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FURTHER REPORT OF THE SECRETARY-GENERAL CONCERNING THE  
IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 435 (1978)  
CONCERNING THE QUESTION OF NAMIBIA

Addendum

Since my last report to the Security Council (S/20967/Add.1 of 29 November 1989), I orally informed the members of the Council on 9 February 1990 that the same day, the Constituent Assembly of Namibia meeting in Windhoek had approved, by consensus, the Constitution for an independent Namibia. Before that, the Constituent Assembly had established 21 March 1990 as Independence Day.

The Constitution is to enter into force on Independence Day. As the fundamental law of the sovereign and independent Republic of Namibia, the Constitution reflects the "Principles for a Constituent Assembly and for a Constitution for an independent Namibia" adopted by all the parties concerned in 1982 and set out in the annex to document S/15287 of 12 July 1982.

The full and definitive text of the Constitution as adopted is annexed to the present report (annex I), together with a note entitled "Comparison of the Constitution of the Republic of Namibia with the 1982 Constitutional Principles" (annex II).

Annex II

Comparison of the Constitution of the Republic of Namibia with  
the 1982 constitutional principles

The following indicates how the provisions of the Constitution of the Republic of Namibia, adopted by the Constituent Assembly on 9 February 1990, which is to enter into force on the date of independence, 21 March 1990 (see article 130 of the Constitution), comply with particular requirements of the Principles for a Constitution for an Independent Namibia set out in document S/15287, annex, section B, of 12 July 1982 (the "1982 Constitutional Principles"):

Principle B1. (a) "Namibia will be a unitary ... State"

The unitary nature of Namibia is expressed explicitly in the penultimate preambular paragraph and in article 1(1). More importantly, the Constitution as a whole calls for a unitary rather than a federal structure. In particular, the National Assembly is to be elected on the basis of proportional representation in the country as a whole (see art. 49 and schedule 4) with no member representing any particular area, the President is to be elected directly by the population as whole (art. 28(2)) and the only organ in which there is to be any regional representation is the National Council (art. 69(1)).

(b) "Namibia will be a ... sovereign ... State"

The sovereign nature of Namibia is expressed explicitly in the penultimate and the final preambular paragraphs and in article 1(1) and (2). More importantly, the Constitution calls for a State that is in no way dependent, in either its domestic or its international relations, on any other State and that conducts all of its own affairs.

(c) "Namibia will be a ... democratic State"

The democratic nature of Namibia is expressed explicitly in the penultimate preambular paragraph and in article 1(1) and (2). More importantly, the entire nature of the Constitution is that of a democratic State, in providing for an elected legislature and executive (see Principles B3 and 4 below), an independent judiciary (see Principles B3 and 5 below) and a catalogue of guaranteed human rights (see Principle B5 below). Article 17(1) gives all citizens "the right to participate in peaceful political activity intended to influence the composition and policies of the Government ... [and] ... to form and join political parties". The latter right is reaffirmed by article 21(1)(e), which is one of the rights referred to in paragraph (a) of Principle B5 below from which no derogation is permitted. Finally, article 95(k) calls on the Government to adopt "policies aimed at ... encouragement of the mass of the population ... to influence Government policy by debating its decisions".

Principle B2. (a) "The Constitution will be the supreme law of the State"

Article 1(6) of the Constitution reads: "This Constitution shall be the Supreme Law of Namibia" and the final paragraph of the Preamble refers to the Constitution "as the fundamental law of our ... Republic". The supremacy of the Constitution informs all its substantive articles. Attention is invited particularly to articles 5 (the fundamental rights enshrined in the Constitution to be upheld by all organs of Government), 24(3) and 26(5)(b) (certain provisions of the Constitution to prevail even in times of national disaster, states of national defence or public emergencies), 32 (the subjection of all presidential powers to the Constitution), 63 (the subjection of the functions and powers of the National Assembly to the Constitution), 78(2) (the subjection of the courts to the Constitution), 89(2) (the subjection of the Ombudsman to the Constitution). All principal public officials must take an oath on the Constitution (art. 30 and schedules 1, 2 and 3).

(b) "[The Constitution] may be amended only by a designated process involving the legislature or votes cast in a popular referendum, or both"

Article 132(2) and (3) specifies how the Constitution can be amended by a two-thirds majority of all the members of the National Assembly plus, once the National Council has been established (see arts. 136(1)(c) and 137(7)), by either a two-thirds majority of all the members of the National Council or by a two-thirds vote in a national referendum. Article 132(4) forbids any amendment of the Constitution that would diminish these majority requirements and article 131 forbids any amendment that would diminish or detract from any of the fundamental rights and freedoms contained and defined in chapter 3 (see Principle B5 below).

Principle B3. (a) "The Constitution will determine the organization and powers of all levels of government"

Chapters 5 (the President), 6 (the Cabinet), 7 (the National Assembly), 8 (the National Council), 9 (the administration of Justice - i.e. the courts) and 12 (regional and local government) of the Constitution determine respectively the organization and powers of the principal central organs and of local government.

(b) "[The Constitution] will provide for a system of government with three branches: an ... executive branch ... a legislative branch ... and a ... judicial branch ..."

Article 1(3) states that: "The main organs of the State shall be the Executive, the Legislature and the Judiciary." These are provided for respectively in chapters 5 and 6, 7 and 8, and 9.

- (c) "... an elected executive branch .... The executive ... branch will be constituted by periodic and genuine elections which will be held by secret vote"

Under article 27(2) "The executive power of the Republic of Namibia shall vest in the President and the Cabinet". Under articles 28(2)(a) and 29(1)(a) the President is to be elected for a normal five-year term by "direct, universal and equal suffrage", except that the first President is elected by the Constituent Assembly (see art. 134(1)). Under article 35(1) the Cabinet is to consist of the President, the Prime Minister and other Ministers appointed from the members of the National Assembly (all except six of whom are elected, as discussed under Principle B3 (e) below).

- (d) "... an ... executive branch which will be responsible to the legislative branch"

The National Assembly, acting with the National Council, may remove the President by impeachment under article 29(2). Under article 32(9) almost all Presidential actions can be reversed by a two-thirds vote of the National Assembly. As to members of the Cabinet, the National Assembly under article 39 may require the President to terminate the appointment of any member of the Cabinet in whom it resolves it has no confidence. Finally, article 41 states that "All Ministers shall be accountable ... both to the President and to Parliament".

- (e) "... a legislative branch to be elected by universal and equal suffrage .... The ... legislative branch will be constituted by periodic and genuine elections which will be held by secret vote"

The legislative branch is to consist principally of the National Assembly, which under article 46(1)(a) is to consist of 72 voting members "elected by the registered voters by general, direct and secret ballot", for a maximum term of five years (art. 50). Under article 49 these elections are to be "in accordance with the principles of proportional representation" and the method of allocating seats is specified in schedule 4; (see also Principle B4 below). Although articles 32(5)(c) and (46)(1)(b) provide that there may be up to six appointed members of the National Assembly, these are not to have a vote and therefore will not have any genuine legislative functions.

The members of the National Council, which under articles 74(1)(a) and 75 will have basically ancillary functions in regard to the adoption of legislation, as well as certain miscellaneous functions to be exercised in co-ordination with the National Assembly, will under articles 69 and 70 be elected, for a maximum term of six years, by the regional councils from amongst their popularly elected members (art. 106(3)).

- (f) "... a legislative branch ... which will be responsible for the passage of all laws"

Under article 44, "the legislative power of Namibia shall be vested in the National Assembly with the power to pass laws ..."; under article 63(1), "the National Assembly, as the principal legislative authority in and over Namibia, shall have the power ... to make and repeal laws ...". The only limitations on that power are the restricted review functions of the National Council provided for in articles 74(1)(a) and 75, and the need to secure presidential assent, which under articles 56 and 64 cannot be withheld if a bill receives a two-thirds vote in the National Assembly and if, should that be necessary, a competent court decides that the bill does not violate the Constitution. Although the President has limited power to proclaim regulations in a declared emergency, such regulations must under article 26(5) and (6) be promptly confirmed by the National Assembly to retain their validity. Finally, under article 108(d) Regional Councils may "make such by-laws or regulations as may be determined by Act of Parliament", but under article 111(5) these "shall cease to be of force if a resolution to that effect is passed by the National Assembly".

- (g) "... an independent judicial branch ..."

A "free and independent judiciary" is called for by the third preambular paragraph. Article 78(2) specifies that "The Courts shall be independent ...", which is ensured by the procedure for appointing judges by the President on the recommendation of a Judicial Service Commission (arts. 32(4)(a)(aa) and 82(1)), for a life term, i.e. to age 65, subject to extension by the President to age 70 (art. 82(4)), and not subject to removal except on limited grounds and on the recommendation of the Judicial Service Commission (art. 84). Furthermore, judges and judicial officers are protected from interference by members the Cabinet, the Legislature or any other person, including the Ombudsman, by articles 78(3) and 93.

- (h) "a ... judicial branch which will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law"

Both the Supreme Court and the High Court have jurisdiction covering "the interpretation, implementation and upholding of this Constitution", under articles 79(2) and 80(2). Under article 64 a competent court may also be asked to decide whether a bill adopted by the National Assembly conflicts with the Constitution. The function of the courts in general in ensuring the authority of the law follows from the unrestricted vesting of the judicial power in the courts of Namibia (art. 78(1)).

Principle B4. "The electoral system will be consistent with the principles in A.1 above"

These principles specified how the Constituent Assembly was to be elected by universal adult suffrage, secret ballot, with assistance to illiterate voters and a free electoral campaign guaranteed by freedom of speech, assembly, movement and press, resulting in an Assembly fairly representing the different political parties that gained substantial support in the election.

Under article 28(2)(a) the President is to be elected "by direct, universal and equal suffrage". Under articles 46(1)(a) and 49 the voting members of the National Assembly are to be elected "by the registered voters by general, direct and secret ballot" ... "in accordance with the principles of proportional representation" as specified in schedule 4. Article 17(2) provides that every citizen who has reached the age of 18 has the right to vote. The rights to organize political parties, to campaign and to freedom of speech, assembly, movement and press are guaranteed by articles 17(1) and 21(1)(a), (d) and (e), as discussed further in connection with Principle B5 (paragraphs (f)-(h), below).

Principle B5. (a) "There will be a declaration of fundamental rights ..."

The entire chapter 3 (arts. 5-25) of the Constitution is entitled "Fundamental human rights and freedoms". It should be noted that, by articles 131 and 132(5)(a) the provisions of that chapter are "entrenched" in the Constitution, in that no amendment thereof is permissible that would repeal, diminish or detract from these rights and freedoms. Articles 22 and 25(1) restrict or prohibit any legislative interference with these rights and freedoms.

Furthermore, under article 24(3), read together in particular with article 5 referred to therein and also with article 26(5)(b), there may not be any derogation from or suspension of any of the fundamental rights and freedoms enshrined in that chapter, even during declared emergencies or "states of national defence" including under martial law; in addition, a number of particularly important rights and freedoms are specifically referred to in article 24(3) which cannot be derogated from or suspended, as indicated in paragraphs (b), (e), (f), (h), (i), (j), (l), (m) and (n) below, in paragraph (c) under Principle B1 above and under Principle B6 below.

(b) "... [the] declaration of fundamental rights ... will include the right[s] to life ...."

The right to life is referred to in the second preambular paragraph, and article 6 unconditionally bars capital punishment. This is one of the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended.

(c) "[rights to] ... personal liberty ...."

Liberty is referred to in the second preambular paragraph. Article 7 prohibits deprivation "of personal liberty except according to procedures established by law". Article 11(1) prohibits arbitrary arrest or detention, articles 11(2) to (5) and 24(2)(a) to (d) specify precisely the rights of arrested or detained persons, including illegal immigrants, and article 15(6) specifically bars any preventive detention of children under 16.

(d) "[rights to] ... freedom of movement ...."

Article 21(1)(g), (h) and (i) guarantees the right of all persons to move freely throughout Namibia, to reside or settle in any part of Namibia and to leave and return to Namibia.

(e) "[rights] ... to freedom of conscience ...;"

Article 21(1)(b) guarantees "freedom of thought, conscience and belief". This is one of the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended.

(f) "... [rights] ... to freedom of expression ...."

Article 21(1)(a) guarantees "freedom of speech and expression, which shall include freedom of the press and other media". This is one of the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended.

(g) "... [rights] ... to freedom of assembly ...."

Article 21(1)(d) guarantees the right to "assemble peaceably and without arms".

(h) "... [rights] ... to freedom of ... association, including political parties and trade unions;"

Article 21(1)(e) guarantees "freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties"; this is one of the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended. Article 17(1) guarantees citizens the right to participate in peaceful political activity, including to form and join political parties. Article 95(c) encourages the formation of independent trade unions.

(i) "[rights] ... to due process ..."

Article 12(1)(a)-(f) sets out the procedures guaranteeing a fair trial in determining civil rights and obligations and disposing of criminal charges. This is one of the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended.

(j) "[rights] ... to ... equality before the law ..."

Article 10(1) specifies that "all persons shall be equal before the law." This is one of the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended.

(k) "... [rights] ... to protection from arbitrary deprivation of private property or deprivation of private property without just compensation ..."

Article 16(1) guarantees to all persons the right to "acquire, own and dispose of all forms of ... property", although permitting its limitation in respect of non-citizens. Article 16(2) regulates the right of expropriation by the State and calls for "the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament".

(l) "... [rights] ... to freedom from racial, ethnic, religious or sexual discrimination"

Article 10(2) specifies that "no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status"; this is one of the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended. Article 23(1) specifically prohibits racial discrimination and the practice and ideology of apartheid and article 23(2) and (3) makes provision for correcting the effects of past discrimination by affirmative action. (See also article 14(1) and the second preambular paragraph.)

(m) "The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights"

The aforementioned provisions, which are based on the 1948 Declaration, are all consonant therewith. In addition it should be noted that the Constitution also provides for a number of other rights that were not recited in the 1982 Principles but are provided for in the Declaration:



Right	Article of Constitution	Article of Universal Declaration
Human dignity	8(1) 8(2)(a)	1
Freedom from torture	8(2)(b) <u>a/</u>	5
No slavery or servitude	9 <u>a/</u>	4
Privacy	13	12
Family	14	16
Children	15	25(2)
Religion	19, <u>a/</u> 21(1)(c) <u>a/</u>	18
Profession	21(1)(j)	23(1)
Education	20	26

a/ These are among the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended.

In addition, a number of economic and social rights, as well as the right to asylum, called for by the Universal Declaration, are referred to in chapter 11 (Principles of State policy).

(n) "Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights"

Article 5 provides that "the fundamental rights and freedoms enshrined in [the Chapter entitled "Fundamental human rights and freedoms"] ... shall be enforceable by the Courts in the manner hereinafter prescribed". Article 25(2) to (4) specifies the access of aggrieved persons to the courts and the latter's powers to fashion appropriate remedies. Article 95(h) seeks to assist in the practical implementation of this guarantee by providing for legal aid in specified circumstances. Article 24(3) prohibits "denial of access by any persons to legal practitioners or a Court of law", and this is among the rights referred to under Principle B5 (a) above which cannot be derogated from or suspended. Furthermore, article 91(a) and (e)(dd) gives the Ombudsman power to investigate complaints concerning violations of fundamental rights and freedoms and to bring proceedings before competent courts for an interdict or some other suitable remedy.

Principle B6. "It will be forbidden to create criminal offences with retrospective effect or to provide for increased penalties with retrospective effect"

Article 12(3) includes precisely the above-stated prohibitions. This is one of the rights referred to under paragraph (a) of Principle B5 above which cannot be derogated from or suspended.

Principle B7. (a) "Provision will be made for the balanced structuring of the public service, the police service and the defence services and for equal access by all to recruitment of these services"

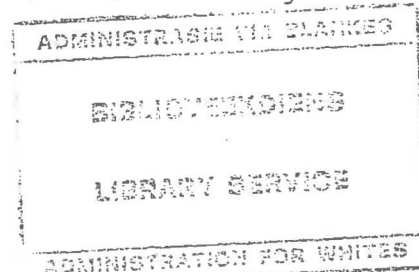
Articles 113(a)(aa), 116(2), 119(2) and 122(2) respectively empower the Public Service Commission to advise on "the appointment of suitable persons to ... employment in the public service, with special regard to the balanced structuring thereof", and require the Inspector-General of Police to "make provision for a balanced structuring of the police force", the Chief of the Defence Force to do so for "the defence force" and the Commissioner of Prisons to do so for "the prison service". In addition, article 23(2) empowers Parliament to legislate in order to achieve "a balanced structuring of the public service, the police force, the defence force and the prison service". Article 91(b) gives the Ombudsman the task of investigating, inter alia, complaints relating "to the failure to achieve a balanced structuring of [the public, defence, police and prison] services or equal access by all to the recruitment of such services".

(b) "The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies"

Article 112(1) and (2) establishes an "independent" Public Service Commission and article 113(a)(bb) specifically charges the Commission to advise on "the exercise of adequate disciplinary control ... to assure the fair administration of personnel policy". Article 91(b) charges the independent Ombudsman (art. 89(2)) with "the duty to investigate complaints concerning ... the failure to achieve ... fair administration in relation to [the public, defence, police and prison] services".

Principle B8. "Provision will be made for the establishment of elected councils for local or regional administration, or both"

Chapter 12 in general and article 102(1) in particular provides for "regional and local government, ... which shall consist of ... regions and



Local Authorities ...". Article 102(3) requires that "every organ of regional and local government shall have a Council as the principal governing body, freely elected in accordance with this Constitution ...".

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