

# Struggle to Survive

## A Report on HIV/AIDS and Prisoners' Rights In Namibia



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*Free my people from behind the walls. I will soon arise to fight the battle. The battle of human rights, the battle of justice that will set my people free from injustice and degradation.*

*The light to the captive, darkness shall be chased from behind the wires of injustice.*<sup>1</sup>

## I. Preface

HIV is widespread in prisons throughout the world. Prisons in the United States reported that nearly 1.7 percent of the total prison population was HIV-positive in 2006.<sup>2</sup> In South Africa, the rate of HIV prevalence among prisoners was forty-five percent.<sup>3</sup> The ratio of HIV-positive inmates to HIV-positive members of the general population is ten to one in France.<sup>4</sup> Confinement and marginalization make prisoners, especially HIV-positive prisoners, more vulnerable to violations of fundamental human rights, particularly the right to the highest attainable standard of health, the right to dignity, and the right to freedom from cruel, unusual, and degrading treatment.

Under international human rights law, an inmate does not surrender all fundamental human rights upon entering prison. The United Nations Universal Declaration of Human Rights guarantees the right to the highest attainable standard of health for everyone, including prisoners.<sup>5</sup> In 1955, the First United Nations Congress adopted the Standard Minimum Rules for the Treatment of Prisoners to provide a broad framework of basic principles and practices for penal institutions, recognizing the challenges that stem from political, social and economic conditions within each state.<sup>6</sup>

The Namibian Government reports that at least twelve percent of the prison population is infected with HIV/AIDS, although the percentage may be much higher due to underreporting.<sup>7</sup> A combination of lengthy pre-trial detentions, substandard nutrition and sanitation, violence, rape, consensual unprotected sex and inadequate staffing in prisons contribute to HIV transmission. The criminalization of sodomy has resulted in a prohibition on the distribution of condoms in prisons. Lack of access to adequate testing,

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<sup>1</sup> Engelhardt Tjimbinæ Tjaimi Ngatjikare, BEHIND THE WALLS: FREE MY PEOPLE (2007).

<sup>2</sup> U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp06.pdf>.

<sup>3</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, HIV AND PRISONS IN SUB-SAHARAN AFRICA: OPPORTUNITIES FOR ACTION 22 (2006).

<sup>4</sup> *Id.* at 7.

<sup>5</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at art. 25, U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. Mtg., UN. Doc A/810 (Dec. 12, 1948).

<sup>6</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm). [hereinafter SMRTP]

<sup>7</sup> REPUBLIC OF NAMIBIA, MEDIUM TERM EXPENDITURES FRAMEWORK FOR 2008/2009 TO 2010/2011 12, 334 (2007), <http://www.mof.gov.na/Budget%20Documents/200809/Medium%20Term%20Expenditure%20Framework%20for%202008-2009%20to%202010-2011.pdf>, [hereinafter "Expenditures Framework"]. This figure was calculated by dividing the HIV/AIDS infection rate for 2007/2008 by the total capacity of the prisons; however, not all inmates actually know their HIV/AIDS status, so this figure is likely to be higher.

medical care and counseling further exacerbates the transmission of HIV/AIDS among prisoners.

In 2008, the Legal Assistance Centre collaborated with the University Of Wyoming College Of Law to conduct interviews in Windhoek, Keetmanshoop, Mariental, Oshakati, Ondangwa and Ongwediva. Former inmates, government officials, non-profit organizations, defense attorneys, health care professionals and former prison wardens provided information about the status of HIV/AIDS in Namibia's prisons and the government's response to the problem. The Ministry of Safety and Security declined to communicate directly with the delegation.

## II. Summary of Findings

Nearly twenty percent of Namibians are HIV-positive.<sup>8</sup> Although there are no reliable statistics available, the estimated percentage of HIV-positive inmates is likely higher.<sup>9</sup> While the Namibian government is to be applauded for implementing a comprehensive HIV testing, counseling, prevention and treatment program for the benefit of the public, a comprehensive and standardized approach to controlling HIV in the prison system is lacking.

Namibia currently ranks among the top five African countries with the highest per-capita rates of imprisonment, with 267 per 100,000 people currently serving sentences in prison or in pre-trial detention.<sup>10</sup> Interviews revealed a pattern of compromised health, safety and security of inmates and detainees.<sup>11</sup>

Pre-trial detention conditions often fail to meet domestic and international legal standards.<sup>12</sup> The Namibian Constitution requires that a detainee appear before a magistrate within forty-eight hours after arrest.<sup>13</sup> Interviewees reported that delays in judicial procedure and a lack of resources resulted in some detainees lingering weeks, months and even years in pre-trial holding centers, while being subjected to extremely poor conditions.<sup>14</sup>

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<sup>8</sup> REPUBLIC OF NAMIBIA, UNITED NATIONS GENERAL ASSEMBLY SPECIAL SESSION COUNTRY REPORT (2007), [http://data.unaids.org/pub/Report/2008/namibia\\_2008\\_country\\_progress\\_report\\_en.pdf](http://data.unaids.org/pub/Report/2008/namibia_2008_country_progress_report_en.pdf). [hereinafter "UNGASS Country Report"].

<sup>9</sup> Interview, March 19, 2008 (local doctor, Windhoek); *see also* Interview, March 19, 2008 (local nurse, Katutura), *and* MINISTRY OF SAFETY AND SECURITY, NAMIBIAN PRISON SERVICE STRATEGIC PLAN: 2003-2007 (2003), <http://www.mpcs.gov.na/Prison%20Strategic%20Plan.pdf>. [hereinafter "Strategic Plan"]. This figure includes current pre-trial detainees and anyone currently serving a sentence in any of the Namibian prison facilities.

<sup>10</sup> INTERNATIONAL CENTRE FOR PRISON STUDIES, PRISON BRIEF FOR NAMIBIA (2007), [http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/africa\\_records.php?code=36](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/africa_records.php?code=36). [hereinafter "Prison Brief"].

<sup>11</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura and Ongwediva).

<sup>12</sup> *See infra* notes 280 - 392 and accompanying text (discussing Namibia's domestic and international standards).

<sup>13</sup> NAMIB. CONST. art. 11, § 3.

<sup>14</sup> Interview, March 18, 2008 (former inmate and detainee, Windhoek).

Former detainees spoke of severe overcrowding, the mixing of juveniles with adults, poor sanitation conditions, violence and rape in pre-trial detention facilities.<sup>15</sup> A standardized, formal health policy for the care of visibly ill detainees does not appear to exist and transport of sick detainees to local hospitals is often infrequent and unreliable.<sup>16</sup> Detention facilities can be a serious risk to defendants' health and safety and are a potential infection point for disease, including HIV/AIDS and tuberculosis.<sup>17</sup>

The health conditions in Namibia's prisons are similar to those in detention centers. Former inmates, doctors, NGO representatives and former wardens corroborated stories of daily violence, gang activity, overcrowding, forced and consensual unprotected sex, malnutrition, corruption, and poor health care.<sup>18</sup> Regarding HIV-related health issues: testing and counseling procedures are not always readily accessible to inmates;<sup>19</sup> some wardens are indifferent to HIV-positive inmates and others are openly hostile;<sup>20</sup> discrimination against HIV-positive inmates by other inmates and wardens occurs, forcing many to forego testing to avoid the stigmatization faced by those who are HIV-positive;<sup>21</sup> and accessing anti-retroviral (ARV) medication or seeing a doctor could sometimes take days, weeks or even months.<sup>22</sup>

Prisons typically do not have doctors on-site and prisoners requiring care or HIV treatment must request, often repeatedly, to see a physician at an outside hospital.<sup>23</sup> Facilitating transportation for doctor visits is a time and labor-intensive process that further reduces the number of prison staff available to monitor inmate activity in the prison.<sup>24</sup> As a consequence, prisoner safety and security is at risk. Access to prison health staff is further complicated by the fact that nurses and counselors, who typically work in the prisons part-time, often do not work in the prisons on weekends or evenings.<sup>25</sup>

The Namibian Government is capable of a much more proactive response to HIV/AIDS and health problems in the prisons. According to the most recent budget statistics, only one percent of the total 2008-2009 national budget has been allocated to prisons and correctional services.<sup>26</sup> Of this amount, it is unclear how much is allocated

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<sup>15</sup> Interview, March 17, 2008 (former inmate and detainee, Ongwediva).

<sup>16</sup> Interview, March 17, 2008 (detention center warden, Windhoek). In one detention center, it was the duty of the police officer to monitor the detainees each day and to transport any severely ill detainees to the hospital, based on his individual assessment and discretion. *Id.*

<sup>17</sup> See *infra* notes 105 -226 and accompany text (discussing prison conditions).

<sup>18</sup> *Id.*

<sup>19</sup> Interview, March 20, 2008 (prison counselor, Windhoek).

<sup>20</sup> Interview, March 20, 2008 (non-profit representative, Katutura); see also Interview, March 18, 2008 (former inmate, Mariental).

<sup>21</sup> Interview, March 18, 2008 (former inmate, Windhoek).

<sup>22</sup> Interview, March 19, 2008 (local doctor, Windhoek).

<sup>23</sup> Interview, March 20, 2008 (doctor and patients' advocate, Windhoek).

<sup>24</sup> *Id.* See also Interview, March 19, 2008 (local doctor, Windhoek); Interview, March 20, 2008 (clerk, national council, Windhoek); Interview, March 20, 2008 (NGO representative, Windhoek).

<sup>25</sup> Interview, March 19, 2008 (UNAID representative, Windhoek); see also Interview, March 19, 2008 (former female inmate, Windhoek).

<sup>26</sup> Expenditures Framework, *supra* note 7, at 13.

for health services or HIV programming.<sup>27</sup> Insufficient funding for the correctional services contributes to crumbling infrastructures and understaffing, which are severe obstacles to addressing HIV-related issues in the prisons.

Interviews revealed limited government oversight of HIV health practices among the country's thirteen prison facilities. Each prison operates semi-autonomously with discretion in implementing health and safety procedures.<sup>28</sup> One official noted that currently some prisons lack access to a copy of Namibia's National Policy on HIV/AIDS and, thus, cannot implement its policies.<sup>29</sup> There also appears to be a lack of cooperation and coordination regarding inmate health issues between the Ministry of Safety and Security and the Ministry of Health.<sup>30</sup> One doctor noted that instead of working together, the two Ministries are competing with one another for scarce economic and human resources, including doctors and nurses.<sup>31</sup>

Another significant impediment to controlling HIV transmission in prison is the government's refusal to distribute condoms in prison because of the criminal prohibition against sodomy.<sup>32</sup> To date, no statutory law prohibiting sodomy exists in Namibia. However, Namibian common law criminalizes sodomy.<sup>33</sup> Namibia's prisons prohibit official condom distribution based on the rationale that it is illegal and might condone male-to-male sex.<sup>34</sup> The judiciary has upheld the government's position by refusing to extend constitutional protection to individuals discriminated against based on their sexual orientation.<sup>35</sup>

Namibia's common law prohibition on sodomy runs counter to its international obligations under the International Covenant on Civil and Political Rights (ICCPR), which Namibia ratified in 1994.<sup>36</sup> The Human Rights Committee, the entity that monitors nation states' compliance with the ICCPR, noted in 2004 that Namibia should enact anti-discrimination legislation based on sexual orientation.<sup>37</sup> Namibia has thus far declined to take this legislative action.

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<sup>27</sup> *Id.* at 339.

<sup>28</sup> Interview, March 17, 2008 (international aid organization representative, Windhoek).

<sup>29</sup> Interview, March 20, 2008 (government employee, Windhoek).

<sup>30</sup> Interview, March 17, 2008 (international aid organization representative, Windhoek).

<sup>31</sup> Interview, March 20, 2008 (local private doctor, Windhoek).

<sup>32</sup> Interview, March 17, 2008 (local journalist, Windhoek).

<sup>33</sup> Heidi Joy Schmid Note, 8 *CARDOZO J. INT'L & COMP. L.* 163, 16. Sodomy is a common law offense inherited from South African rule in which sodomy was equivalent to an "unnatural sex crime" prohibited under the 1957 South African Sexual Offenses Act. [hereinafter Cardozo].

<sup>34</sup> See e.g. Interview, March 18, 2008 (former inmate, Windhoek).

<sup>35</sup> *Chairperson of the Immigration Selection Board v. Frank* 2000 SA 8/99,

<http://www.superiorcourts.org.na/supreme/docs/judgments/civil/Immigration-Frank.pdf>.

The majority in *Frank*, a Namibian Supreme Court case partially concerning rights for same-sex relationships, rejected the respondent's request to interpret broadly Article 10 of the constitution to protect against discrimination based "sexual orientation." *Id.*

<sup>36</sup> International Covenant on Civil and Political Rights, Dec. 16, 1961, 999 U.N.T.S. 171, available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm). [hereinafter "ICCPR"].

<sup>37</sup> Human Rights Committee, *General Comment* ¶ 74(22) A/59/40 vol. I (2004). Specifically, the Committee found laws that criminalize consensual homosexual conduct violate articles 2, 17 and 26 of the covenant. *Id.*



Namibia can do more to comply with Article 7 of the ICCPR to enforce the prohibition on cruel, inhuman or degrading treatment.<sup>38</sup> Interviews revealed numerous cases of inmate abuse by wardens; wardens taking bribes to ignore inmate rape;<sup>39</sup> and cases of wardens refusing inmates' access to ARV medications<sup>40</sup> or intentionally disclosing an inmate's positive HIV status.<sup>41</sup>

As a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>42</sup> Namibia agrees to take steps to support the full realization of rights in the ICESCR. These rights include the right to the enjoyment of the highest attainable standard of physical and mental health.<sup>43</sup> Inmates deserve the same access to health care as those in the general population, including access to HIV testing, counseling, ARV drugs and preventive devices such as condoms.<sup>44</sup> Because most prisoners will re-enter society at some point, the problem of inadequate health care in the prisons also affects the general population.

In conclusion, Namibian prisoners are not fully able to enjoy their fundamental human rights. Prisoners' rights to dignity and freedom from cruel, unusual, and degrading treatment are violated due to the systemic problems of rape and violence within the prison system and pre-trial detention centers. Likewise, prisoners' right to enjoy the highest attainable standard of health is violated because inmates do not have consistent access to doctors and life-saving medications, inmates are forced to live in overcrowded conditions with sub-standard nutrition and poor sanitation, and the National Policy on HIV/AIDS has not been implemented to its fullest extent in prisons and detention facilities. Yet, the government of Namibia and the Ministry of Safety and Security are capable of implementing the following recommendations that will create a safe and secure prison environment in which the fundamental human rights of all prisoners and detainees will be guaranteed.

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<sup>38</sup> ICCPR, *supra* note 36, at art 7. The ICCPR Human Rights Committee interpreted Article 7 of the ICCPR to mean, "That State Parties have to take positive measures to ensure that private persons or entitled do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power." CCPR Human Rights Committee, *General Comments No. 31 [80] Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument). Article 16 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment mandates that State parties "undertake to prevent in any territory under its jurisdiction...acts of cruel, inhuman or degrading treatment or punishment...when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm). [hereinafter "CAT"].

<sup>39</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>40</sup> Interview, March 18, 2008 (former inmate, Keetmanshoop).

<sup>41</sup> Interview, March 19, 2008 (local doctor, Windhoek).

<sup>42</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Status of Ratifications of the Principal Human Rights Treatises* (June 2004), <http://www.unhchr.ch/pdf/report.pdf>.

<sup>43</sup> International Covenant on Economic, Social and Cultural Rights ¶ 2,12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter "ICESCR"].

<sup>44</sup> Republic of Namibia, National Policy on HIV/AIDS, at 2.3.7 [hereinafter "national policy"], page 11.

### **III. Recommendations**

#### **To the Office of the President:**

- Ensure greater coordination between the Ministry of Health and the Ministry of Safety and Security with respect to the health care of prisoners. This will require increased communication between individual prison heads to ensure standardized health treatment and implementation of the National HIV/AIDS Policy. With appropriate protection of privacy and confidentiality, a centralized database or repository of records should be established to keep track of prisoners' health records as they move throughout the prison system.

#### **To the National Assembly and the National Council:**

- Ensure that prison and holding cells are not overcrowded. The government should consider reducing sentences for petty crimes and non-violent drug offenses and appropriating additional funds to build and expand prison facilities. Efforts to reduce overcrowding in the holding cells must focus on eliminating lengthy pre-sentencing detention. Additional methods to reduce prison overcrowding include the following: implementing alternatives to prison sentences, such as diversion programs; increasing the number of magistrates to allow for quicker sentencing; and allowing prisoners to credit their time served in the holding cells toward their prison sentence.
- Increase the Ministry of Safety and Security's operating budget. Full implementation of many of these recommendations will require a greater expenditure of funds within the prison system.
- Enact legislation to abolish the common law prohibition on sodomy. This common law prohibition of male-to-male sex is a major impediment to the distribution of condoms in prisons and legitimizes discrimination against men having sex with men.

#### **To the Ministry of Safety and Security:**

- Implement the National HIV/AIDS policy and ensure consistent and uniform application of the policy to all prisons and police holding facilities.
- Increase HIV/AIDS education for prisoners and prison officials. This training should include information on treatment, testing, counseling, and prevention. A special emphasis must be placed on addressing the stigma surrounding HIV/AIDS.
- Ensure that prisoners have full and appropriate access to health care services, delivered in a confidential, expedient, and coordinated manner. Prison officials must make every effort to keep prisoners' HIV/AIDS status confidential. This will require greater privacy in administering treatment, standardizing food distribution, and implementing policies that restrict access to health records. Prisoners must be given prompt health care services when needed. Prison officials

must never withhold care for disciplinary reasons. Prison officials must coordinate care between different health care providers.

- Ensure that victims of rape, assaults and other at-risk inmates have access to post-exposure prophylaxis in prison.
- Increase the number of health care providers in the prisons. Each prison should strive to recruit competent nurses and doctors to provide health care services within the prisons. At a minimum, prison officials must ensure that doctors regularly come to the prisons to provide health care services. Additionally, prison officials should increase the transportation staff in order to ensure that there are no staff shortages when a sick or injured prisoner needs to be transported to the local health facility.
- Encourage free and voluntary HIV testing and expand access to post-test counseling and treatment services. Prison officials should provide each prisoner with the opportunity to take an HIV test upon entering the prison system. However, testing must remain voluntary, and the test results must be strictly confidential.
- Ensure that prisoners have free access to proper sanitary items, including personal razors. Prison officials must provide these items when needed and not just on entry into the prison system. Prisoners should not be required or allowed to share these personal items.
- Provide free access to condoms. Sex is an undeniable reality of prison life. Condom distribution is essential to combating the spread of HIV/AIDS and other sexually transmitted diseases.
- Increase oversight of prisoners to reduce violence, rape, drug use, and tattooing. This will require the hiring of additional prison wardens.
- Ensure the proper cleanup of human bodily fluids. Prison officials must require and enable those cleaning up human bodily fluids to use proper sterilization techniques and wear protective gloves.
- Provide sufficient amounts of nutritious food to all prisoners. Prisoners with HIV/AIDS are entitled to more nutritious food than other prisoners. However, this practice compromises the confidentiality of prisoners living with HIV/AIDS.
- Ensure sanitary prison and holding cell conditions. Prison officials must routinely inspect toilets and showers to assure proper functioning. Because holding cells are severely overcrowded and unsanitary, they warrant special attention.
- Develop a reporting system that encourages both prisoners and prison officials to report human rights abuses. Officials must keep reports strictly confidential,

except to the extent necessary to investigate and prosecute abuses. People reporting abuses must be protected from retaliation.

- Establish programs that facilitate a greater connection between prisoners and their families. Frequent transfers of prisoners among prison facilities should be limited. Prisoners should be afforded conjugal visits and be permitted to communicate regularly with their families.
- Expand programs to help prisoners reintegrate into society. These programs should provide work-related skills, counseling and health services. Prison officials should coordinate with local health care providers prior to a prisoner's release to ensure uninterrupted care.

## **IV. Methodology**

The AIDS Law Unit of the Legal Assistance Centre (LAC), based in Windhoek, collaborated with students from the University of Wyoming College of Law, students from the University of Namibia Law School and two volunteer attorneys from the United States to research and write this report. The delegation gathered information and facts about Namibia's domestic and international legal obligations and HIV-related issues in the Namibian prison system from over six months of research and more than 60 interviews. The interviews occurred over a one-week period in March 2008 and were conducted in Windhoek, Keetmanshoop, Mariental, Oshakati, Ondangwa and Ongwediva.<sup>45</sup> Due to time and resource constraints upon the interview process, this report does not purport to exhaustively reflect prison conditions in the entire country. LAC distributed interview request letters to various stakeholders, explaining the project's goals and requesting voluntary interviews. Interviewees included former prisoners, former prison wardens, social workers, health care professionals, representatives of non-government organizations and government officials.

Researchers, editors and contributors from the AIDS Law Unit of the Legal Assistance Center include LAC Director Norman Tjombe, Amon Ngavetene, Linda Dumba-Chicalu, Tonderai Bhatasara, Maggy Amweelo, Gabriel Augustus, Immanuel Iita, and Aloysius Katzao. From the University of Wyoming College of Law, authors and researchers include, Professor Johanna Bond, Joseph Azbell, Alan Barstow, Clarissa Collier, Haydee Dijkstal, Jason Mundy, Charles Pelkey, Rachel Ryckman and Anne Spear. Two volunteer U.S. lawyers, Professor Elizabeth Bruch and Sheryl Dickey, assisted with interviews and provided feedback on drafts of the report. Also, three students from the University of Namibia Law School assisted with interviews.

## **V. Background**

### **a. History**

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<sup>45</sup> Interviews were primarily conducted in Windhoek; however, several interviews were conducted in Keetmanshoop, Mariental, Oshakati, Ondangwa and Ongwediva.

From an historical perspective, the development of the prison system in Namibia sheds some light on the health policies and procedures currently implemented within the prison walls.<sup>46</sup> The footprints left by the German colonial forces, the South African system of Apartheid and the leaders of Namibia's liberation struggle, have shaped the present-day correctional institution and its policies.

### **i. German Colonialism**

The penal system in Namibia, an institution characterized by extreme racism at its inception, was a product of the colonial period.<sup>47</sup> The system catalogued a wide variety of offenses and provided six forms of punishment: death by decapitation, severe imprisonment, detention in a fortress, lighter imprisonment, simple imprisonment and a fine.<sup>48</sup> A near-contemporaneous source concludes that German colonizers unfairly administered punishment, with indigenous people punished much more severely than Germans for similar offenses.<sup>49</sup> Punishment for trivial offenses committed by indigenous Africans was harsh and often involved lashings and imprisonment in chains.<sup>50</sup>

Authorities uprooted prisoners, placed many in massive labor camps and subjected them to brutal physical abuse and starvation.<sup>51</sup> Cheap labor served as the motive for the mass arrests; the majority of the prisoners had not committed unlawful offenses and many were political dissidents.<sup>52</sup> In the Namibian prison camps, prisoners slept in temporary tents located near the worksites and often experienced floggings, canings and other forms of abusive punishment, including cigarette burns, beatings, and sleep deprivation.<sup>53</sup>

### **ii. Apartheid under South Africa**

In 1915, during World War I, German rule ended as the South African forces invaded and occupied Namibia.<sup>54</sup> Following the war, the League of Nations granted South Africa

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<sup>46</sup> John W. Nyoka & Stefan Schulz, *Namibian Adult Corrections From the Past Into the Present*. ADULT CORRECTIONS: INTERNATIONAL SYSTEMS AND PERSPECTIVES 272 (Criminal Justice Press 2004).

<sup>47</sup> *Id.* at 271.

<sup>48</sup> *Id.* at 250.

<sup>49</sup> *Id.* at 250. According to the Blue Book, a 1918 English report documenting the German occupation:

[I]f a native was killed or seriously injured as a result of a collision with a German it was a matter of small moment, to be disregarded if the authorities were not forced to take notice of it, and if otherwise even then to be minimized to the greatest possible extent. On the other hand, had a German the slightest of grievances against a native, the latter was made to suffer severely under the lash.

*Id.*

<sup>50</sup> *Id.* at 257. For example, the punishment for vagrancy was 25 lashes and 14 days in chains, while a native convicted of gross negligence and drunkenness received 50 lashes and 14 days in chains. *Id.*

<sup>51</sup> Oxche & Tarrin-Rae, *Post-Independence Prison Reform in Namibia – Some Observations*, CIVIL SOCIETY PRISON REFORM INITIATIVE (2006), [http://www.easimail.co.za/BackIssues/CSPRI/0906\\_Issue871.html](http://www.easimail.co.za/BackIssues/CSPRI/0906_Issue871.html).

<sup>52</sup> *Id.*

<sup>53</sup> See Oxche, *supra* note 51

<sup>54</sup> See generally DONALD L. SPARKS & DECEMBER GREEN, *NAMIBIA* 5-10 (Westview Press 1992), at 14-20.

guardianship status.<sup>55</sup> South Africa continued Germany's discriminatory policies and eventually established a system of Apartheid in Namibia.<sup>56</sup>

South Africa established fourteen prisons in 1920 and used the prisoners as a cheap supply of labor.<sup>57</sup> The racial policies inherent in the South African Apartheid government translated to the operations of correctional institutions in Namibia.<sup>58</sup> In particular, race determined the level of training received by prison staff, and the training facilities were race-based; whites worked in managerial positions while indigenous Africans provided support in offices and performed custodial duties.<sup>59</sup> Authorities primarily classified prisoners by race.<sup>60</sup>

Apartheid prisons operated on a theory of retributive punishment inherited from the German colonial period.<sup>61</sup> Force served as the primary tool of implementing and upholding the punitive philosophy. Consequently, prison personnel were required to meet specific stature requirements that would contribute to the image of strength, control and intimidation the Apartheid administration wanted to convey.<sup>62</sup>

In 1966, the United Nations revoked South Africa's mandate as protector and the South West Africa People's Organization (SWAPO) began efforts toward Namibian liberation.<sup>63</sup> Simultaneously, international pressure for Namibian independence began to mount.<sup>64</sup> In April 1978, the United Nations (UN) adopted Security Council Resolution 435 in an attempt to resolve the political turmoil in Namibia.<sup>65</sup> South Africa acquiesced to the resolution and agreed to hold UN-supervised elections and cease military and police activities.<sup>66</sup> However, in defiance of the resolution, South Africa unilaterally held its own election and refused to discontinue its Apartheid policies.<sup>67</sup> It was not until 1989, following a sustained period of political maneuvering and open warfare, that South Africa eventually adopted Security Council Resolution 435.<sup>68</sup> The country held free and

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<sup>55</sup> See U.S. Department of State, *Background Note: Namibia*, <http://www.state.gov/r/pa/ei/bgn/5472.htm>.

<sup>56</sup> See Sparks, *supra* note 54, at 16-18.

<sup>57</sup> Patricia Hayes et al, *NAMIBIAN UNDER SOUTH AFRICAN RULE: MOBILITY & CONTAINMENT 1915-46 67* (1998).

<sup>58</sup> See Nyoka & Schulz, *supra* note 46, at 273.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 274. The height and chest requirements for recruitment into prisons in South Africa were approximately 167 centimeters and 91 centimeters, respectively. *Id.*

<sup>63</sup> U.S. Dep't of State, *supra* note 52.

<sup>64</sup> *Id.*

<sup>65</sup> See S.C. Res. 435, ¶2, U.N. Doc. S/RES/435 (Sept. 29, 1978). U.N. Security Council Resolution 435 requires the withdrawal of the South African administration from Namibia and the transfer of power to the Namibian people. *Id.*

<sup>66</sup> U.S. Dep't of State, *supra* note 55.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

fair elections shortly thereafter.<sup>69</sup> By February 1989, the elected assembly drafted a new constitution.<sup>70</sup> Namibia officially declared independence on March 21, 1990.<sup>71</sup>

### iii. Independence

Upon independence, Namibia's prison administration operated under the jurisdiction of the Ministry of Justice and the Ministry of Home Affairs.<sup>72</sup> In 1995, Namibia established the Ministry of Prisons and Correctional Services in response to concerns of overcrowding and the use of harsh disciplinary measures.<sup>73</sup> Namibia established the new ministry based on principles of rehabilitation and reform, largely in an effort to move away from a system built primarily on punitive objectives.<sup>74</sup>

## VI. Overview

### a. Prison System

Namibia's prison system consists of thirteen prison facilities located throughout the country.<sup>75</sup> The system currently operates under the authority of the Ministry of Safety and Security, which is one of twenty ministries in Namibia's executive branch of government.<sup>76</sup>

The original legislation establishing the Namibian Prison Service acknowledges the rehabilitative function of the prison service. One of the primary functions of the prison service is to "apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation."<sup>77</sup> Although the administration of correctional services in Namibia has undergone several organizational transformations, the official function of the National Prison Service has remained consistent.<sup>78</sup> In the Minister's Foreword to the Namibian Prison Service Strategic Plan for 2003-2007, Former Minister Andimba Toivo Ya Toivo declared, "As the Minister responsible for the Namibian Prison Service, I am very much impressed with the gradual progress we are making since independence. We

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Oxche, *supra* note 51.

<sup>73</sup> Bureau of Democracy, Human Rights, and Labor, Dep't St. Country Reports on Human Rights Practices, *Namibia Human Rights Practices* (1995), available at [http://dosfan.lib.uic.edu/ERC/democracy/1995\\_hrp\\_report/95hrp\\_report\\_africa/Nambia.html](http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_africa/Nambia.html).

<sup>74</sup> *Id.*

<sup>75</sup> Prison Brief, *supra* note 10.

<sup>76</sup> REPUBLIC OF NAMIBIA, OUR GOVERNMENT, <http://www.grnnet.gov.na/grnabout.html> [hereinafter "Our Government"]. The Executive Branch also consists of the President, who appoints the Ministers and the Cabinet leaders. Namibia's Judiciary Branch has three levels of court: the Supreme Court, the High Court, and Lower Courts. The Legislative Branch's main law-making body is a bicameral Parliament, consisting of the National Assembly and the National Council. *Id.*

<sup>77</sup> Prisons Act 17 of 1998, at Part I, §3(b).

<sup>78</sup> Our Government, *supra* note 76.

have moved from punitive incarceration to a more humane correctional approach based on rehabilitation.”<sup>79</sup>

Although official statements and policies point toward reform, Namibians have varied opinions about the purpose of the prison system. Societal sentiment generally differs from the progressive policies formally articulated by the government. One former inmate observed: “Society has a hatred for prisoners. Society is unforgiving.”<sup>80</sup>

## **b. Economy and Budget**

Budgetary constraints affect the availability of resources that the prison service is able to allocate toward employing prison wardens, constructing and maintaining facilities, and detecting and treating diseases affecting prisoners. The prison service operates on an annual budget of N\$ 228,486,000.<sup>81</sup>

Of the various governmental organs, the national budget allocates only a small portion to the prison system. According to the most recent Ministry of Finance budget report, only one percent of the 2008-2009 national budget is allocated to the Ministry of Safety and Security, including N\$ 203,486,000 for operational expenses and just N\$ 25,000,000 for development projects.<sup>82</sup> The expressed priorities for these monies are to:

*Maintain a healthy environment for offenders; Maintain safe, secure corrections in the institutions; Safe and timely reintegration of offenders into society; Pilot the Offender Management System at Windhoek Central Prison, Hardap Prison, Oluno Rehabilitation Centre and Walvis Bay Prison; [and] Ensure compliance with the Namibian Prison Service mandate and mission.*<sup>83</sup>

One former official within the Ministry of Safety and Security expressed concern over whether the money would actually go toward the programs. “Prisons have their own budget and much of the budget goes to bureaucracy,” said the former official.<sup>84</sup>

## **VII. Inside the Prison**

### **a. HIV/AIDS Training for Prison Officials**

The Ministry of Safety and Security listed 4,031 inmates in detention in 2007,<sup>85</sup> of which 494 inmates were HIV-positive, according to official records.<sup>86</sup> The true number

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<sup>79</sup> Strategic Plan, *supra* note 9, at 2.

<sup>80</sup> Interview, March 18, 2008 (former inmate, Windhoek).

<sup>81</sup> Expenditures Framework, *supra* note 7, at 339.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* Total expenditures for 2008 -2009 fiscal year are N\$ 22,464,500,000. *Id.* at 13. The Ministry of Safety and Security is allocated N\$ 228,486,000, comprising 1% of the total budget. *Id.* at 346.

<sup>84</sup> Interview, March 17, 2008, (NGO representative, Windhoek).

<sup>85</sup> Expenditures Framework, *supra* note 7, at 339.



of inmates living with HIV/AIDS is certainly much higher.<sup>87</sup> As a doctor who provides HIV/AIDS testing described, “90% of people living with HIV don’t know their status” because of the social stigma involved with HIV/AIDS.<sup>88</sup> These statistics suggest the need for thorough, intensive HIV training for prison officials in order to properly care for HIV-positive inmates as well as prevent the transmission of HIV within the prisons.

Although there have been recent efforts to increase HIV/AIDS staff training for new prison wardens, significant problems still exist.<sup>89</sup> Newly hired staff members are put through a seven-month, intensive military-style training.<sup>90</sup> During this training, the staff members receive limited HIV/AIDS education.<sup>91</sup> In describing the trainings offered for prison officials, one warden explained, “We talked about HIV/AIDS and what to do with blood, nutrition, how to treat those with HIV/AIDS.”<sup>92</sup>

The training for wardens regarding HIV/AIDS, however, is quite limited. A former police officer, who is currently an NGO representative working with juvenile detainees, expressed one reason for the ineffectiveness of HIV/AIDS trainings: “The police and wardens are trained as military, so to be able to see the softer side of HIV/AIDS has been a difficult transition.”<sup>93</sup>

Older prison wardens lack even the perfunctory training provided to newer staff members. Many of these wardens have never received training and do not understand the methods of transmission and proper care that HIV-positive prisoners require.<sup>94</sup> This lack of knowledge can lead to discrimination against those whose HIV status is known among the wardens. A former warden from Windhoek Central Prison described the problem as follows:

*Older officers discriminate against those with HIV.... They discriminate by not touching HIV-positive people; they talk badly about people with HIV; and they treat them differently. The guards and prisoners know about [other prisoners'] HIV status. [They] keep their distance from those with HIV.*<sup>95</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> Interview, March 21, 2008, (local doctor, Windhoek).

<sup>88</sup> *Id.*

<sup>89</sup> *See, e.g.*, Interview, March 20, 2008 (foundation representative and member of the clergy, Windhoek).

<sup>90</sup> Interview, March 19, 2008 (former warden, Windhoek).

<sup>91</sup> Interview, March 19, 2008 (former warden, Windhoek).

<sup>92</sup> Interview, March 19, 2008 (former warden, Windhoek).

<sup>93</sup> Interview, March 18, 2008 (foundation representative, Mariental).

<sup>94</sup> Interview, March 17, 2008 (former inmate, Windhoek)

<sup>95</sup> Interview, March 17, 2008 (former prison warden, Windhoek).

When asked for suggestions for the Ministry of Safety and Security, a former inmate expressed some ideas:

*Guards should attend trainings and have thorough [understanding] about prevention and treatment of HIV/AIDS. They ignore people and treat people without respect. The HIV trainings are not compulsory for inmates or guards and are voluntary. Those guards not in attendance treat HIV-positive inmates very bad.<sup>96</sup>*

An additional barrier to assisting HIV-positive inmates, besides the lack of training, is communication barriers that can affect the general treatment an inmate receives while in prison.<sup>97</sup> While the Ministry of Safety and Security has made efforts to combat these complications, a prisoner's inability to communicate concerns to prison officials, without the benefit of a translator, hampers access to care and treatment, particularly in urgent situations. A former inmate from the Hardap Prison recalled the conflicts that stemmed from language barriers:

*With the guards, in general the treatment was not that bad, but the conflict came over language. Most guards were Oshiwambo speaking and many inmates spoke Afrikaans, so it caused a lot of frustration and anger. If I do not speak the same language as the immediate prison warden, I go to his supervisor and complain. He then translates or gives me what I need.<sup>98</sup>*

The lack of training, sensitivity regarding HIV/AIDS and communication barriers make access to health care difficult if not impossible for some inmates. Other factors contribute as well. Inmates must often press wardens for health related assistance. Potential threats of a prisoner's escape jeopardize the willingness of prison officials to authorize the transfer of prisoners needing medical assistance to the hospital. After release from the hospital, there is no guarantee that treatment will continue in prison, as illustrated by a former inmate, once transferred to the hospital following a fight with another inmate:

*Another inmate once stabbed me with a sharpened toothbrush and I was hospitalized.[Upon my return to the prison,] I could not wash linens by myself and I would sleep in dirty linens. All inmates are given general treatment because everyone is a prisoner or criminal, so there is not any form of special treatment and the situation/condition worsened. There were not acceptable ways of care and inmates have to press for certain things; the routine is not organized. To see the clinic, the question was whether I would be attended to.<sup>99</sup>*

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<sup>96</sup> Interview, March 18, 2008 (former inmate, Hardap Prison, Mariental).

<sup>97</sup> See *supra* note 10 and accompanying text.

<sup>98</sup> Interview, March 18, 2008 (former inmate, Mariental).

<sup>99</sup> Interview, March 17, 2008 (former inmate from Keetmanshoop, Keetmanshoop).

When a prisoner wants to make a complaint regarding an illness, the process largely depends upon the interaction of the inmates and the prison officials. Generally, a prisoner must report any concerns or problems to the prison official on duty. The following is the general observation of a former inmate concerning the obstacles associated with reporting an illness:

*When a person was sick, he went to the guards and asked to be taken to the hospital. The guards yelled and ignored him and treated him badly. If hospital was refused, then you could go to the head of the prison to complain, but there was an officer in charge. Only when the higher official was present would the guards be nice. The moment the higher official left, the guards were bad again.*<sup>100</sup>

## **b. Decentralization & Lack of Standardized Treatment**

Although the President of Namibia appoints one Commissioner to oversee the entire prison system, the heads of each prison facility have great latitude in the implementation of the institution's goals.<sup>101</sup> According to a foreign government agency employee, "Each prison is almost autonomous; there is no central programming. Each prison's programming depends on the director or commander."<sup>102</sup> The Walvis Bay Prison is one example where progressive steps to combat HIV transmission among the prison population are being implemented under the direction of the prison officials.<sup>103</sup> The program involves mentorship between older and younger inmates as well as testing and counseling programs.<sup>104</sup> Because of such autonomy, standards and practices are largely dependent upon the attitudes of individual prison directors.

An international aid representative pointed to both negative and positive consequences of the decentralized nature of the Namibian correctional system:

*[On one hand] prison autonomy allows the commander discretion and latitude in how the prison is run. If he is a progressive, he may implement policies that are more favorable to combating HIV, including better health care inside, programs designed to increase HIV awareness, and better nutrition/meals if the budget allows. [On the other hand, this system] creates inequalities among the prison system and prisoners experience these differences since they are often circulated through different prisons during their incarceration.*<sup>105</sup>

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<sup>101</sup> See Prisons Act, *supra* note 77, at Part I §2(2)(a).

<sup>102</sup> Interview, March 17, 2008, (international aid representative, Windhoek).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Interview, March 17, 2008 (international aid representative, Windhoek).

## VIII. Role of Prison Conditions in HIV Transmission

### a. Pre-trial detention

Although conditions in Namibian prisons are not ideal, some former prisoners reported that the prison conditions were better than conditions in police holding cells, which hold defendants before trial. One former inmate, held in a Windhoek detention center for more than a year before his release on bail, said conditions were far worse than in Windhoek Central Prison.<sup>106</sup> Namibia's Constitution guarantees defendants an appearance before a magistrate within 48 hours of arrest.<sup>107</sup> However, since that period includes only "business days," weekends and holidays may delay the initial detention hearing by several days.<sup>108</sup>

The initial appearance acts as only the first step of the judicial process and in no way guarantees release or transfer to facilities overseen by the Namibian Prison Service. Indeed, in the event of a lengthy bail dispute for those charged with serious crimes or those deemed to pose a flight risk, pre-trial detention may ultimately exceed the actual sentence provided by statute.<sup>109</sup> Interviewees provided anecdotal evidence of cases<sup>110</sup> in which defendants remained in pre-trial detention<sup>111</sup> for periods of up to five years.<sup>112</sup>

Estimates vary, but a report by Annelie Odendaal issued in 2000 suggests that those in pretrial detention represent approximately seven percent of Namibia's prison population.<sup>113</sup> Although extended periods of detention without trial and conviction raise a number of issues, the conditions within holding facilities constitute a serious risk to defendants' health and safety and provide a potentially major infection point for disease, including HIV/AIDS and tuberculosis. Police holding cells are not subject to proposed reforms under the prison system's strategic plan<sup>114</sup> and issues of overcrowding, poor sanitation and violence are often worse than they are within the prison system itself.

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<sup>106</sup> Interview, March 18, 2008 (former inmate, Windhoek).

<sup>107</sup> NAMIB. CONST. art. 11, § 3.

<sup>108</sup> *Supra* note 102.

<sup>109</sup> *Id.* The attorney cited several cases in which defendants, whose offense would have resulted merely in a fine, had spent months in detention before trial. *Id.*

<sup>110</sup> Interview, March 19, 2008 (former warden, Windhoek).

<sup>111</sup> Interview, March 17, 2008 (former detainee, Oshakati detention center)

<sup>112</sup> Interview, March 17, 2008 (station commander)

<sup>113</sup> See generally Annelie Odendaal, *Crime, Social Change and Social Control in Namibia: An Exploratory Study of Namibian Prisons*, PAN-AFRICAN ISSUES IN CRIME AND JUSTICE – INTERDISCIPLINARY RESEARCH SERIES IN ETHNIC, GENDER AND CLASS RELATIONS, (Ashgate Press 2004), at 56-76.

<sup>114</sup> Strategic Plan, *supra* note 9.

Several interviewees reported seriously overcrowded cells with limited sanitary facilities and minimal oversight from police.<sup>115</sup>

One former female prisoner reported that she spent a week in a Windhoek holding cell with fifty women.<sup>116</sup> In one interview, a former detainee described a cell in which thirty detainees were required to share a single broken toilet placed in the middle of the room and overflowing with human waste.<sup>117</sup> A detention center employee noted that beds had been removed from the detention center he oversaw in order to prevent escapes.<sup>118</sup>

With police facilities understaffed, officers on duty must often choose between detainee oversight and routine patrol duties.<sup>119</sup> As a result, violence is often rampant in holding cells: detainees are subject only to “the law of the inmates,”<sup>120</sup> and self-proclaimed “inmate captains” take charge of cells by ordering beatings and theft of whatever personal property detainees might have in their possession.<sup>121</sup>

Instances of violence within holding cells frequently involved the rape of weaker and younger detainees, according to several interviewees.<sup>122</sup> Interviewees suggested that officials sometimes place juvenile detainees in cells with adults. In at least one case, a former inmate reported that an older inmate raped him while in detention.<sup>123</sup>

With an HIV/AIDS rate approaching twenty percent in the general population, conditions within holding cells provide an uncontrolled environment ideal for the rapid transmission of HIV/AIDS. In keeping with the requirements of national AIDS policy privacy protections, officials do not ask inmates about their HIV status upon arrival. In addition, there is no formal policy for the treatment, separation or care for visibly ill detainees in holding cells.<sup>124</sup>

## **b. Food and Nutrition**

Complaints about the quality and quantity of food in both pre-trial detention facilities and prisons were common among most former inmates and staff interviewed.

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<sup>115</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).

<sup>116</sup> Interview, March 19, 2008 (former inmate, Windhoek).

<sup>117</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>118</sup> Interview, March 17, 2008 (station commander).

<sup>119</sup> Interview, March 19, 2008 (former warden, Windhoek).

<sup>120</sup> Interview, March 18, 2008 (former inmate, Windhoek).

<sup>121</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).

<sup>122</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>123</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>124</sup> Interview, March 18, 2008 (former inmate, Mariental).

*In the morning, we would get a liquid porridge. You could almost drink it. It was not powerful. You would drink it and then in half an hour go to the bathroom and it's gone. Lunch would be at 3:00 p.m. Once you finish it, it was back to the cells until tomorrow morning. Lunch was millet ... beans, peas. It was the only menu that you eat every day. On Wednesdays and Sundays, though, we would get a little piece of meat; only about a mouthful. This was the only time we get meat. You can have water anytime.*<sup>125</sup>

One former warden at Windhoek Central Prison acknowledged that despite a prescribed menu, inmates did not always receive required items. Instead, he offered what he said was a more accurate menu:

*At 6 a.m., they get five slices of bread, porridge that is not well cooked, and soup. Around 1 p.m., they eat the bread from the morning or gamble with it. At 4 p.m., fish with porridge and soup, which is tasteless but sometimes nice, it depends. Water is available inside and they can make their own tea.*<sup>126</sup>

Inmates diagnosed as HIV-positive are entitled to additional food, including protein rich items not generally available to all prisoners.<sup>127</sup> While some former inmates report that such items are available to prisoners suffering from HIV or other diseases, other inmates report that additional food is not consistently offered to even the most seriously ill.<sup>128</sup> Access to additional food is inconsistent throughout the system. A physician at Windhoek Central Hospital told interviewers that he commonly sees malnourished inmates, whether HIV-positive or not, and often concludes that the best available treatment for some is simply an increase in caloric intake.<sup>129</sup> Complaints about food, however, are sometimes counterproductive. As one former inmate explained, "Complaining about the food sometimes adds more problems for you. They [the wardens] may deny you a meal so that you do not get any food at all."<sup>130</sup>

While adequate nutrition is essential for the treatment of HIV-positive inmates, the issue appears to go beyond just those facing health issues. One government official noted that while officials make some allowances for the ill, food for the general prison population is inadequate.

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<sup>125</sup> Interview, March 17, 2008 (former inmate, Katutura).

<sup>126</sup> Interview, March 19, 2008 (former warden, Windhoek).

<sup>127</sup> Interview, March 18, 2008 (former inmate, Hardap Prison, Mariental); *see also* National Policy *supra* note 44 at 2.3.7(6), page 12 (*stating*: "Prison authorities shall ensure that nutrition, treatment, care and support services are provided to prisoners living with HIV/AIDS in a sensitive and confidential manner and shall guard against inadvertently disclosing the HIV status of any prisoner.).

<sup>128</sup> Interviews, March 17-19, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).

<sup>129</sup> Interview, March 20, 2008 (physician, Katutura).

<sup>130</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

*I wonder why nutritious food is given only to the sick; every prisoner should get nutritious food. Nutritious food is given only to the sick because of the belief [by the general public] that prisoners should not get food—there must be a move away from punishment to rehabilitation.*<sup>131</sup>

Closely related to adequate food and nutrition is the issue of food handling practices. Inmates are responsible for food preparation in facilities with no specified handling procedures.<sup>132</sup> Several interviewees raised issues of food handling and hygiene at many of the system's thirteen prisons. One noted, "No gloves were used to serve food and the dining halls are not hygienic; they have cockroaches and flies; there were no utensils."<sup>133</sup>

### **c. Access to Hygienic Products**

The sharing of razor blades is a high-risk practice that encourages HIV transmission among prisoners.<sup>134</sup> Former inmates reported that prison officials require inmates to shave but provide no hygienic means for doing so.<sup>135</sup> Generally, inmates will have a specific time to share a single razor, used under the supervision of a warden.<sup>136</sup> As an inmate recalled, "We only use one razor for all inmates to share. You shave, then I shave... on down the line. Then the razor is given back to the wardens."<sup>137</sup>

At the point of initial processing, prison officials commonly provide inmates with soap, toilet paper, and a toothbrush.<sup>138</sup> Replacement items are not readily available.<sup>139</sup> As one former inmate noted, "If you lose your toothbrush you don't get any more. You can buy it or you can borrow it from another prisoner."<sup>140</sup>

A former inmate indicated prisons did not distribute soap and other personal hygiene products for periods up to several months.<sup>141</sup> As a result, inmates often relied on visitors to bring the most basic personal hygiene products or to deposit money in their prisoner accounts in order to purchase the supplies.<sup>142</sup> The former inmate went on to say that at one facility there is no prison commissary and inmates must ask wardens to purchase

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<sup>131</sup> Interview, March 20, 2008 (government employee, Windhoek).

<sup>132</sup> Interview, March 19, 2008 (former inmate, Windhoek).

<sup>133</sup> Interview, March 18, 2008 (former inmate, Katutura).

<sup>134</sup> Interview, March 18, 2008 (former inmate, Windhoek).

<sup>135</sup> *Id.*

<sup>136</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>137</sup> Interview, March 17, 2008 (former inmate, three separate sentences in three separate facilities).

<sup>138</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>142</sup> *Id.*

such items on their behalf.<sup>143</sup> Demand for basic hygienic items, such as soap, toothbrushes and toothpaste, is so high that some inmates use them to barter for sexual relations.<sup>144</sup>

#### d. Clean-up of blood

Inmate-on-inmate violence is common, often resulting in the spillage of blood and other bodily fluids in cells. An interviewee reported that prison staff require inmates, often the victim himself, to clean up pools of blood.

*With other inmates remaining in the area, the prisoner who was attacked had to clean up the blood, as long as he was not too hurt. The guards would not go near the blood. We clean up blood with a cloth and water. They gave us no cleaning supplies or any gloves.*<sup>145</sup>

#### e. Overcrowding

Namibia currently ranks among the top five African countries with the highest per-capita rates of imprisonment, with 267 per 100,000 currently serving sentences or in pre-trial detention.<sup>146</sup> The most recent data available from the Namibian Prison Service shows that in 2004, the country's thirteen prisons were at more than 116 percent of capacity.

**Capacity and overcrowding per prison, July 2004<sup>147</sup>**

Prison Institution	Capacity	Lock Up	Overcrowding (%)
Windhoek Central	912	1 266	38.82
Hardap Prison	941	965	2.55
Oluno	557	574	3.05
Walvis Bay	300	389	29.67
Omaruru	59	114	93.22
Grootfontein	70	134	91.43
Swakopmund	88	95	7.95
Keetmanshoop	110	127	15.45
Luderitz	290	127	-56.21
Gobabis	220	181	-17.73
Divundu Rehabilitation Centre	275	289	5.09
Elizabeth Nepemba Juvenile Centre	Under construction	91	0
Farm Scott Prison Farm	Under construction	90	0

<sup>143</sup> *Id.*

<sup>144</sup> Interview, March 19, 2008 (former Warden, Windhoek).

<sup>145</sup> Interview, March 18, 2008 (former inmate, Windhoek).

<sup>146</sup> Prison Brief, *supra* note 10.

<sup>147</sup> See generally Annelie Odendaal, *Crime, Social Change and Social Control in Namibia: An Exploratory Study of Namibian Prisons*, PAN-AFRICAN ISSUES IN CRIME AND JUSTICE – INTERDISCIPLINARY RESEARCH SERIES IN ETHNIC, GENDER AND CLASS RELATIONS, (Ashgate Press 2004), at 56-76.



<b>Total</b>	<b>3822</b>	<b>4442</b>	<b>116.22%</b>
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The majority of the named facilities serve as maximum-security prisons (59% of prisoners),<sup>148</sup> but hold inmates of all risk levels with varying sentences.<sup>149</sup> Windhoek Central Prison houses the majority of violent prisoners in the system.<sup>150</sup> In 2000, there were reportedly 1098 men and 61 women in that facility.<sup>151</sup>

While Prison Service data does not reflect severe overcrowding, interviews offered examples of serious population pressures within individual facilities. One former inmate, held in Oluno Rehabilitation Center, reported that his nine-bed cell contained twelve inmates and offered examples of others that held fifteen to seventeen inmates, meaning that many either shared beds in shifts or slept on the floor.<sup>152</sup> The prisons housed men and women separately; however, there were examples of young boys mixed in with the general male population.<sup>153</sup> Of some 600 inmates, one former inmate estimated that seven were only seventeen to eighteen years old.<sup>154</sup>

While the Prison Service's 2004 data suggests that the Oluno facility was just three percent over capacity, staff and inmate interviews suggest the problem is more serious. One prison warden said his facility often housed more than 300 inmates, even when the official capacity is 211.<sup>155</sup>

Reports from other facilities throughout the system corroborated such claims. Referring to conditions in Keetmanshoop, one former inmate described overcrowding that had transcended critical levels.

*There are many people in one cell and it is crammed. The normal space for one cell is eleven but sometimes more come in and it's a nightmare. Sometimes you have to sleep on the floor. For each cell, there is a toilet and showers or basins that you shower with. But not everyone can do*

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Supra* note 141.

<sup>152</sup> Interview, March 17, 2008 (former inmate, Oluno)

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Interview, March 17, 2008 (prison warden).

*these things all at once. In order to avoid tension you have to stretch out time so everyone has a chance.*<sup>156</sup>

Overcrowding and staff shortages result in limited oversight of inmates. Consequently, sex, violence, drug use and tattooing occur undetected and each is a potential factor in the transmission of HIV.

## **IX. Role of Behavior in HIV Transmission**

Several identified behaviors put inmates at risk of contracting HIV while in prison. Identifying a causal relationship between those behaviors and actual HIV transmission, however, is problematic without quantitative data.

### **a. Violence**

Violence is a defining characteristic of prison life worldwide.<sup>157</sup> Namibia is no exception. Violence, throughout the country's prisons and detention centers, is common and widespread.<sup>158</sup> Former inmates interviewed consistently indicated that violence of some form was almost a daily occurrence. In some instances, inmates used violence to assert power or dominance over another inmate or as a result of ethnic tensions. In other cases, an inmate would resort to violence to ward off sexual advances.

*One time I received a proposition from another inmate to be his 'lady'. I fought that person by using my fists. I was touched on the buttocks by the inmate and so I used my toothbrush to stab him, but it wasn't sharp enough to penetrate the skin. The perpetrator never bothered me again... Those who cannot fight become victims of sodomy.*<sup>159</sup>

Although violence occurs primarily between inmates, numerous interviewees either witnessed<sup>160</sup> or were themselves the victims of violence perpetrated by prison wardens.<sup>161</sup> One former inmate attributed much of the violence to the "long-termers," inmates who had nothing to lose and no hope of leaving prison.

*There are those that are serving many years and they feel like "What is the deal?" For them, there is really nothing to care for. It is among this population that [loss of hope] occurs. If someone is serving 2-3 years and is put in the same area as someone that has many years they can easily disorient you. Those serving 2-3 years often visualize having a better*

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<sup>156</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>157</sup> N. Wolff, C. L. Blitz, J. Shi, J. Siegel, and R. Bachman, *Physical Violence Inside Prisons: Rates of Victimization*, CRIMINAL JUSTICE AND BEHAVIOR, May 1, 2007; 34(5): 588 – 599.

<sup>158</sup> Interview, March 17, 2008 (warden, detention center).

<sup>159</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>160</sup> Interviews, March 17 – 19, 2008 (former inmates, Windhoek, Keetmanshoop).

<sup>161</sup> Robert Winslow, San Diego State University, Crime and Society, *A Comparative Criminology Tour of the World: Namibia*, [www-rohan.sdsu.edu/faculty/rwinslow/africa/namibia.html](http://www-rohan.sdsu.edu/faculty/rwinslow/africa/namibia.html), retrieved May, 2008.

*life.... If you have a soft spot, you will come out and end up stabbing someone.... The long serving prisoners have a very negative impact.*<sup>162</sup>

Violence in prison, whatever the cause, facilitates unprotected exposure to blood.<sup>163</sup> Interviews revealed that physical violence between inmates occurred often and that many encounters resulted in some type of bloodshed by one or both of the inmates. One of the most common forms of inmate-to-inmate violence involved stabbings.

*Every time there is fighting, killing, and bad things. Many times, you cannot even sleep in the prison. You have to sleep with your hands over your head.... There is a lot of fighting within the cells. Sometimes you are just playing games, they lose and may not accept the results. You see I'm a boxer and another prisoner is also a boxer so the prison authorities would put on a boxing match. I won. He took his defeat but was not really happy. So he sharpened a wire and stabbed me.*<sup>164</sup>

*My last fight I was cut with a very sharp knife. [Interviewee points to scars on his face]. I went to the hospital because too many blood I lose. I was in the hospital for one week but if I don't talk to them they don't care. I was stabbed another time and didn't have to go to the hospital because they say I was making an excuse to see the outside.*<sup>165</sup>

While the risk of transmission through exposure to infected blood is lower than the risk of exposure by unprotected sex or intravenous drug use,<sup>166</sup> it still serves as a possible means of infection.<sup>167</sup>

## **b. Tattooing**

The practice of tattooing is common in prison cultures around the world.<sup>168</sup> Although prohibited under Namibian prison policy, tattooing appears to be widely practiced.<sup>169</sup> The existing system-wide ban of the practice does little to stop it. Often, inmates use a single tattooing needle on several prisoners.<sup>170</sup> When a needle is unavailable, inmates

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<sup>162</sup> Interview, March 18, 2008 (former inmate, Keetmanshoop).

<sup>163</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, HIV/AIDS PREVENTION, CARE, TREATMENT AND SUPPORT IN PRISON SETTINGS – A FRAMEWORK FOR AN EFFECTIVE NATIONAL RESPONSE PRISONS, [hereinafter Response] at 11 (2006).

<sup>164</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>165</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>166</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *HIV and It's Transmission* (July 1999), <http://www.cdc.gov/hiv/resources/factsheets/transmission.htm>.

<sup>167</sup> *Id.*

<sup>168</sup> Response, *supra* note 163 at 27.

<sup>169</sup> Interview, March 17, 2008 (former warden).

<sup>170</sup> Response, *supra* note 163 at 27.

will sharpen items and insert them under their skin as a substitute.<sup>171</sup> While research indicates that the risk may be low for HIV transmission via tattooing, it does pose a serious risk for transmission of Hepatitis C.<sup>172</sup>

*It was not a common thing but people who do tattoos join gangs in prison. Some of those who are bored and want to pass the time do it to themselves. It was done with these type of rings [Interviewee points to his wrist]. It bends, they melt it and dip into ink and put it under the skin. Some of the guys, like me, I wouldn't share my needle but others would share. Those that would share would burn the top of the needle before the next one used it.*<sup>173</sup>

Tattooing seems to be especially prevalent among juvenile offenders.<sup>174</sup> One former inmate estimated that three out of every 10 juvenile offenders get tattoos while incarcerated.<sup>175</sup>

### **c. Sex: Consensual, Coercive and Rape**

Despite some officials' assertions to the contrary, sex does occur in prisons.<sup>176</sup> Sex can take place among inmates in one of three ways. First, there is consensual sex, which occurs when two inmates engage in a voluntary and consensual intimate relationship. Second, there is coercive sex. Coercive sex occurs when an inmate engages in sexual contact or a sexual relationship with another inmate in order to gain a perceived advantage or benefit (for example, submission in return for protection or other favors). Third, rape occurs when an inmate physically forces him/herself sexually upon another inmate. All three types of sexual encounters can transmit HIV/AIDS.<sup>177</sup>

#### **i. Consensual Sex**

Namibian inmates engage in consensual sexual relationships with other inmates for a variety of reasons. First, inmates may engage in sexual activity because of boredom.<sup>178</sup> One prison counselor explained that the lack of programs may lead to sexual activities

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<sup>171</sup> Elizabeth Kantor, MD, University of California San Francisco; HIV Transmission and Prevention in Prison, <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13>.

<sup>172</sup> Response, *supra* note 163 at 27.

<sup>173</sup> Interview, March 18, 2008 (former inmate, Mariental)

<sup>174</sup> Interview, March 17, 2008 (local NGO representative).

<sup>175</sup> Interview, March 18, 2008 (former inmate).

<sup>176</sup> Interview, March 17, 2008, (former inmate, Ongwediva); Interview, March 17, 2008, Former inmate (LAC Office in Keetmanshoop); Interview, March 18, 2008, NGO Representative (Mariental); Interview, March 17, 2008, (local NGO representative, Windhoek) ("Official stance is that there is no sex in prisons because of supervision"); Interview, March 17, 2008, Prison Counselor (Windhoek); Interview, March 20, 2008 (government representative, Windhoek).

<sup>177</sup> The transfer of semen or vaginal secretions from one individual's body into another person's vagina or anus is a mode of transmission of HIV/AIDS.

<sup>178</sup> Interview, March 17, 2008 (prison counselor, Windhoek).

because “there is not enough opportunities for being creative.”<sup>179</sup> The prison counselor also believed that “those that are more active have less time to engage in illegal activities.”<sup>180</sup>

Second, the inmate may long for an intimate relationship since Namibian prisons prohibit conjugal visits with family.<sup>181</sup> An NGO representative stated that there is a need for conjugal visits and a “human touch” policy.<sup>182</sup> The representative explained, “You have subcultures in prison and people have needs. [Prisons] need to provide conjugal visits.... This keeps the family together.”<sup>183</sup> One former prisoner corroborated this claim. “There are no conjugal visits in prisons and many married men take ‘women’ [other male inmates] in prisons.”<sup>184</sup>

Third, consensual sexual activity in prisons occurs for the same reasons that sexual relationships form outside of prison— as a result of sexual attraction and sexual needs. This can occur between male and female inmates who find a way to get access to each other.<sup>185</sup> For example, “There was a prisoner who was an electrician that was brought over by the wardens to the women’s section to work on the lights. And he and a female inmate had sex. She got pregnant.”<sup>186</sup> This can also occur between inmates of the same sex.<sup>187</sup> “In some cases the relationships may be completely consensual. There was one case where an inmate was in the hospital and wanted to be released to go back to prison to be with his boyfriend.”<sup>188</sup>

## ii. Coercive Sex

Coercive sex occurs between inmates and other inmates and between wardens and inmates.<sup>189</sup> Inmates often exchange sex for various privileges or benefits.<sup>190</sup> First, inmates trade sex for protection.<sup>191</sup> As one former inmate explained, “Sexual relationships are quite common. Category 28 Gang [the gang known for sexual assaults] would select young-looking men as partners. There was a male section and a female section [of the prison] so you must date one of the same sex.”<sup>192</sup>

Second, inmates trade sex for food.<sup>193</sup> A representative of a faith-based organization described how food is often a bartering tool to get sex from another

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Interview, March 18, 2008 (local NGO representative, Windhoek).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Interview, March 18, 2008, (former inmate, Windhoek).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Infra*, see note 192 and accompanying text.

<sup>188</sup> *Supra*, note 178.

<sup>189</sup> *Infra*, see notes 193 through 206 and accompanying text.

<sup>190</sup> *Infra*, see notes 193 through 203 and accompanying text.

<sup>191</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>192</sup> *Id.*

<sup>193</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

inmate.<sup>194</sup> “In the cell, bread is given in return for sex or something else. If you have sex one time, then you are that person’s wife and if you don’t give something usually a fight ensues.... Inmates bribe one another by using food for sex.”<sup>195</sup> Groups of inmates engage in this behavior as well. “There was...a group called the Blue Jackets who would select other inmates as ladies, relationships were so intimate that you would do favors for them, even share your food with them because you owe that person something.”<sup>196</sup> Inmates who worked as kitchen staff within the prison often initiated the exchange.<sup>197</sup>

*Some inmate chefs in the kitchen may give preferential treatment or food in return for sex and you must be cautious about taking offers. You know what is expected in return.... There was no prior engagement before, but food is prepared and given. If you accept the food, then you agree to a sexual relationship.... You were assaulted if you wanted to leave the relationship.... You must refuse food and if you know a person is engaged in such behavior, you must refuse any offers.*<sup>198</sup>

Prisoners trade sex for other commodities as well.<sup>199</sup> One former inmate held the view that “The necessities are what drive sex; inmates need soap and other basic needs and that drives sex most of the time.”<sup>200</sup> Another former inmate noted this type of behavior among the more ‘affluent’ inmates, “The rich prisoners will exchange food, money, etc. for sex.”<sup>201</sup>

Prisoners perceived as ‘weak’ often become targets for coercive sexual encounters.<sup>202</sup>

*Prisoners usually target the weak with food and cigarettes. For example if a prisoner is transferred to Windhoek, he does not have family in the area so other prisoners give him the basic needs—soap, toothpaste and then they will come up to him for a reward [sex].*<sup>203</sup>

In addition, coercive relationships often are accompanied by jealousy, violence and an inability to leave the relationship if one inmate so chooses. A former inmate explained, “Jealousy counted and if it was seen that one is favoring another, then others

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<sup>194</sup> Interview, March 20, 2008 (local FBO representative, Katutura).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Interview, March 18, 2008 (former inmate, Mariental).

<sup>198</sup> *Id.*

<sup>199</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>200</sup> *Id.*

<sup>201</sup> *Supra*, note 184.

<sup>202</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>203</sup> Interview, March 17, 2008 (prison warden, Windhoek).

might interfere with that relationship. Violence erupted uncontrollably; if you wanted out, then there were serious consequences. You might be beaten to death, poisoned.”<sup>204</sup>

Some wardens also engage in sex with inmates. A former prison warden stated, “I have heard about staff and inmate sex. In 1997, a prisoner got a staff [member] pregnant.”<sup>205</sup> Sex between a prison official and a prisoner is inherently coercive because of the sharp discrepancy of power and control between the warden and the prisoner. The inmate may be engaging in the relationship solely for a perceived advantage or because the inmate feels that he or she has no choice.

*At the Windhoek police station, wardens would have sexual relationships with women in custody. I got this information from the person providing food to the inmates. I also saw it with my own eyes—they were in an intimate relationship. What I thought then was that those who were in a relationship with the wardens would receive better treatment—I was not in that type of relationship.*<sup>206</sup>

### iii. Rape

Sexual assault, although shrouded in secrecy, is an unfortunate reality of prison life. One former prisoner estimated that “every week, someone is raped in prison.”<sup>207</sup> Rape can be the brutal result of a variety of altercations. One situation is the punishment for an inmate refusing to fulfill his or her end of the bargain in a coercive sexual relationship. As a former inmate explained, “If the guy does not pay up, the only option is rape.”<sup>208</sup> Not only does actual physical violence often precipitate rape, the threat of physical violence can force inmates to engage in sex. “They [the perpetrator] will also make a threat, like ‘I am in a gang, I have friends, if you do not [have sex] you will suffer.’”<sup>209</sup>

Second, rape can be the consequence of a disagreement between inmates. For example, if one inmate has the same tattoo as another inmate, violence may result. “Quarrels, fights, or rape may break out if you [an inmate] use another’s number or signs because these are forms of one’s identity.”<sup>210</sup>

Certain inmates become targets for rape while in prison. Perpetrators prey upon those inmates whom are believed to be weak. “Sodomy in the general prison population is a matter of power; if [you are] weak, then [you] get raped.”<sup>211</sup> Often times, “Prisoners will attack weaker prisoners and ask them for food, cigarettes, soap. If a prisoner doesn’t have a family, and the other person doesn’t pay them back [for food, cigarettes, soap],

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<sup>204</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>205</sup> Interview, March 19, 2008 (former prison warden).

<sup>206</sup> Interview, March 18, 2008 (former inmate, Keetmanshoop).

<sup>207</sup> Interview, March 18, 2008 (former inmate, Windhoek).

<sup>208</sup> Interview, March 19, 2008 (former prison warden).

<sup>209</sup> *Id.*

<sup>210</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>211</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

then they will get raped or there will be a threat of violence against the weaker person.”<sup>212</sup>

Despite prison policy mandating separate housing for juveniles and adult inmates, adults prey upon juveniles in detention centers. One former inmate described that, “The problem of youth mixed with older inmates is much worse in the detention centers. In the detention center, there will be boys as young as nine years old. These boys seemed to be subject to the same problems of rape as the prisoners in the prisons.”<sup>213</sup>

The police have also allegedly played a role in the rape of juveniles in detention facilities. One local HIV/AIDS program coordinator reported that, “[There are a] few cases where young boys are caught for drinking and driving and the cops say, ‘we will teach you a lesson,’ and put them in a cell where they know that they will be raped.”<sup>214</sup> Although the risk of juvenile rape is probably greater in detention centers, sexual assault on juveniles is not unheard of in the prisons. One former inmate recounted facing the threat of sexual assault:

*One night, prison wardens took me away from the juvenile section and locked me up with more hard-core prisoners. My mother’s intervention assisted. It was the kitchen inmates working with the staff that resulted in me being removed from the juvenile section to be locked up with the hard-core prisoners to have sex with me. I acted on the same day and complained that, “I am too young.” My mother complained and I was removed the same day.*<sup>215</sup>

Like jailers in detention centers, prison wardens sometimes play a role in allowing sex with or rape of juveniles to occur. One former inmate, a victim of sexual assault in prison, explained, “At the time, there was no chance to complain to the prison wardens. Some [inmates] are paying officers to get the boys—you are in trouble if you complain.”<sup>216</sup> Describing reporting procedures following an incident of rape, one former inmate recalled:

*There are incidences of raping but a victim is very powerless when reporting it. If you report they simply call in the other guy and you are still in the same situation and in the same cell. For fear of being beaten up people are silent because you expose yourself to more injury. There is a fear to report because some of the wardens are being bribed by the prisoners.*<sup>217</sup>

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<sup>212</sup> Interview, March 19, 2008 (former prison warden).

<sup>213</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>214</sup> Interview, March 19, 2008 (local HIV/AIDS program coordinator).

<sup>215</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>216</sup> Interview, March 18, 2008 (former inmate/local NGO coordinator).

<sup>217</sup> Summary of interviews, March 17, 2008 (former inmate from Windhoek Central Prison and Keetmanshoop).



Even if the wardens are not involved in the assault, they are sometimes indifferent to its occurrence. A former warden reported, “When I asked how prisoners [are] protected from rape and HIV, [the] supervisor said that we can’t do much because rape happens at night and we can’t protect. It is underground.”<sup>218</sup>

Namibian prisons, much like prisons around the world, have gangs. A number of former inmates explained, “There are three gangs. The 26’s, 27’s and the 28’s. The 26’s are the robbers. The 27’s are the murders. And the 28’s are the rape cases.”<sup>219</sup> In certain prisons, there were gangs specifically formed to commit “sodomy.” As one former inmate simply stated, “The sodomy gang would get together and do sodomy on someone.”<sup>220</sup>

“Gang rape,” rape involving multiple perpetrators, is also a problem in Namibian prisons.<sup>221</sup>

*One inmate was raped by three men.... He was forced to have sexual intercourse with them.... He wanted to commit suicide [after the rape] by swallowing his AIDS tablets. He would save one and consume one and planned to take all of the saved tables at once.*<sup>222</sup>

A counselor explained that this is how rape often occurs in prison: “Groups of men gang up on a newcomer and it occurs usually through gang rape. The person is usually raped over a prolonged time, even for years.”<sup>223</sup> Other inmates may serve as accomplices by alerting rapists when wardens are approaching.<sup>224</sup>

## **X. Inadequate Prevention and Treatment of HIV in Prison**

### **a. Condoms and Anti-Sodomy Laws**

*Condoms...were not given to inmates because the officials asked, ‘Who wants condoms in prisons?’ The response was overwhelming that condoms promote sodomy.*<sup>225</sup>

The government of Namibia’s refusal to distribute condoms in prison appears to be directly related to the anti-sodomy law.<sup>226</sup> In 2006, an official within the Ministry of Safety and Security, Ignatius Mainga, stated, “By giving [prisoners] a condom, you are

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<sup>220</sup> Interview, March 17, 2008 (former inmate, Ongwediva).

<sup>221</sup> It important to note that gang rape is not necessarily an act committed by an established gang within the prisons.

<sup>222</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>223</sup> Interview, March 21, 2008 (local NGO counselor).

<sup>224</sup> Interview, March 19, 2008 (former prison warden).

<sup>225</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>226</sup> Interview, March 17, 2008 (local NGO representative, Windhoek).

telling them to go ahead and do it [have sex]."<sup>227</sup> The government's disapproval and fear of male-to-male sex, according to the director of a Windhoek-based NGO, is the basis of the current administration's refusal to overturn this law.<sup>228</sup>

Former inmates and wardens, as well as NGO officials, all state that prisons do not formally or officially distribute condoms.<sup>229</sup> However, one NGO representative believes that condoms are available on a limited basis in some prisons, but this could not be corroborated.<sup>230</sup> One former prison social worker states, "There is no condom distribution allowed. I could bring in some for demonstration purposes, but only one or two."<sup>231</sup> The current policy is based on the mistaken notion that sex should not and does not occur in prisons.<sup>232</sup>

"[Male-to-male sex] is a true fact. It's happening in prisons," reported a prison social worker.<sup>233</sup> Sex, including violent, coercive, and consensual forms, does occur in prison, and condoms are often an effective way to prevent transmission of HIV and other sexually transmitted infections.<sup>234</sup> One police warden stated that many officials within the Ministry of Safety and Security do not believe that sex occurs in prison.<sup>235</sup> Although one prison official said that he would have no problem with condom distribution in the detention center he oversees, he reported that there was no need for condoms because sex does not occur in his facility and condoms only encourage sex.<sup>236</sup>

When inmates manage to smuggle condoms into the prisons, they must dispose of them surreptitiously. A social worker, who conducts HIV/AIDS trainings in the prisons, found that condoms were sometimes disposed of in the cell toilets, clogging them and creating sanitation problems.<sup>237</sup>

Allowing condoms in prisons would aid efforts to curb the spread of HIV and other sexually transmitted diseases.<sup>238</sup> The overwhelming feeling is that whether or not the government agrees with condom distribution or the law banning sodomy, "Sex in prisons

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<sup>227</sup> Natasha Tibinyane, Namibia's prisons sit on Aids 'time bomb', Mail & Guardian Online (South Africa), January 4, 2006. Available at:

[http://www.mg.co.za/articlePage.aspx?articleid=260457&area=/insight/insight\\_\\_africa/](http://www.mg.co.za/articlePage.aspx?articleid=260457&area=/insight/insight__africa/).

<sup>228</sup> Interview, March 17, 2008 (local NGO representative, Windhoek).

<sup>229</sup> Interview, March 21, 2008 (social worker); Interview March 17, 2008 (former inmate) & Interview, March 19, 2008 (former warden).

<sup>230</sup> Interview, March 17, 2008 (international aid organization representative, Windhoek).

<sup>231</sup> Interview, March 18, 2008 (nurse from a local hospital).

<sup>232</sup> *Id.*

<sup>233</sup> Interview, March 21, 2008 (social worker).

<sup>234</sup> National Policy, see *supra* note # at 3.4, page 19. Republic of Namibia, National Policy on HIV/AIDS, at 3.4 [hereinafter "national policy"], page 19.

<sup>235</sup> Interview, March 17, 2008 (police warden).

<sup>236</sup> Interview, March 17, 2008 (police warden).

<sup>237</sup> Interview, March 20, 2008 (social worker, Windhoek).

<sup>238</sup> Interview, March 21, 2008 (social worker); Interview, March 17, 2008 (former inmate, Keetmanshoop).

is taking place.... When [inmates] get out of prison, they take the [HIV] virus home to their families.”<sup>239</sup>

## **b. Testing**

Interviews suggest that access to HIV testing is inconsistent throughout the system.<sup>240</sup> Namibian government policy rightfully bars the mandatory testing of all people, including prisoners.<sup>241</sup> For inmates who would like to be tested, access to testing is often difficult.<sup>242</sup> There is no evidence to suggest that testing facilities are available in prisons.<sup>243</sup> Although testing is available for prisoners at hospitals or through NGOs, prisoners must rely on the willingness of the wardens and the availability of transportation.<sup>244</sup> As one former inmate noted, “The [prisoners] had to press for testing...If you don’t get tested, then tough luck.”<sup>245</sup>

Several former inmates reported that the prison authorities neither encouraged HIV testing nor informed prisoners of the option.<sup>246</sup> Despite these obstacles, some prisoners saw the need to get tested, simply because “there was so much talk about HIV.”<sup>247</sup> Another former prisoner recalled, “The decision came upon me [to get tested] because I knew my lifestyle. I was reckless and had multiple partners. So, I decided to take the opportunity to get tested and know my status.”<sup>248</sup>

The desire to know one's HIV status, however, does not appear to always result in the opportunity to get tested. A prison social worker stated:

*Prisoners that request to be tested don’t get access to testing. The guards say that they don’t have vehicles to transport and that they are not responsible. I have tried to get a group that would take prisoners to get tested, but this was hard to get together because of the strict prison policy and security.*<sup>249</sup>

One former inmate reported that prisoners had no access to testing unless they showed acute symptoms, adding that the decision as to which inmates had access to testing was left to wardens rather than health officials or the prisoners themselves.<sup>250</sup>

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<sup>239</sup> Interview, March 20, 2008 (network support officer).

<sup>240</sup> Interview, March 17, 2008 (former inmate); Interview, March 17, 2008 (police warden); Interview, March 19, 2008, (local NGO representative).

<sup>241</sup> National Policy, *supra* note 44, at 3.3, page 18 and 2.3.7(1), page 11.

<sup>242</sup> Interview, March 17, 2008 (former inmate) & March 17, 2008 (station commander) & March 19, 2008 (local NGO representative).

<sup>243</sup> Interview, March 21, 2008 (social worker).

<sup>244</sup> Interview, March 21, 2008 (social worker).

<sup>245</sup> Interview, March 17, 2008 (former inmate).

<sup>246</sup> Interview, March 18, 2008 (former inmate, Mariental); Interview March 17, 2008 (former inmate).

<sup>247</sup> Interview, March 18, 2008 (former inmate).

<sup>248</sup> Interview, March 17, 2008 (former inmate).

<sup>249</sup> Interview, March 21, 2008 (social worker).

<sup>250</sup> Interview, March 17, 2008 (former inmate).

Although some interviewees reported that testing was reasonably available to inmates, others reported that it was quite difficult for inmates to get access to testing. One prison official explained that “if someone asks for a test, they [prison wardens] would grant this person a test if possible and if they looked ill enough.”<sup>251</sup>

### **c. ART/ARV Access**

Antiretroviral therapy for an HIV-positive individual often prolongs life and renders the person less infectious,<sup>252</sup> making it one of the most important elements in HIV/AIDS treatment.<sup>253</sup> Despite this fact, the prison system appears to have an inconsistent and problematic method of distributing these life-saving drugs to those in need.<sup>254</sup>

While a doctor from outside the prison prescribes drugs, prison authorities are responsible for administering medications.<sup>255</sup> Nursing staff and/or prison wardens distribute ART medication to HIV-positive inmates daily.<sup>256</sup> However, several former inmates complained that the distribution of those drugs was often inconsistent.<sup>257</sup> One physician at Windhoek Central Hospital noted that his ability to treat patients often depends upon the willingness of wardens to follow through on prisoners’ requests to see a doctor:

*Yesterday I saw a prisoner who is on ART and he reported that he had not gotten his medicine for five days because the guard did not care. The month supply of meds had run out but the guards did not care enough to bring him here to get more.*<sup>258</sup>

Some interviewees reported that the decision to grant an inmate’s request to see a doctor often depends on a single warden’s discretion and that sometimes wardens deny inmates access based on their assessment of the prisoner’s attitude or their attitude towards HIV/AIDS.<sup>259</sup>

### **d. Counseling**

Counseling is also an important part of treating, caring for, and supporting people who are living with HIV/AIDS.<sup>260</sup> One official explained that counseling “allows those

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<sup>251</sup> Interview, March 17, 2008 (prison warden).

<sup>252</sup> World Health Organization, Department of HIV/AIDS, Who pledges massive effort to increase ARV treatment, Essential Drugs Monitor, (2003), Available at: [http://mednet2.who.int/edmonitor/33/EDM33\\_7\\_ARV\\_e.pdf](http://mednet2.who.int/edmonitor/33/EDM33_7_ARV_e.pdf).

<sup>253</sup> National Policy, *supra* note 44, at 4.1, page 24.

<sup>254</sup> Interview, March 19, 2008 (local doctor, Windhoek).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Interview, March 17, 2008 (warden from a detention center).

<sup>258</sup> Interview, March 19, 2008 (local doctor).

<sup>259</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop); Interview, March 17, 2008 (former inmate, Windhoek).

<sup>260</sup> National Policy, *supra* note 44, 4.1 page 24.

with HIV/AIDS to live positive lives. Working to re-establish [people living with HIV/AIDS's] positive self-esteem is very important.”<sup>261</sup> Another NGO official corroborated this sentiment: “HIV breaks integrity and dignity. [One must] make sure to do things that help the HIV-positive person, so they can help themselves.”<sup>262</sup>

HIV testing centers generally offer pre-test counseling, counseling during the testing process, and post-test counseling.<sup>263</sup> Counseling for HIV-positive people helps them come to terms with their HIV status and reach out to family and friends for support.<sup>264</sup> The counseling also includes critical medical information regarding pharmaceutical options, dietary needs and the means by which one can prevent HIV transmission.<sup>265</sup> For those who receive a negative test result, counselors provide information on prevention measures.<sup>266</sup>

The availability of HIV counseling for inmates largely depends upon the head of each prison.<sup>267</sup> As previously stated, the management structure of the Namibian prison system grants a great deal of autonomy to individual prison heads, resulting in the inconsistent availability of counseling programs.<sup>268</sup>

Confidentiality is also a major concern for prisoners seeking counseling. While several prisoners expressed a desire to take advantage of HIV counseling within the prison, many expressed a concern that the information they share with counselors, who often work directly with police, will not remain confidential.<sup>269</sup>

### **e. Stigma**

HIV/AIDS stigma, which often discourages people from accessing HIV prevention and treatment strategies, occurs both inside and outside of the prison walls.<sup>270</sup> An NGO official stated that a correlation exists between the rate of infection and the level of HIV stigma: “In areas where HIV prevalence is low, there is high stigma.”<sup>271</sup>

Although some reports suggest that a supportive network exists for HIV-positive prisoners,<sup>272</sup> other reports indicate that the prison environment is highly stigmatizing.<sup>273</sup> Some inmates “did not mind [being in close quarters with HIV-positive prisoners] but there were some who didn’t want to mix with those with HIV. They didn’t want to drink

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<sup>261</sup> Interview, March 18, 2008 (local NGO representative, Windhoek).

<sup>262</sup> Interview, March 19, 2008 (local NGO/FBO representative).

<sup>263</sup> Interview, March 19, 2008 (local doctor).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> Interview, March 17, 2008 (international aid organization representative, Windhoek).

<sup>268</sup> *Id.*

<sup>269</sup> Interview, March 19, 2008 (former inmate, Windhoek).

<sup>270</sup> Interview, March 19, 2008 (US government official, Windhoek).

<sup>271</sup> Interview, March 19, 2008 (local NGO representative).

<sup>272</sup> Interview, March 18, 2008 (former female inmate, who served 1.6 years at Windhoek Central).

<sup>273</sup> Interview, March 19, 2008 (local doctor, Windhoek).

from the same cup or eat from the same plate.”<sup>274</sup> One physician stated that many inmates forego both testing and treatment due to stigma: “[Prisoners] get isolated...causing some [inmates] not to come to the clinic [to receive treatment]. Inmates are also afraid of stigma and the lack of confidentiality, which may keep them from taking their ARVs.”<sup>275</sup>

Wardens also sometimes add to the stigmatization of HIV-positive prisoners. Prisoners reported to a social worker that wardens would not inform HIV-positive prisoners of the time when they needed to take their ART medicine, compromising the strict ART schedule.<sup>276</sup> One former warden described his colleagues’ attitudes at Windhoek Central Prison: “Staff would not touch the guy [who was HIV-positive]. They talked badly about him.... I could tell he was treated differently by what the staff said behind his back and the distance they would keep.”<sup>277</sup>

## **XI. National Law and Policies**

### **a. The Constitution**

Namibia’s Constitution, ratified upon independence in 1990, guarantees all citizens a basic right to life and establishes that the respect for human dignity is a fundamental human right.<sup>278</sup> Article 8 guarantees, “No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>279</sup> Furthermore, Article 8 provides, “In any judicial proceedings...and during enforcement of a penalty, respect for human dignity shall be guaranteed.”<sup>280</sup> When prisoners have limited access to the basic human needs of adequate health care, nutrition and personal safety within the prison system, Namibia is not fulfilling its constitutional obligations.

#### **i. Article 8 - Cruel, Inhuman or Degrading Treatment**

Namibia’s Prison Act mandates that the Prison service “ensure that every prisoner is secured in a prison in safe custody until lawfully discharged or removed therefrom.”<sup>281</sup> Although Namibia’s prison wardens are responsible for the security and discipline of prisoners, overcrowded facilities and budget constraints pose a challenge for those responsible for security within the prison.<sup>282</sup>

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<sup>274</sup> Interview, March 18, 2008 (former inmate, Katutura).

<sup>275</sup> Interview, March 19, 2008 (local doctor, Windhoek).

<sup>276</sup> Interview, March 21, 2008 (local counselor, Windhoek).

<sup>277</sup> Interview, March 19, 2008 (former warden, Windhoek).

<sup>278</sup> NAMIB. CONST. art. 11, § 3.

<sup>279</sup> *Id.* at Article 8, § 2(b).

<sup>280</sup> *Id.*

<sup>281</sup> Prisons Act 17 of 1988, Part I, Section 3 (Namibia).

<sup>282</sup> See Expenditures Framework, *supra* note 7, at 339.

Interviews with former inmates and prison staff suggest that prisoners are often victims of cruel, inhumane and degrading treatment by both wardens and fellow detainees.<sup>283</sup> The systematic failure to ensure that inmates and pre-trial detainees are safe from violence and rape subjects inmates to cruel, inhuman and degrading treatment.<sup>284</sup> The Ministry of Safety and Security can do more to ensure the safety of individual prisoners, whether threats to safety come from staff or fellow inmates.<sup>285</sup>

The Prison service has not fulfilled its obligations by allowing juveniles to share cells with adults and unwittingly or intentionally subjecting juveniles to sexual assault.<sup>286</sup> The placement of juvenile inmates within an adult section so that he or she may become prey to another inmate constitutes cruel, inhuman and degrading treatment.<sup>287</sup>

A pervasive lack of space and proper sleeping accommodations may violate the constitutional ban on degrading treatment, particularly since those congested living conditions increase agitation amongst prisoners, eroding a prisoner's right to safety. Overcrowding in Namibian prisons strains scarce financial and human resources, contributes to increased sexual and physical violence, and can lead to much higher rates of HIV and tuberculosis transmission among inmates.<sup>288</sup> Overcrowding occurs both within the general prison system and within pre-detention holding cells.

## **ii. Article 10 - Equality and Freedom from Discrimination and Namibia's Sodomy Laws**

Article 10(1) & (2) of the Namibian Constitution states, "All persons shall be equal before the law" and "No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."<sup>289</sup> The adopted common law offence of sodomy conflicts with Article 10(1)(2), and discrimination against gay men violates the constitutional mandate to make all persons equal before the law. In a 1999 Namibian Supreme Court case, however, the Court rejected an attempt by the respondent to interpret Article 10 broadly to apply to sexual orientation.<sup>290</sup> The judge wrote:

*In Namibia, as in Zimbabwe, the Constitution does not expressly prohibit discrimination on the grounds of "sexual orientation".*

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<sup>283</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop); Interview, March 17, 2008 (former inmate, Windhoek, Oluno).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 27

<sup>289</sup> NAMIB. CONST. art. 10, § 2.

<sup>290</sup> Frank, SA 8/99 (2001) NASC (5 March 2001).

*The Namibian Constitution corresponds to that of Zimbabwe in regard to the provision for equality and non-discrimination. The "social norms and values" in regard to sexual behaviour of Namibians appear to correspond more to that of Zimbabweans than to that in South Africa as reflected in judgments of the Constitutional Court of South Africa.*<sup>291</sup>

Government officials who proclaim the illegality of sodomy rely on adopted common law introduced under South African rule in which sodomy was a common law offence equivalent to an “unnatural sex crime” prohibited under the 1957 South African Sexual Offenses Act.<sup>292</sup>

Pursuant to Article 66 of the Namibian Constitution, “Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.”<sup>293</sup> This provision means that the common law offense of sodomy under South African common law was in force, retained by Namibia at its independence in 1990, and is therefore valid. Namibia’s reliance on the South African common law prohibition on sodomy may be in contravention of Article 10 of the Namibian Constitution, which affords all person equality under the law. Second, subsequent changes to South Africa’s constitution, which now prohibits discrimination based on sexual orientation, may weaken the position taken by Namibia’s Supreme Court.

## **b. The Namibia Prisons Act**

The Namibia Prisons Act 17 of 1998 recognizes a national obligation to provide for the health and security of its prisoners.<sup>294</sup> Part I, section 3(a) states that the function of the prison service “shall be to ensure that every prisoner is secured in a prison in safe custody until lawfully discharged or removed....”<sup>295</sup>

Part IV section 25 (a)(b) of the Namibian Prisons Act requires that prison wardens be responsible for the “security and safe custody of all prisoners detained in custody in that prison; and the treatment and discipline of prisoners therein be in accordance with this Act.”<sup>296</sup> However, several former inmates described prison environments in which wardens beat inmates regularly.<sup>297</sup> One former inmate stated that wardens would beat

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<sup>291</sup> Frank, at 113, 116

<sup>292</sup> Cardozo, at 165.

<sup>293</sup> NAMIB. CONST. art. 66.

<sup>294</sup> *Id.*, at Part I.

<sup>295</sup> *Id.*

<sup>296</sup> Cardozo, at Part IV

<sup>297</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).



inmates in such a way that no physical signs would show.<sup>298</sup> This same inmate revealed that at the prison in Oluno an officer severely beat an inmate's testicles causing permanent injury and an inability to walk.<sup>299</sup> The Ministry of Safety and Security is obligated to ensure that prison authorities act in a way that promotes the purpose and tenor of the Namibia Prisons Act.

### **c. National Policy on HIV/AIDS**

Namibia's National Policy on HIV/AIDS includes a commitment that all prisoners, people awaiting trial, and prison staff have access to the same standard of treatment, care and support available to the general population.<sup>300</sup> The policy embraces a position of "equivalency," that the rights of access to health care enjoyed by the public must apply to all citizens, including those incarcerated within the Namibian prison system. The policy holds that all inmates and pre-trial detainees have access to the same health care, counseling and preventative services as those made available to the public at large.<sup>301</sup> Access to consistent HIV counseling, testing, prevention, and treatment for prisoners and pre-trial detainees, however, appears to be severely limited.<sup>302</sup>

The National Policy requires that all Namibians living with HIV/AIDS have access to "psycho-social support including counseling, management of depression, and other mental health concerns."<sup>303</sup> Several NGOs, including the Catholic Health Initiative, provide counseling for people in the general population who are living with HIV/AIDS.<sup>304</sup> Several former inmates indicated counseling is available in some prisons.<sup>305</sup> However, one former inmate was concerned about the confidentiality of these sessions, noting, "Prisoners don't trust confidentiality. Sometimes the counselors are with the police, working together."<sup>306</sup>

### **i. Palliative Care**

Through its existing policy, the Namibian government also commits to provide "palliative care," including the temporary alleviation of suffering, to HIV/AIDS-infected individuals at all times.<sup>307</sup> However, several former prisoners reported not being able to access even basic healthcare.<sup>308</sup> When provided, access was inconsistent and often dependent upon the decisions of individual prison wardens.<sup>309</sup>

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<sup>298</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>299</sup> *Id.*

<sup>300</sup> National Policy, *supra* note 44, at 11.

<sup>301</sup> *Id.* at § 2.3.7, 2.

<sup>302</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).

<sup>303</sup> National Policy, *supra* note 229, at 26.

<sup>304</sup> Interview, March 19, 2008 (health NGO representative, Windhoek).

<sup>305</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).

<sup>306</sup> Interview, March 17, 2008 (former inmate).

<sup>307</sup> *Id.*

<sup>308</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).

<sup>309</sup> Interview, March 17, 2008 (former inmate).

Namibia's HIV/AIDS policy commits the government to minimize the risk of tuberculosis (TB) transmission. This is especially important to prisoners, who are often at a greater risk of TB infection.<sup>310</sup> There was little evidence to suggest that the prisons actively minimized the risk of TB transmission. One former warden pointed out that precautions preventing TB transmission are lacking.<sup>311</sup>

#### **d. Framework for Improving Prison Conditions—Medium Term Expenditure**

The Ministry of Safety and Security established the following benchmarks to promote lawful and more humane incarceration.<sup>312</sup> These objectives include:

- (1) Reduce overcrowding with 2 percent by 2008/09 from the current average number of 4,727*
- (2) Minimize the spreading of infectious diseases with 5 percent by 2008/09 from the current figure of 653 infected inmates*
- (3) Reduce re-offending from 18 percent to 12 percent by 2010/11*
- (4) Reduce major security incidents from 219 to 208 by 2010/11.*<sup>313</sup>

Additionally, the Ministry of Safety and Security divided the correctional process into three phases; (1) Safe Custody, (2) Rehabilitation and (3) Reintegration.

The Safe Custody Program is two-fold and emphasizes the physical environment of the facility and the administration of facilities by prison officials. The most current Medium Term Expenditure Framework allocates N\$ 209,661,000 to “provide reasonable, safe, secure and humane control of offenders and to meet the physical and mental health needs of offenders.”<sup>314</sup> In addition to the infrastructure and design of the facilities, the Ministry of Safety and Security seeks to develop a physical and mental health strategy consistent with professional and community standards.<sup>315</sup> Furthermore, the Ministry of Safety and Security seeks to enhance security within the correctional facilities through the modern unit management model, recruitment of prison officers, an uninterrupted supply of basic needs and measures to control gang activity within the prison facilities.<sup>316</sup>

Although the Ministry of Safety and Security recognizes the importance of providing a safe and secure environment for inmates, the Ministry can and should more comprehensively and effectively implement its policies. One prison official described the dilapidated internal conditions of the prison facilities, noting that there were cracks on the

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<sup>310</sup> National Policy, *supra* note 44, at 26.

<sup>311</sup> Interview, March 19, 2008 (former warden).

<sup>312</sup> Expenditures Framework, *supra* note 7, at 339.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 340.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

walls.<sup>317</sup> The prison official went on to say that because construction of several facilities took place in the 1940's, the facilities are run-down and need remodeling.<sup>318</sup> Furthermore, reports of inconsistent food supplies and prevalent gang activity create even more concerns for the prisoner.<sup>319</sup>

The Rehabilitation Program encourages prisoners to develop skills and positive attitudes while in detention.<sup>320</sup> The program includes academic and vocational training as well as psychological services in order to facilitate a gradual transition toward a successful release.<sup>321</sup> The ultimate objective is to ensure rehabilitation of the inmate and to prepare the inmates for a successful life after prison.<sup>322</sup> The Ministry of Safety and Security can do more to prepare prisoners for life after incarceration. A government official recognized, "Prison is to serve your punishment. [But] criminals are people too and we should have programs for rehabilitation. They shouldn't be treated badly because one day these prisoners will return to society, and we want them to be useful citizens."<sup>323</sup>

The policy defines successful reintegration of offenders into society as being "capable of leading [an] industrious [life] after release from prison."<sup>324</sup> The range of community programs includes psychological care, substance abuse counseling, vocational and life-skills training, and housing assistance. The Ministry of Safety and Security offered a community-based approach to support and assist offenders who are transitioning back into society.<sup>325</sup> Echoing the common sentiment of many Namibian employers, one employer stated, "Why should I take a person with a criminal record when I can find someone [else]."<sup>326</sup> The Namibian government can do much more to facilitate the reintegration phase. In the mean time, some non-governmental organizations have attempted to assist in areas where the Ministry of Safety and Security has not fully implemented these policies.

### **e. National Prison Service - Strategic Plan**

In 1999, seeing a need for modernization and reform of its prison system, Namibian officials contacted the Correctional Service of Canada (CSC), requesting guidance.<sup>327</sup> A CSC assessment team issued recommendations after a series of site visits beginning in 2000.<sup>328</sup> Recommendations included the development of a computerized offender classification system and investment in staff development.<sup>329</sup> The Canadian

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<sup>317</sup> Interview, March 19, 2008 (warden, Hardap Prison)

<sup>318</sup> *Id.*

<sup>319</sup> Interviews, March 17-18, 2008 (former inmates, Windhoek, Katutura, and Ongwediva).

<sup>320</sup> Expenditures Framework, *supra* note 7.

<sup>321</sup> Expenditures Framework, *supra* note 7, at 341.

<sup>322</sup> *Id.*

<sup>323</sup> Interview, March 19, 2008 (government official, Windhoek).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*, at 341.

<sup>326</sup> Interview, March 17, 2008 (NGO Official, Windhoek).

<sup>327</sup> CORRECTIONAL SERVICE OF CANADA, *Partnerships and the Correctional Service of Canada* (April 2001), <http://www.csc-scc.gc.ca/text/intlforum/media/nam-1-eng.shtml>.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

recommendations were eventually included in a strategic plan designed to implement those recommendations. The Namibia Prison Service Strategic Plan specifies that “an integrated . . . justice system contributes to the protection of society by providing reasonable, safe, secure and humane custody of offenders in accordance with universally acceptable standards, while assisting them in their rehabilitation, reformation and social reintegration as acceptable law abiding citizens.”<sup>330</sup>

Much of the language within both the short-term strategic plan and the longer “Vision 2030” document obligates the prison system to adequately care for offenders infected with HIV/AIDS. Both documents call for “compliance with the universally acceptable standards for the treatment of offenders,” to provide “a safe environment of custody for offenders” and “respect for the inherent dignity, humanity and worth of all individuals, including offenders.”<sup>331</sup>

Although the Prison Service has articulated a commitment to making treatment and prevention methods available to prisoners, interviews suggest that this is not always the case. Often there is too little information surrounding the issue of treatment and prevention. Indeed, recent news reports suggest the Prison Service still has no hard data on the rates of infection within its facilities.<sup>332</sup> Further, among those who do know their status, only one-third of infected prisoners are receiving appropriate treatment.<sup>333</sup> Though staff development is a centerpiece for the Strategic Plan, evidence suggests that facilities remain understaffed, with little training offered to those charged with care and oversight of inmates.

#### **i. Provision of Antiretroviral Therapy (ART)**

The government of Namibia is committed to providing equal access to affordable antiretroviral therapy and preventive treatment for the onset of opportunistic infections.<sup>334</sup> Furthermore, the National HIV/AIDS Policy states “every person considering ART shall be provided with ART counseling.”<sup>335</sup> The Namibian Government has called for literacy campaigns to ensure that the general population has the necessary information to access HIV/AIDS treatment mechanisms.<sup>336</sup>

Despite the government’s proclamation to provide ART medication to anyone infected with HIV, distribution of medications in prisons appears to be limited to inmates

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<sup>330</sup> See generally, Strategic plan, *supra* note 9.

<sup>331</sup> *Id.*

<sup>332</sup> REPUBLIC OF NAMIBIA, MINISTRY OF HEALTH AND SOCIAL SERVICES, *Follow-up to the Declaration of Commitment on HIV/AIDS (UNGASS), Namibia Country Report* (January 2003-December 2005).

<sup>333</sup> “Whilst the precise figure of HIV positive inmates is not known to the Namibian Prison Service as testing inmates is not mandatory, it is known that only a third of those prison inmates in Namibia who know their HIV status are receiving anti-retroviral treatment (ART). Costs of treating inmates are also skyrocketing, as those on ART need special diets to boost their immune system.” *The Namibian* (April 20, 2007).

<sup>334</sup> *Id.* at 25.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 26.

who are noticeably sick or to those who can bribe, persuade, or otherwise convince wardens to provide them with ART medications.<sup>337</sup>

## **XII. International Law**

The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) offer clear protections for the incarcerated.<sup>338</sup> As a party to both, the government is obligated to ensure that no representative of the government inflicts cruel, inhumane or degrading treatment upon others and to protect the personal security of the individual.<sup>339</sup>

As a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), Namibia also agrees to take progressive steps, utilizing the maximum available resources to do so, to support the full realization of rights in the ICESCR, including the right to the enjoyment of the highest attainable standard of physical and mental health.<sup>340</sup> Various other international documents also specifically expand on rights for the incarcerated that all countries should use as guidelines for the treatment and care of inmates. These include the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and the Principles for the Treatment of Prisoners.<sup>341</sup>

Lastly, the Namibian government should respect the findings of the Human Rights Committee that discrimination based on sexual orientation violates the principles of the ICCPR.<sup>342</sup> The refusal to acknowledge that consensual male-to-male sex is occurring in prison and the refusal to allow condom distribution, because it would promote illegal sexual behavior, endangers the health of inmates by contributing to HIV transmission among prisoners.

### **a. Prison Conditions**

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<sup>337</sup> Interview, March 17, 2008 (prison official).

<sup>338</sup> ICCPR, Supp. No. 16 at 53.; CAT, Supp. (No. 51) at 197.

<sup>339</sup> ICCPR Human Rights Committee. Human Rights Committee interpreted Article 7 of the ICCPR to mean, “that State Parties have to take positive measures to ensure that private persons or entitled do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.” CCPR Human Rights Committee, GENERAL COMMENTS, *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (May 26, 2004) available at

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument).; Article 16 of the CAT mandates that State parties “undertake to prevent in any territory under its jurisdiction...acts of cruel, inhuman or degrading treatment or punishment...when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

<sup>340</sup> ICESCR, at para. 2 and 12.

<sup>341</sup> SMRTP, *supra* note 6, at 35.

<sup>342</sup> General Comment, No. 31.

Any serious attempt to address the problem of HIV/AIDS in the Namibian prison system must include a comprehensive review of prison conditions. Overcrowding, inadequate nutrition, violence, sexual assault, inconsistent access to medical services and high rates of infectious diseases seriously undermine what should be a principle aim of prisons, namely the reformation and rehabilitation of the incarcerated.<sup>343</sup>

### **i. Overcrowding**

Overcrowding is a serious problem within both the general prison system and pre-trial detention holding cells. Overcrowding, which results from a confluence of factors, including unnecessarily long sentencing delays, strains scarce financial and human resources, contributes to increased sexual and physical violence, and can lead to higher rates of HIV and tuberculosis transmission among inmates.<sup>344</sup>

Article 9(3) of the ICCPR requires states to provide those in detention prompt appearance before a judge.<sup>345</sup> In many cases, this does not appear to be happening. A local defense attorney stated that it was common for prisoners to spend weeks or longer in pre-trial detention waiting to see a magistrate.<sup>346</sup> In rare cases, some detainees have sat in pre-trial detention for periods ranging from one to five years.<sup>347</sup>

The Standard Minimum Rules for the Treatment of Prisoners (SMRTP) article 9.1 suggests that nightly sleeping arrangements for prisoners should be such that no more than two prisoners share a sleeping area and that all bedding should meet health requirements.<sup>348</sup> Interviews with former prisoners and officials revealed overcrowded cells in various prisons, in some cases holding as many as thirty-five prisoners.<sup>349</sup> While it is unrealistic to expect that each prisoner receive a separate cell, the government should take steps to significantly reduce overcrowding in cells.

The lengthy pre-trial detention periods jeopardize a prisoner's right to health, safety, and prompt appearance before a judge. Likewise, lack of adequate space and proper sleeping accommodations negatively affects a prisoner's right to privacy while extreme overcrowding may constitute cruel, inhumane and degrading treatment.

### **ii. Health and Nutrition**

As a party to the ICESCR, Namibia also agrees to take progressive steps to support the full realization of rights in the ICESCR for its citizens, including the right to the

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<sup>343</sup> ICCPR, at art. 10.

<sup>344</sup> Expenditures Framework, *supra* note 7, at 27.

<sup>345</sup> ICCPR, at art. 9.

<sup>346</sup> Interview, March 19, 2008 (Defense Attorney, Windhoek).

<sup>347</sup> *E.g.*, Interview, March 17, 2008, (former inmate, Windhoek); Interview, March 17, 2008, Prison Official Windhoek).

<sup>348</sup> SMRTP *supra* note 6 at Provision 9.1

<sup>349</sup> Interview, March 17, 2008, (former inmate, Windhoek).

enjoyment of the highest attainable standard of physical and mental health.<sup>350</sup> Incarceration does not suspend these rights, and penal institutions have an obligation to ensure the basic elements of health for all prisoners. “In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees [...] to preventive, curative and palliative health services.”<sup>351</sup>

Adequate nutrition, basic hygiene and sanitation are the cornerstones of overall good health. Penal institutions are encouraged under the Standard Minimum Rules for the Treatment of Prisoners<sup>352</sup> to provide for minimum living conditions. One basic necessity detailed under Rule 20 is access to potable water and nutritional food: “(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, or wholesome quality and well prepared and served. (2) Drinking water shall be available to every prisoner whenever he needs it.”<sup>353</sup> Although the Ministry of Safety and Security earmarked funds “to ensure continuous supply of basic needs such as food, water and electricity, clothing, health care, shelter and sanitation,” the majority of interviews conducted with former inmates suggest that the ministry is not meeting its own expressed goals and its domestic and international obligations.<sup>354</sup>

### iii. Rape and Violence

*There is much violence. Someone wanted a date with me and I ended up fighting the person. I pressed the alarm but the guards didn't react. I was stabbed in the head by a sharpened toothbrush.*<sup>355</sup>

One of the most fundamental of human rights is the right to life, liberty and security of the person.<sup>356</sup> Article 9 of the ICCPR obligates State's Parties to ensure to *everyone* the right to liberty and security of the person.<sup>357</sup> General Comment 8 to Article 9 of the ICCPR is especially relevant in this context because it states that the right to security of the person is “applicable to all deprivations of liberty.”<sup>358</sup> Thus, incarceration does not deprive an inmate of the right to be secure. State parties should read Article 9 in combination with Article 10 of the ICCPR, which obligates State Parties to ensure that persons deprived of their liberty “be treated with humanity and with respect for the inherent dignity of the human person.”<sup>359</sup>

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<sup>350</sup> ICESCR, at para. 2 and 12.

<sup>351</sup> ICESCR, at General Comment No. 14, section 34.

<sup>352</sup> Prison Policy Act of 1998. The Act does not mention nutrition, sanitation nor hygiene.

<sup>353</sup> SMRTP, *supra* note 6, at rule 20.

<sup>354</sup> Interview, March 17, 2008 (former inmates, Windhoek, Oluno).

<sup>355</sup> Interview, March 17, 2008 (former inmate).

<sup>356</sup> UNDHR, at article 3

<sup>357</sup> ICCPR, at art. 9

<sup>358</sup> ICCPR, at General Comment 8; ICCPR, at art. 9, para. 1.

<sup>359</sup> ICCPR, at art. 10

The Namibian Government also has an obligation to ensure that prisoners are not subjected to torture or to cruel inhuman or degrading treatment or punishment.<sup>360</sup> The ICCPR, like the Namibian Constitution, states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>361</sup> The Human Rights Committee has interpreted this provision to mean, “That States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”<sup>362</sup> This means that the government has an obligation to prevent not only violations committed by its own wardens but also violations perpetrated by private persons, such as other inmates.

Namibia ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on November 28, 1994.<sup>363</sup> The CAT mandates that Namibia (as well as other state parties) “undertake to prevent in any territory under its jurisdiction...acts of cruel, inhuman or degrading treatment or punishment...when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>364</sup>

When wardens have sex with inmates, the inherently coercive nature of the prison environment raises serious concerns about cruel, inhuman and degrading treatment.<sup>365</sup> The unequal and authoritarian relationship between prisoners and prison employees vitiates the usual notions of consent in sexual relations. Where sexual intercourse between officers and prisoners involves the promise or provision of reward, it may constitute rape.

Under Article 7 of the ICCPR and Article 16 of the CAT, an act is cruel, inhuman or degrading treatment when the act or condition causes mental or physical suffering rising to a particular level of severity, although below that of torture, and when inflicted by or at the instigation of a government actor. Article 10(1) of the ICCPR further provides that “all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.” These provisions not only prohibit torture and ill treatment, but also impose a positive duty on states to treat prisoners humanely.<sup>366</sup>

Under the CAT, an act is torture when it: (1) causes severe physical or mental suffering; (2) is committed for the purpose of obtaining information, punishment,

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<sup>360</sup> CAT, at art. 16; ICCPR, at art. 7.

<sup>361</sup> ICCPR, at art. 7.

<sup>362</sup> *General Comment No. 31.*

<sup>363</sup> Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (2004) available at <http://www.unhchr.ch/pdf/report.pdf>.

<sup>364</sup> CAT, at art. 16

<sup>365</sup> Interview, March 19, 2008 (former prison warden); Interview, March 18, 2008 (former inmate).

<sup>366</sup> COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY THE HUMAN RIGHTS TREATY BODIES. *General Comment 7 to Article 7*, U.N. Document HRI/GEN/1/Rev.1, July 29, 1994, p.7.



intimidation or coercion; and (3) is inflicted by or with the consent or acquiescence of any person acting in an official capacity.<sup>367</sup>

Namibia has not satisfied its obligations under the ICCPR, the CAT and other relevant human rights treaties and resolutions because some wardens have reportedly engaged in acts that constitute cruel, inhuman, and degrading treatment and may even rise to the level of torture. One NGO representative stated that there have been cases of police officers putting juveniles arrested for drinking and driving "in a cell where [the officers] know that [the juveniles] will be raped" to "teach [the juveniles] a lesson."<sup>368</sup>

In addition to the international treaties discussed above, the United Nations' Standard Minimum Rules for the Treatment of Prisoners<sup>369</sup> provides guidelines for prison administrators to ensure protection against cruel, inhuman or degrading treatment or punishment. The Standard Minimum Rules also assist in the interpretation of Article 10(1) of the ICCPR, which mandates the humane treatment of and respect for the human dignity of prisoners.<sup>370</sup>

All former inmates interviewed reported that rape occurs in prison.<sup>371</sup> For example, one former inmate reported that three inmates gang raped another male inmate.<sup>372</sup> Inmates are afraid to report incidences of rape "because some of the wardens are being bribed by the prisoners."<sup>373</sup> The wardens are sometimes even bribed to not pay attention to a particular part of the prison to facilitate sexual assault.<sup>374</sup>

In another case involving juveniles, prison wardens reportedly placed juvenile inmates with adults for the sole purpose of ensuring that the juvenile was sexually assaulted.<sup>375</sup> One former juvenile inmate reported an incident in which prison guards removed him from the juvenile section and placed him with "hard-core prisoners" so he could be sexually assaulted.<sup>376</sup>

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<sup>367</sup> Torture is defined in Article 1 of the CAT as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." CAT, at art. 1.

<sup>368</sup> Interview, March 17, 2008 (foreign aid organization representative, Windhoek).

<sup>369</sup> SMRTP, *supra* note 6.

<sup>370</sup> *Id.* at rule 31. The Standard Minimum Rules reiterate the prohibition on cruel, inhuman or degrading treatment or punishment within the particular context of punishment within the prison itself. Rule 31 provides "corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment shall be completely prohibited for punishment for disciplinary offenses."

<sup>371</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop); Interview, March 17, 2008 (former inmate); Interview, March 17, 2008 (former inmate, Oluno, Windhoek).

<sup>372</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>373</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>374</sup> *Id.*

<sup>375</sup> Interview, March 17, 2008 (former inmate, Keetmanshoop).

<sup>376</sup> *Id.*

Rape causes mental and physical suffering and is inflicted at the acquiescence of government officials when prison wardens fail to pay attention to a particular part of the prison or place a juvenile in an adult cell. Systematic rape, with the cooperation of wardens, constitutes cruel, inhuman or degrading treatment under the ICCPR and the CAT.

## **b. International Obligation to Repeal the Sodomy Law**

Namibia is obligated to overturn the common law offense of sodomy pursuant to commitments made under international human rights conventions ratified since independence.<sup>377</sup> International human rights law protections of privacy, non-discrimination and dignity provide legal justification for overturning the anti-sodomy law.<sup>378</sup>

Namibia has ratified the ICCPR as well as both optional protocols.<sup>379</sup> Namibia is obligated to respect and ensure that its citizens enjoy certain rights without discrimination on the basis of sex or other protected status.<sup>380</sup> The rights enshrined in the ICCPR that Namibia is obligated to respect and that are relevant to the abolishment of sodomy laws include the right to equality, the right to be free from discrimination and the right to privacy.<sup>381</sup>

Individuals have successfully challenged state violations of these ICCPR provisions in cases involving discrimination on the basis of sexual orientation. In *Toonen*, the UN Human Rights Committee<sup>382</sup> decided that laws that criminalize consensual homosexual conduct violate the right to privacy (Article 17) and rights against discrimination (Articles 2 and 26).<sup>383</sup> The Committee also concluded that nations should read the non-discrimination provisions in the covenant broadly.<sup>384</sup> The Committee stated that “in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be interpreted to include sexual orientation.”<sup>385</sup>

Almost 10 years after the Human Rights Committee’s decision in *Toonen*, Namibia continues to retain anti-sodomy laws that discriminate based on sexual orientation. The Human Rights Committee in 2004 noted in its general comments that in Namibia, there was an “absence of anti-discrimination measures for sexual minorities, such as homosexuals [and] the State party should consider, in enacting anti-discrimination

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<sup>377</sup> ICESCR.

<sup>378</sup> Int’l. J. of Public Admin., 25(1), 13–44 (2002).

<sup>379</sup> [http://www.bayefsky.com/html/namibia\\_t1\\_ratifications.php](http://www.bayefsky.com/html/namibia_t1_ratifications.php).

<sup>380</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>381</sup> ICCPR, at art. 2, 17, 26

<sup>382</sup> The body responsible for monitoring State compliance with the ICCPR.

<sup>383</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para 3.1.

<sup>384</sup> *Id.*

<sup>385</sup> ICESCR, at art. 27.

legislation, introducing the prohibition of discrimination on the ground of sexual orientation.”<sup>386</sup>

In 1998, South Africa’s Constitutional Court struck down the country’s anti-sodomy laws, decriminalizing male-to-male sex.<sup>387</sup> The South African Constitution, one of the most progressive in the world with respect to protecting the rights of sexual minorities, expressly prohibits discrimination based on sexual orientation.<sup>388</sup> Ecuador, Fiji and Switzerland have similar provisions in their constitutions.<sup>389</sup> Lastly, the U.S. Supreme Court relied, in part, on international human rights law in its decision to overturn a Texas anti-sodomy law in 2003.<sup>390</sup>

Namibia should follow the lead of these countries and repeal its anti-sodomy law. This would bring Namibia in line with international standards and provide a prison environment in which prison authorities could freely distribute condoms, thereby reducing the transmission of HIV/AIDS in many cases.

### **XIII. National and International Response**

#### **a. The United States President’s Emergency Plan for AIDS Relief (PEPFAR)**

Many donors and governments send money to Namibia to assist in fighting the AIDS epidemic.<sup>391</sup> Although many European states help to fund domestic NGOs and their initiatives, the United States President’s Emergency Plan for AIDS Relief (PEPFAR), is one of the most significant contributors to Namibia’s HIV/AIDS effort.<sup>392</sup> One NGO worker stated that if PEPFAR pulled funding for HIV/AIDS out of Namibia, the existing organizations, programs and clinics would be unable to function.<sup>393</sup>

U.S. President George W. Bush created PEPFAR in January 2003 as a five-year plan to fight the HIV/AIDS crisis.<sup>394</sup> As one of the fifteen focus countries, Namibia developed a National Strategic Plan on HIV/AIDS in order to start receiving funding.<sup>395</sup> In 2007, Namibia received \$91,188,901(U.S.).<sup>396</sup> The prison system does not directly receive any

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<sup>386</sup> Int’l. J. of Public Admin., at 25(1), 13–44 (2002) at 21.

<sup>387</sup> National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others, 1998.

<sup>388</sup> SA Const.

<sup>389</sup> Int’l. J. of Public Admin., at 35, 36.

<sup>390</sup> *Lawrence and Garner v Texas*, 539 U.S. 558 (2003).

<sup>391</sup> Interviews, March 17-21, 2008 (NGOs).

<sup>392</sup> Interview, March 19, 2008 (AIDS NGO representative, Windhoek); Interview, March 19, 2008 (research NGO, Windhoek).

<sup>393</sup> Interview, March 17, 2008 (NGO worker).

<sup>394</sup> The United States President’s Emergency Plan for AIDS Relief (PEPFAR), <http://www.pepfar.gov/about/>, retrieved on May 2, 2008.

<sup>395</sup> PEPFAR requires the “three ones” plans from the host countries. The United States does not have any such plans. *Id.*

<sup>396</sup> The United States President’s Emergency Plan for AIDS relief, [www.pepfar.gov](http://www.pepfar.gov), retrieved on April 15, 2008.

of this money to help prevent HIV infection or treat and care prisoners infected with HIV.<sup>397</sup>

Although PEPFAR is the largest donor for AIDS relief in the world,<sup>398</sup> it is not without criticism. Much of the PEPFAR funding given to NGOs for HIV prevention supports “education programs emphasizing abstinence and faithfulness.”<sup>399</sup> This abstinence-only prevention message is problematic, because studies have shown these types of messages are not successful in lowering the prevalence rates of HIV.<sup>400</sup> In addition, the focus on abstinence stymies discussion of sex outside of marriage and condom availability.<sup>401</sup> The focus on abstinence largely does not reflect the realities of prison life, rendering the governmental response ineffective in the prison context.

## **b. Domestic NGO Response**

The Namibian government and civil society began addressing the AIDS epidemic long before becoming a recipient of PEPFAR funding.<sup>402</sup> There are many AIDS organizations in Namibia, but many interviewees suggested that the current response is inadequate.<sup>403</sup> One of the biggest concerns is the lack of human resources. One program implementer reports:

*We don't have enough hands to provide care. The HIV/AIDS epidemic contributes to this. Community health workers are coming to work weak and not taking care of themselves. Patients are more needy. They are unable to feed and bath themselves. For the workers there is no support, no linens, no equipment. It is very frustrating.*<sup>404</sup>

The lack of resources can cripple efforts to combat HIV/AIDS in the prison system. Partly due to the double stigma that results from being both a prisoner and a person who is HIV-positive, HIV-positive prisoners and their health care are often the last ones considered.<sup>405</sup> One NGO representative, whose organization provides AIDS relief but does not work with prisoners, admitted that he had not considered the idea until questioned about it. He stated, “... it is a big risk group. I don't even know where to begin. I know you are here to get information from *me*, but the simple fact that you came to ask these questions already has me thinking of ways we can try.”<sup>406</sup>

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<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> “Abstinence programmes don't stop HIV” *New Scientist*; 8/11/2007, Vol. 195 Issue 2616, 4-6, 1

<sup>401</sup> “Bush Seeks to Boost AIDS Relief”, Scott Stearns. March 10, 2008, retrieved on April 15, 2008.

<http://www.voanews.com/english/NewsAnalysis/2008-03-12-voa31.cfm>

<sup>402</sup> Interview, March 17, 2008 (NGO).

<sup>403</sup> Interview, March 18-19, 2008 (NGO); Interview, March 19, 2008 (UNam).

<sup>404</sup> Interview, March 19, 2008 (UNam).

<sup>405</sup> Interview, March 20, 2008 (doctor, Windhoek); Interview, March 17, 2008 (former inmate, Windhoek, Oluno).

<sup>406</sup> Interview, March 17, 2008 (NGO).

Interviews revealed that few organizations work inside the prisons or with former prisoners. The Ministry of Safety and Security restricts access to the prisons, which likely contributes to NGO frustration and neglect of this vulnerable population. One NGO worker reports that her organization would be willing and able to extend their services to the local prison if the Ministry of Security and Safety requested their assistance.<sup>407</sup>

The few programs that offer services to prisoners may not be fulfilling the needs or gaining the trust of those incarcerated. One former inmate stated, “Prisoners are suffering and organizations use prisoners as tools. You see them driving around in BMWs and still prisoners do not have food to eat.”<sup>408</sup> This distrust has the potential to render the few offered programs ineffective.

## **XIV. Conclusion**

As a relatively young country, Namibia has made great strides in providing fundamental human rights for its citizens since independence from the Apartheid regime of South Africa in 1990. Also, Namibia is making inroads transforming its prison system from one based on punishment to rehabilitation. However, the human rights of Namibia's prisoners have yet to be fully actualized, particularly when it comes to HIV/AIDS issues.

Prisoners in Namibia face innumerable health and safety risks while incarcerated. Former inmates, prison wardens, doctors and prison nurses interviewed for this report confirmed and corroborated that inmates are routinely subjected to overcrowding, violence, sexual assault, rape, substandard nutrition, and inadequate sanitation. Prisoners living with HIV/AIDS have an even greater challenge in prison. HIV/AIDS treatment requires a substantially greater nutritional intake as well as a strict regimen of clinical visits and medications, much of which is unavailable inside the prison system at present.

With respect to HIV/AIDS transmission, the problem is exacerbated by inmate behavior. With or without condoms, inmates will continue to engage in sexual contact, through both consent and coercion. The government's refusal to distribute condoms based on an outdated anti-sodomy common law violates Namibia's domestic and international human rights obligations.

Yet, Namibia is well-placed to address these human rights concerns. The nation's progressive constitution and policies provide a solid stepping-stone for Namibia to meet its legal obligations. Namibia must now take steps to ensure that its prisoners enjoy their fundamental human rights by overturning the anti-sodomy law and promoting condom distribution in prisons, implement its own National Policy on HIV/AIDS within the prison system, and otherwise adhere to its domestic and international human rights

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<sup>407</sup> Interview, March 17, 2008 (NGO).

<sup>408</sup> Interview, March 18, 2008 (former inmate, Windhoek).

obligations. This will ensure a safe, healthy, and secure environment for all prisoners, including those living with HIV/AIDS.