

NAMIBIA

Justice delayed is justice denied

The Caprivi treason trial

I. Introduction

In the early hours of 2 August 1999, members of a secessionist group, the Caprivi Liberation Army (CLA), launched an armed attack on government forces and buildings in the regional capital of Katima Mulilo in the Caprivi region of north eastern Namibia. According to official sources, they attacked the police headquarters, the local offices of the Namibian Broadcasting Corporation, an army base and an immigration post. In the attacks, 11 people were killed, at least six of whom were members of the security forces. That evening, President Samuel Nujoma declared a State of Emergency. A curfew was imposed in Katima Mulilo and Namibia's borders with Angola, Zambia and Botswana were closed.

After the initial assault, government forces repelled the attack and rounded up rebel fighters and suspected civilian sympathizers. Over 300 people were detained on suspicion of participating in the attack, sympathizing with the secessionists or assisting them to plan or launch the attacks. Most of the detainees stated that they were tortured at the time of their arrest and during interrogation. Many were systematically punched, hit with rifles and beaten with sjamboks¹ by members of the security forces, and were denied medical treatment. In some cases their injuries were recorded in reports of medical examinations conducted after their release or in photographs taken by defence lawyers. During bail hearings in September and October 1999, several defendants took off their shirts in court to show marks on their bodies which they stated were the result of torture.

In Parliament, Hage Geingob, the Prime Minister at the time, said that "because of provocation by the separatists, some unfortunate excesses had resulted in the effort [of] our security forces to zealously protect their motherland."² Defence Minister Erkki Nghimtina acknowledged that the security forces had "made some mistakes regarding human rights abuses" in the first few days after the attack.³ He said that commanding officers had been instructed to stop the ill-treatment of detainees and that disciplinary action would be taken against officers who had beaten or tortured detainees.⁴

¹ Long stiff whips

² "Prime Minister avoids condemning Caprivi abuses", *Pan-African News Agency (PANA)*, 9 August 1999.

³ Tangeni Amupadhi, "Govt admits abuses" *The Namibian*, 12 August 1999.

⁴ "Namibian government admits atrocities in Caprivi" *Agence France Presse (AFP)*, 12 August 1999

The authorities have not made public the findings of any investigation of the allegations of torture. Amnesty International is concerned that statements allegedly made under duress, including torture, may be used as evidence against the defendants. International human rights law such as the United Nations International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Namibia is party, prohibit torture and the use of evidence extracted under torture in legal proceedings, except as evidence against the perpetrators of torture. They require that those responsible for torture be brought to justice and that international standards be observed for the humane treatment of those detained or imprisoned.⁵

Of those arrested following the uprising, approximately 122 remain in custody awaiting the resumption of their trial on charges of high treason, murder and other offences in connection with the uprising. The majority have been in custody for close to four years. They face long prison sentences if convicted. Since their arrest in August 1999, there has been very slow progress in bringing the defendants to trial. The majority could not afford legal representation and were denied state-appointed legal aid until June 2002 when the Supreme Court ruled that the government should provide them with legal aid. After repeated delays, the trial is now scheduled to resume in October 2003. During their prolonged imprisonment, many of the defendants have complained of irregular medical care, inadequate food and sanitation, and lack of access to their families.

Amnesty International remains concerned that many of the defendants - at least 70 according to sources - charged in connection with the Caprivi uprising may be prisoners of conscience, arrested solely based on their actual or perceived non-violent support for the political opposition in the region, their ethnic identity or their membership of certain organizations. In some cases, members of the Mafwe community appeared to have been targeted for arrest. Some Mafwe defendants said that they had been arrested to remove them from senior posts they held in Caprivi. Released detainees told Amnesty International that the police referred to their ethnicity when arresting them or during interrogations. For example, Bolle n Mwilima and Rodwell Kasika Mikendwa were told they were arrested because they are of Mafwe ethnic origin and therefore allegedly knew about the rebel movements. Alfred Tawana Matengu maintains he was arrested solely because he is a member of the Democratic Turnhalle Alliance (DTA), one of Namibia's main opposition parties.

Amnesty International is concerned that violations of the defendants' pre-trial rights may seriously undermine their right to a fair hearing in accordance with international standards articulated in the ICCPR and the African Charter on Human and Peoples' Rights (ACHPR). This report provides an overview of the events which led to

⁵ United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) (Article 10(1)); UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Articles 2 and 4)

the Caprivi uprising in August 1999, including the government's initial response to the attack. In light of Namibia's human rights obligations under these international treaties, the report examines the violations of the Caprivi defendants' pre-trial rights, including torture and ill-treatment, poor prison conditions, initial lack of legal representation, flawed investigations and denial of bail. The report concludes with recommendations to the relevant Namibian authorities for action to protect the human rights of the Caprivi defendants, particularly in respect of the fact that their rights to a prompt hearing, to be presumed innocent, to have adequate time to prepare a defence and to have legal aid have already been undermined.

II. Background

The armed uprising in the Caprivi region in August 1999 was the latest manifestation of a secessionist movement among members of the Lozi-speaking ethnic groups in Namibia which dates back several decades.

Photocaption : Map of Namibia

Caprivi, one of Namibia's 13 provinces, is a geographically isolated corridor to the northeast of Namibia which borders Botswana, Zambia and Angola. For more than 100 years, it was part of the multi-ethnic Lozi or Barotse kingdom that stretched over an area which included parts of present-day Botswana, Namibia and Zambia. Following agreement between the colonial powers in 1890, Caprivi became part of the German colonial territory of South West Africa. In 1920, South West Africa was designated a League of Nations mandated territory under South African rule. In 1972, Caprivi was given its own Legislative Council which could take decisions concerning the development of the territory. It was administered by a Commissioner-General from South Africa, and had its own national anthem and emblem. In 1990, Namibia gained its independence from South African rule.⁶

The population of the Caprivi region is approximately 100,000 which is made up predominantly of members of the maSubia and Mafwe ethnic groups. Since independence, the maSubia have traditionally supported the ruling party, South West African People's Organisation (SWAPO). The larger Mafwe community has usually supported opposition parties. Cumulative dissatisfaction among the Mafwe stemming from perceived political marginalization by the Windhoek-based government led to the creation of an armed political force in the 1990s. Long-standing claims for special political status or complete autonomy for Caprivi, allegedly promised by SWAPO before independence, have not been met. In 1995, the Mafwe lost control of part of East Caprivi when the government

⁶ M. Fisch, 'The secessionist movement in the Caprivi: A historical perspective', Namibia Scientific Society, Windhoek, 1999.

granted the request of the Yeyi ethnic community for its own traditional chieftaincy. The Mafwe alleged discrimination in government appointments and development assistance.

Mafwe leader Mishake Muyongo became President of the DTA, one of Namibia's main opposition parties in 1989. However, he was expelled from the DTA in 1998 after reports that he had been involved in buying arms in South Africa in connection with his support for the secessionist CLA. He subsequently headed a secessionist group, the Caprivi Freedom Movement, which included supporters from the Mafwe and other ethnic communities in Caprivi, and former police officers from the pre-independence Counter-Insurgency Unit known as Koevoet (Crowbar). After government forces reportedly discovered a military training camp in Mudumu Game Park in Caprivi in October 1998, they cracked down on suspected secessionists. Mishake Muyongo and as many as 2,500 other people fled to Botswana in the following months. Mishake Muyongo was later granted political asylum in Denmark.

III. Government response to the Caprivi uprising

On the evening of the CLA attack on 2 August 1999, President Nujoma declared a State of Emergency in Caprivi province under the Namibian Constitution⁷. It accorded the security forces wide-ranging powers of search, arrest and confiscation of property. Some human rights guaranteed under the Constitution were suspended, including the right to liberty, and the rights to freedom from search and seizure without a warrant and from confiscation of property. Although the ICCPR allows derogation from certain fair trial rights in public emergencies which threaten the life of the nation, some human rights may never be suspended in any circumstances. Under the ICCPR, these rights include the prohibition of torture and right to freedom of thought, conscience, religion and belief. Any suspension of rights must not involve discrimination on grounds of race, colour, sex, language, religion or social origin.⁸ Also, the ACHPR does not allow for derogation from any of its provisions, including fair trial guarantees, under any circumstances. The State of Emergency remained in force for more than three weeks.

The National Defence Force (NDF), the Namibian armed forces, and the Special Field Force (SFF), Namibia's paramilitary police, were deployed following the CLA attacks. More than 300 people were arrested, some of them arbitrarily, and close to 200 were released. A total of 132 people were charged with 275 counts of criminal conduct

⁷ Article 26(1) of the Constitution of the Republic of Namibia (Namibian Constitution) states: "At a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order, the President may by Proclamation in the Gazette declare that a state of emergency exists in Namibia or any part thereof."

⁸ CAT (Article 2); ICCPR (Article 4). The ICCPR allows derogation from these human rights only through a process. It is not automatic.

including high treason, murder, sedition, public violence, theft, possession of weapons and malicious damage to property. They have remained in custody for almost four years. During their prolonged imprisonment, at least 11 defendants have died. Approximately 122 presently remain in custody awaiting the resumption of their trial.⁹

In total, nine out of the initial 132 defendants have had all charges against them withdrawn and have been released. For example, in May 2003, the charges against five defendants were withdrawn due to various circumstances which ensued after their arrest, including the deaths of witnesses.¹⁰

Although the State of Emergency was declared in the Caprivi province alone, nine people were arrested outside of Caprivi. Three of them, two teachers, Albert Sibeya and Martin Mutumba, and a police officer, Chrispin Mazila, who were arrested and detained for almost 10 days without being charged or brought before a magistrate, challenged the legality of their arrest and detention with the High Court. They sued the Minister of Home Affairs, who argued that the State of Emergency gave him wide powers which could be exercised in areas outside of the Caprivi region. On 7 November 2000, the High Court rejected this argument and the claims for damages were settled out of court. The case proceeded thereafter on the basis that the State of Emergency did not apply to areas outside of the Caprivi region. This effectively meant that the arrest and prolonged detention of the three was unlawful and all charges against them were dropped. A settlement on the amount awarded to them was reached out of court on 19 September 2001, the terms of which were not made public.

Shortly after the CLA attack, approximately 14 Namibians were arrested by the Zambian authorities and were reportedly handed over to their Namibian counterparts without standard extradition procedures having been followed. They are among the remaining 122 defendants. Six had entered Zambia in June 1999 seeking asylum. Known as the “Mamili Six”, they are alleged to be among the main leaders who planned the CLA attack.¹¹ The defendants maintain that they were held incommunicado from November 1999 until May 2000 when they appeared in Court for the first time. The Namibian police and NDF maintain that they were only arrested in May 2000 and are contesting the fact that they were arrested outside Namibia.

In May 1999, the Botswana government granted asylum to approximately 2,232 Caprivi refugees. While the majority were subsequently repatriated to the Caprivi region, 15 were detained by the Botswana government following the CLA attack in response to allegations made by the Namibian authorities that the 15 were allegedly involved in planning the attack. The Namibian government requested that they be extradited and stand trial with the other defendants. Subsequently, one of the 15 was reportedly released by mistake and another one fled Botswana. On 21 September 2001, a Botswana magistrate granted the extradition request on the remaining 13. However, this ruling was

⁹ Approximate figures are given due to the difficulty in obtaining accurate and consistent figures.

¹⁰ Two of the five defendants are Zambians who are reportedly being deported to Zambia by the Namibian government; Werner Menges, “5 Caprivi suspects free” *The Namibian*, 6 May 2003

¹¹ One of the six, Stephen Mamili, a former broadcaster with the NBC, is among the 11 defendants who have since died in custody. He died on 21 February 2001, reportedly of pneumonia.

successfully appealed on 5 December 2002 and all 13 were released without charge. The Namibian government has since filed another appeal with the Botswana High Court which is pending.

In July 2002, four more men were detained in connection with the CLA attack, approximately 26 months after it took place. While one of the four arrested subsequently died, the remaining three were added to the defendants already in custody and standing trial. Five others are being held in Mariental, approximately 260km south of Windhoek. They have appeared in court on a charge of high treason. Their case has been postponed and awaits a decision from the Prosecutor-General as to whether they will be prosecuted. If prosecuted, it is not yet clear whether they will stand trial with the other 122 defendants.

Government opponents in Caprivi and neighbouring countries were also targeted by the NDF due to suspicions that they were cooperating with the CLA in an effort to advance their separate struggles against their respective governments. For example, the CLA was suspected of cooperating with UNITA (*União Nacional para a Independência Total de Angola*, National Union for the Total Independence of Angola) in Angola, the Lozi, and the Kxoe San people. About 400 Kxoe San were among the refugees who fled Caprivi and the Kavango province in Angola to Botswana in 1998. Although some of the returned refugees stated they were not involved in the CLA rebellion, they complained of being treated as rebel sympathizers by Namibian forces and accused of harbouring members of UNITA.

Most of the defendants were held for a few weeks at police headquarters in Katima Mulilo. After being charged, the majority were transferred from police custody to Grootfontein prison, approximately 800km from Katima Mulilo, on 26 and 27 August 1999, just as the State of Emergency was lifted. Most of the defendants remain in Grootfontein prison to date apart from approximately 14 who are in Windhoek for medical reasons.

All of the 122 defendants are charged under the “common purpose” doctrine with 275 counts of criminal conduct including high treason, murder, sedition, public violence, theft, possession of weapons and malicious damage to property. In June 2002, the Ministry of Justice appointed lawyers from the Legal Aid Directorate to represent the defendants. The defendants were reportedly divided into three groups by the Legal Aid Directorate to enable the defence lawyers to better manage their cases and prepare the defence of their clients. One group consists of approximately 70 defendants who allegedly assisted or sympathized with the secessionists.¹² Amnesty International believes that many of the defendants in this group may be prisoners of conscience. A second group consists of approximately 40 defendants who allegedly participated directly in the CLA attack.¹³ A

¹² The four defendants who obtained bail in September 1999 and were acquitted in August 2001 belong to this group.

¹³ One defendant in this group was 17 years old at the time of arrest and has been detained with adults throughout

third group consists of six defendants, known as the “Mamili Six”, who are alleged to have led the uprising. When the trial resumes in October 2003, defence lawyers reportedly intend to file an application to have all charges against the six dismissed on the basis that the judge presiding over the trial does not have jurisdiction. This is based on the claim that the Zambian and Namibian authorities did not follow official extradition procedures.

IV. Violations of pre-trial rights

Following their arrest and detention in August 1999, most of the Caprivi defendants were reportedly held incommunicado, tortured and ill-treated by military, state security and police officers, and denied access to legal representation, medical care, food and water. By the time their trial resumes in October 2003, the defendants will have spent approximately four years in custody following repeated delays to the resumption of their trial. It is for these and other reasons that Amnesty International is deeply concerned that the pre-trial rights of the defendants have been seriously violated.

1) Torture and ill-treatment of defendants

Torture and ill-treatment are prohibited under the CAT and the ACHPR.¹⁴ Article 8 of the Namibian Constitution also provides that “[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁵ Article 2 of the CAT stipulates that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Under the CAT, a defendant possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention and trial. Accordingly, evidence obtained as a result of torture may never be admitted, except in proceedings against alleged perpetrators.

The UN Special Rapporteur on Torture has called for a total ban on incommunicado detention. According to the Special Rapporteur, “...torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that defendants be given access to legal counsel within 24 hours of detention.”¹⁶

his detention, in contravention of Namibia's international human rights obligations (Article 10 of the ICCPR) which require children to be separated from adults. International standards impose a duty on states to secure the best interests of each child and to ensure that measures affecting children who have broken the law take into consideration the personal circumstances of the juvenile.

¹⁴ CAT (Articles 2, 4); ICCPR (Article 7); ACHPR (Article 5).

¹⁵ Namibian Constitution (Article 8 (2 b)).

¹⁶ Report of the Special Rapporteur on Torture, UN Doc. E/EN.4/1995/434, para. 926 (d).

Although the prohibition of torture must be observed at all times and in all circumstances, torture appears to have been used widely against those detained in connection with the Caprivi uprising. More than 100 detainees, including those who were released without charge, have said that they were tortured or subjected to other ill-treatment by police, army and state security officials during their interrogation and detention as a means of obtaining information and eliciting confessions. In some cases, financial inducements were offered in exchange for information.

Brian Mbozi, a 46-year-old Mafwe farmer, was arrested on 12 November 1999 by SFF and army officers. He was interrogated and allegedly tortured for three days at a police station. During this ordeal, he was beaten with sjamboks for three hours, forced to turn around continuously while pressing his finger on the ground, and beaten whenever he fell down. Police officers threatened to kill him while holding a gun to his head and denied him access to food, medical treatment and his family. He gave the following account:

On the 16th of November, [a police officer] told me: "Take off your clothes." He got hold of my penis and used a garden cutter and pressed it to my private parts. I was crying. He cut a bit of it off. I agreed to sign [a statement], otherwise they were going to kill me. He started beating me again, that same day. From the 16th of November to the 4th of December I was not allowed to be visited by my family. Food was brought B it was thrown away. They threatened to beat my younger sister as well.

He was constantly made to re-write his statements to the police and on 20 August 2000 was reportedly offered payment to provide information. He complained about the torture and severe beatings and is suing the government for it. His case is among the many still pending. He also complained about the attempted financial inducement, both to the police and the Office of the Ombudsman. The Office of the Ombudsman reportedly referred his complaint to the prosecuting authorities in September 2000. The outcome of any investigation is not yet known. Brian Mbozi remains in custody.

The Legal Assistance Centre, a Namibian non-governmental human rights organization, has been instructed to act on behalf of 135 claimants who are demanding compensation or reparation from the state for allegedly perpetrating torture.¹⁷ The main violations for which the government is being sued are unlawful arrest and detention, assault and torture, and failure to take victims to a doctor for medical treatment. The first defendant to file a civil case claiming compensation for torture and ill-treatment was Geoffrey Mwilima, a former opposition Member of Parliament, who is claiming compensation of N\$1.5 million (approximately US\$200,000). Geoffrey Mwilima

¹⁷ Dani Booysen, *Die Republiken*, 25 June 2003.

sustained a broken jaw and severe lacerations which he maintains resulted from being whipped and kicked by police. His case was settled out of court in July 2003, along with four others, bringing the total number of settled claims to nine. The settlements did not include any admissions of liability on the part of the government. The terms of the settlements were not made public.

Photocaption: Geoffrey Mwilima

The most common torture methods were said to have been beatings with fists, sjamboks, rifles and rubber batons, as well as electric shocks and death threats. Some prisoners were forced to urinate on themselves or drink urine. Sensory deprivation techniques were also used. Some defendants were reportedly blindfolded or made to stand or sit with their hands above their heads and against a wall for long periods of time.

Postrick Mario Mwinga, a 43-year-old former security guard employed at the Ministry of Home Affairs, fled to Botswana. He was arrested on 27 September 1999 after he voluntarily returned to Namibia, and was taken to Chichimani SFF camp. He gave the following account of the ill-treatment he and his family were subjected to:

[An SFF officer] took his rifle, he hit me with a butt of the rifle on the left cheek. One tooth was broken. He told me I must swallow my tooth. He took me to my village, Sefuwe. My mother, she is crippled. He started beating my mother and my sister. He broke two ribs of my sister. My sister has passed away because of the two broken ribs. She didn't go to the hospital. They took a big stone... and they put it on the back of my head. They began sitting on my back and began hitting me. They said, If you say you are not involved in the attack, you will die.=

Back at the police station, he was reportedly blindfolded, shackled to a table by his legs and denied food and water for three days. He said that SFF officers banged his head against a wall, applied electric shocks to his genitals and forced him, under threat of death, to read a confession statement on the radio on 29 September 1999. He remains in custody.

In almost all cases, injured prisoners did not receive medical care for lengthy periods, with serious consequences for their health. They were often denied food and water over several days, or were denied clothing and bedding. During several weeks following their arrest, they were held incommunicado, and denied all access to their families and lawyers. Some who fled to Zambia after the CLA attack said that they were arrested and tortured in Zambia by Zambian soldiers in the presence of Namibian officers, before being returned to Namibia.

Martin Chainda, a 47-year-old teacher from the village of Makanga, was arrested on 24 August 1999 after being stopped at a roadblock by SFF officers. He was taken to Katima Mulilo police headquarters where he was reportedly

beaten with rubber batons and punched until he lost consciousness. He was reportedly forced to sign a statement admitting to helping transport rebels, and was denied medication to treat his diabetes and injuries before being transferred to Grootfontein prison. He remains in custody.

Most of the torture and ill-treatment of those arrested in connection with the CLA uprising occurred at the time of arrest or shortly afterwards. However, members of the security forces are reported to have tortured or threatened some defendants during continuing investigations. Police officers allegedly used torture when taking defendants out of prison on “field trips” to point out weapons caches and to deter them from withdrawing, during the forthcoming trial, confession statements which they had earlier made to the police.

The SFF, Namibia’s paramilitary police force, have been implicated in many of these torture allegations. As part of the police force, they fall within the terms of the 1990 Police Act.¹⁸ However, unlike the regular police force, there are no educational requirements for membership in the SFF,¹⁹ and SFF training focuses solely on operational issues rather than the full range of law enforcement duties. There is also alleged to be more political direction of the SFF than of the regular police, with reporting lines direct to the Head of State and not to the Minister of Home Affairs, thereby removing any parliamentary supervision.

2) Poor prison conditions

Namibia is obliged under international and national law to ensure minimum standards of detention and imprisonment and to protect the rights of all defendants.²⁰ All people deprived of their liberty are entitled to be treated with “humanity and with respect for the inherent dignity of the human person”.²¹ The UN Human Rights Committee, established to monitor state compliance with the ICCPR, has said that states cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment. States are obliged to provide all defendants and prisoners with services that will satisfy their essential needs. These essential needs include: food, washing and sanitary facilities, bedding, clothing, medical care, access to natural light, recreation, physical exercise, facilities to allow religious practice, and communication with others including those in the outside world.²²

¹⁸ Police Act (Act No. 19), 1990, Namibia.

¹⁹ Government Notice 246, 1998.

²⁰ UN Body of Principles for the Protection of all Form of Detention or Imprisonment (Body of Principles); UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).

²¹ ICCPR (Article 10); ACHPR (Articles 4, 5); Namibian Constitution (Article 8).

²² *Kelly v. Jamaica* (253/1987), 8 April 1991, Report of the Human Rights Committee (A/46/40), 1991; *Parkanyi v. Hungary* (410/1990), 27 July 1992, Report of the Human Rights Committee (A/47/40), 1992.

Defendants have the right to be examined by a doctor and, where necessary, to receive medical treatment.²³ They should be afforded prompt and regular access to doctors.²⁴ The Human Rights Committee has stated that the obligation to treat individuals with respect for the inherent dignity of human persons encompasses the provision of medical care and basic sanitary facilities during detention. Similarly, the Committee further states that the provision of inadequate food as well as the total absence of recreational facilities violates the requirements of Article 10 of the ICCPR unless under exceptional circumstances.²⁵

In addition to allegations of torture and ill-treatment, the Caprivi defendants have reported harsh prison conditions and have lodged complaints with the Namibian authorities about lack of medical care, insufficient food, unsanitary conditions and lack of access to their families. International human rights standards require the authorities to reply promptly to requests for improvements or complaints about treatment made by defendants and prisoners, and allow such requests or complaints, if rejected, to be taken before a judicial or other authority.²⁶ The Caprivi defendants have received little response to complaints about their conditions of detention.



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Oscar Lumphalezwi, a former senior policeman with more than 24 years' experience, was one of those arrested and tortured following the CLA attack. He has more than 50 scars on his neck and back from the sjamboks that were used to beat him following his arrest on 6 August 1999. He also began to suffer from high blood pressure soon after his arrest and torture.

He was refused medical treatment for six days.

He is married with twelve children and has remained in custody awaiting the resumption of the treason trial for four years.

²³Body of Principles (Principle 24); Standard Minimum Rules (Rule 24).

²⁴ Human Rights Committee, General Comment 20, para. 11.

²⁵Exceptional circumstances in this context may refer to extremely grave situations, such as a national disaster; *Kelly v. Jamaica* (253/1987), 8 April 1991, Report of the Human Rights Committee (A/46/40), 1991

²⁶ Body of Principles (Principle 33).

In an unsuccessful bail application made by Bernard Mucheka and Geoffrey Mwilima in September 2002, their poor health and extremely limited access to health care were cited as key determinants in seeking bail. Although their bail application was denied, High Court Judge Elton Hoff criticized their lack of medical treatment while in custody and reminded prison officials of their moral and legal responsibility to provide the defendants with proper care and medical attention. He warned that failing to do so would result in criminal prosecution. The judge further stated that the denial of medical care was unacceptable and contrary to the fundamental freedoms contained in Namibia's Constitution.²⁷

International standards also require that those held in pre-trial detention be given all reasonable facilities to communicate with family and friends, receive visits from them and to be detained, if possible, near their homes.²⁸ These rights are subject to restriction and supervision only as "necessary in the interests of the administration of justice and of the security and good order of the institution".²⁹ The majority of the Caprivi defendants have been held in Grootfontein prison for almost four years. Grootfontein prison was emptied of other prisoners to accommodate them. Initially, the defendants were denied all access to their families. Contact has remained limited as most of their families are based in Katima Mulilo, over 800km from Grootfontein.

At least 11 defendants **B** Stephen Mamili, Francis Malambo Kelezo, Brian Mushandikwe, Sydney Sinvula Lisho, Nicolas Thomas Toliso, Joseph Siboyili Kaliyangile, Walubita Erasmus Chika, Cassius Pelekelo, Benard Nyamazao Makunde, Felix Munangiza and Eugene Kulisesa **B** have died in custody since August 1999. The Prisons Act states that an inquest must be conducted to determine the cause of death of a person who passes away while lawfully being held in a prison only if a medical officer finds the death to have been from unnatural causes. However, according to Principle 34 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "[w]henver the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority...".

According to the Namibian authorities, the deaths were reportedly due to natural causes. Therefore, no official investigations have been conducted into the deaths. However, there are fears that some of the illnesses which preceded the deaths, such as encephalitis, tuberculosis and pneumonia, may have been aggravated by insanitary prison conditions and medical neglect.

²⁷ Werner Meges, "Caprivi duo's bail bid thrown out" *The Namibian*, 13 December 2002.

²⁸ Body of Principles (Principle 19); Standard Minimum Rules (Rule 92).

²⁹ Standard Minimum Rules (Rule 92).

Death in custody of Cassius Pelekelo

The circumstances surrounding the October 2002 death of Cassius Pelekelo, who was arrested in July 2002, remain unclear. Prior to his death, Cassius Pelekelo was admitted to Katima Mulilo state hospital. The authorities allege that he had been unwell at the time of his arrest. However, upon admission to the hospital, his family were denied access to him which raised concerns that he may have been tortured. The National Society for Human Rights, a Namibian human rights organization, called for a postmortem examination. No further information about the cause of his death has since been made publicly available.

3) Initial lack of access to legal representation

International legal standards require that everyone arrested or detained and everyone facing a criminal charge has the right to prompt assistance of legal counsel.³⁰ The UN Human Rights Committee has stated that “all persons arrested must have immediate access to counsel.”³¹ It has been widely recognized that prompt and regular access to a lawyer is an important safeguard against torture, ill-treatment, coerced confessions and other violations.³² A defendant’s access to a lawyer may be restricted or suspended in exceptional circumstances, such as a state of emergency, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. However, the Special Rapporteur on Torture has recommended that, even in exceptional circumstances, anyone arrested should be given access to legal counsel no later than 24 hours after their arrest.

Those initially arrested in the wake of the Caprivi uprising were denied access to lawyers for approximately three weeks after the first arrests took place, until the State of Emergency was lifted on 25 August. The Minister of Defence reportedly maintained that the security forces first had to interrogate suspects before permitting them to see their lawyers, and argued that under the State of Emergency, the constitutional law stipulating that suspects must be brought before a court within two days of their arrest did not apply.³³

Once they were granted access to lawyers following the lifting of the State of Emergency, most of the defendants had difficulty in obtaining private legal representation due to their inability to afford legal fees. Legal aid was initially refused by the state on the

³⁰ The UN Basic Principles on the Role of Lawyers (Principle 7); Body of Principles (Principles 15 & 18).

³¹ Concluding Observations of the Human Rights Committee: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

³² Human Rights Committee General Comment 20, para. 11; Report of the UN Special Rapporteur on torture (E/CN.4/1992/17), 17 December 1991, para. 284.

³³ Tangeni Amupadhi, “Govt. admits abuses” *The Namibian*, 12 August 1999; Namibian Constitution, Chapter 3, Article 11.

grounds that it did not have sufficient funds to provide legal assistance to the defendants. Some were initially represented by a few private lawyers, largely on a *pro bono* basis.

Amnesty International is concerned that the state's denial of access, including to legal counsel, may have facilitated the reported torture and ill-treatment of the defendants by Namibian police, army and security officers. Amnesty International believes that the initial denial of access to legal representation and subsequent refusal by the state to provide legal aid constituted a fundamental violation of the defendants' right to legal counsel before trial, and has serious implications for their right to a fair hearing.

4) Flawed investigations

International human rights law states that evidence obtained under duress, including under torture, is in breach of the prohibition against torture, and should not subsequently be used as evidence in any legal proceedings.³⁴ The equivalent obligation under Article 7 of the ICCPR has been interpreted by the UN Human Rights Committee as meaning that "the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment".³⁵ Article 12 of the Namibian Constitution provides similar protection. All allegations by defendants that statements have been extracted through torture or ill-treatment must be promptly and impartially examined by the competent authorities, including judges.³⁶

Notwithstanding the size, seriousness and complexity of the Caprivi treason case, the approximate four-year delay in the trial indicates significant flaws in police investigations and a lack of evidence to corroborate confession statements made by the defendants. In interviews with Amnesty International in November 2001, defendants stated that they were forced to sign confession statements under torture and ill-treatment. In addition, there have been credible allegations of bribery of defendants in exchange for testimony. Some prisoners were reportedly offered clothing and money in exchange for information. For example, the police are reported to have admitted to one defendant that there was no evidence against him, but given that he had been imprisoned for such a lengthy period, the police offered to release him on the condition that he drop all legal action against the government. The police have denied this.

Amnesty International believes that whenever there is an allegation that a statement was elicited as a result of torture, cruel, inhuman or degrading treatment or duress, a separate hearing should be held before such evidence is admitted in the trial.³⁷ At such a hearing, evidence should be taken to establish whether the statement in question

³⁴ CAT (Article 15).

³⁵ Human Rights Committee General Comment 20, para. 12.

³⁶ Human Rights Committee General Comment 13, para. 15; CAT (Articles 13, 16).

³⁷ Amnesty International, *Fair Trials Manual*, 94.

was made voluntarily. If it is determined that the statement was not made voluntarily, then it must be excluded from evidence in all proceedings except proceedings brought against those suspected of coercing the statement. Amnesty International believes that the Caprivi defendants should be released immediately and unconditionally where there is insufficient evidence to prosecute or where evidence has been obtained by means of torture.

V. Right to a fair hearing in jeopardy

The right to a fair hearing is specified by a number of rights which include the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defence, the right to defend oneself in person or through counsel and the right to call and examine witnesses.

The basic elements ensuring the right to a fair trial are provided for in Article 12 of the Namibian Constitution and in international human rights treaties.³⁸ Amnesty International is deeply concerned that the Caprivi defendants' right to a fair hearing is in serious jeopardy in light of: their prolonged imprisonment; the undermining of their right to be presumed innocent; the undue delay in the trial proceedings and their denial of bail; their difficulties in obtaining state-funded and experienced legal representation; and the restrictions imposed on their right to prepare a defence.

1) The presumption of innocence undermined

According to international human rights standards such as the ICCPR and the ACHPR, every person charged with a criminal offence has the fundamental right to be presumed innocent, and treated as innocent, until and unless proven guilty according to law after a fair trial.³⁹ Article 12 of the Namibian Constitution similarly provides that:

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

All of the Caprivi defendants have been jointly charged, under the “common purpose” doctrine⁴⁰, with 275 counts of criminal conduct including high treason, murder,

³⁸ ICCPR (Article 14); ACHPR (Article 7). See also Amnesty International, *Fair trials manual* (AI Index: POL 30/002/1998) at www.amnesty.org.

³⁹ Article 14(2) of the ICCPR; Article 7(1) (b) of the ACHPR.

⁴⁰ The doctrine was introduced into South Africa via the Native Territories=Penal Code (Section 78 of Act 24 of 1886). It was used to convict the ASharpeville Six of murder in *S. v. Safatsa* (1988 (1) SA 868 (A) [160]), where six of eight defendants in South Africa were convicted of murder for participating in a mob attack killing one person. The Court based the convictions on the doctrine of “common purpose” in that the accused shared a “common purpose” with the crowd to kill the deceased. Therefore the act of one in carrying out the murder was imputed to all six defendants.

sedition and public violence. The “common purpose” doctrine has its origins in English law and was used extensively in South Africa prior to 1994, especially in political trials. The doctrine of “common purpose” essentially relieves the prosecution of having to prove beyond a reasonable doubt that each participant committed conduct which contributed causally to the ultimate unlawful consequence. The conduct of a participant who actually causes the consequence or offence is imputed or attributed to the other “participants”. In doing so, the “common purpose” doctrine shifts the burden of proof from the prosecution to the defendants and undermines their right to be presumed innocent. However, in accordance with the standard principle of the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial.⁴¹

Amnesty International believes that in the case of the Caprivi defendants, the application of the “common purpose” doctrine undermines their right to be presumed innocent. Many of the defendants who were said to have participated in the CLA attack were reportedly arrested solely on the basis of their actual or perceived political views, ethnicity or membership of certain organizations. Amnesty International believes the charges against the defendants under the “common purpose” doctrine should be withdrawn. The authorities should individualize the charges and specify the evidence against each defendant. Where there is no evidence, all charges should be withdrawn and the defendants should be immediately released.

2) Struggle for state provision of legal aid

According to Article 95 of the Namibian Constitution, the state is obliged to provide free legal aid “...in defined cases with due regard to the resources of the State.”⁴² According to Principle 6 of the UN Basic Principles on the Role of Lawyers (Basic Principles), if a person who is arrested, charged or detained does not have legal counsel of their own choice, they are entitled to have a lawyer assigned by a judge or judicial authority whenever required by the interests of justice.⁴³ If they are unable to afford to pay, assigned counsel must be provided by the state free of charge.⁴⁴ Principle 3 of the Basic Principles provides that governments must ensure there is sufficient funding and other resources to provide legal counsel for the poor and other disadvantaged people.⁴⁵

⁴¹ Universal Declaration of Human Rights (UDHR) (Article 11); ICCPR (Article 14); Body of Principles (Principle 36); ACHPR (Article 7); African Commission Resolution (Paragraph 2); Namibian Constitution (Article 12).

⁴² Namibian Constitution, 1990, Article 95, Section H.

⁴³ The determination of whether the interests of justice require appointment of counsel depends primarily on the seriousness of the offence, the issues at stake, including the potential sentence, and the complexity of the issues.

⁴⁴ ICCPR (Article 14); Body of Principles (Principle 17); Basic Principles (Principles 3, 6), Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples’ Rights (African Commission Resolution), para. 4.

⁴⁵ Amnesty International, *Fair Trials Manual*, 1998: 34.

The Legal Aid Act provides for legal aid in civil and criminal cases, to enable people with inadequate means to engage legal practitioners.⁴⁶ Originally such legal aid was at the discretion of the Director of Legal Aid, except in cases in which a court had directed that legal aid should be provided. However, an amendment to the Legal Aid Act in 2000 removed the power of the courts to require that legal aid be provided.

In the Caprivi treason case, the state initially refused to provide legal aid on the grounds that it did not have sufficient funds to provide legal assistance to the defendants. In November 2001, with the assistance of the Legal Assistance Centre, the defendants challenged the constitutionality of the state's refusal to provide legal aid. On 14 December 2001, three High Court judges ruled unanimously that the Director of Legal Aid should provide legal aid to the defendants to enforce their constitutional right to a fair trial. In delivering the ruling, Acting Judge Harold Levy was quoted as saying that any person before a Namibian court was entitled to a fair and proper trial, and that essential to a fair trial was the right to be legally represented. He added that the constitution did not intend that laws could be made which would entitle the Legal Aid Director to refuse legal aid in a case of treason. In response to the state's argument that due regard be given to the resources of the state, the judge said that there was no evidence before the court that the resources of the state would not allow the granting of legal aid to the accused.⁴⁷

The government subsequently lodged an appeal with the Supreme Court against the High Court ruling, arguing that it did not have the resources to provide legal aid to the defendants and denying that the constitutional rights to a fair trial and to legal representation include a guarantee that legal aid be provided by the state. On 7 June 2002, the government lost its appeal. The Supreme Court ordered the government to provide legal aid to the defendants. Since June 2002 the trial has been adjourned several times, partly to enable the appointment and preparation of the state-funded defence lawyers.

According to Principle 6 of the Basic Principles, when accused individuals are represented by assigned counsel, the authorities are obliged to ensure that the lawyers assigned to defend them have the experience and competence commensurate with the nature of the offence of which their clients are accused.

Initially, the Ministry of Justice appointed lawyers from its Legal Aid Directorate, which raised serious concerns due to the expected magnitude and complexity of the trial, the limited capacity of the Legal Aid Directorate and the likelihood that the defendants would require representation for several years. This would have proven difficult given that the Legal Aid Directorate would be required constitutionally and legally to provide lawyers in other unrelated cases that could not wait for the conclusion of the Caprivi treason trial. According to Dr. Sufian Bukurura, a former senior law lecturer from the University of Namibia:

“[I]t is doubtful whether any of the legal aid counsel in the Directorate of Legal Aid has sufficient experience to handle such a case. If the intended purpose for

⁴⁶ Legal Aid Act, Act No. 29 of 1990.

⁴⁷ UN Integrated Regional Information Networks (IRIN), 17 December 2001.

legal aid is the interests of justice, and the right to a fair trial in particular, providing inexperienced counsel may, therefore, not fulfil the intended purposes.”⁴⁸

On 6 May 2003, the state announced that nine new lawyers would replace the lawyers from the Legal Aid Directorate and represent the Caprivi defendants.⁴⁹ Amnesty International believes that the state’s initial refusal to provide legal aid prior to May 2003 has seriously undermined the Caprivi defendants’ right to a fair hearing.

3) Undue delay in trial proceedings

International human rights law and the Namibian Constitution provide for a right to trial without undue delay such that proceedings must start and final judgement (after all appeals) must be rendered without undue delay. This right obliges the authorities to ensure that all proceedings, from pre-trial stages to final appeal are completed and judgements issued within a reasonable time.

“...[A] person’s defence [should] not [be] undermined by the passage of inordinate amounts of time, during which witnesses’ memories may fade or become distorted, witnesses may become unavailable, and other evidence may be destroyed or disappear. ... The right to be tried promptly encapsulates the maxim that justice delayed is justice denied.”⁵⁰

This requires the prisoner to be released if criminal proceedings are not started and completed within a reasonable time.⁵¹ For anyone charged with a criminal offence and held in custody, the obligation on the state to expedite trials is even more pressing. International standards require that a person charged with a criminal offence be released from custody pending trial if the time deemed reasonable in the circumstances is exceeded. According to the African Commission on Human and Peoples’ Rights:

“Persons arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.”⁵²

The Caprivi trial proceedings have been delayed for close to four years, during which time most of the defendants have remained in custody, despite the efforts of dozens

⁴⁸ Werner Menges, “Fair trial doubts for treason accused” *The Namibian*, 26 July 2002.

⁴⁹ Five of the lawyers are from Zambia and Zimbabwe and four are from Namibia.

⁵⁰ Amnesty International, *Fair Trials Manual*, 1998: 100.

⁵¹ ICCPR (Articles 9, 14); ACHPR (Article 7); African Commission Resolution, para 28; Namibian Constitution (Article 12).

⁵² African Commission Resolution (Paragraph 2(c)).

of the defendants to seek release upon bail. On 4 September 2001, the High Court refused the application for release on bail of 53 of the defendants citing “public interest, the interest of the administration of justice, and that none of the 53 had testified to assure the court that they would attend the trial if they were released on bail.”⁵³ The court considered that: the trial was not likely to end for a considerable period of time; the defendants would not be in a position to interfere with witnesses, at least until the trial, since the application to disclose their identities had been refused up until that point; and the defendants were prepared to remain in the town of Grootfontein and comply with any other bail conditions. However, the court was of the view that if released on bail, the defendants might not stand trial, might commit similar offences or might interfere with state witnesses at a later stage.

Two defendants, Geoffrey Mwilima and Bernard Mucheka, later filed a new bail application, their third since their detention in August 1999, on the grounds of poor health. This was heard in the High Court on 26 September 2002. The judge ruled against their bail application on 12 December 2002 on the basis that it would not be in the interests of justice or the public to grant them bail. The ruling took into account the 5 December 2002 ruling of the Botswana High Court which dismissed charges against 13 Namibians held in custody in connection with the CLA attack. The 13 had appealed a ruling to extradite them to Namibia and were successful. In the bail application of Geoffrey Mwilima and Bernard Mucheka, the judge considered the possibility that if released on bail, the two defendants could cross the border into Botswana and there would be no guarantee that the Namibian government could have them extradited to stand trial.

In June 2003, Minister of Justice Albert Kawana reportedly stated in the National Assembly that the trial could take at least two to three years to conclude, and that the delay in the trial was largely the fault of the defendants as the prosecution was ready over two years ago. According to the Justice Minister: “...it was the accused who decided to enforce their rights before courts of law that caused the delay.”⁵⁴ Previously, the authorities had suggested that the length of time required for investigation of the case was one cause of the delay. The authorities however have failed to acknowledge that further delays resulted from the government’s refusal to provide legal aid to the defendants, as well as the delay in the state appointment of defence counsel. The most recent delay to the trial took place in May 2003, when the state requested another adjournment to October 2003.

Given the four year delay in trial proceedings, it is evident that the criminal proceedings against the Caprivi defendants were not started and have not been completed within a reasonable time. The defendants have remained in custody throughout this time and it is expected that once the trial resumes, it will likely take a lengthy period of time to conclude. As continued imprisonment pending the conclusion of the trial undermines the defendants’ rights to liberty, the presumption of innocence and the right to trial without undue delay, the Caprivi defendants should be released on bail immediately.

⁵³Werner Menges, “53 fail in bail bid” *The Namibian*, 5 September 2001.

⁵⁴Lindsay Dentlinger, “Treason trial could drag on for years” *The Namibian*, 1 July 2003.

4) Restrictions on the right to prepare a defence

According to international human rights law and the Namibian Constitution, anyone accused of a criminal offence and their lawyer must have adequate time and facilities to prepare a defence.⁵⁵ This includes the right to prepare the examination of prosecution witnesses. There is therefore an obligation on the prosecution to give the defence adequate advance notification of the witnesses that the prosecution intends to call at trial and access to information that forms part of the evidence, such as witness statements.

In the Caprivi treason trial, the state initially invoked state privilege in refusing to disclose the names or statements of in excess of 500 additional witnesses on the basis that some of the witness statements mention suspects who are still at large and are implicated, and who could intimidate or threaten witnesses if their names were disclosed. The prosecution only reportedly disclosed to the defendants the names of approximately 34 state witnesses who will give evidence at the trial, all of whom are members of the police or security forces.

In response to an application for disclosure of witness statements by the defence on 1 August 2001, the High Court held that if the requested identities and statements of the state witnesses were disclosed, their safety could not be guaranteed by the state and they might be forced to flee or change their testimony. The court found that there were sufficient statements available to the accused to prepare their defence. The application to not disclose was granted without any challenge as the defendants' legal representative was unable to continue with the case due to non-payment of legal fees.⁵⁶

The right of the defendants to adequate facilities to prepare a defence may be satisfied by granting the defence lawyers access to the information rather than the defendants, or by omitting the names and addresses of the witnesses from the statements.⁵⁷ The disclosure of witness statements enables the defence to go through each statement and establish which of the defendants have conflicts with each other's defence cases, and to then find out which of the defendants who do not have conflicts of interest can continue to be represented. Without the disclosure of witness statements, the defence is at the disadvantage of not being able to prepare to cross examine each of the state witnesses.

In May 2003, the state relaxed its restrictions on the disclosure of witness statements by providing that witness statements would be released to the defence at least

⁵⁵ UDHR (Article 11); ICCPR (Article 14); African Commission Resolution, para. 2; Namibian Constitution (Article 12).

⁵⁶ The Legal Assistance Centre was unable to represent the defendants in appealing the ruling as they do not handle criminal cases.

⁵⁷ European Commission for Human Rights in *Haase v. Federal Republic of Germany* (7412/76), 12 July 1977, 11 DR 78; *Ofner v. Austria* (524/59), 3 Yearbook 322, 19 December 1960.

three days before a witness is called to testify. Amnesty International is concerned that three days' notice is insufficient given the complexity and magnitude of the case, and the right of the defendants to have adequate time to prepare a defence.

VI. Failure to investigate allegations of torture

Torture is prohibited under international law and the Namibian government has obligations under the CAT to institute a prompt and impartial investigation into allegations of torture and to bring to justice any person suspected of torture.⁵⁸ When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through torture or ill-treatment, they must take all necessary steps to ensure that those responsible for using such methods are brought to justice.⁵⁹

Following allegations of torture during the arrest and initial interrogation of the Caprivi defendants, an initial investigation was conducted by the police Complaints and Discipline Unit (CDU) in 1999.⁶⁰ However, four years after the attack, there has been no public report on the outcome of the investigations despite the fact that at least 11 police and SFF officers have been linked to allegations of torture and ill-treatment.

The Namibian police force, Nampol, reportedly completed the investigation in March 2000. The criminal investigation dockets were submitted to the NDF instead of to the Prosecutor-General as is the normal procedure. The NDF and the police apparently intended the NDF to handle the torture cases, on the grounds that during the State of Emergency, when the torture reportedly took place, the Minister of Defence had assumed control of the police. The NDF legal advisor, Colonel Kavungo, was quoted as saying that:

“[The NDF will] handle the Caprivi torture cases using its internal disciplinary mechanisms because at the time of the alleged torture there was a state of emergency administered by the army... Defence has its own jurisdiction, its own type of courts and its own way of handling disciplinary matters. We don't need to send our cases to the Prosecutor-General.”⁶¹

Therefore, any criminal conduct by the police and soldiers was to be dealt with under military law.⁶² However, following a High Court application, which the government first opposed but later conceded, the dockets were handed over to the Prosecutor General.⁶³

⁵⁸ CAT, Articles 12 and 17.

⁵⁹ Guidelines on the Role of Prosecutors (Guideline 16).

⁶⁰ “Torture allegations probed” *IRIN*, 7 September 1999; Tangeni Amupadhi, “Torture probe ‘incomplete’ ” *The Namibian*, 13 June 2001.

⁶¹ Chrispin Inambao, “Caprivi tortures ‘internal matter’”, *The Namibian*, 29 March 2000.

⁶² “New reports of torture emerge” *The Namibian*, 29 June 2000.

⁶³ Legal Assistance Centre, Constitutional and Human Rights Unit Annual Report 2000: 3.

Since then, no decision has been taken on the prosecution. None of the security personnel who have been accused of perpetrating human rights abuses have been suspended or brought to justice, although it appears that in June 2001, Police Commissioner Sebastian Ndeitunga was reported as saying that “most” of the at least 11 security personnel accused of human rights abuses had been transferred from Katima Mulilo to other police stations. That same month, the Prosecutor-General referred the dockets back to the police for further investigation because witness statements were missing. The Police Commissioner also reportedly said that, despite evidence of torture, “[the Police Inspector General] can suspend someone but there are no suspensions because of the sensitivity [of the case].”⁶⁴

The Deputy Prosecutor-General Lourens Camper reportedly stated that the prosecutions of the police officers will only take place once the Caprivi treason trial has concluded as the charges of police brutality are considered less serious than the charges faced by the defendants. According to Lourens Camper, “[t]his case is only a case of assault, assault GBH [grievous bodily harm] and common assault, not as serious as the other case of high treason.”⁶⁵ According to the UN Guidelines on the Role of Prosecutors, prosecutors are required to give due attention to the prosecution of crimes committed by public officials, particularly grave violations of human rights and the investigation of such offences. Prosecutors are also required to refuse to use any evidence against suspects which they know or believe on reasonable grounds was obtained through recourse to unlawful methods, especially involving torture or ill-treatment. Prosecutors are also required to take all necessary steps to ensure that those suspected of using such methods are brought to justice.⁶⁶

The Office of the Ombudsman received complaints of torture from the defendants but has claimed it has limited powers under the 1990 Ombudsman Act to carry out investigations or to make public statements. However, according to the 1990 Ombudsman Act, the Ombudsman has:

“...the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government...”⁶⁷

The Namibian Constitution also states that the Ombudsman has the duty and power to refer investigations to the Prosecutor-General. The Ombudsman can also bring proceedings in a competent court to secure the termination of the offending action, or to change the offending procedures.

⁶⁴ Tangeni Amupadhi, “Torture probe ‘incomplete’ ” *The Namibian*, 13 June 2001.

⁶⁵ Tangeni Amupadhi, “Caprivi torture cases ‘on the back-burner’ ” *The Namibian*, 29 October 2002.

⁶⁶ UN Guidelines on the Role of Prosecutors (Articles 15 and 16).

⁶⁷ Namibian Constitution (Article 91(a)).

Concerns have been raised regarding the chronic shortage of financial and human resources in the Office of the Ombudsman. The government admitted in its 1996 report to the UN Committee against Torture that the Office of the Ombudsman was “under-resourced and understaffed”. It appears that the Office of the Ombudsman only conducts preliminary investigations to verify that complaints about the police are well founded and then refers them to the CDU for actual investigation. However, the lack of feedback or action by the CDU and the reported poor quality of their investigations has led most complainants to resort to civil law remedies. In contravention of Namibia’s obligations under the CAT, the government has failed to promptly conclude and publicly report on allegations of torture and ill-treatment made by the Caprivi defendants, and to bring the suspected perpetrators to justice.

VII. Conclusion and recommendations

Amnesty International has raised in this report a number of concerns regarding the Caprivi defendants. Among these is the violation of their pre-trial rights which include: their incommunicado detention; their alleged torture and ill-treatment; denial of access to lawyers, their families and medical care; and being forced to sign confessions under torture. This report also highlights Amnesty International’s concerns regarding the defendants’ right to a fair hearing. These concerns include: the undermining of their right to the presumption of innocence through the misuse of the “common purpose” doctrine under which all 122 defendants have been charged with very serious charges including high treason, murder and sedition among others; the undue delay in the trial proceedings and their denial of bail; their struggle to obtain state-funded legal aid; and the undermining of their right to prepare a defence through restrictions placed on the disclosure of witness statements. Taken together, Amnesty International believes that these concerns may seriously undermine the defendants’ right to a fair hearing.

Amnesty International calls upon the Namibian authorities to urgently take measures to address these concerns and to ensure that the rights of the Caprivi defendants are fully respected from now on. The authorities must honour their obligations under the ICCPR, the ACHPR and the CAT, and ensure that the provisions of these treaties are fully implemented in law and in practice. In order to ensure the fairness of the trial of the Caprivi defendants, Amnesty International is calling on the relevant authorities in Namibia to:

1. Ensure that the conditions for a fair hearing are guaranteed

The Namibian authorities should, as a matter of urgency, take measures to expedite the Caprivi treason trial with a view to finalizing the trial without undue delay as required by international standards. All charges against the defendants under the “common purpose” doctrine should be withdrawn as it undermines their right to be presumed innocent and

treated as such. The charges and evidence against each defendant should be individualized and specified. The remaining prisoners should be tried promptly.

Statements extracted by torture or ill-treatment must not be brought as evidence in court (except against alleged perpetrators of the torture) as required by the United Nations Convention Against Torture. All allegations that confessions were extracted through torture should be promptly and impartially investigated according to international standards. All defendants against whom evidence is based on confessions extracted under torture should be released.

2. Try defendants promptly or release them

All prisoners of conscience and all other defendants against whom there is insufficient evidence to prosecute should be immediately released and all charges against them withdrawn. All prisoners being held for a prolonged period should be tried promptly and fairly or released.

3. Establish independent and impartial inquiries into all reports of police torture and ill-treatment and bring to justice the suspected perpetrators

The Namibian government should take effective measures to investigate all allegations of torture and ill-treatment promptly, thoroughly and impartially. The results of any investigations, including investigations already undertaken, should be made public. Such investigations should be carried out according to international standards related to the investigation of torture, including the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

All law enforcement officers accused of torturing suspects arrested in connection with the August 1999 Caprivi uprising should be immediately suspended, pending the results of investigations into the allegations. All perpetrators of human rights violations should be brought to justice.

The Namibian government should make it publicly clear that human rights violations perpetrated by the police, army and state security forces will not be tolerated under any circumstances and that the need to investigate crime or deal with public disorder can never be used as a justification for human rights violations. The arrest and interrogation of criminal suspects must only be undertaken by law enforcement officers legally empowered and properly trained to carry out these duties.

All police, army and state security forces should be provided with comprehensive human rights training.

4. Ensure humane conditions of treatment and detention, and full rights of access to families, lawyers and doctors

The Namibian government should ensure that the defendants' right to the presumption of innocence is respected and that they are humanely treated. The authorities should respect all relevant international treaties and standards including the ICCPR, the UN Body of Principles for the Protection of All Person under Any Form of Detention or Imprisonment, and the UN Standard Minimum Rules for the Treatment of Prisoners. The defendants should be treated in a manner appropriate to their status as unconvicted defendants.

The Namibian government should publicly take a stand against the practice of holding people incommunicado and inform the police and military that such abuses will be punished. No-one should be held incommunicado.

Proper medical care, including treatment at specialist institutions or civil hospitals, should be provided to sick defendants. As required by international standards, all such medical care should be provided free of charge.

An independent and impartial inquiry into the treatment of the prisoners in custody should be established with a view to recommending improvements so as to make prison conditions compatible with international standards, including those set forth in the Standard Minimum Rules for the Treatment of All Prisoners. In particular, prisoners should, following their arrest, be allowed immediate and regular access to their families, legal representatives and independent medical doctors, and be kept in humane and hygienic conditions.

A review of the provision of legal aid and the repeal of the Legal Aid Amendment Act of 2000 should be undertaken with the aim of ensuring that in future and where required, all individuals are provided with state-funded legal aid. The Caprivi defendants should be provided with legal aid throughout their trial process including any appeals and to seek compensation in respect of violations of their rights.

5. Empower the Ombudsman-s office

The Office of the Ombudsman should be empowered to investigate all allegations of human rights violations by the police and the army, including through the allocation of adequate financial and human resources. The Office of the Ombudsman should investigate reports of human rights violations and make recommendations for the prevention and remedy of human rights violations.

6. Issue an invitation to UN Special Rapporteur on Torture

The Government of Namibia should issue an invitation for a fact-finding visit to Namibia by the UN thematic mechanisms, in particular the Special Rapporteur on Torture.

7. Provide redress for the victims and their families

The Government of Namibia should ensure that all victims who were subjected to arbitrary arrest, torture and ill-treatment, or their families where appropriate, obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible for torture victims.⁶⁸

Amnesty International also urges the international community to assist the Government of Namibia in its efforts to provide redress to the victims of torture and their families.

⁶⁸ Paragraph 5 of Article 9 of the ICCPR expressly mentions this right.