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UNDER ARTICLE 40 OF THE COVENANT**

Initial report

NAMIBIA*

[15 October 2003]

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ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CSO	Central Statistics Office
EC FUND	Employees' Compensation Fund
EPZ	Export Processing Zone
FAO	Food and Agriculture Organization of the United Nations
GDP	Gross Domestic Product
GNP	Gross National Product
HDI	Human Development Index (of the United Nations Development Programme)
HDR	Human Development Report
HRDC	Human Rights and Documentation Centre (of Faculty of Law, University of Namibia)
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organization
LAC	Legal Assistance Centre
MOHSS	Ministry of Health and Social Services
MSD	Maternity Leave, Sick Leave and Death Benefit Fund
NDP	National Development Plan
NGO	Non-governmental organization
NHDR	Namibia Human Development Report (of the United Nations Development Programme)
NHIES	Namibia Household Income and Expenditure Survey
NLFS	Namibia Labour Force Survey
OHCHR	Office of the United Nations High Commissioner for Human Rights

SADC	Southern African Development Community
SWAPO	South-West Africa People's Organization
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
UNDP	United Nations Development Programme
EIU	Economist Intelligence Unit
EPI	Expanded Programme on Immunization
DTA	Democratic Turnhalle Alliance
CES	Centre for External Studies
JTC	Justice Training Centre
NAMAF	Namibia Macro-Economic Framework
NEPRU	Namibian Economic Policy
PLAN	The Peoples Liberation Army of Namibia
OAU	Organization of African Unity
NID	Namibia Institute for Democracy
SAHRIT	Southern Africa Human Rights Trust
NGP	National Gender Policy
WHO	World Health Organization
DHS	Demographic Health Survey
MOHSS	Ministry of Health and Social Services
PMTCT	Prevention of Mother to Child Transmission

PART I

LAND AND PEOPLE

A. The land

1. Namibia is a land of 824,000 km², with 1,400 km of coastline. It has a narrow coastal desert plain, from which the land rises to an extensive interior plateau, 1,000-1,500 m above sea level. Namibia is one of the most arid countries in the world. Rainfalls are low and variable, evaporation rates high, and there are no permanently flowing rivers between the southern and northern borders. Rainfall increases from south-west to north-east. The coastal strip is hyper-arid desert, and only 8 per cent of the country, in the extreme north-east, receives more than 500 mm of rain, which is considered the minimum for dry land cropping. The potential rate of evaporation from open water far exceeds rainfall by 420 per cent in the north, and 1,750 per cent in the south. Rain falls in short sharp bursts, resulting in low infiltration, and can be highly localized.

2. Just as critical as average rainfall, is its variability. The driest areas suffer most variability. This means years of well-below-average rainfall, or drought, are to be expected. This variability also demands flexible land-use in order to prevent degradation, because what the land can sustain in a wet year becomes over exploitation in a dry one. Climate, sild and water availability determine the three vegetation biomes: desert (16 per cent of the land areas), savannah (64 per cent) and dry woodland (20 per cent). The low, variable rainfall accounts for many of the adaptations developed by plants and animals, and has also shaped the land settlement and management patterns of people.

3. As one of the world's most arid countries, it is not surprising that Namibia is also one of the least densely populated. Average population density is 1.7 people per km². Countries such as Pakistan and Turkey, of a similar size, support 30 times as many people. In the past, settlement was confined to those areas with reliable water (such as the Cuvelai drainage basin with seasonal "Oshana" along the Okavango river, riverine areas of East Caprivi, and near Windhoek's spring) while transhumance was practised elsewhere. Nomadic pasteurism, as practised by the Himba, is a way of coping with variations in pasture between areas and years. Under current land-use patterns, determined by politics and economics as much as ecology, commercial farms occupy 54 per cent of the country, mainly in the south and centre, communal land accounts for 40 per cent largely in the north, proclaimed conservation areas 13 per cent and diamond areas 2 per cent.

4. The key implications of these geographical characteristics are:

- Water is scarce, difficult and expensive to locate and extract;
- The majority of the land is only suitable for extensive livestock or game farming;
- The land has an inherently low carrying capacity (of animals and hence humans);

- Carrying capacity fluctuates with rainfall;
- There is a risk of irreversible degradation.

Therefore the capacity of the resource base to continue to sustain the growing population is questionable.

5. The question can now be answered in concrete terms and with a greater measure of confidence than ever before. Thanks to the Central Planning Commission, through its Central Statistics Office, which successfully conducted the 1991 Population and Housing Census. This report provides a glimpse at the census results.¹ (A second post independence census, the Namibian Population and Housing Census 2001 has been conducted, the first one having been undertaken in 1991. The report on the Population and Housing Census only provides provisional results on the Namibian population by males and females and by their places of enumeration, that is the constituency, region and total country.)

B. The people

Population size and growth

6. According to the census results, in 1991 Namibia had a total population of 1,409,920 made up of 686,327 males (48.7 per cent) and 723,493 females (51.3 per cent).² When the 1991 total population figure is compared with the records of the censuses held in 1971 and 1981, the evidence is that the population of Namibia has been growing rapidly. This is illustrated as follows:

Census	Population	Annual growth
Year	Size	Rate (%)
1971	737 497	-
1981	1 033 196	2.89
1991	1 409 920	3.0

7. Most other countries in Africa show similarly high rates of population growth, out of the 43 African countries with data referred to 1991, 17 countries have growth rates of, between 2.0 and 2.9 per cent per annum and 25 countries (including Namibia) exhibit growth rates of between 3.0 and 3.8 per cent. Mauritius has the lowest growth rate of 1.1 per cent per annum.

Some characteristics of Namibia's population

8. Unlike the earlier population censuses during the colonial period, the 1991 first post independence census was simply about numbers; it collected data on some basic social, economic and demographic characteristics of the people and their housing environment. The purpose was to enable the different sectors of the economy and society better understand the prevailing population issues and thereby formulate appropriate policy and programme responses. Information is provided in the following sections on some selected characteristics of the population of Namibia derived from the 1991 census results.

Population distribution and density

9. During the 1991 census exercise, 382,680 persons were enumerated in places designated as urban, while 1,027,240 persons were found in rural localities. Given the increasing rural-to-urban immigration trend, the urbanization of Namibia's population will continue to increase. The following table shows the population of the proclaimed municipalities and major towns as of 1991.

Namibia: Population and proclaimed municipalities and major towns

	Municipality/town	Population
1.	Windhoek	
	(a) Main	147 059
	(b) Katutura	41 521
	(c) Khomasdal	86 639
2.	Swakopmund	18 899
3.	Gobabis	17 881
4.	Grootfontein	8 340
5.	Karibib	12 829
6.	Karasburg	2 978
7.	Mariental	15 032
8.	Keetmanshoop	4 602
9.	Okahandja	7 581
10.	Omaruru	11 040
11.	Otavi	3 506
12.	Otjiwarongo	15 921
13.	Outjo	4 535
14.	Tsumeb	16 211
15.	Usakos	3 548
16.	Henties Bay	1 612
17.	Luderitz	7 700
18.	Okakarara	3 725
19.	Ondangwa	7 916
20.	Ongwediva	6 172
21.	Opuwo	4 234
22.	Oshakati	21 602
23.	Rehoboth	21 439
24.	Katima Mulilo	13 372
25.	Rundu	19 366
26.	Khorixas	7 358
27.	Arandis	4 303

Source: Central Statistics Office (CSO), 1991 Census of Population and Housing, Final Tabulations.

10. Namibia's total population of about 1.4 million is spread over a vast, largely arid, territory of 824,269 km², giving the country an average density of about 1.7 persons per km², one of the lowest in the world (figures are based on the 1991 Census of Population and Housing). However, about 70 per cent of the total population live in only 5 of the 27 census districts (Oshakati/Ondangwa, Caprivi, Windhoek, Kavango and Rehoboth). The distribution of the population by sex, region and rural/urban residence is provided hereunder:

Namibia: Population by sex and region

Region	Both sexes	Male	Female
Caprivi	90 422	44 065	46 357
Erongo	55 470	28 939	26 531
Hardap	66 495	33 728	32 767
Karas	61 162	33 923	27 239
Khomas	167 071	87 706	79 365
Kunene	64 017	32 359	31 658
Ohangwena	179 634	80 165	99 469
Kavango	116 830	55 763	61 067
Omaheke	52 735	22 312	25 423
Omusati	189 919	83 623	106 296
Oshana	134 884	61 544	73 340
Oshikoto	128 745	61 979	66 766
Otjozondjupa	102 536	55 221	47 315
All regions	1 409 920	686 327	723 593

11. The major factor in the spatial distribution of the population is migration which is induced largely by a continuous search for better economic opportunities among able-bodied people. The census in 1991 counted 1,290,527 persons as born and enumerated in Namibia; and out of this total, 280,130 or 21.7 per cent, were enumerated as "usually resident" in districts outside their districts of birth. This gives an impression of the magnitude of internal migratory movements among the in-born population in the country; but more detailed analysis of the census data would reveal the pattern and characteristics.

Non-Namibians

12. The census results also indicated that foreign nationals number 49,404 or 3.5 per cent of the total enumerated population. About 87.4 per cent of the foreigners in Namibia are from African countries, mainly from Angola, South Africa and Zambia. Outside Africa, the majority of foreign nationals in the country are from European countries.

Age/sex structure

13. The sex ratio (i.e. number of males per 100 females) of the total population is 94.47, although there are variations among the districts. Sex ratio is in excess of 100 in the urban areas where commercial farming and mining predominate, mainly because more males than females migrate to these centres of population.

14. The age composition of the population can be described as youthful; children aged 0-14 years make up about 42.0 per cent of the total population, while older persons aged 65 years and over constitute barely 4.8 per cent of the total. The preponderance of young persons in the population is a reflection of the high level of fertility (that is, the rate at which children are being born) while the small numbers surviving to older ages show the effect of high mortality rate (the rate at which people are dying) on the population.

Demographic characteristics

15. The census collected information from women aged 15-49 years (conventionally defined as the childbearing years) on the number of children born within the 12 months preceding the census, and number of children dead.

16. Together with the information on the age profile of the population, it is possible to derive indirect estimates of fertility and mortality from the census data.

17. Based on the conventional technique, age specific and total fertility rates are derived from the census data; the estimates from the census data show that the total fertility rate in Namibia in 1991 was 5.7. This implies that, in the count of the population census, if fertility remained constant at the 1991 levels, a Namibian woman at the completion of childbearing (age 45-49 years) would give birth to 5.7 children. Compared to fertility estimates in other parts of the world, the level of fertility in Namibia is among the highest.

18. Based on the census age/sex structure of the population, it is possible to derive indirect estimates of mortality, as well as estimates of life expectancy for each age group in the population. A preliminary analysis has revealed that mortality is fairly low and declining; the crude death rate in Namibia in 1991 was 12 per 1,000 population, life expectancy at birth for both sexes was 58.32 years; 60.30 years for females and 56.3 years for males.

19. It is the combination of high birth rate and declining death rate in the population that has given Namibia such a high rate (3.0 per cent) of population growth. It also implies that if the high rate of population growth persists, the population of Namibia, now about 1.5 million, would increase to about 3 million by the year 2015.

SOCIAL CHARACTERISTICS OF THE POPULATION

Housing and household characteristics

20. Different housing types were identified in the course of 1991 census exercise; but by far the most predominant are the detached and the Kraal or hut. Overall, about 50.4 per cent of the total population were enumerated as living in Kraals or huts, while 32.5 per cent live in detached houses. However, the Kraal is a feature of the rural population, as detached houses are largely fashionable in the cities. About 67 per cent of urban residents were enumerated in detached houses, while close to 74 per cent of rural dwellers lived in huts. Over 70 per cent of the total population rely on paraffin or candle as fuel for lighting and 24 per cent have access to electricity. The rural/urban contrast is striking but predictable: some 64.3 per cent of urban households have access to electricity, compared to only 4.2 per cent of the rural households. In the rural areas also, about 90 per cent of the households rely on paraffin or candles.

21. Access to the supply of potable clean water is critical to health and human survival. Pipe borne water is reported to be available to 98 per cent of the urban population; but in the rural areas, the overwhelming majority (about 75 per cent) rely on wells, boreholes, rivers, canals and lakes for water.

22. In the rural areas also, some 86 per cent of households use the bush as toilet facility, whereas in the urban areas, water closet facilities are used in about 80 per cent of households.

23. Overall, the reported average household size is 5.2 persons; but it is 4.7 in the urban and 5.4 in the rural areas. As shown below, close to 40 per cent of all households are headed by women and this is more so in rural than urban areas.

Household head	Rural	Urban	Total
Male	57.1	68.0	60.7
Female	42.9	32.0	39.3

Language groups

24. The major language groups identified during the census are San, Caprivi, Herero, Kavango, Nama/Damara, Ovambo, and Afrikaans. Others are German, English and other European and African languages. The results show that majority (about 50.6 per cent) of Namibians speak the Ovambo languages; followed by Nama/Damara (12.5 per cent), Kavango (8.0 per cent) and Caprivi (4.7 per cent). The remaining 4.6 per cent are speakers of the other languages.

Marital status

25. The question on marital status was directed at males and females aged 15 years and above in the population. Out of the total population of 821,533 in this age category 409,078 (or about 49.8 per cent) had never been married; in terms of sex distribution, 54.3 per cent of the male and 65.1 per cent of the female population in this age group were never married. About 17 per cent of all marriages had been disrupted by separation, divorce or death of spouse. Of sociological interest is the fairly large proportion of persons not in any union at the older ages. The census data show that 7.0 per cent of males and 14.1 per cent of females aged 40 years and above were not in any marital union in 1991.

Education

26. The census attempted to measure educational performance in the population through questions on literacy and levels of educational attainment. Of the total 998,436 aged 10 years and above enumerated, 76.5 per cent said they were literate (i.e. able to read and write), made up of 77.7 per cent of the male and 75.6 per cent of the female population. Literacy level is as high as 90.0 per cent among urban residents, but 69.2 per cent among urban residents but 69.2 per cent among the rural population.

27. While the overall school attendance ratio is generally high (77.6 per cent participated in the school system), the level of educational attainment is overwhelmingly low. Among all the 459,414 persons aged 6 years and above who have records of past school attendance, the levels of educational attainment are distributed as follows:

Some primary school	173 634
Completed primary	55 834
Some secondary school	174 931
Completed secondary school	28 931
Technical/vocational	11 167
Teacher training	5 946
University	8 470
Not stated	762
All educational levels	459 414

Disability

28. The census also attempted to measure the nature and extent of permanent disability conditions in the population. Tabulated results show that disability conditions afflicted 43,823 persons, or 3.1 per cent of the total population, in 1991. About 53.5 per cent of all disabled persons were males while 46.5 per cent were females. The overwhelming majority of disabled people (79.3 per cent) resided in the rural areas. When tabulated by age, disability conditions seem to be positively correlated with age and more and more people get afflicted as they grow older.

29. The census identified five major permanent disability conditions within the population: blindness, deafness, impairment of speech, limb impairment and mental disability. Only 431, or about 1.0 per cent of all disability cases referred to conditions outside the major five listed. Impairment of the limbs accounts for most disability cases (35.0 per cent), followed by blindness (30.0 per cent) and mental derangement (16.0 per cent).

Human development and poverty

Trends in key indicators

Indicator	1995	1996	1997	1998
Human Development Index (HDI) Global	.611	.573	.570	.644
HDI Rank	108	116	118	107
HDI (Namibia)	n/a	.734	.744	.770
Human Poverty Index (HPI) Global	n/a	n/a	45.1	30
HPI (Namibia)	n/a	n/a	26.9	20
GDP per capita (N\$)	5 092	5 120	5 098	n/a
GDP per capita (US\$)	2 107	1 957	1 984	n/a
GDP growth rate	3.3%	3.0%	1.8%	n/a

Source: UNDP, Human Development Reports; Namibia Human Development Reports.

30. The country has made progress in the areas of health, education, poverty eradication, gender equity, welfare of children, governance, population and environmental management. However, its nutritional levels fall well below that of a middle income country; the output of the educational system leaves much to be desired; women have gained in education but their status has changed little, etc. Now the country faces an unprecedented threat of HIV/AIDS.

31. Namibia's human development is significantly higher, from 0.570 in 1997 to 0.644 in 1998. This is reflected in the improvement of Namibia's ranking from 118 in 1997 to 107 in 1998 among the countries of the world. Much of the gains, however, can be attributed to one single factor: the improvement in educational enrolment and literacy. Though these improvements are in some degree attributable to corrections in previous data errors, they partly reflect national policy that heavily emphasises education and have been reported in previous Namibia Human Development Reports.

32. The state of reform in economic growth, poverty and equity at the national level remains, however, a cause for concern. The economy grew by 1.8 per cent in 1997. Inequity remains endemic. The richest 10 per cent of society still receive 65 per cent of income leaving only 35 per cent for the remaining 90 per cent. In other words, half of Namibia's population survives on approximately 10 per cent of the average income, while 5 per cent enjoys incomes that are five times the average. The ratio of per capita income between the top 5 per cent and the bottom 50 per cent is about 5:1. Human development in Namibia correlates highly with where a person lives in the country and the person's mother tongue. This is reflected in the regional human development indices of Khomas and Caprivi, which are 0.858 and 0.538 respectively. Generally, as one moves from South to North, the regional human development indices decline. Okavango, Ohangwena and Caprivi are at the bottom of the development list, the latter two trading positions in 1998.

ECONOMIC CHARACTERISTICS

33. According to the census records, the working age population, defined as all persons aged 10 years and above, has a total of 998,436, made up of 493,580 persons defined as "economically active", (i.e. those currently employed and those "actively" looking for gainful employment), and 503,610 identified as "not economically active". The Constitution of the Republic of Namibia provides in article 15 (2) and (3) that:

- (2) *"Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this sub-article children shall be persons under the age of sixteen (16) years.*
- (3) *No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under condition and circumstances regulated by Act of Parliament. Nothing in this sub-article shall be construed as derogating in any way from sub-article (2) hereof."*

34. For those employed, agriculture is the major preoccupation; it engages 47.4 per cent of the gainfully occupied. Manufacturing is still a minor sector of economic activity employing barely 5.8 per cent of the workers and most of the remaining workers are in administrative and service activities. While males are predominant in mining and quarrying, construction, public administration, defence and social security, women workers dominate the services and, to some extent, education sectors.

35. Of the 493,580 persons enumerated as economically active, 393,341 (or 79.9 per cent) were actually found working; registering an unemployment rate of 20.1 per cent in 1991. Unemployment was almost equally distributed among the male and female labour force; 20.6 per cent of males and 19.0 per cent of females were unemployed. It is striking to note that over 70 per cent of those unemployed are graduated from the primary and junior secondary school system.

36. Labour force participation rate (ratio of active population to the total population) varies by age and sex. The pattern shows a higher activity rate among the males than females, and a generally low level of participation at the younger ages (10-19 years) largely because of schooling. For both sexes the participation rates are highest between ages 25 and 59 years.

GROSS NATIONAL PRODUCT

Size and structure of the economy

37. Estimates put Namibia's Gross Domestic Product (GDP) at US\$ 2,106 million in 1992 giving it a per capita income of US\$ 1,610. This compares to US\$ 2,670 for South Africa, US\$ 570 for Zimbabwe and US\$ 530 for sub-Saharan Africa as a whole. Despite prolonged drought in 1991 and 1992 and sustained world and regional economic recession, the Namibian economy has performed better since independence than at any time since 1980. Between 1990 and 1994, real GDP grew at an average of 3.5 per cent per year (although it fell in 1990), demonstrating Namibia's economy exhibits the classic characteristics of past colonial exploitation where large multinational firms and settler farmers exploit natural resources for export, leaving other sectors largely undeveloped. The large commercial agriculture and mining sectors dominate the small manufacturing sector.

38. The Namibian economy recorded a steady annual real gross domestic product (GDP) growth 3.6 per cent for the past five years, in spite of a decline of 1.9 per cent in 1993. The better performance was on account of the moderate recovery in diamond production and increase in fish output. Fish processing, water and electricity also contributed to the 1994 real growth. Excluding diamonds, the growth in the other sectors would have resulted in a 4.8 per cent growth in real GDP. Real gross national income expanded by 14.8 per cent in 1994 after receipts from the rest of the world decreased by 1 per cent as share of GDP at current market prices. Real GDP per capita showed a moderate improvement of 2.3 per cent to US\$ 1,288.00 when compared with the decline of 4.9 per cent in 1993. Real GDP at market prices grew by 5.5 per cent in 1994, which was responsible for the better performance in real per capita GDP.

39. Namibia's overall balance of payments was provisionally estimated at N\$ 2,266 million in 1994, the result of a widened current account surplus of N\$ 748 million and a deficit on the capital account of N\$ 440 million. The position of foreign reserves assets improved to N\$ 719 million, equivalent to six weeks of merchandise import and non-factor services. The level of foreign assets at 31 December 1994, was N\$ 10.5 million compared with foreign liabilities of N\$ 8.9 million.

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Growth Rates	0.3	7.4	8.2	-1.9	6.5	4.1	2.5	5.0	6.5	4.7	4.4

Source: The Economist Intelligence Unit (EIU) Reports.

40. Namibian Macro-economic Framework (NAMAF) projections applicable to 1999 and 2000 only. Note: 1990 to 1995 are actual percentages while the projected figures are from 1996 onwards. Prospects for the Namibian economy are steady for the short and medium term, but rather uncertain in the longer term for the key sectors of mining, agriculture and fishing. The economy is sensitive to developments in neighbouring countries, particularly South Africa, as well as in the world market.

41. Reflecting the positive growth rates in mining and general government output, the Namibian economy showed an expansionary stance during the first quarter of 1995. According to the short-term indicators of real sector development, developed by the Research Department of the Bank of Namibia, the economy expanded by 3.8 per cent. The growth in the economy is accounted for by a significant growth rate in mining and general government, which expanded 15 per cent and 1.6 per cent respectively. General government and mining account for 49.7 per cent of GDP. Other significant growth was recorded in transport and communication, retail sales and fishing. Commercial agriculture declined by about 9 per cent, while manufacturing activities slowed down by 6.4 per cent.

Rate of inflation

42. Due to the dominant influence of South African-produced goods in Namibia's imports, and the pegging of the Namibian dollar to the rand, consumer price inflation remains heavily influenced by that in South Africa. Nevertheless, domestically-produced goods and services have an influence on overall inflation, and Namibia's public sector pay and budget deficit also have an impact on wage and price inflation. Namibian inflation will continue to be influenced by South African inflation, until the dominance of imported South African consumer goods is reduced or the Namibian dollar is de-linked from the rand. Namibian domestic money supply is under control.

43. The year-on-year inflation rate averaged 9.9 per cent in the first quarter of this year, up from 8.4 per cent in the final quarter of 1993. The faster upward trend in the Windhoek all-items index was largely due to sharp increases in the prices of clothing and footwear (up by 16 per cent on a year earlier) and, to a lesser extent, housing (up by 12 per cent compared with a year earlier). Food price inflation remained relatively subdued, with prices averaging 6.4 per cent more in the first quarter than during the same period last year.

44. Namibia's inflation rate, as measured by annual percentage changes of the interim consumer price index of Windhoek, closely follows that of South Africa. However, during 1994 the increase in general price level in Namibia remained higher than in South Africa. The annual average inflation for Namibia was recorded as 10.7 per cent in 1994 compared with 8.65 per cent in the previous year. The major consumer item influencing the upward trend of the Namibian inflation is food, which accounts for more than 28 per cent of the total consumer basket.

45. Following marked increases in the inflation rate during June and July 1998, the trend slowed down, reaching 7.18 per cent in September 1998. The main contributor was domestic non-tradeables (services) during the year as a whole, while prices for imported goods exceeded the national average figure over the previous three months. Price increases for domestic goods remained relatively low (September: 2.5 per cent). Despite the sharp depreciation of the South African rand, prices for imported products increased only modestly, indicating that most of them are of South African origin rather than from overseas. The depreciation took its toll with other items, particularly housing (interest rate and fuel price increase), for which prices increased by 9.88 per cent.

46. Low international inflation together with South Africa's restrictive stance of monetary policy and its downward correction in the price levels of the fresh foodstuffs because of improved weather conditions, have prompted the overall inflation rate in Namibia (as measured by the consumer price index increase for Windhoek) to recede slightly from 10.8 per cent in 1994 to 9.9 per cent in 1995. From the considerable deceleration in the consumer price as regards the indicators of human resources utilization, it is evident that there is a need for improvement as a matter of urgency to ensure that the talent of the young generation is not wasted. In terms of activity status, the census enumerated 998,436 persons in the working age group (10 years and over), made up of 493,580 (49.4 per cent) defined as economically active, or in the labour force, leaving over 50 per cent of the working age population in the economically inactive category. Out of the economically active population, 99,239 or 20.1 per cent are unemployed.

47. The majority of those unemployed, about 74 per cent, are first time job seekers, most of them below 25 years of age but almost equally divided by sex. It is noteworthy that about 71 per cent of the unemployed males and 78 per cent of their female counterparts are products of the primary and junior school system. Equally striking is the emergence of university graduate unemployment. It is estimated that the underemployment rate could be as high as 41 per cent of the economically active population. Labour force participation rates are generally high, but considerable variations exist between males and females and according to age. Participation in the labour force is very limited among boys and girls below age 15 years, in part because of schooling.

Literacy rate

48. Literacy rate (any language) 77.7.

Literacy rate, in official language English 49.0.

Religion

49. Namibia is a secular State (meaning that there is no official religion for the country). Of the various secular denominations in Namibia it is estimated the 95 per cent belongs to the Christian faith. The majority of them are either Catholic or Protestant with a few charismatic denominations afloat.

External debt

50. Sustainable economic growth is one of the objectives of the Government of the Republic of Namibia. In order to realize this objective, the Government is intending to lower its fiscal deficit to around 3 per cent of GDP by the year 2000, this implies reducing the public expenditure and avoiding unnecessary borrowing. A very restrictive approach to all forms of borrowing was applied for two years after independence. Government remains extremely concerned to avoid incurring debt unnecessarily, but recognizes that selective borrowing can play a legitimate role in financing development plans. It is planned that foreign borrowing will be considered for particular projects, where this is consistent with Government's deficit target, if:

- The project involves productive investment;
- The project has high returns on investment;
- The borrowing is on grant basis or concessional terms, which facilitate long-term repayment.

51. The following section provides an initial overview of the Namibia's current debt situation. The table below provides the external debt of Namibia:

Summary of Namibia's external debt (in thousands of Namibian dollars)

	Balance outstanding 31.12.1995	Balance outstanding 31.01.1996	% of GDP 31.12.1995	% of GDP 31.01.1996
Central Government debt	474 985	471 074	4.33	4.29

Source: Ministry of Finance CS-DRMS Report 504 printed on Thursday, 15 February 1996.

Note: Only external loans included in the report. The report selects only Central Government debt.

52. Central Government's debt per GDP at the end of 1995 was 4.33 per cent dropped slightly to 4.29 per cent at the end of January 1996. Before 1992 the debt of the Government of Namibia was above 12.5 per cent. A shift occurred in the half of 1992 from the foreign debt being wholly a liability of the Bank of Namibia, following the rescheduling arrangements. At the end of 1993, the official external debt was recorded at N\$ 459.4 million and by the end of

the 1993/94 financial year it amounted to N\$ 488.4 million - this was equivalent to about US\$ 134 million. This was 5.58 per cent and 4.76 per cent of GDP respectively. However it is quite clear from the point of view of the country, that this debt transferred to the Bank of Namibia is external and should be included in the total of external debt. If this is done, total debt as at 1993/94 amounted to N\$ 1,118.4 million or approximately US\$ 308 million. Relative to the 1994 GDP total, this indicates an external debt/GDP ratio of 11 per cent.

53. In 1997 the combined rates of unemployment and underemployment were estimated to be as high as 60 per cent of the labour force - 263,000 out of 435,000 adults were either unemployed or wished to work more hours in a week than they did. While open unemployment was higher in the urban areas, the more pervasive, but often disguised, problem was that of underemployment in rural areas. The marginal nature of agriculture did not provide a sustainable livelihood for farmers, and was not a full-time occupation for most.

54. For this section of the report extensive use was made of the following sources:

- The Statistical Abstract, 1996, No. 5, of the Central Statistics Office of the National Planning Commission, Windhoek, Republic of Namibia;
- "Seven years independence, current developments and future prospects in Namibia - some topical highlights", a Namibian Economic Policy Research Unit (NEPRU) discussion paper, March 1997 (NEPRU working paper No. 54);
- The Namibian Economy, No. 13/December 1997, a NEPRU Viewpoint;
- The Namibian Economy, No. 19/December 1998, a NEPRU Viewpoint;
- Namibia - Human Development Report 1998, by UNDP with United Nations Country Team, Windhoek, Republic of Namibia.

55. The Ministry of Finance estimated the servicing cost of the debt (principal and interest payments) for the financial year 1995/96, which it is still servicing, amounted to about N\$ 75.9 million. This is additional to the payments of N\$ 78.5 million per annum for 17 years from April 1995 against the Bank of Namibia Facility. Bringing the total servicing costs of the official external debt at that time to approximately N\$ 155 million. This was only 2.6 per cent of the total exports. Since the end of "no-borrowing policy" in 1992 a number of new rand as well as hard currency loans have appeared on the books of the Government. However these are concessional loans. The following table indicates the private external debt for the years 1994 and 1995:

Private external debt in thousands of Namibia dollars

	1994	1995	% of GDP 1994	% of GDP 1995
Currency	100 170	911 989	0.98	0.84

Namibia's private external debt with the rest of the world was N\$ 100.17 million and N\$ 92.0 million in 1994 and 1995 respectively. This shows a decrease of 8.2 per cent in 1995 from that of 1994. These figures might considerably underestimate the private external debt. At the end of 1993 the private external debt was about 11 per cent of GDP. It is worth noting that the above figures of the private external debt are the total of the private external debt of the following currencies converted to Namibian dollars: Swiss francs, Deutsche marks, US dollars, ECU and rand. The underestimate of the private external debt can be attributed to the fact that not all private sectors responded to the survey questionnaire by the Bank of Namibia.

56. According to the figures available the total external debt at the end of 1995 was N\$ 56,974 million. This gives a total debt: GDP ratio of 5.2 per cent. A larger share of the private external debt is borrowed in rand. 76.9 per cent and 74.9 per cent of the total private debt was in rand for the years 1994 and 1995. It is clear for this type of debt that it carries no foreign exchange risk. Future projections show a declining foreign private debt, but these projections might not make sense as they do not include future borrowing.

57. It is envisaged that the overall fiscal deficit of 1996/97 will amount to 4.1 per cent of the projected GDP of N\$ 13,520 million. Only 9 per cent or N\$ 50 million of this deficit will be financed by foreign loans which will, as in the past, take the form of project related loans at highly concessional terms. Therefore one concludes that Namibia has low deficit compared to other sub-Saharan developing countries.

58. In the pre-colonial period, Namibia was inhabited by a number of indigenous nationalities such as Hereros, Ovambos, San, Namas, Damaras, Kavangos, Caprivians, etc. These principal indigenous populations had their own diverse cultures, civilizations and systems of government. Reference can be made to the Kingdoms of Ipumbu, Mandume Ndemfayo, Maharero, Tjamuaha, Hendrik Witbooi, etc. These great Kingdoms had well defined boundaries within which they exercised effective control over their people and natural resources.

59. Concepts of human rights were found in African communities where they were practised by the people in their own traditional way. It could be concluded that the same ideas as those existing in Western communities were being expressed in African communities, only that different environments and cultural structures made the appearance of such ideas different. It can, therefore, be said that fundamental human rights are not peculiar to any political system, country, race or community. In fact they are a part of the values and norms of all communities. Implementation of human rights values was primarily based on a collective approach to problem solving through the process of consultation and respect for the elderly, who were regarded as wise and experienced. Remedies were provided against tyrannical rulers who trampled on the rights of their subjects.³

60. An individual had to rely on his intimate group, the extended family or clan to manipulate the political and social forces in order to exercise his rights. The traditional African legal order in general and Namibia in particular, therefore, recognized certain rights as fundamental and inalienable. Perhaps the indigenous populations in pre-colonial Namibia enjoyed greater freedom than their modern counterpart. The observance of such rights in Namibia varied from community to community, a reflection of the different emphasis on values and the level of economic development.

Early contact with European traders and missionaries

61. During the thirteenth century, Namibia had its first contacts with European countries through trade at the port of Walvis Bay where commodities such as brandy, tobacco, agricultural products and arms were exchanged for cattle and other products. During this period, German and British missionaries began penetrating into the interior of Namibia and established themselves as settlers. The favourite saying of Bismark, the Chancellor of Germany in the nineteenth century, was that “the missionary and the trader must precede the soldiers”. It goes without saying that this policy was successfully implemented in Namibia by the German colonial administration. Right from the beginning, these missionaries did not limit themselves only to preaching Christianity but became involved in business and political activities.

62. Unfortunately this period was marked by internal wars for more land between different tribes and the missionaries exploited this unfortunate state of affairs. European traders started to increase in Namibia and to acquire land through unequal trade agreements and other dubious means. These agreements were concluded by some of the traders to the extent that some of the local population did not appreciate what they were committing themselves to.

63. Namibian chiefs were advised by their missionary “friends” and traders that if they came under German protection, the Afrikaner farmers coming from Transvaal would respect their land and property. Neighbouring rival chiefs would be prevented from invading their territories and taking away their cattle. Three prominent Namibian chiefs refused to enter into such protection agreements. Chief Ipumbu was forcefully removed from his traditional stronghold in Uukwambi and was banned from his kingdom to another area called Uukwanyama under protective detention, where he died. Chief Mandume Ndemfayo engaged in fierce battles with the Portuguese in Angola. He was later captured and executed. Chief Hendrik Witbooi refused bluntly and told a German Commissioner who attempted to convince him on 29 June 1892 to enter into such an agreement the following words:

“To me it is a matter of wonder and impossibility and I cannot conceive that a Chief, being an independent Chief and ruler over his own land and people (for every Chief is this), able to defend his people against all danger or threats ... can, if he accepts protection from another, still be regarded as a Chief as independent Chief ... every one under protection is a subject of the one who protects him. Moreover, this Africa is the land of the black Chiefs (i.e. Hottentots) and when danger threatens a Chief, and he feels he is unable alone to oppose such danger, then he may call upon his brother Chiefs or of other Chiefs and say, come brother or brothers and let us stand together and fight for our land and avert this danger which threatens our land for we are the same in colour, in manner of life and although divided under various Chiefs the land is ours in common.”⁴

64. Groundwork for preparation of the so-called protection agreements initiated by German traders and missionaries was completed and the process of pacification and conversion into Christianity was also completed to lay the ground for physical colonial occupation. The infamous Berlin Conference of 1884, whereby the European colonial powers agreed to partition Africa, agreed that Germany should annex Namibia.

65. A so-called protectorate was declared over Luderitz in April 1884. Subsequent to the arrival in Namibia of more colonial officers and troops, the protectorate was gradually extended into the interior and eventually covered the rest of Namibia with the exception of the northern part.

66. On 30 December 1886, Germany entered into an agreement with Portugal and on 1 July 1890, with Britain, thus fixing the colonial boundaries of Namibia. This marked a new stage in the completion of the colonialization of Namibia.

Physical extermination of the indigenous population and gross violation of human rights

67. Following the completion of colonial occupation, the German colonial army launched one of the most cruel and shameful operations of genocide wiping out in the process half of the Namibian Herero population. The genocide forced half of the population to flee to neighbouring countries such as Botswana. Other Namibian nationalities such as the Namas and Damaras also suffered from this cruel treatment. This suffering provoked the 1903 Nama uprising in the south, and subsequently the Herero revolt in 1904, when more inhuman acts were perpetrated by German soldiers, who exterminated \pm 65,000 Hereros and thus reduced the size of the Herero population by more than half.⁵

68. The extent of the atrocities was so severe that a liberal such as Helmut Bley was forced to comment as follows:

“We can legitimately talk of extremism in German South West Africa in the period after the defeat of the Herero and Nama uprising of 1904. Whites were then in control of the political and economic life of the colony in a unique way. The Africans had been totally dispossessed of land and cattle reduced in number by a process which one can only call genocide and their status lowered to the servant of dominant whites.”⁶

69. Attempts were made by European powers and their scholars to demonstrate the fact that prior to colonial occupation, Namibia like the rest of the African continent at the time was a *terra nullius* territory (i.e. unoccupied land). On the contrary, it had been inhabited by a number of independent nations of varying size since time immemorial. Cultivation and other economic activities took place as implemented by the Ashantis in Ghana and the Bantu communities in East and Central Africa. It should be said that the inhabitants of these African communities observed unwritten laws and regulations and participated in decision-making. This process of participation in decision-making was indeed ideal for the promotion and protection of human rights.

Colonial period

70. The colonial period saw a ruthless denial of the rights of the Namibian people. The more democratic aspects of the traditional way of life were disrupted. The way the colonial administration was structured denied the majority of people their human dignity and the ruthlessness which accompanied the enforcement of colonial power indicated a disregard for the lives of those who, in their traditional conviction, opposed the foreign authorities. As mentioned earlier, traditional Chiefs like Ipumbu Ya Shilongo and others were banished, Mandume Ndemfayo was killed, Hendrik Witbooi and Chief Maharero were imprisoned.

71. During the course of World War I the South African troops, at the request of the Allied Powers, occupied Namibia in 1915 and established a military administration in the territory. At the end of the war and in context with the Treaty of Versailles, the Allied Powers decided that Germany should be deprived of all its colonies including Namibia and that such territories should not be treated as spoils of war and therefore, should not be annexed by the occupying Powers.⁷

The mandate system

72. Namibia was categorized as a “class C mandate” by the Covenant of the League of Nations (art. 22) to continue to be administered as an integral part of the Mandatory under the direct administration of the Mandatory, and was not permitted to exercise its right of self-determination with a view to its ultimate sovereignty. Britain was designated as the mandatory power for Namibia but transferred the administration of the territory back to South Africa. By a specific mandate agreement, South Africa was appointed on 17 December 1920, to administer Namibia on behalf of the British Crown. The purpose of such a mandate was clearly specified as “to promote the utmost material and moral well-being and the social progress of the indigenous inhabitants of the territory”.

73. South Africa betrayed this sacred trust and began its plans by attempting to annex Namibia, which the international community entrusted to it. South Africa assumed the right to confiscate land and property from the Namibians in the same unjust manner as was done under German colonial rule. It entrenched political, social and economic discrimination by institutionalization accompanied by massive human rights violations. It encouraged the immigration of more whites from South Africa to Namibia and promoted racial segregation in violation of its mandate under the Covenant of the League of Nations.

74. The Permanent Mandate Commission of the League of Nations which was established under paragraph 9 of article 22 of the Covenant and which was mandated to supervise the administration of the mandated territories examined the reports of South Africa regarding its administration in Namibia. The Commission on a number of occasions was very critical of the activities of South Africa in Namibia but because it did not have the necessary authority, it was unable to take appropriate steps against South Africa to redress the situation which prevailed at that time. The Government of South Africa did not consider the international status of Namibia as a mandated territory seriously and therefore, continued to consider it, in practice, as an annexed former German colony. In fact, in 1933 the South African Government approached the League of Nations with a proposal to formally annex Namibia and to do away with the mandate arrangements.⁸ However, the League did not consent to this request. Meanwhile petitions were launched by Reverend Michael Scott on behalf of Chief Maharero protesting the colonial subjugation and violations of human rights perpetuated against the Namibian people by the South African regime.

The trusteeship system and the role of the United Nations

75. Following the demise of the League of Nations and the mandate system, and the subsequent establishment of the United Nations Trusteeship System under Chapter XI-XII and XIII of the United Nations Charter, South Africa was the only country among the mandatory

powers which refused to place its mandated territory under the new system by entering into a trusteeship agreement with the United Nations. South Africa rejected the idea that the mandate system was superseded by the United Nations Trusteeship System and challenged the authority of the United Nations, to interfere in the affairs of Namibia.⁹ In this regard, South Africa argued that Namibia geographically, economically and strategically had been part of South Africa and that it had also been administered as an integral part of its territory, and revived its earlier proposal which was (already rejected by the League of Nations) to formally annex Namibia.

76. The United Nations General Assembly, in its resolution 65 (1) of 14 December 1946, challenged the South African position and its ability to unilaterally change the international status of Namibia and turned down its proposal to annex the territory. The General Assembly instead, recommended that Namibia be placed under the United Nations Trusteeship System and for this purpose requested South Africa to conclude a trusteeship agreement with the United Nations.

77. When the repeated United Nations recommendations and appeals to South Africa to place Namibia under the Trusteeship System were to no avail and particularly when it became evident that South Africa was not prepared even to cooperate with the United Nations in submitting annual reports on the situation in Namibia, the General Assembly by its resolution 338 (VI) of 6 December 1949 requested the advisory opinion of the International Court of Justice (ICJ) regarding the international status of Namibia in the light of the South African claims.¹⁰

78. On 11 July 1950, the ICJ reaffirmed that Namibia was a territory under international mandate assumed by the Union of South Africa on 17 December 1920, and that the Union of South Africa continued to have the international obligations stated in article 22 of the Covenant of the League of Nations.¹¹ Moreover, the ICJ indicated that the provisions of Chapter XII of the Charter are applicable to Namibia in the sense that they provide means by which the territory may be brought under the Trusteeship System.

79. Despite this and two subsequent advisory opinions of the ICJ and the persistent appeals of the United Nations, South Africa still continued to reject the United Nations authority over Namibia which led to the decision of Ethiopia and Liberia in 1960 to bring the issue before the ICJ for a binding decision enforceable under Article 94 of the United Nations Charter. As former members of the League of Nations, Ethiopia and Liberia on 4 November 1960 submitted a decision of the ICJ as principal claimants, claiming that South Africa was under legal obligation to submit Namibia to the United Nations supervision and control, and that it was duty bound to submit annual reports on the territory to the United Nations General Assembly. Although the opinion of the court was favourable to Ethiopia and Liberia's claims in the first phase of its decision (i.e. the court decision of 21 December 1962 which ruled that the court had jurisdiction to adjudicate upon the merit of the Namibian case submitted by Ethiopia and Liberia),¹² the court nevertheless reversed its original trend on 18 July 1966 and declined to take a decision on the merits of the case on the grounds that the applicants could not be considered as having established "any legal right or interest pertaining to them in the subject matter of the claims".¹³

80. Convinced that South Africa had no intention at all of cooperating with the United Nations on the Namibian issue and moreover disillusioned with the unfavourable decision of the court, the General Assembly decided to terminate South Africa's mandate over Namibia. The relevant part of the General Assembly resolution 2145 (XXI) of 27 October 1966 which was adopted by a vote of 114 for, 2 against (South Africa and Portugal) and 3 abstentions (France, Malawi and the United Kingdom) reads as follows:

“Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the mandate, the Charter of the United Nations and the Universal Declaration of Human Rights. Considering that all the efforts of the United Nations to induce the Government of South Africa to relinquish the administration of the territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail. Decides that the mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the territory and that henceforth South-West Africa comes under direct responsibility of the United Nations. Resolves that in the circumstances the United Nations must discharge those responsibilities with respect to South-West Africa.”

Suppression of political activities and the launching of the armed struggle

81. The South-West African People's Organization (SWAPO) was formed on 19 April 1960 (1959) following the dissolution of the Ovamboland People's Organization (OPO). During this period, mass campaigns against the illegal occupation of Namibia and persistent human rights abuses were taken, headed by SWAPO and its President, Dr. Sam Nujoma. In 1959 a mass demonstration was held in Windhoek's Old Black Location against the forcible removal of the residents of the Old Location to Katutura. (A place appropriately called “we won't settle here”.) This demonstration was violently suppressed and 11 residents including women were violently shot dead by the South African Police. Repeated violent persecution followed, and the SWAPO leadership was forced to leave the country. SWAPO President, Dr. Sam Nujoma, left the country and established the first SWAPO headquarters in the Republic of Tanzania.

82. The continued refusal of South Africa to comply with the resolutions of the General Assembly convinced SWAPO and the Namibian people that there was no other alternative but to wage an armed liberation struggle in order to liberate Namibia. The Peoples Liberation Army of Namibia (PLAN), the armed wing of SWAPO was formed and on 26 August 1966, the combatants of PLAN and the South African Forces fought at Ongulumbashe. Since that date, South Africa was engaged in armed confrontations with SWAPO. Almost all members of SWAPO leadership inside the country were arrested, tried and convicted in South Africa. Mr. Herman Ya Toivo, the current Minister of Labour, was one of the 11 Namibians interned at Robben Island and charged under the draconian Terrorism Act, No. 83 of 1967 which was made retroactive to June 1962 and expressly extended to South-West Africa (Namibia).

83. The trial opened in Pretoria despite the United Nations General Assembly's request to South Africa to withdraw the case. The Association of the Bar of the City of New York described the Terrorism Act as an offence to the basic concept of justice, due process and the rule of law, and protested against its application to Namibia. The United States Ambassador to the United Nations, Mr. Goldberg, spoke of the atrocious Terrorism Act, while the United States Vice-President, Hubert Humphrey, strongly condemned the trial during his African tour.¹⁴ The defence team led by N. Phillips, Q.C., objected to the jurisdiction of the court on the ground that South African title to the territory of Namibia was illegal in terms of international law. After the hearing of evidence and arguments, the court rejected this contention and convicted the defendants.¹⁵

84. In an August address to the court, Ya Toivo addressed the court as follows:

“My Lord we find ourselves here in a foreign country, convicted under laws made by people whom we have always considered as foreigners. We find ourselves tried by a judge who is not our countryman and who has not shared our background. We are Namibians and not South Africans. We do not now and will not in future, recognize your right to govern us, to make laws for us, in which we had no say, to treat our country as if it was your property and us as if you were our masters. We have always regarded South Africa as an intruder in our country. This is how we have always felt and this is how we feel and it is on this basis that we have faced this trial! I am a loyal Namibian and I could not betray my people to their enemies. I admit that I decided to assist those who had taken up arms. I know that the struggle will be long and bitter. I also know that my people will wage that struggle, whatever the cost. We believe that South Africa has a choice - either to live at peace with us or to subdue us by force. If you choose to crush us and impose your will on us, then you not only betray your trust but you will live in security for only so long as your power is greater than ours.”

85. Ya Toivo and nine co-defendants were sentenced to 20 years' imprisonment. The long sentences did not deter Namibians from intensifying the armed struggle and internal political struggle. This period was followed by the introduction of draconian legislation such as section 6 of the Terrorism Act, 1967 (Act No. 83 of 1967).¹⁶ This empowered any commissioned officer of the rank of Lieutenant Colonel or above to arrest without a warrant any person suspected of committing a so-called terrorist act. Such a person could also be detained indefinitely.

86. Mr. Mushimba and Mr. Hendrik (Shikongo) were implicated in the murder of Chief Phillemon Elifas, a Chief who was used by the South African Government against his own people. The two were charged with murder under section 6 of the Terrorism Act, 1967 (Act No. 83 of 1967) which provided for indefinite detention until investigating officers were satisfied with their investigations. In the case of the *State v. Mushimba*¹⁷ the High Court first sentenced both Mr. Mushimba and Mr. Shikongo (co-accused) to death on the grounds that he was responsible for the death of Chief Elifas. On appeal, Judge Berker upheld the appeal on the basis that members of the Security Services concocted the evidence by obtaining evidence through illegal means such as by stealing the defence lawyer's documents at *Lorentz and Bone* (a defence lawyer's company).

87. The issue in this case was whether information obtained by dubious means was admissible. This judgement was significant because it curtailed the excessive powers of the security forces. Any person could without a warrant be detained at any place if a police officer had reason to believe that such a person is a terrorist or was withholding any information relating to the furtherance of terrorist activities. The police had broad powers to detain, interrogate and even to torture prisoners. The broad power under this additional draconian legislation was used as a catalogue for detentions without trial and torture. Traditional leaders and SWAPO political leaders such as John Ya Otto, Jason Mutumbulwa, Axel Johannes, Victor Nkandi and many others were mercilessly persecuted.

88. SWAPO combatants captured in action were tortured and forced to join the so-called Koevoet (Crowbar) Counter Insurgency Unit. This was an attempt by the South African Army to Namibianize the war (Namibians fighting against Namibians).

89. There was no difference between the judicial system and its executive. It remained a white, male, upper-class institution and instead of being the protector of human rights, it became the enforcement machinery of apartheid in Namibia. The only significant case where justice and fairness was upheld, was that of *Katofa v. Administrator General for South West Africa*.¹⁸ Katofa was detained in terms of Proclamation AG 26, 1978 of South-West Africa. The object of the proclamation was that the Administrator-General had the right to issue a warrant of arrest of any person suspected of threatening the security of the State by engaging in terrorist activities.

90. Joseph Katofa was detained for a period of almost a year and was not allowed to see his lawyers. The prime object of these proceedings were the *interdictum de homine liberto et exhibendo*, popularly known as an application for a writ of habeas corpus, against the illegal deprivation of liberty, as a threat to the very foundation of a society based on law and order. Through centuries, the courts in democratic countries have jealously guarded and protected the rights of individuals to their liberty and their own jurisdictions in respect of the deprivation of liberty. This was indeed the position in South-West Africa when the court was considering the case of Joseph Katofa. The court considered this principle and Katofa was subsequently released.

91. In another case the *State v. Nangolo*,¹⁹ Nangolo the accused in this case initially left Angola together with Canisius and engaged in a number of armed activities in the country killing several white farmers and creating fears among the white population of the country. Nangolo was eventually captured and was sentenced to death despite the international community's plea for clemency. He was executed in Windhoek central prison despite the fact that he was in a wheelchair.

92. In 1971 the ICJ terminated the South African Mandate. South Africa remained intransigent. John Voster, the South African Prime Minister, described the ICJ ruling as hypocrisy and vowed to continue with the illegal administration of the territory. While thousands of Namibians continued to suffer under the draconian apartheid system, the exploitation of human and natural resources continued unabated. In 1978, the United Nations Security Council resolution 435 was adopted and remained the basic resolution for ending the Namibian conflict.

93. Meanwhile negotiations continued relentlessly between the Western Contact Group consisting of the United States of America, Canada, Britain and France, on one hand, and SWAPO and South Africa on the other. During this process of protracted negotiations serious obstacles were removed, while South Africa introduced new ones such as the linkage of the Cuban withdrawal from Angola to the independence of Namibia.
94. Finally, an agreement was reached on the basis of the United Nations General Assembly resolution 435 - which called for the withdrawal of Cuban forces from Angola and the holding of free and fair elections in Namibia. In 1989 SWAPO and South Africa signed a ceasefire agreement which was mediated by the United Nations.
95. Following the safe return of all the exiles in 1989, elections were held in Namibia. SWAPO won the elections organized and supervised by the United Nations. A Constituent Assembly was established consisting of all political parties which won seats and was entrusted with the duty of drafting a new Constitution.
96. On 21 March 1990, Namibia obtained her independence. The Constitution of the new Republic, which was adopted unanimously on 9 February 1990 by all political parties represented in the Constituent Assembly, is universally perceived as a liberal and democratic one. All basic principles of a pluralistic society are entrenched in this Constitution. Basic human rights are guaranteed and there is a provision for general elections on a regular basis. Power is shared amongst the Executive President, a two-Chamber Parliament and an independent judiciary. The Republic of Namibia can thus be perceived as a pluralistic democratic country.
97. Namibia's young democracy, however, faces new challenges. A democratic tradition was never cultivated under the colonial occupation. The new Government with its meagre resources is struggling to cultivate a culture of democracy, and respect for human rights which were frequently violated and abused by the old colonial dispensation.
98. Namibia is a unitary, secular State with a multiparty system of government. It is divided into thirteen Administrative Regions. Each region has an elected Regional Council, with a Regional Governor as the Regional Chief Executive. It has an executive presidency system with a President as both the Head of State and Head of Government. But executive power is vested in the President and the Cabinet of Ministers. In this way, the presidential system partakes of aspects of both the American presidential system and the British Cabinet system. The Cabinet consists of the President, the Prime Minister (who is head of government administration) and Ministers.
99. At present there are 23 Cabinet members, including the President (Chairperson), the Prime Minister and the Attorney-General. The larger ministries have deputy ministers, e.g. the Ministry of Foreign Affairs. All ministers must be members of the National Assembly in which legislative power is vested. It has the power to pass laws with the assent of the President and subject, where applicable in terms of the Constitution, to review by the National Council whose membership of 26 consists of 2 members elected by each of the 13 Regional Councils. The National Assembly on the other hand has 72 members elected through the party list method of the proportional representation system and up to 6 non-voting members appointed by the

President. Municipal, town and village councils constitute local government. All members of the councils are elected by secret ballot on the basis of the first-past-the-post electoral method. All elective institutions of the State operate upon the basis of multipartism.

100. The judicial power of the country is vested in the courts which consist of (a) the Supreme Court, (b) the High Court, and (c) Lower Courts. The independence and impartiality of the judiciary are guaranteed by the Constitution. The High Court has unlimited jurisdiction and therefore it is better placed to protect human rights. The Supreme Court has only appeal jurisdiction except when it is called upon by the Attorney-General to determine the constitutionality of an act or law.

CONSTITUTION BILL OF RIGHTS

Post independence and the new constitutional framework

101. As it has been intimated earlier on, the Namibian Constitution is in terms of article 1 (6), the supreme law of Namibia. The Constitution established the Republic of Namibia “as sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all” (art. 1 (1)). In terms of the said Constitution, all power is vested in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State (art. 1 (27)) of which the main organs are defined under article 1 (3) as the executive, the legislature and the judiciary.

Entrenchment of fundamental human rights and basic freedoms

102. The Constitution in general establishes a limitation on governmental power. It outlaws arbitrary action by the Government which are inconsistent with the Constitution. The Bill of Rights in particular constitutes a legal framework for the promotion and protection of human rights. All the laws of the country, i.e. the common law, customary law, international law and statute law should be in conformity with the Constitution in order to be valid and enforceable.

103. Whereas in the colonial legal order the determinant question often asked by the courts and tribunals in order to assess the legality of the executive conduct was, “what is the law or the legislative intent of the statute?”. The new human rights-orientated legal framework provided by the Constitution compels us to put the question quite differently, namely, is the statute compatible with the Namibian Constitution in general and the Bill of Rights in particular? This is the critical difference between the old oppressive legal order and the new human rights-orientated legal framework. Since independence, fundamental human rights and freedoms of the individual have been placed centre stage in the legal system. They are enshrined in the Bill of Rights, i.e. chapter 3, of the Constitution. In terms of article 5, these rights are justifiable not only against private individuals but above all and against all organs of the State, particularly the legislature and the executive.

104. The main object of the Bill of Rights is, therefore, to ensure that the rights and freedoms guaranteed by the Constitution are not trampled upon with impunity. In this connection, persons alleging human rights violations can seek redress in the courts of law or in quasi-judicial bodies e.g. the Office of the Ombudsman, etc.

105. A closer look at the freedoms and rights protected under the Namibian Constitution reveals that they go well beyond the conventional ones, not only in Africa but the world over. The examples provided hereunder will suffice to illustrate this point.

(a) An indefinite detention is totally banned by the Namibian Constitution. This means that an arrested person must be brought to court within 48 hours. This noble principle and ideal situation should be welcomed, but the Namibian Government with its limited resources cannot fully comply with this constitutional requirement. Therefore, there are instances where the 48-hours rule was not adhered to. This presupposes adequate financial and human resources which must be mobilized to alleviate the problem. It requires additional training for magistrates, prosecutors, police officers, court interpreters, and above all sufficient magistrates courts, detention centres and transport. Despite these constraints, Government has succeeded in abiding by the constitutional 48-hours rule in most cases. However, the Constitution of the Republic of Namibia excludes the application of the 48-hour rule in article 11, sub-article 4, to illegal immigrants held in custody under the Immigration Control Act No. 7 of 1993.

106. The death penalty has been abolished in Namibia. There has been a serious debate going on in Namibia regarding the question of the introduction of the death penalty. The statistics after independence indicate that there was no escalation in crime when the death penalty was abolished. The abolition of the death penalty is one of the most progressive provisions of the Constitution. Namibia is one of the few countries in the world that have totally abolished the death penalty.

107. Affirmative action for women and the disadvantaged majority represents a unique and significant acknowledgement of the wrongs of the past. Women in Namibia have traditionally and historically suffered discrimination and this enjoys the special attention of the Government. To date, some workers still suffer discrimination at the workplace. Some commercial farmers still employ workers under slavery conditions. All these adverse conditions are being addressed by the Government. In addition, the Constitution addresses the plight of children and other vulnerable groups.

108. The inclusion in article 24 (3) of the Constitution of a list of rights and freedoms which cannot be suspended or derogated from in any circumstances or for any reason, not even during the state of emergency, e.g. detention without trial and without access to a legal practitioner, is also significant. The entrenchment of the freedom of association in the Constitution is remarkable, hence, multiparty democracy is guaranteed.

109. In addition to the fundamental freedoms discussed above, article 18 of the Constitution addresses principles of administrative justice. The said article states as follows:

(a) “Administrative bodies and administrative officials shall act fairly, reasonably and comply with the requirements imposed upon such bodies, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.”

(b) “Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened are entitled to approach a competent court to enforce or protect such rights or freedom and may approach the Ombudsman to provide them

with legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto and provide such recommendations to Parliament or recommend prosecution to the Office of the Attorney-General or Prosecutor-General.”

(c) “The power of the court includes the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such a lawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in circumstances of particular cases.”

(d) “Administrative tribunals are governed by provisions of article 12 (1) (a) of the Namibian Constitution which require that in the determination of their civil rights and obligations ... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent tribunal established by the law. *Djama v. the Government of the Republic of Namibia*²⁰ is a case in point where the court set aside a detention and deportation of an immigrant on the grounds that no deportation tribunal existed in law to authorize the deportation of an immigrant in terms of article 11 (4) of the Namibian Constitution.”

Legality

110. The Namibian Constitution is founded on the rule of law. Administrative Law is the one area where the rule of law is particularly relevant. Every administrative act which affects the rights, duties or liberty of any person must be authorized by the law, and the action taken has to comply with the requirements imposed by the common law or relevant legislation. A decision reached by an administrative authority not authorized by law is ultra vires and void. The most recent decision of the High Court of Namibia is *Skeleton Coast Safaris v. Olympia Reisen*²¹ illustrates the operation of the principles of legality.

111. The court found that the Tender Board was not authorized in terms of its enabling legislation to grant the concession sought by the respondent and set aside the decision of the Tender Board to award the tender to Olympia Reisen on the ground that the award of the tender was ultra vires. The court held that the power to award the concession rested with Cabinet in terms of the Nature Conservation Act. The decision of the Tender Board was therefore held to be null and void.

Natural justice

112. Principles of natural justice were developed over many years, mostly by the courts in England and elsewhere, to ensure justice and fairness. They are aimed at ensuring that decisions of administrative bodies and individuals act fairly, reasonably and observe rules of natural justice.

113. The rules ensure that there will be fairness and sound relationship between the State and the individual. They have been designed to strike a balance between the protection of procedural rights of an affected individual and the safeguarding of administrative efficiency in the regulation of a modern state. The fundamental importance of the requirement of natural justice was emphasised by Lord Reid in the landmark decision of the House of Lords in *Ridge v. Baldwin (1964) A.C. 40.*²² It is against this background that cases of a similar nature in Namibia have been following the above-mentioned principle.

114. Therefore, the role of judicial and quasi-judicial institutions in Namibia in the promotion and protection of human rights can be seen in the light of the new culture that developed after Namibia's independence. Furthermore, suppose, for example, a person alleges that an action taken by an immigration officer under a provision of the Immigration Control Act, No. 7 of 1993, encroaches upon his or her human rights, that person can bring an action in a court of law to test the legality of the action of the immigration officer in terms of the fairness or the reasonableness of such action. The aggrieved person can rely on article 18 of the Namibian Constitution.

115. The Constitution recognizes the role of the courts in enforcing the Bill of Rights so that any person who alleges that any of his or her rights guaranteed to him or her by the Constitution have been or is likely to be abused has the right to challenge the validity of the alleged abuse in a court of law. In addition to the Courts, there are a number of State institutions that were established with a view to enhancing the protection and promotion of human rights in Namibia. Foremost among these are the Office of the Ombudsman and the Directorate of Legal Aid.

INTERNATIONAL, REGIONAL AND MUNICIPAL LEGAL FRAMEWORK WITHIN WHICH HUMAN RIGHTS ARE PROTECTED

International and regional instruments

116. With regard to the implementation of international human rights instruments, Namibia has demonstrated a serious commitment to the protection and promotion of human rights of women and children. It has in a relatively short period ratified all the major international human rights instruments such as the Covenant on Civil and Political Rights, Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention on Refugees, Convention on Women, International Conventions on the Elimination of All Forms of Racial Discrimination, International Convention on the Suppression and Punishment of the Crime against Apartheid, and Optional Protocol to the Covenant on Civil and Political Rights, Second Optional Protocol to the Covenant on Civil and Political Rights, Convention on the Crime of Genocide, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Namibia as a Member State of the United Nations respects the Universal Declaration of Human Rights and the Declaration of the Right to Development.

117. At the regional level, the most important human rights instrument is the African Charter on Human and Peoples Rights. It can only be ratified by Member States of the Organization of African Unity (OAU). Namibia has ratified the OAU Charter. The African Charter is significant in the sense that it covers civil, political and economic rights as well as cultural rights and obligations of individuals.

118. A number of these rights are similar if not identical at both regional and international levels. Ratification at either level is viewed seriously. Theoretically, contradictory provisions would present problems but however, no such contradictions have ever occurred. If one of the agreements has no corresponding provision in a corresponding instrument at another level, the provision of one may be read into another. In the domestic environment, Constitutions including the Namibian one, cover Bills of Rights. In most cases, these are the rights covered at the international level. It is quite possible that a given Constitution may be in conformity with the international agreements. Under such circumstances, the general rule is that the international

instruments should prevail over domestic legislation within the context of the doctrine of *pacta sunt servanda*. Some countries however do not provide that their Constitutions should prevail over international law. In Namibia, international treaties and agreements to which Namibia is a party, are self-executing under the Constitution. Article 144 of the Namibian Constitution provides that:

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

119. Under the Convention for Social, Economic and Cultural Rights, member States which have ratified the Covenant are obliged to do periodic reporting.

Municipal judicial practice in protecting human rights

120. In this section, are discussed various rights under the Constitution and it will be established how the courts have construed the provisions in their endeavour to protect human rights and in enabling a conducive environment of fundamental freedoms as guaranteed by the Bill of Rights.

GOVERNMENTAL DEPARTMENTS

The Office of the Ombudsman

121. The Ombudsman in Namibia performs, in terms of articles 25 and 91 (d) of the Constitution specific functions in the promotion and protection of human rights. The Ombudsman is appointed by the President on the recommendation of the Judicial Service Commission.

122. In Namibia, the Ombudsman can only recommend prosecution to the Prosecutor-General, who in terms of the Constitution is responsible for prosecutions. In order for the courts and the Ombudsman to perform their functions effectively without fear or favour or without any interference from either the Government or private persons, the independence and impartiality of the Office of the Ombudsman is guaranteed by the Constitution. The independence of the judiciary is also protected under article 78 (3) and of the Ombudsman under article 89 (2) of the Constitution.

123. In Namibia, the Ombudsman can only recommend action; this reduces his/her effectiveness in achieving the stated role but nevertheless, the Office of the Ombudsman plays a significant role in the protection and promotion of human rights and fundamental freedoms.

The Directorate of Legal Aid

124. This Directorate was established in terms of article 95 (h) of the Namibian Constitution which requires the State to establish a legal system to “promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State”.

125. The South African Legal Aid Act (Act No. 22 of 1969) remained in force pursuant to article 140 of the Namibian Constitution until it was replaced by the present Legal Aid Act (Act No. 29 of 1990) as amended by the Legal Aid Amendment Act No. 17 of 2000. The present legal aid scheme is an improvement upon the one inherited from South Africa because it covers all cases, both civil and criminal. The South African system concentrated on criminal matters involving capital offences and a few matrimonial matters. The major functions of the Directorate is to provide legal aid for criminal matters to persons whose means are inadequate to enable them to engage private legal practitioners to represent them.

126. The principal functions, duties and powers of the Director of Legal Aid in terms of the Act are: (annexure "B")

1. To consider and decide applications for legal aid and criminal matters in both original and appeal proceedings before the lower courts and tribunals of the country (sections 8, 11 and 13, and 22, of the Legal Aid Act as amended).
2. To act on the recommendations for legal aid from magistrates and judges in appropriate cases (sections 8 (1) and (9) of the Legal Aid Act as amended).
3. To allocate to any practitioner any matter in respect of which he/she has granted legal aid on such conditions as he/she may specify and to remunerate such practitioner in accordance with the tariff of fees which in terms of section 24 of the Act are to be prescribed in regulations by the Minister of Justice under section (6) of the Act, and the Regulations under the Legal Aid Act, 1990, Government Notice No. 107 of 8 October 1991.
4. To terminate any legal aid granted for good cause (section 19 of the Legal Aid Act as amended).
5. To promote arbitration procedures in the resolution of disputes in appropriate cases (section 19 of the Legal Aid Act as amended).

In carrying out his/her duties and exercising his/her discretionary powers, the Director of Legal Aid is guided by the interest of justice, the means of the applicant, and the relevant provisions of the Namibian Constitution.

NON-GOVERNMENTAL ORGANIZATIONS (NGOs)

Legal Assistance Centre

127. Before independence the Legal Assistance Centre dealt with many cases of human, rights abuse in the interest of countless Namibians, including Messrs. Axel Johannes, Dan Tjongarero, Victor Nkandi, etc., who were arrested shortly after the assassination of King Philemon Eliphas in the north of Namibia. Numerous youths were detained and ruthlessly beaten up. For instance, Mr. Ndali Kamati and Mr. Victor Nkandi were flogged under the infamous Proclamations AG 26 and 29 which gave wide powers to traditional leaders to detain people. Mr. Israel Kalenga was beaten almost to death and was detained for one year without charges being brought against him. He was finally released by the traditional Chief, Mr. Shikongo Taapopi after suffering humiliation at his hands.

128. The Legal Assistance Centre has been in operation since 1988 and has been charged with the responsibility of protecting human rights violations during the colonial period. Since independence, the human rights situation has improved considerably because the Namibian Constitution provides strong human rights safeguards and protection. The Legal Assistance Centre was always at loggerheads with the police and the army because most of its clients were abused extensively by these institutions. After independence, new cases were brought to the attention of these institutions. Today, the Legal Assistance Centre feels that it has an educational role to play. The Legal Assistance Centre believes that the creation and enforcement of a human rights culture must be cultivated from the grassroots.

129. Furthermore, the Legal Assistance Centre feels that the enforcement machinery under the African Charter is not effective and therefore, Namibia has to rely on local capacity rather than regional arrangements. The Legal Assistance Centre has used international instruments such as ICCPR, in argument in the courts and the system of communications to the Human Rights Committee on one occasion.

130. The Legal Assistance Centre's efforts has been significantly strengthened by the cooperation extended by the Ministry of Home Affairs to expose human rights abuses. The Ministry of Justice, the United Nations High Commissioner for Human Rights and the Human Rights and Documentation Centre (HRDC) of the Faculty of Law, University of Namibia are undertaking an extensive training process for the police, prison warders and immigration officers with a strong human rights component. The Office of the Government Coordinator for Human Rights, in the Ministry of Justice together with the Namibian Police and the HRDC has started a nationwide human rights training programme for rank and file policemen and women. Human rights education amongst the community is important if the change in attitudes is to be realized. It is believed that the experience took many years to evolve in other countries and that Namibia will go through a similar evolution.

Namibia Institute for Democracy

131. This is a foreign funded non-governmental organization. Its main focus is on human rights education. It is believed to work closely with Konrad Adenaur Stiftung in Germany. The mission of the Namibia Institute for Democracy is to promote and protect the values and principles of multiparty democracy through education and culture. It is believed to be promoting political tolerance and national reconciliation in Namibia. The Namibia Institute for Democracy is registered as a non-profitable association. It was formed to promote a general and widespread acceptance of democratic values, practices and principles in Namibia as its major goals.

132. Through civic education campaigns, all Namibians are encouraged to commit themselves and adhere to the democratic principles embodied in the Constitution of the Republic of Namibia. The Namibia Institute for Democracy develops and designs civic education programmes aimed at educating Namibians about the contents of the Namibian Constitution and principles of multiparty democracy. These educational programmes are presented, through the print and electronic media, seminars, discussion groups and community information programmes. In this connection, the Namibia Institute for Democracy consults with the Government, other non-governmental organizations, interested groups, the media, educational authorities, the business sector, political parties and individuals.

133. The Institute receives its main funding from the Konrad Adenaur Foundation in Namibia. Funds and other contributions are, however, also received from other donors. It is an independent, non-political and autonomous institution with a Board of Trustees and permanent employees with the responsibility to coordinate and execute programmes. According to its vision, it is loyal to the Namibian Constitution. It must be stated here, however, that it has on its board of directors leaders of the official opposition (The DTA) such as Hon. Mr. Hans Eric Staby and Mrs. Junius, all influential people in the opposition party.

National Society for Human Rights

134. This organization basically criticizes everything the Government of Namibia is trying to achieve in the process of nation building. According to this organization, there are human rights abuses in Namibia but fortunately some of these allegations have always been refuted by credible organizations, locally as well as internationally. Namibia has a free press, and journalists have access to information, but to date, no government institution has been implicated in human rights abuses. From time to time, however, there are individuals within the police and the security forces who exceed their powers but these elements are firmly dealt with by the Government through prosecutions in the courts. In addition, intensive training and education of the police and the security forces has almost eliminated these isolated incidents. Workshops are held for the Ministries of Home Affairs and Defence, the Police, Prisons and Immigration Departments from time to time on the promotion and protection of human rights. These target groups are State institutions which might violate human rights in the performance of their official functions.

The Human Rights and Documentation Centre (HRDC)

135. This Centre was established by the Ministry of Justice in collaboration with the University of Namibia. The HRDC is located within the Faculty of Law of the University of Namibia.

136. Its principal function is to promote the objectives of the HRDC viz. the creation of a culture of human rights awareness among the Namibian people by conducting research and through education. It also helps to cultivate a sustainable and durable culture of human rights and democracy in Namibia and throughout the Southern African region with assistance of the Network of Southern African Universities (UNITWIN).

INDIVIDUAL REMEDIES FOR THE VIOLATION OF HUMAN RIGHTS

137. Namibia has a justiciable Bill of Rights which is incorporated in the Namibian Constitution. Any person who alleges that his or her human rights have been violated or are likely to be violated may seek redress in the High Court. If he or she is dissatisfied with the decision or judgement of the High Court, he or she may appeal therefrom to the Supreme Court. So the Supreme Court has appellate jurisdiction only. But it also has original jurisdiction because it can pronounce on the constitutionality of legislation if the matter is referred to it by the Attorney-General.

138. Apart from judicial protection, there is the Ombudsman who is also empowered to investigate allegations of human rights violations *mero motu* or after receiving a complaint from an individual. There is also a State-funded legal aid scheme under the Ministry of Justice which offers legal assistance and representation to indigent persons who may wish to seek redress in the courts or before the Ombudsman for abridgement of their human rights. In this way the Ministry of Justice also plays a useful role in the protection of human rights in Namibia. Finally there is an independent and free legal profession which advises and represents persons seeking redress for alleged human rights violations.

139. An individual may apply to the High Court or the Ombudsman for redress. In a successful application the High Court may make any order aimed at compensating the applicant. The compensation may take the form of payment of damages determined by the court. In addition the High Court may order restitution, so may the Ombudsman.

140. The Bill of Rights, which is incorporated in the Constitution, protects some of the human rights referred to in the various international human rights instruments. For example, the right to life is protected. Flowing from this, the death penalty is totally abolished in Namibia. Personal liberty is protected. Freedom from torture or cruel, inhuman or degrading treatment or punishment is also protected, so is freedom from slavery and forced labour. Right to equality before the law is also protected. Freedom from discrimination based on sex, race, colour, ethnic origin, religion, creed or social or economic status is also protected, so is freedom from arbitrary arrest and detention. The right to a fair trial before an independent and impartial tribunal is also protected. Right to privacy is also protected. Various rights of the child, including the right to education, are also protected. Various fundamental freedoms like freedom of speech, expression, thought, conscience and belief, association and movement are also protected. Some human rights are derogable during a state of national defence or any period when a declaration of emergency under the Constitution is in force. However derogation from or suspension of certain human rights is not permissible. They include the right to life including freedom from the death penalty; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery or forced labour; rights to equality before the law; freedom from all forms of discrimination; the right to a fair trial; the various rights of the child; and freedom of speech, expression, thought, conscience and belief, and association.

141. In terms of the Namibian Constitution, international agreements binding upon Namibia under the Constitution form part of the law of Namibia. Thus international instruments to which Namibia is a State party are generally self-executing. But nothing in law prevents a Ministry sponsoring a piece of legislation on any matter from ensuring that human rights protected under the Constitution or international human rights instruments are taken into consideration when drafting the legislation. This helps to reinforce the country's commitment to the carrying out of relevant provisions of the Bill of Rights or international human rights instruments, or to make implementation easier to monitor and evaluate.

142. The Ministry of Justice has final responsibility for the promotion and protection of human rights on behalf of the Government. To this end it ensures implementation of human rights. It does so when scrutinizing bills, i.e. draft legislation, to ensure that Bills promote and do not violate human rights. The Ministry has in collaboration with the University of Namibia set up the Human Rights and Documentation Centre (HRDC), within the Faculty of Law,

responsible for the promotion and protection of human rights. When it comes to implementing specific human rights referred to in the various international instruments, the Ministry or government agency responsible for the specific items under the instruments are charged with the responsibility of implementing the rights protected.

143. For instance, the Ministry of Justice is responsible for implementing the right to a fair trial and freedom from torture together with the Ministry of Basic Education, Sport and Culture, the Ministry of Home Affairs and the Ministry of Defence. The Ministry of Local and Regional Government and Housing, the Ministry for Higher Education, Training and Employment Creation and the Ministry for Basic Education, Sport and Culture are responsible for implementing relevant aspects of the rights of the child. The Ministries are assisted in this regard by various governmental and non-governmental agencies and organizations engaged in various socio-economic activities.

FURTHER MEASURES TO CREATE AND SUSTAIN A CULTURE OF HUMAN RIGHTS RESPECT

144. Namibia is a young democracy, but it has been established over the past few years that this democracy should be strengthened even further. The Constitution of the Republic of Namibia brought new challenges in the country. The mere fact that there exists a laudable democratic Constitution does not guarantee freedom, peace and respect for fundamental rights. Human rights must be made a living reality in Namibia. Constant striving, including in the areas of research and education are very important in attaining this aim.

145. Why is it important to build a culture of human rights when democracy already exists in Namibia? Those African countries which gained independence, but who failed to protect and promote human rights, have failed as democracies. Military dictatorships, authoritarian regimes were the order of the day, instead of multiparty democracies. It is a lesson well learnt for Namibia. Human rights values are fundamental to democracy, and Namibia must at all costs protect and promote human rights. It is within this context that is established the importance of building a sustainable culture of human rights respect.

146. Human rights education is a critical component in creating a sustainable human right culture. Such education must be done at all possible levels in the society. Not only primary and secondary schools and tertiary level education must be considered, but also adult education and other literacy programmes. Specialized courses for civil servants and senior government officials are also necessary. These objectives will be realized by designing well tailored curricula for each level. Curriculum development is particularly suitable in the cases of formal education, whereas the other situations could be served by workshops and seminars. From the side of Government, the Ministry of Basic Education and Culture is an essential participant, amongst others, in the national human rights framework.

147. The Government of Namibia has committed itself towards building a sustainable culture of human rights. The Namibian Government cannot succeed in such an effort if it takes the challenge on its own. Cooperation between the Government, non-governmental organizations and multilateral institutions is crucial in order to make this effort of building a human rights culture, a resounding success.

148. The Government Coordinator for Human Rights in Namibia is located at the Ministry of Justice. The Minister of Justice conceptualized the Human Rights and Documentation Centre (HRDC) and together with the Vice Chancellor of the University of Namibia, entered into a Memorandum of Understanding on 16 April 1993 establishing the HRDC, within the Faculty of Law of the University of Namibia.

149. Two key bodies able to meet the challenge of deepening the human rights legal and civil culture are the Justice Training Centre (JTC) and the HRDC. The JTC was established by the Ministry of Justice in August 1993 in cooperation with the Faculty of Law of the University of Namibia and is sited within the Faculty of Law. The Centre has primary responsibility for judicial training in Namibia, including the training of magistrates, community court judges and judicial officers, such as court clerks and interpreters. Additionally the JTC undertakes the legal training of the police, prosecutors, prison officers and the military, as well as providing legal training for law graduates. The JTC has been incorporated and assists in the implementation of the Agreement on cooperation between the Ministry of Justice and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva.

150. The Human Rights and Documentation Centre is in a strategic place to facilitate scholarly research and educational activities relating to the human rights situation in Namibia. The University of Namibia is the focal point for inter alia human rights, within the UNITWIN linkage network of Southern African and European Universities. This further strengthens the position of the HRDC, as there are human rights researchers who visit UNAM.

151. Amongst the objectives of the HRDC is the collection of human rights materials and the dissemination of same. The HRDC is foreseen as providing vital human rights information support to a wide range of users. The HRDC will develop the capacity to repackage human rights materials in a way to make them accessible to a wider public. Specific elements of the mandate of the HRDC are:

- Documentation and maintenance of materials on human rights for the use of lawyers, scholars and the general public;
- Dissemination of information and materials on human rights;
- Preparation of teaching materials on basic human rights issues for use at all levels of public education;
- Preparation of curricula on human rights for use in the schools;
- Organizing and holding of conferences, workshops, seminars and courses on human rights;
- Reviewing and reporting on the human rights situation in Namibia and South Africa.

The HRDC handles both documentation and information. These include books and other information such as newspapers, newspaper clippings, unpublished papers, files on human rights cases, etc.

152. The library and information materials complement each other. Their interaction and effective deployment will develop over time and be utilized by the JTC, NGOs, individuals and government officers for purposes of facilitating research and analysis and for the advancement of understanding of human rights themes.

153. The HRDC will develop from a national institution into an institution which would render services to the Southern African Region. The University of Namibia is part of the Network of Universities in Southern Africa (UNITWIN) and within this network the University of Namibia has been identified to be responsible for law and human rights issues.

154. The HRDC acts as a clearing house for information and as an interface between government, civil society, NGOs and grass-roots organizations, for better coordination between cooperating partners. Its location within the University is a plus, as this provides it with a unique vantage point for interacting with the student and academic bodies. The HRDC has Observer Status with the African Commission for Human and Peoples' Rights.

155. Under the Agreement entered into in mid-1997 between the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Ministry of Justice, two objectives for cooperation were identified - to ensure that the provisions of the Constitution and human rights treaties are incorporated into national laws and reflected in national policy, and to ensure that these human rights standards are disseminated.

156. These objectives are being realized by the provision of training to personnel such as judges, police and prison officials, as well as Defence Force staff. The OHCHR assists in the mounting of workshops and by the provision of training materials and personnel. These activities will be sustained after the two-year Agreement has run, by the production of specialized training materials during the plan period.

REPORT ON THE STATUS OF HUMAN RIGHTS IN NAMIBIA POST THE 1994 VIENNA CONFERENCE

157. Cabinet decided that the subject of Human Right should be within the portfolio of the Ministry of Justice. Consequently the Ministry of Justice bears the final responsibility for human rights within the public legal sector and indeed the protection and promotion of human rights within the country and also the fulfilment of Namibia's international obligations concerning human rights.

158. The Ministry of Justice initiated the establishment of the Inter-Ministerial Technical Committee on Human Rights in early 1995 with the following terms of reference:

1. To assist in the compilation of periodic country reports as required by the various human rights treaties to which Namibia is a State party;
2. To participate in training programmes aimed at training officials in the compilation of the periodic reports;
3. To procure copies of the various treaties and relevant documents necessary for the compilation of such reports;

4. To do anything or carry out any activity necessary for the performance of the tasks of the Committee.

The Inter-Ministerial Technical Committee on Human Rights relies on the Ministry of Foreign Affairs as regards activities with an international dimension, in the same vein, the Committee relies on Ministries or offices concerning matters particular to those Government bureaux.

159. The Technical Committee has met several times, towards the creation of a culture of human rights respect within the country. Namibia continues to accede to International Human Rights Conventions (e.g. entry into force on 28 December 1994 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; entry into force on 28 February 1995 of the International Covenant on Civil and Political Rights; and entry into force on 28 February 1995 of the International Covenant on Economic, Social and Cultural Rights).

160. Human rights activities organized by the Ministry of Justice include the human rights Workshop in the Swakopmund from 18 to 24 February 1991, convened in conjunction with the Raoui Wallenberg Institute, Lund, Sweden. This was followed by the course on human rights held at Otjiwa from 29 March to 2 April 1993, also convened by the Ministry of Justice in conjunction with the Raoul Wallenberg Institute, Lund, Sweden.

161. From 6 to 8 July 1994 a Workshop entitled "Promoting democracy, human rights and development, from Vienna to Windhoek and beyond" was convened in Windhoek by the Ministry of Justice and the Commonwealth Secretariat, London, United Kingdom.

162. From 20 to 23 February 1996 a Workshop was convened at Midgard Farm "Reporting obligations under international human rights instruments and implementation of international humanitarian law" organized by the Ministry of Justice and the Red Cross.

163. On 5 August 1997 the Agreement was signed between the Ministry of Justice and the Office of the United Nations High Commissioner for Human Rights. Under this Agreement a number of human rights workshops have been convened for the police, prisons service and the immigration department. This project is ongoing.

164. During March to April 1998 the Ministry of Justice, working in conjunction with the HRDC and the Commonwealth Secretariat in London, United Kingdom, convened the following workshops:

For NGOs	Rights of the child;
For parliamentarians	Human rights and democracy;
For regional governors	Democracy, human rights and good governance;
For the private sector	The role of the private sector in the creation of a sustainable culture of human rights;
For the women's organization	What are the causes and how best to tackle issues of violence and abuse including abortion.

165. In 1998 the Ministry of Justice working in conjunction with the HRDC and UNESCO published *The Southern African Human Rights Reader: Towards creating a sustainable culture of human rights*, being a compilation of contributions on human rights, from representatives of each of the member States of the Southern African Development Community (SADC). Published in 1999 by the Ministry of Basic Education and Culture and UNESCO, with some input from other sources, including the Ministry of Justice, was *Education for Human Rights and Democracy in Southern Africa* - a teacher resource manual for use in secondary schools, being a joint project between Namibia, Mozambique and Zimbabwe.

166. From 7 to 10 December 1998 the Ministry of Justice working with the HRDC and UNESCO convened a regional human rights Conference entitled "Vienna Plus Five: Towards a sustainable culture of human rights in Southern Africa"

167. In early 1999, a joint project by the Ministry of Justice, the Namibian Police, and the embassies of Finland and the Netherlands, in Windhoek, providing human rights training for the rank and file of policemen and policewomen in the regions, as well as train-the-trainers instructions were carried out. Two police human rights trainers per region and two trainers from the Israel Patrick Iyambo Police Training College in Windhoek participated in the project.

168. The HRDC in collaboration with the Ministry of Justice, i.e. office of the Human Rights Coordinator, organized two workshops on human rights for traditional leaders. Traditional leaders from the eastern and western parts of Namibia attended the first workshop. The workshop took place in Oshakati from 19 to 23 June 2000. A subsequent second workshop for traditional authority secretaries from central and southern Namibia was held from 18 to 22 September. Both workshops were sponsored by OHCHR.

169. A workshop for Magistrates was organized by the HRDC in collaboration with the Ministry of Justice, i.e. office of the Human Rights Coordinator. The theme of the workshop was "Human Rights and the Administration for Justice for Magistrates".

170. In February 2001 the HRDC in collaboration with the Ministry of Justice, organized a two-day workshop for judges at Midgard Resort. Sixteen judges attended this workshop.

171. Senior police officers attended a workshop in November 2001. The HRDC in collaboration with the Ministry of Justice convened the workshop.

172. In September 2002 the Human Rights Trust of Southern Africa (SAHRIT) based in Harare, Zimbabwe organized a regional training workshop on State Party Reporting from 10 to 12 September 2002 in Harare.

173. Government officials from the different Southern African Development Community (SADC) countries attended the workshop. The participants at this workshop are responsible for compiling State party reports for their countries. The Ministry of Justice was able to send a Senior Legal Officer to attend the workshop.

174. A second follow-up workshop was organized by SAHRIT in Gaborone, Botswana, concerning the International Covenant on Civil and Political Rights. The Ministry of Justice was able to send a Senior Legal Officer who is responsible for compiling State party reports to participate in the training programme.

175. SAHRIT organized a training course on Economic, Social and Cultural Rights in Harare from 4 to 22 November. A Senior Legal Officer from the Ministry of Justice was selected to attend the course in Harare.

176. On 7 to 11 October 2002 the HRDC, Faculty of Law and the University of Namibia, in collaboration with the embassy of Finland, conducted a Human Rights Treaty Reporting Workshop. Members of the Inter-Ministerial Technical Committee on Human Rights and NGOs attended the workshop.

PART II

THE SUBSTANTIVE RIGHTS RECOGNIZED UNDER RELEVANT ARTICLES

Article 1

177. Article 1 (2) of the Namibian Constitution states that all power is vested in the people of Namibia, who exercise their sovereignty through the democratic institutions of the State.

178. All Namibian citizens have the right to participate freely in all governmental structures directly or through their freely elected representatives at the national, regional and local government levels. The election of the representatives is conducted in terms of the Namibian Constitution (art. 133-137) and the Electoral Act, 1992 (annexure "C"). There is an independent Electoral Commission established in terms of section 3 of the Electoral Act, which has the "executive authority to direct, supervise and control in a fair and impartial manner any elections under this Act".

179. After a lengthy and armed liberation struggle the country conducted its first "free and fair election" under the supervision of the United Nations from 7 to 11 November 1989 in terms of the Security Council resolution 435. The first independence elections were won by SWAPO (South West Africa People's Organization), which is still the ruling party. The elections were certified free and fair thereby allowing the people of Namibia to enjoy their right to self-determination. Since the attainment of independence on 21 March 1990 the country has conducted internationally recognized free and fair elections at the national and regional and local government levels.

180. In the case of *J.G.A. Diergaardt et al v. Namibia*,²³ the applicants in this matter claimed to be victims of a violation by the Government of the Republic of Namibia in terms of article 1 of the Covenant under the Optional Protocol on Civil and Political Rights.

181. According to article 100 of the Namibian Constitution, land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia are the property of the State, except in those cases where another person lawfully owns such resources.

182. Generally, all natural resources that a country has is land. In Namibia historically, the land that was used by the indigenous people was never owned. Land was communally used and cared for. At the time of independence the whites owned the productive land, which is still the case.

183. However, in order to deal with the inequalities of land distribution article 16 of the Namibian Constitution provides that all persons shall have the right to acquire, own and dispose of all forms of immovable property individually or in association with others and to bequeath their property to their heirs or legatees. Article 16 further provides Parliament by legislation to prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens. However, article 16 requires the property to be expropriated in the interest of the public and subject to compensation.

184. Table 1 hereunder gives a summary of the present agricultural land ownership with reference to Namibia's land surface area of about 823,500 square kilometres (82,350,000.00 ha.).

Table 1

Land ownership	%	Size in ha.	Size in km ²
1. Title deed land belonging to white individual farmers	23.0	18 846 700	188 467.0000
2. Title deed farms belonging to Government and emerging Black individual farmers	4.4	3 621 200	36 212.0000
3. Title deed farms belonging to municipal organizations, trusts and foreigners	9.8	8 065 400	80 654.0000
4. Title deed farms belonging to companies	8.3	6 830 900	68 309.0000
5. Black farmers on communal land (including "Odendal farms")	38.1	31 274 000	312 740.0000
6. National parks	13.7	11 213 000	112 130.0000
7. Restricted (diamond mining) areas	2.6	2 139 800	21 398 0000
Total	99.6	81 991 000	819 910.0000

NB: Note however that in the absence of similar data for the period from 2001 to date, a number of transactions have taken place. This means that there has been some slight reduction in the size of title deed of agricultural land belonging to white individual farmers and also simultaneous increase in title deed land belonging to the Government, companies or close corporations, emerging Black farmers and other organizations.

185. The Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995) provides (annexure "D"):

(a) The acquisition of agricultural land by the State for the purposes of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices;

(b) To vest in the State a referent right to purchase agricultural land;

(c) To provide for the compulsory acquisition of certain agricultural land by the State;

(d) To regulate the acquisition of agricultural land by foreign nationals;

(e) To establish a lands tribunal and determine its jurisdiction;

(f) To provide for matters connected therewith.

Despite the laws in place most of the white farmers have made it difficult for Government to obtain land for redistribution.

Article 2

186. The Government of the Republic of Namibia accords to all individuals (citizens and non-citizens) the rights of all persons, which are provided in the Covenant. Under article 10 of the Namibian Constitution all persons are entitled to fundamental human rights and freedom regardless of race, sex, colour, ethnic origin, religion creed or social or economic status.

187. Therefore all persons legally resident in Namibia enjoy the provisions of chapter 3 regardless of their status. The status of refugees in Namibia is determined by the international obligations under the United Nations Charter and the Charter of the African Union then known as the Organization of African Unity (OAU).

188. If an alien claims the status of refugee, he or she applies for asylum and registers with the Ministry of Home Affairs and the United Nations High Commissioner for Refugees. An Inter-Ministerial Sub-Committee on Refugee Status meets about every three months to hold interviews, to make decisions on applications and to hear appeals. This subcommittee includes a representative of the UNHCR who serves in an advisory capacity.

189. Namibia is a party to both the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. These rights are protected under the Bill of Rights of the Namibian Constitution and are accorded to all Namibians regardless of their colour, race, political or religious affiliation or nationality. Therefore people

alleging human rights violations can seek redress in the High Court. If he or she is dissatisfied with the decision or judgement of the High Court, he or she may appeal from there to the Supreme Court. The Supreme Court has appellate jurisdiction only.

190. It is clear from the above that there is no distinction between a citizen of Namibia and a non-citizen as far as access to remedies in the courts is concerned. In the case of *Raphael Sikunda v. the Government of the Republic of Namibia, the Minister of Home Affairs, Mr Jerry Ekandjo*,²⁴ the applicant a son of a detainee, Jose Domingo Sikunda brought an application in the High Court to release his father from custody. The High Court held that the detention of Jose Domingo Sikunda was unlawful and was an infringement of his fundamental rights.

191. Apart from judicial protection, there is the Ombudsman who is also empowered to investigate allegations of human rights violations *mero motu* or after receiving a complaint from an individual. There is the Chairman of the Inter-Ministerial Technical Committee on Human Rights in the Ministry of Justice to respond to human rights issues in the country. The Inter-Ministerial Committee on Human Rights is constituted by Government officials from line ministries seized with human rights responsibilities.

192. There is also a State-funded Legal Aid Scheme under the Ministry of Justice, which offers legal assistance and representation to indigent persons who may wish to seek redress in the courts, or before the Ombudsman for abridgement of their human rights. In this way the Ministry of Justice plays a useful role in the protection of human rights in Namibia. Finally there is an independent and free legal profession, which advises and represents persons seeking redress for alleged human rights violations.

193. An individual may apply to the High Court or the Ombudsman for redress. In a successful application the High Court may make any order aimed at compensating the applicant. The compensation may take the form of payment of damages determined by the court. In addition the High Court may order restitution, so may the Ombudsman.

194. The Bill of Rights, which is incorporated in the Constitution, protects some of the human rights referred to in the various international human rights instruments. For example, the right to life is protected. Flowing from this, the death penalty is totally abolished in Namibia. Personal liberty is protected. Freedom from torture or cruel, inhuman or degrading treatment or punishment is also protected, so is freedom from slavery and forced labour. The right to equality before the law is also protected. Freedom from discrimination based on sex, race, colour, ethnic origin, religion, creed or social or economic status is also protected, so is freedom from arbitrary arrest and detention. The right to a fair trial before an independent and impartial tribunal is also protected. Right to privacy is also protected. Various rights of the child, including the right to education, are also protected. Various fundamental freedoms like freedom of speech, expression, thought, conscience and belief, association and movement are also protected.

195. Some human rights are derogable during a state of national defence or any period when a declaration of emergency under the Constitution is in force. However derogation from or suspension of certain human rights is not permissible. They include the right to life including

freedom from the death penalty; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery or forced labour; rights to equality before the law; freedom from all forms of discrimination; the right to a fair trial; the various rights of the child; and freedom from speech, expression, thought, conscience and belief, and association.

196. In terms of the Namibian Constitution, international agreements are self-executory upon Namibia and therefore form part of the law of Namibia. Thus international instruments to which Namibia is a State party are generally self-executing. But nothing in law prevents a Ministry sponsoring a piece of legislation on any matter from ensuring that human rights protected under the Constitution or international human rights instruments are taken into consideration when drafting the legislation. This helps to reinforce the country's commitment to the carrying out of relevant provisions of the Bill of Rights or international human rights instruments, or to make implementation easier to monitor and evaluate.

197. The Ministry of Justice has final responsibility for the promotion and protection of human rights on behalf of the Government. To this end it ensures implementation of human rights. It does so when scrutinizing bills, i.e. draft legislation, to ensure that bills promote and do not violate human rights. The Ministry has in corroboration with the University of Namibia set up the Human Rights and Documentation Centre (HRDC), responsible for the promotion and protection of human rights. When it comes to implementing specific human rights referred to in the various international instruments, the ministry or government agency responsible for the specific items under the instruments are charged with the responsibility of implementing the protected rights.

198. For instance, the Ministry of Justice is responsible for implementing the right to a fair trial and freedom from torture together with the Ministries of Education, Home Affairs and Defence. The Ministry of Justice, the Ministry of Local and Regional Government and Housing, the Ministry for Youth and Sport and the Ministry for Basic Education and Culture are responsible for implementing relevant aspects of the rights of the child. The Ministries are assisted in this regard by various governmental and non-governmental agencies and organizations engaged in various socio-economic activities. The preparation of the Child Justice Bill to protect children who are accused of crimes in respect of their trial, conviction, sentencing and rehabilitation has reached an advanced stage.

Article 3

199. The Namibian Constitution under article 10 (2) provides for equality between men and women. There are national laws, which reinforce equality between men and women as to marriage, during marriage and its dissolution. The Recognition of Certain Marriages Act (Act No. 18 of 1991) provides fundamental principles governing marriage and family as follows: equality of men and women; bar to any form of discrimination; and equality for all children (annexure "E"). And the Married Persons Equality Act (Act No. 1 of 1996) (annexure "F") provides equal power to spouses married in community of property. This is a departure from the common law, which treated married women as minors in law.

200. Apart from the constitutional provisions of equality, the Government established a Department of Women's Affairs in the Office to the President, which has now been transformed into a fully-fledged Ministry of Women and Child Welfare. The Ministry of Women and Child Welfare has taken an active role in promoting equality. Amongst other actions, the department in November 1997 issued a National Gender Policy (NGP), which is to contemplate on how the Government can encourage and value the contribution of women in national development and the development of society as a whole.

201. The NGP outlines the framework and sets out principles for implementation, coordination and monitoring of gender sensitive issues, which would enhance effectiveness in the continued management and planning of the development process indifferent cultural, social and economic and political settings for a sustainable development in all spheres.

202. The National Gender Policy makes provision for a Gender Commission Secretariat which is in the process of being established. The Gender Commission Secretariat's objectives will be to enforce the implementation of the National Gender Policy. Meanwhile the Ministry of Women Affairs and Child Welfare is overseeing this objective.

203. The Affirmative Action Employment Act No. 29 of 1998 (annexure "G") has been enacted and promulgated. In terms of section 17 defines affirmative action is defined as a set of measures designed to ensure that persons in designated groups enjoy equal implement opportunities at all levels of employment and are equitably represented in the workforce of relevant employer.

204. Section 18 of the aforementioned Act identifies designated groups as follows:

- (a) Racial disadvantage groups;
- (b) Women;
- (c) Persons with disabilities.

205. The Act requires all employers to draft an Affirmative Action Plan, which they must submit to the Employment Equity Commission. The Act provides for the establishment of the Employment Equity Commission, which aims to achieve equal opportunity in employment specifically for women and other identified groups, in accordance with articles 10 and 23 of the Constitution. During the period 2000-2001 the Commission had the following findings through various affirmative action reports by employers: female employees represent 26.4 per cent of the workforce in parastatals and only 12 per cent of senior managers are women while at middle management women accounted for 18 per cent. The public service is made up of 42,607 employees of which 24 per cent are women at senior management level. However, women representation at middle management in public service continues to improve as women make up 41 per cent at present.

206. The following tables indicate the ratio of men and women in the cabinet, judiciary Parliament and the police force:

Table 2

Cabinet

Decision-making position	No. of women		No. of men		Total		% women	
	1997	2002	1997	2002	1997	2002	1997	2002
Ministers	2	3	20	17	22	19	9	12
Assistant ministers	3	4	19	16	22	23	14	17

Source: Ministry of Women Affairs and Child Welfare.

Table 1 indicates that women positions in Cabinet has not improved much since 1997.

207. **Portfolios held by women**

- Minister of Women Affairs and Child Welfare (cabinet post);
- Minister of Health and Social Services (cabinet post);
- Director-General: National Planning Commission (cabinet post);
- Attorney-General;
- Deputy Minister of Women Affairs and Child Welfare;
- Deputy Minister of Home Affairs;
- Deputy Minister of Labour;
- Deputy Minister of Basic Education, Sport and Culture.

208. **Women in Parliament**

The National Assembly includes 23 per cent women (18 women amongst 72 elected and 6 appointed members). There are only 2 women amongst the 26 members of the National Council, elected from the 13 regional councils (7.7 per cent). This means that Parliament on the whole has just over 19 per cent women. This exceeds the world average of 13.8 per cent considerably, although it is still far from the ideal of a perfect balance.

Table 3

209. Ambassadors and high commissioners

Decision-making position	No. of women		No. of men		Total		% women	
	1997	2002	1997	2002	1997	2002	1997	2002
Ambassador/high commissioners	2	2	18	18	20	20	10	10
Next two positions	7	5	52	49	59	54	11.86	9.26

Source: Ministry of Women Affairs and Child and Women.

At present there are 20 foreign missions abroad and women hold only 2 positions. However with the effective implementation of the National Gender Policy, it is hoped that the position of women in foreign missions will improve and match that of their counterparts.

Table 4

210. Judges and magistrates

Decision-making position	No. of women		No. of men		Total		% women	
	1997	2002	1997	2002	1997	2002	1997	2002
Judges	1	1	5	8	6	9	17.5	11
Magistrates	14	22	22	52	36	74	39	30

Source: Ministry of Justice - Directorate of Lower Courts - 2002.

It is evident from the figures above that there has been an increase in the number of women magistrates from the period 1999 to 2002. While there is one woman presiding judge, the holder of the post of Ombudsman is a woman and she is at the level of a High Court Judge.

Table 5

211. Police force: male and female appointment and promotion of Namibian Police from 1997-2002

Lieutenant general		General		Commissioner		Deputy commissioner		Chief inspector	
Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
1	-	1	-	2	-	8	1	48	4
-	-	100%	-	200%	-	87.5%	12.5%	91.7%	8.3%

Source: NAMPOL - 2002.

212. The Namibia Police Force created a gender desk at the beginning of 2002, and the Deputy Commissioner heads it. This desk has already put a Gender Policy in place. The Gender Policy's primary objective is to oversee and monitor all issues related to recruitment, promotions and training opportunities of women in the force.

213. Women participate in the civil and political life of Namibia. However, it is recognized that more needs to be done in this area. Women are mostly affected by domestic violence, especially rape and the contracting of HIV/AIDS. This makes it difficult for them to enjoy fully their civil and political rights. In this regard the Law Reform and Development Commission through its Women and Law Committee is working in the area of reform of family law.

214. Article 20 of the Namibian Constitution states that:

(a) All persons shall have the right to education;

(b) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge;

(c) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, which ever is the soonest.

215. The National Gender Policy (NGP) recognizes the importance of the ensuring and retention of girls and women at all levels of education. In addressing disparities in access to educational opportunities of females, the Government has adopted strategies aimed at ensuring access and maintaining female participation rates in primary, secondary and tertiary education, support efforts towards improving the implementation of the literacy programme.

Table 6

216. **Enrolment of learners in schools, period from 2000 to 2001**

Year	Region	Male	Female	Total
2000	Head office	684	491	1 175
2000	Katima Mulilo	11 522	11 002	22 524
2000	Keetmashoop	17 249	17 527	34 776
2000	Khorixas	17 497	17 970	35 467
2000	Ondangwa East	61 757	65 702	127 459
2000	Ondangwa West	68 508	72 081	140 589
2000	Rundu	30 713	29 225	59 938
2000	Windhoek	45 536	46 732	92 268
Nationals		253 466	260 730	514 196

Table 6 (continued)

Year	Region	Male	Female	Total
2001	Head office	705	503	1 235
2001	Katima Mulilo	11 418	11 349	23 277
2001	Keetmashoop	17 418	17 858	35 276
2001	Khorixas	17 994	18 514	36 508
2001	Ondangwa East	63 311	67 666	130 977
2001	Ondangwa West	69 012	72 930	141 942
2001	Rundu	32 026	30 415	82 441
2001	Windhoek	48 085	49 217	97 302
Nationals		260 479	268 479	528 958

Source: Ministry of Basic Education, Culture and Sport, Annual report, 2002.

217. According to the findings of a study conducted by the University of Namibia (UNAM) in 2000 approximately 1,161 (50.6 per cent) responses sent boys to school compared to 1,135 (49.4 per cent) for girls. Therefore there is no significant difference in the enrolment of boys and girls in Namibian schools.

218. With regard to enrolments at colleges of education in Namibia, out of total of 2,111 students enrolled, 972 (46 per cent) were female in 1999. In the year 2001, out of total of 1,983, about 936 (47.2 per cent) students enrolled were female. This is an increase of 1 per cent from the 1999 intake.

219. At the Government Vocational Training Centres, the total number of trainees enrolled in 1998 was 1,064, out of this total, female trainees were 1,939 (18 per cent). In 1999, the number of trainees increased to 1 610, and the female number increased to 335, or 21 per cent of the total. It means that there was an increase of about 3 per cent, if compared to 1998, in female enrolment. This trend has continued to increase when in the year 2001, out of 1,633 trainees, 441 (27 per cent) were females. This is an indication that the government policy on gender balance is on track.

220. The University of Namibia's Annual report 2000 reported that the enrolment for the Faculty of Agriculture stood at 164 students for the academic year 2002. Out of the total number, 63 (38 per cent) of them are female, compared to 101 male students. In the same year, the Faculty of Economics and Management Sciences enrolled 888 students of whom 412 (46 per cent) were female.

221. For the Faculty of Education in 2002, an enrolment 673 was reported, of whom 309 (46 per cent) were female. This is another indication that more women are now taking up the challenge of tertiary education. The trend throughout the country is that the number of women graduating from colleges and universities is increasing.

222. The University of Namibia is a Dual Mode University, which means that it serves distance education students, as well as full time students on campus. The Centre for External Studies (CES) looks after the distance education external students.

223. CES provides for the educational needs of people who, for various reasons cannot attend the full-time programme offered by the University.

Table 7
CES statistics - 2002

Centre	Deal	Nursing	BBA	Adult	Bed	MASTEP	BETD	Non-degree	Total
Windhoek	56	124	44	22	78	197	55	16	592
Oshakati	632	227	18	43	664	0	479	1	2 064
Katima Mulilo	14	31	3	1	29	0	31	0	109
Rundu	102	26	4	8	126	0	114	0	380
Tsumeb	16	26	2	2	16	0	38	0	100
Otjiwarongo	19	20	0	7	16	0	26	0	88
Khorixas	1	6	1	2	17	0	11	0	38
Swakopmund	6	15	0	5	12	0	12	0	50
Gobabis	13	16	0	6	20	0	18	0	73
Keetmanshoop	8	17	4	6	8	0	35	0	78
Total	867	508	76	102	986	197	819	17	3 572

Source: The Republikein, Monday, 29 July 2002.

The student enrolment for the Centre External Studies increased from 729 in 1997 to 1,522 in 2000, and to 2,193 in 2001. The student number for 2002 was approximately 3,572, which is a 63 per cent increase in 2001.

224. Unwanted pregnancies and increasing numbers of HIV among learners threaten many of the learner's health and social welfare and that of the children born to them. Pregnancies often cause learners to terminate their education, leaving them with very few options for establishing a good life for themselves and children.

225. The Ministry of Basic Education, Sport and Culture is extremely concerned with unwanted pregnancies and the spread of HIV/AIDS amongst learners and has therefore established the following objectives:

- The primary role of the parents in providing population and family life education is stressed;
- Sex education should be included in primary and secondary school curriculum;
- Population and family life education should cover HIV/AIDS and other sexually transmitted diseases and contraception;

- Non-promotion subjects such as Guidance, Life Skills, Religious and Moral Education, Basic Information Science and Physical Education are to be treated as an integral part of the school curriculum and are not to be neglected in schools;
- Teenagers should be provided with adequate information on criminal offence involving child abuse, sexual harassment, rape and statutory rape and be aware of the possible consequences of being guilty of or encouraging the commission of a criminal offence;
- School libraries should have information available on population and family life education and specifically on sexual issues;
- Schools should create opportunities for the discussion of these matters by their learners and by the parents of their learners;
- Affirmative action programmes for girls should be instituted where necessary in schools to ensure that girls are not denied opportunities to prepare themselves for leadership positions in later life. Learners who have had the experience of teenage pregnancy or parenthood may be drawn in where appropriate to assist in counselling others.

Article 4

226. Article 24 of the Constitution concerning derogation states:

1. *Nothing contained in or done under the authority of article 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorizes the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.*
2. *Where any persons are detained by virtue of such authorization as is referred to in sub-article (1) hereof, the following provision shall apply:*
 - (a) *They shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;*
 - (b) *Not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorized;*

- (c) *Not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months, their cases shall be reviewed by the Advisory Board referred to in article 26 (5) (c) hereof, which shall order their release from detention if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such person;*
- (d) *They shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstance, having regard to the public interest and the interest of the detained persons.*

227. Article 21 (l) (b) of the Constitution provides that: “All persons shall have the right to freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning.” And article 21 (l) (c) provides that: “All persons shall have the right to freedom to practise any religion and to manifest such practice.” The above-mentioned rights, and some specified others, may be derogated from under the Constitution. The exclusive justificatory limits to the enjoyment of those rights are provided for by the Constitution. Article 21 (2) provides:

The fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

228. Individuals are free, subject only to the Constitution and any law, to study for a profession and to practise their profession, and also to form professional associations.

Article 5

229. Although this Convention has not been incorporated into any national law, since civil and political rights are enshrined in the Constitution, the rights are protected by the Constitution, which according to article 1 (6) is “the Supreme Law of Namibia”. And these rights are wholly justiciable. Besides, it is possible to invoke the Convention in a court of law or any tribunal, in addition to the constitutional provisions, because international agreements binding on Namibia are self-executing. In this sense the courts will give effect to the provisions of the Convention as implementation does not require a change in the existing law.

230. There is at present no Namibian case specifically on the applicability of treaties and other international agreements binding on Namibia as forming a part of the laws of Namibia but the courts are likely to hold that provisions of such treaties and other international agreements that are self-executing because of their nature are part of the laws of Namibia.

231. Be that as it may, the Minister of Justice has already requested technical assistance from the United Nations High Commissioner for Human Rights to assist the Ministry in drafting various statutes that will incorporate some international human rights instruments into the laws of Namibia.

232. Namibia, which achieved independence in 1990, has a relatively new Constitution with few cases reported involving constitutional interpretation. Such cases are handled by the High Court, whose rules of interpretation draw inspiration from the Roman-Dutch legal philosophy largely in use in Southern Africa, resulting from the colonial experience of the area.

Article 6

233. Article 6 of the Namibian Constitution provides:

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

234. Indeed, the individual's right to respect and protection of his or her life and to the inviolability of his or her existence as a human being has been carried to its logical limits by totally abolishing the death penalty in Namibia. Thus Namibia as a total abolitionist of the death penalty has implemented to its fullest this basic human right, because the right is not derogable under any circumstance or situation or for any reason. Life is also safeguarded by the immunization campaigns waged by the Ministry of Health and Social Welfare, especially for the children.

235. Persons who allege that any of the rights guaranteed to them by article 11 of the Constitution have been or about to be violated may seek redress in the courts or complain to the Ombudsman for protection. There have been occasional problems brought about by financial and logistical constraints, as well as the paucity of magistrates' courts, particularly in the distant parts of the country, with regard to compliance with the 48-hour rule contained in the above-quoted article 12 (3) of the Namibian Constitution. But since independence, the Ministry of Justice has pursued vigorously and consistently a policy of ensuring that justice is brought to the people. To this end, an appreciable number of magistrates' courts have been established in many areas of the country, particularly those which were hitherto denied this service in the colonial period.

236. Concerning the use of force, including firearms, the two operative pieces of legislation are the Arms and Ammunition Act No. 75 of 1969, (annexure "H") which at section 41 empowers the police to search and seize arms and the Criminal Procedure Act No. 51 of 1977 which at sections 39-53 refers to arrest. Section 49 of Act 51, which handles the use of force in affecting arrest states (annexure "I"):

1. If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person:
 - (a) Resists the attempt and cannot be arrested without the use of force; or
 - (b) Flees when it is clear that an attempt to arrest him is being made, or resists such attempts and flees,

the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

2. Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.

237. In 1998 in the Caprivi Region a situation developed where a group of people, of the so-called Caprivi Liberation Army, attacked Katima Mulilo the capital of the Region. This group of people solicited various arms and ammunition as well as other weapons of war from within and out of Namibia. They participated heavily in misleading lots of innocent Namibians into believing that the Caprivi Region was not politically and legally part of Namibia, that a so-called agreement existed that formed the basis of the secession attempt. Various secret camps were established within Namibia. On 2 August 1999 the Caprivi Liberation Army participated in various attacks on some installations in Katima Mulilo where innocent people were killed as a result of this attack. After this attack a number of 129 people were arrested while some fled to the Republic of Botswana avoiding an arrest.

238. Genocide is unknown in Namibia. It has never been truthfully established that hundreds of persons disappeared in the north of the country. Any reported cases of missing persons are thoroughly investigated by the police. The police are trying to enhance its performance through human rights training, the enhancement of communication skills and proficiency and the increase in computer literacy.

239. Currently Namibia is in the process of integrating into its domestic laws the Geneva Conventions and accompanying Protocols, concerning humanitarian law. This will be effected through the enactment of an appropriate law by Parliament.

240. The Government of the Republic of Namibia's main objective in the delivery of health care is to improve the health of the Namibian population through the provision of relevant preventative promotive, curative and rehabilitative health services which are affordable and accessible to all Namibians and by these means making the right to life an enjoyment for all. The Government is also committed to achieving the goal for health for all Namibians by the year 2000 and certain targets have been set out to this effect.

241. The Government of Namibia has a National Health Policy. The WHO Primary Health Care approach has been adopted as part of Namibia's health policy. The health system has been reorientated and the health districts have been strengthened. The comprehensive Primary Health Care Programme has been implemented since 1990 in all health districts. The social sector has received a considerable amount of government funding during the years after independence. The financial resources allocated to the Ministry of Health and Social Services contributed to the improvement of services.

242. The infant mortality rate is reportedly 57 per 1,000 live births. The probability of dying before the fifth birthday is 83 per 1,000 live births. (Sources: Health Information System (HIS) 1996 and Demographic Health Survey (DBS) 1992.)

243. According to the 1992 DHS report it is estimated that about 65 per cent of the population has access to safe drinking water. Only 45 per cent of the rural population have access to safe drinking water. The Ministry of Health and Social Services, however, has a target of ensuring an 80 per cent safe drinking water supply to the rural population by 2010 and at least by the end of the century.

244. The population access to excreta disposal facilities is reportedly not at a satisfactory level. Twelve (12) per cent of the rural households have access to these facilities whereas 77 per cent of the urban population has access to sanitary disposal facilities.

245. Since 1990, the MOHSS has implemented an Expanded Programme on Immunization (EPI), which follows guidelines recommended by the World Health Organization (WHO). The Ministry's policy requires that all children should receive a BCG vaccination against tuberculosis, three doses of DPT vaccine for prevention of diphtheria, pertussis (whooping cough) and tetanus; three doses of polio vaccine and one dose of the measles vaccine. Children should receive all these vaccines by the time they reach 12 months of age. The vaccinations received by children are usually recorded on a health passport, which is given to the mother.

246. According to the health passport and mother's reports, 65 per cent of children between the ages of 12 and 23 months have received all the recommended vaccinations, and only 5 per cent have not received any vaccinations. The remaining 30 per cent of children were partially vaccinated. Ninety per cent of children aged between 12 and 23 months have received BCG vaccination.

247. The life expectancy in Namibia is reportedly as follows:

Life expectancy at birth:	Males:	59.1 years
	Females:	62.8 years
	Overall:	60.9 years

Life expectancy at age 65: No information available

(Taken from Central Statistical Office (CSO) 1992 and reported in MOHSS Evaluation report 1997.)

248. The health situation of the San community in the Otjozondjupa and Omaheke regions has been reportedly worse off as compared to the entire country. Geographically, both the Ohangwena and Kavango regions have the highest maternal mortality rates.

249. With regard to the fight against HIV/AIDS the Namibian Government spends US\$ 39 million (N\$ 331.5 million) a year on the fight against the deadly disease. According to statistics the National HIV prevalence is now at 22 per cent of the population.

250. The Ministry of Health and Social Services has initiated the Prevention of Mother to Child Transmission (PMTCT) Programme, which started in 2002, whereas the anti-retroviral drugs have been supplied to some women, and there are plans to expand the programme.

Article 7

251. Article 18 of the Namibian Constitution provides that no one shall be subject to torture or to cruel, inhuman and degrading treatment or punishment. There is no national legislation prohibiting torture. To reinforce the constitutional provision, the Supreme Court of Namibia declared corporal punishment imposed and inflicted by a State organ as illegal in the case of *Ex-Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State*. Other law enforcement agencies e.g. the Namibian Police and Prison Service have laid down administrative directives aimed at preventing torture.

252. Similar provisions like those in the second part of article 5 of the African Charter can be found in the Namibian Constitution. Article 8 (2) (b) of the Constitution provides: “No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” And freedom from torture or cruel, inhuman or degrading treatment or punishment is one of the human rights, which are not derogable under Namibian law.

253. Although there is no specific domestic law on this human right, this right is justiciable and forms part of the laws of Namibia because according to article 1 (6) of the Constitution, the Constitution is “the Supreme Law of Namibia”. So any instance of torture is considered as a criminal or a civil wrong attracting criminal or civil proceedings. When it comes to torture, particularly State-sponsored torture, it is the law enforcement agencies, e.g. the police, that are most in need of control and from whom the individuals must be protected. The Namibian Police has laid down administrative directives aimed at preventing torture from occurring in the police force. These instructions are used as teaching material during training and as a service manual to be used by police personnel.

254. Article 11 of the Namibian Constitution provides:

1. *No person shall be subject to arbitrary arrest or detention.*
2. *No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.*
3. *All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest, or if this is 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.*

255. Persons who allege that any of the rights guaranteed to them by article 11 of the Constitution have been or are about to be violated may seek redress in the courts or complain to the Ombudsman for protection. There have been occasional problems brought about by financial and logistical constraints, as well as the paucity of Magistrates’ courts, particularly in the distant parts of the country, with regard to compliance with the 48-hour rule.

256. But since independence, the Ministry of Justice has pursued vigorously and consistently a policy of ensuring that justice is brought to the people. To this end, an appreciable number of Magistrate’s Courts have been established in many areas of the country, particularly those which

were hitherto denied this service in the colonial period. As regards the inadmissibility of evidence, in court, obtained through torture section 217 of the Criminal Procedure Act No. 51 of 1977 refers only to evidence which is proved to have been freely and voluntarily made, as being admissible.

257. The Prison Act 17 of 1998 at section 11 provides (annexure “J”) for the function of the Prison Council as regards the administration of the prisons, the welfare and efficiency of the prison service and the conditions of service of prison members. Section 15 states that male and female prisoners be confined separately. Section 17 provides for the inspection of prisons and part VII of the Act is concerned with the admission, custody and treatment of prisoners. The Prison Act conforms with international standards for the treatment of prisoners.

Article 8

258. Namibia has taken the appropriate legal measures to implement the substantive provision of article 5 of the African Charter. Slavery and forced labour, and other forms of servitude are outlawed by the Namibian Constitution. Article 9 provides:

1. *No person shall be held in slavery or servitude;*
2. *No person shall be required to perform forced labour;*
3. *For the purposes of this article, the expression “forced labour” shall not include:*
 - (a) *Any labour required in consequence of a sentence or order of a court;*
 - (b) *Any labour required of persons while lawfully detained which, though not required in consequence of a sentence or order of a court, is reasonably necessary in the interests of hygiene;*
 - (c) *Any labour required of members of the defence force, the police force and the prison service in pursuance of their duties as such or, in the case of persons who have conscientious objections to serving as members of the defence force, any labour which they are required by law to perform in place of such service;*
 - (d) *Any labour required during any period of public emergency or in the event of any other emergency or calamity which threatens the life and well-being of the community, to the extent that requiring such labour is reasonably justiciable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation;*
 - (e) *Any labour reasonably required as part of reasonable and normal communal or other civic obligations.*

259. Article 8 of the Constitution entitled “Respect for human dignity” provides at 2 (b):

“No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment”

This human right is not derogable and is wholly justiciable.

260. Indeed, forced labour has been criminalized by the Labour Act, 1992. Section 108 of the Act provides (annexure “K”):

1. Any person who causes, permits or requires any other person to perform forced labour shall be guilty of an offence and on conviction be liable to the penalties, which may be imposed by the law for abduction;
2. Subject to the provisions of article 9 (3) of the Namibian Constitution, in this section “forced labour” includes:
 - (a) *Any work or service performed or rendered involuntarily by any person under threat of any penalty, punishment or other harm to be imposed or inflicted upon, or caused to such person by any other person in the event of such first-mentioned person not performing or rendering any such work or service;*
 - (b) *Any work, performed by any child under the age of 18 years of any employee of an employer in terms of any arrangement or scheme in any undertaking who is for any reason required to perform such work in the interest of such employer;*
 - (c) *Any work performed by any person by reason only of the fact that such person is for any reason subjected to the control, supervision or jurisdiction of a traditional chief or headman in his or her capacity as such chief or headman.*

There has not been any case of forced labour prosecuted in the courts since the promulgation of the Act.

261. In order to reinforce the abolition of torture or cruel, inhuman or degrading punishment or treatment perpetrated by or upon the authority of an organ of State, the Supreme Court of Namibia declared corporal punishment imposed and inflicted, by or upon the authority of a State organ as illegal in the landmark case of *Ex-parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State*.

262. Prostitution in Namibia is governed by the pre-Independence Combating of Immoral Practices Act No. 21 of 1980, which was based on the Immorality Act 1957. Act No. 21 of 1980 (annexure “L”) includes a section which permits the prevention of sex slavery and the trade in prostitution by outlawing “detention for the purposes of unlawful carnal intercourse”. The penalty is imprisonment up to seven years, with no option of a fine. This section applies to females only.

Article 9

263. Article 11 of the Namibian Constitution provides:

1. *No person shall be subject to arbitrary arrest or detention.*
2. *No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the ground for such arrest.*
3. *All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest, or if this is 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.*
4. *Nothing contained in sub-article (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigration: provided that such persons shall not be deported from Namibia unless deportation is authorized by a Tribunal empowered by law to give such authority.*
5. *No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.*

264. Article 10 (1) of the Constitution provides that:

“All persons shall be equal before the law.” There is no national or international record prepared or sponsored by private human rights monitors to indicate that individuals have been denied access to the courts or other tribunals solely on the basis of any of the prohibited grounds under the Constitution. Indeed, one way whereby the right of equality before the law is implemented is that indigent persons can benefit from the State - provided legal aid scheme under the Ministry of Justice for almost free legal assistance and representation. The object of this near-free legal aid scheme is to afford equal opportunity to persons so that a person does not fail to obtain justice or gain access to the courts or other tribunals solely as a result of his or her indigence.

Article 10

265. The Namibia Prison Service is established under the Prison Act No. 17 of 1998 (annexure “J”). This Act reflects the United Nations minimum standard rules for the treatment of prisoners. There is a system in place aimed at receiving and dealing with complaints from inmates in prisons and police lock-ups.

266. An inmate of a prison or police lock-up can complain to a medical officer appointed to supervise prisons and lock-ups of any torture or inhuman treatment at the hands of a prison official. Section 6 of the Prisons Act, 1959 (Act No. 8 of 1959), as amended by section 7 of the Prisons Amendment Act, 1981 (Act No. 13 of 1981), provides:

1. For every prison there shall be a medical officer who shall perform such duties as are assigned to him or her by or under this Act.
2. The Administration-General (now President) may, subject to the laws governing the Government Service (now Public Service), appoint for any prison or group of prisons a medical officer who shall be a resident medical officer whose whole time shall be given to the duties of the post to which he has been appointed.
3. If no medical officer has been appointed for any prison as provided in subsection (1) or if the post of medical officer at any prison is terminated or vacant, the duties assigned to the medical officer of such prison by or under this Act shall be performed by the district surgeon for the area in which the prison is situated, or by such other medical practitioner as has been approved for the purpose by the Secretary for National Health and Welfare (now Permanent Secretary: Health and Social Science).

267. Members of the prisons services other than officers who are convicted of assaulting prisoners may in addition to any other penalty be discharged from the service. Should a member be found guilty and sentenced to any period of imprisonment and has been discharged, he can never be reappointed as a member of prisons service. Penalties such as fines can also be imposed on the said members.

268. So far several criminal and civil cases have been laid against prison guards and the Ministry of Prisons and Correctional Services. Recently eight prison warders were charged and prosecuted on eight counts of assault with intent to do grievous bodily harm. They received sentences ranging from a fine of N\$ 300.00 or one month imprisonment; to a total fine of N\$ 2,100.00 or 14 months' imprisonment. The convicted warders were allowed to keep their jobs. However, they now have criminal records. The complainants did not only lay criminal charges against the guards but also sued the Ministry of Prison and Correctional Services, the Civil Division of the Windhoek Magistrate's Court awarded them N\$ 40,000.

269. Every morning at unlocks a Senior Officer, most appropriately the Head of Prison, accompanies the unlock group to receive complaints and requests and to inspect the prison. He sees to it that no junior members are involved in mistreating prisoners. In the absence of the Head of Prisons a competent officer takes this responsibility. Prisoners use this opportunity to complain to the prison authorities, including complaints of assaults should there be any. Prisoners' complaints are also channelled through prisons' Social Workers to the Head of Prisons who further channels the complaints to the Commissioner of Prisons. Investigations take place internally, but should there be evidence that the case is criminal, police are involved for outside court case procedures.

270. Then by convention, a magistrate is empowered to visit prisons regularly every one to four weeks, depending upon where the particular prison is situated, to inspect prisons and police lock-ups and to listen to complaints of prisoners, particularly of any acts of torture and cruel, inhuman or degrading treatment at the hands of prison officials or policemen or policewomen. Where an allegation of torture is made the magistrate has the power to order an investigation of the complaint and the prosecution of the alleged torturer.

271. As far as practicable, awaiting trials are kept separate from convicted prisoners and are given every facility that will assist to prepare his/her defence while in prison. Awaiting trials have an assortment of privileges compared to convicted ones. For example their food may be procured from outside the prison. The distinction in terms of imprisonment between awaiting trials and convicted prisoners includes matters to do with treatment, classification, privileges, education, recreation, social relations and work training.

272. A juvenile who is awaiting trial or the conclusion of his/her trial is not supposed to be detained in prison, unless such detention is necessary and no suitable place of detention is available.

273. For convicted juveniles, efforts are made to separate them from adult prisoners. A special section is kept for such juveniles who are undergoing educational training as part of their rehabilitation. A new prison is under construction at Rundu, which will be the only prison in the country for juveniles.

274. As adverted to in paragraph 190, the Ministry of Justice in collaboration with stakeholders like UNICEF and the Legal Assistance Centre have committed themselves to the development of the child justice system in Namibia, in 1994 a Children's Act Workshop first highlighted the absence of an appropriate child justice system in Namibia. As a result the Juvenile Justice Forum was established to investigate alternatives to the retributive justice model in terms of which children (people under 15) were tried and sentenced to imprisonment. A further concern was the disregard for their human rights while incarcerated.

275. The Namibia Prison Service is comprised of uniformed members and other specialized personnel, which include social workers, medical personnel, etc. Uniform personnel undergo special training. A Code of Conduct for prison members is under preparation, meanwhile a Discipline Code is in place, which is updated from time to time by circulars.

Article 11

276. There is a national legislation, which prohibits civil imprisonment on the basis of inability to fulfil a contractual obligation.

277. Section 65 of the Magistrate Court Act 32 of 1944 provides (annexure "M") that a judgement debtor can only be imprisoned for contempt of court, which is a common law offence. If a debtor fails to comply with the court order, the court can give an order, which it deems necessary including imprisonment for disobeying a court order.

278. Section 300 of the Criminal Procedure Act provides that the court may award compensation where the offence causes damage to or loss of property (annexure "I").

Article 12

279. Under the provisions of article 21 (l) (g) (l) of the Constitution:

All persons shall have the right to:

(g) *Move freely throughout Namibia;*

(h) *Reside and settle in any part of Namibia.*

280. Namibia is fulfilling its international obligations under both the United Nations Charter and the Charter of the Organization of African Unity (OAU) with regard to the acceptance and protection of refugees as asylum-seekers within its borders.

281. This Namibia has done by the enactment of the Namibia Refugees (Recognition and Control). Previously the operative law was the Immigration Control Act. The new Act provides for the implementation of the conventions applicable to recognized refugees. These are both the United Nations Convention relating to the Status of Refugees of 28 July 1951, as amended by the Protocol on Refugees 1968 and the OAU Convention on Refugees of 1969. Section 2 of the Act integrates into Namibian domestic law the provisions of the 1951 Convention (the Convention being annexed to the Act as a schedule) giving it force and effect in Namibia.

282. Section 3 defines “refugees” as follows (annexure “N”):

For the purposes of this Act, a person shall be a refugee if:

(a) Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, he or she is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of the country; or

(b) Not having a nationality and being outside the county of his or her former habitual residence, he or she is unable or, owing to a well-founded fear or being prosecuted for reasons of race, religion, memberships of a particular social group or political opinion is unwilling to return to it; or

(c) Owing to external aggression, occupation, reign, domination or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality, he or she is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality.

283. Section 4 states the restrictions on the grant of refugee status.

284. Section 5 of Act No. 2 of 1999 provides for the loss of refugee status:

A recognized refugee shall lose his or her refugee status for the purposes of the Act if he or she:

- (a) Voluntarily returns to the country of which he or she was a national or to the country where he or she was habitually resident; or
- (b) Has voluntarily availed himself or herself of the protection of the country of his or her nationality; or
- (c) Acquires a new nationality and enjoys the protection of the country of his or her new nationality; or
- (d) Can no longer, because the circumstances in connection with which he or she has been granted refugee status have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality.

285. Section 6 provides for the appointment by the Minister of Home Affairs, of a Commissioner for Refugees and section 7 provides for a Committee, to be known as a Namibian Refugee Committee. The powers, duties and functions of the Committee are stated at section 10:

- (a) To receive and consider every application for granting of refugee status referred to it by the Commissioner in terms of section 13 (2) (c);
- (b) To carry out such investigation or to conduct such inquiry into any matter relating to an application which is under consideration in terms of paragraph (a) as it may deem necessary;
- (c) To make in respect of every person who has applied in terms of this Act for refugee status recommendations for the Commissioner as to the granting or not of such status to such person;
- (d) To register, in their prescribed manner, every recognized refugee and protected person; and
- (e) In addition to the powers and duties instructed to it by or under this Act, to perform such other functions entrusted from time to time to it by the Minister or the Commissioner.

286. Section 14 of the Namibia Refugees (Recognition and Control) Act states that any person who has applied for refugee status in Namibia and every member of the family of such person, shall have the right to remain in Namibia pending the grant of such status.

287. Concerning the cessation of proceedings in respect of unlawful entry by refugees, section 15 provides:

Notwithstanding the provisions of the Immigration Control Act, but subject to the provisions of sections 23, 24 and 25, no proceedings shall be instituted or continued against any person, or any member of the family of such person, in respect of his or her unlawful entry into or unlawful presence in Namibia, if such person:

(a) Has applied in terms of section 13 (1) for refugee status, but only until a decision has been given on the application or, where such person has noted an appeal in terms of section 27 against such decision, until such person has had an opportunity to exhaust his or her right of appeal; or

(b) Has been granted refugee status in terms of this Act.

288. Section 16 of the Act concerning the residence in Namibia of recognized refugees states:

Every person who has been granted refugee status in terms of section 13 (4) (a) shall, subject to the provisions of this Act:

(a) Be issued with an identity card in the prescribed form; and

(b) Be permitted to remain in Namibia as a recognized refugee in accordance with the provisions of this Act.

289. Section 20 (1) provides the requirements to reside in the reception area or refugee settlement:

(1) Notwithstanding anything to the contrary in this Act or any other law contained, the Minister may by order in writing, served in the prescribed manner, require:

(a) A recognized refugee or protected person; or

(b) A person who has applied in terms of this Act for refugee status; or

(c) A member of the family of a person referred to in paragraph (b),

to reside, subject to such conditions as the Minister may determine, in a reception area or a refugee settlement specified in that order.

290. Section 24 of the Act provides for the detention or expulsion of recognized refugees, however there is provision for an aggrieved refugee to appeal such an expulsion order.

291. Section 26 provides for the prohibition of the return of refugees:

(1) Notwithstanding anything to the contrary in any other law contained, no person:

- (a) Who is a refugee; or
- (b) Who is a member of the family of a refugee,

shall, subject to the provisions of subsections (2), be refused entry into Namibia or, whether such person has entered Namibia lawfully or unlawfully or is lawfully or unlawfully present in Namibia, be expelled or extradited from Namibia to any other country, or be subjected to any similar measure, if, as a result of such refusal, expulsion, extradition or other measure, such person is compelled to return to or remain in a country where:

- (i) He or she may be subjected to persecution on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or
- (ii) His or her life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in part or the whole of that country.

(2) The provision of subsection (1) shall not apply to any person referred to in section 4 (1) or to a person who is removed from Namibia under section 49 (1) of the Immigration Control Act for reasons of the security of the State.

292. Section 27 of the Namibia Refugees (Recognition and Control) Act accords a right of appeal and section 28 establishes an Appeal Board.

Article 13

293. Under article 21 (1) (G)-(I) of the Constitution:

All persons shall have the right to:

- (i) *Leave and return to Namibia.*

294. In terms of the law no person may be expelled from Namibia unless such expulsion or removal from Namibia has been authorized by an Immigration Tribunal. Section 43 (1) of the Immigration Control Act, Act No. 7 of 1993, provides:

For the purposes of the provisions of article 11 (4) of the Namibian Constitution, the Minister shall establish so many tribunals to be known as immigration tribunals as the Minister may deem desirable for the hearing and determination of applications for authorization for the removal of persons from Namibia in terms of this Act or any other law.

295. And article 11 (4) in the relevant part provides that an illegal immigrant in Namibia “shall not be deported from Namibia unless deportation is authorized by a Tribunal empowered by law to give such authority”. The Tribunal will take into account all relevant facts including the likelihood of the person to be deported being tortured in the country to which he or she may be expelled. If there is this likelihood, then the person will be referred to the agency responsible for refugees to determine whether such a person should be given refugee status. This agency usually seeks advice from the Ministry of Foreign Affairs and the United Nations High Commissioner for Refugee’s office in Windhoek, Namibia. Namibia has yet to enact a law dealing with refugees, although Namibia provides asylum to a considerable number of persons, particularly Angolans. This omission may make it difficult for persons seeking asylum to assert their rights effectively.

296. In the experience of the Legal Assistance Centre (LAC), a non-governmental human rights organization which also provides free legal assistance and representation to deserving persons, the Immigration Tribunal deals with approximately 50 to 130 cases in one sitting. The immigration authorities respect the status of refugees. Failure to apply for refugee status at a very early stage counts heavily against an asylum-seeker and he or she is likely to be returned to his or her country of origin, unless legally assisted. In a case dealt with by the LAC at the beginning of 1996, the Ministry of Home Affairs refused to consider an application for refugee status by a Nigerian national, allegedly because he had remained in Namibia illegally after his temporary residence permit expired. The Ministry only undertook to consider his application after an application was made to the High Court. The absence of domestic legislation dealing with refugees, at the time, made his case difficult.

297. The Minister of Home Affairs may set aside a decision by an Immigration Tribunal to authorize the expulsion of a person from Namibia. The Tribunal may of its own motion, and shall at the request of the applicant, reserve for the decision of the High Court any question of law which arises upon an application heard by the Tribunal. If the applicant or the Chief Immigration officer is aggrieved by a decision of the High Court, he or she may appeal to the Supreme Court.

298. A person is entitled to legal representation during the hearing of his or her case by the Tribunal or during an appeal in the High Court. An indigent person may apply for and receive legal assistance and representation from the Legal Aid Department of the Ministry of Justice or from the LAC.

Article 14

299. Article 12 of the Namibian Constitution provides:

1. (a) *In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, public order or national security, as is necessary in a democratic society;*

- (b) *A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be release;*
- (c) *Judgements in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require;*
- (d) *All 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;*
- (e) *All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice;*
- (f) *No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of article 8 (2) (b) hereof.*

2. *No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this sub-article shall be construed as changing the provisions of the common law defences of "previous acquittal" and "previous conviction".*

300. These rights which have been translated into rules of court in both civil and criminal proceedings are protected by the courts whose independence and impartiality have been given constitutional protection by the Namibian Constitution. Article 78 (3) of the Constitution provides:

No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.

301. Various enabling statutes and rules and regulations made thereunder together with rules of the common law are enforced by the courts and other tribunals so as to give practical meaning to the rights guaranteed under the above-quoted provisions of article 12 of the Namibian Constitution. The statutes are the High Court Act, 1990, and Rules of Court made thereunder; the Supreme Court Act, 1990, and Rules of Court make thereunder; the Magistrates' Court Act, 1944, and regulations made thereunder; and the Criminal Procedure Act, 1977. The statutory provisions under the above-mentioned statutes and regulations and rules are reinforced by common law rules of evidence.

302. The constitutional and other statutory provisions and the common law rules are adequate to protect the rights adumbrated under article 12 of the Constitution. The above-mentioned provisions are adequate and effective to enable individuals to obtain remedies for any violation of the right to fair trial, even against the State and its agents and agencies. Apart from the State-sponsored legal aid scheme, individuals have an independent legal profession to turn to for legal advice and representation.

Article 15

303. Article 12 (2) of the Namibian Constitution provides:

No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law, provided that nothing in this sub-article shall be construed as changing the provisions of the common law defences of “previous acquittal” and “previous conviction”.

Article 12 (3) provides as follows:

No person shall be tried or convicted for any criminal offences or on account of any Act or omission which did not constitute a criminal offence at the time when it was committed nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.

Article 16

304. Article 1 (2) of the Namibian Constitution states that all power is vested in the People of Namibia, who exercise their sovereignty through the democratic institutions of the State. Article 25 of the Namibian Constitution provides:

2. *Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.*

3. *Subject to the provisions of this Constitution, the Court referred to in sub-article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.*

4. *The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.*

305. Article 15 (1) of the Namibian Constitution states:

Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

Article 17

306. Article 13 of the Namibian Constitution states:

1. *No person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedom of others.*
2. *Searches of the person or the homes of individuals shall only be justified:*
 - (a) *Where these are authorized by a competent judicial officer;*
 - (b) *In cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.*

307. Section 16 of the Namibia Central Intelligence Service Act, 1997, Act No. 10 of 1997 states (annexure "0"):

Notwithstanding anything to the contrary contained in any law, no inspection, investigation, revision, or audit which in terms of any law has to be or may be done in connection with any matter or document concerning the Service or the Account, shall be done, unless the person who has to or may do such inspection, investigation, revision or audit has received a security clearance for that purpose.

308. Section 24 of Act No. 10 of 1997 goes on to state:

1. Any person who, without a direction issued under subsection (2):
 - (a) Intentionally and without the knowledge or permission of the dispatcher intercepts a communication which has been or is being or is intended to be transmitted by telephone or in another manner over a telecommunications system; or
 - (b) Intentionally monitors a conversation by means of a monitoring device so as to gather confidential or classified information concerning any person, body or organization; or

- (c) Intentionally and without the permission of the person who is lawfully in charge or occupation of any premises enters upon the premises:
 - (i) To search the premises;
 - (ii) To examine, copy, photograph or transcribe any record, document or other material on the premises; or
 - (iii) To remove any record, document or other material from the premises for the purposes of examining, copying, photographing or transcribing it,

with the purpose of gathering information concerning a threat or potential threat to the security of Namibia in the discharge of a function in terms of this Act, shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$ 20,000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

- 2. Notwithstanding the provisions of subsection (1) or anything to the contrary contained in any law, a judge may, subject to the provisions of section 25, issue the Service with a direction authorizing the Director-General (of the Namibian Central Intelligence Service), or any staff member or other person authorized thereto by the Director-General under section 26 (1) (... to act in accordance with subsection (1) ...).

Article 18

- 309. Article 5 of the Namibian Constitution states:

The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia.

- 310. Article 21 (1) (b) of the Constitution provides that: "All persons shall have the right to freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning". And article 21 (1) (c) provides that: "All persons shall have the right to freedom to practise any religion and to manifest such practice." The above-mentioned rights, and some specified others, may be derogated from under the Constitution. The exclusive justificatory limits to the enjoyment of those rights are provided for by the Constitution. Article 21 (2) provides:

The fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

311. Freedom of religion is also a right with clearly laid down justificatory limits in terms of the above-quoted provisions of article 78 (3) of the Namibian Constitution. In the same way persons may freely exercise their thought and conscience and propagate their beliefs and views within limits set by the Constitution and the law.

312. Article 22 of the Namibian Constitution states:

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorized, any law providing for such limitation shall:

(a) Be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) Specify the ascertainable extent of such limitation and identify the article or articles hereof on which authority to enact such limitation is claimed to rest.

313. As regards the teaching of religion in schools in Namibia, in the past children were taught biblical studies, which concentrated on the Bible. Today children are taught religious studies and moral education. Parents do have the right to have their children exempted from religious services in schools. These are issues for inclusion in the forthcoming Education Bill and form part of the policy decisions made by the National Institute for Education Development (NIED) in Okahandja, Namibia.

Article 19

314. Article 9 of the African Charter provides for freedom of expression. This right is ensured by article 21 (1) (a) of the Namibian Constitution which states that “all persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media”. Article 13 of the Namibian Constitution also states that “no person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others”.

315. Four laws effect the freedom of information. The Newspaper and Imprint Registration Act No. 63 of 1971, the Publications Act No. 42 of 1974, the Namibian Press Agency Act No. 3 of 1992, and the Copyright and Neighbouring Rights Protection Act No. 6 of 1994.

316. A summary of the relevant sections of these laws follows:

The Newspaper and Imprint Registration Act No. 63 of 1971 (annexure “P”).

Section 2 - Prohibits the printing and publishing of unregistered newspapers.

Section 3 - Provides the procedure for registration.

Section 4 - Provides for the issue of a certificate after registration.

Section 7 - Provides for notification of the place of publication and the names and addresses of the proprietor, printer and the publisher of the newspaper.

317. The Publications Act No. 42 of 1974 (annexure “Q”)

Section 1 - States that in the application of the Act the constant endeavour “to uphold a Christian view of life shall be recognized”.

Sections 2-7 - Provides for a Directorate, Committees, and Advisory Committees, responsible for publications and that these come under the authority of the Minister.

Section 3 - States that the area of responsibility of the Directorate covers the publication of objects, films and public entertainment.

Section 9 - Authorizes the Committee to prohibit publications it deems undesirable.

Sections 35-38 - Provide for a Publication Appeal Board.

Section 39 - Permits the review of decisions of the Appeal Board by the Supreme Court.

318. The Namibian Press Agency Act No. 3 of 1992 (annexure “R”)

Section 4 - The objects of the Agency shall be to carry on a news agency service for the collection of news and information and the distribution of such news and information to subscribers of the services for the Agency and other persons, bodies and organizations.

Section 5 - States for purposes of achieving its objects the Agency may, subject to the provision of any other law:

(a) Establish and control facilities for the collection and distribution of information and news;

(b) Enter into agreements for the supply of information or news to the Agency or for the distribution of information or news by the Agency;

(c) Compile, print, produce, publish or distribute any literary matter.

Section 6 - States that the Agency will be managed by a Board of Directors appointed by the Minister (of Information and Broadcasting).

319. The Copyright and Neighbouring Rights Protection Act 1994 No. 6 of 1994 provides for the application of copyright law in Namibia (annexure “S”)

Section 2 - States that the original works of the following will be eligible for copyright - literary works, musical works, artistic work, cinematography film, sound recordings broadcasts, programme-carrying signals, published editions and computer programmes.

Sections 29-34 - Provides for infringements of copyright and remedies.

Sections 35-44 - Establishes a Copyright Tribunal.

320. The Ministry of Home Affairs, under the provisions of the Immigration Control Act No. 7 of 1993, requires journalists to obtain a temporary work visa before entering Namibia on work assignments.

Article 20

321. The Preamble of the Constitution of Namibia states:

“Whereas we the people of Namibia ... will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single State ... committed to these principles 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 ...”

322. As a result of its membership of the Organization of African Unity (OAU) and the United Nations, Namibia is fully committed to the principles enshrined in the Charter of the OAU and is consequently committed to the Charter of the United Nations and African Charter of Human and People’s Rights.

323. The goals of the Ministry of Foreign Affairs which is responsible for the management of Namibia’s foreign policy are as follows:

(a) To establish and maintain stable and good neighbourly relations with States around the Republic of Namibia;

(b) To promote world peace and security and the settlement of all international disputes by negotiations, not war.

324. It is therefore in fulfilment of this policy that Namibia has signed or acceded to the following international instruments:

1. African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty).
2. Comprehensive Nuclear-Test-Ban Treaty.
3. The United Nations Conventions on Chemical Weapons: The Prohibition of the Development, Production, Stockpiling and Use and Their Destruction.

325. The main object of the Racial Discrimination Prohibition Amendments Act 1991 is to render criminally punishable certain acts and practices of racial discrimination (and apartheid) (annexure “U”) in relation to, inter alia, public amenities, the provision of goods and services, immovable property, educational and medical institutions, employment, associations, religious services, and the incitement of racial disharmony and victimization. The upshot of the object of the legislation is to ensure enjoyment without discrimination of the rights and freedoms guaranteed to persons and groups by the Constitution.

326. In terms of the Racial Discrimination Prohibition Amendment Act, 1991 if not permissible for a person to publish or display, or cause or permit to be published or displayed, any advertisement or notice that indicates an intention to perform any act which constitutes racial discrimination.

327. Under the law, every person is prohibited from publicly using any language or publishing or distributing any written matter or displaying any article (e.g. flag, insignia or emblem) or doing anything with intent to threaten, ridicule or insult any persons belonging to a particular racial group, or cause, encourage or incite disharmony or feelings of hostility, hatred or ill-will between different racial groups or persons belonging to different racial groups or disseminate ideas based on racial superiority.

328. The law forbids any person from establishing, supporting or being a member of or participating in activities of an organization or movement of which the aim is to engage in acts of violence against members of any particular racial groups or engage in activities aimed at causing or promoting any such acts.

329. A person who does any of those things which are prohibited commits an offence and is liable to a fine not exceeding N\$ 80,000 or imprisonment for a period not exceeding 15 years or to both.

330. The Racial Discrimination Prohibition Amendment Act, 1991 (Act No. 26 of 1991), was passed so as to render criminally punishable, in pursuance of the Namibian Constitution, certain acts and practices of racial discrimination in relation to, inter alia, public amenities, the provision of goods and services, and immovable property. This law was passed to cure the mischief of the colonial period where in terms of government policy and law certain sections of the Namibian society were denied equal access to public property and services contrary to equality of all persons before the law. Section 2 of the Act provides:

2. (1) No person shall:
 - (a) Deny any other person access to or the use of any public amenity or any facility in a public amenity;
 - (b) Permit any other person such access or use on less favourable terms or conditions than those upon which he or she would otherwise permit such access or use; or
 - (c) Require any other person to leave or cease to use any such amenity or facility,

because such other person is a member of a particular racial group.

- (2) No person shall in respect of any public amenity apply any practice or policy whereby any facility or service available at such public amenity is provided to members of the public on a segregated basis according to colour, race, nationality or ethnic or national origin.

- (3) For the purposes of subsections (1) and (2), “public amenity” means:
- (a) Any public accommodation establishment, including any hotel, guest house, pension, rest camp, guest farm, holiday farm, caravan park or any other premises in or upon which accommodation is normally available for and provided to members of the public;
 - (b) Any public recreation area, including any game park, nature reserve, tourist recreation area, holiday resort or any other similar area to which members of the public normally have access or may obtain admission either free of charge or against payment of a fee;
 - (c) Any public restaurant, including any refreshment room, tea room or other premises in or upon which food or drink (whether alcoholic or not) for consumption on the premises is normally provided to members of the public;
 - (d) Any public conveyance which members of the public are normally entitled or allowed to use for travelling, whether by air, rail, road or sea;
 - (e) Any theatre or other premises where a dramatic performance, play, concert or film is presented or shown to members of the public;
 - (f) Any premises where an exhibition, sports meeting or any function is held or may take place to which members of the public have been invited or are normally allowed to attend.

Article 21

331. The right to assemble is protected under Namibia’s Constitutional Bill of Rights. Article 21 (1) (d) provides:

All persons shall have the right to assemble peaceably and without arms. Like the right to freedom to practise any religion, the right to freedom of association and the right to freedom of thought and conscience, the enjoyment of the right to assemble is subject to the provision of article 21 (2), quoted in the paragraph above.

332. As stated in that paragraph, article 21 (2) states the exclusive justificatory criteria - outside the fact that no arms should be carried during the assembling - against which limitations on those rights, including the right to assemble, must be measured. In this connection, public gatherings are regulated by Public Gatherings Proclamation, 1989 (AG No. 23 of 1989). Section 2 provides:

1. Subject to subsections (3) and (4), no person shall hold, preside or otherwise officiate at, or address a public gathering unless he, or another person, has given notice in writing to the commander of the police station nearest to the place where the gathering is to be held of:

- (a) The place and time at which the gathering is to be held;
- (b) The nature of the gathering;
- (c) The person or organization by or in the name, on behalf or in the interests of whom or which the gathering is to be held; and
- (d) The names and addresses of the person who will preside and otherwise officiate at and address the gathering.

333. Notorious laws pertaining to public gatherings existed prior to independence prohibiting meetings held by certain persons, requiring person to notify a Magistrate before holding a meeting and giving Magistrates the power to prohibit meetings in certain circumstances. These laws were repealed by Proclamation AG No. 14 of 1989. Demonstrations within 500 metres of a court room on a weekday are illegal in terms section 2 (1) of the Demonstrations in or Near Court Buildings Prohibition Act No. 71 of 1982.

334. Section 81 (3) of the Labour Act No. 6 of 1992 provides (annexure “K”) for the right of peaceful assembly by authorizing peaceful pickets during a strike.

335. Following on the controversy in the case of *Chief Hikuminwe Kapika v. the Government of the Republic of Namibia and Others* of September 1997, the Law Reform and Development Commission, in the Ministry of Justice, is reviewing the laws pertaining to public gatherings with a view to improving same.

Article 22

336. The substantive rights to freedom of association and to strike are protected under article 10 of the African Charter and are guaranteed to individuals and groups by article 21 of the Namibian Constitution, as follows:

1. *“All persons shall have the right to:*
 - (e) *freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;*
 - (f) *withhold their labour without being exposed to criminal penalties.*

Article 21 goes on to state:

2. *The fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*

337. Indeed, it is part of the principles of State policy expressed in the Namibian Constitution that:

1. All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.

338. The registration and operations of political parties are determined by section 39 of the Electoral Act No. 24 of 1992 (annexure “C”).

339. Concerning the registration and operations of organization such as human rights groups - these may be formed in terms of section 19 of Companies Act No. 61 of 1973 (annexure “T”), as associations “not for gain”; or they be formed under common law provisions, which permit contracts of association in terms of the Constitution of that association.

340. The individual’s right to participate in the Government and politics of Namibia is guaranteed by the Constitution.

Article 23

341. According to article 14 (3) of the Constitutional Bill of Rights in the Namibian Constitution, the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

342. Article 1 of the Namibian Constitution provides that “All persons shall be equal before the law” and explicitly forbids discrimination on the basis of sex.

343. Children’s rights are protected by article 15 of the Namibian Constitution. Indeed, Namibia is a State party to the United Nations Convention on the Rights of the Child, and has endeavoured to implement the rights protected by the Convention. Namibia’s efforts at implementing the Convention are contained in the initial report submitted to the United Nations Human Rights Commission in December 1992.

344. Article 20 (1)-(3) of the Constitution of Namibia states:

(1) “All persons shall have the right to education ...”

(2) “Primary education shall be compulsory ...”

(3) “Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is sooner ...”

345. Article 15 (1) of the Constitution gives children a right “subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by their parents”. The Children’s Act No. 33 of 1960 requires the consent of both parents for the adoption of a child.

346. A draft law on children is in process of formation by the Ministry of Health and Social Services, which would remove all existing discrimination against parents and children born outside marriage. The CEDAW country report of Namibia states that where the parents have not been married such a child is considered part of the mother's family alone, with the mother as the legal guardian and custodian of the child. The father has no special rights of access. Such a child takes the name of the mother and the duty to support the child is shared by the parents, in proportion to their earnings. Such a child would only inherit if specifically named in a will. The High Court of Namibia recently delivered judgement in the *Kalomoh* case in favour of the illegitimate child to inherit from his biological father.

347. The principle of sexual equality is unequivocally enshrined in the Namibian Constitution which states at article 10 that all persons are equal before the law and that no person may be discriminated against on the grounds of sex. There is not subsidiary legislation which contains a general prohibition on sex discrimination.

348. The Constitution states that the customary law in force at the date of independence shall remain valid only to the extent to which it does not conflict with the Constitution. The Constitution also provides that all laws in force at the date of independence shall remain in force until amended or repealed by Parliament or until declared unconstitutional by a competent court. Government is giving attention to sex discrimination under customary law - a Draft Customary Courts Bill under discussion will regulate the jurisdiction and powers of traditional tribunals and reinforce the Constitution by defining "customary law". The position of women under customary law was improved by the Traditional Authorities Act No. 17 of 1995 which seeks to enhance the role of women within traditional authority. The rewriting of inherited laws, for instance, in the areas of marriage and inheritance is receiving the attention of the Law Reform and Development Commission.

349. The question of the legal capacity of women in terms of customary law is far less clear cut. As stated in the CEDAW report of Namibia women in these unions remain subordinate to men in areas such as decision-making in family matters and control over property. The treatment accorded women under various customary regimes does differ. In matrilineal communities children belong to their mother's lineage and clan. Some ethnic groups place women at the level of chiefs.

350. In Namibia, in civil marriage, both men and women attain majority at the age of 21 and single adults of both sexes have equal capacity. Previously under the Roman-Dutch common law inherited from South Africa, all civil marriages in Namibia were subject to the common law concept of "marital power", where authority in the union lay with the man. As "head of the household", a wife could not bring a court action nor enter into a substantive contract without the "assistance" of her husband.

351. In late 1995 the Married Persons Equality Bill (Act No. 1 of 1996) (annexure "F") was introduced to Parliament. It abolished the marital power, levelled the playing fields and put married person on equal footing. Each must consult on major transactions. Both have equal guardianship of the children and consent of both is required as regards important decisions such as marriage of the child or adoption.

352. Whereas civil marriages must be registered (between 1990-1993 an average of 6,000 civil marriages were registered annually nationwide), this is not a requirement for customary marriage. Customary unions are alliances between kinship groups (i.e. “extended”) rather than between two individuals (i.e. “nuclear”). In customary marriage there is often “bride price” and power relations are dominated by men.

353. In the extended family decision-making can be done outside the man-woman relationship. Often a man and woman can live together as man and wife without the formalization of the union. Such cohabitation is not legally recognized and where children are born in such circumstances the child will be looked after by the mother or her extended family. In a 1991 census 43 per cent of rural households and 32 per cent of urban household were female headed.

354. Statutory affirmative action in Namibia is provided for under article 1 of the Constitution which ensures the presence of women on important government decision-making bodies. Article 95 (a) of the Constitution provides authorization for affirmative action for women (section 4.2 of the CEDAW report refers).

355. The outlaw of any form of discrimination against women is contained in the Namibian Constitution. In terms of article 10 (2) of the Constitution, “No persons may be discriminated against on the grounds of sex ...”. This is meant to prohibit all forms of discrimination against women. One way in which this provision has been implemented is the promulgation of the Married Person Equality Act, 1996 (Act No. 1 of 1996). The main object of this legislation was to do away with certain discriminatory laws and practices against married women in Namibia. The Act provides for legal equality with respect to the legal capacity and domicile of married women.

356. It is important to note also that Namibia is a State party to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. Namibia has presented its report on the measures taken to implement the Convention.

Article 24

357. As regard the children at article 15 (c) of the Constitution states that:

“Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development.”

358. Children’s rights are protected by the Namibian Constitution. Article 15 of the Constitution provides:

1. Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

2. *Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of the sub-article children shall be persons under the age of sixteen (16) years.*

3. *No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this sub-article shall be construed as derogating in any way from sub-article (2) hereof.*

4. *Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.*

5. *No law authorizing preventive detention shall permit children under the age of sixteen (16) years to be detained.*

359. Forced labour has been criminalized by the Labour Act No. 6 of 1992 section 108 of which provides at subsection (2) (b) for forced labour to include (annexure “K”):

Any work performed by any child under the age of 18 years of any employee of an employer in terms of any arrangement or scheme in any undertaking who is for any reason required to perform such work in the interest of such employer.

360. As regards the age of attainment of majority in criminal matters, under the common law children under the age of 7 years are criminally incapable, and between the ages of 7-14 years the State must prove criminal intent. Children above the age of 14 are criminally liable.

361. In labour related matters the Age of Majority Act No. 57 of 1972 states that a person below the age of 21 years cannot enter into a contract without the permission of their parent or guardian.

362. Indeed, Namibia is a State party to the United Nations Convention on the Rights of the Child, and has endeavoured to implement the rights protected by the Convention. Namibia’s efforts at implementing the Convention are contained in the initial report submitted to the United Nations Human Rights Commission in December 1992.

363. Concerning the treatment of children during wartime (article 50 of the Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949), the Ministry of Justice of Namibia is in the process of drafting the necessary domestic law adopting the Geneva Conventions and additional Protocols.

Article 25

364. Namibia has a multiparty system of government. Therefore all citizens have the right to participate freely in all governmental structures directly or through their freely elected representatives - at the national, regional and local government levels. Such elections are conducted in terms of the Namibian Constitution and the Electoral Act, 1992 (Act No. 24 of 1992) (annexure "C"). There is an independent Electoral Commission established in terms of section 3 of the Electoral Act which has the "exclusive authority to direct, supervise and control in a fair and impartial manner any elections under this act". In terms of section 5 of the Act, the Commission consists of:

(a) A judge or former judge of the Supreme Court or the High Court, who shall be the chairperson of the Commission; and

(b) Four persons as the other members of the Commission,

appointed by the President, with the approval, by resolution, of the National Assembly. Under the provisions of the Affirmative Action Act, 1998 (29 of 1998) currently before Parliament those previously discriminated against as regards their participation in public affairs, will receive favourable treatment.

365. In Namibia every citizen, subject to the law, has equal access to the public service. Considering the colonial history of the country during which time the policy and the law of the colonial, occupying power were systematically aimed at disadvantaging the majority black population, the framers of the Namibian Constitution saw it fit not only to condemn racism and apartheid, the controlling ideology of the South African racist, colonial regime, but to attempt to correct some of the wrongs of the past. To this end, Parliament has been empowered by the Constitution to promulgate an affirmative action legislation aimed at achieving a balanced structuring and the personnel establishment of the public service, including the police, the defence force and the prison service. Article 23 provides that:

2. Nothing contained in article 10 (see paragraph 6 above) hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or 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 past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

3. In the enactment of legislation and the application of any policies and practices contemplated by sub-article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

366. The constitutional provision promotes affirmative action in general terms. This has the danger of leaving the interpretation of the constitutional provision to the whims of individual employers and other key players. Such a situation will in turn tend to engender arbitrariness and breaches of human rights. To avoid these pitfalls, the Ministry of Labour and Human Resources Development has prepared an affirmative action Bill which will be tabled before Parliament shortly pursuant to the constitutional directive. In the absence of such legislation, the public service has in any case been pursuing an affirmative action programme upon the authority of the above-quoted constitutional stipulation. It is hoped that the incoming legislation will achieve some measure of certainty and clarity in the implementation of affirmative programmes.

367. The right of access to public property and social services and amenities contained in sub-article 3 of article 13 of the African Charter is guaranteed to individuals by the anti-discrimination provisions of the Namibian Constitution.

368. The Racial Discrimination Prohibition Amendment Act, 1991 (Act No. 26 of 1991), at section 2 of the Act provides (annexure "U"):

2. (1) No person shall:
 - (a) Deny any other person access to or the use of any public amenity or any facility in a public amenity;
 - (b) Permit any other person such access or use on less favourable terms or conditions than those upon which he or she would otherwise permit such access or use; or
 - (c) Require any other person to leave or cease to use any such amenity or facility,

because such other person is a member of a particular racial group.
- (2) No person shall in respect of any public amenity apply any practice or policy whereby any facility or service available at such public amenity is provided to members of the public on a segregated basis according to colour, race, nationality or ethnic or national origin.
- (3) For the purposes of subsections (1) and (2), "public amenity" means:
 - (a) Any public accommodation establishment, including any hotel, guest house, pension, rest camp, guest farm, holiday farm, caravan part or any other premises in or upon which accommodation is normally available for and provided to members of the public;
 - (b) Any public recreation area, including any game park, nature reserve, tourist recreation area, holiday resort or any other similar area to which members of the public normally have access or may obtain admission either free of charge or against payment of a fee;

- (c) Any public restaurant, including any refreshment room, tea room or other premises in or upon which food or drink (whether alcoholic or not) for consumption on the premises is normally provided to members of the public;
- (d) Any public conveyance which members of the public are normally entitled or allowed to use for travelling, whether by air, rail, road or sea;
- (e) Any theatre or other premises where a dramatic performance, play, concert or film is presented or shown to members of the public;
- (f) Any premises where an exhibition, sports meeting or any function is held or any event takes place to which members of the public have been invited or are normally allowed to attend.

Article 26

369. As pronounced in the second preambular paragraph of the Namibian Constitution the rights guaranteed by the constitutional Bill of Rights are secured for all persons regardless, inter alia of race, colour or ethnic origin. The idea of the superiority of the white race over the black majority of the Namibian society, as a direct result of the practicalization of the ideology of apartheid of the occupying South African regime, was eschewed at independence. Article 10 of the Namibian Constitution provides for the equality of all persons before the law and for the freedom from discrimination.

370. In a recent decision of the Supreme Court of Namibia of *Muller v. the President of the Republic of Namibia and Another 2000 (6) BCLR (NmS)* a matter based on discrimination between men and women and in particular with article 26 of the Covenant on Civil and Political Rights. The facts of the case are as follows in short Mr. Muller married Ms. Engelhard during 1996. Mr. Muller wished to use his wife Ms. Engelhard's surname. In other words they would have become Mr. and Ms. Engelhard. To do this he would have to comply with the formalities prescribed by section 9 of the Aliens Act. The general practice is a wife assumes her husband's surname without any formalities, a husband would have to apply to change his surname to his wife's in terms of section 9 of the Aliens Act.

371. Mr. Muller applied to the High Court for an order that section 9 (1) (a) be declared unconstitutional on grounds that the section infringes his rights under article 10 of the Namibian Constitution (equality before the law and freedom from discrimination on the grounds of sex). He also asked that he be allowed to assume his wife's surname. Mr. Muller's application was dismissed by the High Court. He appealed to the Supreme Court.

372. The Supreme Court made a number of important findings. Under article 10 (1), legislation may treat persons differently if there is a sensible or rational reason for the difference in treatment. The legislation must also have been enacted for a legitimate purpose. An example of a legitimate purpose, in this case, is to prevent persons changing their surnames to avoid detection by the police.

373. The court further held that the test under article 10 (2) is, however, much stricter. If the legislation treats persons differently on one of the grounds referred to in article 10 (2) (for example, sex or race), and this difference in treatment is discriminatory, then the legislation is contrary to article 10 (2). The only exception is if it is covered by article 23 i.e. “affirmative action” legislation. To be a discrimination, the different treatment must also have an element of unjust or unfair treatment. The court will look at the effect of the discrimination on the person. Relevant factors include the person’s position in society, whether he or she was disadvantaged by racial discrimination in the past, whether the discrimination is based on a specified ground or not and whether the discrimination affected the person’s dignity.

374. In applying the law to the facts, the court concluded that the different treatment did not affect Mr. Muller’s dignity. He was also not a member of a previously disadvantage group, because he was a white male. The legislation was also necessary to establish a person’s identity for various purposes. The different treatment also reflected the tradition that a wife used her husband’s surname on marriage. Mr. Muller was therefore not the victim of discrimination and the Supreme Court ruled against Mr. Muller.

375. Mr. Muller and Ms. Engelhard submitted a Communication (No. 919/2000) to the Human Rights Committee. They claimed that they were victims of a violation by Namibia of articles 26, 23, paragraph 4 and 17, paragraph 1 of the International Covenant on Civil and Political Rights.

376. In light of the Committee’s views concerning Communication No. 919/2000 the Committee was in concurrent with the authors that indeed they have been victims of discrimination and violation of article 26 of the Covenant. In arriving to its decision the Committee rejected the State party’s arguments that the purpose of Aliens Act, section 9, paragraph 1, is to fulfil legitimate social and legal aims in particular to create legal security, and secondly that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husband’s surnames. The Committee failed to see why the sex-based approach was taken by section 9, paragraph 1, of the Aliens Act. The Committee further argued that the Act cannot be serving the purpose of creating legal security since the choice of the wife’s surname can be registered as well as the choice of the husband’s surname. In view of the argument of a long-standing tradition the argument cannot be maintained as a general justification for different treatment of men and women which is contrary to the Covenant.

377. In accordance with the article 2, paragraph 3 (a) of the Covenant, the State party was under an obligation to provide the authors with:

- A remedy avoiding any discrimination in choice of their surname; and
- Abstain from enforcing the cost order of the Supreme Court, in case where it is already enforced to refund the respective amount of money.

378. The Government of the Republic of Namibia responded to the above by informing the authors through their legal representative (the Legal Assistance Centre, Windhoek, Namibia) to proceed in terms of the Aliens Act 1937 to assume as name the surname of the wife in accordance with procedures laid down by the aforementioned Act. Further, the Government of

the Republic of Namibia published the views of the Human Rights Committee on the web site of the Human Rights and Documentation Centre of the University of Namibia, the body engaged in human rights education and information. Concerning the cost order of the Supreme Court the Government of the Republic of Namibia was of the view that it is not within its power to dictate the courts of law of Namibia, including the Supreme Court, as regards their discretion to award costs in matters before them.

379. Article 78 (3) of the Namibian Constitution expressly prohibits members of the Executive and Legislature or any other person from interfering with judges or judicial officers in the exercise of their judicial functions. Therefore the Government of Namibia will be violating the Constitution if it sought to interfere with the Supreme Court's order of cost awarded to the successful party in the matter in question. In the result the Government of Namibia did not see its way clear in interfering with the order of costs awarded to the successful party.

380. The State considers all Namibians as one people belonging to one nation. As has been emphasized passim in the present report, racial discrimination by the Government and its agencies and private persons or institutions has been prohibited and criminalized by the Racial Discrimination Prohibition Amendment Act No. 26 of 1991. There is therefore no question of the domination of one section of the Namibian society over the other. There will neither be legal nor political support for such a retrogressive scheme.

381. Despite or in addition to the foregoing, it should be pointed out that the Preamble to the Constitution provides, amongst other things that "... we the people of Namibia":

"Will strive to achieve national reconciliation and to foster peace, unity and common loyalty to a single State."

382. The Law Reform and Development Commission (LRDC) of the Ministry of Justice, is tasked to review and initiate changes to existing laws which offend the spirit of the Constitution. One such law determining inheritance and succession for blacks is the Native Administrative Proclamation No. 15 of 1928. Currently, the widows and children of blacks are disinherited on the death of the husband/father, causing widespread hardship and inhibiting development. The proposed Inheritance and Succession Bill developed within the LRDC will resolve this outstanding social issue.

Article 27

383. Article 19 of the Namibian Constitution provides that "Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected in this article do not impinge upon the rights of others or the national interest."

384. Namibia has a rich and diverse cultural heritage, in terms of African and European traditions, and also physically, for instance in the form of rock art. However, in the past the cultural differences were accentuated through racism, exclusive ethnic allegiances and the colonial strategy of "divide and rule". In contrast it is now understood that there is a need for Namibians to develop mutual understanding and tolerance, as equals, as a new and united nation is built.

385. One of the first concerns has therefore been to record and understand the cultures which exist. A start has been made in this through the National Orature Project. The National Archives and the State Museum have also been engaged in research and education concerning Namibian cultures, and the struggle against racism in Namibia. There have been displays at the Museum about Namibia's liberation struggle, and the role played in this by the United Nations, the solidarity movement, and Namibian leaders. Traditional knowledge and customs are also being gathered in regard to the natural environment. Major exhibitions of Namibian and other rock art have been mounted, to show not a characteristic of a particular ethnic group, but to show Namibian art as an invaluable contribution to the world of art.

386. It is well known that the system of apartheid rule deliberately divided the ethnic components of society in Namibia. This created much social tension and division in the society, so that today the Government has adopted a policy of reconciling all the components of society, to form a united nation. Whereas Namibia does have communities such as the Khoi-San and the Ovahimba, an effort is under way, within the means of the Government, to integrate and uplift formally marginalized communities.

Notes

¹ Excluding Walvis Bay which was enumerated under the 1991 Population Census of the Republic of South Africa (population 23,000: male 14,484; female 8,516).

² The Census Preliminary Results of 2001 indicate that the Namibian population is made up of 936,718 females and 890,136 males giving a total population of 1,826,854 with an annual growth rate from 1991-2001 of 2.6.

³ Adgebite, *African Attitudes to the International Protection of Human Rights*, in Eide/Schou (Eds), of Human Rights, Stockholm, 1986 and 69 etc.

⁴ Chief Hendrik Witbooi: When he was addressing European traders and missionaries in Namaland by Australian Joint Commission on Foreign Affairs and Defence Report on Namibia, August 1892.

⁵ Helmut Bley of Hamburg University, in an introduction to his book entitled *South West Africa under German rule 1894-1914*, stated the following when summarizing the German measures of colonialism.

⁶ *Australian Joint Commission on Foreign Affairs and Defence, Report on Namibia*, August 1982, Part 1, paper No. 230, p. 11.

⁷ Sixth quarterly Economic Review of Namibia, Botswana, Lesotho and Swaziland. (London: *The Economist Intelligence Unit* No. 1 (1985), P.20 for a discussion of the limited degree to which policy regarding resolution 293 was implemented, see G. Carter and Patric Omeara, *Southern Africa in Crisis*, Bloomington, Indiana University Press (1977), pp. 18-82.

⁸ *ICJ Reports*, 1971, p. 53.

⁹ See, *Charter of Economic Rights and Duties of States*, General Assembly resolution 3281 (XXXIX) of 12 December 1974.

¹⁰ Security Council Decree No. 1, loc. cit., note - on Official Records.

¹¹ Ibid.

¹² *International focus on transnational corporations in South Africa and Namibia* (New York): United Nations Department of Public Information (1985), p. 18.

¹³ Reginald H. Green: *International focus on transnational corporations in South Africa and Namibia* (New York): United Nations Department of Public Information (1985), p. 18.

¹⁴ Carlos, Joel, *No Neutral Ground*, Thames 4 Growell Company, New York, p. 207.

¹⁵ David Soggot, *Namibia the violent heritage*, 1986, p. 77.

¹⁶ See section 6 of the Terrorism Act, 1967 (Act No. 83 of 1967).

¹⁷ *State v. Mushimba*, 1977, 2 SA 829 (A).

¹⁸ *Katofa v. Administrator General for South West Africa and another*, 1985, (4) SA 211 at 220.

¹⁹ *State v. Fillemon Nangolo* (unreported) Namibia Supreme Court Case No. 100/1976.

²⁰ *Djama v. the Government of the Republic of Namibia and Others*, (1993), (1) SA 387.

²¹ *Skeleton Coast Safaris v. Olympia Reisen* (unreported) NS Case No. 179/93.

²² *Ridge v. Baldwin* (1964) A.C. 40.

²³ Communication No. 760/1997.

²⁴ Case No. A/327/2000.
