

# NAMIBIA

## Civil Society Report on the Implementation of the ICCPR (Replies to the List of Issues CCPR/C/NAM/Q/2)

To be submitted for the Review of the Second Periodic Report of Namibia  
(CCPR/C/NAM/2) at the 116<sup>th</sup> session of the Human Rights Committee

Windhoek, February 2016

### Submitted by:

Namibia Non-Governmental Organisations Forum (NANGOF) and Legal Assistance Centre (LAC)



### Joined by:

Women's Action for Development (WAD)  
Citizens for an Accountable and Transparent Society (CATS)  
Southern African Christian Initiative (SACHI – <http://sachi-sadc.org>)  
Breaking the Wall of Silence (BWS)  
Women's Leadership Centre (WLC)  
Namibian Women's Health Network (NWHN)  
Katutura Youth Enterprise Centre (KAYEC)  
Church Alliance for Orphans (CAFO)  
Sister Namibia  
Ana-Jeh San Trust  
David Kasume Community Development Organisation  
Business Hub Namibia  
NAWIB  
Nam-YCW  
Khomas Homeless Development Organisation  
Kingdom Power  
ACPCN/NM4J  
Victims 2 Survivors  
Queensland Project  
Restoring the Dignity of our People  
Autism Association of Namibia  
Namibia Pension Funds Protection

## NAMIBIA – Joint Civil Society Report with CCPR Centre and SALC

**With the support of:**



Southern Africa Litigation Centre (SALC)

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Centre for Civil and Political Rights (CCPR Centre)

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## I. Introduction

### a. Joining organisations

This joint report has been prepared by civil society organisations under the auspices of the Namibia Non-Governmental Organisations Forum (NANGOF trust) and drafted by the Legal Assistance Centre (LAC) in reply to the List of Issues on Namibia adopted by the UN Human Rights Committee<sup>1</sup> in view of the review of the Second Periodic Report,<sup>2</sup> scheduled at the 116th session of the Human Rights Committee in March 2016.

NANGOF Trust is the umbrella network for all non-governmental organisations (NGOs) in Namibia. Its role is to advocate for pro-poor government policies, build linkages and networks for NGOs and provide capacity strengthening support to member organisations. NANGOF Trust has up to 200 direct member NGOs and 500 indirect member NGOs, community based organisations (CBOs) and faith based organisations (FBOs).

LAC is a public interest law centre founded in 1988 that collectively strives to make the law accessible to those with the least access, through education, law reform, research, litigation, legal advice, representation and lobbying, with the ultimate aim of creating and maintaining a human rights culture in Namibia. The LAC currently has four major units: (1) The Social Justice Project; (2) the Gender, Research and Advocacy Project and (3) the Land, Environment and Development Project. The LAC is based in Windhoek.

The organisations presenting this report are as set out above.

### b. Methodology

The NANGOF trust with the support of the Centre for Civil and Political Rights (CCPR Centre) and the Southern Africa Litigation Centre (SALC) convened a workshop attended by a broad variety of civil society organisations working in the various areas addressed by the International Covenant on Civil and Political Rights (ICCPR). The workshop provided input on the List of Issues raised by the Human Rights Committee, which input is collated in this response. In addition, more in depth information was obtained from interviews with stakeholders and desk review when necessary.

### c. Contact details

The Legal Assistance Centre drafted and coordinated the input for the submission of this report.

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<sup>1</sup> CCPR/C/NAM/Q/2

<sup>2</sup> CCPR/C/NAM/2

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### II. Replies of Civil Society to the List of Issues

#### a. Constitutional and legal framework within which the Covenant is implemented (art. 2)

**Issue 1:** *In relation to the Committee's previous concluding observations (see CCPR/CO/81/NAM, para. 6), please elaborate on the status of the Covenant vis-à-vis domestic law. With reference to paragraph 83 of the State party's report (CCPR/C/NAM/2), please inform the Committee of whether provisions of the Covenant have been directly or indirectly invoked before the courts and, if so, please provide detailed information on these cases. Please also provide updated information about any steps taken to comply with the Committee's previous recommendations to establish a mechanism to implement the Committee's Views adopted under the Optional Protocol (see CCPR/CO/81/NAM, para.8).*

#### Comments from Civil Society

The provisions of the Covenant can be directly invoked by Article 144<sup>3</sup> of the Namibian Constitution and this has been confirmed by the Namibian Supreme Court,<sup>4</sup> the highest court in Namibia. The Covenant has not been extensively referred to in litigation, however.

The State party's responses under paragraphs 4 to 7 of the Replies of Namibia to the List of Issues (CCPR/C/NAM/Q/2/Add.1 – hereafter the responses) would appear to respond to the query as to whether a mechanism to implement the Committee's views has been established. No dedicated mechanism has been established, however a number of civil and political rights have been raised under the auspices of the National Human Rights Action Plan (NHRAP) prepared by the Office of the Ombudsman and which was approved by cabinet on 9 December 2014. In particular, the right of access to justice and the right not to be discriminated against have been incorporated into the NHRAP under focus areas 6 and 7.

As per the State party's response in paragraph number 4, it is agreed that there is an ongoing process to translate essential government services into local languages, however not all local languages are accommodated i.e. the San and the Ovahimba languages. In addition not all government institutions are in possession of translated documents. There is no official accommodation for persons who cannot read or for the visually impaired to access this information.

While the Namibian National Language Policy calls for mother tongue instruction in the lower grades, implementation is slow, haphazard and not uniform. On the ground research suggests that where children are taught in their vernacular, it is taught as a specific separate subject and is not across the board in all subjects at that level.

It is true that witnesses in court proceedings are entitled to speak in the language of their choice but interpreters are not always available in a number of local languages. There is no accommodation for sign language to be made available to the hearing impaired.

With due respect, the State party's response under paragraph number 8, relating to the *Müller and Another v Namibia* case, cannot be supported since the Supreme Court's decision forms part of the exhaustion of local remedies. In fact, the State party responded to the recommendation of the Human Rights Committee that there was a process in place to allow for the change of surname – the exact same process that was confirmed to be a violation in terms of the ICCPR with the recommendation that it should be abolished.<sup>5</sup>

<sup>3</sup> "Article 144 International Law: Unless otherwise provided by the Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

<sup>4</sup> *Government of the Republic of Namibia v Mwilima and Other Accused* 2002 NR 235(SC) at 260H.

<sup>5</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/) - Communication No 919/2000 and the files of the Legal Assistance Centre.

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### Recommendations:

#### The State Party should:

- i) Consider establishing a forum in conjunction with the Office of the Ombudsman by utilizing the latter's evaluation function of the National Human Rights Action Plan to additionally act as a monitoring mechanism;
- ii) Ensure documents are translated into all local languages, as well as braille;
- iii) Create mechanisms that ensure that persons who cannot read or are visually impaired have access to information in a manner which they can understand;
- iv) Reconsider its National Language Policy in relation to the teaching of lower primary school children in their vernacular languages due to concerns about standardized implementation and available human resources with the necessary skills – dependent upon this review, the State Party may reconsider its current policy, alternatively put in place an entrenched system for capacity building of teachers and ensure full implementation;
- v) Encourage the provision of translation services as a career and provided dedicated training opportunities;
- vi) Make provision for the availability of sign language practitioners to the hearing impaired at any point of engagement with the justice system;
- vi) Comply with the Human Rights Committee's recommendation in the case of *Müller and Another v Namibia*.

**Issue 2:** *Please elaborate on the functions of the Office of the Ombudsman and on its mandate, including whether and how far the Office can follow up on individual complaints. With reference to the Committee's previous concluding observations (para. 7) and paragraph 14 of the State party's report, please provide updated information on the proposed amendments to the Ombudsman Act, 1990 (Act. No. 7 of 1990), and indicate the steps taken, if any, to adopt those amendments.*

### Comments from Civil Society

The State party and the Office of the Ombudsman are commended for the proposed amendments to the Ombudsman Act which, if passed, will certainly strengthen the mandate of the Office and can only serve to improve access to services and justice. A concern must be raised, however, as to the lengthy time it can take for such amendments to be approved in parliament and thereafter to be properly promulgated into active law. An example in this regard would be the Child Care and Protection Act which took 21 years from conception to adoption as law - the time it takes a child to grow from birth to adulthood under the current law. It should be noted that this Act is still not in force due to the regulations currently being drafted. In addition, currently and even more so in terms of the envisaged expanded mandate of the Office of the Ombudsman, sufficient staffing and financial resources remain cause for concern.

It is noted that the recruitment of a dedicated Children's Advocate within the Office of the Ombudsman is a positive and welcome move.

### Recommendations:

#### The State Party should:

- i) Attend to the promulgation of the amendments to the Ombudsman Act as a matter of urgency;
- ii) Ensure that the Office of the Ombudsman is provided with adequate financial and human resources in order to fulfil its mandate, both now and after the amendments come into force.

**b. Non-discrimination, equal rights of men and women and the right to life (arts. 2, 3, 6 and 26)**

**Issue 3:** *Please indicate whether the State party has undertaken a review of its legislative framework with a view to eliminating discriminatory legal provisions and to ensuring that a comprehensive non-discrimination regime is in place. Please respond to allegations that the prohibitions against discrimination are not effectively enforced and that women in particular are faced with discrimination in areas such as credit, pay, owning and/or managing businesses, education and housing.*

**Comments from Civil Society**

In paragraph 13 of the State party's response, it notes that one of the specific objectives to be achieved under the National Human Rights Action Plan (NHRAP) for the non-discrimination theme is "to enhance affirmation of the rights of people with disabilities, indigenous people, women and LGBTIs". The recognition of discrimination on the basis of sexual orientation in this statement is to be congratulated. In paragraph 14, the government states that "to protect above groups from discrimination", new legislation will be developed to prohibit certain specific forms of discrimination and hate speech, with enforcement to take place in accessible equality courts. However, discrimination on the basis of sexual orientation is excluded from the list and, in line with the government's statement in paragraph 13, should not be neglected. It is also not clear that attention to non-discrimination on the basis of race will adequately cater for all discrimination against marginalised indigenous persons, who are mentioned in the NHRAP.

According to section 10.2 of the NHRAP, key concerns in respect of the vulnerable LGBTI community include "the continued criminalization of sodomy, the omission of sexual orientation as a prohibited ground for discrimination in the work place, the continued criminalization of sex work and how it impacts the right to fair/just and safe work conditions, continued insensitivity by the Namibian police of the plight of LGBTIs, and the lack of extensive research on LGBTIs' human rights situation. Further concerns include discrimination, violence and punitive acts against homosexuals by the police and the lack of facilities to cater for LGBTI needs, especially in detention facilities or holding cells." The recognition of these problems is commended, and remedial measures should be put into place.

The decriminalisation of sodomy should be prioritised. Homosexuality itself is not illegal in Namibia, but sodomy and certain other sexual acts between consenting adult males are criminal offences. Even though these crimes are seldom if ever applied in practice, their existence has a negative impact on the LGBTI community and contributes to discrimination against that community. Namibia's Combating of Rape Act defines rape as including a wide range of sexual acts in circumstances that involve force or coercion, so the crimes of sodomy and unnatural sexual offences are now relevant only to sexual acts between consenting adult men.

Sex workers are another vulnerable group. The laws against public solicitation seldom lead to actual criminal charges but do serve as a basis for police harassment, prevent sex workers from seeking protection against abusive clients, make it harder to target sex workers for HIV-related health interventions, and force sex workers to work in hidden and dangerous environments. Although such a measure is likely to be controversial in some sectors of Namibian society, a serious discussion on the way forward to protect sex workers against abuse and discrimination should be initiated by government.

In respect of replying to the allegations that prohibitions against discriminatory practices are not effectively enforced and that women are in particular being discriminated against in areas such as credit, pay, owing and/or managing businesses, education and housing, the State party has unfortunately failed to respond. In the view of civil society these allegations remain a true concern.

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### Recommendations:

#### The State Party should:

- i) Ensure that discrimination and hate speech against indigenous persons and LGBTI persons are fully covered in the proposed law reforms on discrimination, hate speech and equality courts, in line with Namibia's existing NHRAP;
- ii) Consider the inclusion of discrimination on the basis of HIV status and on the basis of involvement in sex work in any such proposed law reforms;
- iii) Ensure that the NHRAP is meaningfully implemented by all relevant government Ministries and agencies, by means of law reform as appropriate;
- iv) As part of the effort to combat discrimination against the LGBTI community, abolish the common-law crime of sodomy, which is relevant only to consensual sex between adult men and is seldom if ever applied in practice;
- v) Open public discussion on the possibility of decriminalising sex work, and on other measures which could be implemented to protect sex workers against abuse and discrimination;
- vi) Consider measures to encourage LGBTI persons to access public facilities without fear of being discriminated and/or victimized;
- vii) Urge government representatives to refrain from using discriminatory language against LGBTI people; government officials should be educated to be sensitive to all minority groups;
- viii) Consider measures to make it easier for members of minority groups, particularly LGBTI persons, to report cases of rape, abuse or denial of access to state facilities, without victimization, accompanied by sensitization of service providers – and particularly the police;
- ix) Consider measures to provide people with disabilities an easier and safer way to obtain and approach public facilities without requiring personal assistance as far as possible;
- x) Motivate and encourage the other stakeholders identified in the National Human Rights Action Plan of the Ombudsman, to become actively involved in the implementation thereof and to provide target dates and specific actions to achieve meaningful implementation.

**Issue 4:** *Please indicate the measures taken to encourage the registration of customary marriages, as requested by the Committee in its previous concluding observations (para. 9). In view of information provided in paragraph 20 of the State party's report, please specify the measures taken to eliminate legal and cultural discrimination faced by women married under customary law. Please provide the Committee with updated information on the status of the enactment of the Bill on Recognition of Customary Law Marriages. In the absence of any enactment of the bill, please report any measures taken to combat polygamy. Please specify whether and how implementation of section 26 (2) of the Communal Land Reform Act, 2002 (Act No. 5 of 2002) is monitored, particularly in the light of reports that traditional practices that permit family members to confiscate the property of deceased men from their widows and children continue. Please also indicate whether there is any intention to outlaw Native Administration Proclamation 15 of 1928, still implemented in northern Namibia, and according to which one is automatically married out of community of property unless a 30-day notice is given expressing the wish to be married differently, and which has frequently led to the disinheritance of widows.*

### Comments from Civil Society

A bill on the Recognition of Customary Marriages was published by the State party's Law Reform and Development Commission (LRDC) in 2004, followed by public consultation on this proposed law reform alongside a range of related family law reforms – but this urgently-needed bill does not seem to be moving forward. It is true that consultation has been continuing, but consensus on this issue may not ever be



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reached, and there is a need to push this Bill forward. Concerns arising under the current laws include the lack of a system of documentation and proof for customary marriages, concerns about abuse of the customs of polygamy and bride price, grounds for customary divorce which discriminate between men and women and customary divorce procedures which are inadequate to protect women and children.

It is indeed the case that in the case of *Berendt v Stuurman* 2003 NR 81 (HC) the High Court declared sections 18(1) and 18(2) of the Native Administration Proclamation 15 of 1928 as well as the regulations made under section 18(9) unconstitutional. However, the statement in paragraph 18 of the State party's reply to the List of Issues that "The court further held that the common law rule did indeed become invalid and unconstitutional on 21 March 1990" is incorrect. In fact, the High Court held as follows:

“1. Sections 18(1), 18(2) and 18(9) of the Native Administration Proclamation 15 of 1928 (the Proclamation) and the regulations made under s 18(9) thereof are declared to be in conflict with the Constitution of Namibia. Parliament is required to remedy the defect by 30 June 2005.

2. Until the defect is remedied, or until the expiration of the time set by this order, whichever be the shorter, ss 18(1) and 18(2) of the Proclamation and the regulations made under s 18(9) of the Proclamation shall be deemed to be valid.”

The time period for addressing the constitutional defect was extended to 30 December 2005 by *Government of the Republic of Namibia v The Master of the High Court & 3 Others*, case no 105/2003. Parliament addressed the problem in the Estates and Succession Amendment Act 15 of 2005. That Act repeals subsections (1), (2), (9) and (10) of section 18, but astonishingly provides as follows in section 1(2):

“Despite the repeal of the provisions referred to in subsection (1), **the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force** in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed.”

Civil society asserts that this constitutes bad faith on the part of Parliament and makes the “repeal” of the race-based rules meaningless by continuing to apply the same race-based rules to the same groups of people despite their technical “repeal”. A draft Intestate Succession Bill has been published by the LRDC. This draft would create one set of rules on intestate succession for all persons, and also includes welcome provisions aimed at preventing property-grabbing. It should be moved forward as soon as possible, to provide a realistic answer to the issue which was avoided by Parliament in 2005. Public consultation is welcome, but law reform on succession has been under discussion for a great many years now and consultation cannot continue indefinitely.

There are also a number of cases reported in the media in terms of which children under the age of 18 are being coerced by parents into marriage under customary practices. It is CSO's concern that the parents that consent to these marriages will not be reported therefore not be held accountable according to the Child Care and Protection Act once it comes into force. In order to make the relevant provisions of the Child Care and Protection Act effective, there is a need for an intensive publicity campaign and efforts to involve traditional leaders. It should also be noted that Namibia's Combating of Rape Act criminalises rape within marriage, and this could be applied to a coercive child marriage along with the relevant provisions of the Child Care and Protection Act.

### Recommendations:

#### The State Party should:

- i) Prioritise finalisation of the Recognition of Customary Marriages Bill to ensure that customary marriages are registered and recognised as marriages for all legal purposes, that the grounds and procedures for divorce contain no sex discrimination, and that there is sufficient protection for women and children in divorce proceedings;

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- ii) Prioritise finalisation of the Intestate Succession Bill to create one set of rules on intestate succession for persons of all races and to provide improved protections against property-grabbing;
- iii) Urgently enact a law reform to remove the race-based rules which create different default marital property regimes for persons in some parts of Namibia;
- iv) Ensure meaningful enforcement of the rules on child marriage in the Child Care and Protection Act (which should soon be in force) by providing for a public awareness campaign and training of relevant service providers on this issue;
- v) Prepare the way for effective implementation of the Child Care and Protection Act by continuing sensitization of traditional authorities on the rights of women and the guarantee of non-discrimination- this will also assist in the effective implementation of the bills still to be finalised as previously referred to herein;
- vi) Address the weaknesses in the Communal Land Reform Act 5 of 2002 which delay appeals in order to strengthen its impact in addressing discrimination against widows and children.

**Issue 5:** *The ruling *Lotto Frans v. Inge Paschke and others*, case No. (T) 1 1548/2005, declares it unconstitutional to prohibit children born out of wedlock from inheriting and indicates that “by design or result, the social stigma which attached to adulterous and incestuous children was transferred to children born out of wedlock”. With reference to this ruling, please elaborate on the treatment of children born out of adulterous or incestuous relationships, in particular on whether they experience discrimination in inheritance and which measures are in place to combat de jure and de facto discrimination and stigma.*

### Comments from Civil Society

Civil society agrees with the government’s statement on the court ruling and the legislative enactments which remove discrimination against children born outside marriage in respect of inheritance, noting that the relevant provisions of the Children’s Status Act 6 of 2006 will soon be replaced by similar provisions in the Child Care and Protection Act 3 of 2015 which is expected to come into force later this year. However, on the ground, there are unofficial reports of cases where such children are being victimized and denied their right to inherit. There is a lack of data in this regard, as such cases often go unreported. There are improved provisions in the Child Care and Protection Act for reporting guardians who do not act in a child’s best interests. The legal provisions in place to protect the inheritance rights of children born outside marriage need to be more widely publicised.

### Recommendations:

#### The State Party should:

- i) Consider measures to educate, promote and enforce the rights of children born outside of marriage especially with regard to customary practices and amongst customary and traditional leaders.

**Issue 6:** *Please provide information on steps taken to combat and prevent societal stigma and discrimination against persons living with HIV/AIDS, including in employment. Taking into consideration that women are disproportionately affected by the pandemic, both as patients and as caregivers for HIV-positive persons, please indicate whether any specific measures for protecting and supporting women are in place. Furthermore, please comment on reports that the practice of forced or coerced sterilization of women living with HIV/AIDS is ongoing, and provide information on the measures taken to ensure that the guidelines regarding informed consent set out by the courts in *LM and Others v. Government of the Republic of Namibia* are always implemented. Furthermore, in relation to the Committee’s previous concluding observations (para. 10) and the information provided in paragraph 32 of the State party’s report, please describe the steps taken to further increase access to antiretroviral treatment.*

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### Comments from Civil Society

We have to commend the State party on its active involvement in combating HIV /AIDS and the measures it has already taken. Despite these measures and the great impact it has had the State party seems to fail to acknowledge the root cause and problem areas for the spread of HIV and for example continue denying access to condoms in prisons<sup>6</sup> for fear of promoting “immoral practices” like sodomy, denying LGBTI sexual orientation and public services without prejudice, also continue to justify non recruiting of HIV positive persons into public services such as the police, the Defence Force and not making any objection to the fact that some foreign countries will only provide scholarships to Namibians to facilitate studies in such country on condition that they are not HIV positive.

In respect of the forced sterilization cases heard in the High Court of Namibia, the court provided guidelines for informed consent to be obtained prior to an operation such as sterilization. Formal guidelines are still to be developed by the state in consultation with CSOs. In the interim, the state hospitals have now put in place the obligation by women who wish to undergo sterilization to provide them with an affidavit setting forth their desire to undergo the said operation. This is again discriminatory against women who need to undergo emergency operations and/or sterilizations who now need to go to the police and make statements before such operation can take place. This is unrealistic in terms of emergency operations. Reports from CSOs working in this area suggest that in some cases husbands are also required to approve the sterilization which would be a denial of such women’s right to privacy and physical integrity.

As mentioned above, the Ministry of Safety and Security and the Namibian Defence Force still continue discriminating against people living with HIV in terms of denying such applicants any employment. This denial of employment is based on their policies and encouraged due to the fact that they are not held accountable under the Labour Act in so far as discriminating on the basis of HIV is concerned. In light of the newly modified medication available, HIV is not a life threatening disease and the Ministry of Safety and Security as well as the Defence Force should be encouraged to rethink their intake process.

The list of CSO’s referred to as working with the state in paragraph 40 of the state’s response to the List of Issues is outdated – some of these organizations are either nonexistent or have changed names.

### Recommendations:

#### The State Party should:

- i) Consider what is the most practical way to combat the spread of HIV and AIDS without becoming morally biased, including by providing and promoting the use of condoms for instance in places like prisons, where sex is an undeniable fact, in particular sex between male persons, as well as providing education and awareness raising on the rights not to be discriminated against on the basis of sexual orientation;
- ii) Consider rethinking the way to obtain statements from women who wish to undergo sterilization and other operations so not to violate their right to privacy or their right to access health;
- iii) Expedite the development of the formal guidelines for informed consent to a medical procedure;
- iv) Investigate cases of coerced sterilisation and provide redress,<sup>7</sup> such as reversal procedures where possible, to those women who have been sterilised without their consent, including cases which cannot be brought before a court for reasons of it being prescribed in terms of civil law;
- v) Consider forcing the Ministry of Safety and Security and Namibian Defence Force to discontinue HIV testing for purposes of recruitment;

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<sup>6</sup> It was reported in a daily newspaper that the Windhoek Correctional Facility affirmed that condoms could not be distributed since it would be encouraging criminal activity - *The New Era*, 16 February 2016. This was in response to a previous report that the Minister of Health has called for the supply of condoms in correctional facilities.

<sup>7</sup> The LAC reports that negotiations with the Office of the Government Attorney are ongoing.

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- v) Reconsider the relations with foreign countries that provide scholarship opportunities in their countries only for Namibians who are not HIV positive.

**Issue 7:** *Please provide detailed information on the procedure to be followed in order to access abortion, and comment on reports according to which obtaining approval for abortion requires cumbersome administrative procedures. Please also comment on reports according to which a high number of girls and women resort to unsafe abortions and on the frequent incidents of killings or abandonment of babies and infants. Please elaborate on the measures taken to provide support to young and/or single mothers and protect them from discrimination and stigmatization. In view of the above, please indicate whether there is any intention to amend the law on abortion to facilitate access to the same. Furthermore, please indicate whether there are plans to legalize access to contraceptives by persons under 18 years of age and please describe measures to disseminate information about contraception methods and to promote sexual and reproductive health education among adolescent boys and girls.*

### Comments from Civil Society

The Government has not elaborated on the cumbersome procedures to be taken before acquiring a legal abortion in the case of a pregnancy resulting from a rape, where there must additionally be a certificate from a magistrate. The process of obtaining all the required permissions can delay the process past the first trimester of the pregnancy, with negative health consequences for the women in question. The existing requirements and procedures are not just cumbersome but are also a violation of the women's right to make decisions about her own body.

The provision on access to contraceptives was removed from the Child Care and Protection Act before it went to Parliament. It is an open question as to whether the right to consent to medical interventions at age 14 which remains in the Child Care and Protection Act might include access to some forms of contraception. But there is no conflict with any other law, as the "age of consent" referred to (from the Combating of Rape Act) applies only *where the other party is more than 3 years older* – sex between children of similar ages is not criminalised under any law (because it is not clear in this case that anyone is exploiting anyone else), and access to contraception could prevent teen pregnancy.

The youth need to be educated about contraceptives and pregnancies. The hospitals and state facilities are not youth friendly and do not encourage sexually active teenagers to approach them for guidance. (The NGO Nappa does provide more youth-friendly clinics, but is not able to provide these services throughout the country.) In this regard it is recommended that all schools should have comprehensive life skills programmes which address things like pregnancy, birth control, sexually transmitted infections (STIs), sexual and reproductive rights. Churches should also be encouraged to become involved in educating teenagers on the prevention of unwanted pregnancies.

Although there are no national statistics on the incidence of illegal abortion, anecdotal evidence suggests that many women resort to dangerous methods in attempts to induce abortion, and that some people are profiting from the dangerous and illegal sale of pills which can induce abortions. In September 2015, the Deputy Minister of Gender Equality and Child Welfare called for an extensive investigation into the illegal sale of abortion drugs following a string of reports of abortion drugs being sold since 2014. This was reported in the *Namibian* newspaper but the outcome of the investigation has not been reported.

### Recommendations:

#### The State Party should:

- i) Consider enacting a more liberal law on abortion, mindful of the fact that women with resources can get to neighbouring countries where abortion is legal – meaning that only poorer women face the dangers of illegal abortion methods;

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- ii) Sensitize health care providers in Namibia to provide non-judgmental access to contraceptives, and to support women who wish to terminate unwanted pregnancies in circumstances where this is legal – which may also curb the issue of baby dumping;
- iii) While the provisions in the Child Care and Protection Act providing for safe havens (where babies can be left anonymously in safe environments without fear of prosecution for child abandonment) the State party should supplement the new legal provisions with awareness-raising campaigns about safe havens, the promotion of alternatives such as foster care and adoption, counseling services for teens who are pregnant and a liberalized approach to legal abortion;
- iv) Consider revamped and comprehensive life skills curricula in schools to teach young learners about avoiding teen pregnancies and managing them if they do occur.

**Issue 8:** *With reference to the Committee’s previous concluding observations (para. 22), please indicate whether any legal amendments are intended to provide for protection against discrimination for lesbian, gay, bisexual and transgender persons. In particular, please indicate whether there is any intention to remove the “anti-sodomy” law, to reintroduce the prohibition of discrimination in employment based on sexual orientation or to include the protection of persons living in same-sex relationships in the Combating of Domestic Violence Act. Please respond to allegations that same-sex relationships are explicitly excluded from important legal provisions. Please also comment on allegations according to which many human rights violations against lesbian, gay, bisexual and transgender persons go unrecorded or are not prosecuted, such as the use of “corrective rape” against lesbian women, the disowning of lesbian, gay, bisexual and transgender children by their families and the beating of lesbian, gay, bisexual and transgender persons. In this regard, please also respond to allegations that, in the northern area of Oshiwambo, police have refused to prosecute the assault of a transgender woman by a group of men. Please describe which laws are in place to protect lesbian, gay, bisexual and transgender persons against hate crimes and which efforts the State party has taken to combat social stigmatization of persons on the basis of sexual orientation or gender identity.*

### Comments from Civil Society

See response to Issue 3 above.

It is additionally noted that the State party failed to respond to the issue of protection of persons living in same-sex relationships in the Combating of Domestic Violence Act. The Combating of Domestic Violence Act 4 of 2003 provides for protection orders in domestic relationships. These are court orders which direct the abuser to stop the violence and provide other protective measures as necessary. However, protection orders are not available in the case of violence between same-sex partners. The Act makes this restriction explicit; section 3(1)(f) of the Act states that a person is in a “domestic relationship” with another person (and so covered by the remedies in the law) if:

“they, **being of different sexes**, are or were in an actual or a perceived intimate or romantic relationship” (emphasis added).

### Recommendations:

#### The State Party should:

- i) Remove the restriction in the Combating of Domestic Violence Act 4 of 2003 to ensure that protection is afforded to persons living in same-sex relationships;
- ii) See further the recommendations under Issue 3 above.

**Issue 9:** *Please comment on reports according to which persons with disabilities are frequently excluded from society and deprived of their rights, including freedom of movement, the right to vote, access to justice, freedom to choose medical treatments, access to mainstream education and employment. The Committee would appreciate receiving detailed information on programmes and policies currently in place to provide*

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*support to persons with disabilities, and the resources allocated to these. In this regard, please also indicate whether any specific programmes and policies are currently in place to inform persons with disabilities on their rights and to provide them with support in exercising them. Please also elaborate on the measures taken to protect persons with disabilities from discrimination.*

### **Comments from Civil Society**

While Article 10 of the Namibian Constitution does provide broad protection for equality before the law, it does not mention disability specifically. This makes it particularly important that it be supplemented by specific legislative protections for persons with disabilities.

Although certain policies are in place according to the State party to afford support to persons with disabilities, the State party omitted to provide the relevant programmes currently in place and/or to be introduced in order to provide better support, or the financial resources available for these programmes.

Civil society is concerned that there are no enforcement mechanisms available that mandate newly erected buildings to cater specifically for people with disabilities. While it is understood that financial resources are a problem in respect of the restructuring of old public buildings, the state has not made it compulsory for newly-constructed public buildings to cater for people with disabilities.

Currently people with disabilities have limited access to education in so far as inclusive education is concerned, as well as challenges with accessibility to learning centres; educational curricula should be specifically designed to cater for the needs of the different disabilities, with accessible materials provided.

Despite the Affirmative Action (Employment) Act 29 of 1998, which makes specific reference to affirmative action to increase the number of people with disabilities in employment, this law is not being effectively applied to persons with disabilities in practice.

The State party has not answered the questions posed by the Committee on problems and discrimination faced by persons with disabilities.

Access to health care services remain a challenge for some persons with disabilities; for instance, facilities often lack staff with adequate ability to assist blind or deaf persons.

Access to public services remain a challenge because there is no appropriate infrastructure in most public buildings and no assistance readily available.

In prisons, people with some disabilities are not properly cared for or protected against physical, verbal or other abuse.

The concept of inclusive education suggests that people with disabilities and learning disabilities must be provided with the necessary facilities and material required to have equal access to education and learning opportunities, not just physical access to learning centres; inclusive education means providing blind persons with learning material that they can listen to and the deaf people with visual material that they can see so that such persons can be placed in a position to enjoy their right to education.

People with disabilities currently only have access to education until Grade 10. This is discriminatory due to the fact that Grade 10 does not provide a sufficient education to commence with most employment opportunities, or to be accepted at a tertiary institution.

Institutions which cater for persons with disabilities are not available in the whole of Namibia, but only in the urban areas, specifically Windhoek.

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More training should be provided to teachers on how to include people with disabilities, on the kinds of disabilities, and on ways of communicating with people with different disabilities.

### **Recommendations:**

#### The State Party should:

- i) consider creating awareness of the discrimination suffered by people with disabilities and promote their inclusion
- j) oblige newly erected buildings to have in mind proper planning so as to cater for people with disabilities and to ease their way around; also to encourage existing buildings to amend and/or incorporate facilities to assist people with disabilities;
- ii) consider the word “inclusion” and ensure that the individual needs of the specific disability is addressed; also to make available training to the educators on how to include people with disabilities and to reconsider the class size when children with disabilities are together with children that have no disabilities;
- iii) consider the promotion of progressive legislation in this regard.

**Issue 10:** *Please inform the Committee on the number of women currently employed in the public sector, including the number in high-level decision-making positions. Please provide detailed information on the differences in the employment rate of men and women, and the gender wage gap.*

### **Comments from Civil Society**

From the statistics provided by the state in terms of the percentage of women in managerial positions it is evident that women are still not on par with men in management in the public sector, suggesting that affirmative action on this issue has not yet achieved its desired outcome.

### **Recommendation:**

#### The State Party should:

- i) Consider mechanisms to ensure that more women fill managerial and executive positions in the public sector.

### **c. Violence against women, including domestic violence (arts. 2, 3, 6, 7 and 26)**

**Issue 11:** *Taking into account the results of the Namibia Demographic and Health Survey 2013, according to which 40 per cent of men and 35 per cent of women in Namibia believe it to be justified for a woman to be slapped by her partner for reasons such as burning the food, going out without permission or refusing to have sex, please inform the Committee on any measures taken to increase enforcement of the Combating of Domestic Violence Act. Please clarify whether the law provides for any mitigating excuses for violence taking place within a domestic relationship, and indicate whether there is any intention to prohibit the practice of paying lobola, which is used as justification to beat and mistreat wives. Please indicate the measures taken to increase the expertise among law enforcement officials, judges and prosecutors in recognizing victims of domestic violence and addressing the issue. Given that only magistrates may issue protection orders, please indicate whether any measures are being taken to ensure that each village, including areas where indigenous communities live, has a sitting magistrate or is within a reasonable distance of a sitting magistrate. Please indicate whether any steps have been taken to provide for the application of a protection order outside court hours or court days. Please inform the Committee on measures taken to combat so-called “passion killings”.*

### **Comments from Civil Society**

We have to commend the State party on all its activities undertaken to raise awareness of domestic violence, for enacting legislation and for the efforts made to implement the Combating of Domestic Violence

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Act. However there would appear to have been no decrease in the incidents of domestic violence, the murders of intimate partners and general violence against women and children which indicates that there is a need for additional measures to address this problem.

There seems to be inadequate application of the rules on bail in some instances, with persons who have committed repeated rapes or made threats to the victims who reported the GBV cases being released on bail when they actually pose a danger to society.

There are still a number of problems with the services provided by the GBV Protection Units, which do not consistently provide a sensitive response to GBV victims who attempt to report cases. Persons who report cases more than once are stigmatized as ‘problem cases’, with the victim being made to feel like the wrongdoer. Most do not have sufficient social worker services attached, and most do not have shelter facilities available for GBV victims.

It is telling that the State party’s response focuses primarily on reports of the 2nd National Conference on Gender Based Violence. Money and energy repeatedly spent on a huge national conference could better be spent on ensuring meaningful implementation of the existing conference recommendations, the National Plan of Action on GBV, and the laws which have been put in place to combat GBV.

The State party failed to respond to the concern about the accessibility and enforceability of the Combating of Domestic Violence Act in areas far from magistrates and police services. Circuit courts and community courts could be utilized in such instances.

In 2012 NAMPOL reported 1397 cases of rape and attempted rape, which is probably an underestimate of the actual extent of rape in Namibia, It is suspected that child rape – which consistently accounts for about one-third of all reported rapes over the last few years – is particularly likely to be underreported.

### **Recommendations:**

#### The State Party should:

- i) Increase outreach to men and boys in combating GBV;
- ii) Provide rehabilitation services for both victims and perpetrators of GBV and their families;
- iii) Increase GBV sensitization and training on GBV-related legislation in schools, incorporated to the life skills curriculum;
- iv) Focus on concrete implementation of the National Plan of Action on GBV rather than holding further national conferences;
- v) Make more use of specialised prosecutors who liaise closely with police to ensure proper consideration of bail issues and to increase conviction rates on GBV cases;
- vi) Improve the response of GBV Protection Units to victims and provide more shelters and support services to victims.

**Issue 12:** *Please inform the Committee on whether any measures have been taken to combat harmful practices against women and girls carried out in certain parts of the country, such as coercing girls to participate in their initiation into womanhood (sikenge); preparing girls for sex and testing their sexual readiness by making them have sex with their grandfather, uncle or brother (kutamunwa), including while they are asleep (mulaleka); stretching the labia minora (malebe); cutting and scarring young women’s bodies (kupaza/lipazo); drying out the vagina for “dry sex” (kuomisa busali/kukonyiwa inge ku omile); forcing a widow to have sex with one of her dead husband’s relatives during “widow cleansing” (kufwamena/kahoma); marrying a widow to the brother of her deceased husband; and removing growths (ku zwisa sijabana). Please indicate whether these acts are explicitly prohibited and criminalized and tried in*



*court (both civil and traditional courts). Please comment on reports according to which certain forms of female genital mutilation are occasionally practiced and indicate whether there is any intention to fully prohibit and criminalize female genital mutilation.*

### **Comments from Civil Society**

We do not agree with the State party's reply that there are no harmful practices being practiced in Namibia. Although the names of these practices may not be as suggested by the Committee, there are credible reports of harmful practices such as various sexual initiation customs. These practices are often condoned as being accepted under customary law. The Child Care and Protection Act 3 of 2015 (passed by Parliament but not yet in force) contains the following provision on harmful cultural practices:

#### **Harmful social, cultural or religious practices**

**226.** (1) A person may not subject a child to social, cultural and religious practices which are detrimental to his or her well-being.

(2) A person may not give a child out in marriage or engagement if such child does not consent to the marriage or engagement or is below the minimum age for marriage contemplated in section 24 of the Marriage Act, 1963 (Act No. 25 of 1961).

(3) A -

(a) child requires the consent of the minister responsible for home affairs in order to marry; and

(b) person below the age of 21 years also requires the consent of his or her parent, parents or guardian in terms of section 10(10) of this Act in order to marry.

(3) A person who contravenes subsection (1) or (2) commits an offence and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.

(4) The Minister may, after consultation with interested parties including traditional leaders, by regulation prohibit any social, cultural or religious practice, including but not limited to any form of sexual initiation, which, in the Minister's opinion, may be detrimental to the well-being of children.

(5) A regulation contemplated in subsection (4) may provide that any person who contravenes or fails to comply with a provision of a regulation, commits an offence and is liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

This is a laudable beginning, but it will require a great deal of effort to implement in practice. It must be remembered that it is often difficult for people – particularly children - to speak out about such issues for fear of rejection by community and family. Therefore, intensive awareness-raising and the support of traditional authorities will be necessary to implement this provision meaningfully.

There are currently no statistics available on how many women and girls are subjected to harmful social and cultural practices.

### **Recommendations:**

#### The State Party should:

- i) Embark on intensive education awareness-raising in targeting communities on harmful cultural practices and their rights in this regard, and on the links between such practices and GBV, public health, the spread of HIV;
- ii) Sensitise police and magistrates to the ways in which specific harmful practices may constitute rape or domestic violence as well as contravention of the Child Care and Protection Act (once it comes into force), and provide support for victims who attempt to speak out about such violations.

**Issue 13:** *In relation to information provided in paragraph 63 of the State party's report, please describe the measures taken to investigate allegations of rape. Also according to this information, a significant number of rape victims withdraw their court cases to receive compensation from the accused, because they succumb to family pressure, shame and threats or because they are discouraged by the length of time involved in prosecuting alleged perpetrators. Therefore, please indicate the measures in place to provide support and protection to victims of rape and domestic violence, including increasing the number of shelters and protection units for women and children. Please provide statistical data on sentencing in rape cases, disaggregated by the number of cases heard by court, the type of court (civil or traditional) hearing the case, the sentences imposed, the number of defendants acquitted and the number of rape allegations withdrawn. Please elaborate on the conditions that have to be met for an employee who leaves his or her job owing to sexual harassment to be entitled to "remedies available to an employee who has been unfairly dismissed", and indicate the number of cases where these remedies have been awarded.*

### **Comments from Civil Society**

The State party has indicated the relevant provisions of the Combating of Rape Act and outlined a number of factors that hamper the successful conviction and sentencing of rape violators, but without indicating measures to reduce these limiting factors.

Data on attrition and conviction rates in rape cases was published by the Legal Assistance Centre in 2006 (based on a national sample of court files), but there is no indication that government regularly compiles or releases such data, which make it impossible to monitor progress on these issues.

The Labour Act 11 of 2007 prohibits discrimination on a range of grounds and specifically addresses sexual harassment in the workplace (although omitting any mention of non-sexual forms of harassment which cannot be classified as discrimination). Sexual harassment cases are rarely reported, for fear of victimization and loss of employment. There are anecdotal reports of sexual harassment of women, including in the police force, Namibia Defence Force, the mining sector and construction industries, where some fear to report such incidents for fear of being seen as not being fit for a "man's job" or fear of further harassment and stigmatization.

The Labour Act 11 of 2007 envisages Codes of Good Practice for key workplace issues (section 137), but no Code of Good Practice on Sexual Harassment has been issued.

### **Recommendations:**

#### The State Party should:

- i) Compile and release regular statistics on prosecutions, withdrawals and convictions in rape and other GBV-related criminal cases; put into place victim support measures to discourage case withdrawals;
- ii) Consider effective mechanisms to implement the protections against sexual harassment in the workplace, and ensure that the victims thereof are provided with adequate complaint mechanisms and appropriate protection after making such complaints.

#### **d. Right to life and prohibition of torture and cruel, inhuman or degrading treatment or punishment (arts. 6 and 7)**

**Issue 14:** *Please provide updated information on the content and the adoption of the bill on the crime of torture and please indicate the bill's definition of torture. Please inform the Committee about cases where a court has declared evidence inadmissible according to article 12 (1) f of the Constitution. Please comment on reports alleging the use of excessive force as well as unlawful or arbitrary killings by the police, and on*

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*reports according to which members of the police regularly detain sex workers and coerce them to have sex with them before release. Please indicate whether there have been any cases where a police officer has been convicted of torture, including rape and/or murder. With reference to paragraph 41 of the State party's report, please specify the safeguards in place to ensure the independence of the Police Disciplinary Unit, and, with reference to paragraph 144 of the report, please describe the safeguards in place to ensure the independence of the Internal Investigation Directorate of the Police.*

### Comments from Civil Society

It is noted that the Prevention and Combating of Torture Bill will be tabled in parliament during early 2016. It is correct that evidence obtained via torture was declared inadmissible in the Caprivi treason cases and could therefore not be utilized against such accused. What is concerning, however, is that there has been no indication that the Office of the Prosecutor-General will launch an investigation into the identity of the perpetrators (be they police force or defence force members) and certainly no confirmation that the perpetrators will ultimately be criminally charged.

The Legal Assistance Centre still documents cases of excessive force and abuse of power by the police force, the most recent referring to the physical assault of a client by 9 police officers following an allegation made against client that he had stolen a laptop. The allegation was subsequently withdrawn and client was never criminally charged. The Legal Assistance Centre has another open case in its records relating to the killing of a youth by police officers in 2014.

During 2013 there were continuous reports from a San women's grassroots group about the abuse of powers by police officials in Omega 1, in the Zambezi Region. A charge of rape was also laid against one of the police officers. This charge was later withdrawn ostensibly because of a fear of reprisal given that the police officer had access to the complainant in her hospital room where she was allegedly threatened. It is conceded that the Internal Investigation Directorate initiated an investigation and indeed a response was received from the Office of the Regional Commander in the Zambezi Region.<sup>8</sup> It appears though that no proper follow up was done since the recommendation by the Regional Commander that the accused police officer be transferred has not been implemented with the community confirming that he is still stationed at Omega 1. In addition, the Regional Commander recommended an awareness campaign be held at Omega 1 police station to make it clear what is expected from a police officer *vis a vis* the public. The community reports that they are not aware of any such training or campaign taking place.

There is anecdotal evidence that police officers abuse their powers in relation to sex workers with reports in the media suggesting that sex workers are arrested and only released once they have sex with the arresting officer.<sup>9</sup>

The use of corporal punishment in some schools continues despite the fact that its use is prohibited by the Education Act 16 of 2001. The Legal Assistance Centre has received requests for help from parents and sometimes directly from children who are being beaten at school. Text messages complaining about the use of corporal punishment at specific schools are regularly published in the national newspapers as sent in by parents or learners.

### Recommendations:

#### The State Party should:

- i) Expedite the promulgation of the Prevention and Combating of Torture Bill and ensure that prosecutors and the police force are provided with training in order to properly administer the Act;
- iii) Ensure investigations are carried out into reports of human rights violations by the police and that

<sup>8</sup> By letter dated 22 November 2013.

<sup>9</sup> One such report: "Sex workers spill the beans" Namibian Sun 23 October 2013.

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police officers are held accountable for such violations through disciplinary and criminal proceedings meeting international human rights standards. This would apply equally to members of the municipal City Police force;

- iv) Initiate an investigation by the Internal Investigation Directorate or another independent body to establish the identity of the perpetrators (police or defence force) accused of torture in the Caprivi treason trial and subsequently suspend and ensure that perpetrators are brought to justice in a fair trial;
- v) Ensure police respect and protect the rights of all individuals irrespective of their profession, sexual orientation, sex or any other ground of discrimination, including through continued and concerted human rights training of police officers;
- vi) Elicit public opinion around the proposed decriminalisation of sex work with a view to considering the decriminalisation of same;
- vii) Make public statistics relating to the matters investigated by the Internal Investigation Directorate and the results of such investigations;
- viii) Consider whether an independent body is required to replace the Internal Investigation Directorate. Dependent on the results of such investigation, this could be the Office of the Ombudsman if decentralized and sufficiently resourced;
- ix) Ensure better enforcement and more proactive action to consolidate the prohibition of corporal punishment at schools.

In addition, civil society wishes to raise the following further concern:

The State party has failed to adequately address the issue of transitional justice and so redress human rights abuses of the past. The fate and whereabouts of the estimated number of 4000 Namibians who disappeared at the hands of the then liberation movement, now the ruling party, SWAPO, remains unknown. The families live in trauma and uncertainty and are denied the right to know the truth about the fate and whereabouts of their loved ones. There are also practical concerns relating to the inability to settle important legal issues dealing with inheritance, property and marital status. The inability to obtain information about their loved ones aggravates their trauma and is submitted to be a form of continuous torture and denial of their right to know the fate and whereabouts of their loved ones. In addition, the survivors continue to be discriminated against and are unable to equally and fairly benefit from the programs that are designed to assist the war veterans.

### **Recommendations:**

The State party should:

- i) Investigate the fate and whereabouts of the missing persons who disappeared while under SWAPO's care in exile;
- ii) Take responsibility for and provide remedies for the SWAPO ex- detainee question;
- iii) Create a platform for national dialogue on establishing the truth about past rights violations and so promote healing.

### **e. Elimination of slavery, servitude and forced labour and measures to protect minors (arts. 8 and 24)**

**Issue 15:** *With reference to paragraph 130 of the State party's report, please inform the Committee on measures taken to prevent and punish the use of child labour, and provide statistical information on child labour. Please also clarify whether children between 16 and 18 may legally work under harmful and/or hazardous conditions. Please explain the reason for the lack of any institution mandated to implement and*

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*enforce child labour laws and indicate whether any legal reforms are intended to facilitate access by labour inspectors to private farms. Furthermore, please comment on reports according to which farm workers on communal farms and domestic workers, mainly women and children, are frequently subjected to insufficient compensation and prolonged working hours as well as corporal punishment. Please comment on reports that the State party is a country of origin and destination for children and women subjected to forced labour and trafficking, and report on the current anti-trafficking legislation and on the measures in place to improve early identification of, as well as assistance to, victims of trafficking and other forms of related exploitation, and please indicate whether any trafficking offenders have been convicted.*

### Comments from Civil Society

It is correct that the Ministry of Labour and Social Welfare is tasked with the oversight of the Labour Act and its regulations and that the current Labour Act indeed has provisions aimed to protect children against harmful work. However, the problem would appear to be in the implementation of this oversight function. Reports obtained from grassroots civil society organisations indicate that children still work under harsh conditions, in many instances not attending school, and that the labour directorate is insufficiently staffed to properly monitor and enforce compliance with the law.

This would also apply to the situation of farm workers and domestic workers. Although Namibia has legislation setting out minimum wages in these two cases, reports from grassroots CSOs indicate that these are not always complied with and sanctions are not enforced against the offending employees. It must also be noted with concern that the minimum wage legislation has resulted in a number of employees losing their employment due to an inability or unwillingness by some employers to abide by this legislation.

From the information available to the Legal Assistance Centre, there have been a few isolated cases of forced labour and trafficking, but no indication of links to organised crime. Studies have also turned up only isolated cases, many involving family members from other countries coming to Namibia and doing chores for food and board – sometimes exploitatively and sometimes not. It will be good to have a legal framework in place in order for any potential cases to be dealt with in a uniform manner.

### Recommendations:

#### The State Party should:

- i) Ensure that the Labour Directorate is sufficiently staffed and sufficiently resourced to adequately supervise and investigate all child labour issues, ideally creating a unit specifically trained and sensitized to deal only with child labour issues;
- ii) Provide annual reports by the Ministry of Labour and Social Welfare to all stakeholders, including civil society, on the situation of child labour, farm and domestic workers and detailing follow up on outstanding concerns;
- iii) Provide accessible avenues for farm workers and domestic workers for the reporting of violations and ensure protection against possible victimisation;
- iv) Expedite the proposed legislation relating to trafficking.

#### **f. Right to liberty and security of person, right to a fair trial and independence of the judiciary (arts. 9 and 14)**

**Issue 16:** *Please indicate the average length of pretrial detention and describe the measures taken to reduce its usage. In view of the State party's indication, in paragraphs 36, 40, 131 and 134-137 of its report, that every arrested or detained person must be brought before a magistrate or judicial officer within 48 hours where possible, please inform the State party of cases where it has not been possible to respect the 48-hour rule and please elaborate on the measures taken to ensure respect of the 48-hour rule at all times. Please*

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*also indicate whether any measures are envisaged, including an administration of justice policy, to combat the practical barriers to the enforcement of the right to appeal or review, such as delays in producing the transcripts of trials or undue delays in preparing the appeal/review records of proceedings by clerks. With reference to paragraph 146 of the report, please indicate whether the policy of separating pretrial detainees from convicted detainees is systematically implemented, and provide information on steps taken to promote the use of alternatives to pretrial detention such as protective measures, bail or electronic bracelets. Furthermore, please specify the number of persons currently detained under the Prevention and Combating of Terrorist Activities Act. With reference to paragraph 141 of the report, please provide detailed information on cases of unlawful arrests and/or imprisonments and compensation granted.*

### Comments from Civil Society

The Criminal Justice Forum referred to in the State party's report would appear to meet only on a sporadic basis. Pre-trial detention remains unacceptably lengthy, partly due to the length of time that it takes to investigate the matter. Judicial records confirm that many criminal trials currently in the courts relate to incidents of two or more years ago. In addition there have been reports of the courts not allowing postponements for further investigations when such investigations have been inordinately lengthy and this has resulted in a number of serious charges being withdrawn.

The 48 hour rule is indeed entrenched in our constitutional framework and the courts have confirmed this consistently in their judgments. There is a concern, however, that a number of towns do not have a permanent sitting magistrate which can cause delays in terms of the 48 hour rule. This is compounded by the challenges of ensuring that there are sufficient vehicles at all police stations to ensure that accused persons can be transported to a magistrate in good time.

There are practical barriers to the rights to appeal or review which are cause for concern. In the experience of the Legal Assistance Centre and a number of its clients, there continues to be an inordinate delay in preparing courts records for appeal to be used by appellants and no proper mechanism for them to expedite or enforce the preparation of the court record.

According to sources at the Office of the Ombudsman, trial awaiting and convicted detainees are kept separate at correctional facilities with a few isolated exceptions. However, accused who are convicted for a period of no longer than three months are for the most part returned to the police cells where they are kept together with trial awaiting detainees while serving out their sentence, which sentences are generally remanded to two months.

There is currently no utilization of electronic bracelets. Many accused are unrepresented due to a lack of a public defender's programme and are not able to properly formalize a bail request. There is insufficient effort to encourage magistrates to assist the accused in this regard. Where bail is granted, the sum is very often too high for the accused to pay, resulting in overcrowding in the holding cells.

There are currently no provisions accommodating persons with any kind of disabilities when coming into contact with the judicial system.

### Recommendations:

#### The State Party should:

- i) Ensure that dedicated participation in the Criminal Justice Forum is enforced and regularly reported upon to all stakeholders, including civil society;
- ii) Ensure that the police force is properly equipped to facilitate the transfer of an arrested person to a magistrate at all times;
- iii) Ensure the provision of a dedicated person at all courts to deal only with the preparation of the court records for appeal;

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- iv) Consider utilizing law graduates to act as public protectors in less serious criminal cases for a limited period of time after their admittance;
- v) Engage with magistrates and prosecutors to encourage them to consider bail in each and every case of an unrepresented accused and to assist such accused in understanding the procedure involved;
- vi) Engage with organisations assisting persons with disabilities in order to put in place a considered policy to properly accommodate persons with disabilities when coming into contact with the judicial system.

### **g. Treatment of persons deprived of their liberty (art. 10)**

**Issue 17:** *Please comment on the reportedly very poor prison conditions, in particular in pretrial holding cells, where detainees are allegedly faced with overcrowding, poor sanitation, the prevalence of tuberculosis and inadequate on-site medical assistance. Please also indicate whether any programmes are in place to prevent and address HIV in prisons, including the mandatory distribution of condoms, and whether there are any plans to introduce new programmes. With reference to paragraph 143 of the State party's report, please indicate the frequency of prison inspections by visiting justices. Please provide detailed information on the complaints mechanism and safeguards in place to ensure that complainants do not risk being subjected to reprisals. Please clarify whether complaints by inmates are inquired into solely on the occasion of prison inspections by visiting justices. Also with reference to paragraph 143 of the report, please indicate whether the Correctional Service Act, 2012 (Act No. 9 of 2012), replacing the Prisons Act, provides for any differences regarding prison monitoring and complaints mechanism, and indicate the reason why the Correctional Service Act has not yet been implemented. With reference to the Committee's previous concluding observations (para. 14) and paragraphs 42 and 144 of the report, please provide further detailed information on the mandate of the Correctional Inspector, how he or she will be chosen and the safeguards in place to ensure his or her independence. Please indicate whether any steps have been taken towards ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Please inform the Committee of any plans to develop alternatives to detention and whether there are any programmes to educate judges and prosecutors about alternatives to detention.*

### **Comments from Civil Society**

There appears to be a conflict with the statistics in paragraph 86 of the State replies relating to the Oluno Correctional Facility. The statistics do not reflect the reports of overcrowding presented from civil society sources in that the State party notes that their official bed capacity is sufficient but simultaneously reports overcrowding in 6 facilities.

It is reported that there are a number of vacancies relating to medical personnel in the correctional services. This understaffing also results in medical assistance not being consistently available within the facilities, 24/7. A court commissioned report prepared by the Legal Assistance Centre in 2011<sup>10</sup> on standards within the facilities indicated that while official menus and diets are balanced and reviewed, the reality is that the foods are not always available or provided. This is challenging in particular when certain foods are required for medical conditions and can have a detrimental effect on the response to HIV/AIDS.

Condoms are still not provided in correctional facilities due to the State party's stance that their provision will encourage the commission of a crime, namely sodomy. Anecdotal evidence suggests that desperate inmates use plastic bags to protect themselves instead.

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<sup>10</sup> S Ganeb v Ministry of Safety and Security and One other – case number A160/2011.

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There have been no reports in the media or otherwise of correctional services inspections by visiting justices. The Office of the Ombudsman conducts regular visits and we commend the recent visit to the Windhoek correctional facility by the current First Lady.

The Correctional Services Act 9 of 2012 was already promulgated on 1 January 2014.

The Ministry of Justice is in the process of rolling out community service orders as an alternative form of punishment for minor offences according to the reports to the access to justice monitoring committee under the National Human Rights Action Plan.

We recognize the efforts of the Correctional Services to move from punishment to rehabilitation and reintegration and the State party is encouraged to continue on this trend.

### **Recommendations:**

#### **The State Party should:**

- i) Make every effort to ensure that all vacancies for medical personnel within the Correctional Services is filled, and that they are tasked with monitoring the quality and quantity of food and the provision of medicine. Compulsory monthly reports to the Commissioner of Prisons should be effected;
- ii) Consider providing condoms in prisons for purposes of public health concerns;
- iii) Ratify the OP-CAT as a matter of urgency;
- iv) Expedite the roll out of community service orders and undertake a capacity building exercise amongst stakeholders. Government should ensure a bigger pool of supervisory bodies by making it attractive to supervise offenders.

### **h. Refugees and asylum seekers (arts. 6, 7 and 13)**

**Issue 18:** *Please respond to reports according to which the State party's Commissioner for Refugees, Nkrumah Mushelenga, stated to the press that "domestic refugee law does not have a provision granting refugee status for being gay". How does the State party ensure respect for the principle of non-refoulement where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated under articles 6 and 7 of the Covenant? Please inform the Committee whether the ruling in *Zhu v. Minister of Home Affairs and Another*, case No. 2004 NR 170 (HC), is systematically complied with. Please explain to the Committee the reason for requiring asylum seekers and refugees to reside in the Osire refugee settlement and indicate whether any steps have been taken towards providing them with full liberty of movement.*

### **Comments from Civil Society**

The State party correctly refers to the current applicable legislation, namely the Namibian Refugees Act No. 2 of 1999. There has been no official reply to the issue raised regarding the position of asylum seekers with a well-founded fear of irreparable harm based on their sexual orientation. The comment made by the State party's Commissioner of Refugees was made against the backdrop of an urgent court application against the summary deportation of a gay Ugandan male. The deportation was blocked by the court and subsequent negotiations ensured that the client is now a student in Canada.<sup>11</sup> It could be argued that currently the legislation offers protection to people who are threatened by imminent harm on the basis of being members of a "particular social group," which is defined in the legislation as one of bases for protection. Therefore, homosexuals are members of a "particular social group" entitled to asylum if they are persecuted for their sexual orientation.

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<sup>11</sup> According to Norman Tjombe, client's attorney of record.



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It is correct that the State party has entered a reservation in respect of the 1951 Geneva Convention which then requires refugees and asylum seekers to remain in Osire Refugee Camp unless they have specific permits to leave the camp. The assistance that the State party says it gives in the camp, can also be made available to refugees and asylum seekers outside the camp, be it by way of cash grants or vouchers. In addition, the ability to take on work would do much to restore dignity to those already bowed down by the injustice faced in the country they have fled and would also contribute to Namibia's economy.

### **Recommendations:**

#### The State Party should:

- i) Consider amending the Namibian Refugees (Recognition and Control) Act No. 2 of 1999 which stipulates the criteria and the grounds to be considered for asylum seekers in the country on an individual basis, by clarifying that a "particular social group" could include a group persecuted based on their sexual orientation;
- ii) Devise a system whereby refugees and asylum seekers can move freely within Namibia while still obtaining the requisite support.

#### **i. Fair trial and due process (art. 14)**

**Issue 19:** *With reference to paragraph 169 of the State party's report, please provide detailed information on traditional courts and cases heard by them. In view of the indication in paragraph 169 of the report that traditional courts adjudicate for compensation of the victims only, please clarify whether offenders receive any punishment. Please indicate whether there is a monitoring system in place to ensure that traditional courts systematically apply all applicable fair trial and due process laws and do not apply customary law that conflicts with the Constitution, other statutory laws or the Covenant. In relation to the information provided in paragraph 175 of the report, please provide information on the criteria for eligibility for legal aid, as well as on the functioning and financing of the legal aid system. Furthermore, please respond to allegations that many of the detainees in the Caprivi high treason case are prisoners of conscience, and explain how the "common purpose doctrine" is compatible with article 14 of the Covenant.*

### **Comments from Civil Society**

At a recent meeting of the Office of the Ombudsman's National Human Rights Action Plan's access to justice monitoring committee, there were reports of concern that the justices of the Community Courts are not sufficiently remunerated and that this should be addressed.

There is no automatic review of decisions made by the Community Courts to ensure that they are in line with the Constitution.

Government has omitted to provide the current financial ceiling for the means test for prospective applicants for legal aid. This stands at N\$2000 which means that anyone earning a monthly income of more than N\$2000<sup>12</sup> is excluded. This sum translates into Euro 112 at the current exchange rates. Taking into account the current prices of accommodation, food and other services, N\$2000 is considered to be a very low income and it is almost impossible to understand how one could survive on that monthly sum. Given that most legal firms require deposits of over N\$5000 before they take on any case, this effectively excludes access to justice for a large number of people.

According to the Office of the Ombudsman, the Legal Aid Directorate currently has a moratorium on divorce cases with the result that many women are precluded from escaping from abusive relationships.

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<sup>12</sup> The Director of the Legal Aid Directorate has the discretion to raise this to N\$2500.

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Government has not responded to the query relating to the compatibility of the “common purpose doctrine” with article 14 of the Covenant. Under this doctrine, all Caprivi detainees were equally charged on more than 130 counts, ranging from treason and murder to theft. This would mean that even if your only act was to provide fuel for a vehicle used in the attack, you too would be charged with treason, murder, etc. under the premises that your actions added to a common purpose. The provision of fuel was in fact the charge against one of the detainees who was subsequently acquitted after being incarcerated for some 15 years. It can therefore be argued that the common purpose doctrine may fall short of the rights contained in article 14 of the Covenant.

### **Recommendations:**

#### The State Party should:

- i) commission a full enquiry as to the current status of the Community Courts and their successes and failures including the need for an automatic review of all judgments;
- ii) consider more equitable ways of deciding whether legal aid is granted or not, in particular excluding assistance only on the basis of financial means, especially given the high levels of domestic violence;
- iii) strongly consider the utilization of night courts, small claims courts and traffic courts in order to deal with the backlog in the criminal courts;
- iv) consider the decriminalization of petty offences, including traffic offences;
- v) consider some form of *ex gratia* assistance to those Caprivi detainees found not guilty.

#### **j. Right to privacy (art. 17)**

**Issue 20:** *In relation to paragraph 185 of the State party’s report, please provide updated information on the establishment of interception centres provided for in part 6 of the Communications Act, 2009 (Act No 8 of 2009), and provide detailed information on the gathering and holding of private information under the Act or under any other laws. Please also indicate whether and following what procedure individuals have the right to ascertain what personal data concerning them is stored and for what purpose, and to request rectification or elimination of such data. Please indicate the remedies available to complainants of a violation under article 17 in such contexts.*

#### **Comments from Civil Society**

In its response to the List of Issues, paragraph 103, the State party incorrectly refers to Act 16 of 2009, whilst it is in fact the Communications Act 8 of 2009. It is conceded that part 6 thereof, providing for the interception of telecommunications, has not yet come into force. As background in order to place any concerns in context, it should be noted that while the Act was still in the form of a bill, it was labelled the “Spy Bill” by journalists and the general public. This may have prompted the State party’s National Council, which serves as the house of review, to conduct stakeholders meetings where input was requested and received from the communications industry, media practitioners, legal experts, academics and civil society prior to the Act coming into force.

While being appreciative of the State party’s consultations on this issues, the result was that despite concerns raised during the stakeholder consultations, part 6 was not removed from the final Act and although it is not currently in force, its inclusion in the legislation suggests that the State party intends for same to come into force in the future. There have been anecdotal reports of active interception of telecommunications. These include the tapping of telephones and “bugging” of offices. It is not possible to scientifically verify such reports.

The State party under paragraph 185 of its State Report states that interception centres are staffed by the Namibia Central Intelligence Service (NCIS) as designated by the Director-General. The use of the word “are”

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and not “will be” can cause the inference to be drawn that the interception centres are currently operational despite the enabling part of the legislation not yet having come into force.

It is noted that the Committee’s further questions pertaining to the type of information obtained, the individual’s right to access such personal information and possible remedies available, were not addressed by the State party under reply.

### **Recommendations:**

#### The State Party should:

- i) Make the public aware of the mechanisms put in place to ensure that violations of the right to privacy is independently investigated and prosecuted to the full extent of the law without fear or prejudice;
- ii) Conduct further stakeholders consultative meetings and consider civil society’s input on the issue afresh before the coming into force of Part 6 of the Communications Act 8 of 2009;
- iii) Further uphold Article 13(1)<sup>13</sup> of the Namibian Constitution, by amending the applicable legislation, to provide for the additional requirement, alternatively to make it abundantly clear that any interception of telecommunication shall only be justified where it is authorised by a competent judicial officer and a warrant is issued.

#### **k. Protection of the family, the right to marriage and equality of the spouses (art. 23)**

**Issue 21:** *With reference to the information provided in paragraph 211 of the State party’s report, please describe the safeguards in place to prevent child and forced marriages. Please provide detailed information on the procedure to be followed to obtain a divorce and indicate the grounds upon which a divorce may be granted. Please also elaborate on the amendments that might be introduced to the current divorce law according to proposed reforms. In view of the information provided in paragraphs 205 and 207 of the report, please comment on reports according to which the current law may trap spouses in dangerous marriages. Furthermore, with reference to paragraph 207 of the report, please clarify whether the divorce act does not apply to marriages of certain religions and traditional marriages. In this regard, please specify the difference, if any, between a “traditional” and a “customary” marriage. Please also respond to allegations that in some communities the size of a girl’s or a woman’s labia can be cited as a valid reason for divorce.*

### **Comments from Civil Society**

#### *Safeguards in place to prevent child and forced marriages*

The Child Care and Protection Act sets the minimum age for marriage at 18- the law already set this for civil marriage but not for customary marriage. The Child Care and Protection Act includes penalties for forced marriage or betrothal; the penalty is a fine of up to N\$50 000 or imprisonment for up to 10 years, or both.

#### *Procedure followed to obtain a divorce and grounds upon which a divorce may be granted*

Namibia’s current divorce law is an outdated system inherited from South Africa at independence. The current law is based on fault. This means that one spouse must prove that the other spouse did something wrong, usually some form of desertion or adultery. This approach does not fit well with reality, because the break-down of relationships is usually much too complicated to assign all the blame to one person. Another problem with the current law on divorce is that it is almost impossible for couples to get divorced without the help of lawyers, even if they are both in agreement about how to divide the property and take care of the children. This makes divorces expensive. Even though divorce cases are almost always settled without a trial, it is still necessary for at least one of the spouses to appear in person in Court. This can also add

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<sup>13</sup> “No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with the law.....”

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expense, especially for people who live outside of the capital city Windhoek. There are only four grounds for divorce currently recognised in Namibia; Adultery, Malicious/Constructive Desertion, Incurable Insanity and Declaration as a habitual criminal.

The proposed Bill would change the fault-based system of divorce. The new basis for divorce would be that the marriage itself has broken down beyond repair (“irretrievable breakdown”). The new law would give the court stronger powers to divide the property of the marriage, new powers to make sure that the arrangements made for the children of the marriage will protect the best interests of the child and it would simplify the divorce procedure in cases where the spouses have no real dispute about their divorce or the terms of the divorce. Divorce cases would still be dealt with by the High Court but the court would be able to finalise divorces without seeing either spouse in person if there were no concerns about the fair division of property or the well-being of any children involved. The proposed new Bill, however is, and has been, in bill form for a considerable period of time and it would appear not to be high on Namibia’s priority list. However it was listed as a possible bill that may be presented to Parliament in the 2016 sessions.

### **Recommendations:**

#### The State Party should:

- i) Raise and create public awareness on the changes to the law regarding child marriage, specifically focusing on traditional communities, through public outreach and liaison with traditional leaders;
- ii) Take all necessary steps to ensure that the Child Care and Protection Act comes into force without any further unnecessary delay;
- iii) Prioritize the Divorce Bill and take all necessary steps to ensure that it comes into force and effect without any further unnecessary delay.

### **I. Freedom of expression, peaceful assembly and freedom of association (arts. 19, 21 and 22)**

**Issue 22:** *Please clarify whether research projects are subject to authorization and, if so, please explain how this is compatible with article 19 of the Covenant. Please indicate whether there is any intention to withdraw the ban on political events on campuses of all government institutions of higher learning. Please comment on reports indicating that journalists working for State-owned media practice self-censorship, that there have been incidences of intimidation of journalists by members of the South West Africa People's Organization, a political party, and that freedom of expression may be impacted by political-party affiliation. In this regard, please elaborate on any efforts the State party has undertaken to ensure freedom of expression and freedom of the press.*

### **Comments from Civil Society**

#### *Research projects*

In paragraph 111 of the State replies to the List of Issues, the State party confirms that research projects are subject to authorization with the justification that this is for administrative purposes only and actually facilitates the research process. It is contended that a number of the provisions of the Research, Science & Technology Act 23 of 2004 and the Regulations are a violation of Article 19 of the Covenant. These provisions are unconstitutional and overbroad essentially requiring any potential researcher to apply for a research permit. In addition the application procedure is onerous and costly. The Legal Assistance Centre together with the Institute for Public Policy Research and *The Namibian* newspaper has made application to the High Court of Namibia to declare portions of the Act<sup>14</sup> as in direct conflict with the Constitution of Namibia. The State party has opposed the application and the matter is due for hearing in 2016.

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<sup>14</sup> In fact applicants suggest that the entire Act should be scrapped and redrafted anew.

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### *Academic freedom*

It is agreed that academic freedom is a fundamental freedom contained in the Constitution of Namibia. At the outset it must be said that provisions of the Research, Science and Technology Act referred to above clearly impact negatively on academic freedom.

The State party's reply to the Committee's question relating to the ban on political events on campuses of higher learning institutions appears to deviate from the question by referring to staff of the higher learning institutions and their internal policies relating to holding political offices. The State party's reply gives the impression that it maintains a hands-off approach and does not want to interfere with the policies in place.

Despite this impression given, it is civil society's understanding that the University of Namibia (UNAM) has historically been stricter with sanctioning dissenting voices towards the Swapo Party or Government on its campus than the recently renamed Namibian University of Science and Technology (formerly Polytechnic of Namibia). There is an indication that this may slowly be changing since in an interesting turn of events, in early 2016 UNAM appointed two academics (Job Amupanda and Dr Elijah Ngurare) who previously held high profile positions in the youth league of the governing party (Swapo Party of Namibia), to senior positions. The duo was expelled by the party in mid 2015, because they publicly and harshly criticised the party, top party cadres and its governance of Namibia (especially pertaining to the utilisation of the country's resources). The two expelled politicians (now academics and youth activists) together with two other Swapo Party youth league members expelled by the Swapo Party have taken the party to court to contest their expulsion. The case is currently being heard in the High Court of Namibia. It remains to be seen how UNAM will deal with the two academics after the court judgement. One of the applicants is a founder of the controversial Affirmative Repositioning (AR) movement which organised mass demonstrations on the land issue (especially urban land) and continues to keep the matter in the public domain.

### *Self-censorship of journalists at state-owned media houses*

At state-owned media houses it is not only the journalists who practice self-censorship, but also the top structure (editors, Director-Generals, etc). In a recent example of self-censorship the director-general of the Namibian Broadcasting Corporation (NBC), Stanley Similo cancelled a panel discussion an hour before it was to go on air. The live television show "Talk of the Nation" was scheduled to discuss the (dismal) state of Namibia's education sector and according to Similo was cancelled in order to avoid "stepping on people's toes" in a "politically sensitive time".<sup>15</sup>

It is also widely believed that the Namibia Broadcasting Corporation (NBC) cancelled certain popular phone-in radio programmes in 2009 (election year), because the callers were too critical of the Swapo Party politicians. Some phone-in programmes have been re-instated but have been re-named and come with stricter rules. Both the state-owned broadcaster (NBC) as well as the state-owned newspaper (*New Era*) from time to time venture out to accommodate divergent voices from the Namibian society. However, time and again they are being reigned in. Surprisingly, a well-known and outspoken academic, Prof. Joe Diescho has been availed space in the state-owned newspaper *New Era* which bravely publishes his weekly column "Diescho's Dictum" in which the author critically analyses conditions in Namibia and offers various remedies. It is posited that this column may have cost Prof. Diescho his employment with a state owned institution, Namibia Institute of Public Administration and Management (NIPAM). The newspaper bravely continues to publish "Diescho's Dictum" with the most recent publication of his column found in the *New Era* edition of Friday, 5<sup>th</sup> February 2016. It remains to be seen how long this will continue.

Prof. Diescho is not a member of any political party. He has refused to incorporate the Swapo Party election manifesto into the syllabi of NIPAM, which he headed at the time of his dismissal, because he believes that

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<sup>15</sup> See Namibian Sun, 28 Jan 2016, "Similo clarifies NBC's position"

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there should be a clear distinction between the State and the Party. Both Prof. Diescho and the four Swapo Youth League members who have been expelled by the Swapo Party as well as the AR movement are an example of citizens who have significant influence on the public opinion. Therefore their freedom of expression is punished.

In another example of incidences of intimidation by a member of the ruling Swapo Party, a Swapo regional councillor, Ambrosius Kandjii, barged into the studios of the NBC on August 13, 2013. Mr Kandjii verbally and physically attacked a producer, who was live on air, accusing her of being a “liar” and supporting the opposition party Rally for Democracy and Progress (RDP). He also insisted the radio station belonged to Swapo and not to the public.

In January 2012, Namibia’s former Youth Minister Kazenambo Kazenambo hurled racial insults and threatened to assault journalist Tileni Mongudhi of *The Namibian* newspaper during an interview.

In April 2012 prominent Swapo Party members, including former Minister of Information Joël Kaapanda and former Swapo Party secretary general (simultaneously Minister of Justice and Attorney General) Mrs Pendukeni Iivula-Ithana, threatened to delay or halt state funding to the NBC and state-owned newspaper *New Era*, claiming that the media outlets were not adequately supporting the government’s agenda and accommodating too many critical voices.

It is regrettable that Namibia has not replied to the Committee’s question relating to efforts undertaken by the State party to ensure freedom of expression and freedom of the press. The Constitution of Namibia guarantees freedom of the media, and Namibia’s press has enjoyed a relatively open environment. Although Namibia is internationally rated highly on media freedom, the Namibian Constitution is silent on access to information and currently there is no access to information legislation in Namibia. Instead, Namibia still operates under the apartheid era Protection of Information Act of 1984.

In practice public information is difficult to access by journalists and members of the public. Government employees find it difficult (or refuse) to distinguish between public information and information which is confidential. In 2008 the Office of the Prime Minister initiated a policy framework for the development of access to information legislation in Namibia but seven years later nothing has happened in this regard.

### **Recommendations:**

#### The State Party should:

- i) Review, declare as unconstitutional and remove all policies and legislation in conflict with academic freedom as contained in the Namibian Constitution, subject only to the sound interpretation of Articles 21(2) and 22 of the Namibian Constitution;
- ii) In recognising that politics play an important role in everyday life, clarify that campuses are open to political events, as long as there is no physical violence or destruction of property, no war-mongering and no incitement to violence or hate speech uttered;
- iii) Ensure that all higher learning institutions are accessible to all political parties or civil movements, whether registered with the Electoral Commission of Namibia or not;
- iv) Ensure the Namibian Broadcasting Corporation (NBC) respect the freedom of expression of all regardless of their political affiliations and that it operates in a non-partisan and non-discriminatory manner;
- v) Honour and implement the declaration: “Windhoek Declaration on Promoting an Independent and Pluralistic African Press (1991)” that it has signed, as well as various other African protocols, charters, conventions and guidelines pertaining to the media;

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- vi) Ensure all media houses in Namibia respect and adhere to the *Guidelines on Media Coverage of Elections in the SADC Region (2012)* as well as the *Southern African Broadcasting Association Guidelines and Principles for Broadcast Coverage of Elections in the SADC Region (2005)*;
- vii) Implement the policy framework for the enactment of access to information legislation;
- viii) Through the Office of the Prime Minister, set clear guidelines to be followed by all Ministries, Offices and Agencies of the State on how information of public importance held by the respective State institutions can be accessed by the public and the media.

### **m. Protection of children (art. 24)**

**Issue 23:** *With reference to the Committee’s previous concluding observations (para. 19) and paragraph 56 of the State party’s report, please provide updated information on the enactment of the Child Justice Bill. Please also provide updated information on the current status of the draft Child Care and Protection Bill. Please provide the Committee with further detailed information on the content of these bills and on the human, technical and financial resources that will be allocated to their implementation. In view of the indication in paragraph 56 of the report that the bill “revives a presumption that a child under ten years of age cannot legally be prosecuted for an offence”, please clarify whether there have been cases of children under 10 years of age who have been prosecuted for an offence. Please comment on reports that juvenile detainees share cells with adults and specify the number of special prison facilities for juveniles and the number of juveniles currently detained. Please also indicate whether the constitutional protection against detention under the age of 16 is always respected. Furthermore, please inform the Committee whether any steps have been taken to declare corporal punishment illegal in all settings, and to disseminate information on the harmful effects of corporal punishment and promote non-violent forms of discipline. Please respond to allegations that teachers in regions bordering Angola, Botswana, Zambia and Zimbabwe sometimes refuse to teach children who cannot provide proof of citizenship. Please also respond to allegations that teachers have turned away teenage mothers who wished to return to school. Furthermore, please provide information on any measures taken to ensure that every child is registered and receives citizenship.*

### **Comments from Civil Society**

#### *Updated information on the enactment of the Child Justice Bill*

The Child Justice Bill has still not been tabled in parliament. It is listed as a bill that may be tabled in Parliament in 2016.

#### *Updated information on the current status of the draft Child Care and Protection Bill*

Although Namibia states that the draft Child Care and Protection Bill was passed in Parliament and is now the Child Care and Protection Act 3 of 2015, it still has not come into force yet due to the preparation of the regulations. These are in their final stages and it is hoped that the Act will be brought into force in 2016. Civil society supports the decision to adequately prepare the regulations to allow for better implementation of the law.

#### *Further detailed information on the content of these bills and on the human, technical and financial resources that will be allocated to their implementation*

The Child Care and Protection Act 3 of 2015 in short will give effect to the rights of children as contained in the Namibian Constitution and international agreements binding on Namibia. The Act: sets out principles relating to the best interests of children; sets the age of majority at 18 years; provides for: the establishment of a National Advisory Council on Children; the appointment of a Children’s Advocate; the establishment of a Children’s Fund; the appointment and designation of social workers, social auxiliary workers, community care workers and probation officers; the designation of private social workers and child protection organisations for certain purposes; makes provisions relating to children’s courts, court procedures and court orders; provide for residential child care facilities, places of care and shelters;

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regulates the status and matters relating to certain children; provide for proof of parentage and parental responsibilities and rights in respect of children born outside marriage and children of divorced parents; regulates custody and guardianship of children on the death of the person having custody or guardianship; outlines parental responsibilities and rights, parenting plans and their formalisation; provides for kinship care of children; outlines prevention and early intervention services in relation to children; sets out measures relating to children in need of protective services; regulates foster care and the issuing of contribution orders; deals with the domestic adoption and intercountry adoption of children and the combating of the trafficking of children; includes additional measures for the protection of children; includes provisions relating to persons unfit to work with children; outlines grants payable in respect of certain children; creates new offences relating to children; repeals certain laws, including the Children’s Act, 1960, Children’s Status Act, 2006 and the Age of Majority Act, 1957; amends the Combating of Domestic Violence Act, 2003, the Combating of Immoral Practices Act, 1980, the Liquor Act, 1998, the Administration of Estates Act, 1965, the Marriage Act, 1961 and the Criminal Procedure Act, 1977; and gives effect to the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other international agreements binding on Namibia.

The Ministry of Gender Equality and Child Welfare has completed some technical and financial assessments for the implementation of the Act.

### *Cases of children under 10 years of age who have been prosecuted for an offence*

It is regretted that Namibia offers no reply to the Committee’s question relating to whether children under the age of 10 years are or have been prosecuted for an offence, and also whether the constitutional protection against detention for children under the age of 16 is respected.

### *Juvenile detainees*

While the State party reports that from the entire population there are only 2 juvenile offenders currently detained, it is respectfully denied that this is accurate based purely on the high amount of juvenile cases pending before the Namibian courts and the backlog of such cases. Data on file at the Legal Assistance Centre shows that in 2010, 319 juveniles were charged with criminal offences and in 2011, 281 juveniles were charged. According to a report published by the Namibia Statistics Agency, 18 juveniles were detained in 2014.<sup>16</sup> The reason why there has suddenly been a drop in the number of children in conflict with the law is not clear.

**Table 4.2 Age of offender at the time of Arrival**

| Age Group    | 2013       |              | 2014         |              |
|--------------|------------|--------------|--------------|--------------|
|              | Count      | %            | Count        | %            |
| <17          | 2          | 0.4          | 18           | 0.9          |
| 17 - 19      | 28         | 5.2          | 100          | 5.1          |
| 20 - 21      | 41         | 7.6          | 169          | 8.6          |
| 22 - 25      | 108        | 19.9         | 396          | 20.2         |
| 26 - 30      | 120        | 22.1         | 467          | 23.8         |
| 31 - 40      | 157        | 29.0         | 558          | 28.5         |
| 41 - 50      | 63         | 11.6         | 198          | 10.1         |
| 51 -60       | 17         | 3.1          | 47           | 2.4          |
| 61 - 70      | 5          | 0.9          | 3            | 0.2          |
| 71 +         | 1          | 0.2          | 3            | 0.2          |
| <b>Total</b> | <b>542</b> | <b>100.0</b> | <b>1,959</b> | <b>100.0</b> |

*Source: Ministry of Safety and Security.*

<sup>16</sup> Namibia Statistics Agency, *Namibia Social Statistics*, Namibia Statistics Agency, 2014 at 38.



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In the government report to the Committee that monitors the Convention on the Rights of the Child it stated that:

*...in 2009 the Elizabeth Nepemba Juvenile Detention Centre in Kavango Region did not receive enough juvenile inmates to justify full-time operation. It may therefore be modified for other purposes. Children who are incarcerated are put into special sections of the thirteen existing prisons around the country, where they are isolated from the adult population. These sections are staffed by officers who have received special training on dealing with juveniles. Currently, there is a preference for using local facilities to incarcerate children because in the majority of cases it makes it easier for family members to visit the child.<sup>17</sup>*

### *Corporal punishment*

The Education Act prohibits the use of corporal punishment in state and private schools. There was one recent case to test whether corporal punishment may be used in private schools. This case ruled that corporal punishment may not be used in private schools, although the case is on appeal. The Child Care and Protection Act will outlaw the use of corporal punishment at any registered facility which cares for children (including children's homes, shelters, crèches and day care centres), and in any form of alternative care where the child has been placed in terms of a court order (such as foster care or court-ordered kinship care). The use of corporal punishment as a sentence for crime or a disciplinary measure was prohibited by a 1991 court case; the Child Care and Protection Act provides further clarity by prohibiting usage of corporal punishment in police custody or prison.

The key principle is Article 8 of the Namibian Constitution, which protects human dignity and prohibits "cruel, inhuman or degrading treatment or punishment". In 1991, the Namibian Supreme Court found that Article 8(1) of the Namibian Constitution prohibits corporal punishment by any "organ of state", which would include government schools as well as the administration of corporal punishment to adult and juvenile offenders. This principle was established in the case of: *Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State* 1991 NR 178 (SC).

Civil society has worked to disseminate information on the harmful effects of corporal punishment and promote non-violent forms of discipline.

### *Teenage mothers who wished to return to school*

In 2009 Cabinet approved a policy from the Ministry of Education for the prevention and management of learner pregnancy. This progressive and flexible policy allows pregnant learners to attend school and allows new mothers to return to school, within a framework that focuses on the support and protection needs for mother and child. The policy also considers the role of the father if the father is a learner. The policy places a strong focus on the prevention of learner pregnancy and places an important recognition on flexibility – allowing each case to be dealt with according to the situation. The Ministry of Education has started to implement the policy but more could be done for better implementation; some people are still unaware of the new policy options whilst others do not fully understand the policy and the emphasis it places on prevention as the primary strategy to addressing the problem of learner pregnancy.

### *Registration and citizenship of children*

It must be noted and commended that the State party correctly states in its replies to the List of Issues the measures taken by the Ministry of Home Affairs and Immigration to ensure that every child in Namibia is registered upon birth.

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<sup>17</sup> *First, Second and Third Namibia Country Periodic Reports on the Implementation of the United National Convention on the Rights of the Child and Two Optional Protocols 1997-2008*, Windhoek: Ministry of Gender Equality and Child Welfare, [2009] at 76, footnote omitted.

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### Recommendations:

#### The State Party should:

- i) Table the Child Justice Bill in parliament without any further delay and take all reasonable steps to ensure that it comes into force and provide sufficient resources for implementation;
- ii) Ensure that the Child Care Protection Act comes into force without any further unnecessary delay by finalizing its Regulations and provide sufficient resources for implementation;
- iii) Ensure that juveniles are not detained with adults whether in holding cells or permanent cells by supplementing the current infrastructure to cater for juvenile detainees;
- iv) Make every effort to minimize the detention of juvenile offenders and rather provide for alternative methods of management;
- v) Through the Ministry of Education continue to expand its implementation of its policy on the prevention and management of learner pregnancy.

**Issue 24:** *In view of the significant number of children who have become victims of sexual violence or abuse, including child prostitution, please indicate the measures taken to combat this phenomenon. Please provide information on: (a) the number of such cases recorded; (b) investigations carried out; (c) sanctions imposed; and (d) remedies provided to victims. Please clarify whether children engaged in prostitution are always treated as victims and never as offenders. Please comment on reports according to which there is a lack of expertise in responding to child rape, as well as to reports according to which San girls have suffered sexual abuse by teachers, and indicate whether allegations of sexual abuse of indigenous girls in schools are always investigated.*

### Comments from Civil Society

The Child Care and Protection Act includes a list of scenarios where a child is considered to be a “child in need of protection”. A child who is a victim of sexual violence/abuse including prostitution would fit within this list. When a report is made, a social worker will investigate the case. This may result in the removal of the child from the situation. The case will be reviewed by the children’s court and the court will have the option to order a range of interventions. Whilst this is a provision that must be implemented, the recognition in the law of the categories under which a child is in need of protection and the specific steps must then follow is a positive step in taking measures to combat the problem. The Child Care and Protection Act will also introduce mandatory reporting for professionals/officials who have duties with respect to children.

There are insufficient government and private accessing counselling services for child victims of sexual violence or abuse. It is civil society’s understanding that children engaged in prostitution are treated as victims and not as offenders.

Civil society implemented a project to improve responses of police and court officials to child witnesses. There was a plan to have this programme incorporated into government structures, however this did not appear to transpire. Measures to deal with vulnerable witnesses are incorporated into law – for example relocating the trial to a less formal setting while the victim gives evidence, rearranging furniture in the courtroom, or adjusting where people stand, allowing a support person to accompany the victim or the option to give evidence from behind a screen or through CCTV if resources are available.

### Recommendations:

#### The State Party should:

- 1) Ensure that GBV-Protection Units and courts have sufficient resources to effectively implement the provisions for vulnerable witnesses.

**n. Right to vote (art. 25)**

**Issue 25:** *In view of the information provided in paragraph 221 of the State party's report, please clarify whether any alternatives are in place for persons who want to register to vote but who cannot be identified by someone who is already registered within the meaning of the law.*

**Comments from Civil Society**

The Electoral Act 5 of 2014 requires anyone who wishes to register as voter in Namibia to prove the following: that he/she is a Namibian citizen; that he/she is 18 years of age or older; his/her identity and that he/she has been resident for more than 12 consecutive months in the Local Authority area where he/she intends to be registered as a voter.

Current legislation does not require of every citizen who wants to be registered as a voter to be identified under oath or affirmation by two registered voters. The identification of a prospective voter by two registered voters is only required if the person does not have national documents with which he/she can identify him/herself. It is clear that this provision is open to abuse. If anyone loses their national documents they can approach the Ministry of Home Affairs for a replacement (duplicate), which should be issued within a few days.

The State party under reply states that the alternative to an applicant who cannot provide proof of identity and who cannot find two registered voters who are able to identify him/her, is for such applicant to approach the electoral tribunal to appeal against the refusal. However, electoral tribunals and the electoral court is a completely new process for Namibia. Voters and members of contesting political parties have so far not been publicly informed by the Electoral Commission of Namibia (ECN) which magistrate's courts will serve as electoral tribunals during a specific election. Neither has the ECN included anything so far about electoral tribunals or the electoral court in their voter education campaigns. According to experiences related by voters who have attempted to lay a complaint at an electoral tribunal there seems to be a lack of training and awareness among the judicial staff at such magistrate's courts, so much so that some complaints or appeals have not been processed. The legal framework is in place but civic education and information is lacking. Rules and procedures of the Tribunals may also still be pending.

**Recommendations:**

The State Party should:

- i) put mechanisms in place to ensure that the Electoral Commission of Namibia embark upon vigorous voter and civic education to promote widespread knowledge and understanding among the electorate as well as the judicial staff at designated magistrate's courts about the purpose and functioning of electoral tribunals;
- ii) make public which magistrate's court are designated to function as electoral tribunals specifically during pre-election and election periods;
- iii) embark on the process of creating and establishing the required rules for the electoral tribunals and the electoral court and make them publicly known;
- iv) encourage and assist the Ministry of Home Affairs to continue with outreach programmes in rural areas to ensure that every Namibian citizen is captured on the National Population Register and is issued with national documents to enhance the integrity of the voter registration process.

**o. Rights of minorities (art. 27)**

**Issue 26:** *Please provide information on any specific measures to ensure indigenous participation in decision-making processes relating to traditional sites and objects, and whether consultations with affected communities are systematically carried out before awarding concessions to extractive industries. Please also inform the Committee on any mechanisms in place to provide redress and compensation for the loss of land by indigenous peoples, and on the measures taken to identify adequate lands for their resettlement, in particular regarding the Himba, Ovattjimba, Ovatie, Ovazemba and San. In view of paragraph 228 of the State party's report, please elaborate on the measures taken to maintain and strengthen cultural diversity. Furthermore, please inform the Committee whether any steps have been taken to investigate allegations of discrimination and/or abuse by the traditional authorities of dominant tribes in areas also inhabited by other, smaller tribes, and whether indigenous language interpreters work in courts, tribunals and prosecutors' offices.*

**Comments from Civil Society**

It is correct that the State party has created an office falling under the office of the Prime Minister to specifically attend to the societal needs of the San community and other marginalised groups. The current State President appointed three Deputy Ministers to the Office of the Vice-President, one of them being the Deputy Minister of Marginalized Communities. The Deputy Minister of Marginalized Communities is tasked with supporting the Indigenous Peoples. This commitment shows that the State party has come a long way in recognising Indigenous Peoples and efforts have been made to represent them within the highest office of the government structure. The State party is commended for this effort.

However, the resettlement farms that were allocated to the San are not properly supervised by the State or its officials and the San people have not been capacitated to maintain the farms. Since the San were traditionally hunter-gatherers, they do not have the skills and knowledge to farm with live stock and crops. The Office of the Ombudsman was also tasked to produce a White Paper on the Rights of Indigenous Peoples in Namibia. Civil society organisations working with Indigenous Peoples indicate that the communities feel that they were not genuinely consulted as most of the traditional leaders in the villages are not even aware of the document's existence.

The Indigenous Peoples in Namibia lament the lack of self-determination pertaining to their own cultural and traditional matters. They yearn for proper and genuine consultation by the State. The State party appointed a chief for the San people in Tsumkwe West despite their objections. The community made their complaints public on the radio and in newspapers, but the Government went ahead to coronate a traditional leader that the !Kung San community did and do not want.

Individual communities feel that their right to land is not respected. The San community in the Tsumkwe area is concerned about the many illegal fences erected by other ethnic tribes of Namibia. One of the illegal fence cases has been submitted to the Legal Assistance Centre and the matter is pending judgment in the High Court.

**Recommendations:**

The State Party should:

- i) Ratify the ILO Convention No. 169, thus ensuring that the issues facing Namibia's Indigenous Peoples are addressed;
- ii) Recognise the rights of Indigenous Peoples and minorities explicitly in the Namibian Constitution;
- iii) Recognise and protect the rights of Indigenous Peoples to own, develop, control and use their lands and territories;

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- iv) Work with Indigenous Peoples on land titling of their traditional lands and provide more funding to the Ministry of Land Reform in order to continue purchasing land for the resettlement of indigenous groups. Furthermore, the resettled groups should design the process and be provided with support during their rebuilding of their communities;
- v) Continue with the San Development Program, meanwhile consulting indigenous groups to ensure efforts are consistent with their cultures and needs. This should include addressing the obstacles, such as costs, discrimination, and distance, facing indigenous children in attending school;
- vi) Continue and expand the recognition of traditional authorities to promote the representation of indigenous groups at the local and national level;
- vii) Approve the White Paper on the Rights of Indigenous Peoples in Namibia written by the Office of the Ombudsman and address the issues addressed in the White Paper;
- viii) Implement the recommendations made by UN Special Rapporteur James Anaya in 2013 on the Rights of Indigenous Peoples (A/HRC/24/41/Add.1);
- ix) Adopt a national action plan on its implementation to ensure indigenous peoples' effective and politically meaningful participation in the decision-making process and equal representation in the governance of the country as provided under UNDRIP and ILO Convention 169;
- x) Implement the World Conference on Indigenous Peoples Outcome Document, beginning with drafting a National Plan of Action to achieve the ends of the Declaration.

### **p. Dissemination of information relating to the Covenant and the Optional Protocol (art. 2)**

**Issue 27:** *Please indicate what measures have been taken to disseminate the second periodic report of the State party and information on its forthcoming examination by the Committee. Please provide detailed information on the involvement of representatives of civil society, non-governmental organizations, minority and indigenous groups, and the national human rights institution in the preparatory process of the State party's report.*

#### **Comments from Civil Society**

The second periodic report and the forthcoming examination have not been publicized and the general public is not aware of this event or of its significance. As stated in paragraph 136 of the State replies to the List of Issues, the Namibia Non-governmental Organizations Forum (NANGOF) is part of the Inter-Ministerial Committee on Human Rights and Humanitarian Law, a technical committee comprised of officials from line ministries and Agencies who are charged with responsibility to prepare and compile information for the country's state reports on the implementation of the international human rights instruments to which Namibia is a state party. However, NANGOF was not consulted in the preparation of the government report to the Human Rights Committee.

#### **Recommendations:**

##### The State Party should:

- i) initiate a public education process relating to the significance of human rights treaties in general and the ICCPR in particular and provide a structured platform for input and comments;
- ii) ensure that civil society is given sufficient time to make input on State party reports to ensure proper and full consultation prior to such reports being submitted to cabinet;
- iii) ensure full and comprehensive public dissemination of the concluding observations of the treaty bodies and ensure that they are couched in terms to facilitate understanding of the general public which could be done via national radio and television. These observations should be translated into the local languages of the State party.

### III. Additional Information

1. In 2014, the State party proposed amendments to the Namibian Constitution, after limited consultation with various political parties. Civil society responded strongly calling on the State party to have wider consultation on the amendments. The public debate focused on the process rather than on the substance of the amendments. Unfortunately, despite protests on television, radio and in print and a demonstration at Parliament, the changes were rushed through. Given that the Constitution is the supreme law in Namibia and a promise to its people, the manner in which these changes were brought about have caused some alarm in civil society circles and the State party is called upon to entertain genuine and adequate consultations in regard to any legislative changes in the future, in particular in relation to the Namibian Constitution.
2. There is a particular inconsistency between the Namibian Constitution and the Covenant in relation to sexual minorities. The Namibian Constitution does not include sexual orientation among the enumerated classes in article 10(2) to be guaranteed equality and freedom from discrimination. This is compounded by the fact that sodomy is still considered to be a common law crime in Namibia. The State party is called upon to guarantee equality and freedom from discrimination for all and to take steps to remove the crime of sodomy from its legal system.
3. A media release published by the National Assembly in local newspapers announcing the opening of parliament in 2016, had detailed that Cabinet will table the long awaited *Whistleblowers Protection Bill* as well as the *Witness Protection Bill* in Parliament this year. Civil Society herewith urges the State party to seek public scrutiny and input on the bills before passing same.