, Amnesty International, 2001
4. Lene Wendland, “A Handbook on State Obligations under the UN Convention against Torture, Association for the Prevention of Torture (APT), Geneva, 2002
5. Debra Long, “Guide to the Jurisprudence on Torture: Article 3 of the European Convention for the Protection of Human Rights, Association for the Prevention of Torture (APT), Geneva, June 2002
6. “Combating Torture: A Manual for Action”, Amnesty International, London, 2002
7. *Malumo v State* (CC 32/2001) [2012] NAHCMD 33 (11 February 2013)
8. *S v Calvin Liseli Malumo + 116 Others*, High Court of Namibia, Case No. CC 32/2001 (March 1 2010)
9. *S v Calvin Liseli Malumo + 116 Others*, High Court of Namibia, Case No: CC 32/2001 (25 June 2008)
10. “Namibia: The Judiciary under Siege: Special Report for 1995”, NSHR, Windhoek, January 5 1996

11. “Waiting for Justice: The Politics of Delay in the Administration of Justice in Torture Cases: Practice, Standards and Responses, Redress, London, 2008
12. CCPR General Comments (No.12 (1984); No.20 (1992); No.21 (1992); No.29 (2001); No. 31 (2004); No. 32 (2007); and No.35 (2013)), Office of UN High Commissioner for Human Rights
13. CAT General Comments (No. 2 (2007) and No. 3 (2012)), Office of the High Commissioner for Human Rights
14. Bennett Kangumu Kangumu, “CANU: 1964 and After”, *Contestations over Caprivi Identities: From Pre-Colonial Times to the Present*, University of Cape Town
15. “Namibia: Justice Delayed is Justice Denied”, Amnesty International, London, 2003
16. “Emergency Regulations Applicable to the Caprivi Region: Article 26 of the Namibian Constitution”, *Government Gazette of the Republic of Namibia no.2157*, Windhoek, August 3 1999
17. “Press Statement made by Sam Nujoma, President of South West Africa People’s Organization (SWAPO); and Albert Muyongo, Vice President, Caprivi African National Union (CANU)”, Lusaka, Zambia, November 5 1964
18. “Namibia: Enforced Disappearances: Discovery of ‘No Name’ Gravesites”, NSHR, Windhoek, 2008
19. “The Independence of the Judiciary in Namibia”, Konrad Adenauer and the authors, 2008
20. “Torture in International Law: A Guide to Jurisprudence”, APT and CEJIL, 2008
21. “Istanbul Protocol: Manual for the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, Office of UN Commissioner of Human Rights, Geneva, 2004

**END**