



NAMIBIA

SHADOW REPORT

UNDER INTERNATIONAL CONVENTION ON THE
ELIMINATION OF RACIAL DISCRIMINATION

COMMENTS ON COUNTRY REPORT CERD/C/NAM/12 OF SEPTEMBER 26 2007

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TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	5
II.	INTRODUCTION	6
III.	SUBSTANTIVE SUBMISSION	7
A.	GENERAL INFORMATION	7
1.	Article 1: Compliance	8
1.1.	Absence of Statistical Indicia	9
1.2.	Rule by Manifesto	11
1.3.	Threats to Judicial Independence	12
1.4.	Lack of Accountability	14
1.5.	Status of International Treaties	14
1.6.	Selective Incorporation of Treaties	15
1.7.	Silence on Poverty and Disparities Issues	17
B.	LEGALISLATIVE, JUDICIAL, ADMINISTRATIVE OR OTHER MEASURES	18
1.	Article 2(1): Prohibition and Eradication of Racial Discrimination	19
1.2.	Ineffective Affirmative Action Measures	19
1.3.	White Racism	21
1.4.	Black Reverse Racism	21
1.4.	Existence of Ethnically Based Political Parties	23
1.5.	Reluctance to Make Article 14 Declaration	24
1.7.	Dereliction of Treaty Obligation	25
2.	Article 2(2): Condemnation of Racial Discrimination	27
2.1.	Marginalization of San	28
2.2.	Permanent Application of Affirmative Action	31
2.3.	Propagation of Apartheid Ideology	32
2.4.	Arbitrary Policy of National Reconciliation	33
3.	Article 3: International Solidarity against Racism	35
3.1.	Warm Relations with Violators	35
3.2.	Pattern of Voting at UN	38
4.	Article 4: Prevention and Prohibition of Incitement	40
4.1.	Failure to Prevent and Prohibit Incitement	40
4.2.	Active Participation in Hate Expression	42
5.	Article 5: Equality before Law	45
5.1.	Illegitimate Distinctions, Limitations or Suspension	45
5.2.	Ovakwanyama Communal Farmers	45
5.3.	Banning of Afrikaans Language	47
5.4.	Kxoe San People	48
5.5.	Verbal Attacks on Sexual Minorities	49
6.	Article 5(a): Fair and Public Trial	51
6.1.	Composition of Judicial Service Commission	53
6.2.	Lack of Transparency of JSC Operations	53
6.3.	Prevalence of Undue Political Influence	54
6.4.	Torture and Cruel, Inhuman or Degrading Treatment	56
6.5.	Denial of Right to Speedy Trial	57

6.6. Violations of Presumption of Innocence Doctrine	63
6.7. Refusal to Provide Legal Aid	64
6.8. Denial of Right to Own Choosing Counsel	67
6.9. Procedurally Flawed Treason Trial	69
7. Article 5(b): Right to Security of Person	70
8. Article 5(c): Right to Political Activity	72
8.1. Assault on Freedom of Expression and Opinion	73
8.2. Rally for Democracy and Progress (RDP)	74
8.3. Congress of Democrats (CoD)	75
8.4. Caprivi National Democratic Party (CNDP)	76
8.5. Banning of UDP	76
8.6. Author Hereof	77
8.7. Control of Electoral Commission (ECN)	78
9. Article 5(d)(i): Other Civil and Political Rights	80
9.1. Violations of Refugees Rights	80
9.2. Violation of Non-Refoulement	83
10. Article 5(d)(iv): Right to Marriage	85
11. Article 5(d)(v): Right to Own Property	87
11.1. Alienation of Rehoboth Baster Property	88
11.2. Discriminatory Expropriation of White-owned Farms	89
12. Article 5(vi): Right to Inheritance	89
13. Article 5(vii): Right to Freedom of Conscience and Religion	90
14. Article 5(viii): Right to Freedom of Expression and Opinion	91
14.1. Rehoboth Rights Violations	92
15. Article 5(e): ESCR Rights	93
16. Article 6: Just and Adequate Reparation or Satisfaction	95
16.1. Rejection of TRC	96
16.2. Marginalization of Ombudsman Office	97
IV. OBSERVATIONS AND RECOMMENDATIONS	100
V. ABOUT AUTHOR HEREOF	101

I. EXECUTIVE SUMMARY

The principal purpose of this Shadow Report (“the Shadow Report” or “this Shadow Report”) is to give an alternative view about the status of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) (hereinafter “the Convention” or “ICERD”) in Namibia (hereinafter “the country” or “the State Party”) and thereby facilitate the understanding and effective consideration by the supervisory *Committee on the Elimination of Racial Discrimination* (CERD) (hereinafter “CERD” or “the Committee”) of the 8th to 12th Periodic Report of the State Party (i.e. CERD/NAM/12 dated July 17 2007 hereinafter “the present State Party Report” or “the State Party Report”) regarding the aforesaid status.

Substantial consideration is being had as to whether or not and or how the State Party has or has not complied with its obligations under the substantive provisions of the Convention. Special reference is being made as to whether or not all the domestic legislative, administrative and other measures, which the State Party has so far adopted, are compliant with the provisions of the Convention: that is to say whether or not such measures are effective and appropriate and whether they were adopted without delay as contemplated under Article 2 of the Convention.

Specifically, this Shadow Report examines whether or not and or to what extent the State Party has heeded the observations made by the CERD experts on August 13 1996¹ and whether or not or to what extent the State Party has complied with all the 8 Suggestions and Recommendations of CERD as contained in the latter’s Concluding Observations² of September 27 1996.

This Shadow Report prioritizes certain issues which denote non-compliance by the State Party with both the substantive and procedural provisions of the Convention. These are

¹Summary Record of the 1169th meeting: Namibia, Venezuela 06/11/96 (CERD/SR.1169 (Summary Record)) during the 49th Session

²Concluding Observations of the Committee on the Elimination of Racial Discrimination: Namibia, 27/09/96

legislative, judicial, administrative or other measures which the State Party has or has not taken to give effect to the provisions of especially Article 2, read with Article 5, of the Convention as well as Article 9(1) regarding the strictness of the procedural compliance by the State Party with its reporting obligations under the Convention.

Constant and conscious attention will be paid to “racial discrimination” as defined under Article 1 of the Convention. This Shadow Report seeks to demonstrate that the State Party is in serious material (i.e. substantive and procedural) breach of most of its obligations under the Convention. In backing up its argument herein, the Author of this Shadow Report relies on the facts and figures obtained from various sources including legal, opinion and other reports regarding the state of racial discrimination, racism, xenophobia and related intolerance in the State Party.

In the final analysis, this Shadow Report also contains suggestions and recommendations directed to both CERD and the State Party on the ways and means of effective compliance by the State Party with the provisions of the Convention and other treaties applicable in the State Party.

II. INTRODUCTION

1. The Author of this Shadow Report (vide Chapter V *infra*, for further particulars) (hereinafter “the Author hereof”) is a private national human rights monitoring and advocacy organization, with one head office in the capital city and six additional human rights monitoring and advocacy offices. Those offices are strategically located in the rural and remote areas of the country. This is where human rights abuses are prevalent. This is also where traditional customs and practices are more pronounced and where inequities and inequalities are more severe than in the urban areas. *Ipsso facto* the Author hereof claims to have first-hand and practical knowledge of the situation regarding racial discrimination as defined both under Article 1 of the Convention as well as racism, racial discrimination, xenophobia and related intolerance as envisaged in the *Declaration and Programme of Action* of the 2001

World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

2. This Shadow Report has been prepared in accordance with both the recommendations contained in the *Manual on Human Rights Reporting under Six Major International Human Rights Instruments*³ and the Proposed Harmonized Common Guidelines on Reporting to the International Human Rights Treaty Monitoring Bodies.⁴
3. The attention of CERD is also drawn to the various footnotes and other explanatory back-up sources and references informing this Shadow Report.

III. SUBSTANTIVE SUBMISSION

4. The thrust of this Shadow Report is to demonstrate that the State Party is substantively and procedurally in serious breach of its obligations under the Convention, when and if the following legislative, judicial, administrative and other measures or non-measures it has adopted or has not adopted were taken as a pointer:

A. GENERAL INFORMATION

5. The Author hereof has examined and, *ipso facto*, is fairly familiar with the contents of the State Party Report. Save when and where the contrary appears from this context, the Author hereof generally concurs with the averments contained in paragraphs 6 to 395 of the State Party Report.

³"The Reporting Process", *Manual on Human Rights Reporting under Six Major International Human Rights Instruments*, United Nations, New York, 1991, p.127-142

⁴United Nations documents HRI/MC/2005/3 of June 1 2005 and HRI/MC/2005/6 of June 8 2005

Article 1: Compliance

6. The Author hereof is of the opinion that, notwithstanding the provisions of Article 144 of the Namibian Constitution, the Convention is not self-executing *ex proprio vigore*. Hence, the State Party is legally bound to incorporate the provisions of the Convention into its domestic legal order by taking effective legislative, judicial, administrative or other measures to give effect to the Convention. The Author hereof notes with concern that paragraphs 6 to 16 of the State Party Report fail to briefly describe, as required, the policy of prohibiting and eradicating racial discrimination in all its forms and manifestations as well as the general legal framework within which racial discrimination, as defined in Article 1(1) of the Convention, is prohibited and eliminated.
7. Similarly, contrary to the guidelines for reporting, the State Party Report fails to briefly inform CERD about the policies and legal framework within which the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the civil, cultural, economic, environmental, political and social or any other field of public life are promoted and protected in the State Party.
8. Equally, the State Party has failed to indicate, as required, whether or not the provisions of the Convention can be invoked before, and directly enforced by, the Courts of the State Party and or whether or not such provisions have first to be incorporated by way of the enactment of effective domestic laws seeing that the State Party is a dualist country.
9. The Author hereof welcomes the fact that, in terms of paragraphs 9 through 16, the State Party attempts to provide CERD with relevant information, as required, under General Recommendation IV on the demographic make up of the population of the State Party. However, the State Party has demonstrably failed to briefly describe the effective legislative, judicial, administrative or other measures it has adopted to give

effect to the provisions of especially Article 5--the non-derogable principle of equality and non-discrimination--of the Convention. In particular, this failure is exposed by the chronic presence of gross inequalities and inequities as well as the seemingly unbridgeable disparities in the income distribution among the population of the State Party. *Inter alia* a high Gini-coefficient of between 0.6⁵ and 0.7⁶ and a low human development index ranking of 125⁷ are *ipso facto* proof of the aforesaid failure.

10. Moreover, this impermissible socio-economic scheme of things goes straight to the heart of the universal principle of equality before the law and non-discrimination as consecrated in Articles 10 and 5 of the Namibian Constitution and the Convention, respectively. It also runs counter to the *raison d'être* of the Republic of Namibia, which is to secure to all its citizens justice (including natural and socio-economic justice), liberty, equality and fraternity.⁸

Absence of Statistical Indicia

11. The Author hereof is also concerned that the information that the State Party has provided CERD with on the demographic composition of the population of the State Party is stone silent about the economic, social and demographic indicators, including vital statistics illustrating the conditions of the communities referred to in paragraphs 9 to 16 of the State Party Report. There is also no information in the State Party Report on the conditions of special minority and vulnerable groups, such as sexual minorities, migrant workers, refugees and internally displaced persons. As a matter of fact, the Author hereof expresses concern that the State Party has apparently not yet found it imperative to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁵"Wealth distribution remains skewed", *New Era online*, Tuesday, February 19 2008

⁶"Introduction", *Minorities in Independent Namibia*, Minority Rights Group International, 2002, p.5

⁷"HIV-AIDS weighs down on development index", *New Era online*, Friday, November 30 2007

⁸Preambular paragraph 5(5) of the Namibian Constitution, which reads: "Whereas we the people of Namibia [...] have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity"

12. While generally concurring with the descriptive statements on the *de jure* constitutional, political and legal structures as per paragraphs 17 to 27 of the State Party Report, the Author hereof is also concerned by the failure of the State Party Report to explain the subtle threats to the *de facto* separation of powers between the legislative, executive and judicial organs of the State.
13. Hence, with specific reference to paragraphs 19, 25 and 27 of the State Party Report, the Author hereof wishes to make the following observations:
 - 13.1. The *de facto* separation of powers between the Legislative and Executive organs of the State is non-existent in the State Party. Article 32(2) of the Namibian Constitution stipulates that the Executive Branch is responsible to the Legislative Branch (i.e. Parliament), while Article 41 of the said Constitution on Ministerial Accountability provides that all Cabinet Ministers are accountable to the President and to Parliament. Furthermore, in terms of Article 44 of the said Constitution, the legislative power of the State is vested in Parliament, while according to Article 45, read with Article 74(4) (b), of the Constitution, Members of Parliament “shall be representative of all the people and shall, in the performance of their duties, be guided by the objectives of this Constitution, by the public interest and by their conscience”.
 - 13.2. However, in terms of Article 35 of the Constitution, the Executive Branch consists of the President, the Prime Minister and such other Ministers as the President may appoint from Members of Parliament. This then means that *de facto*, Members of Parliament and Cabinet Ministers are in most cases one and the same. Moreover, in terms of Article 48, read with Article 70(2), of the Constitution, a Member of Parliament, with immediate effect, vacates his or her seat *inter alia* if the political party which nominated him or her to Parliament disqualifies him or her as a member of such party.

13.3. It must, furthermore, be pointed out that the present Parliament (i.e. from 2005 to 2010) consists of members, many of who have been single-handedly appointed by former President Sam Nujoma.⁹ Nujoma is referred to in paragraph 21 of the State Party Report. Much of this appointment took place in October 2004 shortly before the general and presidential elections and shortly before Nujoma's successor and incumbent President His Excellency Lucas Hifikepunye Pohamba took office.¹⁰ As a result, the current Parliament is predominantly made up of Cabinet Ministers and praise singers¹¹ as well as die-hard and conservative supporters of former President Nujoma.¹²

Rule by Party Manifesto

13.4. The Author hereof also wishes to point out in reference to paragraph 17 and 18 of the State Party Report, that although *de jure* the Government of the State Party was formed in terms of the Namibian Constitution, which was unanimously adopted by the Constituent Assembly on February 9 1990, in practice the State Party is governed in accordance with the 2004 Election Manifesto of the incumbent Swapo Party.¹³

⁹"At the President's pleasure", *The Namibian online*, Monday, October 4 2004; "Crunch time for Swapo", *The Namibian online*, Friday, October 1 2004; "Nujoma pulls 'bogus' rabbit out of the hat", *The Namibian online*, Monday, October 4 2004; "Changes in Swapo 'a defining moment'", *The Namibian online*, Tuesday, October 5 2004

¹⁰There is widespread belief in the State Party that incumbent President Lucas Pohamba is not his own man and that he is a puppet of former President Sam Nujoma. However, addressing a burial ceremony at Eenhana on August 26 2007 President Pohamba denied being a puppet of Nujoma saying: "I know there are some people who are saying that I am a puppet of Nujoma. I want to tell you that I was not, am not and will never be a puppet of anybody" (see also "President warns of 'havoc' as heroes laid to rest at Eenhana", *The Namibian online*, Tuesday, August 28 2007, <http://www.namibian.com.na/>)

¹¹"Ulenga sick of Swapo 'praise songs'", *The Namibian online*, Monday, April 10 2006

¹²"At the President's pleasure", *The Namibian online*, Monday, October 4 2004; "Crunch time for Swapo", *The Namibian online*, Friday, October 1 2004; "Nujoma pulls 'bogus' rabbit out of the hat", *The Namibian online*, Monday, October 4 2004; "Changes in Swapo 'a defining moment'", *The Namibian online*, Tuesday, October 5 2004

¹³"Senior Justice employees urged to master the Swapo Manifesto", *The Namibian online*, Monday, January 30 2006; "Is Swapo Manifesto The Only Way?", *The Namibian online*, Tuesday, July 19 2005; "Swapo loyalty 'crucial for to posts'", *The Namibian online*, Wednesday, September 10 2003

Threats to Judicial Independence

13.5. As for the judiciary and with specific reference to paragraph 25 of the State Party Report, the Author hereof wishes to note that in terms of preambular paragraph 3 and Articles 12, 78(2) and 78(3), read with Articles 82, 83, 85, 86, 87, 88 and 89, of the Namibian Constitution, the judiciary should be free and independent and be separated from the Legislative and Executive Organs of the State Party. However, the Author hereof notes with great concern the fact that, in practice, there are very serious subtle threats to judicial independence in the State Party.¹⁴ These threats, among other things, range from the actual appointment of Judges in the High and Supreme Courts to Magistrates and judicial officers at the traditional authority levels; the composition of the Judicial Service Commission;¹⁵ the absence of transparency and rules of procedure regarding the manner Judges of the High and Supreme Courts are appointed;¹⁶ the practice of appointing acting¹⁷ judges; and the politically charged manner and fashion in which the current¹⁸ Prosecutor-General has been appointed as well as the systematic erosion¹⁹ of the institutional independence of the Office of the Ombudsman.

13.6. With regard to paragraph 27 of the State Party Report, the Author hereof also wishes to point out that the Council of Traditional Leaders (CTL) is also not institutionally

¹⁴“Concern over Judicial Independence & Integrity”, *Press Release*, NSHR, July 22 2004

¹⁵The Judicial Service Commission is illegally constituted and is dominated by members who have been directly appointed by either the President and or the Minister of Justice. Please also refer to “Composition of Judicial Service Commission” in the subsequent sections of this Shadow Report

¹⁶The Author hereof is strongly of the opinion that the appointment of both the current Judge President of the High Court of Namibia and Chief Justice of Namibia was a politically motivated exercise based on the non-existent “policy of national reconciliation” and the ill-conceived policy of affirmative action. Accordingly, such appointments have been carried out unlawfully in accordance with the State Party’s nonetheless non-existent law on affirmative action to make provisions for such an appointment. Moreover, the Judiciary and or the Judicial Service Commission are not and cannot be defined as “employers” nor can judges be defined as “employees” as contemplated in either the Labor Act 1992 (Act no 2 of 1992); the Labor Act 2007 (Act no 11 of 2007) and in the Affirmative Action (Employment) Act 1998 (Act 29 of 1998)

¹⁷“Concern over Judicial Independence & Integrity”, *Press Release*, NSHR, July 22 2004

¹⁸“Concern over Judicial Independence & Integrity”, *Press Release*, NSHR, July 22 2004

¹⁹“GRN Undermines Office of Ombudsman: Right to a Fair Public Trial”, *Namibia Human Rights Report 2004*, August 2004

independent of the Executive Branch. In a one-dominant²⁰ party State, CTL is dominated by traditional leaders that are perceived as subservient²¹ to especially former President Dr. Sam Nujoma, while most of the traditional leaders that did not politically support the ruling Swapo Party have not been recognized by the State Party.²² After seven (7) years of attempting to exhaust domestic remedies had failed, more than 40 unrecognized traditional leaders, all of them members of minority national groups, have now threatened to petition the United Nations and international human rights organizations. Addressing a media conference in Windhoek on March 11 2008, now late Herero Chief John Tjikuua said:

*“How long are they considering now? It is seven years! This is violation of the rights of communities. We are marginalized by our own Government, we have suffered enough under the German and South African governments [...] We have explored all avenues of Government and are now left with one option only and that is to appeal to the United Nations and international human rights organizations”.*²³

14. Similarly, the basic rights of certain traditional communities--such as the Rehoboth Basters²⁴ and the Kwe²⁵ San (i.e. Bushman) community of Western Caprivi as well as

²⁰“State capture: The One Dominant Party System”, Namibia: Disputed Elections 2004: Monitoring National & Presidential Elections, December 15 2004, p.42-50

²¹ Most of the recognized traditional leaders have publicly called for a Fourth Term of office for Nujoma.

²²“Unrecognized traditional authorities ‘a major headache for Government””, *The Namibian online*, Monday, September 27 2004; “Chiefs threaten to challenge legality of some land boards”, *The Namibian online*, Wednesday, July 12 2003; “Herero chief wants federal system”, *The Namibian online*, Friday, August 15 2003 and “Freedom from Discrimination: Non-recognition of Certain Traditional Leaders” Namibia: Human Rights Report 2003, August 11 2003, p. 76

²³“Herero chiefs launch international appeal”, *The Namibian online*, Wednesday, March 12 2008

²⁴This distinct racial minority group also known as mixed race group arrived in Namibia between 1868 and 1870 following systematic abuses of human rights and other oppressive practices in the Cape Colony of South Africa. They bought land which they then called Rehoboth from another distinct traditional group (i.e. the Nama) and on which to enjoy, practice, profess, maintain and promote their culture, language, customs, tradition or religion as contemplated in terms of Articles 19 and 66, read with Articles 10, 22, 24(3) and 146(2)(b), of the Namibian Constitution. However, the State Party denies the Rehoboth Basters the right to have their own traditional authority under the pretext that the Baster people do not own any lands in the State Party and that ‘a chief without land is not a chief.

²⁵The State Party denies the Kwe San community of Western Caprivi the right to form and maintain their traditional authority in basically the same fashion as the Rehoboth Basters

the Ovazemba²⁶ people of Ruacana, to mention but a few--to have their own traditional authorities, *inter alia*, in order to promote and practice their cultures, customs and traditions are denied by the State Party.

Lack of Accountability

15. The Author hereof points out that several historical, social, cultural and political factors have made it possible for the existence of a *de facto* situation in the State Party where the majority, as the case may be, rules without the consent of the minority, as the case may be, and where the ruling Swapo Party only cites the provisions of the Namibian Constitution when and where this suits them. This state of affairs is complicated by, *inter alia*, the absence of the *de facto* separation of powers, the capture and control by the ruling Swapo Party of Parliament, the mechanical, token, perfunctory or haphazard implementation of the Namibian Constitution and a culture of entitlement plus lack accountability on the part of especially the Executive Branch as well as by the attitude, on the part of the ruling Swapo Party, that 'if you are not with us, you are against us'.

Unclear Status of International Law

16. It is also regrettable to note that the State Party Report fails to unambiguously indicate whether or not aggrieved persons can directly invoke the provisions of the Convention before the Courts. Due to the provisions of Article 1(6), read with Articles 30 and 32(1), of the Namibian Constitution, which says that the said Constitution is the supreme law of the State Party, it is not clear whether or not the provisions of the Convention can directly be invoked before the Courts in the State Party. This is in spite of the provisions of Article 144 of the said Constitution, which stipulates:

²⁶This situation affecting the Ovazemba traditional community is practically the same as in the case of the Rehoboth Basters and the Kwe San people of Western Caprivi

“Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall be part of the law of Namibia”.

17. State Party spokespersons want to make one believe that via Article 144 of the said Constitution, international law is automatically and directly invokeable before, and enforceable by, the Courts.
18. However, it appears from the above quote that the general rules of public international law are only part of the law of Namibia in the absence of the constitutional and or statutory provisions overriding them. Since, in terms of Article 1(6) of the aforesaid Constitution, the said Constitution is hierarchically superior to any other law, it appears that the provisions of the Convention and those of many other similar international human rights instruments applicable in the State Party should first be incorporated in order to make them invokeable before, and directly enforceable by, the Courts.

Selective Incorporation of International Treaties

19. In 2003 the State Party incorporated the four Geneva Conventions of 1949 and the 1977 Protocols Additional thereto into domestic law. This seems to suggest that many international treaties should first be incorporated into domestic law in order to make them invokeable by the Courts of the State Party. In the case of the Geneva Conventions of 1949 and the 1977 Protocols Additional thereto into domestic law, the incorporation instrument reads:

“to give effect to certain Conventions done at Geneva on 12 August 1939 and to certain Protocols additional to those Conventions done at Geneva on 10 June 1977; and to provide for matters incidental thereto”.²⁷

20. After all, the term “to take effective administrative, legislative, judicial and other measures to give effect to the provisions of the Convention” *ipso facto* suggests strongly that ICERD, like the Geneva Conventions of 1949, is not a self-executing treaty *ex proprio vigore*. Hence, domestication is the rule rather than the exception.
21. Therefore, the Author hereof fully concurs with the sentiments expressed by University of Namibia (UNAM) Faculty of Law Lecturer and Researcher Francois-Xavier Bangamwabo who wrote on the domestication of international and regional human rights instruments in the State Party’s legal framework. Bangamwabo, *inter alia* observed:

“As regards the domestication and implementation of the Rome Statute by the Namibian government, the author of this research is not aware of any legal or administrative measures put in place by Namibia with its obligations as spelt out in the said Statute”.²⁸

22. The above quote therefore also seems to suggest strongly that, with the exception of perhaps the two International Covenants on Human Rights, which might be self-executing due to the fact that they are directly incorporated into Chapters 3 and 11 of the Namibian Constitution, any other international human rights treaties might first be incorporated before its provisions can be directly invokeable before the Courts of the State Party.

²⁷“Government Notice no. 3109”, Government Gazette of the Republic of Namibia, December 18 2003,p.2

²⁸“The implementation of international and regional human rights instruments in the Namibian legal framework”, Human Rights and the Rule of Law in Namibia, Konrad- Adenauer-Stiftung, MacMillan Namibia, 2008, p.165-186

23. It ought to be recalled that during its consideration of the State Party Report under the Convention against Torture (CAT) on May 6 1997, the UN Committee against Torture (CAT) has similarly expressed concerned that the State Party has not integrated, as required by articles 2 (1) and 4 (1) of the Convention and, and has *ipso jure* recommended that the State Party. Hence, CAT recommended that the State Party should enact a law defining the crime of torture in terms of Article 1 of the said Convention and should legally integrate this definition into the Namibian substantive and procedural criminal law system.²⁹

Silence on Poverty and Disparities Issues

24. While appreciating the fact that an attempt has been made in paragraphs 9 to 16 of the present State Party Report to describe the main ethnic and demographic characteristics of the population in the State Party, the Author expresses concern that the State Party Report is stone silent on the proportion of the population living below the national poverty line, the literacy rates, mortality³⁰ rates, and employment and unemployment rates as well as gender equality measure per ethnic and or racial group in the State Party.
25. The State Party Report is also silent on the cultural, economic and social characteristics of the State Party and or on the deplorable educational and health facilities as well as access thereto by all racial, ethnic or cultural groups. Moreover, it must be pointed out that during the consideration on August 13 1996 of the State Party's 4th to 7th State Party Reports, CERD expert Luis Valencia Rodriguez correctly noted that major disparities persisted in the State Party in the economic and social areas and that 5 percent of the population earned over 70 percent of the national income, whereas 75 percent of the very poor earned only 7 percent. Furthermore, Mr.

²⁹paragraphs 235 and 241 (CAT/C/SR.293 and 294/Add.1) on May 6 1997 "Concluding observations of the Committee against Torture: Namibia" 06/05/97. A/52/44,paras.227-252. (Concluding Observations/Comments)

³⁰The maternal and ipso facto the child mortalities rates in the State Party are on the increase as reported in UNICEF's State of the World Children 2008 plus its Namibian Supplement released on January 28 2008. See also "Maternal death rate shoots up" , New Era online, January 29 2008

Rodriguez observed that the socio-economic situation in the State Party was “a potential source of serious political problems for the country” and wanted the State Party to explain to CERD how these problems were being handled.³¹

26. In terms of the 1988 State Parties recommendations, which CERD has also endorsed, it was agreed that, as a general practice, State Parties shall submit periodic comprehensive reports on each intervening occasion when reports were due as per the provisions of Article 9(1) of the Convention. Hence, the State Party is also deemed by the Author hereof to be in grave breach of its procedural obligations under the Convention for having failed to observe the strictly binding provisions of Article 9(1) to the effect that periodic reports must be submitted at two-year intervals and upon request by CERD.³²
27. Specifically, the Author hereof notes with concern that the State Party has failed to submit the 8th to 12th State Party Reports on December 11 1997 and the 13th to 16th State Party Reports by the year 2006.³³

B. LEGISLATIVE, JUDICIAL, ADMINISTRATIVE OR OTHER MEASURES

28. Under the Convention the State Party is obliged to take effective legislative, judicial, administrative or other measures to give effect to the following provisions of the Convention:

³¹paragraph 25 of the “Summary Record of the 1169th meeting: Namibia and Venezuela 06/11/96 (CERD/SR.1169 (Summary Record)) during the 49th Session

³²“Periodic Reports: The Key Issues”, Manual on Human Rights Reporting under Six Major International Human Rights Instruments, United Nations, New York, 1991, p.141-142

³³The Author hereof also notes with concern that CERD had to hold its 2006 session without the State Party Report and that CERD had to write a letter to then Namibia’s UN Ambassador Martin Andjaba in which CERD *inter alia* advised the State Party to seek outside help in order to able to comply with its ICERD obligations.

Article 2(1): Prohibition and Eradication of Racial Discrimination

29. In terms of Article 2(1), read with Articles 5 and 9(1), of the Convention, the State Party is required to inform CERD on the effective legislative, judicial, administrative and other measures it has undertaken without delay and by all appropriate means to give effect to its undertaking not to engage in acts or practices of racial discrimination against individuals, groups or institutions. In addition, the State Party is expected to ensure that all public authorities and public institutions at the national, regional and local levels act in conformity with the provisions of Article 2(1) of the Convention. The State Party is also under the obligation, in terms of Article 2(1) of the Convention, to produce information on the ways and means by which the State Party is complying with its obligation of condemning racial discrimination, of pursuing policies of prohibiting and eradicating all forms of racial discrimination, racism, xenophobia and related intolerance, and of promoting interracial understanding.

Ineffective Affirmative Measures

30. Nonetheless, the Author hereof is of the opinion that, save merely citing the constitutional principles (i.e. Article 23(1) of the Constitution) and the ineffective Racial Discrimination Prohibition Act 1991 (Act 26 of 1991) as amended by the Racial Discrimination Prohibition Amendment Act 1998 (Act of 26 of 1998), in paragraphs 28 to 45 the State Party Report does not cover any other effective measures the State Party has taken in the legislative, judicial, administrative or other measures domain with the objective of abiding by its obligations as contained in Article 2(1) of the Convention. This includes reviewing, amending, rescinding or nullifying any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

31. The Author hereof also expresses serious concern over the fact that neither the principal act, the Racial Discrimination Prohibition Act 1991 (Act 26 of 1991) nor its amendment, the Racial Discrimination Prohibition Amendment Act 1998 (Act of 26 of 1998) incorporate the definition of “racial discrimination” as contained and envisaged in Article 1(1) of the Convention. As a matter of fact, none of the purported Acts of Parliament enacted by the State Party makes reference to ICERD.
32. In addition, the presence of so many out-of-date statutes from the previous apartheid dispensation is *ipso facto* proof that the State Party has failed to comply with its obligations under Article 2(1) of the Convention.
33. Through its Concluding Observations of September 27 1996, regarding the previous State Party Report, CERD noted that “the State Party’s efforts towards full enforcement of the principles and provisions enshrined in the Convention have been seriously hampered by continuing resort to a number of out-of-date [...] discriminatory laws of the former Government”.³⁴ CERD expressed concern “at the subsistence of out-of-date and discriminatory laws and the persistence of practices inherited from the apartheid regime”.³⁵
34. The Committee also recommended that the State Party take urgent measures to eliminate all remaining discriminatory laws and practices and encouraged the State Party “to strengthen measures taken to foster a culture that effectively protects human rights by disseminating as widely as possible information on the international human rights instruments to which it is party and on the outcome of the consideration of the present report, among the authorities responsible for the enforcement of the Convention's provisions, as well as among the general public”.³⁶

³⁴paragraph 6 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination: Namibia of September 27 1996

³⁵paragraph 11 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination: Namibia of September 27 1996

³⁶paragraph 18 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination: Namibia of September 27 1996

White Racism

35. Referring to paragraphs 28 to 45 of the State Party Report, the Author hereof respectfully submits that the State Party Report fails to provide CERD with information on the effective, if any, measures which the State Party has taken to give effect to its undertaking to prohibit and, by all appropriate means, including legislation, to bring an end to racism, racial discrimination, xenophobia and related intolerance coming from any individuals, groups or organizations.
36. For example, subtle practice of racial discrimination, racism, sexism and general discrimination targeting non-whites, women and persons with disability especially in the white-dominated private sector remained prevalent in the State Party.³⁷ The Author hereof continues to be preoccupied with the high incidence of racism and racial discrimination, which is prevalent in especially the white-dominated private sector in the country. On April 29 2008 a racist white employer had to dismiss his black employees after they demanded work uniforms. The employer reportedly told his employees that:

*“You don’t need uniforms, you’re black. God gave you uniforms already”*³⁸

Black Discrimination and Reverse Racism

37. There is also widespread perception among members of minority ethnic groups that the State Party is using the provisions of Article 23(2) of the Namibian Constitution to “justify” discrimination in reverse³⁹ against whites and members of other ethnic minority groups in the State Party in respect of access to the public service. The use of ill-defined terms, such as “designated groups”, “black” and “previously disadvantaged groups” in the Affirmative Action (Employment) Act 1998 (Act 29 of

³⁷“Racism: Divided we fall” and “Response from Engen”, *Insight Namibia Magazine*, June 2008, p.9-10

³⁸“Abusive employer fires workers”, *Namibian Sun*, July 10 2008, p.4

³⁹“Discrimination in reverse”, J.W.F Pretorius, Chairman of Monitor Action Group, June 24 2008

1998), without any definition, are interpreted by the State Party to mean only those Oshiwambo-speaking people who are politically affiliated to the ruling Swapo Party.

38. For example, on January 17 2003, Evangelical Lutheran Church in the Republic of Namibia (ELCRN) Bishop Zephania Kameeta spoke out strongly against corruption and tribalism, which he says are making a mockery of the ideals of "our heroes".⁴⁰ Leaders from various ethnic minority groups, such as ethnic Herero, Nama and Kavango groups, have equally and openly accused the State Party of socio-economic marginalization and exclusion.
39. On August 6 2003, ethnic Herero Paramount Chief Kuaima Riruako accused the State Party of marginalizing minority groups in the country and demanded federalism.⁴¹ Paramount Chief Riruako said his people's desire to have their own national state should not be likened to "1998 Caprivi secessionism", but as means to give minority groups an equal opportunity to participate in the way they are ruled. Riruako also charged that the current unitary Namibian state had failed over the last 13 years of independence because it only benefits the "majority tribe" which controls all State resources. Riruako further charged that, for one to get a job in the public sector, the person must first be Oshiwambo-speaking and secondly must be a Swapo Party member.⁴²
40. Also, on July 25 2006, a group of Nama-speaking residents staged a peaceful demonstration to protest against high unemployment and poverty in the Karas Region. They charged that residents of the said region "have become the poorest, despite the abundant natural resources the region is bestowed with". The group also accused the State Party of political corruption and discrimination saying the Nama-speaking people was overlooked in the public service, while only Oshiwambo-speaking people secured positions in regional government structures. Furthermore,

⁴⁰"Graft, tribalism betray ideals of the struggle – Kameeta", *The Namibian online*, Monday, January 20 2003

⁴¹"Herero chief wants federal system", *The Namibian online*, Friday, August 15 2003

⁴²"Herero Leaders Accuse GRN", *Namibian Human Rights Report 2004*, August 2004, p.91

the protesters also expressed disappointment about the lack of tertiary education institutions in the Karas Region. They argued that most of their children hailed from poor backgrounds and could not afford to travel elsewhere for studies. They also charged that development projects had come to nothing with most companies closing their doors before long.⁴³

41. Furthermore, in a strongly-worded letter addressed to then Namibian President Sam Nujoma in mid-January 2003, five (5) ethnic Kavango traditional leaders demanded a quota of jobs in Government for their subjects equal to the region's "overwhelming" support for Swapo Party.⁴⁴

Existence of Ethnically Based Political Parties

42. Nor does the State Party Report indicate the effective measures it has taken to give effect to its obligation under Article 2 (1) of the Convention to encourage the formation of integrationist multi-racial organizations and movements and other means of removing barriers between racial groups as well as to discourage anything which tends to strengthen racial divisions, including tribal and ethnic divisions.
43. The attention of CERD is drawn to the fact that most of the political parties, including the ruling Swapo Party, comprise members of certain ethnic groups. For example, the Swapo Party predominantly comprises Oshiwambo-speaking people, while the Opposition United Democratic Front (UDF), the National Unity Democratic Organization (NUDO), the Monitor Action Group (MAG) and the newly formed Democratic Party of Namibia (DPN)⁴⁵ also comprises predominantly members of the

⁴³"Nama-speaking residents at Keetmanshoop protest", *The Namibian online*, Thursday, July 27 2006 and "Namas Accuse GoN of Discrimination", Namibia Human Rights Report 2006, October 11 2006, p.181-182

⁴⁴"Kavango leaders complain of being left out by Govt", *The Namibian online*, Thursday, February 13 2003

⁴⁵A new political party known as the Democratic Party of Namibia (DPN) whose leadership comprises entirely Nama-speaking people was formed in the South of the country. Its founders charged that the South has received very little political attention over the past 18 years of Namibian independence. DPN interim Secretary General Adam Isaaks said that the South is in fact worse off than before Independence and "that is why we have decided to register the party". In particular Isaaks launched a broadside attack against the ruling Swapo Party and its Government saying they have isolated people from the South.

Damara, Herero and Afrikaner as well as Nama communities, respectively. These are also not the opinions of the Author hereof alone. UNAM Faculty of Law Researcher Salome M Chomba also sees it that way. In her research report on the status of ICERD titled *The Universality of Human Rights: Challenges for Namibia*, Ms. Chomba also makes reference to *inter alia* “an undertone of unspoken segregation between blacks and whites”.⁴⁶

44. In light of the above, it is very difficult to see whether when enacting relevant legislation, the State Party consciously has the intention to give effect to the provisions of the international human rights instruments which it had ratified. It is therefore submitted that the State Party has done very little, if any, to adopt new legislation to criminalize racism, racial discrimination, xenophobia and related intolerance, as well as to review, amend, repeal, rescind and nullify paraphernalia of out-of-date discriminatory laws from the former apartheid regime. This is *ipso facto* proof of the fact that the State Party has deliberately and or recklessly failed in its primary obligation of employing all appropriate means and without delay to adopt and put into effect a comprehensive national policy of eliminating racism, racial discrimination, xenophobia and related intolerance in all their forms or manifestations.

Reluctance to Make Article 14 Declaration

45. Moreover, the aforementioned failures are commensurate with the State Party’s reluctance to make a declaration under Article 14 of the Convention that it recognizes the competence of CERD to receive and consider petitions from individuals or groups within the jurisdiction of the State Party claiming to be victims of violations by the State Party of any of the rights set forth in this Convention. As a matter of fact, the situations described the preceding paragraphs violate the right of aggrieved persons to

⁴⁶“Convention on the Elimination of All Forms of Racial Discrimination: The Universality of Human Rights: Challenges for Namibia”, *Human Rights and the Rule of Law in Namibia*, Konrad-Adenauer-Stiftung, Macmillan Namibia, 2008, p.189

effective remedies both domestically and internationally and this goes straight to heart of the purposes of Article 6 of the Convention.

46. The Author hereof welcomes the admission by the State Party at the beginning of paragraph 31 that “Section 18 [of the Racial Discrimination Prohibition Act 1991 (Act 26 of 1991), as amended by the Racial Discrimination Prohibition Amendment Act 1998 (Act 26 of 1998)] has not been repealed or amended and is still applicable in its original form”. The State Party also admitted that no trial could be instituted without the written authority from the Prosecutor-General. Hence, then, a *nolle prosequi* decision by the Prosecutor-General has, in practical terms, also the effect of perpetuating racial discrimination.

Dereliction of Treaty Obligations

47. It must, moreover, be emphatically pointed out that the duty to take effective legislative, judicial, administrative or other measures to give effect to the provisions of the Convention rests with the State Party and not with individual private citizens. Hence, the argument by the State Party towards the end of paragraph 31 that Section 18 of the Racial Discrimination Prohibition Act 1991 (Act 26 of 1991), as amended, “therefore in no way whatsoever limits the rights of complainants who lay complaints and request criminal prosecutions to be initiated under the Act” is null and void *ab initio*. It implies that the Prosecutor-General is at liberty to change his or her mind and grant the request of each and every complainant who wished to initiate private prosecution. Apparently, this is so even if he or she is of the opinion that there is no case on which a reasonable Court will convict the alleged perpetrator.
48. Furthermore, the argument by the State Party also in paragraph 31 that “any person who has a substantial and peculiar interest in the issue [...] may institute a private prosecution” does not hold water and is *ipso facto* specious. The State Party can hardly abdicate its duty to private citizens and or other interest parties. Moreover, in a

country where poverty is said to be as high as 75 percent⁴⁷ of a population of between 1.8 million and 2 million people and where gross income disparities are said to be among the world's severest,⁴⁸ it would be inconsequential to expect poor people, such as San or Bushmen people, to have the necessary resources to mount a private prosecution against anyone.

49. The Author hereof therefore totally disagrees with the conclusions contained in paragraph 31 of the State Party Report that:

“Section 18 of the Racial Discrimination Prohibition Act, 1991 therefore in no way whatsoever limits the rights of complainants who lay complaints and request criminal prosecutions, to be initiated under the act”.

50. *Ipsa facto* the Author hereof concurs fully with the opinions expressed on this subject by UNAM Faculty of Law Researcher Ms. Salome Chomba who observed that:

“In its concluding remarks and observations on the combined report handed in by Namibia, [CERD] were of the opinion that [Section 18] places a severe and unusual obstacle in the way of persons wishing to institute criminal proceedings. This went against the very issue that [CERD] was trying to address in terms of effective and adequate remedies to aggrieved persons. Taking into account the number of cases that the Prosecutor-General's office received for prosecution, it would be impossible to have a matter set on the roll if only the Prosecutor-General in person could allow for prosecution to take place. [CERD] concluded that, if section 18 were deleted and a few changes were made to the [Racial Discrimination Prohibition Act 1991] (Act

⁴⁷ “Poverty”, Namibia Human Rights Report 2005, August 10 2005, p.49-50

⁴⁸ “Gross income disparities”, Namibia Human Rights Report 2005, August 10 2005, p.49-50

*26 of 1991)], then this statute would be an effective remedy for all aggrieved persons and it would comply with the Convention”.*⁴⁹

51. Nor does the Author hereof agree with the views contained in paragraphs 32 and 152 of the State Party Report in which an attempt is being made to blame the “erosion” of effectiveness of the existing legal remedies in the State Party on “a series of decisions in the High and Supreme Courts which tested the constitutionality of the 1991 Act against other provisions of the Constitution, especially those which guaranteed free speech” and on “the derogation from the non-discrimination prohibition” which “is subject to satisfying the test of being a reasonable restriction as interpreted in numerous judicial decisions of the High and Supreme Courts”.⁵⁰
52. In terms of Article 25(1), read with Articles 5, 18, 21(2) and 22, of the Namibian Constitution, administrative and legislative bodies and or administrative and legislative officials are prohibited from making any law or taking any action “which abolishes or abridges the fundamental rights and freedoms conferred [by the Bill of Rights], [because] any law or action in contravention thereof shall to the extent of the contravention be invalid [...]” Hence, in the first place, the State Party’s legislature should not have adopted legislation and or it should not have retained Sections 18 and 11 of the said Act. It should have reviewed, amended, rescinded or nullified these offensive provisions in the Racial Discrimination Prohibition Amendment Act 1998 (Act 26 of 1998) as directed⁵¹ by the aforementioned Courts.

Article 2(2): Condemnation of Racial Discrimination

53. In terms of Articles 1(4) and 2(2) of the Convention, the State Party is under the obligation to inform CERD on the special and concrete temporary measures it has

⁴⁹“The universality of human rights: Challenges for Namibia”, Human Rights and Rule of Law in Namibia, Konrad-Adenauer-Stiftung and the Authors, Macmillan Namibia, 2008, p.192

⁵⁰ paragraphs 32 and 152 of document CERD/NAM/12

⁵¹ paragraph 36 of CERD/NAM/12

adopted in order to promote and or fulfill racial equality among the various groups within the State Party's population. In terms of the reporting requirements under Article 9 of the Convention, the attention of the State Party reporting should be focused on the socio-economic and political situation of such groups. This is so in order to ensure that the development of such groups in the social, economic and cultural arenas takes place on an equal footing with that of the general population.

Marginalization of San

54. Specific reference is being had to paragraphs 62 through 144 as well as paragraphs 162 to 165 and 284 to 289 of the State Party Report where it is claimed that the "Government of the Republic has over the years pursued policies and implemented various programmes for the specific improvement of the living standards of persons from marginalized communities, as part of the constitutionally sanctioned measures to redress past socio-economic imbalances in the Namibian society".⁵² At paragraphs 62 and 66 of the State Party Report, the State Party indicates that it was providing CERD with "accurate" information and "an overview" on the "enjoyment of socio-economic rights affecting marginalized communities, particularly the San".
55. While the Author hereof strongly commends the albeit belated initiative taken by Deputy Prime Minister Dr. Libertine Amathila towards addressing the pressing and urgent needs of especially the San (i.e. Bushman) indigenous minority communities, the Author hereof also wishes to draw the attention of CERD to the *de facto* situation regarding the San and other marginalized groups in the State Party.
56. It is not at all true as claimed in paragraph 28 of the State Party Report that the State Party has "over the years pursued policies and implemented various programmes for the specific improvement of the living standards of persons from marginalized communities".

⁵² paragraph 28, U.N. document CERD/C/NAM12

57. Firstly, although concurring with the State Party Report at paragraph 75 that the 1991 National Conference on Land Reform and Land Question resolved to implement the land rights of especially the San communities, which need special protection, no legislative, judicial, administrative or other measures have so far been taken in order to give effect to the resolutions of the said Conference.
58. The statements contained at paragraph 110 of the State Party Report, which, by the way, contradict the claims made earlier at paragraph 63, that the San Development Programme was “introduced” in 2005 by the aforementioned Dr. Amathila, is *ipso facto* smoking-gun proof that, indeed, no legislative, judicial, administrative or other measures have been taken in order to give effect to the resolutions of the aforesaid Conference prior to the beginning of 2005. Moreover, as stated in paragraph 114 of the State Party Report, the San Development Programme only became a reality in November 2005, following Cabinet Decision no. 25/29.11.05/001.
59. Secondly, the aforementioned Dr. Amathila claimed on August 30 2005 that she was “shocked to discover” that San communities lived under virtual slavery.⁵³ Assuming that Dr. Amathila was not a Minister (and she was) in 1991 and assuming that she did not attend the aforesaid Land Conference in which, by the way, San representatives actively participated, in addition to the fact that the said Conference enjoyed widespread and prominent coverage in the media, the Author hereof finds it extremely difficult if not impossible to believe that Dr. Amathila’s expression of shock was genuine. Moreover, it was against this background that the Author hereof on September 4 2005 urged the State Party to “pay or make reparations” for the San peoples.⁵⁴

⁵³“San people living in slavery”, Namibia Human Rights Report 2006, October 2006, p.115

⁵⁴“GON SHOULD MAKE REPARATIONS FOR SAN”, *Press Release*, NSHR, September 4 2005

60. Thirdly, on July 15-16 2003, that is two (2) good years prior to 2005 when Dr. Amathila “discovered” that the San people were living under virtual slavery, the Author hereof and several indigenous minority groups in the country, held a two-day workshop about the situation of minorities in the State Party. Specifically, the workshop dealt with land and other fundamental human rights of indigenous minority groups as well as persons, belonging to ethnic, religious or linguistic minorities, including not least the San peoples.
61. The workshop, which was jointly organized by the Author hereof and the London-based Minority Rights Group (MRG) International, was well attended also by representatives of the State Party. Throughout the workshop, indigenous minority leaders accused the State Party of systematic exclusion and marginalization of their communities.⁵⁵ Unfortunately, the impact of the workshop, which also enjoyed extensive and high profile media coverage, resulted in a virulent verbal attack on July 16 2003 by then Namibian President Sam Nujoma.⁵⁶ This attack was aimed at the Author hereof, whites, MRG and the independent print media.
62. Fourthly, a year prior to the abovementioned workshop or conference on minority rights, a comprehensive report entitled *Minorities in Independent Namibia* had been published containing specific and clear recommendations⁵⁷ for the State Party on the implementation of *inter alia* the constitutional and legal rights⁵⁸ of minorities (including affirmative action) as well as other issues of governance in the State Party,
63. Fifthly, barely two years after the beginning of the implementation of the aforesaid San Programme, the Legal Assistance Centre (LAC), which is a public interest law firm in the State Party, published a 60-page report showing that the State Party’s 30

⁵⁵“Indigenous peoples accuse GRN of exclusion: Freedom from Discrimination”, Namibia Human Rights Report 2003, August 11 2003, p.68

⁵⁶“Whites and NGOs accused of sowing tensions: Freedom from Discrimination”, Namibia Human Rights Report 2003, August 11 2003, p.68-69

⁵⁷“MRG’s Recommendations”, *Minorities in Independent Namibia*, Minority Rights Group International, London, 2002, p.30-31

⁵⁸“Constitutional and legal rights of minorities in independent Namibia”, *Minorities in Independent Namibia*, Minority Rights Group International, London, 2002, p. 11-14

000 San peoples remain landless and that they have yet to reap the benefits of democracy in the State Party. The said LAC report, which also shows that the future of the Bushman people looks “gloomy”, *inter alia*, reads:

*“It is a disgrace that 17 years after independence, one group remains extremely marginalized and still lives in extreme poverty”.*⁵⁹

64. The State Party Report is also required to discuss in detail the existing policies and practices, the operations of public institutions and authorities, such as the Public Service Commission, Police, Office of the Prosecutor-General and the Office of the Ombudsman, as well as the regional and local government authorities and relevant laws and the scope of the legislation the State Party has enacted in this field. Also, the State Party is expected to describe, in detail, the special programs put in operation and projects it has initiated and how such programs and projects affect the objective of achieving racial equality among all sectors of the State Party’s population. However, it failed to do so.

Permanent Application of Affirmative Action

65. At paragraph 152 of the State Party Report it is *inter alia* suggested that the State Party’s affirmative action (or temporary special) measures are “by definition of limited duration”. However, “affirmative action” and or “affirmative actions measures” as contemplated in Sections 17(2) and 17(3) of the Affirmative Action (Employment) Act 1998 (Act 29 of 1998) are of unlimited and are of permanent application. Hence, the State Party’s affirmative action measures are contrary to the provisions of Article 1(4) of the Convention. In any case, the State Party does not indicate in its State Party Report the duration as required in terms of Article 1(4) of the Convention part of which reads: “[...] provided, however, that such measures [...]

⁵⁹“NAMIBIA: San remains landless and marginalized says NGO”, *IRINnews online*, February 12 2007

shall not be continued after the objectives for which they were taken have been achieved”.

Propagation of Apartheid Ideology

66. The State Party is also under the obligation, in terms of Articles 2(2), 4 and 5 of the Convention, to adopt the legislative measures referred to in Article 23(1) of the Namibian Constitution to give effect to the provisions of the Convention. However, an effective legislation prohibiting and eliminating the propagation of the ideology of apartheid is non-existent in the State Party. This is also the view of other observers, such UNAM Professor Nico Horn as well as Faculty of Law Researchers Ms. Salome Chomba and Mr. Francois-Xavier Bangamwabo who, severally, argue that the Racial Discrimination Prohibition Act 1991 (Act 26 of 1991) as amended is “inadequate”, in terms of prohibiting and eradicating all forms of racial discrimination in the State Party.⁶⁰ Moreover, at paragraph 46, the State Party appears to admit to this fact, by stating that the Office of the Prosecutor-General only “instructs prosecution for the common law crime of *crimen injuria*”.
67. Furthermore, in spite of the provisions of Article 23(2) of the Namibian Constitution, there is also no law in place in the State Party, enacted to make effective provision “directly or indirectly for the advancement of persons within Namibia who have been socially, economically, and educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving balanced structuring of the public services, the police force, the defense force, and the prison services”.⁶¹

⁶⁰“Recommendations: The Universality of Human Rights: Challenges for Namibia”, Human Rights and the Rule of Law in Namibia”, Konrad-Adenauer-Stiftung, MacMillan Namibia, 2008, p.194-195

⁶¹Article 23 (2) of the Namibian Constitution

68. Moreover, it should be recalled that during the consideration of the 4th to the 7th State Party Report on August 13 1996, the issue of *inter alia* the non-enactment of a comprehensive law on affirmative action was raised by CERD expert Luis Valencia Rodriguez. Specifically, Rodriguez wanted to know whether or not the legislation referred to in Article 23(2) of the Namibian Constitution, providing for the advancement of socially, economically or educationally disadvantaged Namibians, has “been enacted, and if so, what was its purpose and which categories of individuals was it supposed to protect?”⁶² Therefore the Author hereof deplors the fact that there is no information in the State Party Report on whether or not such law has now been enacted, and if not, the reasons given for such non-enactment.

Arbitrary Policy of National Reconciliation

69. The Author hereof also wishes to challenge the veracity of the statements contained in paragraphs 56 to 61 of both the present State Party Report and paragraph 4 of the previous State Party Report. In particular, the Author hereof states that, save the references contained in the preambular paragraph 5(4) of the Namibian Constitution, there are no any other legislative measures, whatsoever, that the State Party had been adopted to give effect to the proclaimed “Policy of National Reconciliation”. It must be pointed out in this regard that the subject matter of Paragraph 5(4) of the Preamble to the Namibian Constitution should have been the basis for legislative, judicial, administrative or other measures which the State Party should have adopted for the achievement of the constitutional notion of national reconciliation and the fostering of peace, unity and a common loyalty to a single State.

70. Therefore, in a *Press Release* issued on September 12 2007 responding to a Ministerial Statement delivered in the National Assembly by Justice Minister and Attorney General, the Author hereof reminded the State Party that “the meanings, intentions, purposes and objectives of the constitutional doctrine of national

⁶²paragraph 28 Summary Record of the 1169th Meeting: Namibia, Venezuela. 06/11/96. CERD/C/SR.1169. (Summary Record)

reconciliation have civil, cultural, economic, environmental, political and social dimensions”.⁶³

71. Moreover, in terms of paragraph 9 of the Summary Record of the 1169th Meeting on Namibia and Venezuela on August 13 1996, CERD expert Andrew Chigovera requested the State Party to provide additional information on the different linguistic groups mentioned in paragraph 5 of the Seventh State Party Report of November 2 1995. Hence, the non-existence of any legislative, judicial, administrative or other measures to give effect to such policy is *ipso facto* strong circumstantial indicator of the (non)-importance the State Party attaches to the purported policy of national reconciliation.
72. It must also be emphatically pointed out that as it is being applied in the State Party, the verbal and arbitrary policy of national reconciliation is used as a strategy of infringing upon a spectrum of basic human rights and fundamental freedoms of citizens as guaranteed under Chapter 3 of the Namibian Constitution and Articles 19, 20, 21 and 25 of ICCPR and as envisaged under paragraphs 8 and 12 of CCPR General Comment 25 of July 12 1996. This is in so far as it refers to ensuring the right of citizens to freedom of expression and opinion, assembly and association and, to a certain extent, freedom of movement.
73. For example, the policy of national reconciliation is abused as the basis and or ground for attempts aimed at banning⁶⁴ the Author hereof for having submitted a petition to the Office of the Prosecutor of the International Criminal Court to investigate, among others, former Namibian and Swapo Party President Sam Nujoma *ratione personae* in

⁶³“NSHR’S reply to livula-Ithana Statement”, *Press Release*, NSHR, September 12 2007

⁶⁴In her statement titled “Ministerial Statement in the National Assembly on the Constitutional Principle of National Reconciliation” on September 12 2007, Justice Minister and Attorney General Pendukeni Iivula-Ithana instigated lawmakers to enact a law banning the Author hereof claiming that “the reported International Criminal Court (ICC) submission made by Mr. Phil ya Nangoloh of the Namibian Society for Human Rights (NSHR)” was a threat to the policy of national reconciliation and that the submission “has the potential of disrupting our peace and stability”. Also, on August 20 2007 Swapo Party Chief Whip Jhonny Hakaye another die-hard and conservative supporter of former President Sam Nujoma tabled a motion in the National Council aimed at banning the Author hereof for the same reasons as Justice Minister and Attorney General Iivula-Ithana.

respect of allegations of enforced disappearances of thousands of Namibians prior to and after Namibian independence on March 21 1990.

Article 3: International Solidarity against Racism

74. The State Party is required to provide CERD with accurate information about the legislative, judicial, administrative or other measures the State Party has taken to give effect to the provisions of Article 3 of the Convention. Specifically, the State Party is required to enumerate the measures it has put in place which, not only condemn racism and apartheid, but also which prevent, prohibit and eradicate all practices of racism and apartheid in the State Party as well as in other countries. The State Party is also required to provide CERD with information on the status of diplomatic, cultural, economic, military, sporting and other relations or associations with regimes deemed by the international community as engaging in racism, racial discrimination, xenophobia and related intolerance.

Warm Relations with Violators

75. The Author hereof wishes to express its serious reservation about the fact that the State Party has a tendency of maintaining warm relations with discredited and States condemned by the international community for engaging in racism, racial discrimination, xenophobia and related intolerance. For example, in the mid-1990s the State Party accorded a warm welcome and a red carpet treatment to Burmese dictator, Senior General Than Shwe, and has failed to use General Shwe's state visit to express concern about the systematic persecution of pro-democracy activists, led by Nobel Peace Laureate Aung San Suu Kyi.
76. Similarly, the State Party has maintained warm diplomatic, cultural, economic, military, sporting and other relations with a couple of Nigerian dictators, such as General Sani Abacha and General Ibrahim Babanginda, and has failed and or

refrained from condemning the judicial murder of Ogoni ethnic minority environmentalist activist Ken Saro-Wiwa and eight others in Nigeria on November 10 1995.

77. Furthermore, high-ranking officials from North Korea⁶⁵ and China have also been warmly welcomed in the State Party and not a single word was expressed by the State Party on the very serious violations of human rights and fundamental freedoms occurring in both North Korea and China. On the contrary, during the latest visit by Chinese President Hu Jintao to Namibia, the State Party used the occasion to support Chinese occupation of Tibet and, by implication, also human rights violations by Chinese authorities in the Himalayan kingdom.⁶⁶
78. As if associating itself with the likes of Sani Abacha and Than Shwe was not bad enough, the State Party maintains very cordial relations with Zimbabwean President Robert Mugabe and his ZANU-PF party. This is despite the systematic racism, racial discrimination, xenophobia and related intolerance occurring in Zimbabwe, for which President Mugabe and his ZANU-PF party are held accountable by the international community, including the United Nations. For example, on July 1 2006 former Namibian President Dr. Sam Nujoma lashed out at white Namibians who criticized the controversial land reform in Zimbabwe. Dr. Nujoma angrily retorted:

*“The British should be careful because they're trying to break down Mugabe's Zimbabwe [...] If the English imperialists make a mistake today to occupy Zimbabwe, I will instruct Swapo to go fight for the Zimbabweans [...] you touch Zimbabwe, you touch Swapo”.*⁶⁷

⁶⁵“Red Carpet For Korean Dictator”, Press Release, NSHR, March 14 2008

⁶⁶“Chinese Dragon Hu Go Hu-Me”, Press Release, NSHR, February 4 2007; “Hu Visit to Namibia Met with Criticism” VOA news online, February 5 2007; “NSHR slams China over its human rights record”, *The Namibian online*, Monday, February 5 2007

⁶⁷“Nujoma backs Katali”, *The Namibian online*, Monday, July 3 2006

79. Speaking to British Broadcasting Corporation radio on February 21 2003, then Namibian President Sam Nujoma said he knew of no human rights abuses under Zimbabwean President Robert Mugabe.⁶⁸
80. Therefore the Author hereof wishes to draw the attention of both CERD and the State Party to CERD's 1972 General Recommendation and to its 1975 declaration that:

“All policies, practices or relations which have the effect of supporting, sustaining or encouraging racist regimes are irreconcilable with the commitment to the cause of elimination of racial discrimination which is inherent in the ratification of, or accession to, the Convention, and inconsistent with the specific commitment of States Parties to condemn racial segregation and apartheid in accordance with Article 3 of the Convention, and their resolve to build an international community free from all forms of racial segregation and racial discrimination expressed in the preamble of the Convention”.

81. CERD has made similar decisions in 1984 and 1985.
82. Hence, the rhetorical and arrogant pronouncements at paragraph 146 of the State Party Report that “Namibia does not have territorial jurisdiction on any other territory beyond her borders” should *ipso facto* be seen as proof of the State Party's generally negative attitude towards the obligations emanating from Article 3 of the Convention. Moreover, the pronouncements by the State Party are compatible with the averments contained in paragraph 17 of the previous State Party Report (i.e. CERD/C/275/Add.1 of January 3 1996) to the effect that the State Party was compelled by *inter alia* “close historical ties between Namibia and South Africa” and that “independent Namibia had no choice but to continue the economic and trade ties with apartheid South Africa”. Assuming this argument by the State Party is genuine, what would be

⁶⁸“Nujoma says he knows of no rights abuses at hands of Mugabe”, *The Namibian online*, Monday, February 24 2003

the grounds and or criteria used in the unscrupulous maintenance of the seemingly unconditional cordial diplomatic and other relations between the State Party and, for example, Zimbabwe under ZANU-PF and Mr. Robert Mugabe? The State Party can hardly have it both ways?

Pattern of Voting Conduct at UN

83. The Author hereof is also concerned about the pattern of conduct by which the State Party systematically votes at the United Nations and other international fora in cahoots or hands in glove with States known to engage in serious violations of the internationally-recognized human rights of their citizens. For example, on November 28 2006 the State Party led a group of UN Members States that blocked the speedy adoption by the UN General Assembly of the overdue Declaration on the Rights of Indigenous Peoples. Introducing the said blocking, the representative of the State Party at the United Nations argued that some provisions of the Declaration “ran counter to the national constitutions” of a number of African countries in that some of the wording in the Declaration refers to the rights of indigenous peoples to self-determination.⁶⁹ According to the State Party’s UN Ambassador Dr. Kaire Mbuende:

*“Not only does [the Declaration] introduce a new meaning to the principle of self-determination, but it also contradicts Article 1 of our Constitution which establishes Namibia as a unitary sovereign state. The right to self-determination cannot be used to encourage secession or disrupt the national unity and territorial integrity of sovereign states on the basis of ethnicity, religion, racial exclusivity or any other such categorisation. Article 19 of the Declaration is therefore unacceptable to Namibia”.*⁷⁰

⁶⁹“UN Indigenous Rights Declaration Blocked”, <http://www.arcticpeoples.org/2006/11/29/un-indigenous-rights-declaration-blocked/>

⁷⁰“Indigenous rights: Crunch time for Namibia”, *The Namibian online*, Thursday, September 13 2007

84. As expected the blocking of the Declaration prompted the Author hereof to issue a *Press Release* on December 2 2006 in which these observations were made:

*“As a Namibian human rights group, we totally reject this claim at least in so far as the country is concerned. The country’s Constitution, which has been praised worldwide, contains a bill of rights entirely consistent with the Universal Declaration of Human Rights of 1948 as well as the purposes and principles of the UN as contained in the UN Charter. Moreover, this bill, read together with the provisions of Articles 95(d), 96(d) and 144 of the Constitution, clearly shows that the Namibian Constitution is wholly consistent with the norms of international human rights, humanitarian and customary law. Namibia’s attitude vis-à-vis the Declaration is compatible with the Government’s **de facto** policy of ethno-cultural leveling and its superficial approach towards both the Constitution and international human rights treaties and declarations adopted by the UN. Namibian representatives in the various international forums have shown reluctance or indifference towards progressive human rights treaties and declarations aimed at addressing pressing human rights situations worldwide. For example, since becoming a UN Member State in 1990, Namibia has constantly either refrained from voting or has voted against a number of progressive UNGA resolutions on grave human rights situations in such countries as Burma (i.e. Myanmar) and North Korea. The country’s track record of voting at the UN and other international human rights forums reveals a pattern of negative behavior towards the adoption of, and compliance with, international human rights instruments”.*⁷¹

⁷¹“GoN’s UN Behavior Worrisome”, *Press Release*, NSHR, December 3 2006

Article 4: Prevention and Prohibition of Incitement

85. The State Party is under the obligation to provide CERD with accurate information and in great detail on the legislative, judicial, administrative or other measures it has taken to give effect to its undertaking to comply with the provisions of Article 4 of the Convention. In particular, the State Party is required to supply CERD with information on the “immediate and positive” measures it has undertaken designed to prevent, rather than cure, all forms of incitement to, or acts of, racism, racial discrimination, xenophobia and relative intolerance. This should be done with due regard to the fundamental human rights to freedom of expression and opinion and association as consecrated in Articles 19 and 20 of the Universal Declaration of Human Rights.
86. In terms of CCPR General Comment 11 of July 29 1983 on the prohibition of propaganda for war and inciting national, racial or religious hatred, States Parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. Article 20 of ICCPR obliges States Parties to enact a law making it clear that any propaganda for war and any advocacy of national, racial or religious hatred constitutes incitement to discrimination, hostility or violence, whether or not such propaganda or advocacy has aims which are internal or external to the State Party concerned and that States Parties should themselves refrain from any such propaganda or advocacy.

Failure to Prevent and or Prohibit Incitement

87. However, despite the mandatory requirement imposed under Articles 4(a) and 4(b) and CERD’s General Recommendations 1 of February 24 1972 and 3(VII) of May 4 1973, there are still no effective legislative, judicial, administrative or other measures to give effect to the State Party’s undertaking to enact “immediate and positive” laws

preventing and punishing incitement to, or acts of, racism, racial discrimination, xenophobia and related intolerance, including political hate speech.

88. Therefore, it is the considered opinion that the statements by the State Party as contained in paragraphs 147 to 152 of the State Party Report are not at all compatible with the compulsory and mandatory requirement imposed by the provisions of Article 4 of the Convention. For example, there is no law preventing and punishing the propagation of the ideology of apartheid in the State Party, despite the provisions of Article 23(1) of the Namibian Constitution. Nor does the Racial Discrimination Prohibition Act 1991 (Act 26 of 1991), as amended, contain a clear and or narrowly defined anti-hate expression clause amending, reviewing or repealing Section 11(1) (b) of the said Act.
89. It is, furthermore, respectfully submitted that the *raison d'être* of the Racial Discrimination Prohibition Act 1991 (Act 26 of 1991) as amended by the Racial Discrimination Prohibition Amendment Act 1998 (Act 26 of 1998) reads as following:

“To render criminally punishable, in pursuance of the provisions of Article 23 of the Namibian Constitution, certain acts and practices of racial discrimination and apartheid in relation to public amenities, the provisions of goods and services, immovable property, educational and medical institutions, employment, associations, religious services, and involving the incitement of racial disharmony and victimization; to amend the Liquor Ordinance, 1969 and the Admission of Persons to Namibia Regulation Act, 172; and to provide for matters incidental thereto.”

Active Participation in Hate Expression

90. The above quote makes no reference, whatsoever, to the prohibition and or criminalization of the propagation of the ideology of apartheid as required under Articles 4(a) and 4(b) of the Convention. Nor is there reference to hate expression in the above quoted passage. This omission should also be considered as a key indicator that the measures the State Party has taken do not *ipso facto* effectively and adequately give effect to the provisions of the Convention.
91. Moreover, on numerous occasions since 1996 high-ranking State Party leaders, led by then Namibian President Sam Nujoma, have systematically engaged in incitements and other forms of hate expression directed at *inter alios* whites⁷² in general, sexual minorities,⁷³ Europeans⁷⁴ and Ovimbundu-speaking⁷⁵ people and, in recent years, Ovakwanyama⁷⁶ people.
92. For example, former President Sam Nujoma⁷⁷ declared sexual minorities as “enemies of the State” and accordingly urged their expulsion from the country and or their imprisonment. On March 19 2001, Nujoma declared:

*“The Republic of Namibia does not allow homosexuality, lesbianism here. Police are ordered to arrest you, and deport you and imprison you too”.*⁷⁸

⁷²“Nujoma threatens to expel ‘Boers’: Freedom from Discrimination”, Namibia Human Rights Report 2003, August 11 2003, p.79; “Whites and NGOs accused of sowing tensions: Freedom from Discrimination”, Namibia Human Rights Report 2003, August 11 2003, p.72; “Nujoma makes racist, homophobic remarks: Freedom from Discrimination”, *Namibia Human Rights Report 2004*, August 2004, p.82

⁷³“The treatment of sexual minorities”, *Minorities in Independent Namibia*, Minority Rights Group International, London, 2002, p.18 and “Amnesty takes issue with Nujoma’s anti-gay threats”, *The Namibian online*, Monday, April 2 2001

⁷⁴“Freedom from Discrimination”, *Namibia Human Rights Report 2003*, August 11 2003, p.67-83; “Freedom from Discrimination”, Namibia Human Rights Report 2004, August 2004, p.74-92; “Freedom from Discrimination”, *Namibia Human Rights Report 2006*, October 2006, p.174-197 and “Freedom from Discrimination”, *Namibia Human Rights Report 2007*, November 13 2007

⁷⁵“Ethnic targeting of ethnic Ovimbundu people: Freedom from Discrimination”, *Namibia Human Rights Report 2000*, p. 64-68

⁷⁶ “Hate expression targets Kwanyama people: Freedom from Discrimination” *Namibia Human Rights Report 2006*, October 2006, p.175-177

⁷⁷“International confidence in Namibia damaged by anti-gay attacks”, *Afrol news online*, May 11 2001; “Persecution: Lesbian and Gays Rights”, www.hrw.org/wr2k1/special/gay.html; “Gay Issues Nixed at UN Racism and Intolerance Conference”, *The Gully.com*, www.thegully.com/essays/gyamundo/010830_UN_racism.html

93. In an equally scathing racist attack on white citizens in the State Party, Nujoma made this remark on May 1 2004:

*“Some of the whites are behaving as if they came from Holland or Germany with land [...] steps will be taken and we can drive them out of this land. We have the capacity to do so”.*⁷⁹

94. Former Home Affairs and current Regional and Local Government and Housing Minister Jerry Ekandjo, who is also Swapo Party Secretary of Information and Mobilization, has also systematically made racist and homophobic statements against whites and sexual minorities⁸⁰ as well as members of certain indigenous⁸¹ minority groups in the State Party.

95. Responding to questions from MAG Opposition party in National Assembly on July 3 2008 as whether or not he told a Swapo Party rally that black Namibians should not trust "whites and Boers in the country, because they were killers", Regional and Local Government and Housing Minister Jerry Ekandjo argued that the State Party would have had a population of 20 million had the German colonial powers not eliminated “60 per cent of the population between 1884 and 1915” and had the white minority apartheid regime of South Africa not ruled Namibia from 1919 until March 20 1990.⁸²

⁷⁸“Namibia: The Bermuda Triangle of African Homophobia”, the Gully.com, www.thegully.com/essays/africa/010327gay_na.html

⁷⁹“Namibia warns ‘racist’ farmers”, *BBC News online*, Monday, October 3 2004

⁸⁰“Namibia gay rights row”, *BBC news online*, Monday, October 2 2000; “Politicians accused of failing Namibia's gay community”, *The Namibian online*, Tuesday, May 20 2003; “Gay-bashing likened to ‘cancer of racism’”, *The Namibian online*, Thursday, March 22 2001; “Being a Public Lesbian in Namibia: Reflections on Some Recently Experienced Absurdities”, <http://web.uct.ac.za/org/agi/pubs/newsletters/vol7/public.htm>

⁸¹“Xenophobia also in Namibia, says MP”, *The Namibian*, Thursday, June 12 2008, p.3

⁸²“Whites were ‘killers’: Ekandjo”, *The Namibian online*, Friday, July 4 2008

96. Several other ruling Swapo Party officials and other individual activists in the State Party have also engaged in incitements with pronounced racist, racial discriminatory, homophobic and xenophobic overtones against whites,⁸³ certain ethnic minorities and foreigners⁸⁴ as well as Ovakwanyama⁸⁵ people.
97. Referring to the *de facto* human rights and democracy situation in the State Party, UNAM Faculty of Law Professor Nico Horn lamented the absence of a human rights sensitive political culture and expressed concern that “Namibia has become less liberal and less sensitive in respect of human rights issues since 1996”.⁸⁶ In particular Professor Horn cites the gay and lesbian debacle, the lack of a legal framework for the justiciability of socio-economic rights⁸⁷ and what he described as “flagrant neglect” of basic human rights in the new Criminal Procedure Act 2004 (Act 25 of 2004) as ominous indicia that “Namibian society needs to remain sensitive to human rights issues”.⁸⁸

⁸³On October 7 2005 Methuzal Matundu (33) also known as 'Malcolm X' Matundu stated this before presiding Magistrate Sarel Jacobs: “I am the authentic author of that placard. The intention was to solicit the support of black people to employ that strategy, because the Mau Mau school of thought, of which I'm the head, believes that killing all white people is the only way that we will get people to take black people seriously. The only language which we think the white people can understand is the approach that was followed in Zimbabwe, and that is the approach of revolution. The killing of white people is a strategy to achieve our goal, which is the repossession of our wealth from white people. The only way we can repossess our wealth, is to get people to take black people seriously, and the only way people will start taking black people seriously, is when (whites') lives are threatened”.

⁸⁴“Xenophobia and Namibia”, *Windhoek Observer*, Saturday, July 5 2008, p.20

⁸⁵“Wants Answers on ‘Invasion by Kwanyamas’” *New Era online*, July 7 2006 and “New Era Makes New Error!”, *Press Release*, NSHR, July 7 2006 and “Attorney-General Ithana Appeals For Fairness”, *The Namibian online*, Monday, January 3 2005 and “Political perspective”, *The Namibian online*, Friday, October 28 2005

⁸⁶“Conclusion” in “International human rights norms and standards: The Development of Namibian case and statutory law”, *Human Rights and the Rule of Law in Namibia*, Konrad-Adenauer-Stiftung, Macmillan Namibia, 2008, p.164

⁸⁷In terms of Article 101 of the Namibian Constitution, these basic rights are merely regarded as unjusticiable principles of state policies and are even placed under Chapter 11 instead of Chapter 3 of the Constitution. This is despite the fact that all human rights are interrelated, interdependent and indivisible

⁸⁸“Conclusion” in “International human rights norms and standards: The Development of Namibian case and statutory law”, *Human Rights and the Rule of Law in Namibia*, Konrad-Adenauer-Stiftung, Macmillan Namibia, 2008, p.164

Article 5: Equality before Law

98. The State Party Report is also expected to *inter alia* list the legislative, judicial, administrative or other measures which the State Party has adopted which both prohibit and eradicate racial discrimination in accordance with Article 2 of the Convention and guarantee the right to equality before the law and non-discrimination in the enjoyment of all human rights, in accordance with Article 1 of the Convention.
99. The Author hereof concurs with the claims contained in paragraphs 153, 162, 178, 216, 217, 222, 263-264, 265-266, 295 and 333 of the State Party Report albeit only in so far as the constitutional provisions and the enjoyment of the so-called Article 5 rights are concerned.

Illegitimate Distinctions, Limitations or Suspensions

100. However, the Author hereof also widely disputes the wrong impression being created throughout the State Party Report that the said rights are *de facto* respected, protected and fulfilled by the State Party as required in terms of both Article 5 of the Convention and as affirmed or sworn to in terms of Articles 30, 38, 55, 71 and 87(c), read with preambular paragraph 5(5) and Articles 1(1), 5, 18 and 25(2), of the Namibian Constitution. Specific attention of CERD is drawn to the following acts of illegitimate distinctions, limitations, suspensions or abolitions of the following protected Article 5 rights:
101. Several communities have been targeted by State Party officials:

Ovakwanyama Communal Farmers

102. The fundamental human rights of citizens to reside and settle in any part of the country are also denied to certain ethnic groups while allowed to others. For example,

the Ovakwanyama people, who have been lawfully residing in the State Party since 1917, are now subtly being told that, after all, they are not Namibian citizens, but citizens of neighboring Angola.⁸⁹ On several occasions, individuals purporting to be die-hard supporters and *ipso facto* acting in the name or defense of former Namibian President Sam Nujoma either have written anonymous letters to the editor in the State-owned print media or have circulated anonymous electronic messages on the Internet targeting the Ovakwanyama people.⁹⁰

103. With 25 000 and 60 000⁹¹ cattle, the Ovakwanyama communal farmers have been evicted⁹² from residing and settling in the Ukwangali district of western Kavango Region under the pretext that they had failed to obtain prior permission from local land boards established in terms of the Communal Land Reform Act 2002 (Act 5 of 2002), as amended. However, many of the Ovakwanyama communal cattle farmers being so evicted have been residing in the said district since 1986. This means that they have been living in the Ukwangali district for at least three (3) years prior to Namibian independence on March 21 1990. Moreover, their eviction in terms of the provisions of the Communal Land Reform Act 2002 (Act 5 of 2002), as amended, could not and should not be applied retroactively.

104. However, when it comes to the encroachment on the communal land belonging to the marginalized and the voiceless indigenous minorities, such as the San (i.e. Bushman) people in the northeastern part of the country, a different standard is being used. Case in point: due also to State Party's failure to approve a 2003 conservancy management plan for some 2 000 San people in the N#u Jaqna Conservancy, hundreds of non-San and non-Kwanyama cattle herders brought thousands of cattle into the said

⁸⁹“Wants Answers on ‘Invasion by Kwanyamas’” *New Era online*, July 7 2006 and “New Era Makes New Error!”, *Press Release*, NSHR, July 7 2006

⁹⁰“Attorney-General Ithana Appeals For Fairness”, *The Namibian online*, Monday, January 3 2005 and “Political perspective”, *The Namibian online*, Friday, October 28 2005

⁹¹“Farmers, 60 000 cattle ordered out of Kavango”, *The Namibian online*, Monday, October 24 2005

⁹²“Govt names farmers illegally grazing cattle in Kavango”, *The Namibian online*, Tuesday, January 31 2006; ; “Farmers evicted from Kavango ‘ready to die with their cattle’”, *The Namibian online*, Thursday, February 2 2006; “Police drive evicted farmers from Kavango”, *The Namibian online*, Wednesday, August 30 2006; “Eviction order granted against communal farmers”, *The Namibian online*, Tuesday, February 12 2008

Conservancy. Nonetheless, unlike in the case of the Ovakwanyama communal cattle farmers in the Ukwangali district of the Kavango Region, no action has [so far] been taken to evict those non-Bushman and non-Kwanayama farmers who have encroached on San land. This state of affairs prompted the Legal Assistance Centre to issue this early warning to the State Party:

*“Unless the government acts promptly and sets up a statutory and administrative framework for the administration of San communal lands, there is going to be political and legal chaos, with a potential to destabilize the government’s land reform measures”.*⁹³

Banning of Afrikaans Language

105. The State Party also deliberately targets the use of Afrikaans language in public schools in public life in general. For example, through a verbal decree on March 28 2001 then President Sam Nujoma banned the use of the Afrikaans language as medium of teaching in Namibian schools. Nujoma angrily fumed:

*“I don't want to see our children being taught Afrikaans in schools again”.*⁹⁴

Nujoma repeated his verbal ban on Afrikaans on July 13 2003.⁹⁵

106. A substantial number of Namibians speak Afrikaans language. According to the State Party figures released at paragraph 16 of the State Party Report, close 150 000 Namibians or some 8 percent of the total population speak Afrikaans language as their mother tongue compared to, for example, only the 5 668 or 0.3 percent of the population who speak Setswana as their mother language. Nonetheless, while the State-owned Namibian Broadcasting Corporation (NBC) broadcasts TV news in

⁹³“NAMIBIA: San remain landless and marginalized”, *IRINnews online*, February 12 2007

⁹⁴“Ditch Afrikaans”, *The Namibian online*, March 29 2001

⁹⁵“President bans Afrikaans Language”, *Namibia Human Rights Report 2003*, NSHR, Windhoek, August 11 2003, pp.86-87

Setswana vernacular, there are no such NBC TV news broadcasts in the Afrikaans language.⁹⁶ Moreover, in accordance with a 1981 policy document of the ruling Swapo Party titled *Toward a Language Policy for Namibia* it is *inter alia* declared:

*“The seven local languages become eight if we include Afrikaans amongst them. Afrikaans is of Germanic origin and as a result of South Africa’s illegal occupation of the territory has become the effective **lingua franca**. In spite of being an imposed or colonial language, it is now spoken as a mother tongue by the Rehobother population near Windhoek, and this certainly qualifies it to be considered a local language.”*

107. Furthermore, Articles 3(2) and 3(3) of the Namibian Constitution stipulates that:

Nothing contained in this Constitution shall prohibit the use of any other language as a medium of instruction in private schools or in schools financed or subsidized by the State, subject to compliance with such requirements as may be imposed by law, to ensure proficiency in the official language, or for pedagogic reasons. Nothing contained in Sub-Article (1) hereof shall preclude legislation by Parliament which permits the use of a language other than English for legislative, administrative and judicial purposes in regions or areas where such other language or languages are spoken by a substantial component of the population.”⁹⁷

Kxoe San People

108. The long running ethnic conflict between the Kxoe community in western Caprivi and the Hambukushu people in eastern Kavango continues. The Hambukushu people, led by their controversial Chief Erwin Mbambo, continued with impunity to encroach into the traditional areas of the Kxoe people in western Caprivi. Chief Mbambo’s

⁹⁶“Diskriminasie En/Of Vergelding?”, Monitor Action Group (MAG), May 6 2001

⁹⁷“Afrikaans In Namibië”, Monitor Action Group (MAG), April 9 2001

territorial intrusion into Kxoe communal area is strengthened by the State Party having recognized him as the only traditional leader in the area, presiding over both his Hambukushu subjects and the historically marginalized Kxoe (Kwe) San people.⁹⁸

109. During 2003 LAC human rights lawyer Norman Tjombe also said that the State Party dismissed the Kxoe's application for recognition because Mbambo was already officially recognized.⁹⁹ WIMSA Coordinator Axel Toma also pointed out that Mbambo's authority was extended into western Caprivi at the time when many Kxoe tribesmen, including their late chief Kippie George, fled to Botswana amid allegations of serious human rights abuses committed by Namibian security forces in the Caprivi Region. Toma also expressed concern that Mbambo has since pushed even more of his Hambukushu subjects into Kxoe communal areas without consulting Kxoe traditional leaders.¹⁰⁰

Verbal Attacks on Sexual Minorities

110. Since 1996 sexual minorities have been experiencing systematic verbal attacks. For example, on September 29 2000 then Home Affairs and Police Minister Jerry Ekandjo urged newly graduated Police officers to "eliminate" gays and lesbians "from the face of Namibia".¹⁰¹
111. On March 19 2001 former President Sam Nujoma¹⁰² declared sexual minorities as "enemies of the State" and urged their expulsion from the country and or their immediate imprisonment. Nujoma declared:

⁹⁸"Hambukushu-Kxoe Tension", Namibian Human Rights Report 2003, August 11 2003, p.103-104

⁹⁹ "President heads north-east to tackle tribal dispute", *The Namibian online*, Thursday, July 24 2003

¹⁰¹"Ekandjo Does It Again", *Press Release*, NSHR, October 2 2000

¹⁰²"International confidence in Namibia damaged by anti-gay attacks", *Afrol news online*, May 11 2001; "Persecution: Lesbian and Gays Rights", www.hrw.org/wr2k1/special/gay.html; "Gay Issues Nixed at UN Racism and Intolerance Conference", *The Gully.com*, www.thegully.com/essays/gyamundo/010830_UN_racism.html

*“The Republic of Namibia does not allow homosexuality, lesbianism here. Police are ordered to arrest you, and deport you and imprison you too”.*¹⁰³

112. In a third of the numerous incidents and in support of "indeed [...] all our Swapo Party leaders who stood firm against gays and lesbians" Swapo Party Youth League Secretary for the Oshana Region Teobald Fidelis Ndoroma read a petition addressed to a local governor. The petition read *inter alia* as follows:

*“[These] social evils [are] tantamount to [the Biblical Sodom] and Gomorra, which we do not want to happen in independent Namibia.[...] Therefore Comrade Governor, through you to the central government we want all gays and lesbians to be arrested and those not Namibians to be deported with immediate effect”.*¹⁰⁴

113. In yet another anti-gay incident, the State Party's Supreme Court ruled:

*“Namibian law does not protect same-sex relationships, does not give them the same legal status as relationships between a man and a woman, and does not recognize people in same-sex relationships as constituting a family. Equality before the law for each person does not mean equality before the law for each person's sexual relationships. Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions in the Namibian Constitution”.*¹⁰⁵

114. In addition, the said court noted that the Namibian Constitution had to be interpreted while taking the "traditions, values, aspirations, expectations and sensitivities" of the Namibian people into account. The court further argued that when public anti-homosexual statements by then President Sam Nujoma and then Home Affairs

¹⁰³“Namibia: The Bermuda Triangle of African Homophobia”, the Gully.com, www.thegully.com/essays/africa/010327gay_na.html

¹⁰⁴“Amnesty takes issue with Nujoma's anti-gay threats”, *The Namibian online*, Monday, April 2 2001

¹⁰⁵“Supreme Court ruling 'shocking'”, *The Namibian online*, Friday, March 23 2001

Minister Jerry Ekandjo [...] were considered, this was an indication that in Namibia the trend was against the recognition of same-sex relationships.¹⁰⁶

Article 5(a): Fair and Public Trial

115. Article 5(a) of the Convention makes provisions for the right to procedural guarantees. These include the right to a fair and public trial by an independent, impartial and competent court as well as the right of everyone to due process of the law before the courts and similar tribunals for the purpose of obtaining effective remedy. Alternatively put, the constitutional guarantee of due process of law prohibit all and any levels of government from arbitrarily or unfairly depriving any individual citizens of any of their basic rights. As a maxim goes: “no person shall be deprived of life, liberty, or property, without due process of law”.
116. It goes without saying that the existence of a free and independent judiciary--as contemplated in preambular paragraph 3 and Articles 12 (1)(a), 78(2) and 78(3) and 78, read with, *inter alia*, Articles 18 and 25 of the Namibian Constitution--creates the necessary *de jure* conditions for fair and public trials and for obtaining an effective remedies.
117. In accordance with CCPR General Comment 13 of April 13 1984 on equality before the courts and the right to a fair and public hearing by an independent court established by law, States Parties should specify the relevant constitutional and legislative texts which provide for the establishment of such courts and ensure that they are independent, impartial and competent. State Parties should also indicate the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office as well as the condition governing promotion, transfer and cessation of their functions. The State Party should also indicate whether

¹⁰⁶“Supreme Court ruling 'shocking'”, *The Namibian online*, Friday, March 23 2001

or not there is actual independence of the judiciary from the Executive and Legislative Branches.

118. The State Party is also expected to supply CERD with accurate information on the legislative, judicial, administrative or other measures adopted which give effect to the right of everyone, without distinction as to race, color, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status, to equality before the law and to non-discrimination before courts and tribunals as well as all other organs administering justice.¹⁰⁷ This includes the right of everyone accused and or charged with a criminal offense to be presumed to be innocent until proven guilty in accordance with due process of law and to be afforded adequate time and facilities for the preparation of his or her defense and to effectively communicate with counsel of his or her own choosing¹⁰⁸ as well as to be tried without undue delay.¹⁰⁹
119. *De facto*, however, there has been and continue to be several subtle structural and other serious threats to judicial independence in the State Party. Being the main human rights monitoring and advocacy organization in the State Party, the Author hereof has during the last 18 years of its existence expressed grave concern about, *inter alia*, the following grave threats to judicial independence:

¹⁰⁷The Human Rights Committee under general remarks relating to General Comment 23 of July 27 2007 lists several peremptory procedural guarantees which all State Parties, regardless their legal traditions and domestic law, must respect, protect and fulfill.

¹⁰⁸It is the considered opinion that, contrary to the provisions of Article 14(3) (b) of ICCPR and paragraphs 32 to 34 and 37 of CCPR General Comment 32 of August 23 2007, Caprivi High Treason Trialists have been denied the right to communicate with counsel of their own choosing. Reference is also made to several statements to this effect by the Author hereof including "In defense of right to counsel" issued on July 27 2006. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair.

¹⁰⁹According to Article 14(3) (c) and paragraphs 27 and 35 of CCPR General Comment 32, an important aspect of a fair trial is its expeditiousness in order to serve the interests of justice and to ensure that the accused does not stay too long in a state of uncertainty.

Composition of Judicial Service Commission

120. In terms of Article 85 of the Namibian Constitution, the President, on the recommendation of the Judicial Service Commission (JSC), appoints all High Court and Supreme Court judges. The JSC is composed of the Chief Justice (who chairs it), the Attorney General (who is a politician and member of the Executive Branch) and another judge of the High Court (who is directly nominated by the President) as well as two members from the professional legal associations, as the case may be.
121. One of the most crucial problems to which the Author hereof wishes to draw the attention of CERD is, first, the fact that the President directly appoints the Attorney General and another Judge of the High Court to be members of the JSC. Secondly, most of the members of the legal profession associations are either themselves employees of the Executive Branch or they are dependent on such Branch for clientele. Hence, they would be extremely susceptible to undue political influence from the said Branch. Thirdly, the fact that the two legal professional associations--viz. the Namibia Law Association (NLA) and the Law Society of Namibia (LSN), consist of predominantly black lawyers and white lawyers, respectively--creates festering racial tensions between the two bodies.¹¹⁰ In the opinion of the Author hereof, this situation has an additional negative impact on the makeup of the JSC.

Lack of Transparency on JSC Operations

122. Furthermore, Article 85 (3) of the Namibian Constitution obligates the JSC to make rules and regulations to regulate the procedures before it, while Section 4 (2) of the Judicial Service Commission Act 1995 (Act 18 of 1995) also makes it obligatory for the JSC to execute its operations and functions in accordance with the rules and regulations made in terms of Article 85(3) of the Constitution. All appointments made by the JSC must *ipso facto* follow such rules and regulations. However, numerous

¹¹⁰“Law Society to challenge Govt in Supreme Court”, *The Namibian online*, Thursday, August 21 2003

appointments to the judiciary have been made without such rules or regulations having been promulgated. Hence, the operations of the JSC are illegal. This is in addition to such operations being conducted and held *sub rosa* and to the fact that judicial appointments are merely announced in the press once they have been implemented. CERD is hereby requested to require the State Party to produce the copies of the rules of procedures of JSC, since the proof the pudding is in the eating.

123. There should therefore be a participative and transparent process to be followed when judges and other judicial officers are appointed. Accordingly, there should be public hearings at which interested parties can make submissions or where candidates should at least be interviewed in a forum that is open to the public. This process is very important because judges are appointed until age 65 and can only be removed from office under exceptional circumstances.

Prevalence of Undue Political Influence

124. There are several indications to prove that the State Party has systematically exerted undue influence the Judiciary. The Legal Practitioners Act 1995 (Act 15 of 1995) had to be amended during November 2002, *inter alia*, in order to allow the admission of certain State-employed law graduates as legal practitioners without passing a qualifying examination. In other words, these are *de facto* affirmative action appointments.¹¹¹ This also qualifies them to be members of the JSC, which makes recommendations to the President to appoint High Court and Supreme Court Judges.
125. Speaking in the National Assembly in June 2002, Attorney General Pendukeni Iivula-Ithana diligently and openly campaigned for Ms. Martha Imalwa's appointment as the current Prosecutor General and defended the *ad hoc* amendment to the Legal Practitioners Act 1995 (Act 15 of 1995) as part of the State Party's efforts to

¹¹¹The attention of CERD is also drawn to the fact that the Judicial Service Commission is not an "employer" as contemplated in the Labor Act 1992 (Act no 2 of 1992), the new Labor Act 2007 (Act no 11 of 2007) or the relevant Sections of the Public Service Act 1995 (Act no 13 of 1995) or the Affirmative Action (Employment) Act 1998 (Act no 29 of 1998)

“modernize the legal practice and to democratize a profession that had once been the exclusive domain of privileged white elite”.¹¹² Predictably, ruling Swapo Party MPs during November 2002 bulldozed the enactment into law of the controversial Legal Practitioners Amendment Act 2002 (Act 22 of 2002), despite serious objections from both the Opposition parties and the country’s two professional legal bodies.¹¹³

126. The Author hereof has since Namibian independence on March 21 1990 systematically been expressing “grave concern” over the chronic presence of a “pattern of commissions and omissions” by the Executive Branch to undermine judicial independence in the State Party.¹¹⁴ In a *Press Release* titled “Concern over Judicial Independence & Integrity” issued on July 22 2004 (visit www.nshr.org.na and search under “*Press Releases*”) in which at least seven (7) serious incidents were listed, the Author hereof made this observation:

*“NSHR is deeply disturbed that the Executive Branch has over the years successfully managed to insidiously and systematically rid this country of an independent judicial system through a triangular strategy: public pressure, including systematic verbal attacks;¹¹⁵ passage of crippling and incursive legislation; and the maintenance of an acting judicial officer system”.*¹¹⁶

¹¹²“Law on lawyers faces challenge”, *The Namibian online*, Monday, November 18 2002

¹¹³“Lawyers take Govt to court”, *The Namibian online*, Monday, January 27 2003; “Admission of Prosecutor as legal practitioner delayed”, *The Namibian online*, Tuesday, January 28 2003; Court postpones Imalwa’s application to be admitted as a legal practitioner”, *The Namibian online*, Monday, February 17 2003; “Test case on independence of Prosecutor General starts”, *The Namibian online*, Tuesday, July 1 2003; “Law would cut to heart of democracy, warns lawyers”, *The Namibian online*, Wednesday, July 2 2003; “Law Society to challenge Govt in Supreme Court”, *The Namibian online*, August 21 2003

¹¹⁴“The State of the Judiciary and the non-adherence to the Constitution”, *Press Release*, NSHR, August 8 2000; “Another deplorable erosion of rule of law”, *Press Release*, NSHR, February 25 2004; “Minister’s utterances treasonous”, *Press Release*, NSHR, March 3 2004; “Concern over Judicial Independence & Integrity”, *Press Release*, NSHR, July 22 2004; “Namibian judiciary ‘facing Zimbabweanisation’”, *Afrol news online*, www.afrol.com/articles/12105; and “NSHR questions judge’s appointment”, *Press Release*, NSHR, June 6 2006

¹¹⁵“More attacks on Namibian judiciary”, *The Namibian online*, Thursday, March 29 2001; “Govt addresses judiciary issue”, *The Namibian online*, Monday, April 30 2001; “Kapia ‘undermining’ judiciary”, *The Namibian online*, Wednesday, June 26 2002; “PM sticks to his guns on change in judiciary”, *The Namibian online*, Thursday, February 6 2003; “Law Society defends judiciary”, *The Namibian online*, Friday, July 5 2002

¹¹⁶“Concern over Judicial Independence & Integrity”, *Press Release*, NSHR, July 22 2004

127. It is therefore the considered opinion of the Author hereof that the abovementioned subtle structural and other serious threats to judicial independence in the State Party flagrantly violate the absolute and peremptory requirement of the competence, independence and impartiality of all courts and tribunals as contemplated under Articles 12(1) (a), 78(2) and 78(3) of the Namibian Constitution as well as Article 14(1) of ICCPR, read with paragraphs 19 and 25 of CCPR General Comment 32 of August 23 2007.
128. The Author hereof generally concurs with the statements by the State Party as contained in paragraphs 178-180 and 212-214 of the State Party Report. However, in an attempt to illustrate the systematic State Party infringement upon the right to a fair and public trial, the Author hereof wishes to make specific reference to a pattern of commissions and omissions, which have been taking place in the State Party during the last 18 years of Namibian independence:

Torture and Cruel, Inhuman or Degrading Treatment (CIDT)

129. Torture and CIDT are strictly prohibited in terms of Article 8 of the Namibian Constitution which provides that “[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment” as well as under CAT and African Charter on Human and Peoples’ Rights (ACHPR).¹¹⁷ Article 2 of CAT stipulates that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”. Under CAT, a defendant possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention and trial. Accordingly, evidence obtained as a result of torture may never be admitted, except in proceedings against alleged perpetrators.

¹¹⁷Articles 2 and 4 of CAT, Article 7 of ICCPR and Article 7 of ACHPR

130. In 1995 the UN Special Rapporteur on Torture has called for a total ban on *incommunicado* detention. According to the Special Rapporteur, “[...] torture is most frequently practiced during *incommunicado* detention. *Incommunicado* detention should be made illegal and persons held *incommunicado* should be released without delay. This has not been complied with by the State Party. Legal provisions should ensure that defendants be given access to legal counsel within 24 hours of detention”.¹¹⁸ This has not been complied with either.
131. Article 7 of ICCPR is non-derogable in its entirety. According to this provision, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by Article 14, including during a state of emergency, except if a statement or confession obtained in violation of Article 7 is used as evidence that torture or other treatment prohibited by this provision occurred. Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.¹¹⁹
132. However, following their arrest and detention in August 1999, most of the Caprivi high treason trialists had been held *incommunicado*, tortured and ill-treated by military and state security agents as well as Police officers. These incidents occurred especially during the State of emergency which then Namibian President Sam Nujoma declared in the Caprivi Region. The high treason trialists were also denied access to legal representation, medical care and food as well as water.

Denial of Right to Speedy Trial

133. Article 11(3), read with Articles 5, 7, 12(1) (b) and 18, of the Namibian Constitution, guarantees the right of everyone arrested and detained to “be brought before the nearest Magistrate or other judicial officer within 48 hours of their arrest or, if this is

¹¹⁸ paragraph 926(d), Report of the Special Rapporteur on Torture, U.N. Doc. E/EN.4/1995/434

¹¹⁹ paragraph 6, U.N. document CCPR/C/GC/32

not reasonably possible, as soon as possible thereafter and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer”.

134. All of the Caprivi high treason trialists have been subjected to torture and CIDT, while a group of four (4) such trialists was held *incommunicado* for three (3) weeks before their official arrest took place.
135. This is why on February 25 2003, Caprivi high treason trialists reacted with anger and frustration when they heard in the High Court at Grootfontein that they face yet another postponement. Their case has been postponed on ten (10) occasions since June 2001.¹²⁰ Hence, the contents of Table 5 in the State Party Report at paragraph 214 should be rejected for inaccuracy.
136. On October 29 2003, evidence produced before the High Court at Grootfontein showed that Namibian Defense Force (NDF) soldiers held *incommunicado* a group of four (4) alleged Caprivi secessionists for six (6) months without court appearance. The Namibian Police officers who arrested John Samboma, Richard John Samati, Oscar Muyuka Puteho and Richard Libano Misuha, had testified in the said High Court that on November 6 1999, they had delivered the suspects into the said soldiers’ hands.¹²¹ However, the quartet only appeared in court for the first time on May 2 2000.¹²² It must be pointed out that on December 12 2005, the UN Working Group on Arbitrary Detention (WGAD) classified the detention of John Samboma and 12 other persons as constituting a “total or partial non-observance of the international norms relating to the right to a fair trial which is of such gravity as to give the deprivation of liberty an arbitrary character”.¹²³ In addition to that, the Author hereof revealed on February 26 2003 that another eight (8) Caprivi high

¹²⁰“Caprivi treason suspects angered by trial delays”, the *Namibian online*, Wednesday, February 26 2003

¹²¹“Treason suspects jailed for six months before court appearance”, *The Namibian online*, Thursday, October 30 2003

¹²²“Suspects held for months without trial”, *Namibian Human Rights Report 2004, August 2004*, p.69

¹²³Opinion no. 47/2005 issued on December 12 2005 UN Document (E/CN.4/2006/7, p.8)

treason trialists were being secretly held *incommunicado* at the time and without trial at Mariental.¹²⁴

137. The frequent delays that characterized the First Batch Treason Trial also plagued the Second Batch Treason Trial on several occasions. Firstly, the 12 men had spent several months in secret detention in Hardap Prison. They were only brought before Mariental and Katima Mulilo Magistrate's Courts during the course of 2004 after the Author hereof challenged the State Party to accurately account for the total number of Caprivi detainees.¹²⁵ Secondly, their first trial in the High Court, which was scheduled to take place on March 1 2005, was postponed several times, first, to May 16 2005, then July 7 2005 and later on to October 29 2005.¹²⁶
138. The expeditiousness of a hearing is a *sine qua non* element of the right to a fair hearing. In accordance with Article 14(3)(c), read with CCPR General Comment 32 of August 23 2007:

"[...] The right of the accused to be tried without undue delay [...] is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. [...] In cases where the accused is denied bail by the court, they must be tried as soon as possible [...] This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. All stages,

¹²⁴"8 suspects detained 'secretly'", *The Namibian online*, Monday, March 3 2003; "GRN Must Give Accurate Figures of Detainees", *Press Release*, NSHR, February 26 2003; "Cops release names of latest treason accused", *The Namibian online*, Tuesday, March 4 2003; and "Mariental Detainees", *Press Release*, NSHR, February 29 2004

¹²⁵"GRN must give accurate figures of detainees", *Press Release*, NSHR, February 26 2003

¹²⁶"Second treason trial still stuck", *The Namibian online*, Monday, July 11 2005

*whether in the first instance or on appeal must take place 'without undue delay'.*¹²⁷

139. However, owing to a combination of commissions and omissions for which the State Party is especially held responsible, this absolute procedural right is not in practice guaranteed in most cases. Firstly, the Author hereof has, through its *Namibia Human Rights Report*, systematically documented numerous cases showing the chronic prevalence of arbitrary deprivation of personal liberty¹²⁸ and prolonged pretrial¹²⁹ detention occurring in the State Party. In most cases, common law criminal suspects have been held in Police custody without trial for up to four years.¹³⁰
140. The overwhelming majority of the close to 120 Caprivi treason trialists, who are facing multiple high treason charges, have been in Police custody effectively without trial for up to six (6) years because most them were arrested in August 1999.¹³¹ They have therefore been denied the right to a speedy trial contrary to relevant national and international law norms.
141. A huge backlog of court cases, shoddy and or slow Police investigations and repeated postponements of trials, as well as the chronic shortage of judicial officers, were identified and listed as being among the principal factors contributing to prolonged pre-trial detention in the country.¹³² According to High Court Judge and Magistrates' Commission Chairperson Justice Sylvester Mainga, suspects remain in Police custody for up to four (4) years before going on trial.¹³³ The huge¹³⁴ backlog of court cases at

¹²⁷ paragraph 35, "Right of Persons Charged with a Criminal Offence", UN document CCPR/C/GC/32, p.10-11

¹²⁸"Freedom arbitrary deprivation of liberty", Summarized Namibia Human Rights Report 2006, October 11 2006, p.59-60 and "Freedom arbitrary deprivation of liberty", Namibia Human Rights Report 2007, November 13 2007

¹²⁹"Prolonged pre-trial detention", *Namibia Human Rights Report 2007*, November 13 2007, p.112 and "Suspects Held For Months without Trial", *Namibian Human Rights Report 2004, August 2004*

¹³⁰"Magistrates taken to task", *The Namibian online*, Wednesday, February 21 2007 and "Frequent postponement of cases", *Namibia Human Rights Report 2007*, November 13 2007, p.111

¹³¹"Treason suspects jailed for six months before court appearance", *The Namibian online*, Tuesday, October 30 2003; "Longer delay looms in Caprivi trial", *The Namibian online*, Monday, May 19 2003; "Caprivi treason trial may face delay of up to year", *The Namibian online*, January 21 2000; "Caprivi treason trial set to drag on", *The Namibian online*, July 18 2000 "High treason trial date set", *The Namibian online*, Monday, November 18 2002

¹³²"Right to Fair Public Trial", *Namibia Human Rights Report 2007*, November 13 2007, p.105-112

¹³³"Magistrates taken to task", *The Namibian online*, Wednesday, February 21 2007

¹³⁴"Massive Case Backlog", *Namibia Human Rights Report 2007*, November 13 2007, p.111

both Lower Courts and High Courts levels is *ipso facto* proof that the right to speedy trial has been flagrantly violated in the State Party.

142. Other various factors, which have exacerbated the denial of the right to speedy trial--include judicial misconduct and corruption,¹³⁵ systematic executive interference in the affairs of the judiciary,¹³⁶ refusal to release detainees on bail,¹³⁷ denial of effective legal representation¹³⁸ and resistance¹³⁹ to provide legal assistance as well as the frequent postponements of proceedings,¹⁴⁰ for which the State Party is almost entirely held responsible--have contributed to the violation of the right to a speedy trial in respect of especially Caprivi high treason trialists.
143. On January 15 2007 and speaking at the official opening of the High Court session for 2007, Judge President Petrus Damaseb warned that the State Party's *certiorari* system "had all but collapsed" and added that this resulted in "a very serious violation of the rights of those people for whose benefit the [certiorari] system was created."¹⁴¹
144. On several occasions over the last 18 years, other high-ranking State Party officials and judicial officers have also used the terms "has collapsed" or "is near collapse"

¹³⁵ For example, in February 2007, a frustrated High Court and Magistrates' Commission Chairperson Judge Sylvester Mainga accused some Magistrates of "embarrassing and tarnishing the reputation of the judiciary". Judge Mainga also revealed that several charges of misconduct by Magistrates, ranging from incompetence, theft, untruthfulness and drunkenness on duty to absenteeism, arrogance, impatience and insubordination were being investigated (vide "Gross judicial misconduct", *Namibia Human Rights Report 2007*, November 13 2007, p.111-112)

¹³⁶"Judges Likened With Mercenaries"; "SPYL Leader Blasts Judiciary"; "Maverick Justice Minister Packs Judiciary"; "Deputy Minister Brands Judge; Firebrand Minister Accuses Judiciary"; and "President Endorses Judiciary Attacks", *Namibia Human Rights Report 2004, August 2004, p.62-66*

¹³⁷"Treason trial bail ruling now set for next month", *The Namibian online*, Monday, November 13 2006

¹³⁸ "In defense of right to counsel", *Press Release*, NSHR, July 27 2006 Also State-sponsored counsel are only allowed on condition they do not accept instructions from their clients to challenge the jurisdiction of the State Party to try the detainees

¹³⁹Despite the enactment of the Legal Aid Act 1990, the State Party only grudgingly granted legal aid after it was directed to do so by the Supreme Court on December 14 2001, following a successful Supreme Court application by the detainees themselves in the *Mwilima and Others* case no. SA 29/2001. Vide also "Struggle for state provision of legal aid", Document-Namibia: Justice delayed is justice denied: The Caprivi treason trial", Amnesty International, AFR42/001/2003, "GoN refuses to appoint private counsel", *Namibia Human Rights Report 2006* under "Right to Fair Public Trial" and "Second treason trial still stuck", *The Namibian online*, Monday, July 11 2005

¹⁴⁰"Frequent postponements of cases", *Namibia Human Rights Report 2007*, November 13 2007, p.111

¹⁴¹"Crumbling *certiorari* system", *Namibia Human Rights Report 2007*, November 13 2007, p.109-110

when referring to the untenable system of administration of justice in the State Party.¹⁴²

145. Moreover, in an exposé in its July 2008 edition, the investigative *Insight Namibia* news magazine published two disturbing articles on how delays in delivery of judgments by High Court and Supreme Court Judges undermined the rule of law in the State Party.¹⁴³
146. In addition, during its consideration of the State Party's First Periodic Country Report under ICCPR on July 30 2004, the supervisory HRC had expressed concern that, contrary to the provisions of Article 14 of ICCPR, the right to a fair trial without undue delay and within a reasonable period of time, was being denied in the State Party. HRC recommended that the State Party "undertake urgent steps to guarantee that trials take place within a reasonable period of time".¹⁴⁴
147. In any event, the statements by the State Party referring to "circumstances which may have led to delays in the [Caprivi high treason] trial",¹⁴⁵ which statements are at variance with the earlier statements by the same State Party that "[Caprivi high treason trialists] are guaranteed a fair and public trial [...] within a reasonable time",¹⁴⁶ may *ipso facto* be deemed as admission that the right to a speedy trial is not, in practice, guaranteed in the State Party.

¹⁴²According to a report in *The Namibian* edition of February 26 2007 titled "PG fears justice system collapse" and issued on February 23 2007, Prosecutor General Olivia Imalwa warned inter alia that: "If we do not take action, the criminal justice system will collapse and the reviving thereof will be a daunting task". In an official statement issued at the opening warned at the official opening of the High Court for 2007 on January 15 2007 Judge President Petrus Damaseb warned that a crucial part of the State Party's criminal justice system that was designed to help ensure that justice is done in the country's Magistrates' Courts has collapsed. These remarks are contained in a media report titled "*Criminal review system in collapse, Judge warns*" which hit the headlines in *The Namibian* edition of January 17 2007

¹⁴³"Courts: Justice denied", *Insight Namibia*, July 2008, p.20-22 and "A real travesty of justice", *Insight Namibia*, July 2008, p3 and "NAMIBIA: Justice delayed is justice denied: The Caprivi treason trial", Amnesty International, AI Index: AFR 42/001/2003, August 4 2003

¹⁴⁴paragraph 17, U.N. document CCPR/CO/81/NAM

¹⁴⁵paragraph 214, U.N. document CERD/C/NAM/12, p.33

¹⁴⁶paragraph 185, U.N. document CERD/C/NAM/12, p.30

Violations of Presumption of Innocence Doctrine

148. Article 12 (1)(d) of the Namibian Constitution similarly provides that:

"[A]ll persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them".

149. Article 14 (2) of ICCPR also guarantees the right of everyone charged with a criminal offence to be presumed innocent until proven guilty according to law. In addition, according to CCPR General Comment 32 of July 9-27 2007, the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving a charge. This guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Presumption of innocence ensures that the accused has the benefit of doubt. This also requires that persons accused of a criminal act must be treated in accordance with this principle.

150. Yet, this right is denied in practice especially in the case of Caprivi high treason trialists. Firstly, all of the Caprivi high treason trialists have been jointly charged, under the "common purpose" doctrine, with 275 counts of criminal conduct including high treason, murder, sedition and public violence. The doctrine of "common purpose" essentially relieves the prosecution from having to prove beyond reasonable doubt that each accused committed a conduct which contributed to the ultimate unlawful consequence. This state of affairs shifts the burden of proof from the prosecution to the accused and thereby undermining their right to be presumed innocent. The doctrine of presumption of innocence, on the other hand, imposes the burden of proof upon the prosecution throughout a trial.

151. Secondly, the Caprivi high treason trialists are being systematically treated as if they have already been found guilty in accordance with the law. For example, on November 27 2002 a group of twelve (12) Caprivi high treason trialists instituted a massive civil claim for damages against the Minister of Prisons and Correctional Services. They claimed that they have been brutally assaulted by Prison officials at the Grootfontein Prison between July 31 2000 and August 7 2000.¹⁴⁷
152. Furthermore, virtually all of the Caprivi high treason trialists had been subjected to torture and other cruel, inhuman or degrading treatment (CIDT), especially during the pre-trial period.¹⁴⁸ Moreover, speaking at the opening of a week-long human rights training course for Police officers on November 2 2001, Deputy Namibian Police Inspector General Major-General Fritz Nghiishililwa, conceded that “some excessive force” had been used when the Police reacted to rebellious activities in the Caprivi Region on August 2 1999.¹⁴⁹ Hence, the claims by the State Party at paragraphs 184 through 187 of the State Party Report should be viewed as *non sequitur* and a red herring.

Refusal to Provide Legal Aid

153. The right to legal aid is guaranteed by the Namibian Constitution under Articles 25 (2) and 95(h) thereof. In terms of this constitutional provision, the state is obliged to provide free legal aid for indigent persons “[...] in defined cases with due regard to the resources of the State”. Principle 6 of the UN Basic Principles on the Role of Lawyers stipulates that if a person who is indigent is arrested, charged or detained does not have legal counsel of his or her own choice, he or she is entitled to legal counsel assigned by a Judge whenever required by the interests of justice and provided for free of charge by the state.

¹⁴⁷“12 Caprivi suspects claim damages for alleged assault”, *The Namibian online*, Thursday, November 28 2002

¹⁴⁸“Inadmissibility of torture evidence” Press Release, NSHR, January 4 2006

¹⁴⁹“Police admit ‘excessive force’ in the Caprivi”, *The Namibian online*, Monday, November 5 2001

154. However, in the Caprivi high treason case, the State Party initially declined to provide legal aid for the accused on the grounds that it did not have sufficient funds to provide legal assistance. Consequently, on November 12 2001, 128 Caprivi high treason accused mounted a legal challenge against the State Party. They prayed the High Court to order the halting of their prosecution if they remain without legal representation. Led by Geoffrey Mwilima, the 128 accused filed a semi-urgent application against the State Party, the Director of Legal Aid and the Prosecutor General. Specifically, they prayed the High Court: (1) to order the Legal Aid Director to provide them with State-funded defense counsels, (2) to order that the criminal proceedings against them may not go ahead until they have legal representation, and (3) to strike down as unconstitutional those parts of the Legal Aid Act 1990 (Act 29 1990), as amended, which took away High Court Judges' authority to direct that suspects should be provided with legal aid in cases where they thought a person could not stand trial without assistance from a defense counsel.¹⁵⁰
155. Mwilima and his co-accused argued that without legal representation, they will be denied their constitutional rights to a fair trial. The State Party opposed the said legal challenge.¹⁵¹ In a unanimous decision, on December 14 2001, three (3) High Court judges directed the Director of Legal Aid to provide legal aid as prayed for by the accused in order to enforce their constitutional right to a fair trial. In delivering the ruling, Acting Judge (AJ) Harold Levy was quoted as saying that any person before a Namibian court was entitled to a fair and proper trial, and that essential to a fair trial was the right to be legally represented. AJ Levy added that the Namibian Constitution did not intend that laws could be made which would entitle the Legal Aid Director to refuse legal aid in a case of treason. In response to the State Party's argument that due regard be given to the resources, AJ Levy said that there was no evidence before the court that the resources of the state would not allow the granting of legal aid to the accused.¹⁵²

¹⁵⁰“Caprivi suspects mount challenge”, *The Namibian online*, Tuesday, November 12 2001

¹⁵¹“Caprivi suspects mount challenge”, *The Namibian online*, Tuesday, November 12 2001

¹⁵² “Caprivi appeal on way”, *The Namibian online*, Monday, December 17 2001

156. The State Party subsequently appealed with the Supreme Court against the aforementioned unanimous High Court decision. The State Party argued not only that it did not have the resources to provide legal aid to the 128 accused, but it also denied that the constitutional rights to a fair trial and to legal representation include a guarantee that legal aid be provided for by the state. Nevertheless, on June 7 2002, the Supreme Court directed the Ministry of Justice to provide legal aid for the 128 accused. Since June 2002 the trial has been adjourned several times over a period of one (1) year, partly to enable the appointment and preparation of the state-funded defense counsels for the high treason trialists.
157. After the delay of some ten (10) months and the June 2002 Supreme Court ruling in favor of state-funded legal representation, the State Party finally appointed nine (9) defense counsels on April 28 2003 to represent the highly controversial Caprivi high treason trialists in the treason trial case.¹⁵³ Citing “budgetary constraints” in the beginning of February 2003, the Ministry of Justice dismissed the first team of defense lawyers within a week of their appointment.¹⁵⁴
158. On May 6 2003 the Ministry of Justice announced that nine (9) new counsels would replace the five (5) defense lawyers from the Legal Aid Directorate to represent the 128 Caprivi accused. The Author hereof is of the opinion that the initial refusal by the Ministry of Justice to provide legal aid has seriously undermined the right to a fair and public hearing as envisaged in Articles 12 and 14 of the Namibian Constitution and ICCPR, respectively.

¹⁵³“Delayed Appointment of Defense Counsel”, Namibia Human Rights Report 2003, August 11 2003, p.79

¹⁵⁴“Setback for Caprivi treason trial defense”, *The Namibian online*, Friday, February 14 2003

Denial of Right to Own Choosing Counsel

159. This right to choose own counsel is also denied in practice especially in the case of the Caprivi high treason trialists.
160. When the Caprivi high treason trial began in earnest in 2006 a group of between 15 and 30 Caprivi high treason trialists lost legal representation, following the withdrawal of their State Party-instructed legal counsels. Several such legal counsels withdrew from representing the said group because, ‘contrary’ to the counsels’ instructions from the State Party, the Caprivi high treason trialists questioned the jurisdiction of the High Court to try them. The group insisted that, as the Caprivi Zipfel (i.e. Caprivi Region) has legally never been part of Namibia and, as they were not Namibian citizens but Caprivians, the Namibian High Court has no jurisdiction over them.¹⁵⁵ Hence, they argued, they were not subject to be tried in a foreign court for any commissions or omissions that have occurred in their own motherland.¹⁵⁶
161. In a *Press Release* issued on February 18 2005, the Author hereof “deplored allowing, tolerating or condoning the trial of persons who had no legal representation as “a serious travesty of justice”. The Author hereof also emphasized the fundamental right of any accused persons to be represented by a legal representative of their choice “who is willing and capable of expressing their views effectively and efficiently”.¹⁵⁷
162. In yet another *Press Release* issued on July 27 2006, the Author hereof expressed “its deepest concern about at least the procedural unfairness in the so-called Second Caprivi high treason trial” saying that:

¹⁵⁵“We are not Namibians, say 15 treason accused - Trial hangs in the balance once again”, *The Namibian online*, Wednesday, February 2 2005, “Caprivi 15’ treason suspects refuse to budge on jurisdiction challenge”, *The Namibian online*, Thursday, February 24 2005 and “Second batch of high treason suspects lose their lawyers”, *The Namibian online*, Thursday, May 19 2005

¹⁵⁶“NAMIBIA: Caprivi separatists still defiant”, *IRINnews online*, May 26 2005, “Second batch of high treason suspects lose their lawyers”, *The Namibian online*, Thursday, May 19 2005 and “Second treason trial still stuck”, *The Namibian online*, Monday, July 11 2005

¹⁵⁷“Fear of travesty of justice in high treason trial”, *Press Release*, NSHR, February 18 2005

“the right of everyone to legal counsel of one’s own choosing is guaranteed in terms of Article 12(1)(e) of the Constitution and universally acknowledged in terms of Articles 14(3)(d), 7(1)(c), 8(2)(d) and 6(3)(c) of the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, respectively”.

163. The Author hereof also pointed out that “a trial must not only be fair, but it must also be seen to be fair” and further that “the right of accused to legal counsel of their own choosing is absolute and may not be limited”. In an attempt to drive home the absoluteness of the right to counsel of one’s choosing, the Author hereof made reference to the ICTY case of *Prosecutor vs. Martić* Case No. IT-99-11-PT, T of August 2 2002 at pp. 5-6.¹⁵⁸
164. Furthermore, on May 16 2005, Acting Judge (AJ) John Manyarara failed to order Legal Aid (LA) Director Vero Mbahuurua to instruct a private counsel to represent Second Batch high treason trialist John Mazila Tembwe. Tembwe refused to accept and avail himself of the services of a LA-provided counsel. He argued that the same State Party that he holds responsible for his persecution could hardly provide him with one of its employees as an independent and effective counsel.¹⁵⁹ Hence, in the absence of a clear court order by AJ Manyarara to compel the State Party to arrange a private and independent legal counsel to represent Tembwe, LA Director Mbahuurua refused to instruct a private counsel to that effect.¹⁶⁰ Appearing on July 7 2005, Legal Assistance Centre (LAC) Director Norman Tjombe told AJ Manyarara that he had instructions to lodge an urgent application with the view to compel the State Party to provide Tembwe with an independent defense counsel as prayed for.¹⁶¹

¹⁵⁸“In defense of the right to counsel” *Press Release*, NSHR, July 27 2006

¹⁵⁹“Second treason trial still stuck”, *The Namibian online*, Monday, July 11 2005

¹⁶⁰“Second treason trial still stuck”, *The Namibian online*, Monday, July 11 2005

¹⁶¹“Second treason trial still stuck”, *The Namibian online*, Monday, July 11 2005

Procedurally Flawed Treason Trial

165. In terms of Articles 12 and 13 of CAT, read with Article 9 of ICCPR and CCPR (HRC) General Comment 8 (2), each State Party to CAT “shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable grounds to believe that an act of torture has been committed in any territory under its jurisdiction”. There is irrefutable evidence that all of the initially close to 130 Caprivi high treason trialists had been subjected to torture and CIDT during and, in certain cases, even after the pre-trial interrogations.¹⁶²
166. Despite compelling evidence that torture and CIDT have extensively been used against both the accused and certain witness, magistrates, judges, prosecutors and defense lawyers in the State Party have, dismally failed in their obligation to ensure that the widespread allegations of torture and CIDT of the accused have been investigated promptly and effectively. In terms of Article 7 of ICCPR, read with CCPR (HRC) General Comment 32 of July 9-27 2007 as well as CCPR (HRC) General Comment 20(12), a statement or confession obtained in violation of Article 7 should only be used as evidence that torture or CIDT has occurred. According to HRC, deviating from the fundamental principles of fair trial [...] is prohibited at all times.¹⁶³
167. There is ample evidence to suggest that State Party officials are fully aware that torture and CIDT has extensively occurred in the Caprivi case.¹⁶⁴ Nonetheless, the Office of the Prosecutor General decided that Police officers and other torturers can only be prosecuted once the Caprivi high treason trial is over.¹⁶⁵ There is also extensive evidence to suggest that many State witness were declared “hostile witness” after they accused specific Police officers of having forced them through torture or

¹⁶²“Inadmissibility of torture evidence”, *Press Release*, NSHR, January 4 2006

¹⁶³paragraph 6, U.N. document CCPR/C/GC/32

¹⁶⁴“Prime Minister avoids condemning Caprivi abuses”, Pan-African News Agency (PANA), August 9 1999 and “Namibian government admits atrocities in Caprivi”, AFP, August 12 1999

¹⁶⁵“Caprivi torture cases ‘on the back-burner’”, The Namibian online, October 29 2002

CIDT to make false statements under oath.¹⁶⁶ In a *Press Release* issued on January 4 2006, the Author hereof urged the Chief Justice of the State Party to “promptly order or cause to be ordered an effective separate trial” in order to ensure that no tainted evidence is presented before the High Court in the controversial Caprivi case.¹⁶⁷

168. *Ipsa facto* the Author hereof is of the strong opinion that the Caprivi high treason trial is procedurally flawed and hence unfair *ab initio*.¹⁶⁸ Moreover, the systematic and flagrant commissions and omissions cited in paragraphs 129 to 164 of this Shadow Report strongly suggest that the Caprivi high treason trialists cannot under those circumstances receive a fair trial. The Author hereof is *ipso facto* strongly of the opinion that the Caprivi high treason trial is a monumental travesty of justice.

Article 5(b): Right to Security of Person

169. The Author hereof notes that at paragraphs 216 to 217 of the State Party Report, the State Party fails to inform CERD about whether or not it has adopted effective legislative, judicial, administrative or other measures to give effect to Article 5(b) of the Convention. It is pointed out here that the right consecrated in Article 5(b) of the present Convention guarantees the right of everyone to security of person and protection by the State Party against violence and other bodily harm, whether inflicted by public officials or by persons or groups acting in private capacity. The right to security of person is reaffirmed in terms of Articles 9(1), 9(2) and 9(3) of ICCPR as well as in accordance with CCPR General Comment 8 of 1982.¹⁶⁹

¹⁶⁶“Treason witness declared ‘hostile’”, *The Namibian online*, February 22 2006; “NSHR accuses state of forcing witness”, *New Era online*, August 30 2006; “‘Hostile witness’ frustrates treason trial prosecution”, *The Namibian online*, Tuesday, September 26 2006

¹⁶⁷“Inadmissibility of torture evidence”, Press Release, NSHR, January 4 2006; “Torture claims haunt Caprivi treason trial”, *The Namibian online*, January 5 2006 and “Opinion: The Caprivi Case and Absolute Prohibition of torture”, Press Release, January 11 2006

¹⁶⁸“Caprivi treason trial is procedurally flawed”, *Windhoek Observer*, Saturday, January 7 2006, p.19

¹⁶⁹paragraphs 1-4, UN document A/37/40 (1982) 95

170. Fundamental to effective enjoyment of the right to security of person is the right of any persons arrested and detained in connection with a crime to be brought promptly before a judicial officer authorized by law to exercise judicial powers and to be tried “within reasonable time or to be released” as contemplated in Articles 12(1) (b) and 9(3) of the Namibian Constitution and ICCPR, respectively.
171. On December 12 2005, the UN Working Group on Arbitrary Detention (WGAD) classified the detention of 13 alleged Caprivi secessionists as a Category III detention. According to WGAD, the detention of John Samboma and 12 other persons constituted “total or partial non-observance of the international norms relating to the right to a fair trial which is of such gravity as to give the deprivation of liberty an arbitrary character”.¹⁷⁰ On December 12 2005, the UN Working Group on Arbitrary Detention (WGAD) classified the detention of John Samboma and 12 other persons as constituting a “total or partial non-observance of the international norms relating to the right to a fair trial which is of such gravity as to give the deprivation of liberty an arbitrary character”.¹⁷¹
172. As strongly implied in the preceding sections and paragraphs of this Shadow Report, the yearly statistics and figures contained in the *Namibia Human Rights Report 2006* show that incidents and situations of arbitrary detention have increased from 5 in 2005 to 14 in 2006,¹⁷² while the number of passive social security threats,¹⁷³ such as escalating poverty,¹⁷⁴ gross income disparities¹⁷⁵ and severe food shortages as well as disease¹⁷⁶ have significantly contributed to despair and eventually death.¹⁷⁷ Moreover,

¹⁷⁰Opinion no. 47/2005 issued on December 12 2005 UN Document (E/CN.4/2006/7, p.8)

¹⁷¹Opinion no. 47/2005 issued on December 12 2005 UN Document (E/CN.4/2006/7, p.8)

¹⁷²“Arbitrary deprivation of liberty” and “CPR-Statistical Legend 2006, *Summarized Namibia Human Rights Report 2006*, October 11 2006, p.59-60 and pp.72

¹⁷³“State of CEESRs”, *Summarized Namibia Human Rights Report 2006*”, October 11 2006,p.16

¹⁷⁴“Fighting poverty”, *The Namibian online*, Thursday, October 27 2005

¹⁷⁵“Urban Land: Whose Is It?” *The Namibian online*, Wednesday, June 8 2006

¹⁷⁶“Diarrhea hits Walvis”, *New Era online*, March 15 2006 and “It’s polio”, *New Era online*, June 7 2006 and “Polio-What it is and what to do”, *New Era online*, June 8 2006

¹⁷⁷“Namibia AIDS Death toll”, *New Era online*, May 18 2006]

a repertoire of active human security menaces, such as rising violent crime,¹⁷⁸ including armed robbery,¹⁷⁹ murder,¹⁸⁰ suicide,¹⁸¹ domestic violence,¹⁸² rape,¹⁸³ infanticide and baby dumping,¹⁸⁴ have remained grave manifestations of social insecurity and other threats to the right to security of person.

Article 5(c): Right to Political Activity

173. In terms of Article 5(c) of the Convention, read with Articles 17, 21 and 95(k) of the Namibian Constitution, every citizen of the State Party has the right to engage in peaceful political activities intended to influence the policies and composition of Government and by so doing to join or form the political parties or associations of their choice. However, save in so far as saying that citizens regularly participate in

¹⁷⁸“Crime rise holds NA captive”, *The Namibian*, Wednesday, July 5 2006, “Swapo takes issue on violent crime”, *The Namibian online*, Thursday, October 6 2005

¹⁷⁹“Armed robbery in Namibia”, *New Era online*, June 16 2006; “Police nab Khorab lodge robbers”, *The Namibian online*, Wednesday, January 4 2006, “Robbers assault elderly farmer”, *The Namibian online*, Tuesday, January 10 2006; “Cop crimes concern NSHR”, *The Namibian online*, Friday, August 12 2005; “Outjo farmer beaten to death, robbed”, *The Namibian online*, Tuesday, June 13 2006; “Mental check-up for New Year murder suspect”, *The Namibian online*, Tuesday, June 13 2006; “7 guilty in N\$5,3m heist”, *The Namibian online*, Friday, February 24 2006; “Bicycle robbery gang sent to jail”, *The Namibian online*, Monday, June 5 2006; “Police foil bank robbery, man shot dead”, *The Namibian online*, Monday, June 5 2006; and “Foiled Aussenkehr bank robbery suspects in court”, *The Namibian online*, Tuesday, June 6 2006

¹⁸⁰“Body of murder suspect found in Goreangab Dam”, *The Namibian online*, Monday January 16 2006; “Two in court over Joubert murder”, *The Namibian online*, June 28 2006; “Panga murderer put behind bars for 35 years”, *The Namibian online*, Monday, June 19 2006; “Triple arson murder suspect to be kept in psychiatric unit”, *The Namibian online*, Wednesday, June 14 2006; “Justice delayed in murder case against street kid”, *The Namibian online*, Monday, June 12 2006; “Mental check-up for New Year murder suspect”, *The Namibian online*, Tuesday, June 13 2006; “Kamanjab panga murder suspect convicted”, *The Namibian online*, Thursday, June 15 2006; “Suicide claim adds twist to triple murder trial”, *The Namibian online*, June 12 2006; “Swapo condemns Outjo farm murder”, *The Namibian online*, June 16 2006; “Police seek leads on Outjo farm murder, offer N\$15 000 reward”, *The Namibian online*, Friday, June 30 2006; “Two held for Jan Joubert murder”, *The Namibian online*, Monday, June 26 2006

¹⁸¹“3 more suicides by hanging”, *The Namibian online*, Wednesday, January 11 2006, “3 suicides in two days”, *The Namibian online*, Thursday, February 2 2006; “Suicide claim adds twist to triple murder trial”, *The Namibian online*, Monday, June 12 2006 “Police being investigated for suicide”, *The Namibian online*, Wednesday, June 21 2006; “Five deaths reported”, *The Namibian online*, Thursday, June 22 2006; “2 suicides”, *The Namibian online*, Wednesday, May 17 2006; “Rape, murder and suicides”, *The Namibian online*, Friday, October 14 2005; and “Two suicides reported”, *The Namibian online*, Tuesday, July 4 2006

¹⁸²“Another week ends in violence, greed”, *The Namibian online*, Monday, January 30 2006; “Year-end violence costs a life”, *The Namibian online*, Tuesday, January 3 2006; “Thousands flock to Omhedi for crowning”, *The Namibian online*, Monday, November 14 2005; “WAD joins shebeen debate”, *The Namibian online*, June 8 2006; “License or no license—shebeens are no good”, *The Namibian online*, Friday, June 23 2006; and Friendly Haven offers hope”, *The Namibian online*, Tuesday, June 20 2006

¹⁸³“Three rapes in two days”, *The Namibian online*, Monday, May 15 2006

¹⁸⁴“Woman accused of dumping her baby”, *The Namibian online*, May 15 2006; “Two babies dumped”, *The Namibian online*, Thursday, January 5 2006; “Ongwediva Police probe toilet birth”, *The Namibian online*, Friday, August 19 2005

elections as stated in paragraph 218, the State Party Report fails to inform CERD on the specific, if any, legislative, judicial, administrative or other measures taken to give effect to the right of every citizen to political, economic and religious freedoms.

174. As a matter of fact, as the State Party is a *de facto* one-party¹⁸⁵ State since independence, the right to political activity is severely restricted in the State Party if the following incidents, to mention but a few, were taken as a pointer:

Assault on Freedom of Expression and Opinion

175. Despite their oath or affirmation in terms of Articles 30, 32(1), 38, 55 and 71, among others, of the Namibian Constitution, members of the Executive Branch and high-ranking ruling Swapo Party officials have systematically indulged in flagrant violations of the right to freedom of expression and opinion. Such assault is aimed at Opposition political parties, human rights defenders, the independent media and other civil society actors in the State Party. The Author hereof has, through its annual *Namibia Human Rights Report*, recorded numerous incidents of serious verbal attacks since Namibian independence on March 21 1990. For example, a total of 39 attacks on the freedom of expression and opinion were monitored during the 2007 reporting period. This is compared to the 34 that had occurred during the previous period. Of all the 39 attacks on the freedom of expression and opinion, twenty (20) such attacks were aimed at the media, while eighteen (18) of the attacks targeted the Author hereof and its donors.

176. It is significant to point out that, while the 20 attacks on the media occurred over a period of 14 months, slightly more than 72 percent of all the attacks on the Author hereof took place between July 14 2007 and September 28 2007 alone. It is also noteworthy to indicate that 29 of the 39 attacks on the freedom of expression and

¹⁸⁵“Tremor shakes Namibian politics”, Perspectives: Political analysis and commentary from Southern Africa”, Heinrich Boell Foundation Stiftung, no.1.08, 2008

opinion were carried out in the name or in the defense of former Namibian President Sam Nujoma with his knowledge or acquiescence.¹⁸⁶

177. Furthermore, thirty-four (34) incidents seeking to arrest or eliminate the right to freedom of opinion and expression, including the right of citizens to know and to actively participate in public affairs, were recorded during the 2003 reporting period. Again, high-ranking State Party officials were almost exclusively held responsible. Then President Sam Nujoma alone accounted for at least ten (10) such attacks or threats against the right to freedom of expression and opinion. During the 2003 reporting period, at least three attacks were directed at *The Namibian* newspaper alone.¹⁸⁷ A 2002 ban on State Party advertising in *The Namibian* newspaper is still enforced six (6) years later.¹⁸⁸ At its 2007 Congress, the Swapo Party adopted a resolution imposing a media council to regulate the independent media in the State Party. The resolution received widespread rejection from the independent media.¹⁸⁹

Rally for Democracy and Progress (RDP):

178. As indicated in several sections of this Shadow Report, the right to freedom of association is highly restricted in the State Party. Members of the Executive Branch as well as high-ranking Swapo Party officials have on numerous occasions showed that forming and or joining any other political parties, except the ruling Swapo Party, is not tolerated. For example, addressing a Swapo Party rally at the town of Omuthiya on February 23 2008, incumbent Namibian President Lucas Hifikepunye Pohamba charged that former Swapo Party members who joined the newly established

¹⁸⁶“Freedom from Attacks on Freedom of Expression and Opinion”, Summarized Extended Namibia Human Rights Report 2007, November 13 2007, p.36

¹⁸⁷“Attacks on Freedom of Opinion and Expression”, Summarized Namibia Human Rights Report 2003, p.15 and “Statistical Analysis of Cases”, Summarized Namibia Human Rights Report 2003, p.18

¹⁸⁸“On Keeping An Outdated Ban In Place”, *The Namibian online*, Friday, January 11 2008

¹⁸⁹“Media regulation: Editors speak out”, *The Namibian online*, Friday, May 2 2008; “Govt 'ambushes' media”, *The Namibian online*, Friday, February 8 2008; “No to a Govt-regulated media body, says Misa”, *The Namibian online*, Tuesday, May 6 2008; “Government Can't Impose On Media”, *The Namibian online*, Friday, February 8 2008; “Political Perspective: 'GOVERNMENT' will establish a media council”, *The Namibian online*, Friday, February 29 2008

Opposition Rally for Democracy and Progress (RDP) were “traitors” like Judas who betrayed Jesus and misled people. President Pohamba *inter alia* said:

*“They are comparable to the biblical Judas Iscariot - they were with us (in Swapo), but they betrayed us”.*¹⁹⁰

179. The rally also saw a number of other high-ranking Swapo Party leaders taking aim at RDP members and human rights defenders. They variously urged their audience to deny RDP members’ economic opportunities, such as boycotting RDP businesses as well as denying RDP and human rights defenders access to water.¹⁹¹ The 2008 has particularly seen dramatic increase in political hate speech and other incendiary public statements *a la* ZANU PF directed at RDP members and supporters. Such statements came from high-ranking officials of both the Executive Branch and the ruling Swapo Party. The Author hereof as well as church groups¹⁹² and the Council of Traditional Leaders¹⁹³ have expressed deep concern about political intolerance in the country Reports on the establishment of ‘no go’ areas for opposition parties in general and RDP in particular have been received.¹⁹⁴

Congress of Democrats (CoD):

180. On July 6 2003 President Sam Nujoma and other high-ranking ruling party officials, speaking at public rally held in the Katutura Sports Stadium, branded the Opposition CoD “enemy of the people”.¹⁹⁵ In a speech closely monitored by human rights defenders and pro-democracy activists, a male Swapo Party member repeatedly called upon his

¹⁹⁰“Boycott RDP businesses: Swapo”, *The Namibian online*, Monday, February 25, 2008

¹⁹¹“**Amukwiyu Instigates Sabotage Against Nshr And Rdp***”, *Press Release*, NSHR, March 12 2008

¹⁹²“Churches Disturbed By Intolerance*”, *Press Release*, NSHR, April 2 2008

¹⁹³“Chiefs urge restraint”, *The Namibian online*, Friday, May 16 2008

¹⁹⁴“Swapo Party Activists Block RDP Rally”, *Press Release*, NSHR, May 11 2008; “No-go areas undemocratic: analyst”, *The Namibian online*, Friday, May 16 2008; “SPYL protests venue use by RDP”, *New Era online*, July 11 2008, p.2

¹⁹⁵“CoD Branded ‘The Enemy’ of the People”, *Namibia Human Rights Report 2003*, August 11 2003, p.65

audience and NBC listeners countrywide to treat the Parliamentary Opposition party as “any other enemies of the Namibian people” during the upcoming regional and local elections.¹⁹⁶

181. The attack came after CoD on June 27 2003 approached the High Court to prevent the commencement of the voter registration drive before the Electoral Amendment Act becomes law. The Opposition party also cited illegalities in President Nujoma’s appointment of the Delimitation Commissions in 1998 and 2002 arguing *inter alia* that appointing such Commissions before the time intervals stipulated in the Act meant that all election results based on such delimitations would also be illegal.¹⁹⁷

Caprivi National Democratic Party (CNDP):

182. On July 28 2004, newly formed Caprivi National Democratic Party (CNDP) founding President Martin Lukato accused the Electoral Commission of Namibia (ECN) of having refused to register his party on grounds that its name advocated secessionism.¹⁹⁸ Lukato is a member of the Mafwe tribal group in the volatile Caprivi Region¹⁹⁹ while virtually all the close to 130 Caprivi high treason trialists are also ethnic Mafwe tribesmen.²⁰⁰

Banning of United Democratic Party (UDP)

183. On September 4 2006, the State Party banned the United Democratic Party (UDP) by declaring that the party's “secessionist activities [...] render it an illegal organization”. MIB Deputy Minister Raphael Dinyando said UDP would be forbidden in the country unless the party abandoned, rejected or denounced its “secessionist agenda”. He

¹⁹⁶“CoD branded “enemy” of the people”, *Press Release*, NSHR, Windhoek, July 6, 2003 and “NSHR on Nujoma”, *Nampa online*, July 7, 2003

¹⁹⁷“CoD rejects blame game”, *The Namibian online*, Monday, July 7 2003 and “CoD still confident about challenge”, *The Namibian online*, Friday July 25 2003

¹⁹⁸“GRN Nixes New Caprivi Party “, *Namibia Human Rights Report 2004*, August 2004, p.113-114 and “Caprivi party cries foul”, *The Namibian online*, Monday, October 4 2004

¹⁹⁹ Internal monitoring reports, NSHR, July 30 2004

claimed anyone busy with such an organization to be in violation of the Namibian Constitution.

184. Deputy Minister Dinyando said that law enforcement agencies would act “according to our laws relating to the prevention of illegal gatherings, particularly because the UDP has made clear its intentions aimed at undermining our constitutional order”. The ban turned UDP into the first ever political party to be outlawed in the country since Independence on March 21 1990.²⁰¹

Author Hereof

185. On August 20 2007 Swapo Party National Council Chief Whip Jhonny Hakaye tabled a motion in the National Council to regulate the activities of especially the Author hereof as well as *The Namibian* and *Windhoek Observer* newspapers. The motion came after it came to light that the human rights organization had requested the International Criminal Court to investigate former President Sam Nujoma and three former military leaders.²⁰²
186. As expected, Hakaye and his Swapo Party's action has provoked heavy criticism from some members of the European Parliament. The Group of the Alliance of Liberals and Democrats for Europe want the European Parliament to urge Namibia to immediately stop the "threats and intimidation and to ensure the earliest possible restoration of respect for human rights and the rule of law in Namibia".²⁰³ The group informed the European Parliament that the motion had damaged Namibia's credibility in the light of the country's obligations to fulfill the terms set out in Article 9 of the African, Caribbean and Pacific-European Commission (ACP-EC) Cotonou

²⁰¹“GoN Bans UDP”, Namibia Human Rights Report 2007, November 13 2007, p.149

²⁰² “SWAPO MP Tables NSHR motion”, Namibia Human Rights Report 2007, November 13 2007, p.127

²⁰³“Europe to debate Hakaye's motion on curtailing freedoms”, the *Namibian online*, Friday, September 28 2007

agreement. The article deals with respect for human rights, democratic principles and the rule of law, and the State Party is a signatory thereto.²⁰⁴

187. Several reputable international human rights organizations, such as Human Rights First²⁰⁵ and Coalition for the International Criminal Court (CICC)²⁰⁶ have also expressed concern about death threats issued against the officials of the Author hereof.

Control of Electoral Commission of Namibia (ECN)

188. Articles 17, 21 and 95(k) of the Namibian Constitution guarantee the right of Namibian citizens to engage in peaceful political activities intended to influence the composition and policies of Government. Article 25 of ICCPR, read with CCPR (HRC) General Comment 25 of July 1996 also guarantee the right of citizens without distinction on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to participate in public affairs, voting rights and the right of equal access to public service. Furthermore, Article 25 of ICCPR recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service.
189. According to HRC, whatever form of constitution or government is in force, States Parties are under the obligation to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. In other words, Article 25 of ICCPR lies at the core of democratic

²⁰⁴“Europe to debate Hakaye's motion on curtailing freedoms”, the *Namibian online*, Friday, September 28 2007

²⁰⁵“Rights group urges Pohamba to protect NSHR”, *The Namibian online*, Friday, August 31 2007

²⁰⁶“Public Statement In Reference To The Submission Of Information By A Namibian Coalition Member To The International Criminal Court”, *Press Release*, NSHR, October 5 2007

government based on the consent of the people and in conformity with the principles of ICCPR.²⁰⁷

190. However, free and fair elections are inextricably linked to the existence of an independent electoral authority to supervise the electoral process and to ensure that elections are conducted fairly, impartially and in accordance with established laws which are compatible with ICCPR provisions. Again, although the Covenant does not impose any particular electoral system, any system operating in a State Party must be compatible with the rights protected by Article 25 of ICCPR and must guarantee and give effect to the free expression of the will of the electors.
191. This implies then that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. According to HRC, there should also be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.²⁰⁸ Being entirely made up of ruling Swapo Party members and activists, ECN does not meet any of the requirements set forth in ICCPR. Otherwise, the Author hereof challenges the State Party to describe the electoral system and explain how the different political views in the State Party are represented in ECN. Moreover, the summary dismissal²⁰⁹ on March 7 2008 of the Director of Elections on mere suspicion that he is an RDP supporter is indicative of how the different political views are not accommodated or tolerated at ECN.

²⁰⁷ paragraph 1 CCPR General Comment 25 of July 12 1996

²⁰⁸ paragraphs 20-22 of CCPR (HRC) General Comment 25 of July 12 1996

²⁰⁹ ["KANIME'S DISMISSAL ASSAULT ON DEMOCRACY"](#), Press Release, NSHR, March 9 2009

Article 5(d) (i): Other Civil and Political Rights

192. Articles 21(1) (g) and 21(1) (h) of the Namibian Constitution guarantee the right to freedom of movement and residence within the borders of the State Party, while under Article 97 of the said Constitution the State Party has the obligation to grant asylum to persons who reasonably fear persecution as contemplated in Article 1(2) of the 1951 UN Convention relating to the Status of Refugees.

Violations of Refugee Rights

193. The Author hereof appreciates the fact that the State Party has acceded to or ratified the UN Convention relating to the Status of Refugees as well as the enactment, albeit belatedly, of the Namibia Refugee (Recognition and Control) Act 1999 (Act 2 of 1999). Article 97 of the Namibian Constitution also guarantees the right of “persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group” to be granted asylum in the State Party. However, most of the measures referred to in paragraphs 225 to 262 are either non-existent and or, where they existed, they are not compatible with most of the provisions of the Convention relating to the Status of Refugees.

194. Firstly, the right guaranteed under Article 5(d) (i) of the Convention is generally denied in practice in respect of some 8 000 refugees in the State Party most of whom have been restricted to the Osire Refugee Camp (ORC), some of them for years. The Author hereof has, on numerous occasions since its inception, expressed concern about the refugee rights situation and has strongly advocated that refugees be treated in accordance with internationally recognized principles and norms.²¹⁰

²¹⁰“Exile”, Namibia Human Rights Report 2003, August 11 2003, p.37-40 and “Exile”, Namibia Human Rights Report 2006, October 2006, p.139-140

195. In addition, refugees, individually or through their organizations, have themselves persistently complained about *inter alia* the denial of their right to dignity by the State Party. This includes refugees being indiscriminately restricted to ORC. ORC is situated some 120 kilometers from the nearest town, Otjiwarongo, and more than 200 kilometers northeast of the capital of the State Party. According to UNHCR, about 6 500 refugees are confined to ORC while 1 500 were living outside the camp.²¹¹
196. Secondly, the State Party acts discriminatorily. While it has extended *prima facie* recognition of refugee status to all Angolan asylum seekers, the same privilege is denied to nearly 300 asylum seekers from the Democratic Republic of Congo (DRC) and Burundi, as well as Rwanda, arguing that the political situations in those countries was stable.²¹² Also, despite the enactment of the Namibia Refugee (Recognition and Control) Act 1999 (Act 2 of 1999), which makes provision for an Appeal Board, the latter was only established at the end of 2006. In April 2007 there was a backlog of more than 1 000 status application cases. The State Party recorded 242 new applications and decided on 239 of them. Of these, it granted protection to 146, denied it to 67, and held 24 past the end of the year.
197. The applications for refugee status from many asylum seekers dating as back as 1996 were still pending and waiting for their status determination by the end of 2007. According to the Namibia Refugee (Recognition and Control) Act 1999 (Act 2 of 1999), all refugee determination procedures, including appeals, should be finalized within three months (i.e. 90 days). Some refugees and asylum seekers are yet to get their status, after more than ten (10) years of waiting.
198. Thirdly, the non-applicability of the provisions of Article 11(3) of the Namibian Constitution to “illegal immigrants” makes it possible for anyone viewed as an “illegal immigrant” to be detained for more than 48 hours before court appearance.

²¹¹“We Want To Live With Dignity”, *The Namibian online*, Friday, June 20 2008

²¹²“Namibia: Refoulement/Physical Protection”, World Refugees Survey 2007, U.S. Committee for Refugees and Immigrants, p.91

Accordingly, close to 50 refugees were arrested during 2006 for leaving ORC or traveling with expired permits and were held in Police custody for a long period of time before court appearance.

199. Fourthly, while Article 11(5) of the Namibian Constitution guarantees the right of refugees to legal representation, the right of a refugee to counsel of his or her choice can hardly be enjoyed by refugees in the absence of a proper identification documents. In particular, the absence of proper refugee registration process is probably one of the most pressing violations of the internationally recognized refugee rights in the State Party. In the absence of such registration, the consequential denial of identity and other documents to refugees, by implication, results in attendant denial of other fundamental human rights and freedoms guaranteed by the present Convention and the Namibian Constitution. These rights and freedoms include the right to own movable and immovable property and the right to inheritance, as well as to secure employment and to get married and establish a family.
200. In two (2) incidents the State Party even refused to issue travel documents to two (2) refugees because it had yet to act on their applications (one for a work permit and the other for recognition). Since they were denied travel documents, both had to miss international and regional conferences during July 2007. Most refugees have been living in ORC for more than six (6) years, but still they do not know whether or not they have officially been granted refugee status.²¹³
201. This state of affairs can be likened to overt or covert discrimination as when one does not have an identity document he or she hardly exists. In a *Press Release* issued on June 15 2008, the Author hereof expressed concern about the furtive efforts by the State Party to amend several vital provisions in the Namibian Constitution regarding the acquisition of Namibian citizenship by marriage and naturalization. These inherently xenophobic proposed amendments would be implemented to the chagrin of

²¹³"We Want To Live With Dignity", *The Namibian online*, Friday, June 20 2008

foreigners in general and refugees in particular because, if such amendments were to be effected, a foreigner and a refugee would have to wait for at least 10 years before obtaining his or her citizenship by marriage.

202. Due to the untenable situation at ORC, on June 11 2008 refugees marked the International Refugee Day by petitioning the State Party to close down ORC and demanding either to be integrated “immediately” into the Namibian society or to be repatriated and resettled in other countries.
203. In so far as the constitutional right to freedom of movement and choice of residence are concerned, the fact that the State Party has made reservation (see paragraphs 234 and 241) to Article 26 of the Convention relating to the Status of Refugees is *ipso facto* sufficient indicia that the State Party is of intent to deny certain categories of people the right to freedom of movement and residence.

Violations of Non-refoulement Doctrine

204. The Author hereof also challenges the accuracy of the information which the State Party has provided CERD at paragraph 233 of the State Party Report, regarding the universally binding doctrine of non-refoulement which protects refugees and asylum seekers. The doctrine is a peremptory principle in customary international law that guarantees the right to protection of refugees from being returned to places where their lives or freedoms could be at risk. It is a *jus cogens* of international law that strictly forbids the expulsion of a refugee into an area where he or she might again be subjected to persecution.
205. The principle of non-refoulement arises out of an international collective memory of the failure of nations during World War II to provide safe haven to refugees fleeing certain genocide at the hands of the Nazi regime. Unlike political asylum, which applies to those who can prove a well-grounded fear of persecution based on

membership in a social group or class of persons, non-refoulement refers to the generic repatriation of people, generally refugees, into war zones and other disaster areas. The doctrine is codified within the 1951 Geneva Convention and the 1967 Protocol. Today the principle of non-refoulement ostensibly protects recognized refugees and asylum seekers from being expelled from countries that are signatories to the 1951 Convention or 1967 Protocol.

206. This doctrine has therefore been flouted with impunity on several occasions, despite the statements to the contrary as contained at paragraph 233 of the State Party Report. The Author hereof has recorded several incidents where the State Party had either expelled and or threatened to expel *bona fide* refugees into the hands of potential persecutors.
207. In one such incident on May 18 1998 Dr. Manuel Sahando Neto, an Angolan who had refugee status in Namibia, was arrested and deported by State Party authorities on May 18 1998. Despite a High Court order, Dr. Neto was soon forcibly deported to Angola. His refoulement came within days after he assumed the position of the Executive Director of the Angolan Human Rights League (LADH) which was established on May 6 1998. LADH is legally recognized as a non-profit-making non-governmental organization in the State Party.²¹⁴
208. In another case, State Party authorities abducted thirteen (13) alleged Caprivi secessionists from neighboring Botswana and Zambia to stand trial for high treason in Namibia, a claim the State Party has denied.²¹⁵ However, evidence contradicting the official State Party version, as to how the 13 men were brought before the court, was produced during the controversial high treason trial in the High Court on October 31

²¹⁴“Document - Namibia: Amnesty International shocked at forcible return of refugee”, News Service 99/98, AI INDEX: AFR 42/03/98, May 27 1998, <http://www.amnesty.org/en/library/asset/AFR42/003/1998/en/dom-AFR420031998en.html>; “Human Rights Watch Fears for Deported Angolan Human Rights Activist”, <http://hrw.org/english/docs/1998/05/28/angola1113.htm>; “Southern African Migration Project”, Migration News - May 1998

²¹⁵“NAMIBIA: Govt denies men abducted for trial”, *IRINnews online*, October 29 2003

2003. Contrary to the Namibian Constitution, some of them were unlawfully held in custody for up to six (6) months without court appearance.

209. In a third serious refoulement incident, several Botswana-based reliable sources on December 13 2003 confirmed earlier reports by the Author hereof that at least eight (8) Caprivian refugees have been deported from Botswana to face high treason charges in Namibia. On Friday December 12 2003, the Author hereof, citing reliable sources, reported that “an additional 8 Caprivians are being abducted from neighboring Botswana” to face high treason charges.²¹⁶
210. On December 24 2003 this incident has received condemnation from the United Nations High Commissioner for Refugees in Botswana, which demanded an explanation from the Botswana authorities. Botswana-based UNHCR officials called Botswana's action a violation of its "non-refoulement" policy, which prohibits the forced return of asylum-seekers to areas where they could face danger - a cornerstone of international refugee protection. “We cannot accept that these asylum seekers were deported without a chance to explain their case”, said UNHCR-Botswana Representative Benny Otim. UNHCR said it was neither given a chance to look into the cases nor advised of the deportations.²¹⁷

Article 5(d) (iv): Right to Marriage

211. This right deals with the right to marriage and choice of spouse. In terms of Article 4(3)(bb) a foreigner who marries a Namibian citizen is entitled to citizenship by marriage if subsequent to marriage, such foreigner ordinarily resides in the State Party as the spouse of such citizen for at least two (2) years. In terms of Article 14 of the Namibian Constitution, men and women of full age, “without limitation due to race, colour, ethnic origin, nationality, religion, creed, or social or economic status”,

²¹⁶“9 Caprivians abducted”, Press Release, NSHR, December 13 2003

²¹⁷“Botswana: UNHCR denounces return of asylum seekers to Namibia”, Southern African Migration Project, Migration News - December 2003

has the right to marry and found a family and that the couple is “entitled to equal rights as to marriage, during marriage and at its dissolution”.

212. In addition, CCPR (HRC) General Comment 19 of July 27 1990 on the protection of the family reaffirms the right to marriage and equality of the spouses. Under Articles 14 and 23 of the Namibian Constitution and ICCPR, respectively, the family is recognized as the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant such as Article 17, which establishes a prohibition on arbitrary or unlawful interference with the family.
213. However, the Author hereof has recently discovered and exposed a secret Cabinet document proposing extensive constitutional amendments. One of the proposed constitutional amendments seeks to amend Article 4(3) (bb) to increase the period of two (2) years to at least 10 years.²¹⁸ This limitation makes it even more difficult for couples to achieve *de facto* equality in marriage in that of the spouses is denied such right for not less than ten (10) years. This state of affairs also constitutes a threat to family integrity.
214. HRC requires States Parties to report on how the concept (whether "nuclear" or "extended") and scope of the family is construed and or defined in their own society and legal system.²¹⁹ According to HRC, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States Parties should also indicate whether or not and to what extent such types of family and their members are recognized and protected by domestic law and practice.

²¹⁸ “Furtive Cabinet Intrigues To Amend Constitution”, *Press Release*, NSHR, June 15 2008

²¹⁹ paragraph 2, CCPR General Comment 19 (July 29 1990)

Article 5(d) (v): Right to Own Property

215. In addition to Article 5(d) (v) of the present Convention, the right to own movable and immovable property is guaranteed in the State Party in terms of Article 16 of the Namibian Constitution.
216. Article 27 of ICCPR provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The Human Rights Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under ICCPR.
217. Also, in terms of CCPR General Comment 23 of April 8 1994, HRC concludes that Article 27 of ICCPR on the protection of these rights is directed towards “ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole” while CCPR (HRC) General Comment 23 reads that “persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.²²⁰ HRC also observes that these rights must be protected as such and should not be confused with other personal rights conferred under ICCPR. According to HRC, States Parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to give effect to these rights. However, this right is not in practice enjoyed by certain individuals and or groups in the State Party.

²²⁰ paragraph 1, CCPR General Comment 23 as adopted during 50th Session of HRC on April 8 1994

Alienation of Rehoboth Baster Property

218. For example, on August 29 2007, ethnic minority Rehoboth Baster Community *Kaptein* John McNab once more accused the State Party of systematic discrimination and of having alienated certain properties traditionally belonging to his community. These properties, McNab argues, are not only *sine qua non* assets towards ensuring the survival and continued development of the Rehoboth Baster Community as a distinct cultural, religious and social group, they are also indispensable for the promotion by the Baster Community of their culture as envisaged in Article 19 of the Namibian Constitution.
219. Specifically, *Kaptein* McNab noted that, soon after State Party independence on March 21 1990, his people had been robbed of their immovable and movable property and denied the right to constitute their own traditional authority contrary to the provisions of the Namibian Constitution. McNab said that on October 16 1991 a certain Maasdorp, acting on State Party instructions, had sold several immovable properties belonging to the Baster Community to some Swapo Party members without the approval of Parliament.
220. In a *Press Release* issued on May 27 1996, the Author hereof also accused the State Party of violating the right of the Baster people to exist as “a social group of persons who share a common ancestry, cultural heritage, language, customs and traditions and who recognize a common traditional authority and inhabit a common communal land, commonly known as the Rehoboth Gebiet”.²²¹

“In order for this community to continue to exist as such and enjoy, practice, maintain and promote its culture, language, tradition and customs, Rehobothers are entitled to all the fundamental human rights and freedoms

²²¹“Die Waarheid! Rakende die oorgdrag van die Rehoboth Baster eiendomme”, Chiefs Council of the Rehoboth Baster Community, Volume 1, February 2007

enumerated in [the Namibian Constitution] and in a panoply of international human rights treaties ratified by the Government of Namibia, not least in terms of Article 27 of [ICCPR]”.

Unconstitutional Expropriation of White-Owned Farms

221. In addition, the racist and seemingly politically motivated expropriation of Rehoboth Baster properties, the State Party also embarked upon expropriation of farms belonging to white people. Although there have been several incidents of such expropriation, reference in this regard is made to the latest order of the High Court in which the State Party’s attempt to expropriate four (4) farms belonging to German nationals has been set aside. On March 6 2008, the High Court ruled that the State Party had not complied with the Commercial Land Reform Act 1995 and the provisions of the Constitution.²²²

Article 5(d) (vi): Right to Inheritance

222. This right is also denied in practice in the State Party in part due to the existence of discriminatory law, which the State Party has “inherited” from the previous apartheid dispensation. The Author hereof has read and consequently is familiar with the contents of the supplementary Letter²²³ of June 15 2008 jointly submitted before CERD by the Legal Assistance Centre and the International Women’s Human Rights Clinic and agrees fully with the views expressed therein.

223. Moreover, it must be pointed out that such denial of inheritance rights was part of the issues which the Author hereof has raised in a Shadow Report submitted during the consideration from January 15 2007 to February 2 2007 of the State Party’s report

²²²“Court halts expropriation of four Namibian farms”, *The Namibian online*, Friday, March 7 2008

²²³ “Supplementary Submission to the Committee on the Elimination of Racial Discrimination: Supplementing Namibia’s 2007 Country Report.

under CEDAW.²²⁴ Following the said consideration it was not surprising that the CEDAW Committee only found two (2) positive aspects while at least 26 “principal areas of concern and recommendations” were listed and or made.²²⁵

Article 5(d) (vii): Right to Freedom of Thought, Conscience and Religion

224. Additional to Article 5(d) (vii) of the present Convention and Article 21(1)(b) of the Namibian Constitution, the right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) is also guaranteed in terms of Article 18 of ICCPR and reaffirmed in terms of CCPR General Comment 22 of July 30 1993. Moreover, in terms of its General Comment 22, HRC draws the attention of States Parties to the far-reaching and profound implications of Article 18(1) of ICCPR, which is the same as Article 5(d) (vii) of the present Convention and which entails freedom of thought on all matters, including personal conviction and the commitment to religion or belief for both individuals and communities. According to HRC, the fundamental character of the rights enshrined under Article 5(d) (vii) of the present Convention constitutes the inviolability of such rights even during public emergency.

225. However, the Author hereof expresses concern that the State Party Report is also dead silent on the legislative, judicial, administrative or other measures, if any, that the State Party has adopted to give effect to Article 5(d)(vii) of the present Convention. This right is also violated in practice in the State Party. For example, asked on April 8 2001 what message he had for the church in Namibia, then Namibian President Sam Nujoma had only harsh words for the churches when Nujoma rancorously replied:

*“The church, as far as I am concerned, is foreign philosophers. Our Constitution recognizes freedom of worship but I don't care about it because it's artificial, it's foreign philosophers”.*²²⁶

²²⁴ “Modifications or Abolishment of Discriminatory Laws”, Shadow Report: U.N. Convention on the Elimination of All Forms of Discrimination against Women, NSHR, December 9 2006, p.11-14

²²⁵ Paragraphs 9 to 35 of “Principal areas of concern and recommendations”, U.N. doc. CEDAW/C/NAM/CO/3

²²⁶ “Church seeks to reach Nujoma CCN wants to clear air”, *The Namibian online*, Wednesday, May 16 2001

226. Nujoma claimed that the first German missionaries who came to Namibia did reconnaissance for the colonizers who were to follow.
227. Moreover, the year 2003 saw unprecedented verbal attacks on certain religious denominations in the country, coming from especially ruling Swapo Party officials. According to statistics, altogether seven (7) such attacks on the so-called new churches were recorded.²²⁷ Similarly, the 2003 US State Department report on the freedoms of religion also noted that in the same year, State Party officials had urged caution about "new churches" and emphasized the role of three denominations in the country's independence struggle.²²⁸

Article 5(d) (viii): Right to Freedom of Expression and Opinion

228. Similarly, the Author hereof notes with serious concern the State Party's failure to inform CERD on the specific legislative, judicial, administrative or other measures which the State Party has adopted and put in place to give effect to the provisions of Article 5(d)(viii) of the present Convention on the right to freedom of expression and opinion as contemplated under Article 21(1)(a) of the Namibian Constitution and Article 19 of ICCPR, as well as CCPR's General Comment 10 of June 29 1983.
229. In the opinion of the Author hereof the right to freedom of expression and opinion is probably the most threatened of all the Article 5 rights in the State Party. As indicated in the receding paragraph of this Shadow Report, the rights to freedom of conscience, assembly and association are also severely restricted in the State Party. Hence, it is apparently no mere accident that, at paragraphs 333-341, the State Party Report is equally deafeningly silent on the legislative, judicial, administrative or other measures

²²⁷"Right to freedom of Religion", Summarized Namibia Human Rights Report 2003, p.16 and "Statistical Analysis of Cases", Summarized Namibia Human Rights Report 2003, p.19

²²⁸"Namibia: Status of Religious Freedom: International Religious Freedom Report 2003", <http://www.state.gov/g/drl/rls/irf/2003/23743.htm>

the State Party has adopted and put in place to give effect to the provisions of Article 5(d)(ix) of the Convention.

Rehoboth Rights Violations

230. In the matter between *J.G.A. Diergaardt et al. v. Namibia* on July 25 2000, HRC found the State Party guilty of violating the provisions of Articles 19 of the Namibian Constitution and 27 of ICCPR by intentionally prohibiting the use of Afrikaans.²²⁹ In his submission the late Rehoboth Baster *Kaptein* Hans Diergaardt claimed that the failure by the State Party to introduce the legislation envisaged under Article 3(3) of the Namibian Constitution to permit the use of official languages other than English denied him and his tribesmen the use of their mother tongue in administration, justice, education and public life. This, Diergaardt argued, is in violation of Articles 26 and 27 of ICCPR. Diergaardt *et al* proved how the State Party had instructed civil servants not to reply to the Diergaardt's written or oral communications in the Afrikaans language. Hence, HRC found that the State Party IS in violation of article 26 of ICCPR.²³⁰
231. Therefore, the State Party's action disproportionately affected Afrikaans speakers and constituted indirect discrimination on the ground of language. The Human Rights Committee also stated that the State party is in accordance with Article 2(3) (a) under the obligation to provide J.G.A. Diergaardt *et al* and the other members of their community an effective remedy by allowing its officials to respond in languages other than the official one in a non-discriminatory manner. The State Party is under an obligation to ensure that similar violations do not occur in the future.
232. In this particular regard, CERD is therefore respectfully prayed to impress upon the State Party the primacy and compulsory nature of compliance with its obligation to

²²⁹see *J.G.A. Diergaardt et al. v. Namibia*, (Communication No. 760/1997), CCPR/C/69/D/760/1997 of July 25 2000

²³⁰ paragraph 11, U.N. document CCPR/C/69/D/760/1996 of July 25 2000

release orally or in the next State Party Report all pertinent information about the *de facto* measures which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.

Article 5(e): ESCR rights

233. In terms of Articles 5, 18 and 95 of the Namibian Constitution and Article 12 of ICESCR, the State Party is under the obligation to respect, protect and fulfill the right of every citizen to enjoy the highest attainable standard of physical and mental health. Needless to say, the right of citizens to enjoy the highest attainable standard of mental and physical health care is indispensable for human survival and a dignified life. MDG 6 makes it imperative for the State Party to reduce HIV-AIDS, malaria and TB and, by so doing, to reverse the spread of these pathologies by 2015.²³¹
234. The Ministry of Health and Social Service (MoHSS) continued to grapple with enormous challenges on a yearly basis *inter alia* because three-quarters of this N\$1.6 billion went to salaries alone, while the rest went into the acquisition of new health infrastructure.²³² Despite receiving the second largest budgetary allocation annually in the amount of N\$1.6 billion, the public health sector has remained afflicted by seemingly insurmountable and chronic challenges.²³³ These include a critical shortage of medical staff, lack of adequate medical equipment and drugs, electricity blackouts and water shortages as well as lice, rodent and cockroach infestation in public health institutions.²³⁴

²³²“Hospital Crises - Kamwi Says Money’s the Problem”, *New Era Online*, Friday, July 13 2007

²³³“State of CEESR”, Namibia Human Rights Reports 2005-2007

²³⁴“Hospital still a rubbish dump”, *The Namibian online*, Tuesday, October 10 2006

235. On July 24 2007, President Pohamba urged Health Minister Dr. Richard Kamwi to “act with urgency” and do something about deteriorating levels of service at health institutions. Speaking at the launch of the National Policy on HIV-AIDS, Pohamba observed that the deteriorating service standards had “placed the health and lives of patients at risk and needed to be "rectified without delay".²³⁵ President Pohamba also expressed concern over the “worsening state of hygiene” in and around the public health facilities including dirty residential complexes where our doctors, nurses and other health workers live.²³⁶
236. On July 16 2007, the “appalling and deplorable conditions” in State hospitals prompted the Legal Assistance Centre (LAC) to urge President Pohamba to declare the public health sector “a disaster area”,²³⁷ while on July 18 2007, the Forum for the Future (FFF) observed in a *Press Release* that service delivery at public health institutions across the country has declined sharply and is calling for urgent attention. FFF also observed that there was a chronic shortage of appropriate drugs and health personnel in all public hospitals and clinics. Beds are old and the beddings are dirty. The wards are filthy with an unbearable smell and cockroaches are running all over the place.²³⁸
237. On July 12 2007, Health and Social Services Minister Dr. Kamwi expressed unhappiness with the state of affairs prevailing in the public health sector, which he blamed on budgetary constraints.²³⁹ However, LAC charged that poor or non-existent maintenance and repair of health infrastructure was more “a case of pure incompetence than budgetary constraints”.²⁴⁰

²³⁵“President Urges Urgent Action On Health Sector”, *The Namibian online*, Wednesday, July 25 2007

²³⁶“Health Standards Worry President”, *New Era online*, Wednesday, July 23 2007

²³⁷“Declare public health sector a ‘disaster area’ urges the LAC”, *The Namibian online*, July 17 2007

²³⁸“FFF Statement of Solidarity with the LAC” Forum for the Future, Windhoek, July 18 2007

²³⁹“Hospital Crises - Kamwi Says Money’s the Problem”, *New Era Online*, Friday, July 13 2007

²⁴⁰“Health Sector a ‘Disaster’ LAC”, *New Era online*, July 17 2007

Article 6: Just and Adequate Reparation or Satisfaction

238. This right is expressly guaranteed in terms of Articles Article 16(2) and 25(4) of the Namibian Constitution as well as in terms of Article 14(6) of ICCPR. In terms of CCPR General Comment 32 of July 9-27 2007, payment of “compensation according to the law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice”.²⁴¹ State Parties are therefore required to adopt legislative, judicial, administrative or other measures ensuring that compensation as required in terms of Article 14(6) of ICCPR can in fact be paid to those against whom miscarriage of justice has been effected and that such payment must be made within a reasonable period of time.
239. Under Article 6 of the present Convention, the State Party is under the obligation to provide CERD with accurate information on the legislative, judicial, administrative or other measures which give effect to the provisions of Article 6. Firstly, the emphasis of the said measures should be placed on the effective protection and remedies, through the competent, independent and impartial courts and tribunals as well as other State Party institutions, such as the Office of the Ombudsman or, where applicable, through other national human rights institutions against any acts of racial discrimination as defined under Article 1(1) of the Convention
240. Secondly, the State Party is required to indicate or list the measures so taken to assure to everyone, including both nationals and non-nationals under the jurisdiction of the State Party, the right to seek from such courts and or tribunals just and adequate reparation or satisfaction for any damages resulting from the practice of racial discrimination as contemplated under Article 1(1) of the Convention.

²⁴¹ paragraph 52, “Compensation in cases of miscarriage of justice”, U.N. document CCPR/C/GC/32, p.16

241. This obligation is also not readily fulfilled by the State Party. Specific reference in this regard is, for example, made to the fact that the victims of torture inflicted in the aftermath of the alleged Caprivi separatists attack on August 2 1999 have yet to receive just compensation almost nine (9) after the incidents. Civil claims against the State Party only began on June 18 2008.²⁴²
242. The very fact that the State Party is reluctant to make a declaration referred to in Article 14 of the present Convention should be used as a pointer to the fact that the obligation to pay reparations for those who have been wronged is not at all taken seriously by the State Party.

Rejection of Truth and Reconciliation Commission (TRC)

243. The ruling Swapo Party (SP) has on numerous occasions systematically rejected national and international calls for the establishment of a “home-grown” TRC to deal with the recurrent issue of “missing persons”. Speaking in the National Assembly on September 12 2007, Justice Minister and Attorney General Pendukeni Iivula-Ithana rejected the Author hereof’s calls for a TRC for the country.²⁴³ In an interview with his Swapo Party mouthpiece Secretary General Dr. Ernest Tjiriange also rejected a TRC for the country.²⁴⁴
244. On November 24 2005 then Swapo Party President Sam Nujoma himself once more rejected the establishment of a TRC in the State Party. Addressing a media conference Nujoma said that Namibia did not need a TRC to settle deal with either the latest discovery of mass graves or other incidents of enforced disappearance and deaths that occurred during the war of liberation before Namibian independence and thereafter. Nujoma said:

²⁴²“Caprivi 'torture' trial starts”, *The Namibian online*, Thursday, June 19 2008

²⁴³Internal monitoring reports, NSHR, Windhoek, September 12 2007 and “Ministerial Statement in the National Assembly the Constitutional Principle of National Reconciliation”, Ministry of Justice, September 11 2007

²⁴⁴“Truth probe out of the question”, *Namibia Today*, Friday 31-06 Thursday, September 2007, p.1-2

*“Namibia will never be a rubberstamp of any country. Namibia is different from other countries. We adopted national reconciliation here”.*²⁴⁵

245. In a letter on August 18 2007 addressed to President Lucas Hifikepunye Pohamba the Author hereof proposed an effective homegrown transitional justice as well as a national reconciliation process for the country.²⁴⁶ According to the said letter, the primary objective of such a process should be: (1) to establish as accurately as possible the facts about the gross violations of human rights that had occurred inside and outside Namibia between 1959 and 2003; (2) to investigate the said violations and, if enough admissible evidence is found, to grant amnesty in respect of all those alleged perpetrators who voluntarily disclose the whole truth and or to prosecute all those who refuse to disclose the whole truth; (3) to provide full and effective reparation to the victims of the said violations and their families; and (4) assurances of non-repetition.
246. In addition to that, the Council of Churches in Namibia (CCN) and the Evangelical Lutheran Church in Namibia as well as other major church denominations share the view of the Author hereof that the issue of “missing persons” should be resolved through a home grown reconciliation conference”.²⁴⁷ There is a general consensus among Namibian citizens that the country might benefit from a TRC-styled enquiry into the wrongs of the past.²⁴⁸

Marginalization of Office of Ombudsman

247. The Author hereof concurs with the statements contained at paragraphs 369 and 370 of the State Party Report in so far as this relates to the constitutional and other *de jure*

²⁴⁵Internal monitoring reports, NSHR, Windhoek, November 24 2005 and “Nujoma rejects calls for truth commission”, *The Namibian online*, Monday, November 28 2005

²⁴⁶“Offer to Withdraw ICC Submission”, Letter addressed to President Lucas H Pohamba, NSHR, August 18 2007

²⁴⁷“ELCIN Calls On Members To Be Calm, Prays For Peace”, *Press Release*, NSHR, September 18 2007

²⁴⁸Internal monitoring reports, NSHR, Windhoek, June 19 2007 and “TRC for Namibia?”, *New Era online*, June 21 2007

powers and functions of the Office of the Ombudsman. However, this is practically how far it goes. Since Namibian independence in 1990, the Office of the Ombudsman has been plagued by chronic understaffing and under-funding as well as a host of other institutional and administrative deficiencies, which continuously undermined its institutional independence, integrity and effectiveness.²⁴⁹

248. The mandate of the Office of Ombudsman was supposed to be “receiving and investigating complaints” relating to mismanagement and corruption in public administration as well as human rights violations in the country.²⁵⁰ In addition to insufficient staffing and under-funding and low morale,²⁵¹ the Office of the Ombudsman also continued to experience a flawed organizational structure and insufficient expertise and investigative skills as well as limited public awareness and lack of decentralization. This state of affairs negatively influenced State Party performance in the field of respect for the rule of law.²⁵²
249. On February 24 2004, the Ombudsman listed *inter alia* diminished and declining State Party political support and cooperation from Ministries and other departments as some of the major factors undermining the credibility of the Office of the Ombudsman. In addition, most of the complaints handled by the Office of the Ombudsman by March 2004 related to alleged abuse of power or the country's pension payout system and the greatest number of individual complaints (221) were leveled against the Police, followed by Prisons (200) and Justice (160) departments.²⁵³ Moreover, during its consideration of the State Party Report under ICCPR, HRC also urged the State Party to provide the Office of the Ombudsman with enough personnel and financial means to exercise its functions in the field of protection of human rights, as foreseen by the Namibian Constitution.²⁵⁴

²⁴⁹Problems experienced in filling of posts” and “Staff retreat”, Management Services and Administration, Office of the Ombudsman Annual Report 2001, Namibia, p.21-22

²⁵⁰ Article 91, Namibian Constitution

²⁵¹“A brighter future beckons, says Ombudsman Walters”, *The Namibian online*, Thursday, December 15 2005

²⁵²“GRN Undermines Office of Ombudsman”, *Namibia Human Rights Report 2004, August 2004*, p.65

²⁵³“Public complaints target Police, Prisons, Justice”, *The Namibian online*, Wednesday, March 3 2004

²⁵⁴paragraph 241, U.N. document CCPR/CO/81/NAM

250. After its consideration of the State Party Report under the CAT reporting procedure, the CAT Committee made this recommendation regarding adequate compensation for the victims of torture and CIDT:

*“The Committee recommends that the specific allegations of ill-treatment which have been brought to its attention be investigated and that the results of such investigations be transmitted to the Committee. The Committee also recommends that the cases of disappearance of former members of the South West Africa People's Organization (SWAPO) be, according to article 12 of the Convention, promptly and impartially investigated. In all situations where reasonable grounds exist to believe that those disappearances amounted either to torture or to other forms of cruel, inhuman or degrading treatment, the dependants of the deceased victims should, according to article 14 of the Convention, be afforded fair and adequate compensation. The perpetrators of those acts should be brought to justice”.*²⁵⁵

251. Unfortunately, this recommendation has yet to be carried out by the State Party. Nor have the perpetrators of torture and CIDT and enforced disappearances been prosecuted let alone be investigated promptly and impartially. In the final analysis, the failure by the State Party to make the declarations referred to in Article 14 of the present Convention and Article 22 of the Convention against Torture as well as the State Party's attitude towards the Judiciary and the Office of the Ombudsman are *ipso facto* credible circumstantial indicia that the State Party is not genuinely interested in respecting, protecting and fulfilling the right of persons under its jurisdiction to just and or adequate reparation or any other effective remedy.

²⁵⁵paragraph 247, U.N. Doc. CCPR/C/GC/32 (2007)

IV. OBSEVARTIONS AND RECOMMENDATIONS

252. The State Party is in breach of virtually all substantive and procedural provisions of the Convention.
253. The dimension of the existence of racial discrimination, racism, xenophobia and related intolerance, inequalities and gross income inequities and disparities are very strong pointer to the absence of democracy in the State Party.
254. The Author hereof is strongly of the opinion that the Caprivi high treason trial is a monumental travesty of justice.
255. Examination of the conclusions and observations of the various UN treaty supervisory committees indicate that there are more negative than positive aspects about the State Party's compliance with international instruments.
256. The State Party's conduct at the United Nation and other international forums shows that, more often than not, the State Party has voted together with countries known to have violated the rights of their citizens.

Recommendations

257. The State Party should be censured by CERD.
258. In order to eradicate racial discrimination, racism, xenophobia and related intolerance, the State Party the urgently needs UN assistance through appropriate field presence or similar UN programs.

V. ABOUT AUTHOR HEREOF

“The Author hereof” refers to National Society for Human Rights (NSHR) of Namibia. NSHR is a national private 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 and aims to secure due recognition and observance of all human rights and fundamental freedoms, especially those enshrined in the Namibian Constitution and enumerated in numerous regional and international human rights, humanitarian and customary international law treaties adopted by the United Nations and its specialized agencies.

1. Legal Status

NSHR is lawfully registered as an association incorporated not for gain. The Organization maintains observer status in the African Commission on Human and Peoples' Rights of the African Union and is in special consultative status (Category II) with the UN Economic and Social Council.

2. Overall Objectives

The Organization's overall objectives are to promote:

- the principles of democracy, respect for the rule of law, justice for all and independence of the judiciary
- cultural, political, social tolerance
- accessibility, responsiveness, transparency, accountability and equity in public administration and
- representative and or decentralized political power, based on the informed and active public participation

3. Core Activities

In order to accomplish its mission statement and overall objectives, NSHR conducts certain core activities. These activities include: proactive human rights monitoring, reporting and civic education programs; training (internal and external); advocacy, lobbying and networking; research and documentation; rendering of paralegal services & litigation; and rendering of humanitarian assistance for the indigent.

[END]