

# Namibia, Child Justice and the UNCRC: Warm Love Gone Cold?<sup>1</sup>

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## Introduction

The United Nations provided an important point of reference for the Namibian liberation movement long before Independence. The Charter of the United Nations proclaimed already in 1945 *"the respect for the principle of equal rights and self-determination of peoples"*. The UN Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in the General Assembly resolution 1514 (XV) of 14 December 1960 referred to this principle as much as the Resolution on Namibia CM/Res.1055 (XLIV), passed by the Council of Ministers of the Organization of African Unity decades later.<sup>2</sup> Shortly after Independence Namibia became an enthusiastic member of the United Nations, and embraced quickly a plethora of international treaties and conventions,<sup>3</sup> amongst others the United Nations Convention on the Rights of the Child (UNCRC). Namibia signed and ratified the UNCRC on 26 and 30 September 1990 respectively. Following the World Summit for Children, New York 29-30 September 1990, the Namibian government established an Inter Ministerial Policy Committee, tasked to draft a National Programme of Action for Children of Namibia (NPA) and to *"consider steps to implement the Convention on the Rights of the Child."*<sup>4</sup> One should think that by now Namibia would have achieved a full implementation of most of the standards emanating from the convention. The current state of affairs is however mixed. Today, twenty three years later, notwithstanding some improvements of the situation of the child, two primordial milestones have not been reached, i.e. the establishment of (a) a child (juvenile) justice system, and (b) a child care and protection system.<sup>5</sup>

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<sup>1</sup> Much of the information relied on for this text stems from a yet unpublished manuscript of the study 'Rapid Analysis: Children in Namibia in Conflict with the Law', commissioned by the Ministry of Gender Equality and Child Welfare in 2012; Reference to this study will be made hereafter as: MGECW 2012.

<sup>2</sup> Resolution on Namibia, passed by the Council of Ministers of the Organization of African Unity, meeting at its Forty fourth Ordinary Session in Addis Ababa, Ethiopia, from 21 to 26 July 1986.

<sup>3</sup> For a list of conventions ratified after Independence, see: <http://www.claiminghumanrights.org/namibia.html>

<sup>4</sup> Ministry of Women Affairs and Child Welfare. (2000). National Report on Follow-up to the World Summit for Children. Windhoek: Government of Namibia.

<sup>5</sup> The UN Committee on the Rights of the Child, in consideration of reports submitted by State parties under Art. 44 of the Convention (sixty first session, 17 September 5 October 2012, CRC/C/NAM/CO/2-3) noted *"with*

## The UNCRC in Namibia

Based on Article 144 of its Constitution, Namibia belongs to the so-called monistic school of international law. This approach sees the law as a whole, meaning that international law and domestic law form part of one legal system, which consequently applies to all legal subjects of a specific country. With the ratification of the UNCRC it became part of the law of the land, i.e., an integral source of the Namibian law without the need of a domestic law to make the treaty operative. Accordingly our courts must take cognisance of the treaty in the context of a particular case, and interpret and finally apply its provisions in the same way as any other provision of the “law of the land” – certainly in line with the rules of legal/constitutional interpretation prevailing in our country. This is however currently not happening. The UNCRC is not directly applied in Namibia because Magistrates and Prosecutors are – as it seems – mistaken about the status of the UNCRC in the Namibian law. During a 2012 study of the situation of children in Namibia in conflict with the law,<sup>6</sup> Magistrates and Prosecutors of a number of (not randomly selected) districts have been asked how they dealt with the fact that Namibia is State party to the convention. Most respondents said being aware of the UNCRC as well as the fact that Namibia had signed and ratified the convention, but they also held that they could not apply the treaty law directly in the absence of a law stipulating as much. Although it is submitted that this view is incorrect, it is of little use to argue about the correctness of this view,<sup>7</sup> because a change of mind set would probably only come about on the basis of the authority of a High Court or Supreme Court ruling. But the question whether the Convention provides children with legal entitlements is only one aspect. Equally important is the fact that Namibia is also under treaty duties vis-à-vis the other State parties to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law,<sup>8</sup> safeguarding always the best interests of the child.<sup>9</sup> Here Namibia made strides and as from the mid-1990s,

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*concern that despite discussions for over a decade, two notable laws on children’s rights, the Child Care and Protection Bill and the Child Justice Bill, have not been adopted.”*

<sup>6</sup> MGECW (2012).

<sup>7</sup> Compare: Dausab, Yvonne. 2009. International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective. In Anton Bösl, Nico Horn and André Du Pisani (Eds.), *Constitutional Democracy in Namibia – A critical Analysis after two Decades* (261 - 285). Windhoek: Macmillan.

<sup>8</sup> Namibia was reminded rather early of her duties in this respect; following Namibia’s first report (1992) to the UN Committee on the Rights of the Child, the committee concluded: “[A]s regards the system of juvenile justice in place in Namibia, the Committee is concerned as to its conformity with the Convention on the Rights of the Child, namely its Articles 37 and 40, as well as with relevant international instruments such as the Beijing Rules, the Riyadh Guidelines, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty....”

<sup>9</sup> Article 3 (1) UNCRC.

Namibia directed significant means and made great efforts to address existing shortcomings.<sup>10</sup> Stakeholders, including line ministries of central government worked towards improvement of the situation of children in Namibia. By 2002 a draft layman's Child Justice Bill, based on the principles of restorative justice, was completed, and work continued on draft legislation on child care and protection, with the aim to substitute an outdated Children's Act (33 of 1960). However, the momentum seems to have been lost latest after funding for the Juvenile Justice Project, provided by the Austrian development corporation run out in 2004.

### **Compliance with the UNCRC**

The current state of Namibia's compliance with the UNCRC is unsurprisingly not satisfactory. Measured against the juvenile justice indicators (JJI) developed by UNODC,<sup>11</sup> the Namibian justice system leaves immense room for improvement: Until today there is neither a system guaranteeing the regular independent inspection of places of detention of children (JJI 12), nor a complaints system for children in detention (JJI 13). There is also no specialised juvenile justice system in place (JJI 14), children in conflict with the law are channelled through the adult justice system. While there is a presumption that a child from the age of 7 to 13 years has no criminal capacity, this presumption is often rebutted in practice, which gives Namibia for all practical purposes one of the lowest ages of criminal capacity in the world. And finally, Namibia does not have a national plan for the prevention of child involvement in crime (JJI 15).<sup>12</sup>

#### ***Excursus: Age-crime-distribution, data and crime prevention***

The lack of a prevention plan tallies with a lack of readily available criminal justice statistics in the country, and from there we experience a lack of informed analysis of prevalence and incidence of child offending. While the computer-based Namibian Court Information System (NAMCIS) is supposed to capture adjudication statistics, including cases involving children, the system is not operational at all Magistrate's Courts in the country. Aggregated and disaggregated data currently cannot be electronically extracted from the system. Thus, a manual extraction from the court books has been done recently with regard to the age-crime distribution in the magisterial district of Windhoek Magistrate's Court with interesting results. The age crime distribution

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<sup>10</sup> Government of Namibia. (2009). First, Second and Third Namibia Country Periodic Report on the Implementation of the United Nations Convention on the rights of the Child. Windhoek: Government of Namibia.

<sup>11</sup> United Nations Office on Drugs and Crime. (2006). Manual for the Measurement of Juvenile Justice Indicators. New York: UNODC.

<sup>12</sup> MGECW (2012, p.36).

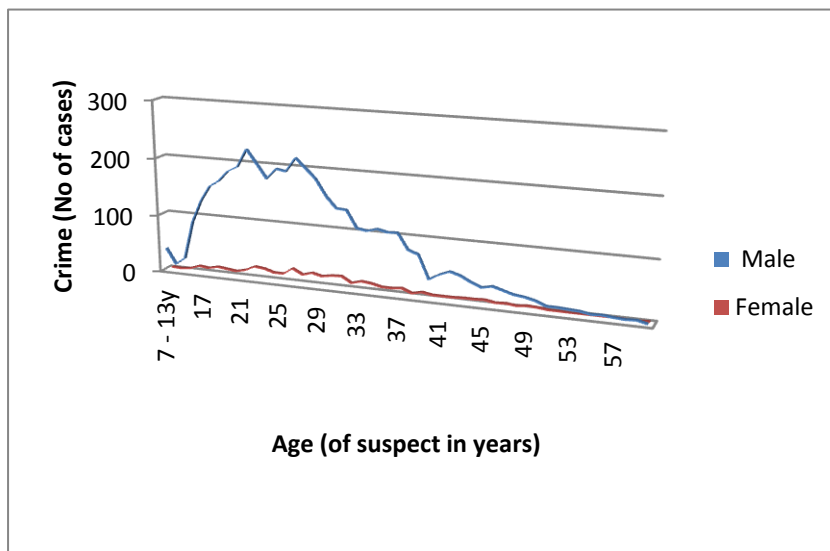
differs considerably from a well known common picture;<sup>13</sup> see Table 1 (*Features of (male) Age-Crime-distributions*) and Figure 1 (*Age-Crime distribution, Windhoek (2012)*).

**Table 1: Features of (male) Age-Crime-distributions**

Characteristics	Common distribution <sup>14</sup>	Windhoek Magistrate's Court, 2012
Mode	Unimodal: < 20 years	Bi-modal: 21 + 27 years
Skewness	Positively skewed: Steep decline above 20 years	Positively skewed: Levelling off above 27 years
Median	approx. 20 years	26.5 years

The problem is that at this point we do not know whether the Windhoek distribution repeats itself more or less exactly in other magisterial districts, or even throughout the country. Considering that the median age for urban areas is 24 years, which is higher compared to the median age of 18 years in rural areas,<sup>15</sup> this is not too probable. But even if the median shifts for rural areas to a lower age, the distribution parameters otherwise might be similar. This beckons an explanation, which considering the paucity of data is difficult to deliver. One attempt to explain adult involvement in crime might want to suggest that we have to look for more detailed answers in the context of the prevailing socio-economic circumstances. At this point in time this is not much substance for the development of a evidence based prevention plan.

**Figure 1: Age-Crime distribution, Windhoek (2012)**



Windhoek Magistrate's Court, 2012		
Age /years	Cases/Male	Cases/Female
7 – 13	41	2
14	14	1
15	26	3
16	92	9
17	131	7
18	158	11
19	169	9
20	187	7
21	196	11
22	227	19
23	204	17
24	180	12
25	198	12
26	195	23
27	219	14
28	203	19
29	186	15
30	159	18
31	140	19
32	139	9
33	110	14
34	107	12
35	112	8
36	108	8
37	109	10
38	82	3
39	76	7
40	36	4
41	46	4
42	53	4
43	48	5
44	39	5
45	32	6
46	36	3
47	31	4
48	26	2
49	24	4
50	20	3
51	13	1
52	13	1
53	12	0
54	11	0
55	8	0
56	9	1
57	7	1
58	6	0
59	7	0
60	3	1

Rows shaded grey represent the two modes of the male age crime distribution.

<sup>13</sup> Schulz, Stefan. (2013). Age-crime-distributions from selected Namibian magisterial districts. Unpublished Manuscript.

<sup>14</sup> Gottfredson, Michael R., & Hirschi Travis. (1990). A General Theory of Crime. Stanford/Cal.: Stanford University Press; p. 123ff (126, 127).

<sup>15</sup> Namibia Statistics Agency. (2013). Namibia 2011 Population and Housing Census Main Report. Windhoek: Government of Namibia; p.27.

Whereas the above issues pertain to the law and policy domain, the situation on the ground is not much better. Criminal justice responses to alleged child offending consist of unconditional withdrawal, imposition of Life-Skill-Training (LST) or Pre-Trial Community Service (PTCS). Since numbers are generally low and resources are weak, children who have to undergo LST often have to wait for many months until a minimum number of participants renders LST sustainable before the training is offered. Besides, PTCS takes place in an environment without systematic preparation. The onus to organise PTCS in such a way that it stands a good chance of success, without alleged offenders defaulting on the service, lies actually with the magistrate and/or prosecutor respectively. There is currently no delivery system by which a reasonable variety of placement agencies with dedicated supervisors are registered, and pointed out to the magistracy and prosecution.

Where high case loads underline the need for optimised case management by prosecutors and magistrates, i.e. aiming at minimising the time spent on any single case, the lack of adequate service delivery systems balances out the intrinsic value of most of the diversion options. Without systematically provided professional support from, supervision and monitoring by service agents and this refers to victim-offender-mediation, LST, PTCS, etc., such interventions carry a higher risk of failure, in other words, the cases come back before the prosecutor and magistrate respectively. Notwithstanding this potential 'malus', today prosecutors and magistrates follow the recommendation from the social workers' who have screened the alleged offender. They do so, although the choice between LST and PTCS does very often not tally with the cognitive, emotional, and moral/social developmental needs of the affected children. But, the underlying assumption that as a rule detention is the worst option may blind us for the insight that on the continuum between imprisonment and LST lies a huge distance which calls for other, needs and risk oriented interventions.

Albeit the above deficiencies of our system, compared with the situation prevailing over the first decade after Independence, Magistrates today remand significantly fewer children in police custody, and try and sentence even fewer children.<sup>16</sup> Fewer children in police custody, this means lesser chances that children are kept in custody together with adults. But children in police custody are still a regular occurrence, and social workers, who do the screening of children in preparation of prosecutorial diversion decisions, have pointed out that they regularly find children in police custody kept together with adults.

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<sup>16</sup> Compare Namibian Prison Service, Legal Assistance Centre, Ministry of Youth and Sports, and UNICEF (Office Windhoek). (1994). Study of Young Offenders in Namibia. Windhoek: Namibian Prison Service.

The fact is that overall, toady only few children are sentenced – in the majority of cases the prosecution withdraws the case conditionally or unconditionally. This is commendable, and yet something is amiss. Whereas the standard connotation of juvenile delinquency is adolescence-limited behavioural incident, it could very well be that those children have been in need of care for a considerable period of time before being arrested for offending.

Being in need of care is nominally a standard trigger for child-welfare, yet such intervention is a rare exception. This has to be seen in the context of our child welfare, care and protection system, which is extremely overstretched and under-funded. Social work is therefore almost exclusively re-active, and client induced, and pro-active social work with the aim to recognise children in need of care independently from being pointed out by others, is not an ordinary occurrence. As a consequence, it happens often that when a child comes into conflict with the law it is also his or her first contact with the law.

Lacking a child centred service delivery system under the Children’s Act, the legally suggested conversion of a criminal case into a children’s court inquiry (s. 30 Children’s Act) seldom takes place. As a consequence, where the limited diversion options are applied to the child implicated in criminal offending, we note a form of ‘net-widening’; i.e. a criminal justice response occurs where a child-welfare, -care and protection intervention would have been called for. Of quite bigger importance even is the conclusion that under these circumstances child offending is at least partially a consequence of a lack of crime prevention.<sup>17</sup>

Of those children who are sentenced, few if any find themselves eventually in a correctional facility.<sup>18</sup> But while the magistracy attempts to avoid trying children, in particular if they are under the age of fourteen, when children are actually sentenced, at least in the magisterial district of Windhoek, the outcome was in 2012 almost exclusively imprisonment with the option of a fine. Finally, children in custody of the Namibian Correctional Service are for all practical purposes ‘imprisoned’. Dispersed over a multitude of correctional facilities, the number of children in any facility remains low, and there are no specific, child adequate rehabilitation programmes in place: they are practically ‘making time’.

All in all, the reality paints a bleak picture in which the system set-up and its environment which dictate the system responses to actual or alleged child offending. It is doubtful

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<sup>17</sup> MGECW (2012, p. 75ff.)

<sup>18</sup> J. Amupadhi, personal communication, 3 November 2012: on 30 October 2012 the total number of persons between 14 and 18 serving a sentence to imprisonment was thirty eight.

whether this can satisfy the requirements of Article 3 (1) UNCRC, because seldom if ever, decisions regarding children in conflict with the law meet the best interests of the child.

### **Coming to terms with ourselves**

Against the above it may be surprising that in 2008 the African Child Policy Forum named Namibia as the second most child friendly country in Africa.<sup>19</sup> It may be another consolation that the dimension of (reported) child offending in Namibia is absolutely and comparatively small.<sup>20</sup> But the status quo must be recognised in context, and looking beyond the here and now gives rise to concern. Namibia wills itself a democratically constituted democracy. As such it does not bode well to deny children, in particular those who get off track their rightful stand. Namibia is demographically young, and ignoring the outlying riches, economically poor. It was found that more than 38% of Namibia's households in the rural areas are relatively poor, and that 12% of the households in urban are extremely poor.<sup>21</sup> Whereas the current population total is about 2.1 million, the total of Namibia's population below the age of 18 years is approx. 928 000, many of them living in dire economic straights. By August 2009 it was submitted that about 28% of all children were either orphaned or vulnerable (OVCs), summing up to then about 263 000; in all likelihood an underestimation of the true situation.<sup>22</sup> Of this total only about 130 000 OVCs benefit under the child welfare grant system, meaning that an equal number of children is not being catered for. From various perspectives of evidence informed crime prevention, this huge number of children living under less than optimal circumstances, being as members of child-headed households, or in kinship care, could become the breeding ground for delinquency and crime. That child offending has not yet taken huge proportions may be due to the survival of the customary extended family. This social unit is typical of both rural and urban Namibia. It provides a net of mutual social obligations, builds on generational and gender authority, and

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<sup>19</sup> Government of Namibia. (2009). First, Second and Third Namibia Country Periodic Report on the Implementation of the United Nations Convention on the rights of the Child. Windhoek: Government of Namibia, p. 2.

<sup>20</sup> According to the arrest statistics of the Namibian Police (2011), less than 1100 (909 male, 119 female) child arrests were recorded for the whole of Namibia.

<sup>21</sup> National Planning Commission. (2010). Children and Adolescents in Namibia 2010. Windhoek: Government of Namibia; p. 29.

<sup>22</sup> Boston University Center for Global Health and Development (2009). Namibia Research Situation Analysis on Orphans and Vulnerable Children – Country Brief. USAID, p. 1.

is the locus of the authority and dominance of the 'patriarch'.<sup>23</sup> In Durkheim's terms mechanic solidarity regulates the flow of prestations and goods more than organic solidarity. Anomie hasn't yet entered the scene; the 'traditional' family provides an effective default system of institutional rules, significant symbols and frames of reference. An important question, which must be addressed elsewhere, is however, whether this justifies complacency.

## **Conclusion**

Namibia began its relation with the UNCRC more than two decades back with a passionate start and a lot of good will. Since then, the good will has been consumed or at least partially consumed, and the passion has cooled down. We feel some disenchantment with the idea of social engineering through policy development according to the blue prints of international treaties and covenants. Since Independence, we acceded to a plethora of international treaties and covenants – by our own deliberation. Now the consequences, the obligations we have entered, are catching up with us, and it may appear at times that external forces are putting undue pressure on us. The above may be no more than a reflex of frustration for that our move towards compliance with the UNCRC is painstakingly slow. But if it were true, even with a pinch of salt, we should understand that adhering to international law is not an end in itself. Buttressing children's rights by implementing systems emanating from international human rights documents, including the UNCRC, prepares the ground for the future. It is exactly those individual rights positions, which afford protection if and when the traditional collective systems of mechanic solidarity start failing or in the worst case collapsing. They still seem to be comparatively strong here and now, albeit our future has already begun: children are beginning to fall through the grid. We'd better get ready now.

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<sup>23</sup> Winterfeldt, Volker. (2002). Traditionalism – social reality of a myth. In: Volker Winterfeldt, Tom Fox and Pempelani Mufune (Eds), Namibia. Society. Sociology. Windhoek: University of Namibia Press; p. 229.