

PREVENTION OF TORTURE

Training Manual for Police Officers

Compiled by: The Office of the Ombudsman

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Acknowledgment

Acknowledgment

This Manual is the product of hard work and dedication by various individuals who relentlessly worked on making this product a success. The Ombudsman : Namibia wish to acknowledge the contributions made by the following persons and institutions:

Staff members in the office who dedicated their time and effort to produce a product that can be utilized to advance the prevention of torture in Namibia.

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The German Embassy for the financial support in producing this manual but also for allowing the Ombudsman : Namibia to create awareness on the issue of Torture, cruel, inhuman and degrading treatment and also for providing an opportunity to take the message of respect for human rights and the prevention of Torture to the Namibian law enforcement personnel.

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FOREWORD

"Learning about human rights is the first step towards respecting, promoting and defending the rights of all people"

Anonymous

I believe members of the Namibian Police Force, more than anybody else, should have a clear picture and good understanding of the concept of torture and the prevention thereof.

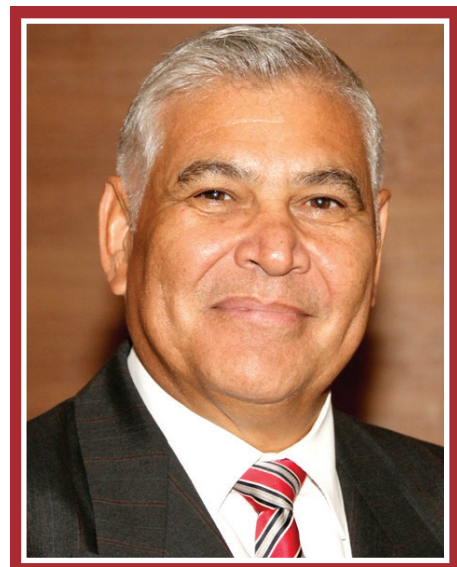
The vast majority of police officers, lawyers, correctional officers, juridical officers, etc do not practice human rights law in their daily lives.

The manual seeks to assist especially police officers in ensuring that they are familiar with human rights in general and in particular with the prohibition against torture. Users of the manual are offered basic information on international human rights law, more specifically on torture and torture prevention. Each chapter addresses a specific human rights area and the manual should be used as training material for collective exercises, as a resource tool for carrying out individual studies and as reference source for the interpretation and application of the law prohibiting torture. It is based on an interactive training methodology which encourages participants to play an active role, contributing their professional expertise to the joint study on how to make and keep Namibia a torture free country.

Cooperation is key to the success of the Prevention of Torture Project and I wish to thank the Namibian Police Force for their commitment to the Project. I also wish to thank the German Embassy in Namibia for their generous support of the Project.



ADV J R WALTERS
OMBUDSMAN: NAMIBIA



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Introduction

EXTRACT OF STATEMENT BY ONNO HÜCKMANN, AMBASSADOR OF THE FEDERAL REPUBLIC OF GERMANY TO NAMIBIA ON THE OCCASION OF THE MEDIA CONFERENCE REGARDING THE SIGNING OF THE ENDOWMENT CONTRACT BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE OFFICE OF THE OMBUDSMAN OF NAMIBIA ON 19 MAY 2015



Onno Hückmann, Ambassador of the Federal Republic of Germany to Namibia, May 2015

I am delighted to inform the public about the project by the Office of the Ombudsman "Preventing torture and other forms of cruel and inhumane treatment among the Namibian Police Force", which is supported by the German Embassy financially.

The overarching aim of this project is to enhance respect for human rights and to strengthen protection of human rights in general among both the police force and the Namibian public.

The prime objective of German foreign policy is to maintain and establish peace. Many conflicts have their roots in systematic human rights violations. So a human rights-based approach is instrumental in ensuring stability and security. This means that no policy area can afford to ignore human rights. Rather, a commitment to human rights must be regarded as a cross-sectorial task for all policy areas.

Germany commits itself to human rights in its national law, too: Article 1 of the Basic Law states "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." Germany is a signatory to virtually all United Nations human rights agreements, and is committed to all key European human rights standards.

This specific project involving the Ombudsman and the Namibian Police Force is meant to raise awareness among the Namibian police in the areas of torture and cruel and inhumane treatment and to distinguish between permitted and prohibited police practices.

The German Embassy is honoured to support a project like this and we hope that the project helps to keep Namibia a torture free country. The outstanding work by the Ombudsman and the Namibian Police Force are key components in this, and we are delighted that a joint project can be realized.

CHAPTER 1:

THE DEVELOPMENT OF AN INTERNATIONAL LEGAL FRAMEWORK TO PREVENT TORTURE

OBJECTIVES

- To provide trainees with an overview as to how the concept of torture prevention arose
- To explain the principles of Human Rights as the basis to prevent torture
- To provide trainees with an overview of the prevention of torture principles under the Namibian Human rights Context

1.1 Introduction

The two great wars of the twentieth century left the international community devastated. The League of Nations¹ did not meet the expectations that it will make the world a safer place. The United Nations Organisation, which replaced the League of Nations, immediately set structures in motion to combat human rights violations and police the international compliance thereof.

The combatting of torture was high on the agenda of the human rights issues that needed to receive attention. The Universal Declaration of Human Rights that was adopted by the General Assembly of the UN in Paris on 10 December 1948, referred to the suffering caused to millions of people all over the world during World War II, in the second paragraph of the Preamble:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

In Article 5, the Declaration addresses torture, representing one of the most prevalent examples of the barbarous acts mentioned in the Preamble:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

By adopting the Universal Declaration, the General Assembly made its intention known to commit the nations of the world to respect the rights of the people. Although torture is not defined in Article 5, it was clearly placed high on the human rights agenda of the international community in its actions to rebuild after the war.

Several subsequent treaties drafted during the second half of the 20th century addressed torture, and is often linked with cruel, inhuman and degrading treatment. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits torture or cruel, inhuman or degrading treatment or punishment and Article 4 of the Covenant states that no derogation may be made under this

¹ Was an association of countries established in 1919 by the Treaty of Versailles to promote international cooperation and achieve international peace and security. It was powerless to stop Italian, German, and Japanese expansionism leading to the Second World War, and was replaced by the United Nations in 1945.

provision. In other words there can be no excuse made in international law for acts of torture and it can never be justified.

For a long time member states felt that since the Universal Declaration of Human Rights is not enforceable, and neither the Universal Declaration nor the ICCPR define torture, there is a need for a treaty dealing specifically with torture. The first step towards a treaty was the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975.

The Declaration was the first document to define torture in Article 1:

1. *For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.*
2. *Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.*

Article 5 deals with *the training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty* to ensure that everyone who are involved in investigations and interrogations are familiarized with the prohibitions. The article also demands that the prohibitions should be taken up in the regulations of law enforcement institutions.

1.2 Principles of Human Rights

In order to understand the purpose of observing human rights and to eliminate and stop incidences of torture, it is imperative that a background be provided as to what human rights are and how it will find application in being observed by law enforcement personnel.

Firstly, it is important to understand that human rights are rights that are enjoyed by every person simply because they are human beings. Human rights cannot be lost or taken away (it can be restricted though) and these rights can be claimed by any person.

A human rights violation is an unlawful deprivation of individual rights that is inherent to all humans.

In the protection and enforcement of human rights, the following human rights principles are common and should always be remembered:

- i. ***The Universality and Inalienability of human rights must be recognised.*** The universality of human rights is encompassed in the words of Article 1 of the Universal Declaration of Human Rights:

"All human beings are born free and equal in dignity and rights."

- ii. **Indivisibility:** Human rights are indivisible. Whether they relate to civil, cultural, economic, political or social issues, human rights are inherent to the dignity of every human person. Consequently, all human rights have equal status, and cannot be positioned in a hierarchical order.
- iii. **Interdependence and Interrelatedness:** Human rights are interdependent and interrelated. Each one contributes to the realization of a person's human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.
- iv. **Equality and Non-discrimination:** All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.
- v. **Accountability and Rule of Law:** States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in international human rights instruments and the constitution of our country.

1.3 The Bill of Rights in the Namibian Constitution

The Namibian Constitution is a product of a struggle for sovereignty and human rights. This is reflected in its first provisions, which states that Namibia is a *“sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.”*²

The Constitution of Namibia is the supreme law of Namibia and Chapter 3 of the Namibian Constitution provides for the protection and enforcement of Fundamental Rights and Freedoms. These rights include the following:

- Protection of Life (Article 6);
- Protection of Liberty (Article 7);
- Respect for Human Dignity (Article 8);
- Slavery and Forced Labour (Article 9);
- Equality and Freedom from Discrimination (Article 10);
- Arrest and Detention (Article 11);
- Fair Trial (Article 12);
- Privacy (Article 13);
- Family (Article 14);
- Children' Rights (Article 15);
- Property (Article 16);
- Political Activity (Article 17);
- Administrative Justice (Article 18);
- Culture (Article 19);
- Education (Article 20);
- Fundamental freedoms (Article 21)

The above rights and freedoms are enshrined in the Constitution and can therefore never be taken away from any Namibian Citizen.

Example : Fair Trial

The right to a fair trial includes the right to a speedy trial, or the right to have the trial finalized within a reasonable time.

Art 12 (1)(b)

"A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released."

In the matter of **Margaret Malama-Kean versus the Magistrate for the District of Oshakati N.O and Another [2001] NAHC 35**, the Court pronounced itself as to what constitutes a reasonable period under Article 12 of the Constitution.

Facts of the Matter:

The Applicant in this matter was arrested on **27th June 2000** on the suspicion of having committed fraud. She was granted bail on 9 August 2000 in the amount of N\$150 000. The matter was postponed several times and on the **9th of April 2001** the Applicant opposed any further postponements. The Magistrate however granted a further postponement and the Applicant then approached the High Court for relief. The High Court remitted the matter back to the Magistrate for further hearing of evidence before granting a postponement; after hearing the evidence, the Magistrate again ruled that the matter be postponed and the matter was simultaneously transferred to the Regional Court for hearing. The date for first appearance was set for 13 July 2001 and on the **13th of July 2001** the case was set down for trial for the **22nd of October 2001**.

The Applicant then lodged the second application to the High Court on the **9th of August 2001** - in terms of the Notice of Motion the relief claimed was inter alia the setting aside of all proceedings in the Magistrates Court, and that the Applicant be released forthwith in terms of Article 12(1) (b) of the Constitution, in that the delay in bringing her matter to trial was unreasonable and that her constitutional right to be tried within a reasonable time has been infringed upon.

The Court found that the period between the date of arrest and the date of trial was unreasonable and thus she was entitled to the relief available under Art 12(1) (b).

This case illustrates that a period of **16 months** could be seen as an unreasonable delay for the purposes of the right to a speedy trial.

FOOD FOR THOUGHT

Are the current time periods in the finalization of criminal cases from date of arrest until trial eventually commences, in line with the constitutional requirements?

CHAPTER 2

CHAPTER 2:

TORTURE , CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

OBJECTIVES

- To introduce to trainees the concept of torture, cruel, inhuman or degrading treatment or punishment
- To differentiate between torturous conduct and other forms of cruel, inhuman or degrading treatment or punishment

2.1 Introduction

The prohibition of torture and other forms of ill-treatment and punishment has a special status in the international protection of human rights. It is included in a number of international and regional treaties and since it forms part of the international law, it is binding on all States that have ratified the treaties.

The prohibition of torture is absolute and torture can never be justified in any circumstance. The state is not permitted to temporarily limit the prohibition on torture under any circumstance whatsoever.

The prohibition of torture overrides any inconsistent provision in another treaty or customary law. The particular importance placed on the prohibition of torture and the traditional obligations of “States to respect, to protect and to fulfill human rights” is complemented by a further obligation “to prevent torture and all forms of ill-treatment”. States are therefore required to take positive measures to prevent its occurrence.

2.2 Definition of Torture

The most widely accepted definition of torture internationally is the one that is set out by Article 1 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):

“... ‘Torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

From this definition, the following essential elements can be identified as conduct that would qualify as torture:

2.2.1 The infliction of severe mental or physical pain or suffering

(a) The infliction of severe physical pain

Torture is not merely assault or even Assault with the Intent to do Grievous Bodily Harm (Assault GBH). While Assault GBH can result in serious injuries to a victim, its definition does not include an element dealing with the infliction of severe pain. The torturer does not necessarily intend to do grievous bodily harm, although it will almost always be a result of torture. The objective of the torturer is to inflict severe pain or suffering. Or to put it differently, torture will normally include intent to do grievous bodily harm, but the crime of assault gbh does not carry an element of intentional infliction of severe pain.

'Severe pain' distinguishes torture, cruel, inhuman and degrading treatment from assault or even assault GBH. While torture is a more serious infliction of pain, there is no indication in either the wording of the different torture documents that torture is only open to those who had a near-death experience.

Examples of actions that may cause severe pain and suffering include:

- beating
- electrical shocks
- suffocation
- sexual assault

(b) Inflicting severe mental pain

*"Interrogators often - sadly - take pride in the fact that they do not resort to 'crude physical methods' in their work, but rely on psychological 'methods'."*³

Physical torture refers to a brutal violation of one's body. Interpreters may differ on what exactly constitute physical torture but they all know it deals with physical force and physical pain. Mental or psychological pain is abstract. There are no scars and no external wounds, and even trained psychiatrists and psychologists usually need time to determine the long-term effects of torture. Some interpreters have argued that given the exact terminology of CAT, the words 'mental pain' should be interpreted as referring to the psychological effects of physical torture and do not create a second category of torture.⁴

However, it is generally accepted by authors and human rights courts that torture as an international law crime includes non-physical aspects such as interrogation techniques. In the case of Ireland v United Kingdom the Court identified five illegal interrogating techniques:

- Wall-standing, forcing detainees to stand on their toes for long period while the whole body weight of the person transfers to his fingers;
- Hooding, where a dark bag is placed over the detainees' heads for long periods of time;
- Subjection to loud noise, in the period before the interrogation starts;
- Deprivation of sleep, before the interrogation starts; and
- Deprivation of food and drink, put detainees on an inadequate, reduced diet while waiting to be interrogated.

³ Reyes, H. 2007. *The Worst Scars are in the Mind: Psychological; torture, in International Review of the Red Cross, Volume 89, No 867, Sept 2007, p. 59.*

⁴ *Ibid.*, p. 595.

Applying these techniques in combination and with premeditation, the Court found that they “caused, if not actual bodily injury, at least physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation”.⁵

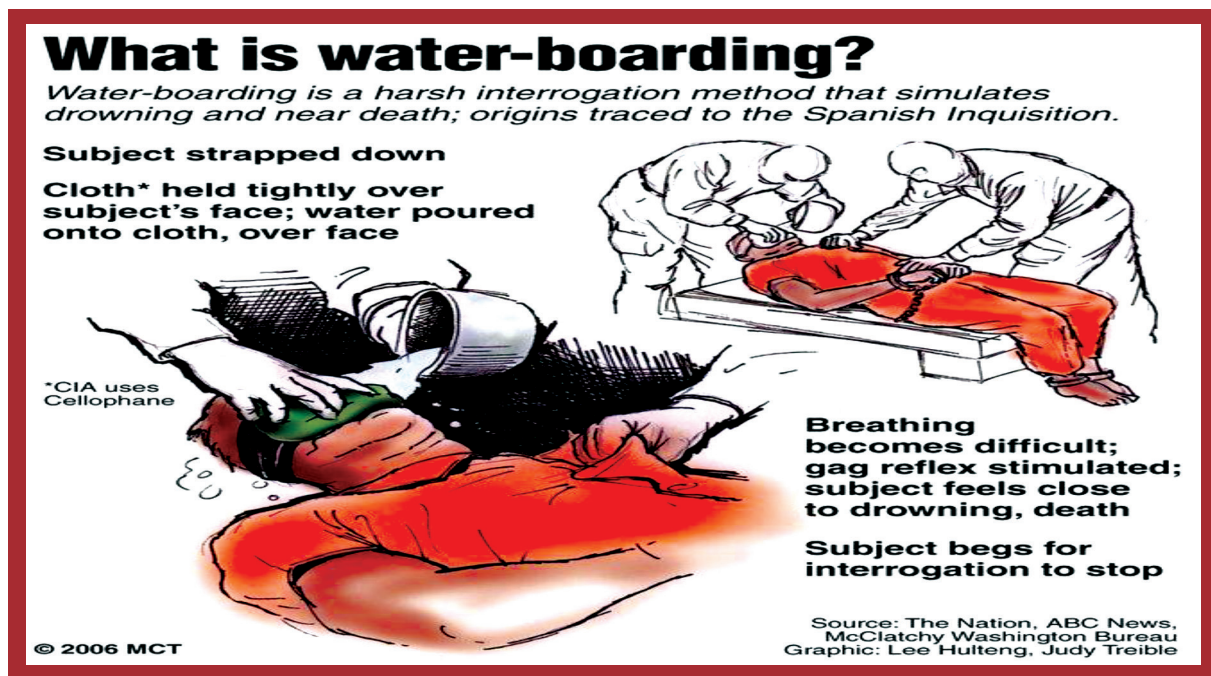
Physicians for Human Rights (PHR), referring to an article in the United States Code (a codification of USA Laws) defines mental torture as

‘...severe mental pain or suffering’ caused by a threat of, or actual administration of procedures calculated to disrupt profoundly the senses of personality.⁶

Reyes points out that PHR went a long way to finally give human rights practitioners an understandable definition of mental torture. PHR calls these techniques ‘psychological coercive tactics’ and identifies these techniques or tactics as psychological.⁷

Other examples of actions that may cause mental pain and suffering include:

- threats
- water boarding



2.2.2 Intention

The prohibited intention is defined by CAT in Article 1:

...intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...

⁵ Ireland v United Kingdom, Eur Court HR, 1978, Series A, No 25, p.66.

⁶ PHR. 2005. Break Them Down. Report by Physicians for Human Rights. Washington DC. .

⁷ Ryens, p. 591.

Not all acts of inflicting pain, even if the act is intentional, fit the definition of torture. The purpose of the torture, cruel, inhuman or degrading deeds must be linked to an intended outcome: to obtain information or a confession or as punishment.

Although confessions are important objectives of combatting international terrorism or terrorist crimes, the purpose of the torture as defined in article 1, places CAT also in the sphere of criminal procedure. Article 217(1) of the Namibian Criminal Procedure Act, Act 51 of 1977, reads as follows:

Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence:

2.2.3 For a specific purpose

The purposive element is central to the notion of torture as understood under international law. It is also the "purpose" element that distinguishes torture from other forms of inhumane treatment.

In order for conduct to be classified as torture under the Convention, the conduct must be inflicted for such purpose as extraction of a confession, gaining information, punishment, coercion or intimidation.

2.2.4 By or with the consent or acquiescence of the state authorities

Torture is linked to official acts. We have noticed that the Tokyo Declaration by the World Medical Association broadened the definition of the perpetrator to include torturers who operate independently such as terrorist bands and individuals acting with a terrorist agenda. Such a definition may have several advantages in international law, but it is not part of international human rights law. It may be that member states of CAT will act on the suggestion of the Tokyo Declaration and adopt municipal legislation to broaden the definition.

The term 'public officials' includes all persons employed in or by the State acting on behalf of the State and/or in furtherance of the interest of the State.

This element makes the prohibition against torture personal to any person acting on behalf of the State. The obligation is not on the Government only, but on every individual acting on behalf of the State and/or in furtherance of the interest of the State.

The element of "consent or acquiescence of the State" places an obligation on the State to place measures into force to prevent torturous conduct. Failure to guard against torture, lack of due diligence, preventative measures, investigative measures and punishment for torture can be seen having consented or acquiescence to torturous conduct.

A police officer obviously fits the CAT definition of a public official or other person acting in an official capacity.

2.3 Cruel, inhuman or degrading treatment or punishment

The Convention against Torture also prohibits other forms of Cruel, Inhuman or Degrading Treatment (CID) or Punishment, that would not necessarily be torture but would violate the human rights of individuals.

2.3.1 Cruel Treatment

The Oxford Advanced Learners Dictionary defines "cruel" as "behavior which causes physical or mental harm to another whether intentionally or not". This action therefore refers to a deliberate and malicious infliction of mental or physical pain on another.

As applied to people, cruelty encompasses abusive, outrageous and inhuman treatment that results in the reckless and unnecessary infliction of suffering upon the body and/or mind. Placing chains and handcuffs on detainees, for example, have been regarded as cruel treatment by our Courts, as illustrated by the case below.

Engelbrecht v Minister of Prisons and Correctional Services 2000 NR 230 (HC)

The Plaintiff (Engelbrecht) sued the defendant (Minister of Prisons and Correctional Services) for damages for injurious treatment and infringement of personal safety. Plaintiff, a trial awaiting prisoner, had been placed in chains from 25 November 1997 to 11 December 1997. He also spent some time in solitary confinement. It appeared from the evidence that plaintiff had assaulted prison officers and his behavior caused some trouble.

During 1999 the Supreme Court of Namibia declared the placing of prisoners in chains unconstitutional and in violation of Art 8 of the Namibian Constitution. The Court held that the Minister of Prisons and Correctional Services was liable to compensate the plaintiff.

In assessing the quantum of damages, the Court took into account that the plaintiff had provoked the prison authorities and that he had not suffered serious and permanent injuries. However, the plaintiff had been an awaiting trial prisoner and was subsequently acquitted. It was not permissible to treat awaiting trial prisoners in this way. The Court held further that the plaintiff had been subjected to **cruel, inhuman and degrading treatment** and having regard to previous decisions, awarded an amount of N\$15 000.

2.3.2 Inhuman Treatment

The Free Dictionary by Farlex defines "inhuman" as "*lacking kindness, pity or compassion*"; "*not suited for human needs*"; and "*not of ordinary human nature, form or character*".

Inhuman treatment is defined in the Elements of Crimes for the International Criminal Court as the infliction of "*severe Physical and Mental pain or suffering*".

The element that differentiates inhuman treatment from torture is the absence of the requirement that the treatment be inflicted for a specific purpose.



The photo depicts the condition of the Wanaheda Police Cells in 2006 – the Ombudsman submitted a Special Report to Parliament to alert Government on the conditions in holding cells

2.3.3 Degrading treatment

The Oxford Advanced Learners' Dictionary defines "degrading" as "*causing a loss of self respect*".

This may involve pain or suffering less severe than for torture or cruel or inhuman treatment and will usually involve *humiliation* and *debasement* of the victim. The essential elements which constitute '*ill-treatment not amounting to torture*' would therefore be reduced to:

- intentional exposure to significant mental or physical pain or suffering; by or with the consent of the State authorities

2.4 Difference between torture and cruel, inhuman or degrading treatment or punishment

The exact boundaries between "torture" and other forms of "cruel, inhuman or degrading treatment or punishment" (CID or "ill-treatment") are often difficult to identify and may depend on the particular circumstances of the case and the characteristics of the particular victim. Both terms cover mental and physical ill-treatment that has been intentionally inflicted by, or with the consent or acquiescence of the State authorities.

Cruel and inhuman or degrading treatment or punishment refers to ill-treatment that does not have to be inflicted for a specific purpose, but there have to be intent to expose individuals to the conditions which amount to or result in the ill-treatment. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction.

In some cases, certain forms of ill-treatment or certain aspects of detention may not constitute torture on their own but may do so in combination with each other. Ill-treatment is, however, prohibited under international law and even where the treatment does not have the purposive element or, as far as degrading treatment is concerned, is not considered severe enough (in legal terms) to amount to torture, it may still amount to prohibited ill-treatment.

The Human Rights Committee has stated that: *"The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied"*.⁸

Namundjebo and Others v Commanding Officer: Windhoek Prison and Another 2000(6) BCLR 671(NMS)

In this case, prison warders put Thomas Namundjebo and four other awaiting trial prisoners in chains (or leg irons). The chains consisted of two metal rings with a fastener that is usually welded closed and sealed in such a way that the prisoner cannot remove the ring. A metal chain connects the two rings. A warder put a ring on each leg, just above the ankle in order to restrict the person's movements and is uncomfortable.

The reason for the chain was that one prisoner was planning to escape while the others had previously escaped from prison. The prisoners were chained for approximately six (6) months. The prison authority removed the chains after Namundjebo and others applied to the High Court. The application referred to Article 8 of the Namibian Constitution and indicated that the action of the prison authority was contrary to the Article. The High Court however ruled in favour of the Commanding Officer of the Windhoek Prison. The applicants lodged an appeal to the Supreme Court.

The Supreme Court noted that imprisonment necessarily affected some of a prisoner's rights, including the right to dignity. To chain a person, "was a humiliating experience which reduces the person placed in irons to the level of hobbled animals whose mobility is limited."

The Supreme Court therefore ruled that it was **degrading treatment** to put chains on prisoners and that it was contrary to Article 8(2) (a) and (b) of the Namibian Constitution.

⁸ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1. at 30 (1994), para 4.

Exercise:

What do you understand under the concept of torture?

.....

.....

.....

What are the essential elements of torture?

.....

.....

.....

Discuss acts that you have observed in your community that can be described as cruel treatment.

.....

.....

.....

Look at the following examples:

- 4.1 A junior investigating officer enters the police cell and takes a suspect in one of his cases out. He takes him to the courtyard of the prison and hits him twice in the face before taking him back to his cell. He repeats this for four days before the trial starts, but does not say a word. On the trial date the suspect informs the officer he intends to plead guilty. The officer does not assault him and takes him to Court. Did the officer torture him or was it only common assault?
- 4.2 An investigating officer visits the police cells every day and tells an trial awaiting accused he is going to harm the prisoner's family. He does not elaborate, but prevents the accused's family to see him or make any contact whatsoever. Is that torture?

CHAPTER 3

CHAPTER 3:

LEGAL FRAMEWORK PERTAINING TO THE PREVENTION OF TORTURE

OBJECTIVES

To sensitize the trainees on the legal framework prohibiting torture and the role and duty they have/should play to prevent the occurrence/application of torture, cruel, inhuman or degrading treatment or punishment

3.1 Introduction

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"

Article 5 of the Universal Declaration of Human Rights

The prohibition of torture and other forms of cruel and inhuman treatment or punishment has a special status in the international protection of human rights realm and is included in a number of international and regional instruments that forms part of the international law that is binding on all States.

Therefore, every citizen of our country is entitled to be protected against treatment or punishment that can be classified as torturous, cruel, inhuman or degrading. The United Nations Convention against Torture also places an explicit obligation on State Parties to "take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction".⁹

3.2 Is Torture a Crime in Namibia?

In dealing with state responsibility, we need to establish whether torture is a criminal offence in Namibia. Since CAT is aiming at protecting suspects from officials, we know that the perpetrators or torture offenders are always officials, or servants of the State. And we also know that the definition of torture refers to two specific situations where officials are most likely to torture suspects:

- When the perpetrator wants to obtain a confession or information from the suspect, and
- when the official is extremely angry and does not want to wait for the legal processes to follow its course, but opts to punish the suspect by torturing him/her.

Information gathered by torturous means can never be reliable. Depending on the ability of the individual to endure pain, some may be able to speak the truth at all times, but it is highly possible that others will incriminate themselves or fabricate evidence against innocent people just to stop the torture.

The state agencies that are most likely to be confronted with obtaining evidence, are the police, or under special circumstances, the military or national intelligence. And the officials who would want to

⁹ Art 2 of CAT

punish people perceived to have caused harm to society, will in all likelihood also be the police, and in times of war or a state of emergency, the military.

The reported criminal court cases abound with confessions that were ruled inadmissible (to be discussed in Chapter 7) because the investigating officers assaulted or inflicted severe pain to the accused, but the torturers are seldom, if ever, brought to book. At best, the victim of torture will institute a civil claim against the Namibian Police or the Defence Force. These civil claims are seldom disputed and often settled. The general public is usually sympathetic and supports the police or military.

Article 2 of CAT provides that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Furthermore Article 12 prompted each State Party to ensure that its competent authorities proceed to a prompt and impartial investigation, whenever there is a reasonable ground to believe that an act of torture has been committed. The articles are clear. There should be legislation and procedure in place to prevent torture, and rumours of torture must be dealt with immediately. The wording of Article 12 suggests that a State Party cannot wait for the unrest, upheaval or any other emergency to calm down before a rumour back with reasonable indications of torture is investigated, it must be done immediately.

The requirements of Articles 2 and 12 cannot be implemented unless Parliament passes a law making torture a crime. This has not happened since Namibia ratified CAT. Does it mean that Namibia is in a breach of the two articles?

Some experts argue that torture as defined by Article 1 of CAT is indeed a crime in Namibia by virtue of Article 144 of the Namibian Constitution that reads as follows:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of Public International Law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Since Namibia ratified CAT, the Convention is part of Namibian law. Some experts are of the opinion that the Prosecutor-General, may prosecute acts of torture in terms of Article 144 of the Constitution and Article 1 of CAT. One can put it even stronger: The Prosecutor-General is compelled to prosecute acts of torture, cruel, inhuman and degrading treatment or punishment in terms of Articles 2 and 12 of CAT.

However, in terms of the rules of evidence, statutory legislation needs to have a penalty clause to be enforceable, which CAT and other references to torture in the Geneva Conventions and ICCPR do not have. Those in favour of recognizing Article 1 of CAT and other treaties prohibiting torture, point out that since the prohibition of torture in international law is one of only a few peremptory rules of international customary law, sentencing can be developed just like it has been developed for common law crimes. Punishment under the common law is not static and the courts constantly adapt their sentencing to fit the demands and needs of the time. In Namibia a convicted person has a right to appeal in all lower court cases, and a right to apply for permission to appeal in High Court cases, with an additional right to petition the Supreme Court if the High Court refuses a request to appeal. Consequently, the fact that the contravention of international treaties and covenants do not have penalty clauses should not be a barrier to prevent prosecution in terms of Article 144 of the Constitution.

However, legislation in line with Article 1 of CAT, and perhaps including the suggestion of the Tokyo Declaration to criminalize torture committed by people acting on their own, is the desirable option. It will, among other things, give Parliament the chance to determine penalties relevant for the Namibian situation, with a clear differentiation between torture on the one hand, and cruel, inhuman and degrading treatment or punishment.

3.3 National Instruments protecting individuals from Torture

3.3.1 The Namibian Constitution:

Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated with respect and concern and the right to be treated with respect is found in Article 8 of the Namibian Constitution that deals with respect for human dignity.

Article 8

Respect for Human Dignity:

- (1) *The dignity of all persons shall be inviolable.*
- (2) (a) *In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*
- (b) *No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment*

The Law Reform and Development Commission are in the process to develop legislation to criminalize torture; in the meantime, it is incumbent on the various institutions to introduce measures to curb this phenomenon.

3.4 Regional Instruments

3.4.1 The African Charter on Human and Peoples' Rights:

Article 5 states that *"every individual shall have the right to the respect of the dignity inherent in a human person and the recognition of his legal status. All forms of exploitation and degradation of men particularly slavery, slave trade, torture, cruel, inhuman and degrading treatment or punishment shall be prohibited"*.

States should therefore ensure that the rights of individuals are protected to ensure compliance with the required regional instrument.

3.4.2 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines):

The "Robben Island Workshop on the Prevention of Torture t" (that was held from 12-14 February 2002) has adopted guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment and proposed that they are adopted, promoted and implemented within Africa.

Some of the guidelines proposed and accepted at this meeting were, *inter alia*:

i. Ratification of Regional and International Instruments

States should ensure that they are a party to relevant international and regional human rights instruments and ensure that these instruments are fully implemented in domestic legislation and accord individuals the maximum scope for accessing the human rights machinery that they establish.

ii. Promotion of Support and Co-operation with International Mechanisms

States should co-operate with the African Commission on Human and Peoples' Rights and promote and support the work of the Special Rapporteurs.

iii. The Criminalisation of Torture

States should ensure that acts which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems.

iv. Non-Refoulement

States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture.

v. Combatting of Impunity

States should ensure that those responsible for acts of torture or ill-treatment are subject to legal process.

vi. Complaints and Investigation Procedures

Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.

vii. Safeguards during the Pre-trial process

States should establish regulations for the treatment of all persons deprived of their liberty guided by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

viii. Conditions of Detention

Reduce over-crowding in places of detention by; *inter alia*, encouraging the use of non-custodial sentences for minor crimes.

ix. Mechanisms of Oversight

States should ensure and support the independence and impartiality of the judiciary including by ensuring that there is no interference in the judiciary and judicial proceedings, guided by the UN Basic Principles on the Independence of the Judiciary.

x. Training and empowerment

Establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups.

xi. Civil Society Education and Empowerment

Public education initiatives, awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons shall be encouraged and supported.

xii. Responding to the Needs of Victims

Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation.

3.5 International Instruments**3.5.1 Universal Declaration of Human Rights:**

The Universal Declaration of Human Rights (1948) is the founding document of the international human rights system. While it is not a treaty, it is considered to reflect customary international law and to be binding on all States. Article 5 states that: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*. The Universal Declaration of Human Rights also says that people have the right to *"an effective remedy"* if their rights are violated.

3.5.2 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, (CAT) is the most comprehensive international treaty dealing with torture and contains a series of key provisions for torture prevention.

Article 4 sanctioned all member states to implement legislation that criminalizes torture:

1. *Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*
2. *Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*

3.5.3 International Covenant on Civil and Political Rights (ICCPR):

Namibia has ratified the above Covenant and is therefore also obliged to adhere to the provisions thereof. The following is an extract of some of the articles that deal in particular with the issue of torture:

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a*

judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. *Anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

Article 10

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Given the above, it is imperative to realize that the government of Namibia has committed itself to protect its citizens against the crimes of torture, cruel, inhuman and degrading treatment or punishment and this commitment should cascade down to actors within the framework of government to adhere to both the national, international and regional instruments that define and guide this type of conduct.

3.5.4 The Rome Statute

In terms of the Rome Statute, the enabling statutes of the International Criminal Court, torture and cruel, inhuman or degrading treatment are war crimes under Article 8 (2) (a)ii, iii and xxi and (2) (c) i & ii) and as crimes against humanity under Article 7 (1) (f) and (k).

Exercise:

1. If you are an investigating officer and you interrogate a person suspected of terrorist activities, and he/she refuses to answer any question, what will you do?
2. Which of the two Covenants deal with torture, cruel, inhuman and degrading treatment or punishment?
3. What other international conventions related to torture has been ratified by Namibia?
4. Did Namibia ratify any regional conventions dealing with torture?
5. What does the Namibian Constitution say about torture?

CHAPTER 4

CHAPTER 4:

THE RESPONSIBILITY OF THE STATE IN COMBATTING TORTURE

OBJECTIVE

- To highlight the responsibilities of government in ensuring protection to its citizens against torture

4.1 The need for a legislative framework

Article 2 of CAT, as stated earlier, spells out the obligation of the State:

1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
2. *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.*
3. *An order from a superior officer or a public authority may not be invoked as a justification of torture.*

In a Manual for Prosecutors, Judges and Lawyers, the High Commissioner for Human Rights points out that the Committee against Torture has on several occasions recommended that State Parties should pass legislation to allow the repeal of laws that undermine the independence of judges.¹⁰ It goes without saying that judges should also be afforded freedom to determine if a statement or confession before the Court is the result of torture, cruel, inhuman or degrading treatment.

We have discussed the issue of legislation above. Suffice it to say that the present legal framework is not good enough. The argument that offenders can always be prosecuted for assault with the intention to do grievous bodily harm is not helpful. There are several torturous acts that will not be covered by the definition of assault. 'Inflicting severe mental pain' is not covered by the definition of assault or any other common law crime. And Namibia does not have any statutory prohibition that covers mental torture.

During Namibia's first (and thus far only) Report to the Committee against Torture in 1997, the Committee made the following recommendation regarding legislation:

Namibia should enact a law defining the crime of torture in terms of Article 1 of the Convention and should legally integrate this definition into the Namibian substantive and procedural criminal law system, taking especially into account:

- a. *The need to define torture as a specific offence committed by or at the instigation or with the consent of a public official (delictum proprium) with the special intent to extract a confession or other information, to arbitrarily punish, to intimidate, to coerce or to discriminate;*

¹⁰ High Commissioner for Human Rights in Cooperation with International Bar Association. 2003. *Human Rights in the Administration of Justice. A Handbook on Human Rights for Justices, Prosecutors and Lawyers*. New York and Geneva: Human Rights Commission, Professional training Series No 9, p. 320.

- b. *The need to legislate for complicity in torture and attempts to commit torture as equally punishable;*
- c. *The need to exclude the legal applicability of all justification in cases of torture;*
- d. *The need to exclude procedurally all evidence obtained by torture in criminal and all other proceedings except in proceedings against the perpetrator of torture himself; and*
- e. *The need to legislate for and enforce prompt and impartial investigation into any substantiated allegations of torture.*¹¹

Considering the implementation of the Convention in Namibia at present, the need for an Anti-Torture Act is obvious. Thus far no one has been prosecuted for torture as a crime in terms of Article 144 of the Constitution. There is no structures in place in the Namibian Police, the City Police of Windhoek, or the military to monitor the use of torture as part of interrogating techniques, or even as punishment.

As long as the public do not see any prosecutions for torture-related offences, the ratification of a treaty will not convince them, or the international community, or the Committee against Torture that the independent Namibian armed forces have adapted to the new constitutional dispensation and left the brutal legacy of the colonial armed forces behind them.

The fourth recommendation (d) is already part of Namibian law. In several criminal cases since Independence confessions were declared unconstitutional because a suspect was either not warned of his/her rights,¹² or has been assaulted. In *S v Malumo and others*¹³ the High Court, referring to Article 8 of the Namibian Constitution and not to CAT, excluded several confessions important for the State's case on the grounds that the accused was not warned of their rights to legal representation and because the Court could not exclude the possibility that the accused have been assaulted and forced to make the confessions. However, no one has been charged with assault, let alone under article 1 of CAT. The need for an act, that specifically addresses recommendation 4, that impartial, and by implication, independent investigators, should be ready to investigate substantiated allegations of torture.

4.2 The need for intensive education

The Committee against Torture suggested in dealing with Namibia's first Report that Namibia should give attention to the training of the Namibian Police, the Defence Force, Correctional Services and medical officers on the Convention.¹⁴

In terms of Article 10 of CAT, the following is stated in terms of education:

1. *Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.*
2. *Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.*

The peace and stability enjoyed by Namibia since independence, possibly contributed to the fact that torture as an issue has never been on the pages of the newspapers, or part of the public

¹¹ Committee Against Torture. 1997. Initial Report of Namibia (CAT/C/28/Add2) on 6 May 1997 (CAT/c/SR.293 and 294/Add.1). Geneva: Committee Against Torture, pp. 35 - 37, on p. 36.

¹² *S v Gariseb and Another* (CC 16/2010) [2013] NAHCMD 25 (30 January 2013) See *S v KaKita* (1) 1997 NR 285 (HC); *S v De Wee* 1999 NR 122; *S v Calvin Liseli Malumo and Others* (unreported) Case CC 32/2001 delivered on 14 February 2007.

¹³ (CC 32/2001) [2010] NAHC 20 (1 March 2010).

¹⁴ Committee Against Torture. 1997. Initial Report of Namibia, p. 36.

debate. However, even if it is not a national issue, it is a concern that the issue is generally raised in civil claims against the police. Since torture is often complicated to define, especially in cases of mental torture, one cannot assume that all the young police recruits understand exactly what torture entails. And without knowledge of the place of torture in international law, they may see assaults to obtain confessions or information as wrong, but the lesser of two evils.

4.3 The Right to lodge complaints and to file for compensation

The Human Rights Committee, when discussing the prohibition of torture in Article 7 of the ICCPR, pointed out that if it is read with Article 2(3), it is clear that State Parties have an obligation to create effective remedies for aggrieved persons as provided for in the Compilation of General Comments of the UN.¹⁵ This note refers specifically to article 7 of ICCPR, but the right to lodge a complaint against maltreatment is also recognized by other treaties. The Human Rights Committee has on several occasions expressed concern whenever it was found that countries did not have effective remedies available to victims of torture.

The remedies should include not only a remedy while the victim is tortured, but also a remedy for compensation. One of the concerns when Namibia reported to the Committee Against Torture was an absence of 'legal instruments to deal specifically with compensating victims of torture or other ill-treatments'¹⁶

The mentioned Handbook on Human Rights by the High Commissioner for Human Rights and the International Bar Association (hereafter The Handbook), points out that the Committee against Torture, stated that CAT, does not make provision for State Parties to grant amnesty to persons accused of torture. In the same vein, the Human Rights Commission (since replaced by the Human Rights Council) has stated that *"amnesty are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not happen in the future"*.¹⁷

This can, however, never be an absolute prohibition to grant torture perpetrators amnesty. In South Africa the Truth and Reconciliation Commission played an important role in the process of reconciliation and nation building. However, the process was doomed to fail if those who testified and revealed their own participation in human rights violations were going to be prosecuted on the ground of their testimonies. Nobody or at least only a limited number of perpetrators would have come forward.¹⁸

Although Namibia did not create a legal framework specifically for victims of torture, several civil cases served before the courts in cases related to what can be described as torture related. A good example is to be found in the Annual Report of the Legal Assistance Centre (hereafter LAC), where the Centre stated that the bulk of their work in for the year was taken up by the so-called Caprivi-cases. The LAC acted on behalf of 134 men who were before Court on counts of high treason and related offences. The LAC reported further that they acted with success on behalf of some accused who were tortured and illegally detained.¹⁹ The downside however was the fact that no one responsible for or participated in the torturous acts were charged or even internally brought before a disciplinary trial.

The reason for not prosecuting anyone was possibly not taken by the police or the military. Nakuta and Cloete points out that although the police dockets related to investigations against the police

¹⁵ Human Right Committee of the United Nations Organisation. *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies: 05/12/2004. HRI/GEN/1/Rev.7. (General Comments)*. New York: General Comment No 20

¹⁶ Committee Against Torture. 1997. *Initial Report of Namibia*, p. 36.

¹⁷ Handbook, p. 321.

¹⁸ Namibia was not prepared to open the issue of disappeared persons in exile, recommended by the Committee Against Torture at Namibia's Report to the Committee. Given the colonial history of Namibia and the enforcement of South Africa's apartheid laws during the illegal occupation of South Africa, the Namibian government was possibly right to start on a fresh page after independence.

¹⁹ See Legal Assistance Centre. 2000. *Constitutional and Human Rights Unit Annual Report*. Windhoek: LAC, available at <http://www.lac.org.na/projects/huricon/Pdf/rep2000.pdf>

and the Defence Force members were initially sent to the legal advisor of the Defence Force, after a public outcry he sent it to the Prosecutor-General.²⁰

4.4 Conclusion

Namibia ratified all the important torture-related treaties in the first ten years of its independence. However, some of the challenges pointed out by the Committee Against Torture are still not met:

- Namibia still does not have an Act as recommended by the Committee;
- There are no regulations or other legislation to ensure that complainants can lay charges if they are tortured or receive cruel, inhuman or degrading treatment;
- Perpetrators of torture are seldom if ever prosecuted; and
- There is no independent body within or outside the police to deal exclusively with investigations of contraventions of CAT.

The treason trial was a serious challenge for Namibia's commitment to its ratification of human rights treaties related to torture and the government's ability and commitment to accept its responsibilities under the ICCPR, CAT, the ACHPR and other treaties related to torture.

Nakuta and Cloete commented on the arrests and claims of torture:²¹

Accusations of torture and abuse of police powers were particularly rife in 1999 when the police, assisted by members of the National Defence Force rounded up and tortured members of the Caprivi Liberation Army during a failed succession uprising. The actions of the police and the army were widely condemned by both national and international human rights organisation, notably the LAC, the National Society for Human Rights and Amnesty international. Namibia is a state party to ICCPR, the African Charter on Human and Peoples Rights and the United Nations Convention Against Torture (sic).²²

However, although no legislation was passed to deal with compensation claims against the State for torture related acts of the police or Defence Force, the civil remedies of the Namibian legal system served torture victims well and several of them succeeded in compensation claims against the State.

In the absence of anti-torture legislation, Nakuta and Cloete nevertheless found that several police officers were charged with the lesser crimes of assault with the intent to do grievous bodily harm and assault.²³

In line with the recommendations of the Committee against Torture, while not mentioning the recommendations, the Namibian Supreme Court ruled that all forms of corporal punishment are considered to be cruel, inhuman and derogating treatment and against article 8 of the Constitution.²⁴

FOOD FOR THOUGHT

1. Why, in your view, do you think the Namibian government is so slow to introduce a Torture Act?
2. There are several models for a unit to deal with complaints of torture. The real question is, however, should it be part of the police (and a similar unit in the Defence Force), or do you prefer an independent body.
 - a. If you opt for in-house units, why? What are the advantages and disadvantages?
 - b. If you opt for an independent body, who should supervise over it? Why?

²⁰ Ibid.

²¹ Nakuta, J, assisted by Cloete, V. Date not mentioned, possibly 2011. *The Justice System and the Rule of Law in Namibia: The Criminal Justice System*. Windhoek: NID available at <http://www.unam.edu.na/wp-content/uploads/2014/10/Criminal-Justice-Book-Final-26-05-11.pdf>, p. 14

²² They possibly refer to CAT here.

²³ Nakuta and Cloete, *supra*, notes 33 and 34.

²⁴ Ex Parte: Attorney-General In Re: Constitutional Relationship Between Attorney-General and the Prosecutor-General (SA 7/93) [1995] NASC 1; 1995 (8) BCLR 1070

CHAPTER 5:

THE ROLE OF THE POLICE IN THE PREVENTION OF TORTURE

OBJECTIVE

- To sensitize the trainees about the role that the police can play in preventing all forms of torture

5.1 Introduction

"A person arrested and detained should be safer in custody than on the street"

Remark by the Inspector-General of the Namibian Police, Lt-General Ndeitunga at the media launch of the Torture Prevention Project on 19 May 2015

The primary responsibility for public safety and public order is vested in the Namibian Police as established by the Namibian Constitution and regulated by the Namibian Police Act, Act 19 of 1990.

The Namibian Constitution provides the basis and foundational values for police work in Namibia. In terms of Article 117 of the Namibian Constitution *"There shall be established by Act of Parliament a Namibian Police Force with prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order."*

The Namibian Police Force was thus established by the Police Act 1990 (Act No 19 of 1990, as amended)

In terms of Section 13 of its establishing Act, the functions of the Force shall be –

- (a) the preservation of the internal security of Namibia;
- (b) the maintenance of law and order;
- (c) the investigation of any offence or alleged offence;
- (d) the prevention of crime; and
- (e) the protection of life and property.

Police officers need to be conscience of all legal aspects of their work. In the pre-constitutional period it was custom for the police to lock up people under the influence of alcohol who are a nuisance at a public place or wanted to drive a motor vehicle. The idea may be to protect the person against himself/herself and protect society at the same time (a type of preventative detention) . But this is no longer tenable in a democratic society. Not only can the person be assaulted in the cells, he/she may die of a natural cause while under police custody. And the public may see it as an act of supporting and encouraging people to break the law. The rule should always be that any person can only be detained once he/she has been legally arrested and his/her rights have been read.

The same principle applies to illegal interrogation methods. Torture is internationally forbidden and in terms of Namibia's commitment to the principle of seeing torture as a non-derogable human rights offence, the armed forces, including the police, has a duty to root this out.

5.2. Vision, mission and values of the Namibian Police Force

The vision of the Namibian Police Force is:
"To protect and serve all people in Namibia"

The mission of the Namibian Police Force is:
"To render the necessary quality service, as laid down in the police act, with due consideration for the fundamental human rights and freedoms, without compromising in upholding the tenets of law and order, safety and security of all persons"

The values of the Namibian Police Force are:

- *to deliver quality services;*
- *to uphold the principles of the rule of law, national commitment and unwavering patriotism;*
- *to respect the Supreme Law of the Republic of Namibia; and*
- *to be accountable to the nation and the community we are serving.*

The Namibian Police not only has the above legal duties flowing from these commitments, but the law provides adequate powers to enable the police to execute their functions and duties and provides for sanction against those who obstruct the police in the execution of their duties. The Namibian Police must always uphold the basic rights and freedoms, while maintaining law and order and investigating offences.

This requires Members of the Namibian Police to always be conscious of individual rights, but to act positively and firmly when required. The maintenance of law and order and bringing wrongdoers to justice are foundation stones of a stable, democratic society. The Namibian Police must balance a person's rights on the one hand and the protection of the public through the administration of justice, on the other hand.

A breach by police of Article 8(2) (b) on torture or cruel, inhuman or degrading treatment or punishment, will result in the exclusion of evidence gained in this manner at trial (see Chapter 7 hereunder). This is expressly provided for in Article 12(1) (f) of the Constitution.

It is the duty of the Police to determine the spirit of each of the basic rights and freedoms. Members must avoid rigid or literal interpretation of these laws; this will assure individuals the full measure of basic rights. The question must always be whether they have been fair, rather than whether they have done the minimum necessary under the law.

The Namibian Police as an institution is an organ and/or an agency of Government and therefore has the constitutional duty to respect and uphold the fundamental right and freedoms of the citizens of Namibia.

5.3 The Southern African Regional Police Chiefs Co-operation Organization (SARPCCO) Code of Conduct of Police Officers

The Southern African Regional Police Chiefs Co-operation Organization (SARPCCO) at their 6th Annual General Meeting held in Mauritius from 27 to 31 August 2001, approved a Code of Conduct for police officials. This code of Conduct is binding on all Police Forces/Services within the Southern African Region and Police Officers servicing in these Forces/Services are required to uphold and enforce this conduct.

5.3.1 Respect for Human Life:

Article 1

Respect for Human Rights: In the performance of their duties, police officials shall respect and protect human dignity and maintain and uphold all human rights, including property rights, of all persons.

Article 2

Non-discrimination: Police officials shall treat all persons fairly and equally and avoid any form of discrimination.

Article 3

Use of Force: Police officials may only use force when strictly necessary and to the extent required for the performance of their duties adhering to national legislation and practices.

Article 4

Torture, Cruel, Inhuman or Degrading Treatment: No police official under any circumstances, shall inflict, instigate or tolerate any act of torture or cruel, inhuman degrading treatment or punishment to any person.

Article 5

Protection of Persons in Custody: Police officials shall ensure the protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

Article 6

Victims of Crime: All victims of crime shall be treated with compassion and respect. Police officials shall ensure that proper and prompt aid is provided where necessary.

Article 7

Respect for the Rule of Law and Code of Conduct: Police officials shall respect and uphold the rule of law and the code of conduct. They shall also, to the best of their capability, prevent and rigorously oppose any violation of them.

Article 8

Trustworthiness: The public demands that the integrity of police officials be above reproach. Police officials shall, therefore, behave in a trustworthy manner and avoid any conduct that might compromise integrity and thus undercut the public confidence in a Police Force/ Service.

Article 9

Corruption and Abuse of Power: Police officials shall not commit or attempt to commit any act of corruption or abuse power. They shall rigorously oppose and combat all such acts. Police officials shall not accept any gifts, presents, subscriptions, favours, gratuities or promises that could be interpreted as seeking to cause the police officials to refrain from performing official responsibilities honestly and within the law.

5.3.2 Service Excellence:

Article 10

Performance of Duties: Police officials shall at all times fulfill the duties imposed upon them by law, in a manner consistent with the high degree of responsibilities and integrity required by their profession.

Article 11

Professional Conduct: Police officials shall ensure that they treat all persons in a courteous manner and that their conduct is exemplary and consistent with the demands of the profession and the public they serve.

Article 12

Confidentiality: Matters of a confidential nature in the possession of police officials shall be kept confidential, unless the performance of duty and need of justice strictly require otherwise.

5.3.3 Respect for Property Rights:

Article 13

Property Rights: In the performance of their duties police officials shall respect and protect all property rights. This includes the economical use of public resources.

5.4 Prevention of Torture during Arrest

Arrest constitutes one of the most drastic infringements of the rights of an individual. Arbitrary arrests which deprive an individual of his/her liberty on improper grounds or without proper procedure open the door for torture, disappearances and other forms of abuses. It is therefore important to ensure that arrests are affected within the legal framework. Article 11(1) of the Constitution states that no person shall be subjected to arbitrary arrest and detention and as such, the rules laid down in the Constitution, the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and other legislation concerning the circumstances when a person may be arrested and how such person should be treated, must strictly be adhered to.

The Operational²⁵ Manual used by the Police sets the benchmark and objective of an arrest and it is stated that, as a general rule, the object of an arrest must be to secure the attendance of a person at his or her trial.

Furthermore, a member may not arrest a person in order to punish, scare, or harass such person.



***Wounds inflicted during an arrest
(the person complained to the Ombudsman)***

²⁵ Manual OPERATIONAL Chapter Title POLICE RESPONSIBILITIES Chapter No. 2 "OPS" - 75 2002-12-02

5.5. Prevention of Torture during Interrogation

It is not against the law to interrogate a person who is in police custody, provided that he/she has been warned of his/her rights. If an arrested person wants to make a confession, the best option is to take him/her to a Magistrate. In terms of the Criminal Procedure Act, Act 51 of 1977, only an officer of peace can take down a confession. While commissioned officers are usually officers of peace, in the light of the weight carried by a confession in Namibian Courts, it is not desirable for the police to play a double role: the investigator and the peace officer who has to take down the confession.

Similarly, if a police officer, especially a non-commissioned officer, takes down a warning statement, and the person starts making a confession, he/she should stop the proceedings and take the person to an officer of peace, preferably a Magistrate to take down the confession.

If a person alleged that he/she has been assaulted, tortured or subjected to cruel, inhuman and degrading treatment or punishment, the officer taking down the statement, must put it in the warning statement, and take the person to the police charge office or to the officer at the station dealing with complaints against the police, to lay a criminal charge.

In the case of *S v. Michael Matroos* 1992 NR, the accused, a police officer at the time, was charged with torturing a suspect to death. The High Court in this case felt bound to order custodial sentence in order to emphasize the strong disapproval of the Court.

5.6 Prevention of Torture during Detention

5.6.1 Introduction:

Detention refers to the physical deprivation of a person's freedom. The Constitution prohibits arbitrary detentions²⁶ and all detainees shall be treated humanely and with respect for their inherent human dignity.

The police are, through law, entrusted with certain powers to detain persons and to determine when a detainee or prisoner eats, sleeps, baths, come out of their cells, sees a doctor/nurse and receive visitors, amongst others. This authority (power) is likely to be abused and misused, and this is why there is a need to control, guard and monitor how those entrusted with this power, use it.

5.6.2 What Rights do Detainees have?

Prisoners/detainees enjoy the same human rights as individuals in the community except the right to liberty and the authorities have an obligation to ensure that the rights of the detained are protected wherever they are held. The rights that are most likely to be violated and which can result in possible instances of torture and other ill-treatment can be listed as follows:

- Right to an adequate standard of living - this includes adequate food and drinking water, housing (accommodation), clothing and bedding.
- Health Rights of Prisoners (detainees) - this includes health screening for all new detainees, the right to health care, healthy conditions in custody, specialist health care,

²⁶ Article 11(a)

- hygiene and exercise.
- Right to safe places of detention - this entails security, good order, control and discipline; Right to meet with Legal Counsel.

5.6.3 How should the rights of detainees be protected?

i. Notify arrested persons of their rights

Everyone deprived of liberty has the right to be given a reason for the arrest and detention. Article 9(2) of the ICCPR states that: *"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for arrest and shall be informed promptly of any charges against him."*

Article 11(2) of the Namibian Constitution states that: *"No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest."* The information conveyed to the arrested person should be sufficient to understand the exact charges and should not only be the alleged offence like e.g. theft or fraud.

ii. Use officially recognized places of detention and maintain effective custody records

The Human Rights Committee²⁷ has stated that *"to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends."*

In terms of Section 15 of the Correctional Services Act, Act 9 of 2012, the Minister may by notice in the Gazette -

- establish correctional facilities throughout Namibia for the reception, detention, confinement, rehabilitation, training or discipline of persons sentenced to imprisonment or detention in custody;
- declare any place, building or enclosure or part thereof to be a correctional facility for the purposes of this Act;
- rename any such correctional facility; and declare any such correctional facility or part thereof closed.

The Namibian Police Force Operational Manual, Chapter 5 on Prisoners, outlines the procedure to be followed when a person is arrested. It provides, *inter alia*, for the proper record keeping of all persons in police custody. The keeping of records is essential to keep members in charge of detentions accountable and to guard against torture.

iii. Avoid incommunicado detention

International standards do not expressly prohibit incommunicado detention (where a detainee is denied all contact with the outside world). However, international standards provide and expert bodies have maintained, that restrictions and delays in granting detainees access to a doctor and lawyer and to having someone notified about their detention are permitted only in very exceptional circumstances for very short periods of time.

²⁷ General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1. at 30 para. 11

In Namibia, detained persons shall be permitted to contact legal counsel and a relative or friend as soon as possible after detention.²⁸ In terms of the Criminal Procedure Act of Namibia,²⁹ an accused who is arrested, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest. A detainee must thus be given an opportunity to contact legal counsel and to be provided with an opportunity to consult such legal representative.

iv. Detainees with mental health problems

The Standard Minimum Rules for the Treatment of Prisoners also state that people with mental health problems shall not be detained in prisons and *"shall be observed and treated in specialized institutions under medical management."*

It is imperative that detainees with mental illnesses are not detained in the normal police holding cells; they should be admitted to an observation institute as soon as possible and they should receive timeous medical attention. If this is not possible, they should be detained separate from other inmates.

v. Humane conditions of detention

A detainee has the right to be detained under conditions that are consistent with human dignity.

The Human Rights Committee³⁰ has stated that the duty to treat detainees with respect for their inherent dignity is a basic standard of universal application. States are obliged to provide all detainees and prisoners with services that will satisfy their essential needs. Failure to provide adequate food and recreational facilities constitutes a violation of Article 10 of the ICCPR, unless there are exceptional circumstances.

McNAB AND OTHERS v MINISTER OF HOME AFFAIRS NO AND OTHERS 2007 (2) NR 531

The plaintiffs (McNab and Others) had been arrested without a warrant in terms of s 40(1) (b) of the Criminal Procedure Act 51 of 1977 and had been kept in custody. They were taken to Court at the earliest opportunity. The plaintiffs claimed damages for unlawful arrest and detention in terms of the common law, alternatively, in terms of the Constitution, particularly Articles 7, 8, 11 and 21(1) (g) thereof. It appeared that they had been kept in appalling conditions in the holding cells which were very dirty and teeming with insects. The basis of their claim was that the arresting officers had not proved that they had had a reasonable suspicion when the arrest was effected, since a statement of a private individual (Mr Erasmus) had been used as the basis of the alleged reasonable suspicion and the plaintiffs disputed the admissibility of such statement. Regarding the alternative claim based on the Constitution, they submitted that they had been deprived of their liberty by arbitrary arrest and that they had been subjected to cruel, inhuman and degrading treatment and that their freedom of movement had been curtailed.

The Court held that having regard to all the evidence, it was satisfied that the police had in fact had a reasonable suspicion. The Court also held, further, that the fact that the plaintiffs had been brought before a court within the prescribed 48 hours had resulted in the subsequent detention

²⁸ Police Operational Manual, Chapter 5 - Standing Orders

²⁹ Section 71(1)

³⁰ In the matter of Kelly v Jamaica, (253/1987), 8 April 1991, Report of the Human Rights Committee (A/46/40)

being lawful and thus the defendants had discharged the onus of proving the lawfulness of the arrest.

The Court found that as to the alleged violation of Art 7 of the Constitution, i.e. deprivation of personal liberty, that there was no substance in this allegation: s 40 of the Criminal Procedure Act clearly establishes the procedure by which a police officer may arrest a person without a warrant and the Court had already found that the police officers had complied with the requirements prescribed by s 40; they had established on a balance of probabilities that they had had a reasonable suspicion that the plaintiffs had committed a Schedule 1 offence, and it was on that basis that they proceeded to arrest the plaintiffs.

Held, further, as to the cruel, inhuman and degrading treatment, that the plaintiffs had not suggested that the police officers had treated them badly, but the Court could take judicial notice of the squalid conditions prevailing in the holding cells.

Held, further, that in terms of Art 12(1) (d) of the Constitution an arrested person was presumed to be innocent until proven guilty: after the arrest the arrested person retained all his or her fundamental rights, including their right to human dignity; it was inhuman for an arrested person to be locked up in a confined cell with about 40 other persons; it was inhuman to lock up a person in a cell infested with cockroaches and lice; this amounted to degrading treatment.

Held, further, that the conditions in the holding cells in which the plaintiffs were detained were inhuman and degrading and therefore unlawful in that they violated the plaintiffs' constitutional right to human dignity.

vi. Detention Period

In terms of Article 11(2) of the Constitution and s 50 of the Criminal Procedure Act, Act 51 of 1977, a person may be detained for a maximum period of 48 hours. Only a Court can authorise further detention after 48 hours have expired. Although detention for 48 hours is authorised by s 50, this does not mean that the police have to detain someone for the full 48 hours. In general persons should be brought before a court as soon as possible after arrest.

If no reasonable grounds for a charge can be found within these 48 hours, the person must be released.

*In Graces v Lana Fouche*³¹ the Court ruled that an accused can even bring an application for bail at any time within the 48 hours period following his arrest. And he is not limited to bringing such an application during normal court hours. In a case of real urgency he can bring it outside such hours and if the public prosecutor refuses to attend the magistrate should conduct an enquiry and obtain all necessary information from the arresting/investigating police officer.

³¹ 1997 NR 278 (HC)

SHEEHAMA v MINISTER OF SAFETY AND SECURITY AND OTHERS 2011 (1) NR 294 (HC)

The applicant was arrested and detained on 14 February 2011. He was brought before a magistrate on 17 February 2011. He brought an application for his release. The Court held that Art 11(3) of the Constitution, which stipulated that a person who was detained had to be brought before a magistrate within 48 hours, was peremptory. The Court accordingly held that the applicant was an aggrieved person in terms of art 25(3) of the Constitution and ordered his immediate release.

MINIISTER OF SAFETY AND SECURITY v KABOTANA 2014 (2) NR 305 (SC)

The crux of this case relates to the rights of arrested and detained persons and particularly the right to be brought before Court within 48 hours after arrest in terms of the provisions of Art 11(3) of the Constitution. The further question that was decided on was the issue of whether it was 'reasonably possible' to bring a person before Court within 48 hours and this issue must be judged on the prevailing circumstances.

The respondent (Kabotana) was arrested by the Namibian Police in the aftermath of an armed attack in and around the town of Katima Mulilo with the apparent purpose of achieving secession of the region of Caprivi (now called Zambezi Region) from the Republic of Namibia. Following the attack, a state of emergency was declared by the President of Namibia to contain the public emergency. The emergency regulations adopted by the President suspended, amongst others, Art 11(3) of the Namibian Constitution with the result that during the state of emergency, security forces could lawfully detain arrested persons for longer than the prescribed period of 48 hours before they were brought to Court. The state of emergency was lifted on 26 August 1999. The evidence established that after the state of emergency was lifted, the Namibian Police and other security services conducted what were referred to as 'mopping up' operations in the region. A number of suspects and potential witnesses were rounded up in those operations and processed through the Katima Mulilo Police Station. At that time, a small group of six detectives was responsible for the arrest, interrogation and processing of suspects at the Katima Mulilo Police Station. This was a small group of detectives given the seriousness and the size of the task they had to perform. The evidence showed that the team worked under severe pressure.

The respondent was arrested during the morning of Wednesday, 1 September 1999, and was detained at Katima Mulilo Police Station from 15h49. He was arrested together with five other suspects. In the early hours of the following morning, 2 September 1999, the group of detectives was called to an area outside Katima Mulilo where security forces had encountered suspected rebels and more arrests were made that day. Consequently, the detectives were able to attend to the administrative work of processing persons arrested on 1 and 2 September only on Friday, 3 September 1999. They spent the whole day on Friday 'processing' the arrested persons. According to the evidence, the 'processing' of a suspect involved interviewing and taking a warning statement from him or her before he or she was taken to Court. The police evidence established that the purpose of this process was to determine which of the suspects should be charged and which should be released. Many suspects were released during the process and never taken to Court. The respondent's warning statement was taken from him at around 15h10 on Friday, 3 September 1999. However, the record also shows that when the respondent and other suspects were taken to Court there was no magistrate or prosecutor available. The respondent and about 15 other

suspects were eventually transported to Grootfontein where they appeared before Court on Monday, 6 September 1999.

The High Court found that the rights of the Respondent was infringed and thus ordered compensation and the Applicant appealed the case.

The Appeal Court held that Article 11(3) is an aspect of the fundamental right to liberty guaranteed by Art 7 of the Constitution. The right to be brought before a Court within 48 hours is undoubtedly an important constitutional right accorded to arrested persons and although one cannot but be sympathetic to the plight of the small team of detectives that was faced with the enormous responsibility of processing large numbers of arrested persons and on the facts of this case, given the importance of the constitutional right in question, the police team processing the suspects could easily have made prior arrangements with Court officials to ensure that there was a presiding officer available to postpone the cases in the late afternoon when they took the suspects to Court.

The appeal was dismissed and the order of the High Court was confirmed in that the Respondent was in unlawful detention and he was awarded compensation in the amount of N\$12 000 with interest at a rate of 20% per annum.

CHAPTER 6:

OVERSIGHT MECHANISMS

OBJECTIVE

- To sensitize the trainees about the role of oversight mechanisms in preventing all forms of torture

6.1 Introduction

In the context of protecting exercising access to fundamental rights, it is important that mechanisms be readily available to access such protection.

6.2 The Judiciary

Article 5 of the Namibian Constitution provides for the duty to protect the fundamental rights and freedoms. It reads: *"The fundamental rights and freedoms enshrined in Chapter 3 shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of Government and its agencies and where applicable to them, by all natural and legal persons in Namibia and shall be enforceable by the Courts."*

The Judiciary therefore plays the most important role in the enforcement and protection of human rights.

Article 78 of the Namibian Constitution provides that -

- (1) the judicial power shall be vested in the Courts of Namibia, which shall consist of:
 - (a) a Supreme Court of Namibia;
 - (b) a High Court of Namibia;
 - (c) Lower Courts of Namibia.
- (2) the Courts shall be independent and subject only to this Constitution and the law;
- (3) no member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law;
- (4) the Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, including the power to regulate their own procedures and to make court rules for that purpose.

With respect to (4), the Supreme Court of South West Africa (pre-independence) was required to

pronounce itself as the guardian of human rights in the matter of **Katofa v Administrator General for South West Africa and Another 1985(4) SA 211 (SWA)** where Berker J (as he was then) used very specific human rights language when he said the following:

"... the present case concerned the liberty of the subject. As such, it involved the infringement of a fundamental right and it was of necessity one of urgency", and he further stated that every individual "is entitled to ask the Court for his release, and the Court is bound to grant it, unless there is some legal cause for his detention"

Both the Supreme Court and the High Court also demonstrated that it is indeed a guardian of human rights in the matter of **S v Scholtz 1998 NR 207 (SC) at 216 H-I** where it was said that:

"What, however, has happened is that the law has undergone some metamorphosis or transformation and some of the principles of criminal procedure in the Criminal Procedure Act are now rights entrenched in a justifiable bill of rights. That is, in my view, the essence of their inclusion in art 12 of the Constitution. Any person whose rights have been infringed or threatened can now approach a competent court and ask for the enforcement of his right to a fair trial"

6.3 The Ombudsman

The Ombudsman Institution is a constitutional office, created by the Ombudsman Act, no 7 of 1990 as an independent office, subject only to the Constitution and the law. Being a creature of statute, the Ombudsman is obliged to comply with its statutory duties. In terms of both the Constitution and the Ombudsman Act, and in addition to the examination of administrative conduct by an official or any government organ, the Ombudsman has the mandate to investigate complaints of human rights infringement by both government officials and private persons and institutions, complaints against administrative organs, the defence force, police and correctional service relating to failure to achieve a balance structure of service or equal access by all to the recruitment of, or fair administration in relation to such services.

6.3.1 Promotion of Human Rights

Neither the Constitution, nor the Ombudsman Act (no 7 of 1990), places an expressed duty on The Ombudsman to promote human rights; however, it is considered as an assumed duty flowing from the mandate. Through its work the Ombudsman becomes the institution for the general promotion and protection of human rights.

In fulfillment of its duty to promote human rights, the Ombudsman does public awareness raising through the printed and electronic media, outreach activities (including visiting schools and rural communities), publications; distribution of pamphlets and brochures and conducting training workshops and conferences.

6.3.2 Protection of Human Rights

Investigating human rights abuses is central to the protection role of the Ombudsman. Section 3(1) of the Ombudsman Act requires of the Ombudsman "to enquire into and investigate complaints concerning alleged or apparent or threatened instances or matters of violations or infringements of fundamental rights and freedoms". The Ombudsman usually

receive complaints in person, telephonically and in writing (letters received through the post office, e-mails and faxes), but one also received complaints directly during regular visits to institutions such as prisons, police cells and hospital/mental institutions as well as during our annual complaint intake programmes, covering the whole country, including rural areas.

COMPLAINT SUBMITTED TO THE OMBUDSMAN

On 17 April 2015 the Ombudsman received a telephone call from person detained at the Katutura Police Station alleging to have been assaulted by members of the Serious Crime Unit.

A visit was paid to the complainant and the Ombudsman investigator detected injuries on the hands of the complainant as a result of handcuffs that were too tight; the complainant indicated that in his opinion it was done deliberately to cause him physical pain.

The complainant was advised by the investigator to open an assault case and the police officers were requested to take the complainant to hospital for consultation and medication, since we were informed that the complainant had not been taken to hospital despite his requests in this regard. However, when the investigator made a follow up visit on 29 April 2015, he found that the complainant had still not been taken to hospital; only after the matter was taken up with one of the police Commanders was the person taken to hospital. He was further advised to file criminal charges against the Police Officer/s.



6.4 The Police Internal Investigation Directorate

The Internal Investigation Directorate within the Namibian Police Force was created to receive and investigate alleged offences committed by the Police, including allegations of human rights violations.

6.5 Parliament

Parliament and the Ombudsman should work together to ensure that prevention of torture education is sufficiently incorporated in the training of police, military and correctional officers.

When it comes to human rights promotion and protection, parliaments and Members of Parliament are essential actors; parliamentary activity as a whole – legislating, adopting the budget and overseeing the executive branch – covers the entire spectrum of civil, political, economic, social and cultural rights and thus has an immediate impact on the enjoyment of human rights by people. As the State institution which represents the people and through which they participate in the management of public affairs, Parliament is indeed a guardian of human rights.

FOOD FOR THOUGHT

- Should we not revisit guided investigations, where prosecutors become more active in investigations?
- Should we not consider to properly investigate a case before interrogating suspects?
- Should Station and Unit Commanders not issue a directive that the interrogation process be supervised by themselves?

CHAPTER 7:

IMPORTANCE OF OBSERVING HUMAN RIGHTS PRINCIPLES

OBJECTIVE

- To sensitize the trainees on the effects of non-compliance/non-observance of human rights standards and the need for compliance

7.1 Introduction

Torture has not been criminalized in Namibia, although the Convention requires that all State Parties are expected to criminalize same. The prosecutorial authority has always opted to prosecute for assault with the intent to cause grievous bodily harm. At first sight, this seems to be a perfect solution since assault with the intent to do grievous bodily harm is a serious offence, and the presiding magistrate or judge can impose a reasonably long prison sentence if the assault caused serious injuries.

However, the definitions of the two crimes are totally different. While torture often constitutes a physical attack, it is not always the case. The European Union guidelines for police officers include actions that do not even require that the body of the victim be touched. Long periods of interrogation while a suspect is not allowed to sit down; is deprived of sleep, food or water; playing loud music and shining bright lights while a victim is sleeping – all these constitute torture, but do not comply with the elements of assault. The best an accused can hope for once he/she is brought before court after an interrogation that constituted psychological torture, is that any confession of admission made will be declared unconstitutional and inadmissible as evidence. Under Namibian law, the innocent victim of psychological torture will not be able to lay a charge against his/her torturer and the torturer will never be held accountable for his/her actions in a criminal court.

7.2 International Implications

7.2.1 Sanctions:

Working positively or negatively, sanctions provide inducements or threats to the offenders to encourage compliance. Sanctions are imposed on either a multilateral or unilateral basis; multilateral sanctions are considered more legitimate and more effective by the international community.

7.2.2 Exclusion from participation in Human Rights Council:

Countries that observe human rights principles are elected to serve on the Human Rights Council. If there are grave violations, countries will not be afforded this opportunity to partake and be members of the Human Rights Council. Namibia was elected as a member of the Human Rights Council in 2014.

7.3 National Implications

7.3.1 Criminal Proceedings:

(i) Importance of due process

The primary function or goal of a criminal justice system is not merely to secure the conviction of an accused but to ensure that a conviction takes place in terms of a procedure which duly and properly acknowledges the rights of an accused at every critical stage during pre-trial, trial and post-trial proceedings.

Chapter 3 of the Namibian Constitution both demands and guarantees due process and places constitutional limitations upon official power. Evidence, however relevant and persuasive it might be, should in principle be excluded where the admission of such evidence would undermine the value system created and guaranteed by a Constitution.

ii. Criminal Procedure Act, Act 51 of 1977

Section 217 Admissibility of confession by accused

- (1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided -
 - (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and
 - (b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question -
 - (i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and
 - (ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having

been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

- (2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection (1).
- (3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him -
 - (a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and
 - (b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.

Section 218 Admissibility of facts discovered by means of inadmissible confession

- (1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.
- (2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

Section 219 Confession not admissible against another

No confession made by any person shall be admissible as evidence against another person.

Section 219A Admissibility of admission by accused

- (1) Evidence of any admission made extra judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained -

- (a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such a person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and
 - (b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.
- (2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).

Section 220 Admissions

An accused or his legal adviser may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

The cases below illustrates the consequences if evidence is not obtained through a due and diligent process.

The State v Haufiku (CC 16/2012) [2013] NAHCNLD 49 (24 September 2013)

The accused objected to the admissibility of verbal admissions he allegedly made on the ground that his constitutional right to a fair trial has been violated. The police officer's evidence in respect of the circumstances was not corroborated by entries in the occurrence book and the court accepted the account of the accused testimony which was probable and corroborated by entries in the occurrence book. The admitted failure to explain the accused's right to legal aid led to the exclusion of the warning statement. The accused objected to the admission of the confession on the ground that he was assaulted by three police officers.

The warning statement as well as the confession recorded an injury to the ear of the accused. The magistrate merely recorded that the accused informed him that he was assaulted by a police officer and he did not further enquire into the circumstances of the assault or the circumstances which led to the accused wanting to make a confession.

The Court held that the State failed to prove the requirements for the admission of the confession.

In S v Malumo and others (2) 2007 (1) NR 198 HC Hoff, J considered a suspect not to be in a different position to an accused.

The Court held that the police had been under a duty to inform the accused of his constitutional rights and to warn him in terms of the Judges' Rules before questioning him.

This would include informing the accused about his right to legal representation, the right to be presumed innocent, the right to remain silent and the right against self-incrimination.

The State v Gariseb and Another (CC 16/2012) [2013] NAHCMD 25 (30 January 2013)

Both accused persons were charged with two counts namely: Murder and housebreaking with intent to rob and robbery with aggravating circumstances. Each accused made an admission of pointing out and a confession. The court held a trial-within-a-trial after the defence objected to the production of the statements on the grounds that the statements were not made freely and voluntarily. Both Counsels contended further that the accused persons were not properly informed of their rights to legal representation including the right to apply for legal aid.

Held: The State bears the onus of proof to prove that the admissions or confessions made by the accused persons were made freely and voluntarily without undue influence. The standard of proof required is that of beyond a reasonable doubt. The state should also prove that the accused made those admissions when he was in his sober and sound senses. In addition, the court must be satisfied that the rights of the accused persons had been adequately explained, including the right of accused to apply for legal aid. A failure to do so may render the statement to be inadmissible.

Held: The admissibility of confessions should meet the requirements of section 217 of Act 51 of 1977 and admissibility of admissions should meet the requirements of section 218 of the same Act.

Held: Article 12 of the Namibian Constitution provides for rights concerning a fair trial - Article 12 (1) (f) in particular provides for the right against self-incrimination and the right to have evidence obtained in violation of Article 8 (2) (b) to be excluded. A police officer who took a statement for an accused person proceeded to take a confession despite the fact that the accused was assaulted during his arrest. The accused gave a statement about five days from the time of his arrest. Assault marks were visible. The statement cannot be said to be free and voluntary, the possibility that accused was still instilled with fear cannot be excluded.

Held: Although the police officers who took statements explained the right to legal representation, they have failed to explain to the accused the right to apply for legal aid. Although the Constitution did not provide expressly or specifically for the right to apply for legal aid, Article 12 provides for a fair trial which includes the right to legal representation and the right against self incrimination. Failure to explain rights to apply for legal aid may render the statements to be inadmissible. The statements were taken in violation of Article 12 of the Constitution and the confessions and admissions are ruled to be inadmissible.

7.4 Institutional Implications

Should Members of the Police Force commit any human rights violation, such a member could be subjected to inter alia disciplinary proceedings. It is therefore important, that members acquaint themselves with the extent of their powers and the extent of limitation in exercising their powers to ensure that they operate within the confines of the law.

7.4.1 Civil Claims - Personal and Institutional

An aggrieved person may institute a civil claim against any member of the Force for a human rights violation. Such a member may be held accountable in his personal capacity but the Institution to which the member is attached, may be cited as a Party and hence also be responsible to compensate the aggrieved person (See Engelbrecht case above)

In an occasional paper on Human Rights and police Crawshaw *et al*³² made the following recommendation on holding superior officers responsible for actions of subordinates:

The UN Code of Conduct for Law Enforcement Officials is silent on this important matter, but this deficiency is remedied to some extent by the terms of another UN instrument. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which build on the Code, embody a provision which states:

"Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use". (Principle 24)

In other words, the authors suggest that although the important *UN Code of Conduct for Law Enforcement Officials* is silent on the issue, one can use another UN instrument, *The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* to hold of senior officers responsible for illegal actions of their subordinates. Holding superior officers responsible for torturous acts of their subordinates, the authors concluded, "is a reasonable and satisfactory way of expressing the notion of command or supervisory responsibility ... applicable to situations in which detainees are subjected to torture or ill-treatment..."

7.4.2 Disciplinary Charges

Disciplinary hearings are obviously not the answer to combat a serious crime such as torture. However, as long as the police do not develop a culture to open criminal cases against members involved in torture or even assault with the intent to do grievous bodily harm, we will not see progress in holding offenders responsible.

The disciplinary committee can get a broad mandate to ensure that convicted offenders will not get away with a warning or a small fine. Disciplinary hearings can be the first step towards an eventual inclusion of a section dealing with the responsibility of the law enforcement agencies in a future Torture Act.

32 Crawshaw, R, Devlin, B and Williamson, T. 1998. *Human Rights Policing. Standards for Good Behaviour and Strategy for Change*. London: Kluwer Law.

Section 18(1) Of the Police Act states that a member who is accused of misconduct may be charged by the Inspector-General.

Regulation 15 of the Namibian Police Force Regulations also provides for offences against duty and discipline and this includes any form of misconduct.

Regulation 15(h)(ii) states that a member shall be guilty of misconduct if he/she uses force/violence against any prisoner/other person.

If one therefore considers the implications of violating the rights of others, when you are attached to the Force, it is advisable to rather adhere to the rules than to be charged with misconduct that has consequences for the member and ultimately his family.

7.5 Conclusion

The total eradication of torture related acts is dependent on a conviction that it is the right thing to do. Torture as an interrogating tool can be attracted to investigating officers since it does not take time and delivers results. Even those who will never think of using torture as a interrogating technique, find it difficult to report a colleague, who like most dedicated officers, only wants to do his/her work as a police officer at the best of his/her abilities.

However, the possibility that senior officers may be held responsible for the actions of others may create a sense of responsibility for the deeds of others. Structures to monitor not only the police, but also medical practitioners, psychologists, psychiatrists and other health workers given the research of Grodin and Annas,³³ will prevent that a successful monitor tool loose its value.

33 Grodin, M and Annas, G. 2007. Physicians and Toture: lessons from Nazi doctors, in *National Review of the Red Cross*, Vol. 89, no867, September 2007, p. 635 on p. 650

ANNEXURE 1

THE DEVELOPMENT OF THE PREVENTION OF TORTURE

PROF NICO HORN

Introduction

Torture as an integral part of ancient legal systems can be traced back to the pre-medieval period. Several of the early civilizations used torture both as a method to obtain confessions and other information, and sometimes as punishment.

With the development of legal systems based on rules, the relationship between torture and truth was raised. However, during the Inquisition period, where the church played a major role in using torture as a method to obtain confessions, the clergy depended on honour and faith to counter the problem. If a person is really innocent, so the theory goes, he/she will not confess. The honour and faith of the victim will help him/her to endure the pain rather than making a false confession. And the innocent tortured can also rely on the protection of Almighty God.

The influence of the Church and the role of religion in society, contributed to the inclusion of torture in the legal system of Europe. The Church was initially reluctant to approve of torture during interrogation. Pope Innocent III prohibited ordeals – including torture – to obtain confessions and names of other “heretics” during his time as the head of the Church.

The 13th century was a time of religious awakening in many parts of the empire and the Catholic Church felt both threatened by the popularity of the ‘heretical’ movements and concerned that the flock may be lead astray. Consequently, in 1252 Pope Innocent IV proclaimed a Papal Bull (a binding Papal Proclamation) authorizing torture as a method to obtain confessions. While torture was also allowed as punishment for convicted heretics, it was not prevalent. Historians set the number of religious convicts who received torturous sentences at less than 2%.

The Reformation brought an end to the Inquisition, but not the end of torture. This time around the intolerance came from the new majority religion of some parts of Europe. And again, the heretics – now the Anabaptists – paid the price. Many Anabaptists suffered torture and drowning under the hands of Protestants. In areas where the Protestant Reformers gained control, torture prevailed, both as an interrogating tool and a punishment for heresy.

While scholars have traditionally linked the abandonment of torture to a new tolerance that developed as a result of the Reformation and the Enlightenment, John Langbein made us aware of the role that the development of law of evidence played in the process.³⁴ Initially an accused in a murder case had to be acquitted if the State did not have *full evidence* against him/her. Full evidence meant a confession in court, even if the judge was sure that all other evidence points to the guilt of the accused. Around the seventeenth century, judges were allowed to find accused guilty without a confession, provided that he also gives a milder punishment. This led to a stronger reliance on collecting and evaluating evidence, and eventually to the abandonment of judicial torture. Langbein calls it an *internal, “juristic” event*. Philosophers, religion and the ideals of the French and American revolutions

34 Langbein, J. 1977. *Torture and the Law of Proof: Europe and England in the Ancient Regime*. Chicago and London: University of Chicago Press.

played a role in the process of abandoning torture, but according to Langbein law of evidence were at the heart of the legal process to abandon torture.

The mere replacement of Catholicism with Protestantism did not end the torture and killing of what the new religion believe to be heretical. Montesquieu tells a story of a "Jew accused of having blasphemed against the Virgin Mary, and upon conviction was condemned to be flayed alive. A strange spectacle was then exhibited: gentlemen masked, with knives in their hands, mounted the scaffold, and drove away the executioner, in order to be the avengers themselves of the honour of the blessed Virgin."³⁵

However, although torture was no longer an evidential imperative, it took a while longer before the legal systems of Europe and the United Kingdom abandoned torture, especially as punishment. The eighteenth and nineteenth century brought an end to superstition and the belief in the power of witchcraft as important factors in criminal justice. Enlightenment philosophers such as Montesquieu, Voltaire and more specifically the Italian Cesare Beccaria prepared the way for legal systems based on reliable evidence rather than forced confessions.

Even Napoleon Bonaparte complained to Major-General Berthier in Egypt about "the barbarous custom of whipping men suspected of having important secrets to reveal must be abolished. It has always been recognized that this method of interrogation, by putting men to the torture, is useless. The wretches say whatever comes into their heads and whatever they think one wants to believe. Consequently, the Commander-in-Chief forbids the use of a method which is contrary to reason and humanity".³⁶

The nineteenth century brought an end to the discretionary powers of judges both in England and on the Continent. Rules of evidence developed exclusionary rules for evidence obtained by using questionable methods. Judges were expected to weigh evidence and determine its value on the grounds of probable truth.

By the end of the nineteenth century torture as an interrogation tool and as punishment almost disappeared from the legal systems in Continental Europe, Britain and the United States. It was, however maintained by the Britain and European countries in their colonies.

In the 20th century totalitarian states once again legalized torture, amongst others Russia after the Revolution in 1917, Germany during the reign of Hitler in his National Socialist State, Mussolini's Italy and Franco's fascist regime in Spain. Closer to home the South African government, while never legalizing torture, turned a blind eye to the special police units and the security forces' use of torture to intimidate the local population and to obtain information. And the reputations of the liberation movements were tainted by testimonies of torture to obtain confessions in the camps in exile.

Latin American authoritarian states such as Pinochet's government in Chile, the military government in Argentina and the authoritarian states of Uruguay and Paraguay, to mention a few, were known to use torture techniques during the cold war against left wing opponents.

In the 20th century torture also became a tool of oppression and even genocide The French colonial authorities' torturous action in Algeria is well-documented and caused the death of many Algerians. After the break-up of Yugoslavia and the subsequent ethnic wars in the Balkan, torture was no longer limited to punishment for crime or to obtain evidence, but as a weapon against ethnic "enemies". The

35 Montesquieu, Charles de Secondat, Baron de, "The severity of Criminal Law", in *The Portable Enlightenment Reader*, edited and with an introduction by Isaac Kramnick (New York: Penguin Books, 1995), 520 quoted by Hoggard, K. On Crime, Punishment, and Reform of the Criminal Justice System, in *Athene Noctua: Undergraduate Philosophy Journal* Issue No. 1 (Spring 2013), p. 2.

36 Boltzmann Institute of Human Rights, *Atlas of Torture*, 2009. History of the Prohibition of Torture and Torture Methods, published at <http://www.univie.ac.at/bimtor/prohibitionoftortureandilltreatment/355>, last accessed on 1 August 2015.

genocide and ethnic cleansing in the Balkan were characterized by inhuman torture of civilians, the elderly and children. . The Namibian Herero/Nama genocide ninety years earlier was possibly the first example of extensive use of torture by the military against civilians with the objective to exterminate a whole nation.

The ultimate revival of torture as an interrogation tool in a modern justice system in a democratic state came from the United States after the 9/11 terrorist attack on the Twin Towers in New York. Suspects were sent to Guantánamo Bay where the prisoners were subjected to torture methods unthinkable in a democracy at the beginning of the 20th century. Examples of executive decisions to allow torture abound during the Bush presidency.³⁷ In May 2015 five psychologists released a report claiming that the "American Psychological Association (A.P.A.) of secretly collaborating with the US Government under former President George W. Bush to enable the authorities to argue that their 'enhanced interrogation methods' programme in the 'War on Terror' did not constitute torture."³⁸

The Atlas of Torture website makes the following comment on the present state of removing torture from the practices and customs of legal systems in the 21st century:

Today, the use of torture for the purpose of extracting a confession has continued to be routine practice in many countries around the world, even though torture and ill-treatment are absolutely prohibited under international law. Recent discussions about the fight against global terrorism have revealed new techniques of coercive interrogation amounting to torture, together with new attempts to justify the use of torture under certain circumstances.

³⁷ See Center for Constitutional Rights. 2006. *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, New York: CFCR. The Report quotes a declaration by the President that the Geneva Convention do not apply to Guantánamo Bay prisoners, that it is beyond the jurisdiction of federal courts, that the President can authorise any interrogation technique, even if contrary to domestic statutes against torture. The list goes on.

³⁸ Atlas of Torture. 2015. *United States: The American Psychological Association allegedly cooperated with the Bush administration to justify torture methods available at <http://www.univie.ac.at/bimtor/news/1776>*, last accessed on 3 August 2015.

CONVENTION AGAINST TORTURE and Other Cruel, Inhuman or Degrading Treatment or Punishment

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

Part I

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. 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.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - a. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - b. When the alleged offender is a national of that State;
 - c. When the victim was a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in Paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in Article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify

the States referred to in Article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found, shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offenses. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested state.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and

practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States

Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.
6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that
 - a. Six members shall constitute a quorum;
 - b. Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The State Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement of the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 above.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of this Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on

- any new measures taken, and such other reports as the Committee may request.
2. The Secretary-General shall transmit the reports to all States Parties.
 3. [Each report shall be considered by the Committee which may make such comments or suggestions on the report as it considers appropriate, and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
 4. The Committee may, at its discretion, decide to include any comments or suggestions made by it in accordance with paragraph 3, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1.]

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this Article 3 that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
 - a. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, references to domestic procedures and remedies taken, pending, or available in the matter.

- b. If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee by notice given to the Committee and to the other State.
- c. The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
- d. The Committee shall hold closed meetings when examining communications under this article.
- e. Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in the present Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission.
- f. In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information.
- g. The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing.
- h. The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report.
 - i.) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached.
 - ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

- 2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

- 1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.
- 2. The Committee shall consider inadmissible any communication under this article which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communication submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communication from an individual under this article unless it has ascertained that:
 - a. The same matter has not been, and is not being examined under another procedure of international investigation or settlement;
 - b. The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit parties thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 23

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on missions for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

Part III

Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the

Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in Article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the State Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which

the denunciation becomes effective. Nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all members of the United Nations and all States which have signed this Convention or acceded to it, of the following particulars:

1. Signatures, ratifications and accessions under Articles 25 and 26;
2. The date of entry into force of this Convention under Article 27, and the date of the entry into force of any amendments under Article 29;
3. Denunciations under Article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

On February 4, 1985, the Convention was opened for signature at United Nations Headquarters in New York.

Concluding Remarks

Concluding Remarks

An extract of the remarks made by Lt-Gen Ndeitunga on 19 May 2015 at the launch of the Prevention of Torture Project

"One of the primary functions of the Namibian Police Force is to protect life and property. It is therefore absolutely disheartening to hear of incidents where police officers are accused of torture or cruel, inhuman or degrading treatment of citizens.

Through this project we hope to ensure that police officers of all ranks and files are sensitized on what constitutes torture and how it can be prevented. In compliance with Art 10 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, we want to ensure that education and information regarding the prohibition is more comprehensively included in the training of police officers who may be involved in arrest, detention, interrogation or treatment of members of the public.

The Namibian Police Force strives to be a professional Force, serving the public with integrity, accountability, fairness and dignity. We want to further strengthen the public's trust and confidence in the Namibian Police Force."

Lt-Gen S Ndeitunga

Inspector-General: Namibian Police Force

Notes

[illegible]