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UNOG-OHCHR
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RE: Supplementary Submission to the Committee on the Elimination of Racial Discrimination: Supplementing Namibia's 2007 Country Report

This letter supplements the Twelfth Periodic Report submitted by the government of Namibia on September 26, 2007 (U.N. Doc. No. CERD/C/NAM/12) on its compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) ahead of the government's scheduled review during the Committee's 73rd Session (July 28 – August 15, 2008). The Legal Assistance Centre (LAC), an independent, non-governmental organization and the only public interest law group in Namibia, along with the International Women's Human Rights Clinic (IWHRC) at Georgetown University Law Center in Washington DC, USA, jointly compiled the letter with the aim of furthering the Committee's work on the intersection of race and gender discrimination. (See appendix A for additional information on the LAC and IWHRC). On page 10 of this submission, we included several suggested recommendations for the Committee to consider in formulating its concluding observations to the government of Namibia on its compliance with the Convention.

I. Gender Dimensions of Racial Discrimination

In line with the Committee's General Recommendation 25 on *Gender related dimensions of racial discrimination*,¹ this submission aims to ensure that race and ethnic discrimination with a disproportionate impact on or adverse consequences for women will not "escape detection" because "there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life" (para. 1). This letter highlights the discriminatory impact of particular Namibian laws upon black women in Namibia to help "enhance [the committee's] efforts to integrate gender perspectives, [and] incorporate gender analysis" when examining racial discrimination (para. 4).

This Committee has also recognized that "some forms of racial discrimination have a unique and special impact upon women" (para. 3) and that "racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men" (para. 1). The Committee has explicitly included within its mandate the "monitoring [of] racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin" (para. 3). The Committee also outlined the gender-related dimensions of racial discrimination it will analyze in determining the

government's compliance with the Convention, including "the form and manifestation of racial discrimination; the circumstances in which racial discrimination occurs; the consequences of racial discrimination and the availability and accessibility of remedies and complaint mechanisms for racial discrimination" (para. 6).

II. Select Race-Based Civil and Customary Laws Adversely Impact Black Women's Rights to Non-Discrimination, Equality, Property, and Housing.

Whereas multiple layers of race and gender discrimination exist in Namibia, this letter focuses on certain aspects of the dual legal system of civil and customary law that has created different legal regimes based on race, which, in effect, have particularly adverse economic, social, and health consequences for black women. While the government has laudably embarked on select legislative reform efforts, it has achieved little progress in the nearly two decades since the passage of Namibia's independent Constitution in 1990 and the earlier ratification of the Convention in 1982.² Instead, race-based civil and customary laws continue to adversely impact black women's rights to non-discrimination and equality (Convention arts. 1, 2, 3), including equal rights during marriage and at its dissolution (art. 5(d)), to property and inheritance (art. 5(d)(v)-(vi)), and to housing (art. 5(e)(iii)).

This letter will highlight examples of such race and gender discrimination by highlighting:

- An Apartheid era law, the Native Administration Proclamation of 1928, that still governs key issues of personal law based on a person's race that have an adverse impact on black women, especially at the most vulnerable times of divorce or at the death of a husband or parent;
- Select customary laws, which, by definition, apply only to black Namibians, and not only contain elements which discriminate against black women, but also exclude them from the protections of civil law, especially in the areas that most closely affect the majority of women, marriage and dissolution of marriage, by either divorce or death.

Black Women Bear the Brunt of Historic and Lingering Race Discrimination

The government report contains little, if any, mention of gender-specific impacts or consequences of race discrimination, contrary to the Committee's instructions to States Parties in the Guideline on Reporting to include in their reports "information on the situation of women ... to consider whether racial discrimination has an impact upon women different from that upon men" giving particular attention to women "who belong to any vulnerable groups, such as indigenous peoples, ...and those in the lowest socio-economic categories."³

In reality, the legacy of Apartheid and lingering patriarchy and discriminatory laws uniquely affect black women throughout Namibia in ways that women and men of other backgrounds are spared. Black women living north of the former Colonialists' demarcated Police Line—created to divide Namibia into two parts, one reserved for whites, and another smaller and less fertile area for "native" blacks⁴—face particular adversity. Apartheid era laws, such as the Native Administration Proclamation, defined as "Natives" members "of any aboriginal race or tribe of Africa,"⁵ and instituted policies carried out by both the German and South African colonizers to create "exclusively white towns and cities." Throughout the pre-Independence period, investment was

concentrated on white towns and cities; the lands north of the Police Line and its peoples were left in the hands of traditional leaders.⁶ South of the Police Line, blacks were only allowed to live in “townships” with inferior social services bordering the white towns.⁷ Because black men from the northern regions were only allowed into the Police Zone as cheap laborers, laws prevented them from bringing their families with them, splitting up families.⁸

Although the laws that decreed the Police Line, a *de jure* race line, no longer exist, it continues to operate as a *de facto* race and poverty line. Apartheid era policies continue to be evident today in the uneven development, poor infrastructure, lower literacy rates and higher poverty and unemployment rates of the northern areas. Of all women in Namibia, black women in northern communities are the poorest, showing “higher social indicators of poverty than men in *all* areas measured,” including standard of living, illiteracy, and percentage of resources spent on basic necessities.⁹ The most underprivileged members of society are black women living in rural, northern communities.

Most black women live in the rural, under-developed north, known as the most densely populated area in the country. Sixty percent of Namibia’s population is concentrated in the northern regions of the country, with forty percent of Namibia’s entire population concentrated in just four of the northern regions: Ohangwena, Omusati, Oshana and Oshikoto.¹⁰ After years of investment in the white Police Zone, and little or none in the northern regions where black, customary communities were settled, there is a sharp divide between the development in the south compared with the north. The vast majority of poor households are located in rural areas, primarily in the areas north of the Police Line.¹¹ In the Caprivi region, for example, the rate of poverty is almost 100 percent.¹² According to the 2001 Census, while the areas north of the Police Line are anywhere from seventy-two to ninety-nine percent rural, south of that line the regions are around fifty to ninety-three percent urban.¹³ In its report to the U.N. Committee on Elimination of Discrimination Against Women, the Government stated that, despite the “large number of rural women in Namibia, they are severely disadvantaged in terms of access to land, labour, agricultural services and assets, natural resources and employment. Rural women are also virtually absent from decision-making structures.”¹⁴ The rates of HIV infection are highest in the North.¹⁵ With a forty-three percent HIV infection rate in 2001, the population of Caprivi suffers from the worst HIV rate in Namibia, and one of the highest in the world.¹⁶

As a result of the Apartheid era race-based geographic division, most customary marriages take place north of the Police Line, meaning that the overwhelming majority of women in such marriages live in the poorest, rural regions of Namibia. By entering marriages governed by customary laws, black women forgo whatever civil protections they may be entitled to under non-discriminatory civil laws. The rate of customary marriages is significantly higher in the north and northeast of Namibia compared with the rest of the country.¹⁷ According to the 2001 National Census, about twenty-seven percent of respondents north of the Police Line were married under customary law, with a higher concentration in the Caprivi and Oshikoto regions (thirty-four and forty-five percent, respectively). Comparatively, the rate of customary marriages south of the Police Line averages two percent and the overall national average rate is nine percent.¹⁸

Given the reality of black women’s lives, particularly in the historically disadvantaged north, the government must rise from its legislative torpor to better comply with the Convention and recognize in both law and its implementation that, as this Committee has recognized in the Reporting Guidelines, “[m]embers of such [vulnerable] groups often experience complex forms of

disadvantage which persist over generations and in which racial discrimination is mixed with other causes of social inequality.”¹⁹

III. The Apartheid Era Native Administration Proclamation Violates the Rights of Black Women

The history of the division of the country along racial lines is reinforced by the inherently racist nature of the Native Administration Proclamation’s very title, evidencing the colonialist government’s discriminatory intent in enacting it. The term “Native” is a derogatory term for a black African person, and this Proclamation attempted to specifically single out and marginalize those persons based on their race. Although in effect since 1930, only subsections of the Native Administration Proclamation’s sections 17 (on civil marriages between “natives”) and 18 (on intestate succession) were put into operation in 1954.²⁰ Consequently, because of the influence of Namibia’s apartheid history, the position on marital property is different for some black persons in Namibia.

Section 17(6), the only provision of the Proclamation remaining in force in the north today, imposes one default marital property regime upon the civil marriages of black people married north of the Police Line, while black people married in the rest of the country, and individuals of any other race married anywhere in Namibia, have a different default marital property regime.²¹ Section 17(6) of the Native Administration Proclamation continues the antiquated policies of the apartheid era, by applying a default marital property regime to black couples married in the north solely by reference to the color of their skin.

The Namibian Government has already acknowledged in its Seventh Periodic Report to the Committee in 1996 the unjustifiable racial discrimination inherent in section 17(6). In paragraph 14, it stated that “[a] further example of discriminatory legislation is section 17(6) of the Native Administration Proclamation. This section, which only applies to a part of Namibia, thus causing further confusion, provides that a marriage between blacks shall be outside of community of property. The usual marital regime is in community of property. *There is definitely no justification for the maintenance of two separate systems, based on skin colour* and, in addition, a black person’s place of marriage.”²² In paragraphs 316 – 22 of its current Report to the Committee, the Government discusses Section 17(6) of the Native Administration Proclamation.²³ Despite the fact that its own Law Reform and Development Commission (LRDC) recommended this section be repealed,²⁴ the Namibian Government has failed to take this step, and as such has allowed the discrimination of the apartheid era to continue.

Because of section 17(6) continues to exist, two different default marital property systems regulate Namibian citizens. The default regime for the majority of citizens in Namibia—of any race, any gender, any socio-economic class, living anywhere in the country, as long as they were married south of the historic Police Line—is in community of property.²⁵ Unlike the out of community of property marital regime, this regime permits spouses equal access to and control over shared marital property, and if the marriage ends, either by divorce or death, each spouse is entitled to half the shared marital property.²⁶ In fact, many spouses to whom section 17(6) applies are often under the erroneous impression that they have either married in community of property—as in the rest of the country—or that they made the necessary declaration to ensure an in community of property marital property regime if, at their wedding, they indicate that they want to be married under that regime.²⁷

Out of community of property arrangements disproportionately affect women's abilities to own, control, and access property, violating their equal rights and rendering them economically dependent. First, women, especially rural and poor women, traditionally bring less property into a marriage (for example, women receive little or no property at divorce or through inheritance and thus are unlikely to receive land or houses from their fathers, brothers, or husbands). Second, as women have historically kept the household and raised children, and still today participate less in the formal economy, their work is often not valued monetarily.²⁸ The traditional undervaluing of women's work, combined with the out of community marital property default, ensure that black women have neither equal power to control marital property nor a claim to any marital property upon divorce or death of their husbands. This cycle perpetuates the historic exclusion of black women from access to and control over property and curtails their enjoyment of civil, economic and social rights.²⁹

Section 17(6) of the Proclamation allows husbands to assert unilateral control over marital property. Husbands invoke section 17(6) to claim their marriages are out of community of property, and as such they are not required to obtain the consent of their wives for transactions involving even the marital home. Husbands of LAC clients have invoked section 17(6) to evict their longtime wives and children onto the street, depriving wives of the resources to which they contributed during lengthy marriages. One LAC client, Maria from Ongwediva, for example, lost nearly all of her property when she sought a divorce from her adulterous and abusive husband.³⁰

Without control over their marital property, women are constantly threatened with losing their housing. Laws, such as the Proclamation, that deny women control over their property also destroy women's dignity by destabilizing their housing situations and giving them only tenuous access to the resources required for a healthy, adequate standard of living.³¹ Under this perpetual threat, women become dependent on their husbands for every life-sustaining tool and may be forced to stay with violent husbands or engage in risky behavior to avoid poverty, the certain consequence of eviction.³²

Yet, the Government has failed to repeal this Apartheid era remnant despite its acknowledgment in its current Twelfth Periodic Report to the Committee in para. 319, that "the LRDC argues that it was necessary to fast track the repeal of Section 17(6) in order to get the people to whom this section applies to be in line with the rest of Namibians; that an in community of property regime was fairer to the vulnerable groups in marriage and that most people have an in community of property regime in mind when they enter into marriage."³³

IV. The Dual Legal System of Race-based Personal Status Law Discriminates against Women

The Government of Namibia commented briefly, and with little detail, on its dual legal system in its Report to the Committee, highlighting in para. 301 the "passing of important anti-discriminatory legislation, notably the Married Persons Equality Act, 1996." Not only did the Report fail to thoughtfully address the adverse impact of the dual system on black women, but even the celebrated Married Persons Equality Act largely exempts from its scope marriages contracted under customary law.³⁴ Although the Namibian Constitution, in Article 66, declared as void all customary law that violates fundamental freedoms, including the rights to equality and dignity, the Government continues to defer to customary laws that deny women's rights to equality, property and inheritance, and subsequently their rights to housing and an adequate standard of living.

In its report to the Committee, the Namibian Government recounted that “at independence, Namibia inherited a host of laws which regulated diverse areas of private law according to the racial origin of the person. The law did not specifically impose uniform rules in all areas of personal law. The South African colonial administration made laws for black Namibians in which they had no say and determined the extent to which their lives were to be governed by the community’s own customs and traditions and determined the aspects which were to be governed by statute.³⁵ Yet, in embracing the traditions of Namibia’s diverse communities, the Government of Namibia has entrenched and encouraged the marginalization of black women and the continued violation of their fundamental rights.

V. Intestate Succession Is Governed by the Race of the Deceased, Effectively Excluding Black Women from Inheritance

The Convention in article 5(d)(vi) explicitly requires States Parties to “eliminate racial discrimination . . . and to guarantee the right of everyone without distinction as to race, colour, or . . . ethnic origin, to equality before the law, notably in the enjoyment of . . . [the] right to inherit.” Yet, despite the formal end of Apartheid in 1990, separate intestate succession laws continue to govern estates in Namibia on the basis of the decedent’s race. According to the customary law that governs the devolution of the estates of black decedents who married under customary law (or in the North under civil law and did not opt into an in community marital property regime) and die without leaving a will, men control the process of distributing property,³⁶ and in nearly all communities women inherit far less valuable property than men.³⁷

Current succession laws continue to have a disproportionate racial and gender impact upon black women in Namibia. For all white and “mixed race” Namibians, intestate property is distributed to the deceased’s relatives by blood or marriage pursuant to the Intestate Succession Ordinance 12 of 1946 (Intestate Succession Ordinance). However, the intestate estates of blacks and members of the Rehoboth Baster community are administered pursuant to separate subsections of the 2005 Amendment to the laws on succession. The government in its report to the committee, has acknowledged “the problem of differentiated and discriminatory systems of estates administration for black, white and *baster* Namibians with each community being regulated by its own system” (para. 305) and that these existing laws have been “criticized for continuing to perpetuate Namibia’s racial stratification in that separate laws and rules govern the inheritance of different racial groups” (para. 308).

The Government of Namibia has stated that it is encouraging Namibians to make wills in order to avoid the pitfalls of the multiple and often sex-discriminatory intestate succession laws, but this policy fails to substantively improve this area of the law and as the Government conceded in its Report to the Committee in paragraph 310, “[i]t is the case that a majority of Namibians especially among the black community die without writing a will.”

The following is a summary of the current, relevant law and its impact upon women and children in Namibia.

Statutory Intestate Succession: The Estates and Succession Amendment Act, No. 15 of 2005

In *Berendt v. Stuurman*, referenced in the Government’s report to the Committee in paragraphs 304 – 06, the High Court of Namibia held that sections 18(1), 18(2), and 18(9) of the

Native Administration Proclamation and Regulation Government Notice 70 (GN 70) violate the right to racial equality of the Namibian Constitution.³⁸ The High Court required Parliament to “remedy the defect by 30th June 2005.”³⁹ Faced with a court order, the Parliament responded with The Estates and Succession Amendment Act, No. 15 of 2005 (the 2005 Amendment), which amends the intestate laws that previously applied to the intestate estates of blacks and *basters*. The Amendment, however, leaves in place the substantive customary law of intestate succession that governs the vast majority of black intestate estates.⁴⁰ Because the substantive rules for distribution were not at issue in *Berendt*, the Namibian Parliament considered it appropriate to leave in place the substantive “native law and custom” rules governing distribution of intestate estates. Consequently, black intestate property is presently distributed according to “native law and custom” as provided by the Apartheid era Native Administration Proclamation, which continues to discriminate against black Namibians on the basis of race, and largely exclude women and girls from inheritance.

Customary Law of Intestate Succession

Although customary law varies among communities in Namibia, the vast majority of customary laws prohibit women, younger children, and extra-marital children from inheriting property from their deceased husband or father’s intestate estates.⁴¹ The Native Administration Proclamation and its corresponding regulations apply these discriminatory laws to the intestate estates of all deceased “natives,” except those married in community of property in the north, without regard to the deceased’s preferences, associations, or cultural values.

According to customary law in most communities, men control the process of distributing property. Women are often excluded from this gathering and, if permitted to attend, are not allowed to speak.⁴² The eldest son or the deceased man’s brother is selected to oversee the distribution of the estate. If there are no sons or brothers, the allocation of the estate is undertaken by traditional leaders, such as the headman. The administrator, with the help of male relatives, decides who will inherit the estate, as well as responsibility for the widow and children. Although decisions regarding distribution of property are made, many communities require widows to be isolated.⁴³ Widows are expected to live apart from the rest of the clan for approximately two weeks after their husband’s death, even though that is the time period during which most inheritance decisions are made.⁴⁴

Nearly all communities are similar in that women inherit far less valuable property than men.⁴⁵ In most communities, men and women identified land, fields, and cattle to be of greatest importance.⁴⁶ In general, customary rules of inheritance do not allow men and women equal access to this type of property. For example, customary inheritance laws in most societies prevent women from inheriting items such as land, homesteads, buildings, and cars.⁴⁷ Moreover, cattle, guns, and arrows used for hunting are also considered masculine items to be inherited only by men.⁴⁸ Communities which permit women to inherit allow them to acquire only small items of little economic value, such as small stock (goats and chickens), kitchenware, and clothing.⁴⁹ Thus, women in most communities inherit less property than their male counterparts.

The practice of widow inheritance is also prevalent in Namibian communities, and adversely affects black women, who prefer not to partake in the custom.⁵⁰ Upon a man’s death, customary inheritance laws dictate that a widow can be inherited by a family member along with the decedent’s movable and immovable property.⁵¹ In most communities, the widow is expected to have sexual relations with the man who inherits her.⁵² If a widow refuses to be inherited, she is forced to leave the household and all of the property,⁵³ and in some communities, is expected to also relinquish

custody of her children.⁵⁴ More often than not, these customary inheritance laws leave black widows and children with nothing.

The Government, in paragraph 330 of its Report to the Committee, states that “Namibia needs a system of intestate succession which accommodates the range of indigenous law and blends it with aspects which promote gender emancipation” and that “[i]t is clear that not everything can be left to indigenous law whose content and impact would be unknown because it is not codified.” However, to date, no such law has even been tabled for parliamentary discussions.

VI. Unequal Grounds and Process for Customary Divorce Adversely Impact Black Women

Customary laws governing marriage and divorce of black Namibians forbid wives to divorce their husbands for the same reasons their husbands may divorce them, and at the same time fail to protect wives from arbitrary decisions by their husbands to divorce them. Consequently, customary divorce law in Namibia may force black women to remain in destructive and demeaning relationships because they lack access to a valid ground of divorce or rightly fear they will not be allowed any property if they leave.

Uneven customary divorce laws disregard black women’s rights to be free from violence and harm, by forcing women in customary marriages to remain married to adulterous and abusive husbands. For example, the divorce ground of adultery, as available only to husbands, prevents wives from divorcing adulterous husbands who put them at an increased risk of contracting HIV/AIDS. The uneven ground of disobedience and uneven divorce processes impede women’s right to divorce husbands who beat and rape them. Black women stripped of civil protections are the most vulnerable women in Namibia; they are the women who were marginalized both by colonial oppressors and by the laws of their own communities.

Unequal and Sex-Based Customary Divorce Laws in Namibia

Customary divorce laws apply differently to men and women in customary marriages, across communities.⁵⁵ Although customary law applies to both black men and women, its sex-discriminatory application adversely impacts black women in particular, by subjecting them to being divorced essentially at the will of their husbands and not providing them with any property or maintenance once they are driven out. LAC continues to be approached by numerous black women who have suffered under sex-based customary divorce law that preferences men over women.⁵⁶ For example, after 22 years of marriage, Maria was shocked when her husband handed her a divorce letter, some clothes, and sent her out of their marital home. She suspects her husband divorced her because of a new girlfriend in town.⁵⁷ To complete the divorce, her husband did not “need the consent of either his wife, her relatives or the traditional authorities, but [could] act unilaterally.”⁵⁸

Unlike the grounds of divorce available for both men and women of all races married under civil law, there are sex-based grounds available unequally to black men and women married under customary law.⁵⁹ The most common unequal ground for customary divorce across communities, and of particular concern given the prevalence of HIV/AIDS, is that men may divorce women for adultery while women are either unable to divorce for adultery at all or only in the presence of other, severe factors, such as physical abuse or desertion. Another ground for divorce that is available only to men is disobedience by the wife. According to University of Namibia Professor Clever Mapaure, “[t]he ground of disobedience is available only to men. In the African culture, women are

subservient and subordinate to men.... Women lack formal education. This connects to marital power, where the man has the power and the woman is powerless. So if the wife fails to obey what the husband demands, he can divorce her.”⁶⁰

Although several communities allow a husband to divorce a wife for her “disobedience,” no customary communities allow a wife to divorce her husband for the same behavior. For example, Prisca, a young Subian woman, had to ask her husband to write her a divorce letter when he started beating her for refusing to have sexual intercourse with him.⁶¹ He refused and she fled to her parents’ home.⁶² In that case, the traditional court fined both Prisca and her father, the former for her disobedience and the latter for not returning his daughter to her abusive husband.⁶³ Another woman, Anne, fled to her parents’ home after her physically abusive husband refused to write her a divorce letter. The traditional authority in that case ordered her to pay her husband cattle for having disobeyed him and for refusing to reconcile with him.⁶⁴ Moreover, the fact that only black women can even be seen as “disobedient” reinforces harmful anachronistic stereotypes along race and gender lines.

Black women in customary marriages are not only subject to unequal customary divorce laws, they face threats, violence, and community ostracism if they dare challenge such customary laws. Divorce carries a heavy social stigma, and there is intense pressure on a woman to “make a marriage work,” even when she is subject to domestic violence, from both her family and the traditional authority. One LAC client married under Herero customary law was subjected to prolonged degrading treatment by her husband, including being beaten until she “could no longer stand up” and, despite his numerous extramarital sexual relations, including with commercial sex workers, being forced to have unprotected sex at gun point. He also locked her and their two minor children out of the marital home. Under her customary laws, adultery by the husband is not a justifiable ground for divorce. When LAC attempted to help her, her parents and traditional authorities threatened to disown and kick her out of the village. Her husband vowed to beat and try to kill her. The threats and pressures were so grave that the client had to flee Namibia and seek shelter in South Africa.⁶⁵ This client is typical of women caught under customary law marriages. These are the most vulnerable women in Namibia facing multiple layers of race, ethnic, and gender discrimination.

VII. Suggested Recommendations

Upon consideration of the information provided in this letter, the Legal Assistance Centre and the IWHRC urge the Committee to consider the following recommendations to the Government of Namibia:

1. Immediately repeal provisions still in effect from the Native Administration Proclamation of 1928, especially section 17(6) on the default marital property regime for blacks married north of the Police Line, and section 18 that permits black intestate decedents estates to devolve according to “native law and custom,” as both discriminate against black women and girls.
2. Legislate and implement a uniform system of personal laws on marriage, divorce, and inheritance that permits individuals to opt out of the uniform civil law by way of an ante-nuptial agreement or will.
3. Ensure the elimination of sex- and race-discriminatory customary law and practice, such as the prohibition of inheritance by women and girls, and the unequal grounds and process of divorce, as well as inequitable division of property at divorce for women married under customary law.
4. Undertake programs with secured funding to address the lingering harms on black women, especially rural black women residing in the northern regions of Namibia, of Apartheid-era policies and sex-discriminatory elements of customary law.

End Notes

¹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25, Gender related dimensions of racial discrimination* (56th Sess., 2000), U.N. Doc. No. A/55/18, annex V (2000) [hereinafter Gen. Rec. No. 25].

² International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. res. 2106 (XX), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, *acceded to by Namibia* Nov. 11, 1982, *available at* <http://www2.ohchr.org/english/law/cerd.htm>, ratification status *available at* <http://www2.ohchr.org/english/bodies/ratification/2.htm>.

³ Committee on the Elimination of All Forms of Racial Discrimination, General Guidelines Regarding The Form And Contents Of Reports To Be Submitted By States Parties Under Article 9, Paragraph 1, Of The Convention, para. 9 (Dec. 5, 2000), U.N. Doc. No. CERD/C/70/Rev.5, *available at* [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/abe104e5613b4321c12569e7004f1ffa/\\$FILE/G0046522.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/abe104e5613b4321c12569e7004f1ffa/$FILE/G0046522.pdf) [hereinafter CERD Guidelines].

⁴ See UN-HABITAT, LAND, TENURE, HOUSING RIGHTS AND GENDER IN NAMIBIA 703-04 (2005)

⁵ Native Administration Proclamation 15 of 1928 s. 25 (defining “Native”) [hereinafter NAP]; see also ARTHUR PHILLIPS AND HENRY MORRIS, MARRIAGE LAWS IN AFRICA 76-77 (Oxford University Press International 1971) (1953) (“In the British colonial territories and in the Union of South Africa, the term ‘native’ means, broadly speaking, a person of African race . . . a person of pure African origin, whatever his mode of life and standard of education may be, will still, in strict law, be classed as a ‘native,’ and there is no officially recognized procedure whereby he can (for purposes of private law) formally and fully divest himself of that status.”).

⁶ See UN-HABITAT, *supra* note 4, at 30-31.

⁷ *Id.* In fact, Ovamboland and the Caprivi strip were only incorporated into German South West Africa to create a source for cheap labor. *Id.*

⁸ See *id.*

⁹ Debie LeBeau, Speech before the National Conference on Women’s Land and Property Rights and Livelihood in Namibia, with a Special Focus on HIV/AIDS: Women’s Access to Child Maintenance as a Right to Property (July 6-8, 2005).

¹⁰ NAT’L PLANNING COMM’N, NAMIBIA 2001 POPULATION AND HOUSING CENSUS 27 (2001), *available at* <http://www.npc.gov.na/census/index.htm> [hereinafter 2001 CENSUS] (Caprivi (population 79,826); Kavango (population 202,694); Kunene (population 68,735); Ohangwena (population 228,384); Omusati (population 228,842); Oshana (population 161,916); and Oshikoto (population 161, 007)).

¹¹ See NAT’L PLANNING COMM’N, NAMIBIA 2004 MILLENNIUM DEVELOPMENT GOALS (2004) [hereinafter MILLENNIUM DEVELOPMENT GOALS] (“Eighty-five per cent of poor households are located in rural areas, making their living from subsistence farming, primarily in the northern and northeastern communal areas. Regions such as Ohangwena, Caprivi and Omusati are the worst off . . .”).

¹² *Id.* at 4.

¹³ 2001 CENSUS, *supra* note 10, at 27.

¹⁴ Namibia, *Second and Third Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women* (37th Sess., 2005), para. 14.1, U.N. Doc. CEDAW/C/NAM/2-3 (Sept. 2, 2005).

¹⁵ See UNICEF, HUMANITARIAN ACTION: NAMIBIA (April 6, 2004), *available at* http://www.unicef.org/emerg/files/Emergencies_Namibia_Donor_Update_060404.pdf.

¹⁶ *Id.*

¹⁷ See 2001 CENSUS, *supra* note 10, at 27.

¹⁸ *Id.*

¹⁹ CERD Guidelines, *supra* note 3, at para. 9.

²⁰ See REPUBLIC OF NAMIB. LAW REFORM AND DEV. COMM’N (LRDC), REPORT ON UNIFORM DEFAULT MATRIMONIAL PROPERTY CONSEQUENCES OF COMMON LAW MARRIAGES paras. 2.8.1.1 – 2.8.1.4 (2003) [hereinafter LRDC REPORT]. Sections 18(1), 18(2), and 18(9) of the Native Administration Proclamation are applicable only in the area south of the Police Line and provide that property not devised by will “shall devolve and be administered according to native law and custom.” NAP s. 18(1) (“All movable property belonging to a Native and allotted by him or accruing under native law or custom to any women with whom he lived in a customary union or to any house, shall upon his death devolve and be administered under native law and custom.”); NAP s. 18(2) (“All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.”); NAP s. 18(9)(d) (“The Administrator may make regulations not inconsistent with this Proclamation . . . prescribing tables of succession in regard to Natives.”).

²¹ See NAP s. 17(6) (“A marriage between Natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commission or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.”); *NAMLEX Index to the Laws of Namibia* (Legal Assistance Centre, ed., 2004 update) (1997) (citing Government Notice (GN) 67/1954); see also DIANNE HUBBARD, *LAW, RACE AND GENDER: MOVING TOWARDS EQUALITY IN MARRIAGE AND INHERITANCE 2* (2003) (“[B]ecause of the influence of Namibia’s apartheid history, the position on marital property is different for some black persons in Namibia”).

²² Namibia, *Seventh Periodic Report of States Parties to the Committee on the Elimination of Racial Discrimination*, para. 14, U.N. Doc. CERD/C/275/Add.1 (Jan. 3, 1996).

²³ Namibia, *Twelfth Periodic Reports of States Parties to the Committee on the Elimination of Racial Discrimination*, paras. 316-22, U.N. Doc. CERD/C/NAM/12 (July 18, 2007), available at <http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/CERD.C.NAM.12.doc> [hereinafter Namibia 2007 Country Report to CERD].

²⁴ See *id.* at para. 319.

²⁵ See *Brummund v Brummund’s Estate 1993 (2) SA 494 (HC) (Namib.)* (“In the absence of an antenuptial contract providing otherwise, marriage creates community of property and of profit and loss . . . every marriage [south of the Police Line] is presumed to be in community until the contrary is proved.”); see also H.R. HAHLO, *SOUTH AFRICAN LAW OF HUSBAND AND WIFE 157* (5th ed. 1985).

²⁶ See LEIGH-ANNE AGNEW & DIANNE HUBBARD, *MARITAL PROPERTY REGIMES AND THE NATIVE ADMINISTRATION PROCLAMATION 2* (2001); LEGAL ASSISTANCE CENTRE, *PROPOSALS FOR DIVORCE LAW REFORM IN NAMIBIA 26* (2000) [hereinafter LAC PROPOSALS] (“If the couple was married in community of property, the joint marital estate will be divided into two equal parts, and each person will receive one part.”).

²⁷ Such “declarations” are invalid because the couple has not made a separate declaration before a magistrate during the month before the wedding ceremony, as required by section 17(6). See LRDC REPORT, *supra* note 20, para. 2.6.

²⁸ See CYNTHIA GRANT BOWMAN & AKUA KUENYEHIA, *WOMEN AND LAW IN SUB-SAHARAN AFRICA 84-85* (2003) (“Ordinarily [considering all forms of contributions to a household in property divisions] should work to the benefit of the wife, who typically has less property of her own, earns less, has custody of the children and thus greater financial need, and is likely to be the spouse who stayed home to care for the family.”).

²⁹ See GOV’T OF THE REPUBLIC OF NAMIB. AND THE U. N. SYSTEM IN NAMIB., *UNITED NATIONS NAMIBIA COMMON COUNTRY ASSESSMENT 2004 13* (2004) (“There is also an intra-household gender dimension to inequality in Namibia that contributes to income poverty, particularly among women and children. Gender inequality manifests itself in different forms, including differential access to resources, inheritance structures favouring men and women’s exclusion from decision-making processes.”).

³⁰ See LAC PROPOSALS, *supra* note 26, at 90-91.

³¹ See Dr. Piet Heyns, Dir. of Resource Mgmt., *Poverty and Livelihoods, Address Before the National Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS* (July 6-8, 2005), in the Report on the Proceedings of the Nat’l Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS, in Windhoek, Namibia.

³² The National Planning Commission in the Office of the President recognized that poverty often “force[s] some people to barter sexual favours for money or food, [while] depressive prospects of a future in poverty may lead some people to disregard the longer-term risks of unprotected sex today.” MILLENNIUM DEVELOPMENT GOALS, *supra* note 11, at 26.

³³ Namibia 2007 Country Report to CERD, *supra* note 23, at para. 319.

³⁴ Section 16 of the Married Persons Equality Act reads as follows:

“Provisions not applicable to marriages by customary law

16. The provisions –

(a) regarding the abolition of the marital power and the consequences of that abolition as set out in Part I;

(b) regarding marriages in community of property as set out in Part II; and

(c) regarding marriages out of community of property as set out in Part IV, do not apply to marriages by customary law.”

³⁵ See Namibia 2007 Country Report to CERD, *supra* note 23, para. 278.

³⁶ See Debbie LeBeau, *In Small Things Stolen: The Archeology of Inheritance versus Property Grabbing in Katutura*, in THE MEANINGS OF INHERITANCE: PERSPECTIVES ON NAMIBIAN INHERITANCE PRACTICES 105, 109 (Robert Gordon, ed., 2005).

³⁷ See DEBIE LEBEAU, EUNICE LIPINGE & MICHAEL CONTEH, WOMEN'S PROPERTY AND INHERITANCE RIGHTS IN NAMIBIA 49 (2004) [hereinafter LeBeau Study].

³⁸ *Berendt v. Stuurman*, Unreported Judgment Case No. (P) A 105/2003 (HC) (Namib.) (holding certain sections of the Native Administration Proclamation and Regulation Government Notice 70 unconstitutional because they violated the right to racial equality provided by the Namibian Constitution, Article 10, and reasoning that although this practice had practical advantages, it is "rooted in racial discrimination, which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration." (quoting *Moseneke and Others v. Master of the High Court and Another* 2000 (10) BHRC 117 (CC) at para. 21 (S. Afr.)).

³⁹ *Id.*

⁴⁰ See Estates and Succession Amendment Act, No. 15 of 2005 s. 1(2) ("despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed.").

⁴¹ See LeBeau Study, *supra* note 37, at 50-54.

⁴² See Michael Bollig, *Inheritance and Maintenance among the Himba of the Kunene Region*, in THE MEANINGS OF INHERITANCE: PERSPECTIVES ON NAMIBIAN INHERITANCE PRACTICES 45, 58 (Robert Gordon, ed., 2005).

⁴³ See Shashank Bengali, *In Africa, 'Estate-grabbing' Leaves Widows and Children Destitute*, KNIGHT RIDDER WASHINGTON BUREAU, June 21, 2006, http://www.mcclatchydc.com/staff/shashank_bengali/story/14086.html.

⁴⁴ See MERCEDES OVIS ET AL., CUSTOMARY LAWS ON INHERITANCE IN NAMIBIA: ISSUES AND QUESTIONS FOR CONSIDERATION IN DEVELOPING NEW LEGISLATION 42 (2005) [hereinafter Ovis study].

⁴⁵ See LeBeau Study, *supra* note 37, at 49.

⁴⁶ See Joanne Lebert, *Inheritance Practices and Property Rights in Ohangwena Region*, in THE MEANINGS OF INHERITANCE: PERSPECTIVES ON NAMIBIAN INHERITANCE PRACTICES 71, 72 (Robert Gordon, ed., 2005).

⁴⁷ See LeBeau Study, *supra* note 37, at xiii.

⁴⁸ See *id.* at 49.

⁴⁹ See *id.* at 52.

⁵⁰ See *id.* at ix.

⁵¹ See *id.*

⁵² See Ovis Study, *supra* note 44, at 117.

⁵³ See LeBeau Study, *supra* note 37, at x.

⁵⁴ See Ovis Study, *supra* note 44, at 60.

⁵⁵ In order to ascertain and establish the customary law, the LAC has relied on exhaustive expert sources and interviews with clients and potential clients who had suffered under discriminatory customary divorce law. LAC's comprehensive report, PROPOSALS FOR DIVORCE LAW REFORM IN NAMIBIA, detailed all available studies on customary divorce laws in Namibia, including community-specific studies. There have been no further studies on divorce since that date. In its 1997 Report to the CEDAW Committee, the Government noted that there was a dearth of research on customary divorce laws, explaining that "further exploration" was required into the area. Government of Namibia, *Initial Reports of States Parties to the Committee on the Elimination of Discrimination Against Women* (1997), at 169, U.N. Doc. No. CEDAW/C/NAM/1 (Feb. 10, 1997).

⁵⁶ Even where a black woman is in a civil marriage, or one of the increasingly common hybrid marriages (where the parties celebrate both civil and customary marriage), she may be subject to customary divorce law, as civil divorces may only be granted in Windhoek. It is very common for individuals to seek customary divorces instead of undertaking an arduous and expensive journey to the capital, Windhoek. Telephone Interview with Professor Clever Mapaire, University of Namibia, Nov. 2007 (on file with author).

⁵⁷ See LAC PROPOSALS, *supra* note 26, at 16-17.

⁵⁸ *Id.*

⁵⁹ See *id.* at 95. Various grounds across communities are not available equally to men and women, among them adultery by the wife and the taking a second wife without the consent of the first. See *id.* at 16.

⁶⁰ Telephone Interview with Professor Clever Mapaire, *supra* note 56.

⁶¹ See LAC PROPOSALS, *supra* note 26, at 16-17. Under the customary law of many communities, men are able to unilaterally divorce women, often by simply writing a divorce letter detailing his reason. In no communities may a

wife simply unilaterally divorce her husband by writing him a divorce letter. Instead, wives must ask their husbands to write one if they wish to avoid bringing the matter before a traditional court..*See id.*

⁶² *See id.* at 10 (*citing* HESTER VAN WINGERDEN, “I DON’T WANT ANY NONSENSE IN MY COURTYARD!”: THE POSITION OF WOMEN IN SUBIA FAMILY LAW 89 (Utrecht Unitwin Network, 1996)).

⁶³ *See id.*

⁶⁴ *See id.* at 17.

⁶⁵ Telephone Interview with Dianne Hubbard, Coordinator of the Gender Research & Advocacy Project, LAC, Nov. 2007 (on file with author).

Appendix A

The Legal Assistance Centre (LAC):

Established in 1988, the Legal Assistance Centre is the only organization of its kind in Namibia working to protect the human rights of all Namibians through public interest litigation; information and training workshops; research; and advocacy for law reform. The LAC challenges the constitutionality of laws in conflict with the Namibian constitution and international human rights law, ranging in topics from land reform, property and inheritance rights, environmental law, gender rights, mental health and the rights of people living with HIV and AIDS. It also acts as a watchdog to help ensure implementation of laws and policies, including for example, the National Gender Policy.

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The International Women's Human Rights Clinic (IWHRC):

The IWHRC, a legal clinic at Georgetown University Law Center in Washington DC, USA, utilizes law students and faculty to support and advance women's human rights globally through partnerships with local women's human rights organizations and attorneys. The Clinic provides national, comparative and international legal analysis to support constitutional challenges, impact litigation, or legislative reform of sex-discriminatory laws, policies, and practices. During 2007-2008, IWHRC has collaborated with LAC to address sex and race discriminatory laws and harmful customary practices that have adversely affected women in Namibia.

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