

# The implementation of international and regional human rights instruments in the Namibian legal framework

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## Introduction

Human rights violations occur within states rather on the high seas or in outer space outside the jurisdiction of any one state.<sup>349</sup> Thus, it follows that effective protection and enjoyment of human rights has to come from within the state. True, the international human rights system does not place human rights abusers in political bankruptcy, nor does it take over the administration of recalcitrant states in order to assure the enjoyment of rights and/or compensate the victims of human rights violations. On the contrary, the international human rights system seeks to persuade or put pressure on member states to meet their international obligations under human rights instruments that they have ratified or to which they have acceded.

There are only two ways through which states can comply with their legal international obligations as contained in treaties: firstly, by observing or respecting their national laws (constitution or statute law) which are consistent with international norms; and secondly, by making those international norms or obligations part of the national legal or political order, that is, they become *domesticated* (internalised or incorporated). The domestication of these international norms or obligations is the main focus of the current research, with an emphasis on Namibian legal system. Thus, this paper seeks to address the following issues:

- How does Namibia meet its obligations under ratified treaties?
- What are the measures or policies taken by the Namibian state to implement or comply with its international obligations as contained in ratified human rights instruments?
- What is the role of domestic courts in this regard?

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349 See Steiner, HJ, P Alston & R Goodman (Eds.). 2000. *International human rights in context: Law, politics, morals* (Second Edition). Oxford: Oxford University Press, p 987.

One thing needs to be kept in mind from the outset: this research is not concerned with human rights violations within Namibia; rather, the thrust is on the domestication and implementation of some major human rights instruments, as ratified or acceded to by Namibia. Before entering the hot waters of the debate, it is worth examining, albeit very briefly, the concept of *domestication* of international human rights law, i.e. its incorporation into national law.

## **Domestication of international human rights law**

As stated earlier, the onus is upon a national legal system to determine the status and force of law which will be accorded to treaty provisions within such legal system. Indeed, it is only when a human rights instrument and its provisions have become part and parcel of domestic law that national courts and quasi-judicial bodies will be able to apply them to cases brought before them by private individuals or organisations.

Traditionally, scholars posit two approaches in respect of the reception of international law into the national legal system, characterising countries as either *monist* or *dualist*.<sup>350</sup> *Monists* view international and national law as part of a single legal order. Under this approach, international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation: international law is immediately applicable within national legal systems. Indeed, to monists, international law is superior to national law.<sup>351</sup> This approach is common in France, Holland, Switzerland, the USA, many Latin American countries, and some francophone African countries. It is worth noting that Namibia, through Article 144 of its Constitution, has adopted the monist approach.<sup>352</sup>

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350 (ibid.).

351 See McDougal, Myres. 1959. "The impact of international law upon national law: A policy-oriented perspective". *South Dakota Law Review*, 4, 25:27–31.

352 Article 144 of *The Constitution of the Republic of Namibia* reads as follows: "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." Thus, all human rights instruments ratified or acceded to by Namibia are part and parcel of its domestic law and should be applied as such, unless they are in conflict with an existing Act of Parliament, or where they are not in conformity with the supreme law of the land, i.e. the Constitution.

*Dualists*, on the other hand, view international and national law as distinct legal orders. For international law to be applicable in the national legal order, it must be received through domestic legislative measures, the effect of which is to transform the international rule into a national one. It is only after such a transformation that individuals within the state may benefit from or rely on the international – now national – law. To the dualist, international law cannot claim supremacy within the domestic legal system, although it is supreme in the international law legal system. This method of incorporation is commonly applied in the United Kingdom, Commonwealth countries, and most Scandinavian jurisdictions.

While the monist/dualist debate continues to shape academic discourse and judicial decisions, it is unsatisfactory in many respects. The debate focuses on the source or pedigree of norms, and ignores the substance of the norms at issue. By creating a dichotomy between norms on the basis of their sources, we risk being blinded from assessing the merits of the contents of the norms at issue. International and national law have traditionally addressed relatively different issues: the former concentrating on the relationships among states, and the latter on relationships among persons within national jurisdictions. In recent times, however, there is a gradual convergence of interest, and the ultimate goal of both systems is to secure the well-being of individuals. This common goal manifests itself in human rights law, environmental law, and commercial law, i.e. areas where there is increasing interaction between national and international law.<sup>353</sup> Thus, international and national law have a lot in common, and an attempt to compartmentalise or isolate them will be analytically flawed and practically inapposite at present.

The theoretical problems with the monist/dualist paradigm aside, the relationship between international law and national law has important practical implications for both systems and their subjects. The relationship determines the extent to which individuals can rely on international law for the vindication of their rights within the national legal system, and has implications for the effectiveness of international law, which generally lacks effective enforcement mechanisms.

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353 Thus, private individuals have become subjects of international human rights law, particularly in regard to the recent creation of ad hoc UN International Criminal Tribunals to prosecute individuals who have committed crimes against humanity, war crimes, genocide, and other violations of international humanitarian law. Among these are the International Criminal Tribunal for the Former Yugoslavia; the Rwanda Tribunal in Arusha, Tanzania; the Special Court for Sierra Leone; and the Hybrid Chambers for Cambodia.

In a nutshell, it is worth remarking that international law does not dictate that one or the other of the aforesaid methods should be used. Thus, what matters most is the internalisation of international legal obligations within national laws, and their subsequent implementation by domestic courts and quasi-judicial bodies. It follows, therefore, that the method by which treaties become national law is a matter in principle to be determined by the constitutional law of a ratifying state, rather than a matter ordained by international legal order.<sup>354</sup>

The benefits of incorporation are self-evident. The fact that international human rights instruments are internalised into domestic law gives national authorities the opportunity to afford redress in cases of human rights violations before such cases are taken to regional or international judicial or quasi-judicial fora. This way, protracted proceedings in a forum that is both remote from and unfamiliar to the claimant can be spared. The settlement of litigations on the national level, saving both time and money, always remains the preferable option.

## **The domestication of international human rights treaties by Namibia**

### *The Rome Statute of the International Criminal Court*

The Rome Statute of the International Criminal Court (herein referred to as *the Rome Statute*) was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) on 17 July 1998.<sup>355</sup> The Rome Statute entered into force on 1 July 2002 after the ‘magic number’ of 60 ratifications was reached on 11 April 2002. Following this entry into force, the first Session of the Assembly of State Parties was held from 3 to 10 September 2002. On this occasion, both the Elements of Crimes over which the court has jurisdiction and the Rules of Procedure and Evidence were formally adopted.<sup>356</sup>

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354 See Leary, Virginia. 1982. “International Labour Conventions and National Law”. In Steiner et al. (2000:999–1000), *supra*.

355 As corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002.

356 See Schabas, William A. 2006. “First prosecutions at the ICC”. *Human Rights Law Journal*, 27, 1–4:26.

**Major international human rights instruments ratified or acceded to by Namibia and other countries in the southern African region**

Country	CAT* Rat./Ac.*	CEDAW* Rat./Ac.*	CERD* Rat./Ac.*	CRC* Rat./Ac.*	ICCPR* Rat./Ac.*	ICESCR* Rat./Ac.*	OPAC* Rat./Ac.*	OPSC* Rat./Ac.*	RSICC* Rat./Ac.*
Angola	12/09/89	17/10/86	-	04/01/91	10/04/92	10/04/92	-	-	07/10/98
Botswana	08/09/00	19/08/96	20/02/74	13/04/95	08/12/00	-	24/09/03	24/09/03	08/09/00
Dem. Rep. of Congo	18/03/96	16/11/86	21/04/76	27/10/90	01/07/77	01/02/77	11/11/01	11/11/01	11/04/02
Lesotho	-	22/08/95	04/11/71	09/04/92	09/12/92	09/12/92	24/09/03	21/09/03	06/09/00
Madagascar	-	17/03/89	07/02/69	18/04/91	23/03/76	03/01/76	-	-	18/07/98
Malawi	11/06/96	12/03/87	11/06/96	01/02/91	22/03/94	22/03/94	-	07/09/00	19/09/02
Mauritius	09/12/92	09/07/87	30/05/72	02/09/90	23/03/76	03/01/76	-	11/11/01	05/03/02
Mozambique	14/09/99	16/04/97	18/04/83	28/05/94	21/10/93	-	06/03/03	06/03/03	28/12/00
<b>Namibia</b>	<b>28/11/94</b>	<b>23/11/92</b>	<b>11/11/82</b>	<b>30/10/90</b>	<b>28/02/95</b>	<b>28/02/95</b>	<b>16/04/02</b>	<b>16/04/02</b>	<b>25/06/02</b>
South Africa	10/12/98	15/12/95	10/12/98	16/07/95	10/03/99	3/10/94	30/06/03	30/06/03	27/11/00
Swaziland	-	26/03/04	07/04/69	06/10/95	26/06/04	26/06/04	-	-	-
Tanzania	-	20/08/85	27/10/72	10/07/91	11/09/76	11/09/76	24/04/03	24/04/03	20/08/02
Zambia	07/10/98	21/06/85	04/02/72	05/01/92	10/07/84	10/07/84	-	-	13/11/02
Zimbabwe	-	13/05/91	13/05/91	11/10/90	13/08/91	13/08/91	-	-	17/07/98

\* The abbreviations represent the following:

- Ac acceded to
- Rat ratified
- CAT Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment
- CEDAW Convention for the Elimination of Discrimination against Women.
- CERD Convention for the Elimination of all Forms of Racial Discrimination
- CRC Convention on the Rights of the Child
- ICCPR International Covenant on Civil and Political Rights
- ICESCR International Covenant on Economic, Social and Cultural Rights
- OPAC Optional Protocol to the Convention on the Rights of the Child: Armed Conflict
- OPSC Optional Protocol to the Convention on the Rights of the Child: Sale of Children
- RSICC Rome Statute of the International Criminal Court

It is worth noting that the ICC is already operational and there are three situations (cases) referred to it for prosecution.<sup>357</sup> However, considering its tender age, we are yet to benefit from its jurisprudence.

As indicated in the above table, Namibia became a state party to the Rome Statute on 25 June 2002. Needless to say, the Rome Statute is part of Namibian law and, therefore, binding on the state in accordance with Article 144 of the Namibian Constitution.<sup>358</sup> Undoubtedly, the Rome Statute imposes legal obligations and expectations on member states. These are, *inter alia*, —<sup>359</sup>

- (i) *to ensure effective prosecution of most serious crimes of concern to the international community as a whole;*
- (ii) *to put an end to impunity for the perpetrators of these crimes;*
- (iii) *to contribute to the prevention of such crimes; and*
- (iv) *to exercise national criminal jurisdiction over those responsible for international crimes.*

At this stage, it is important to remark that the subject-matter jurisdiction (jurisdiction *ratione materiae*) of the ICC extends to four crimes, namely —<sup>360</sup>

- the crime of genocide
- crimes against humanity
- war crimes, and
- the crime of aggression.

In addition to the legal obligations emanating from the Rome Statute, state parties are also encouraged and expected to incorporate the crimes as defined in the Rome Statute within their national legislations. Although the domestication seems an absolutely essential condition for the enforcement of international law within national jurisdictions, very few countries are prepared to incorporate serious international crimes into their own municipal penal codes.

Thus, through ratification of the Rome Statute, Namibia has undertaken the following legal obligations:

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357 See the Situation in Uganda (ICC-02/04), the Situation in Democratic Republic of Congo (ICC-01/04) and Prosecutor v Lubanga (ICC-01/04-01), and the Situation in Darfur referred to the ICC by the UN Security Council in terms of Article 13 of the Rome Statute.

358 *Supra*, footnote 4.

359 See Preamble to the Rome Statute of the ICC.

360 See Article 5 of the Rome Statute.

- To incorporate the four crimes and their elements as defined and provided for in the ICC Statute into its domestic laws
- To exercise its criminal jurisdiction over those responsible for international crimes, and
- To contribute to the prevention of such crimes both within its territory and elsewhere.

These three legal obligations are interlinked; indeed, the first and second obligations listed overlap, in that no criminal prosecution of serious international crimes will be possible unless the domestic laws are amended to include and reflect these crimes and their respective elements. This is the duty of the Namibian legislature.<sup>361</sup>

Equally relevant to the above legal obligations is the concept of *complementarity*. Paragraph 10 of the preamble to the Rome Statute states that –

*... the International Criminal Court shall be complementary to national criminal jurisdictions.*

In addition, Article 17(1) provides that –

*... a case will not be admissible by the ICC when it is being investigated and/or prosecuted by a state that has jurisdiction over it.*

It follows, therefore, that only when states are unwilling or unable to investigate and/or prosecute are cases before the ICC deemed to be admissible. The terms *unwilling* and *unable* are fully explained in Article 17(2) and (3).

All in all, the principle of complementarity reaffirms the argument that the implementation of international human rights instruments squarely depends on the domestic legal framework. This principle also reflects the widely shared view that systems of national justice should remain the front-line defence against serious human rights abuse, with the ICC only serving as a backstop. Therefore, state parties to human rights instruments are called upon to play their vital role

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361 In my recent discussion with a lawyer who is responsible for the Human Rights Directorate within the Ministry of Justice, I was informed that the Namibian government had not yet taken the necessary steps to incorporate crimes as defined by the Rome Statute into its domestic laws.

and comply with their legal obligations, failing which the enjoyment and benefits of human rights will remain a pie in the sky.

### *The NSHR petition and the Rome Statute*

A discussion on the implementation and domestication of the Rome Statute within the Namibian legal framework cannot be complete without looking at the recent highly publicised saga involving the petition by the National Society for Human Rights (NSHR) to the ICC.<sup>362</sup> In terms of this petition, the local human rights NGO wants the ICC to investigate and/or prosecute the Founding President and Father of the Nation, Dr Sam Nujoma, and other Namibians for crimes allegedly committed during the liberation struggle against the then apartheid regime.

The NSHR petition raises two important legal issues with regard to the jurisdictional powers of the ICC:

- Firstly, is the permanent criminal court legally empowered to hear cases involving crimes committed before the entry into force of the Rome Statute? In other words, does the ICC have retrospective jurisdiction, and
- Secondly, is the so-called continuous crimes doctrine part of the Rome Statute?

To adequately address these two issues, one has to look at the provisions of the Rome Statute creating the ICC. Article 11(1) of the Statute states that —<sup>363</sup>

*... the court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.*

The above provision is buttressed by Article 24 of the same Statute, which deals with non-retroactivity *ratione personae*. Under the latter Article, it is clearly spelt out that no person can be held criminally responsible for conduct prior to the entry into force of the Rome Statute.

Articles 11 and 24 are in fact quite closely related, and there were some proposals to merge them during the drafting of the Statute. The reading and construction of

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<sup>362</sup> See *The Namibian*, 30 July 2007 and 3, 6, 7 and 17 August 2007. See also *New Era*, 3 and 7 August 2007.

<sup>363</sup> As mentioned earlier, the Rome Statute creating the ICC entered into force on 1 July 2002.

these two Articles, therefore, evidence that the ICC is a prospective institution in that it cannot exercise jurisdiction over crimes committed prior to the entry into force of its Statute.<sup>364</sup> According to Prof. William A Schabas, a pre-eminent jurist in the field of international criminal law, the idea of retrospective jurisdiction was unmarketable and was never seriously entertained at the Rome Conference at which the Statute was discussed.<sup>365</sup> This was mainly because very few states were prepared to recognise an international court with such ambit.

The second issue is the so-called continuous crimes doctrine upon which the NSHR bases the admissibility of its case. For instance, the *continuous crimes* concept may present itself in the case of ‘enforced disappearance’, which is a crime against humanity punishable under the Rome Statute. Someone might have disappeared prior to the entry into force of the Statute, but the crime would continue after entry into force to the extent that the disappearance persisted.

In determining whether or not continuous crimes are prosecutable by the ICC, one again needs to find an answer from the piece of legislation which creates the court. True, the issue of continuous crimes was discussed and deliberated upon at length at the Rome Conference. However, at the end of the Conference, nothing concrete on the topic was agreed upon; in fact the final document does not contain any provision with regard to continuous crimes.<sup>366</sup>

Coming back to the NSHR petition and taking into consideration the foregoing discussion, it is very difficult to understand how the ICC would entertain the petition. Will the court’s prosecutor and judges amend and/or bend the legislation so as to accommodate this scenario? It is common cause that prosecutors and judges, be they international or national, do not make laws. Rather, their primary role is to interpret existing laws.

As regards the domestication and implementation of the Rome Statute by the Namibian government, the author of this research is not aware of any legal or

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364 See Schabas, William A. 2004. *Introduction to the International Criminal Court* (Second Edition). Cambridge: Cambridge University Press, p 69.

365 (ibid.:70).

366 Surprisingly, the Drafting Committee for the Rome Statute had appended a footnote on para. 1 of Article 24, which read as follows: “[T]he question has been raised as regards a conduct which started before the entry into force and continues after the entry into force”; see UN Doc. A/CONF. 183/C.1/L.65/REV.1, P.2. However, this footnote was removed and, consequently, the final document does not reflect anything on continuous crimes.

administrative measures put in place by Namibia to comply with its obligations as spelt out in the said Statute.<sup>367</sup>

## ***The International Covenant on Civil and Political Rights under Namibian law***

### *Introduction*

This part of the research focuses on domestic laws and policies put in place by the Namibian government with a view to implementing and complying with its legal obligations under the International Covenant on Civil and Political Rights (ICCPR).

Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are often referred to as the *International Bill of Rights*. This is because they contain all fundamental human rights and freedoms which are included, almost verbatim, in all major international and regional human rights instruments as well as the constitutions of all modern states. The ICCPR was adopted by the UN General Assembly in 1966 and entered into force in 1976. Namibia became a state party to the ICCPR on 28 February 1995, and by virtue of Article 144 of the Namibian Constitution, the Covenant is part of Namibian municipal laws. The effect of Article 144 of the Namibian Constitution vis-à-vis the ICCPR is that the rights and freedoms provided therein are enforceable within Namibia by either its judicial or quasi-judicial bodies.

### *Civil and political rights as domesticated and implemented by Namibia*

Article 2(2) of the ICCPR provides that –

*... state parties to the ICCPR are duty bound to take the necessary steps, in accordance with their constitutional processes, to adopt such legislative or other measures as may be necessary to give effect to the rights contained in that Covenant.*

To see whether the Namibian government complies with the above provision, one has to look at the Constitution of the Republic of Namibia, the supreme law of the land.<sup>368</sup>

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367 See supra, legal obligations under the Rome Statute; see also footnote 11, supra.

368 See Article 1(6) of the Constitution of the Republic of Namibia.

Indeed, Namibia has a justiciable Bill of Rights, which is incorporated into the country's Constitution. A reading of Chapter 3 of Namibia's Constitution reveals that all fundamental human rights and freedoms contained in the ICCPR are also provided for and protected by the Namibian Bill of Rights.<sup>369</sup> Briefly, the following fundamental rights are enshrined in the Namibian Constitution:

- The right to life
- The right to personal liberty
- The guarantee against torture or cruel, inhuman or degrading treatment or punishment
- The guarantee against slavery and forced labour
- The right to the protection of the law and the guarantee against discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status
- The guarantee against arbitrary and unlawful arrest and detention
- The right to a fair trial
- The right to privacy
- The right to private property
- The right to marriage and to found a family, and
- The right to participate in peaceful political activity.

In addition, all fundamental freedoms are enshrined in Article 21 of the Constitution. These are –

- freedom of speech and expression
- freedom of thought, conscience and belief, which includes academic freedom in higher institutions of learning
- freedom to practise any religion
- freedom to peaceful assembly
- freedom of association, which includes freedom to form and join associations or trade unions and political parties
- freedom of movement within the country
- freedom to reside and settle in any part of Namibia, and
- freedom to practise any profession, or carry on any occupation, trade or business.

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369 Article 5 of the Namibian Constitution states that all fundamental rights and freedoms enshrined in Chapter 3 are obliged to be upheld and respected by all organs of the government (legislature, executive, judiciary) and its agencies.

The above freedoms may, however, be restricted by a law as long as such restriction is reasonable in a democratic society, and is required in the interests of public policy or the sovereignty and integrity of Namibia.<sup>370</sup>

Besides the aforementioned fundamental rights and freedoms, the Namibian Bill of Rights also addresses the issue of administrative justice. Thus, Article 18 of the Constitution reads as follows:<sup>371</sup>

*Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.*

Thus, private individuals are entitled to approach courts of law in order to challenge decisions made by administrative bodies or authorities if they believe that those decisions are unfair and/or unreasonable.

In addition to the above civil and political rights, the Constitution enshrines the right to enjoy, practise and profess one's culture. The right to education is also provided for in the Namibian Bill of Rights.<sup>372</sup> Nevertheless, other economic, social and cultural rights, as embodied in the ICESCR, are not justiciable in that they are not enshrined in the Namibian Bill of Rights. Having said that, it is worth remarking that the Constitution provides that the Namibian government is obliged to promote and maintain the welfare and good standard of living of its people through the adoption of appropriate policies.<sup>373</sup> The major problem with regard to the implementation and enforcement of economic and social rights as enshrined in the ICESCR is that such implementation is dependent upon the resources available in a state party; thus, these rights themselves are limited by a lack of resources.<sup>374</sup> This scenario is in fact acknowledged by the Covenant itself if one reads Article 2 of the ICESCR.<sup>375</sup>

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370 See Article 21(2) of the Constitution.

371 This constitutional right was buttressed by the High Court of Namibia in the case of *The Chairperson of the Immigration Selection Board v Frank & Another* 1999 NR 257, p 258, para. G.

372 See Articles 19 and 20, respectively, of the Constitution.

373 For a further reading on these policies, see Article 95 of the Constitution.

374 See *Soobramoney v Minister of Health* (Kwazulu-Natal), Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997; available at [www.law.wits.ac.za/judgenebts/soobram.html](http://www.law.wits.ac.za/judgenebts/soobram.html); last accessed 20 October 2007.

375 Briefly, Article 2 of the ICESCR provides that the realisation of the rights recognised in the Covenant by state parties depends on the availability of resources and also on international assistance and cooperation.

Coming back to the civil and political rights recognised and protected by the Namibian Bill of Rights, Article 24(3) of the Constitution spells out a number of rights which cannot be derogated from or suspended even if a state of emergency has been declared. These are, inter alia, —<sup>376</sup>

- the right to life
- the right to legal representation
- the guarantee against torture and other cruel or inhuman treatments or punishments
- the protection against discrimination on any ground as stipulated in Article 10, and
- the right to a fair trial by a competent and impartial tribunal.

It is also important to note that the fundamental rights and freedoms enshrined in the Namibian Bill of Rights are not absolute, in that such rights and freedoms may be limited by an Act of Parliament in as much as the requirements for such limitation are met. Article 22(a) states that –

*... [a]ny law providing such limitation shall be of general application and shall not negate the essential content of such right.*

Additionally, the law which limits the right or freedom in question is obliged to specify clearly the extent of such limitation and to identify the affected right and/or freedom.<sup>377</sup> If one looks at the rules and principles of international human rights law vis-à-vis derogation and limitations of rights, one would come to the conclusion that Articles 22 and 24 of the Namibian Bill of Rights fully comply with such rules.<sup>378</sup>

### *The protection and enforcement of civil and political rights within Namibia*

Article 5 of the Namibian Constitution reads as follows:<sup>379</sup>

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376 With regard to derogation from and suspension of some rights and freedoms under the Constitution, see Article 24 (1), (2) and (3).

377 See Article 22 (b).

378 See e.g. General Comment No. 5, 31/07/81, Derogation of Rights (Article 4): CCPR General Comment, Office of the High Commissioner for Human Rights.

379 See Chapter 3 of the Constitution.

*The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies, and by all natural and legal persons in Namibia, and shall be enforceable by the Courts ... .*

The above constitutional provision is buttressed by Article 25(2), which entitles aggrieved persons who claim their fundamental rights or freedoms guaranteed by the Constitution have been infringed or threatened to approach a competent court for a remedy. In addition, paragraph 4 of Article 25 empowers the court dealing with cases of human rights violations to award monetary compensation to the victims.

Besides the courts of law, the Office of the Ombudsman also plays a significant role with respect to the protection of human rights. Although this Office does not have the power or mandate to hear cases involving human rights violations with a view to awarding monetary compensation or any other remedy, alleged victims of human rights violations may approach the Ombudsman for legal assistance and advice.<sup>380</sup> The Ombudsman is empowered to investigate allegations of human rights violations *meru motu* or after receiving a complaint from an individual. The independence and impartiality of the Office of Ombudsman are protected in terms of Article 89(2) of the Constitution.

Undoubtedly, the Namibian Bill of Rights is justiciable and in fact it fully complies with the legal obligations as spelt out in Article 2(3) of the ICCPR which provides that victims of human rights violations should be awarded remedies. It is worth noting that the whole purpose and *raison d'être* of international human rights law is founded on compensation of victims of human rights abuse and violations. In the absence of such remedies and redress, human rights law becomes fictional and abstract.

The creation of the Office of the Ombudsman is also in accordance with the Paris Principles on National Human Rights Institutions.<sup>381</sup> However, it is submitted that the Ombudsman's Office should be strengthened in terms of its mandate and resources, so as to effectively and efficiently fulfil its noble objectives.<sup>382</sup>

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380 See Article 25(2) and 91(d) of the Namibian Constitution.

381 The Paris Principles on National Human Rights Institutions were adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

382 See Inter-Ministerial & Technical Committee on Human Rights. 2004. *Initial Report on ICCPR*. Windhoek: Ministry of Justice, p 60.

Unlike some countries, Namibia does not have a Human Rights Commission. The mandate of such a Commission is mainly to monitor the protection and promotion of human rights on behalf of the government. Thus, in Namibia's jurisdiction, it is the Ministry of Justice that has the final responsibility for the promotion and protection of human rights on behalf of the government.<sup>383</sup> To this end, the Ministry ensures that existing laws and Bills are in accordance with the rights and freedoms recognised and enshrined in the Constitution. When it comes to implementing and realising specific human rights contained in various human rights instruments ratified or acceded to by Namibia, the Ministry and/or the government agency responsible for the specific items under the instrument are responsible for the implementation of the recognised rights.<sup>384</sup> In realising human rights recognised by the Constitution and other human rights instruments, the various Ministries and governmental agencies are assisted by both governmental organisations and NGOs engaged in various socio-economic activities and in the field of human rights promotion, protection and education.

Finally, Namibians who claim that their rights or freedoms have been violated and who fail to obtain redress from domestic courts may submit individual complaints to the Human Rights Committee in New York.<sup>385</sup> This option is provided for in the First Optional Protocol to the ICCPR, to which Namibia is a state party.<sup>386</sup> For an individual to file a complaint with the Committee, s/he first needs to have exhausted all the local remedies available in the jurisdiction concerned.<sup>387</sup> In assessing whether or not local remedies have been exhausted, the Committee considers factors in the complainant's country such as the availability of remedies, the independence and impartiality of the judiciary, and respect for the rule of law. Upon receiving an individual complaint, the Committee adjudicates on the merits of the alleged violations. In the event that the Committee believes that human rights abuses have occurred, then it transmits its views and recommendations to the concerned state party. More often than not, the Committee may recommend that the complainant (or the victim of human

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383 (ibid.:48).

384 (ibid.:49).

385 This is a quasi-judicial body responsible for the monitoring of the implementation of the rights enshrined in the ICCPR. It is established in terms of Article 28 of the Covenant.

386 See First Optional Protocol to the ICCPR, Article 1.

387 (ibid.:Articles 2 & 5).

rights abuse) be awarded remedies.<sup>388</sup> Article 4(2) of the Protocol provides that, within six months of receiving the Committee's views, the receiving state is obliged to revert to the Committee, clarifying the matter and informing it whether or not action had been taken to remedy the complainant's situation.

However, it is worth remarking that the decisions of the Human Rights Committee are not binding on state parties; rather, they are merely recommendations on how to improve the implementation and realisation of rights and freedoms recognised under the ICCPR.

### *Namibia and the legal obligation under Article 40 of the ICCPR*

Under Article 40 of the Covenant, state parties are legally obliged to submit reports on measures they have adopted to give effect to and realise the rights recognised in the ICCPR. The reports have to indicate factors and difficulties, if any, in implementing the Covenant. The Human Rights Committee, established in terms of Article 28 of the Covenant, is responsible for studying these reports, and may generally comment on or add their recommendations to them. The reports need to be submitted within one year of the entry into force of the ICCPR for the state party concerned. In cases where the initial report has been submitted, the Human Rights Committee may request the submission of subsequent reports any time it deems necessary and appropriate.<sup>389</sup>

In order to comply with the obligations associated with Article 40, Namibia submitted its initial report to the Human Rights Committee in 2004 – after a delay of over eight years.<sup>390</sup> After studying and deliberating upon the Namibian initial report, the Committee came up with concluding observations and recommendations.<sup>391</sup> In the ensuing paragraphs, the discussion centres on positive aspects as well as grey areas of these observations and recommendations.

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388 For example, *Toonew v Australia*, Communication No. 488/1992, Human Rights Committee, 31 March 1994, UN Doc. CCPR/C/50/D/488/1992, in which the Committee held that the Tasmanian Criminal Code (*the Code*), which made private homosexual conduct a criminal offence, violated Article 17 guaranteeing the right to privacy. The Committee also found that the repeal of the infringing provisions, i.e. sections 122(a) and (c) and 123 of the Code would be an effective remedy.

389 See Article 40 (1), (2), (3), (4) and (5) of the Covenant.

390 See Human Rights Committee, CCPR/C/NAM/2003/1.

391 Human Rights Committee, 2216th meeting (CCPR/C/SR.2216), 26 July 2004, or Doc. CCPR/CO/81/NAM.

Among the positive aspects, the Committee noted –

- the speedy establishment of democratic institutions in Namibia since independence
- the abolition of the death penalty for all crimes
- the constitutional provision which incorporates rules of international law and international agreements into Namibian municipal laws<sup>392</sup>
- the creation of the Office of Ombudsman,<sup>393</sup> and the enactment of a legislation which eliminates discrimination between female and male spouses, i.e. the Married Persons Equality Act<sup>394</sup> (in fact, this piece of legislation is in line with Article 3 of the Covenant, which prohibits discrimination and inequality between men and women)
- the right to legal representation in regard to indigent litigants,<sup>395</sup> and
- the drafting of the Children’s Status Bill,<sup>396</sup> whose main purpose is to eliminate all inequalities between children born within and out of wedlock (the Bill has been assented to by the President and has since become law).<sup>397</sup>

As regards recommendations, the Committee urged the Namibian government to urgently take the necessary steps to make torture a specific statutory offence.<sup>398</sup> The onus is, therefore, on the legislature to comply with this obligation: in Namibia, as in many common law jurisdictions, torture is still considered a common law offence to be charged as either assault or *crimen injuria*.

Article 26 of the ICCPR prohibits any discrimination on any of the following grounds: race, sex, religion, colour, and language. The above provision is echoed by Article 10 of the Namibian Constitution. Whether the prohibition of discrimination on the ground of sexual orientation is protected by the Constitution

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392 See Article 144 of the Namibian Constitution.

393 Although the Committee observed that the Office of the Ombudsman should be strengthened and given more resources in order to fulfil its mandate.

394 No. 1 of 1996.

395 See the Legal Aid Act, 1990 (No. 29 of 1990). Indeed, the right to legal representation is one of the main components of the right to a fair trial. More often than not, the right to legal representation is hampered by a lack of resources in developing countries. Very few litigants in both criminal and civil matters are able to afford a private attorney.

396 No. 6 of 2004.

397 See the Children’s Status Act, 2006 (No. 6 of 2006). However, the Act was not yet in force by the time of writing this research.

398 See para. 7 of the Concluding Observations.

is an issue which was addressed in *The Chairperson of the Immigration Selection Board v Frank & Another*.<sup>399</sup> In this case, the High Court of Namibia found that

... Article 10 of the Namibian Constitution provided for equality before the law and prohibition of discrimination on any ground, including sex.

The learned court, using Article 21(1)(e) of the Constitution, further held that same-sex relationships were recognised by the Constitution. At this point it is important to remark that the High Court finding was overturned by the Supreme Court, which held that the Constitution did not recognise same-sex relationships.<sup>401</sup>

Thus, in paragraph 22 of its Concluding Observations, the Committee notes the absence of anti-discrimination measures or legislation for sexual minorities such as homosexuals. Since Namibian society is very conservative, it is uncertain whether or when a law on anti-discrimination on the ground of sexual orientation will be considered. In fact, like in many other African countries, sodomy remains a prosecutable crime in Namibia.<sup>402</sup>

### ***The Optional Protocol on the Involvement of Children in Armed Conflicts***

The Optional Protocol on the Involvement of Children in Armed Conflicts (OPAC) is the first Protocol to the Convention on the Rights of the Child. It was adopted by the UN General Assembly on 25 May 2000,<sup>403</sup> and came into force on 12 February 2002. Namibia ratified the Protocol on 16 April 2002, only two months after its entry into force. As its title indicates, Its core purpose is to prevent the involvement of children in armed conflicts.<sup>404</sup> State parties to the Protocol are expected to ensure that children are not engaged in armed conflict

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399 1999 NR 257.

400 (ibid.:258, para. J).

401 See *The Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107 (SC), p 108.

402 This is a common law offence.

403 See Resolution A/RES/54/263.

404 In international law, *conflicts* are characterised as being of an international nature, i.e. a conflict involving two or more states, and not internal civil wars.

and that places that are significant to children's welfare, such as schools and hospitals, are not targeted in armed conflicts.<sup>405</sup>

### *The OPAC and Namibian domestic laws*

Article 1 of the Protocol deals with state parties' obligation towards members of their armed forces who are younger than 18. This Article requires state parties to ensure that members of their armed forces who have not attained 18 years of age do not engage in direct hostilities. In this regard, Namibia enacted the Defence Act,<sup>406</sup> which regulates, inter alia, the actions and conduct of members of armed forces during hostilities. For instance, section 28 of the Act provides that *any* member of the forces may be called for mobilisation. Section 30(2) of the Act further provides that failure to report for such mobilisation may lead to the recalcitrant member being charged with and prosecuted for desertion under the Military Code. On the other hand, section 7 of the Act lays down the requirements and conditions to be met for one to join the forces. However, the latter section does not lay down the minimum age for recruitment into the armed forces.

The Namibian Constitution protects children from economic exploitation and from performing work that may be hazardous to or interfere with their education, or likely to be harmful to their health or physical, mental, spiritual, moral or social development.<sup>407</sup> For the purpose of this constitutional provision, *child* is defined as a person younger than 16, whereas the Protocol defines *child* as a person younger than 18. Since the Defence Act does not stipulate the minimum age for recruitment into the armed forces, and since the same legislation fails to distinguish between members who may be called for mobilisation, it remains ambiguous whether the Namibian statute law complies with the legal expectations required by Article 1 of OPAC. In addition, the Namibian statute does not prevent members of the armed forces who are below the age of 18 from engaging in armed conflict.

Equally relevant is the minimum age in respect of voluntary recruitment. Article 3 of OPAC provides that, within two months of ratification, state parties to the Protocol are expected to deposit a declaration stipulating the minimum age of

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405 See the Preamble to the Protocol.

406 No. 1 of 2002.

407 See Article 15(2).

voluntary recruitment as well as the safeguards adopted to ensure that such recruitment is not coerced. In addition, each recruit's parents or guardians need to be informed of their child or charge's intentions.

Article 4 of OPAC deals with the recruitment of child soldiers in countries ravaged by conflicts of a non-international character, such as civil and ethnic wars. Under this Article, OPAC prohibits armed groups or rebel movements from enlisting children under the age of 18 for purposes of engagement in hostilities. As discussed earlier herein, Namibia is a state party to the Rome Statute establishing the ICC. The Rome Statute criminalises the enlisting and conscription of child soldiers in international as well as non-international armed conflicts.<sup>408</sup> One notable ongoing prosecution before the ICC involves a certain Lubange, the leader of a Congolese rebel movement titling itself *Forces Patriotiques pour la Liberation du Congo*.<sup>409</sup> Lubange was arrested by the Democratic Republic of Congo (DRC) government, which then referred the case to the ICC for prosecution under Article 12(2)(a) and (b) of the Rome Statute. Lubange is being charged with and prosecuted for enlisting and conscripting children under the age of 15 years into his forces. The warrant against Lubange further indicated that there were reasonable grounds to believe that such child soldiers indeed participated in hostilities.<sup>410</sup> Although there is no armed conflict in Namibia, one can convincingly argue that the above provisions equally apply to Namibia, considering the effect and relevance of Article 144 of the Namibian Constitution vis-à-vis ratified international agreements.

In regard to the implementation and enforcement of the provisions of OPAC, state parties are expected to take all necessary legal, administrative and other measures with a view to incorporating such provisions into their respective national jurisdictions.<sup>411</sup> In addition, Article 6 of the Protocol calls upon state parties to, inter alia, make the principles and provisions contained in the Protocol widely known to adults and children alike. Furthermore, state parties should ensure that all persons used or recruited in armed conflict contrary to the provisions of OPAC are demobilised. Such persons should also be assisted physically as well as psychologically in their reintegration into normal civilian life.<sup>412</sup>

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408 See Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

409 *Prosecutor v Lubange*, ICC – 01/04-01/06-8.

410 See Schabas (2006:35).

411 Article 6 (1) of the OPAC.

412 Article 6 (2) and (3) of the Protocol.

The number of former child soldiers within the borders of Namibia is not easy to ascertain. However, their presence is likely because Namibia shares a border with Angola – a country with a high number of former child soldiers who may have crossed over into Namibia. Moreover, Namibia has refugee camps which accommodate asylum seekers and refugees from war-torn-countries such as Burundi, the DRC, Rwanda, and Somalia. The conscription of child soldiers in these countries is no secret, so the presence of former child soldiers in these refugee camps is a high possibility.

In complying with and implementing Article 6(3) of OPAC, therefore, Namibia is expected to ascertain the presence, if any, of former child soldiers within its territory with a view to assisting them physically as well as psychologically. In this regard, the efforts of the Namibian government, in collaboration with the UN High Commission for Refugees, to accommodate and assist asylum seekers and refugees are commendable. Nevertheless, due to some grey areas<sup>413</sup> in domestic legislation on the topic, implementation of and compliance with the provisions of the present Protocol are not easy to assess.

## **Conclusion**

In this research, the author has attempted to assess the domestication and implementation of human rights instruments by the Namibian government. The focus, therefore, was on policies, legal and administrative measures adopted by Namibia with a view to complying with and implementing its legal obligations, as spelt out in ratified human rights instruments. The first section gives an overview of the rules and principles of international law with regard to the domestication of international law within municipal law. There are two methods used to incorporate international law into national legal systems, namely the monist and dualist approaches. Namibia, through Article 144 of its Constitution, adopted the monist approach. As discussed earlier, in terms of this approach, international law is immediately applicable within national legal frameworks. All in all, one could argue that Namibia's constitutional and legal framework is conducive to the process of domestication of the rules of international law and international agreements.

The benefits of the domestication of human rights instruments within the Namibian legal system are self-evident. Undoubtedly, this gives both national

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413 See page 20 (supra), where some of these grey areas are discussed.

authorities and private individuals the opportunity to afford and obtain redress in cases of human rights abuses and violations, before complaints are taken to regional and international judicial or quasi-judicial fora. This way, protracted proceedings in a forum that is both remote from and unfamiliar to the individual complainant can be spared.

In the second section, the author looked at some of the human rights instruments ratified by Namibia as well as other countries in the region. Three instruments were chosen and analysed *in extenso* with a view to ascertaining their domestication and implementation by Namibia, namely the Rome Statute of the International Criminal Court, the International Covenant on Civil and Political Rights, and the Optional Protocol on the Involvement of Children in Armed Conflicts.

In regard to the Rome Statute, the author is not aware of any legal or administrative measures adopted by the Namibian government to comply with and implement its obligations under the Statute. Perhaps one can argue that it is too early to assess the realisation and implementation of this Statute, considering that the ICC is still in its infancy.

Concerning the ICCPR, with the exception of few problematic areas discussed in this paper, one should commend the efforts being made by the Namibian government in realising and implementing the rights recognised by the Covenant.

Finally, the paper deals with the domestication and implementation of OPAC. After an overview of the provisions of the Protocol and the Namibian statute on the topic, it is not clear whether or not Namibia complies with its legal expectations under this Protocol. Therefore, legislative and administrative measures need to be adopted that will internalise and implement these legal obligations. As stated earlier, the onus is now on the legislature, with the assistance of relevant ministries and other government agencies, to see to it that the legal framework is reformed in such a way that all relevant obligations as outlined are fulfilled.