ACKNOWLEDGEMENTS

This manual incorporates substantial extracts from Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police, published by the United Nations. Other sections of Human Rights and Law Enforcement have been adapted to conform to the Namibian situation and incorporated in this manual. The following sections in particular are either extracts from this work, or adapted from the corresponding sections in Human Rights and Law Enforcement:

- chapter objectives and essential principles at the beginning of each chapter;
- most of the introductions and conclusions to each chapter;
- chapter 1 (effective training techniques);
- most of the exercises and topics for discussion at the end of each chapter;
- the section on the management of confidential informants in chapter 5 (criminal investigations);
- the sections on interviewing techniques and on control measures at the start of and during detention in chapter 7 (detention).

Some of the exercises and topics for discussion have been extracted from Ralph Crawshaw, Human Rights Training: Special Volume for Law Enforcement Officials, published by the Commonwealth Secretariat. It has not been possible to acknowledge these sources by using footnotes, because this would have been inappropriate in a publication of this nature.

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Clinton Light
August 1999
CITATION OF LAW REPORTS AND ABBREVIATIONS

The citation of law reports and statutes is unavoidable, but has been kept to a minimum to make the text more readable. A case reference is made up of a number of parts. For example, the reference to S v Acheson 1991 NR 1 (HC); 1991 (2) SA 805 (Nm) can be understood as follows:

- **S v Acheson:** The name of the case. “S” is an abbreviation for “State”, which indicates that the case is a criminal prosecution.

- **1991 NR 1 (HC); 1991 (2) SA 805 (Nm):** This will differ, depending on the law report, but generally the first number will be the date, the second number (if any) will refer to a volume, the letters to a particular law report, the number to a page number and the final letters in brackets to the court, in this case the High Court of Namibia. This case is reported in both the Namibian Law Reports and the South African Law Reports and therefore both references are given.

The following abbreviations for law reports are used in the text:

- **All ER** All England Reports
- **BCLR** Butterworths Constitutional Law Reports (South Africa)
- **CRR** Canadian Rights Reporter
- **NR** Namibian Law Reports
- **PH** Prentice Hall (South Africa)
- **R & N** Rhodesia and Nyasaland Reports
- **SA** South African Law Reports
- **US** United States Supreme Court Reporter

The name of a judge who delivered the judgment in a case is often given. For example Mahomed AJA delivered the judgment in Acheson’s case. The abbreviation after the judge’s surname reflects the status of the judge, as follows:

- **J** Judge
- **AJ** Acting Judge i.e. a judge appointed for a period of time
- **JP** Judge President (in Namibia, the head of the High Court)
- **AJP** Acting Judge President
- **JA** Judge of Appeal i.e. a judge sitting in an appeal court, such as the Supreme Court of Namibia or the Appellate Division (South Africa), now the Supreme Court of Appeals
- **AJA** Acting Judge of Appeal
- **CJ** Chief Justice
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CHAPTER 1

EFFECTIVE TRAINING TECHNIQUES

A. Introduction

It is important that training be directed not only at the transfer of information, but at changing the attitudes and therefore the behaviour of participants. Trainers are likely to encounter some resistance from participants to the idea of policing based on the application of human rights standards. Resistance or opposition, whether expressed or not, may take the form of one or more of the following statements:

- observing human rights in policing is all very well in theory, but it does not work in practice;
- observing human rights in policing hinders the police in the execution of their duties;
- criminals do not follow rules, why should we?
- only a criminal has human rights, what about a police officer or a victim?

The purpose of this Manual is to respond to these criticisms and to provide trainers with the information to prepare courses that are meaningful for participants and that are relevant to the everyday work of the participants.

B. Learning objectives

The objectives of the trainer are to facilitate satisfaction of the needs of the trainee. That being the case, three basic learning objectives form the foundation of this programme and mirror the following three educational needs of participants in all police training programmes:

- To receive information and develop knowledge - on what human rights and humanitarian standards are, and what they mean;

- To acquire or reinforce skills - so that the functions of the Namibian Police and the duties of members can be fulfilled effectively with due respect for human rights. Simple knowledge of standards is not enough to enable police to transfer those rules into appropriate operational behaviour. The acquisition of skills is to be viewed as a process, as skills are fine-tuned through practice and application. This process may therefore need to be continued, in the light of training needs identified in specific areas of police work, through further training programmes;

- To become sensitised, i.e. to undergo a change in (negative) or to reinforce (positive) attitudes and hence behaviour - so that law
enforcement officials accept, or continue to accept, the need to promote and protect human rights, and actually do so in the course of their duties. The subjects here are the values of the law enforcement officer. This, too, is a long-term process to be reinforced by further training and by appropriate command and management practices.

Thus effective training will aim to improve:

knowledge

+ skills

+ attitudes

to contribute to:

appropriate behaviour

C. The participatory method

The effectiveness of the participatory method is summarised by an old Persian proverb:

Tell me – I forget

Show me – I remember

Involve me – I understand

For maximum effect, the following principles should be applied so as to ensure the maximum participation by trainees in training programmes:

Interactive - This programme implies the use of a participatory, interactive training method. Police, like other adult training audiences, most readily absorb course curricula when they are not spoon-fed the material. Rather, for effective training, the trainees should be fully involved in the process. As practitioners, trainees will bring to the course a rich pool of experience, which must be actively drawn on to make an interesting and effective course.

Flexible - Contrary to certain myths associated with police training, it is not advisable to adopt a "military" approach and order trainees to participate. The result of such techniques is, more often than not, resentment among trainees and, consequently, the closing of avenues of communication between trainer and trainee. While a certain level of control should be maintained by the trainer, the first rule should be flexibility. Questions, even challenges, from the audience should be welcomed, and should be addressed by trainers in a positive and forthright manner. Similarly, excessively rigid timekeeping can leave participants feeling frustrated and resentful.
Adult learning is most effective when the participants are involved in defining their learning objectives. The trainer should therefore at the outset ask participants what expectations they have of the workshop and what information they require from the process.

**Relevant** - The unspoken question of the trainee throughout the course will be: "What does this have to do with my daily work?" The extent to which trainers continuously answer this question will be an important factor in their success. Every effort must therefore be made to ensure that all material presented is relevant to the work of the audience, and that such relevance is made clear where it is not self-evident. This task may be easier when addressing operational themes, such as arrest or the use of firearms. It may require more careful planning, however, for more topical themes, such as non-discrimination and policing or policing and the rights of women.

**Varied** - To secure and retain the active engagement of participants, it is best to vary the teaching techniques used throughout the course. Most police are not accustomed to long classroom sessions, and a tedious and monotonous routine will leave them more conscious of the classroom than of the subject-matter. A varied selection of techniques should be used, alternating discussion with role-playing, and case-studies with brainstorming, as appropriate to the subject matter.

Broadly speaking, therefore, the following methods and approaches should be adopted:

**Presentation of standards** - a short presentation on the human rights and humanitarian standards relative to an aspect of policing, and on the implications of these for policing. Trainers should try and restrict the length of the presentation to about 15 – 20 minutes or try to break up the presentation with short exercises as discussed below;

**Application of participatory techniques** - enables participants to use their knowledge and experience of policing to translate ideas and concepts expressed in the presentation into practice; and also enables them to consider the practical implications of human rights and humanitarian standards for their day-to-day policing activities;

**Focus and flexibility** - enables participants to focus on matters of real and current concern; and enables educators and trainers to adapt to participants' needs as the course progresses.

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**D. Participatory techniques**

A selection of participatory techniques are outlined below:

1. **Presentation and discussion**
Following a presentation (as described above), an informal discussion is useful to clarify points and facilitate the process of translating ideas into practice. Such discussions are conducted by the presenter, who should try to involve all participants. It is useful for presenters to have a prepared series of questions available to initiate the discussion.

At the conclusion of the presentation and discussion, the presenter should provide an overview or summary. Presenters should supplement the lecture portion with the use of pre-prepared visual aids or study materials distributed in advance to all participants.

2. **Visual aids**

Studies indicate that learners are able to recall best experiences (such as role plays or simulations); then what is heard and seen; and least of all information which is only heard. The traditional lecture format should therefore be supplemented by various visual aids.

Audio-visual aids such as blackboards, overhead transparencies, posters, displayed objects, flip charts (useful for making notes during report backs from groups), photographs, slides and videos/films can be used.

3. **Working groups**

A course may be divided into a number of small groups of five or six participants. Each group is given a topic to discuss, a problem to solve or something concrete to produce, within a short time period of up to 50 minutes. A facilitator may, where necessary, be assigned to each group. The main group is then reconvened and the results of the deliberations of each group are presented by a spokesperson for the group.

The course participants may then discuss the topics and the response of each group. The presenter should allow course participants to answer the questions or to debate the answers given by a group, rather than immediately indicating that an answer is correct or incorrect.

4. **Case-studies**

In addition to dealing with discussion topics, working groups may consider case studies. These should be based on credible and realistic scenarios which are not too complex and which focus on two or three main issues. Case studies should require participants to exercise their policing skills in responding to them, and to apply human rights and humanitarian standards. Senior law enforcement officials should be required to exercise command and management skills.

The scenario for a case-study can be presented to participants for consideration by them in its entirety, or "fed" to them sequentially as a developing situation (the "evolving hypothesis") to which they have to respond.
5. **Problem-solving / brainstorming**

These sessions can be conducted as intensive exercises to seek solutions to problems which are both theoretical and practical. They require a problem to be analysed and then solutions to be developed. Brainstorming encourages and requires a high degree of participation and it stimulates those involved to maximum creativity.

Following presentation of the problem, all ideas in response to it are recorded on a board or flip chart. All responses are recorded, no explanations are required, and no interventions are judged or rejected at this stage. The presenter then categorises and analyses the responses, at which stage some are combined, adapted or rejected. Finally, the group makes recommendations and takes decisions on the problem. The learning or sensitisation process occurs as a result of the group discussion on each suggestion.

6. **Simulation / role-playing**

These exercises require participants to perform a task or tasks in a realistic situation simulating "real life". In the context of human rights and law enforcement, simulation or role-playing exercises may be used to practice a skill or to enable participants to experience situations until now unfamiliar to them.

A written factual situation is distributed in advance, and each participant is allocated a particular role (the police officer, the victim, the witness, the judge, etc.). During the exercise, no one is allowed to leave his or her assigned role for any reason. This technique is particularly valuable for sensitising participants to the feelings and perspectives of other groups, and to the importance of certain issues.

7. **Field trips**

Group visits to relevant institutions or locations (a police station, a refugee camp etc.) can provide valuable perspective. The purpose of the visit should be explained in advance, and participants should be instructed to pay critical attention and to record their observations for a subsequent discussion.

8. **Practical exercises**

These involve the assignment of trainees to apply and demonstrate particular professional skills in a supervised procedure. Police may be required to draft human rights standing orders on a particular aspect of police work. Police trainers may be assigned to draft a lesson plan, or to deliver a session in the course itself.

9. **Panel discussion**

The formation of a panel of presenters or experts, possibly following a presentation by one or more of them, has frequently been shown to be a useful training device. Such an approach is particularly effective when presenters have expertise in different aspects of a topic, because of their professional backgrounds or countries
of origin. Ideally, human rights experts should be included together with experts in police practice and police training.

One presenter should act as facilitator, to enable the widest possible participation, to ensure that participants' needs are met, and to provide an overview or summary at the conclusion of the discussion. This method should include direct exchanges between panel members themselves, and between the panel and the audience.

10. Round-table discussions

Round-table discussions, like panel discussions, need a diverse group of resource persons, representing a variety of perspectives on the subject to be addressed. An animated discussion is the goal, and the crucial elements are a strong and dynamic moderator, skilled both in the subject-matter and in the techniques of devil's advocate (in other words, adopting a position only to stimulate debate), and the use of the hypothetical. The moderator should be intentionally provocative, stimulating debate between and among the panellists and the audience, and should control the course of the discussion.

E. Locations for training courses

Ideally, the following conditions should be met in respect of the location for a training course:

(a) Courses should be held in a location away from the normal place of work of the participants.

(b) The room used for a course should be of sufficient size for the number of people it is intended to accommodate.

(c) There should be a sufficient number of small rooms near to the main room or appropriate outside areas to accommodate working groups, so that participants may focus without interruption on their assigned topics.

(d) Seating facilities should be comfortable and flexible, allowing chairs, desks and tables to be moved to accommodate various training techniques.

F. Workshop organisation

The following general guidelines should be taken into account when organising a workshop:

(a) It is probably advisable to select participants so that there is not a wide difference in ranks. Having persons from widely differing ranks may inhibit or limit discussion and debate. Junior ranks may feel inhibited in the presence of more senior ranks. A person from a more senior rank may feel threatened or insulted by a comment or criticism made by a person from a more junior rank.
(b) Try to strike a balance between the number of men and women.

(c) While not essential and not always possible, it may be most productive to train persons who perform broadly similar tasks or have similar job experience together. For example, a person who performs managerial functions would have different expectations than an operational person. Similarly, a recruit would have different training needs than a member with ten years’ experience. Training members who perform the same or similar functions together, for example detectives or members of specialised units, also means that the training programme can be adapted to cater for the particular needs of the group.

(d) Workshops should ideally be organised during working hours.

(e) Allow sufficient time for the workshop. Otherwise, participants are likely to only receive information, which will be quickly forgotten, and their behaviour and attitudes will not be affected.

(f) Workshops should be started by the completion by participants of a brief needs assessment form so that the trainer can attempt to fulfil the training needs of the participants. Questions such as the following can be asked:

- What kind of work do you do (or job classification)?
- Why do you want to attend this course?
- What are your expectations from the training and do you have any particular issues that you would wish to be addressed during the training?
- Have you received any similar training in the past?

(g) An ideal working day, that is excluding lunch and rest breaks, is approximately six to seven hours. It may be difficult for participants to concentrate and therefore absorb information if the day is much longer.

(h) The daily programme should include a 15-minute refreshment/rest break at mid-morning, a lunch break of at least one hour, and a 15-minute refreshment/rest break at mid-afternoon.

(i) Allow for participants, between scheduled breaks, to stand and stretch occasionally. Two or three minutes is sufficient for this, at appropriate intervals, perhaps twice a day.

(j) Avoid difficult subjects at the end of the morning or afternoon.

(k) Where possible, provide water or other drinks in the classroom.
G. Using this Manual

The manual can be sub-divided into the following three broad areas:

- **fundamental concepts** - chapter 2 (human rights and policing), chapter 3 (ethical standards in policing) and chapter 4 (non-discrimination and policing);

- **police duties and functions** - chapter 5 (criminal investigations), chapter 6 (arrest), chapter 7 (detention), chapter 8 (entry, search and seizure) and chapter 9 (use of force and firearms);

- **groups requiring special treatment or protection (vulnerable groups)** - chapter 10 (law enforcement and the protection of juveniles), chapter 11 (policing and the rights of women) and chapter 12 (protection of the victims of crime).

Any training course should include coverage of the fundamental concepts, to be used as an introduction to other topics. This is necessary to ensure that course participants understand the basic issues related to human rights and policing before continuing to discuss the application of human rights standards to specific police duties and functions. It is also an important part of the process of changing attitudes and behaviour.

The depth and extent to which the material should be covered will depend on the target group. Trainers should have an in-depth knowledge of the subject matter and be able to communicate that knowledge to other members. Supervisory officers should understand the theory and be able to apply that knowledge in a wider sense than “street level” members. Training for members performing day-to-day policing tasks should focus on practical issues, so that any knowledge acquired is mostly directly relevant to their work.

It is possible to devise a training programme which is specifically targeted at the training needs of particular groups, by combining some chapters with others. For example, a course which is directed at training detectives would focus particularly on chapters 5 (criminal investigations), 6 (arrest), 7 (detention) and 8 (entry, search and seizure). Traffic officers, for example, would have less need for in-depth training in some of these areas.

The chapters dealing with groups requiring special treatment or protection should not be disregarded as unimportant to “real” police work. These chapters raise important issues for law enforcement and should form part of any basic training course.
CHAPTER 2

HUMAN RIGHTS AND POLICING

Chapter objectives

To give members an understanding of the historical background of human rights and an introduction to the human rights standards contained in the Namibian Constitution and international treaties, declarations, codes of conduct, principles and rules, which are relevant to policing.

Essential principles

Every organ of Government, including the Namibian Police, is required to respect and uphold the fundamental rights and freedoms in chapter 3 of the Constitution.

Every member of the Namibian Police, is therefore required to respect and uphold the fundamental rights and freedoms in chapter 3 of the Constitution.

International human rights treaties form part of the law of Namibia.

National and international human rights standards should be known and applied by all members of the Namibian Police.

Information for presentations

What are human rights?

Human rights are rights enjoyed by every person because they are human beings.

Other rights can be acquired and lost. For example a person may buy a house and so become the owner of the house. The right of ownership means that the person can do what he or she wants to do with the house, subject of course to the law. The person may live in the house or rent the house, donate it to someone else, leave the house to someone in a will, sell the house etc.

A human right does not have to be acquired and cannot be lost or taken away. The right to liberty may be restricted lawfully by arrest or imprisonment, but the person’s right to liberty as such will be unaffected. The person will not however be able to exercise that right while in lawful detention.

An example of a human right is the right to life. Article 6 of the Constitution provides that:

“The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No court or tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.”
Any person who has been sentenced to death by a court in Namibia may claim his/her right to life under article 6. The right may therefore be claimed by any person when his/her right to life is threatened, infringed (affected) or violated.

**Human rights apply to everyone**

In general, human rights may be claimed by any person. There is no such thing as excluding persons from having human rights because they have done something terrible.

Even a person who has violated other persons' human rights, by genocide, rape, murder or torture is entitled to his/her human rights. The person is entitled to all the minimum human right standards such as the right to be presumed innocent until convicted following a fair trial and the right to be detained under humane conditions.

This does not mean that society is powerless or condones what the person has done. Society is entitled to defend itself against these persons, by convicting and punishing them for the crimes they have committed, but only after a fair trial.

The other important aspect to human rights is that the rights apply to all persons without discrimination. The rich and the poor; the powerful and the powerless; men and women; children and adults are all entitled to human rights.

It is possible though that there may be some distinctions between persons. For example, a child of six does not have the right to marry because only men and women of “full age” have the right to marry and to found a family under article 14(1) of the Constitution. A child nevertheless has most of the rights guaranteed in the Constitution.

**Human rights must be respected by everyone**

Every organ or part of the Namibian government, Parliament and the courts are required to respect and uphold all the fundamental human rights referred to in chapter 3 of the Constitution. Parliament may not pass any law which takes away any of the rights included in chapter 3. The government, any part of it or any member of it, including members of the Namibian Police which is an organ of government, may not take any action which takes away or infringes any of the rights included in chapter 3.

It will usually be the State that affects or takes away the human rights of the individual. For example, a police officer may arrest a person and so deprive that person of his or her right to liberty. Yet, article 5 of the Constitution also requires all natural and legal persons (an example of a legal person is a company) in Namibia to respect and uphold these human rights, “where applicable to them.”

For example, a bar or a hotel that refuses to admit persons on the basis of their colour will be violating a person’s human right under article 10(2) of the Constitution not to be discriminated against on the basis of race, colour or ethnic origin.

**How are human rights enforced?**
Human rights would have little value if they could not be enforced effectively. A person whose human right has been violated must be able to enforce that right. A human rights violator should also be required to change his/her practices, so that rights are not continually violated.

Article 25 of the Constitution gives any person who claims that a right or freedom guaranteed by the Constitution has been infringed or threatened, the right to apply to the High Court to enforce or protect the right or freedom. The High Court has various legal powers to ensure that a right that has been infringed is protected, including declaring a law to be unconstitutional and therefore of no effect and awarding monetary compensation for any damages suffered.

What is a “right” and a “freedom”

Chapter three of the Constitution refers to fundamental rights and freedoms. One way of understanding the difference between a right and a freedom is:

- a right means that the state must intervene when necessary to protect a person when he or she exercises the right. For example, article 14(3) of the Constitution provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”;

- a freedom means that the state must not intervene or interfere when an individual exercises the freedom. For example, article 21(1)(a) of the Constitution guarantees that every person has the right to freedom of speech and expression.

Another way of looking at a right and a freedom is to say that there really is no difference (in most or all cases), but they are different ways of expressing the same concept. For example, a person’s freedom from torture is also the person’s right not to be tortured.

A short history of human rights

Modern human rights developed as a result of the Second World War. During this war, what we today call human rights were violated on a global scale. Crimes against humanity, such as mass murder, genocide, extermination, enslavement and deportation were committed against civilians by Nazi Germany and by Japan. Millions of people were murdered in Nazi-occupied Europe, particularly Jews.

One of the responses of the international community after the Second World War was to establish the United Nations in 1945. Most states, including Namibia, belong to the United Nations. The Charter of the United Nations (the document establishing the United Nations, similar to a constitution) specifically refers to human rights in its Preamble (the statement at the beginning of the Charter) and in six of its articles. For example, paragraph 3 of article 1 of the Charter refers to one of the purposes of the United Nations as:
“... promoting and encouraging respect for human rights and fundamental freedoms for all without distinction ..."

The Universal Declaration of Human Rights was the first international statement of human rights. It was adopted by the General Assembly of the United Nations in 1948. The Universal Declaration is really the “parent” of subsequent international treaties and also of the human rights contained in the Namibian Constitution.

The World has changed fundamentally since the adoption of the Universal Declaration of Human Rights. Human rights are claimed by individuals and groups in most countries of the World and in all regions of the World. Whether a country respects human rights is often a matter of international interest. The defence of an undemocratic government that concern about its human rights situation is interference in its internal affairs now sounds hollow and unconvincing. Governments that are democratic and that respect human rights have become the norm, or at least the standard used to measure good government. Africa has undergone fundamental changes in the last decade and democratic governments are becoming more common, even if the majority of countries are still not democratically governed.

It could also be said that democracy cannot exist without respect for human rights. Not only should citizens have the right to change their government on a regular basis, but they should also be free from arbitrary and repressive treatment from the democratically elected government.

**Domestic and international application of human rights**

The most important source of human rights in Namibia is chapter 3 of the Constitution. Namibia's constitution is among the most modern and advanced in the World. It reflects the provisions of the most important international treaties or conventions, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

International human rights treaties or conventions may also be binding on Namibia. An international agreement can be called a treaty, convention, charter or a covenant. The name is not important. A treaty can apply internationally i.e. any state in the world may adopt the treaty or it may apply regionally, for example only to African states. An example of the latter form of treaty is the African Charter on Human and Peoples’ Rights, which only applies to African states.

Treaties are signed by the President or his nominated representative. The treaty does not however becoming binding on Namibia until it is returned to the body that monitors the treaty, usually the United Nations. If a treaty has not yet been adopted by a sufficient number of states, then the country ratifies a treaty. Once the treaty has been adopted by a sufficient number of states so that it comes into operation, a country then accedes to a convention. The words used are not important. In most cases, Namibia has acceded to conventions, because Namibia only recently gained its independence.

Among the more important international treaties that are directly relevant to police work are the International Covenant on Civil and Political Rights and the Convention
against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment. The provisions of the International Covenant on Civil and Political Rights are similar or identical to a number of the provisions in chapter 3 of the Namibian Constitution. Namibia is also a party to the First Optional Protocol and the Second Optional Protocol to the International Covenant on Civil and Political Rights. The First Optional Protocol gives individuals the right to make communications (similar to bringing a legal case) to the Human Rights Committee in Geneva in respect of alleged violations of the Covenant. The Second Optional Protocol prohibits states from using the death penalty.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, requires Namibia to take effective legislative, administrative, judicial or other measures to prevent acts of torture and to compensate victims. Victims of torture must have an effective judicial remedy if they are subjected to torture. Evidence or statements obtained through torture must be excluded from evidence during trials. One of the measures required under the Convention is that law enforcement officials be educated about the Convention.

The Universal Declaration of Human Rights, together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, is often referred to as the International Bill of Rights. In other words, the Declaration and the two Covenants contain the basic human rights in all the various areas in which human rights apply i.e. civil and political, as well as economic, social and cultural rights. The International Covenant on Economic, Social and Cultural Rights protects, for example, the rights to work, to reasonable conditions of employment, to organise trade unions, to protection of families and children, to health, education etc.

Other conventions deal with specific areas. For example, the Convention on the Elimination of all Forms of Discrimination against Women, requires Namibia to take effective steps to remove discriminatory measures against women. The International Convention on the Elimination of All Forms of Racial Discrimination similarly requires Namibia to prohibit any form of racial discrimination.

The Convention on the Rights of the Child protects children’s rights. Particularly relevant to law enforcement are the provisions for the treatment of juveniles in trouble with the law.

Various conventions deal with the treatment of refugees. These conventions are the Convention relating to the Status of Refugees (1951), the Protocol to the Convention (1967) and the Convention Governing the Specific Aspects of Refugee Problems in Africa (20 June 1974). The latter convention only applies in African states. The most important principle of refugee law is that any person who seeks asylum in Namibia should not be returned to a country where the person has a well-founded fear that he/she may be persecuted on the grounds of race, religion, nationality, membership of a particular social group or political opinion. Every asylum seeker should be treated as such and referred as soon as possible to the Directorate of Refugee Administration in the Ministry of Home Affairs.
The Convention on the Prevention and Punishment of the Crime of Genocide prohibits any action directed at destroying a national, ethnic or religious group. Among other prohibitions it prohibits killing or causing serious bodily harm to members of any group.

The African Charter on Human and Peoples’ Rights only applies in Africa. Its provisions are similar to chapter 3 of the Namibian Constitution, but unfortunately often offer less protection to the victim than is available under the Constitution. This is because some of the provisions in the Charter contain substantial limitations of the rights, making the right almost worthless.

**An international treaty may be applied by Namibian courts**

An international treaty may become part of the law of Namibia. Article 144 of the Constitution provides that:

> “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.”

There are three necessary steps before a treaty or convention becomes binding on Namibia and forms part of the law of Namibia.

The President must first sign the treaty. The President has the power to negotiate and sign international agreements and may also delegate this power. See article 32(3)(e) of the Constitution.

Secondly, the signed treaty must be deposited with (in other words, returned to) the international body. In the case of the United Nations, which is usually the institution that initiates international treaties, the signed treaty must be deposited with the Secretary-General of the United Nations.

The treaty is now binding on Namibia under international law i.e. Namibia as a state is bound under the treaty to other states that are parties to the treaty to ensure that it complies with its obligations under the treaty. The treaty does not however form part of the law of Namibia i.e. the rights under the treaty cannot be enforced by persons in Namibia in the courts of Namibia.

Thirdly, the National Assembly must agree to the ratification or accession to an international agreement, which has been negotiated and signed by the President or the person to whom this power has been delegated. See article 63(2)(e) of the Constitution. Now the treaty is part of Namibian law and enforceable by Namibian courts.

The table at the end of this chapter indicates which human rights treaties and conventions Namibia has acceded to or ratified, and where known the date of agreement of the National Assembly to the accession or ratification.

**Principles, minimum rules and declarations**
It is probably correct that only the treaties formally ratified or adopted by Namibia are binding on Namibia. Yet, there are various principles, minimum rules and declarations in the field of law enforcement that are particularly detailed and therefore useful. It is suggested that these principles or rules should nevertheless be followed because they are the product of intensive negotiation and deliberation by representatives of countries and experts from these countries. They can be said to “represent statements of values shared by the major legal systems and cultures.” The rules etc. are also often more detailed and practical than international treaties. For example, a treaty (or a provision of the Constitution) may prohibit torture in general terms. The various rules or principles governing the treatment of prisoners however contain far more detailed and practical measures that can be used to prevent or minimise the use of torture.

Among the most important rules, principles, codes of conduct and declarations affecting law enforcement are the:

- Code of Conduct of Law Enforcement Officials;
- Basic Principles on the Use of Force and Firearms;
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- Standard Minimum Rules for the Treatment of Prisoners;
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty;
- Declaration on the Protection of All Persons from Enforced Disappearance;
- Principles on Extralegal, Arbitrary and Summary Executions.

**Conclusion**

As we have seen, human rights are guaranteed both at the domestic and the international level. Namibia’s Constitution contains the product of more than fifty years of work at the international level in the area of human rights. By incorporating these rights in chapter 3 of the Constitution, human rights are made directly applicable to all Namibians.
Human rights cannot therefore be dismissed as theoretical or unimportant. Every person is entitled to protection of his or her human rights. The courts of Namibia and every government agency (including the Namibian Police) are required to uphold the human rights of all persons. Human rights have an important impact on the work of members as will be seen in the following chapters.

It is suggested that members should not see human rights as hindering or impeding their work or as only protecting criminals. Human rights protect all persons. As will be seen in chapter 12, the victims of crimes also have human rights and members play a critical role in the protection of their rights as well. Human rights are neutral in the sense that upholding and protecting human rights does not mean that a person or a court condones or tolerates crime. Criminals must be detected, detained where necessary, brought to justice and then convicted and sentenced when found guilty. Protecting human rights in this context means that all persons’ rights are respected. Members must work within the law, including chapter 3 of the Constitution and may not violate the rights of any person. If a member violates a person’s rights he or she will also be a law breaker. This may have serious consequences for the successful prosecution of the accused and will be discussed in greater detail in the chapters that follow.

**Exercises and topics for discussion**

**Hypothetical exercise**

You have been designated as a police adviser to Namibia’s official delegation to a United Nations human rights conference. The conference is to develop a new international declaration on the protection of human rights, for submission to a United Nations body. As police adviser, and on the basis of your professional experience:

(a) Is there any particularly vulnerable group which you believe requires better protection under the international human rights system?

(b) Are there any particular law enforcement practices which you believe should be the subject of more stringent international control?

**Topics for discussion**

1. Article 2 of the UN Code of Conduct for Law Enforcement Officials states:

   "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

   It is the prime role of police to prevent and detect crime. Sometimes they have to confront determined and ruthless criminals, gather evidence against them, arrest them, and secure rightful conviction and imprisonment for the protection of society."
Is it placing a conflicting demand on investigative officers to require them to maintain and uphold the human rights of such persons?

If investigating officers feel that there is a conflict between detecting crime and protecting human rights, what can supervisory officers do to ensure that such conflict is resolved and that crime is detected and human rights protected?

2. Why should law enforcement officials concern themselves with Namibian and international human rights standards?

3. Can police violations of human rights make the work of law enforcement more difficult? How?

4. Why is the role of the Namibian Police so important in the protection of human rights?
### LIST OF INTERNATIONAL HUMAN RIGHTS TREATIES TO WHICH NAMIBIA HAS ACCEDED OR HAS RATIFIED

<table>
<thead>
<tr>
<th>Name of treaty</th>
<th>Date of accession or ratification</th>
<th>Date of agreement of National Assembly</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment</td>
<td>28 November 1994</td>
<td>6 October 1994</td>
</tr>
<tr>
<td>Convention Governing the Specific Aspects of Refugee Problems in Africa</td>
<td>Convention signed but not deposited</td>
<td>14 July 1994</td>
</tr>
<tr>
<td>Convention relating to the Status of Refugees (1951) and the Protocol (1967)</td>
<td>17 February 1995 - Protocol signed, but not deposited</td>
<td>14 July 1994</td>
</tr>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
<td>11 November 1982</td>
<td>-</td>
</tr>
<tr>
<td>International Convention on the Suppression and Punishment of the Crime of Apartheid</td>
<td>11 November 1982</td>
<td>-</td>
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<tr>
<td>International Covenant on Civil and Political Rights</td>
<td>28 November 1994</td>
<td>6 October 1994</td>
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CHAPTER 3

ETHICAL STANDARDS IN POLICING

Chapter objectives

To give members of the Namibian Police an understanding of ethical standards in policing, which are principally based on respecting and upholding the rights and freedoms in the Constitution and the laws of Namibia.

Essential principles

Members shall at all times respect and obey the provisions of the Constitution and all laws.

Respect for human dignity is the basis of all human rights.

Members shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

Members shall not commit any act of corruption. They shall rigorously oppose and combat all such acts.

Members shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Members shall report violations of the Constitution, laws and the Standing Orders to their superior authorities and, where necessary, to other appropriate authorities.

Information for presentations

Introduction

“Ethical” is defined in the Concise Oxford Dictionary as morally correct, honourable, moral principles and rules of conduct. Ethical standards in policing therefore refer both to legally based rules of conduct and to morally correct or honourable rules of conduct. “Moral” conduct includes legally correct conduct, but has a wider meaning. At times, something may be strictly legal, but morally wrong.

The first principle of ethical policing is that the Namibian Police and its members must obey and respect the law. One of the functions of the Namibian Police is to maintain law and order (section 13(a) of the Police Act). It is unthinkable for a law enforcement agency and its members to be law breakers. Statements such as “you have to break the law to catch law breakers” would be condoning unethical (and illegal) conduct to reach a desirable result. This is the sort of approach described in the famous statement, “the ends justify the means” i.e. a desired result justifies any method of reaching it. This kind of philosophy ignores the fact that the law enforcers are breaking the law in order to catch other persons who are breaking the law. In other words, members who break the law are little better than the persons they are
trying to bring to justice. Members would also then be guilty of abusing the authority which has been entrusted to them.

It would therefore be unethical for members to break the law, deny persons their legal rights or to abuse the authority given to them under the law.

Unethical conduct also includes dishonest and illegal activities which are directed at an unlawful purpose for the personal gain of a member. Examples of this include involvement in criminal activities, accepting bribes and defeating the ends of justice.

The principle that members of the Namibian Police must respect and obey the law means that no member is above the law or can act outside the law. In fact, every institution or person in Namibia is subject to the same law, no matter how rich or powerful. This is what is meant by the rule of law, which means that the country is governed only through laws and through legal conduct. Article 1 of the Constitution provides that:

“The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.”

For example, the President of Namibia swears an oath of office in terms of article 30 of the Constitution in which he undertakes to “uphold, protect and defend as the supreme law the Constitution of the Republic of Namibia, and faithfully to obey, execute and administer the laws of the Republic of Namibia.”

Members of the Namibian Police must therefore always comply with the provisions of:

- the Constitution, which takes precedence over any other law;
- any applicable law;
- any Standing Order.

The fundamental human rights and freedoms in the Constitution are specified in chapter three of the Constitution. The first article of this chapter (article 5), provides:

“The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.”

The Namibian Police is an organ of government established by section 2(1) of the Police Act. The Namibian Police and its members are under a duty to respect and uphold the human rights and freedoms which are specified in chapter three of the Constitution.

The second principle of ethical policing is that members should respect the dignity of the human person. Respect for human dignity is the basis for all human rights. The principle of respect for human dignity is to be found at the beginning of the Constitution, in the Preamble, which begins:
“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;”

and continues:

“Whereas we the people of Namibia ... desire to promote amongst all of us the dignity of the individual ...”

Article 8 of the Constitution is headed “respect for human dignity” and provides in sub-article 1 that:

“The dignity of all persons shall be inviolable.”

This is another way of saying that the dignity of any person shall not be violated.

As mentioned above, all members of the Namibian Police are required to respect and uphold the fundamental rights and freedoms in chapter three of the Constitution, including respect for the dignity of all persons.

Human rights is therefore not something alien and external to police work. The various human rights enjoyed by all persons in Namibia are specified in chapter three of the Constitution, which must be respected and upheld by every member of the Namibian Police.

Writers on the work of the police often mention the large amount of discretion enjoyed by police officials when dealing with day-to-day problems. Society and the community require police officials to solve problems. Some of these problems are directly crime-related, such as a murder; some problems have no connection to crime, such as emergency assistance at an accident; and some problems are both social and criminal, such as domestic violence or a drunk making a noise.

For example in the case of a husband assaulting his wife i.e. domestic violence, the problem for the police official is how to deal with the situation. One way to stop the assault would be to arrest and detain the husband. Other possible solutions are to separate the parties physically or to counsel them. Another response would be to not respond at all, either by not going to the home or not intervening when at the home. In this case, the expression is often used “it is a domestic matter” to justify the member’s non-intervention. Using this argument, if a husband actually murdered his wife it would also be a domestic matter, but the public would be quite justifiably outraged if the husband was not brought to justice.

Domestic violence in particular involves hard choices, but this is true of a great deal of police work. The particular response of a member may be influenced by a number of factors such as experience, age, philosophy of life, or sex, but it would be desirable to rather have a basic reference point for all members, rather than relying solely on discretion. Over reliance on discretion can lead to policing which is prejudiced and discriminatory. To take again the difficult problem of domestic violence, members may believe that there should never be a police response because there is nothing the police can achieve; it is acceptable for a husband to assault his wife or to moderately “chastise” his wife; the police should not interfere in
what is seen as a domestic matter or a private dispute etc. It may also be believed that there should always be an arrest, regardless of the situation. The individual member’s beliefs would affect the exercise of the discretion in each case.

There are no easy answers, but it is suggested that to make the exercise of the discretion subject to ethical standards for policing, the basic starting point should be that a member should in all situations:

- obey and uphold the law;
- respect and safeguard the human dignity of all persons.

In the difficult situation of domestic violence this may not mean that the perpetrator of the violence will always be arrested. It may be possible to safeguard the dignity of the victim by mediation and intervention, the threat of arrest, the use of the member’s authority as a member of the Namibian Police etc. But ethical policing demands that members should not just walk away from an assault on the dignity, safety and bodily integrity of a human being.

Trainers should be aware that the basis of the discretion may be contrary to human rights principles. The most common example of this is discrimination against or in favour of individuals or groups based on certain characteristics such as race, age, sex etc. It should be noted that the principle of non-discrimination is one of the most important rights guaranteed by the Constitution. It is fundamental to ethical policing that members uphold the law without discrimination, with the object of protecting all persons.

United Nations Code of Conduct for Law Enforcement Officials

The United Nations General Assembly adopted the Code of Conduct for Law Enforcement Officials on 17 December 1979. The Code of Conduct is a useful statement of universal general principles applicable to police work, which should be followed by all members. The Code of Conduct states the human rights guaranteed under the Constitution, which are applicable to police work, in an easy to understand format. The Code of Conduct is not law, but it is a useful guideline.

When adopting the Code of Conduct, the General Assembly recognised that “the nature of the functions of law enforcement and the defence of public order and the manner in which those functions are exercised have a direct impact on the quality of life of individuals as well as on society as a whole.” It acknowledged the important task which law enforcement officials performed diligently and with dignity, in compliance with the principles of human rights; and urged that the Code of Conduct’s standards become a statement of principles for every law enforcement official through education, training and monitoring.

The Code of Conduct provides that:

Article 1
Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure attention whenever required.

Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities vested with reviewing or remedial powers.

There is a commentary on each article of the Code of Conduct, which is helpful in trying to understand the Code. The Code of Conduct with the commentary is fully reproduced in the appendix to this manual. A number of issues which arise out of the application of the Code of Conduct, such as the use of force, the prohibition of torture and the humane treatment of detainees are discussed in detail in chapters 7 and 9.
Exercises and topics for discussion

Hypothetical exercises

Exercise 1

One problem confronting educators and trainers of police, especially educators and trainers of newly appointed police, is that attitudes and skills developed in training programmes are sometimes undermined by attitudes and behaviour actually prevailing within a police organisation. In other words, the culture of the organisation can be hostile to some attitudes and skills thought to be desirable in police officials. This is especially true in relation to training police in human rights standards.

What can be done to overcome this problem by:

(a) educators and trainers of police?

(b) commanders and supervisors of police?

Draw up a short statement setting out the advice you would give to a newly appointed member who arrives in your area of command or supervision on how he or she can remain an effective member, while at the same time respecting human rights.

Exercise 2

Imagine that you are a member of a committee given the task of drawing up a code of ethics for the Namibian Police. Your brief is to take into account:

(a) the principle of respect for the inherent dignity of the human person;

(b) the United Nations Code of Conduct for Law Enforcement Officials;

(c) prevailing circumstances in Namibia, including any concerns about current crime trends and about policing activity,

and to draw up a code of ethics consisting of a number of articles, each with an explanatory commentary, for issue to all members individually. The code will also be made public. Draw up a document which fulfils the terms of this brief.

Exercise 3

Principle 1 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials requires governments and law enforcement agencies to "keep the ethical issues associated with the use of force and firearms constantly under review".

1. What procedures and practices can be adopted to keep the ethical issues associated with the use of force and firearms constantly under review?
2. Consider and describe ways in which ethical issues associated with the use of force and firearms by police may be dealt with during the training of members.

**Exercise 4**

Principle 7, paragraph 2, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states:

“Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.”

1. What difficulties could a member face within the Namibian Police who makes such a report?

2. How could any such difficulties be overcome?

3. Would a member who believed a violation of the Body of Principles had occurred ever be justified in reporting the matter outside the Namibian Police - to the press, for example?

4. How would you advise police recruits undergoing training to respond to any mistreatment of persons in detention by colleagues which they may witness?

**Topics for discussion**

1. What advantages are there in asserting that human rights are inalienable, and inherent in every person, and not rights granted by States?

2. Why should some members feel that there is a degree of incompatibility between enforcing the law and protecting human rights?

3. What can be done to overcome the view among some members that respecting human rights may be incompatible with law enforcement?

4. Article 8 of the UN Code of Conduct for Law Enforcement Officials requires law enforcement officials to respect the law and the Code. The Commentary to the Article states:

   "Law enforcement officials shall report violations (of the Code) within the chain of command and take other lawful action outside the chain of command only when no other remedies are available or effective."

   The Commentary also acknowledges the need to maintain internal discipline within an agency. Is making reports of violations in the way recommended by the Code compatible with maintaining discipline?

5. What uses do internationally devised codes, such as the Code of Conduct for Law Enforcement Officials, have for individual members and the Namibian Police?
6. What supervisory and managerial procedures can be adopted to ensure that all members respect the requirement of confidentiality laid down in article 4 of the Code of Conduct for Law Enforcement Officials?

7. Article 7 of the Code of Conduct for Law Enforcement Officials prohibits police officials from committing any act of corruption. How would you define an act of corruption? List three conditions which you consider the most important for preventing corruption by police.

8. The application of force by police against a person is both an ethical and a legal issue. What level of force does a member need to exert for such issues to arise? In other words, is even the most minimum application of force a question of ethics and legality, or do such issues arise only if injuries are caused?

9. What qualities would you look for in an applicant to the Namibian Police, bearing in mind the requirement that he or she should be capable of acting effectively and ethically as a police official?

10. Are there any advantages in devising ethical codes for different categories of police official - for criminal investigators, for example? How would such a code differ from the basic provisions of the United Nations Code of Conduct for Law Enforcement Officials?

11. Constable "A" and constable "B" are conducting a road block one evening, the purpose of the road block being to trace stolen vehicles. Constable "B" stops a car and constable "A" sees that the driver takes a N$50 dollar note from his wallet and hands it to constable "B". The car is then driven away without being checked.

(a) What should constable "A" do, having observed this incident?

(b) What should his supervisor do on receiving a report of the incident?

(c) In general, what are the dangers to police efficiency and to the protection of human rights when police officials are corrupt?
CHAPTER 4

NON-DISCRIMINATION AND POLICING

Chapter objectives

To give members of the Namibian Police an understanding of what is meant by prejudice, discrimination and stereotyping, the negative effects of this behaviour on policing, that it is contrary to the Constitution, and how this behaviour can be counteracted.

Essential principles

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace.

Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts.

Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

All persons are equal before the law, and are entitled, without discrimination, to equal protection of the law.

In protecting and serving the community, police officers shall not discriminate on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

It shall not be discriminatory for police officers to enforce certain special measures to address the special status and needs of women (including pregnant women and new mothers), juveniles, the sick, the elderly, and others persons where it would be discriminatory to treat them equally.

Information for presentations

Introduction

Namibia has a history of legally entrenched racial discrimination. Until independence in 1990, the South African administration followed an apartheid policy. In terms of this policy, racial groups were legally separated from each other in all areas of life and blacks were systematically denied equality and equal opportunities with whites. The apartheid system also over-emphasised differences between persons, particularly race and language-based differences.

The Constitution is a decisive break with the past. The preamble (the introductory paragraphs at the beginning of the Constitution) recognises that “colonialism, racism and apartheid” previously denied to the people of Namibia the rights to “life, liberty and the pursuit of happiness.” The preamble emphasises that these rights should be
enjoyed by all, “regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status.”

Namibia has an ethnically diverse population, which can make equal policing without discrimination difficult. It is important that members of the Namibian Police respect other persons’ cultures, values and beliefs and are sensitive to these differences. It is also important for members to recognise that all persons, regardless of their race, ethnic origin, religion, sex etc. are entitled to equal treatment and to equal service from the Namibian Police. The ending of legally enforced racial discrimination does not mean that Namibian society is now equal and non-discriminatory in all respects. Our society still shows some of the scars from the past and it will take time, education and changes in attitude to heal.

One of the most important requirements for being a good police officer is impartiality. It is vital for public confidence in the Namibian Police that police officers are seen by the public as being impartial and that they are not biased in their work against members of particular groups. A member should therefore in a particular situation make a decision and take action based on the available facts, not on feelings or pre-conceived ideas.

*The right to equality before the law and the prohibition of discrimination*

Members of the Namibian Police play a vital role in giving the public access to the criminal justice system. For example, a person who has been the victim of a burglary would like the perpetrators of the offence to be found and prosecuted and the return of his or her property. All persons should therefore be entitled to equal access to the assistance of the Namibian Police, without discrimination. Article 1 of the Code of Conduct for Law Enforcement Officials therefore provides that:

> “Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.”

Article 2 of the Code of Conduct also emphasises that the function of police officers is to protect all persons, without discrimination, providing that:

> “… law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”

The culprit who perpetrated the burglary is also entitled to equal treatment and should not be discriminated against. The accused should therefore not be treated more harshly or leniently because he or she is a member of a particular group. Unethical, illegal or discriminatory conduct by a member could destroy the right to a fair trial, for example if the member manufactures evidence or destroys evidence which could prove the innocence of the accused, because the accused belongs to a particular group.

Article 10 of the Constitution guarantees to all persons equality before the law and freedom from discrimination, providing that:

> “(1) All persons shall be equal before the law.”
No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

Article 10(1) guarantees that in the legal process everyone is equal. No person is above the law, in the sense that the person cannot or should not be prosecuted for committing an offence. When a person is prosecuted for committing a crime, he or she should not be treated more harshly or leniently because he or she is a member of a particular group.

Article 10(2) emphasises that discrimination is prohibited, particularly on one of the grounds of sex, race, colour etc. This sub-article confirms that one of these grounds is usually irrelevant as a basis for treating people differently.

Besides the prohibited grounds of discrimination listed in article 10(2), it may also be discriminatory to treat persons differently on other grounds. For example, it may be discriminatory to treat persons unfairly because of their age, sexual orientation (i.e. gays and lesbians), marital status (e.g. married, single, divorced, widowed etc.), physical or mental ability (e.g. blind or deaf persons), nationality (e.g. Namibian citizens versus non-Namibian citizens) or status (e.g. an illegitimate child). It is not possible to state whether in each case the different treatment will constitute discrimination, because the answer will depend on the facts.

Racial discrimination is defined in the International Convention on the Elimination of All Forms of Racial Discrimination, which is an international treaty that forms part of the law of Namibia, as:

"... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Racial discrimination is also prohibited by the Racial Discrimination Prohibition Amendment Act, Act No. 26 of 1991. The act makes it an offence to discriminate against persons on the grounds of race (including colour, nationality, ethnic or national origin) in a number of situations, including access to public amenities; the supply of goods and services; and access to employment, medical treatment or educational institutions.

"Discrimination" in the context of discrimination against women is defined in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women, which forms part of the law of Namibia, as meaning:

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

In certain cases, it may be necessary to differentiate between people or to treat people unequally based on one of these grounds. For example, only women are entitled to social security payment while on maternity leave. This is logical, because only women can become pregnant and give birth to children. Women are also usually the persons who care for children after birth. It may happen that men will
increasingly care for children after birth, in which event the present provisions of the Social Security Act may be considered to be discriminatory and therefore contrary to article 10 of the Constitution.

A further example where it will not be discriminatory to treat people unequally is where the person falls within a vulnerable group or where equal treatment would mean discrimination. For example, a child should not always be treated the same as an adult, because of the child's intellectual and physical immaturity. Similarly, women are generally physically weaker than men. To treat men and women equally by using the same amount of physical force during an arrest may therefore be unequal treatment.

*Ethnocentrism, prejudice and stereotyping*

Many persons judge other persons by the standards of their own culture or background, which are seen as the norm (the usual), natural and good. This can be described as ethnocentric behaviour, in other words, behaviour based on one's own ethnic background or culture. While every person should feel proud of his or her cultural or ethnic background, this can become negative if the values or standards of the person's culture or ethnic group are seen as superior to the standards or values of others. Members should therefore recognise that other cultures or ethnic groups have equally valid views of the world or moral standards.

"Prejudice" can be defined as a bias without reason, which is not based on evidence. A further definition is that prejudice is the holding of preconceived ideas, beliefs or attitudes, formed before the facts are known, which are sustained or supported by over generalisation. As a result of prejudice, groups or individuals are negatively prejudged on the basis of real or alleged characteristics and attributes.

All persons have prejudices. A prejudice can lead to positive or negative treatment of a person. We are mainly concerned with negative prejudices, but positive prejudices can also lead to discriminatory treatment, except that the treatment then favours the individual.

Persons who are prejudiced in respect of other groups judge members of those groups according to their fixed ideas or previously formed beliefs of that group, rather than on the immediate evidence before them about the particular individual. Prejudiced persons hold beliefs, either positive or negative, about persons who belong to a group or category. A group can be formed in many different ways, such as on the basis of skin colour, language group, accent, ethnic group, sex, dress, age, wealth or poverty, customs, religion, nationality, home address, occupation, disability etc. There is probably no limit to the grounds that can be used to distinguish between people and to construct stereotypes. This negative belief can also be described as a stereotype.

"Stereotyping refers to the use of words, actions or pictures to assign roles or characteristics to specific groups of people. This is done solely on the basis of preconceived ideas" (Standing Orders, chapter 11, M.1.a). Stereotypes allow people to take quick shortcuts about other persons, without gathering information about the specific person. In other words, people are classified, very much as one would
divide other kinds of information. It would not be possible to function effectively as humans without to some extent using stereotypes, but the danger of stereotyping is that it can prevent one from seeing the person as an individual and instead only as a stereotype i.e. as a member of a group.

A person who sees others in terms of a stereotype is likely to treat members of the group as different (and often as inferior) without good reason for this treatment. In the context of policing, stereotyping members of a group may result in the member of the Namibian Police helping or not helping a person, or mistreating a person only because of a negative stereotype.

While racial, ethnic or sexist jokes may at times be amusing, they can be hurtful and offensive to persons who are part of the group that is the object of the joke. Jokes based on stereotypes tend to include persons who share the characteristics of the joke teller and to exclude persons who share the characteristics of the person who is the joke. Standing Order F.6. (Chapter 11) specifically provides that members should avoid using repulsive expressions (this would include offensive names) in order to promote good relationships. A commander should take immediate action to halt the use of repulsive expressions, by explaining why such expressions are improper and ordering members not to use such expressions.

Prejudices are often caused by direct generalisation. A prejudiced person’s experience of one person or of a few persons from a particular group is generalised to all members of that group. It is also possible that a prejudice can be based on limited or no personal experience of members of a group and instead based on what the person has heard about the members of the other group. An example of this is where a child acquires prejudices from his or her parents. We know from experience that children are born without prejudice, but that prejudices are then transferred by the parent to the child or by social interaction as the child grows older.

Research has shown that persons who are prejudiced in respect of one group, are likely to be prejudiced in respect of other groups. Persons who recognise their prejudices and are concerned about them, are on the way to eliminating these prejudices.

Treating persons on the basis of a prejudice held by a member and stereotyping persons as members of a group violates the person’s right to equality before the law, because a person is treated differently for a reason which is not based on fact. The other negative consequences of treating persons on the basis of prejudice are that the image of the Namibian Police may be lowered; persons from the group may become uncooperative and hostile to the Namibian Police, persons may act as they are treated, in other words they will respond to the member in a negative way, in the same way that the persons have been treated by the member.

In order to avoid prejudice and stereotyping a member should:

- distinguish between proper evaluation and prejudice – is the action a result of proper evidence or based on pre-judgment;
- be aware of cultural differences and ethnocentricity;
• be aware that prejudice is socially learned, that is in the family, at school etc. It can therefore also be unlearned;

• avoid a patronising tone when dealing with members of racial, ethnic minority groups, tribal and disabled people (Standing Orders chapter 11, M.3.b.3);

• always be impartial;

• always treat persons equally and respect the person’s dignity, but remember to treat the vulnerable and the unequal unequally, that is with special protection and attention;

• remember that he or she is not acting as an individual, but as a member of the Namibian Police, which has the duty to serve all persons.

Exercises and topics for discussion

Hypothetical exercise

Exercise

You have been asked to deliver a lecture to newly appointed police officers on “non-discrimination and law enforcement.”

1. Prepare an outline set of notes (topic headings) for your lecture.

2. Set out the principles and provisions of the Constitution, of international human rights law, standing orders and statutes relevant to your lecture.

3. Summarise the general, practical guidelines that you would give on the subject as an experienced police officer to newly appointed police officers.

Topics for discussion

1. When considering non-discrimination, what is the importance of the principle as expressed in article 1 of the Universal Declaration of Human Rights, “All human beings are born free and equal in dignity and rights”?

2. Briefly list the ways in which the Namibian Police can assist the government in meeting its obligations under the Constitution to ensure human rights to all individuals without distinction on such grounds as race, colour, sex or religion and belief.

3. Consider the right to equality before the law and to equal protection of the law for all persons, and list the implications of this right for policing.
4. Article 20.1 of the International Covenant on Civil and Political Rights, which is an international treaty that forms part of the law of Namibia, provides that:

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

Section 11(1) of the Prohibition of Racial Discrimination Amendment Act, Act No. 26 of 1991, similarly provides that:

“No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to –

(a) threaten or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or

(b) cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or

(c) disseminate ideas based on racial superiority.”

Article 21(1)(a) of the Constitution however guarantees the right to freedom of speech, providing that all persons shall have the right to:

“freedom of speech and expression, which shall include freedom of the press and other media;”

How can these two requirements be reconciled? Which right is the most important?

5. A member of the Namibian Police makes a joke at work, which implies that members of the blue ethnic group are stupid. What action (if any) should be taken against the member?

6. Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, which forms part of the law of Namibia, requires that women have the same employment opportunities as men, including the application of the same criteria for selection in matters of employment. What difficulties (if any) does this create for recruitment to the Namibian Police? How can these difficulties be overcome?

7. While most forms of discrimination against persons is a violation of article 10 of the Constitution, discrimination which favours certain categories of persons (such as women, children and affirmative action policies) is encouraged and sometimes required. In what areas of law enforcement is this “positive” discrimination relevant and necessary?

8. Draft a provision of the Standing Orders which makes discrimination an offence.

9. Ask each participant to write (on three separate pieces of paper) three stereotypes they have heard regarding members of a particular group. The large group should then break into smaller working groups. The slips of paper
are then placed in an envelope, mixed up and each working group is given an equal number of slips of paper. The members of each group then pick one slip of paper at a time and discuss the statement based on the following questions:

- Where and from whom do you think people have learned these stereotypes? Give examples.
- How might your behaviour towards the individuals of the identified group be affected in carrying out your duties as a police officer, if you were to believe the stereotype?
- How might this stereotype be strengthened or perpetuated?
- What is the likely impact of this stereotype on members of the identified group?

The working groups then return to the large group. Each working group then reports back on the discussion of one statement in the group.
CHAPTER 5
CRIMINAL INVESTIGATIONS

Chapter objectives

To give members of the Namibian Police an understanding of the Namibian and international human rights standards relating to criminal investigations, and their relevance to police practice.

Essential principles

Everyone has the right to a fair trial.

Everyone is presumed to be innocent until proven guilty according to law.

No one shall be subjected to arbitrary or unnecessary interference with the privacy of his or her home, correspondence or communications.

No pressure, physical or mental, shall be placed on suspects, witnesses or victims in attempting to obtain information.

Torture and any other inhuman or degrading treatment is absolutely prohibited.

Victims and witnesses are to be treated with compassion and consideration.

No one shall be compelled to confess or to testify against himself or herself.

Investigatory activities shall be conducted only lawfully and for a good reason.

Information for presentations

Introduction

The investigation of crime is the first essential step in the administration of justice. It is the means by which those accused of a crime may be brought before the courts and their guilt or innocence determined. It is also essential to the well-being of society, for crime, particularly unpunished crime, distresses people and undermines social and economic development. For these reasons, effective, ethical and lawfully conducted criminal investigation is an extremely important aspect of policing.

The purpose of this chapter is to focus on the investigation of crime as a distinct police activity. Therefore Namibian law and international human rights standards of particular relevance to criminal investigation will be considered. However, all the other standards relevant to policing, and dealt with in the previous and subsequent chapters of the manual, remain applicable. During the course of an investigation, members may lawfully exercise various powers. Members of the Namibian Police have been given various powers under
law, so that they may protect society. All of these powers to a greater or lesser extent affect or reduce the constitutional rights of the persons affected by the exercise of these powers. These powers should be exercised only when necessary and when legal authority to do so exists.

Members may therefore search individuals or property and seize certain property. Members may exercise powers of arrest. People suspected of the crime under investigation may be detained. When this happens, the detainees must be treated humanely. It may be necessary to use force to arrest or detain a suspect. Force may only be applied when strictly necessary, and then only to the extent required to achieve a lawful purpose. These topics are fully discussed in chapters 7 (detention) and 9 (use of force and firearms).

For the investigation of crime to comply with ethical principles, there must be respect for human dignity and human rights, and compliance with the law by investigators. Investigation of crime in a democratic society entails accountability and responsiveness of the investigators to the community. Furthermore, investigations must respect the principle of non-discrimination. Standards on ethical policing and non-discrimination have been considered in chapters 3 and 4 above, and should be referred to for further information.

General aspects of human rights and police investigations

(a) Fundamental principles

The functions of the Namibian Police are (section 13 of the Police Act):

"(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; and
(d) the prevention of crime."

The purpose of investigating an offence, or an alleged offence, is to gather evidence, to identify the presumed author of the crime, and to present evidence before a court so that the guilt or innocence of the accused may be decided. The fundamental principles of the Namibian Constitution which control police investigations are:

- all accused persons are presumed to be innocent until proven guilty according to law;
- all accused persons are entitled to a fair trial;
- the dignity, honour and privacy of all persons should be respected.

(b) Specific provisions on investigations

(i) The presumption of innocence
Article 12(1)(d) of the Constitution guarantees the right to be presumed innocent, providing that:

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

It is suggested that the right to be presumed innocent applies to all suspects, even before they have been charged with an offence in court. In other words, all suspects should be treated as innocent persons, whether they have been charged in court or not, or whether they have been arrested and detained or they are still at liberty. In *S v Sebejan and Others* 1997 (1) SACR 626 (W), the court held that a suspect is a person:

“about whom there is some apprehension that she may be implicated in the offence under investigation and, it may further be, whose version of events is mistrusted or disbelieved.”

The other important principle is that guilt or innocence can only be decided by a court after a fair trial and not by, for example, by the public, the media, or by members of the Namibian Police.

All suspects should therefore be treated politely, respectfully and professionally at all times.

(ii) The right to a fair trial

Article 12(1)(a) of the Constitution provides a general right to a fair trial for all persons charged with a criminal offence. The other sub-articles of article 12 mention particular aspects of the right to a fair trial. Article 12(1)(a) provides that:

“In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law: provided that such court or tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.”

In order for a person to receive a fair trial, the entire investigation into the offence leading to the charge must be conducted in an ethical manner and in accordance with the legal rules governing investigations. Ethical practice and compliance with the rules is particularly important when:

- gathering evidence;
- interviewing suspects (also see chapter 7 on detention);
- giving evidence in court, when the member should testify truthfully and fairly.

Article 12 gives all persons involved in criminal proceedings a number of specific rights as part of the general right to a fair trial. The rights which are particularly relevant to the investigation of crime are discussed below.
(iii) Specific guarantees included in the right to a fair trial

(a) The right to be informed promptly of the grounds for arrest and of any charge against him or her

Article 11(2) of the Constitution provides 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.”

Article 9(2) of the International Covenant on Civil and Political Rights, which forms part of the law of Namibia, provides that:

“Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

There is therefore the additional requirement that a person also be “promptly informed of any charges against him.” This means that the person should be informed of the legal basis for the detention in a similar way to the charges that will be put to the person in court.

This topic will be discussed in greater detail in chapter 6 (arrest), but these two provisions mean that there is a two stage process when a person is arrested:

• on arrest - the person must be informed promptly, which usually means immediately, of the reason for the arrest; and

• as soon as possible after the arrest - the person must be informed of the charges being brought against him or her.

It is suggested that even where a person has not been arrested, the same guarantees apply. For example, if a person is interviewed as a suspect the person should be informed at the time of the interview what possible charges against the person are being investigated.

In very complex cases, it may take longer to determine the precise charges against the person. The standard under the International Covenant on Civil and Political Rights is nevertheless that the person be informed “promptly”, which means that the person be informed as soon as possible. This will vary with the complexity of the charges from immediately on arrest to some time after the arrest. In no case should the person be informed later than the earliest possible time.

(b) The right to be tried within a reasonable time

Article 12(1)(b) provides that:

“A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.”
This right directly affects criminal investigations, because it means that investigations must be carried out and finalised as quickly and as efficiently as possible. There are a variety of reasons why a trial may not take place within a reasonable time, such as postponements at the request of the defence, absence of witnesses despite being subpoenaed etc. Members should nevertheless ensure that their failure to carry out the investigation within a reasonable time does not result in the acquittal of an accused.

Both society and the accused have an interest in holding a trial within a reasonable time. Society has an interest in ensuring that the guilty are brought to trial and punished as soon as possible. The accused, who may be innocent, also has an interest in trying to finalise the case as soon as possible, because an ongoing trial may affect his or her liberty, family life, employment, status in the community etc. As regards the administration of justice in general, lengthy delays may lead to witnesses dying, becoming unavailable or their memories fading with time.

Judge Hannah held in the Namibian High Court decision of S v Heidenreich 1996 (2) SACR 171 (Nm) that the meaning in the sub-article that “the accused shall be released” was that the accused would be released from prosecution, effectively that the accused could no longer be prosecuted (at 180b). It did not only mean that the accused would be released from detention. In determining what was a reasonable time, the court would look at various factors such as whether the delays were due to the conduct of the prosecution or the defence, the length of the delays, prejudice to the accused caused by the length of the proceedings and the complexity of the case.

(c) The right to call witnesses and to cross-examine witnesses called against him or her

Article 12(1)(d) reads:

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

This right mainly applies during the actual trial rather than during the investigation. It does however have implications for the investigation.

During the course of the investigation, the member may encounter witnesses to the crime whose evidence does not support the case against the person under investigation. Clearly, such evidence may be sufficient to indicate that the person suspected of the crime was not, in fact, the author of the crime, in which case that person would no longer be the subject of the investigation.

On the other hand, the evidence may only weaken the case against the suspect without undermining it completely. Sufficient evidence may remain to justify charging the suspect and placing him or her on trial. The fact remains, however, that the witness who can give evidence which weakens the case against the accused, is a witness of whom the accused should be made aware so that the accused can have the opportunity to call the witness, as guaranteed under article 12(1)(d).
The effect of the ruling of the Namibian Supreme Court in *S v Scholtz* 1996 (2) SACR 426 (Nm S) is that the investigation docket should in general be made available to the accused. The exceptions are where a court decides that particular documents should not be disclosed because disclosure will endanger the life of a witness, or disclose the identity of an informer or disclose confidential police methods. This means that almost all witnesses’ statements will be made available to the defence, and the defence will be able to interview and call these witnesses if they are not called by the prosecution.

In *Scholtz’s* case, Acting Justice of Appeal Dumbutshena considered a number of English cases in which convictions had been obtained mainly because the investigating officers had failed to disclose scientific evidence or witnesses’ statements which would have helped the defence. These cases later became notorious as miscarriages of justice and the convictions were overturned, in some cases many years after the initial convictions. This situation can be avoided through the full disclosure of the evidence contained in a docket.

Strydom JP held in *S v Angula and Others; S v Lucas* 1997 (9) BCLR 1314 (Nm) that the ruling of the Supreme Court in *Scholtz* was also applicable to proceedings in magistrates’ courts. The general rule was that the contents of a docket should be disclosed where necessary to ensure a fair trial. The court could do no more than give general guidelines as to when a docket should be disclosed. These factors include the complexity of the case or the risk of imprisonment.

**(d) The right not to be compelled to testify against oneself or one’s spouse**

Article 12(1)(f) reads:

“No person shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons testimony which has been obtained from such person in violation of article 8(2)(b) hereof.”

The right not to be compelled to testify against oneself applies both during the trial and before the trial commences i.e. during the criminal investigation. An example of the application of the right during a criminal trial is that an accused person cannot be forced to give evidence by the State (or anyone else, such as a co-accused) at his or her trial. The accused must decide to give evidence voluntarily.

During the investigation, no person should be compelled by any means to admit guilt or to provide evidence against himself/herself or another person. The legal requirements are discussed in detail in chapter 7 (detention).

**(iv) Arbitrary interference with privacy**

Article 13 of the Constitution guarantees the right of privacy to all persons, providing that:

“(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the
prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.”

The right to privacy as it affects entry, search and seizure is discussed in chapter 8 below.

The right to privacy also applies to the interception of correspondence and communications. “Correspondence” includes letters and messages. “Communications” has a very broad meaning, meaning any correspondence between persons, no matter in what format the information is conveyed. It would therefore include telephone conversations, cellular phone conversations, radio and computer communications.

Article 13(1) provides that there may be only be an interference with a person’s right to privacy in respect of his or her correspondence or communications if:

- it is authorised by law; and
- the law is necessary in a democratic society; and
- the law was passed by Parliament for the purposes of the interests of national security, public safety, the economic good of Namibia, the protection of health or morals, for the prevention of disorder, for the prevention of crime, or for the protection of the rights and freedoms of others.

The Posts and Telecommunications Act, Act No. 19 of 1992, does not contain any provision which authorises the interception or interference with communications, such as by tapping a telephone. The Namibia Central Intelligence Service Act, Act No. 10 of 1997, authorises the interception of postal articles and other communications in limited circumstances.

The Namibia Central Intelligence Service may assist the Namibian Police by gathering intelligence to be used in the detection and prevention of serious offences (section 5(1)(a)(iii)). Whether an offence is serious is determined by the Director-General of the Namibia Central Intelligence Service, after consultation with the Inspector-General of the Namibian Police (section 5(1)(a)(iii)). A High Court judge may issue a direction authorising the use of these methods subject to rigorous requirements and safeguards. Telephone tapping or any other means of communications interception are therefore unlawful unless an offence is serious and a judge has issued the required directive.

(c) Management of confidential informants
The subject-matter of this subsection is a technical aspect of investigation, but as there are significant ethical and legal issues involved it is given separate and special consideration.

Information on crime and criminals given to police by confidential informants is extremely important, and is sometimes the only means by which some criminals, especially those involved in organised crime, can be brought to justice. The cultivation and exploitation of confidential informants by individual police investigators can significantly enhance the effectiveness of the investigator and the Namibian Police.

However, there are considerable dangers in this process, for the following reasons:

- confidential informants are often criminals themselves, or closely associated with criminals;
- information is usually traded for money or other favours;
- transactions between police officials and informants are, of necessity, conducted secretly.

The dangers in the process of using informants are that:

- an informant may exploit the situation so that he or she can commit crime and avoid detection;
- an informant may encourage others to commit crime in order to receive payment for providing information on that crime;
- a police official may cause an informant to encourage others to commit crime which the official can then detect for the purpose of showing enhanced effectiveness;
- a police official may become corrupted through his or her financial dealings with a confidential informant.

For the above reasons, it is suggested that the Namibian Police should formulate and enforce rules governing relationships and transactions between members and confidential informants. Rules of this type should take into account the following:

- Only one member should be responsible for "handling" a confidential informant, i.e. conducting the relationship with the informant and carrying out all transactions with him or her. This type of arrangement makes one identifiable member accountable for all transactions with the informant.
- While the identity of a confidential informant must generally remain secret, for the protection of the member dealing with the informant, and for the protection of the informant, an official record should be kept showing the
identity of the informant and the member responsible for liaising with him or her. The record should be accessible to only one specific individual in the command structure of the police agency. This would usually be the unit commander.

• The activities of a confidential informant should be strictly monitored. It is often the case that, not only is the informant aware of the planning of a proposed crime, but he or she may also be involved in that planning and be regarded as a potential participant in its execution. The general rule should be that this is not acceptable, because it will mean, almost inevitably, that the informant will be committing a criminal act.

• Very occasionally, the proposed criminal activity is of such a magnitude, and the non-participation of the informant will create such a danger to him or her, that the informant may have to take part in the criminal activity. Condoning any criminal activity, including that of confidential informants, raises very serious legal and ethical issues. Any decision to do so should be taken at the highest level within the Namibian Police, and only after full consultation with the Office of the Prosecutor-General. Such decisions and consultation can take place only on a case-by-case basis. No general immunity must ever be granted.

• Financial rewards to confidential informants for the information they provide should not be excessive. An informant should not be promised a specific amount. Payments should not constitute a big inducement to provide information, otherwise they may tempt informants to encourage people to commit crime. The danger that a person may entice an innocent person to commit a crime, so as to receive a lucrative reward, was referred to by Dumbutshena AJA in S v Nangombe 1994 NR 276 (SC), where a reward of 70% of the value of recovered diamonds was payable by CDM (now Namdeb) to the informant or trap.

• Payments to confidential informants should be strictly controlled through rigorous accounting procedures and supervision. The member making the decision on payment should be unaware of the identity of the informant. The decision maker does need to know the details of the crime and the nature of the information provided.

The final comment to make on police relationships with confidential informants is that the likelihood of corruption of some police officials at some stage is so high as to be almost inevitable. Thus there is an enormous responsibility on senior officers to:

• formulate a clear policy on which to base effective regulatory procedures and guidelines, and to maximise the benefits to be gained from the receipt of confidential information about crime and criminals;

• establish strict regulatory procedures and explicit guidelines so that subordinate members understand exactly how they are to conduct relationships with confidential informants, and the extent to which such relationships are monitored.
The establishment of a system for the effective management of confidential informants is vital to the prevention and detection of crime. Corruption of such a system entails corruption of members, subversion of the criminal justice system, and abuse of human rights.

(d) Victims

The subject of victims of crime is dealt with fully in chapter 12 below. A number of matters however concerning victims relate closely to the investigative process and it is therefore appropriate to consider these briefly here.

One of the three fundamental principles referred to at the beginning of this chapter was the respect for the dignity, honour and privacy of all persons. This principle applies particularly to victims. Paragraph 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states:

“Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”

Victims of crime are often important witnesses of crime. It is therefore important for investigators to be concerned about the welfare of victims for basic humanitarian reasons, but also to ensure that the victim willingly assists in the gathering of information. Victims should be referred for medical treatment where necessary. The victims of sexually violent crimes, domestic violence and child abuse may be referred to organisations which provide counselling and assistance to the victims of these crimes. Some of these organisations are:

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<tr>
<th>Organisation</th>
<th>Address/Contact Information</th>
<th>Telephone Numbers</th>
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<tbody>
<tr>
<td>Childline</td>
<td>Does telephone counselling in respect of child abuse</td>
<td>(061) 23 2221</td>
</tr>
<tr>
<td>Namibian Women’s Network</td>
<td>P O Box 593, Nau-Aib, Okahandja</td>
<td>(0621) 50 2106</td>
</tr>
<tr>
<td>Women’s Solidarity</td>
<td>CCN Building, Erf 8521, Abraham Mashego Street, Katutura, Windhoek</td>
<td>(061) 26 2275</td>
</tr>
<tr>
<td>Woman and Child Protection Unit</td>
<td>Katutura State Hospital, Windhoek</td>
<td>(061) 22 1111</td>
</tr>
<tr>
<td></td>
<td>Keetmanshoop</td>
<td>(063) 22 2241</td>
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<td></td>
<td>Oshakati</td>
<td>(06751) 2 0039</td>
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<td></td>
<td>Rundu</td>
<td>(067) 25 5014/25 5997</td>
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<tr>
<td></td>
<td>Walvis Bay</td>
<td>(064) 20228 x 231</td>
</tr>
</tbody>
</table>
Members should do everything possible to ensure that the victim is not left out of the criminal justice process. The successful investigation and prosecution of crime is not only directed at ensuring the conviction and punishment of the guilty, but also at ensuring that the victim of crime receives some satisfaction from the knowledge that the person responsible has been found and punished.

**Conclusion**

The investigation of crime involves a number of activities such as gathering information from the public, finding and collecting evidence and identifying a possible suspect. Once a suspect has been identified, it is necessary to build up a case against the suspect.

Most of these activities are to some extent affected by the provisions of the Constitution and the law. Members should ensure that their investigatory actions do not contravene these provisions. Otherwise members will become lawbreakers, rather than the upholders of the law. Also, as will be seen in chapter 6 (arrest) and chapter 8 (entry, search and seizure), the effect of obtaining any evidence unlawfully, will be that the evidence will probably not be admissible in court. This may mean that the guilty will be reluctantly acquitted by the courts, because our courts cannot condone lawlessness by law enforcers.

**Exercises and topics for discussion**

*Hypothetical exercises*

**Exercise 1**

Police investigations involve the gathering of information. This can be done by technical means (e.g. intercepting telephone conversations) or by tactical means (e.g. the use of confidential informants).

Especially at critical stages in the investigation of serious crime, for example when an arrest may be imminent, police investigators may be strongly tempted to ignore ethical and legal standards. In fact, an investigator may feel it essential to violate standards on a particular occasion to ensure the success of the investigation.

1. Set out the arguments you would make on such an occasion to convince an investigator that ethical and legal standards should be complied with.

2. Is it ever justifiable to break the law in order to enforce the law?

3. If arguments are made to justify breaking the law in order to enforce the law, how can these be reconciled with the presumption of innocence of all persons suspected or accused of a crime?

4. If investigators are tempted to violate ethical and legal standards, what are the implications for supervision and management of investigations - especially in relation to the examples of information gathering given in the first paragraph of this exercise?
Exercise 2

Imagine that you are members of a working group established to advise the senior command structure of the Namibian Police on ethical standards for investigations.

1. Draw up a code of conduct for the guidance of investigators on the ethical conduct of investigations.

2. Consider the advice you would give on whether breaches of such a code should form the basis of charges under a police disciplinary code, or whether disciplinary codes and disciplinary proceedings should be kept distinct from ethical codes. Give reasons for any conclusions you may come to.

Exercise 3

For the purposes of discussion, imagine that the Namibian Police is investigating an organisation engaged in drug trafficking. The people in this organisation are extremely ruthless and efficient. The results of the investigation to date indicate that further progress can be made only by infiltrating the organisation in order to obtain evidence of its activities. If the tactic of infiltration is successful, the intention would be to move to immediate arrest of those involved in the criminal activities of the organisation. A senior officer authorises the tactic of infiltration, but wants some guidelines drawn up for the officers who will infiltrate the organisation, to ensure that they act in an effective and ethical manner.

1. Draw up the guidelines required by the senior officer.

2. What is your opinion on the length of time a police officer can be expected to operate within an organisation of the type described in this scenario?

3. Should the assigned officer participate in the criminal activities of the organisation? What advice would you give him or her on this point?

Exercise 4

The government wishes to draft a new law which regulates the interception of private mail and telephone conversations by police for the purposes of investigating crime.

1. Set out the recommendations and advice you would offer as:

   (a) a senior police official;

   (b) the director of a civil liberties group concerned about excessive police powers and invasion of privacy.

2. Draw up a policy statement for the government based on equal consideration of both sets of recommendations and advice.

Topics for discussion
1. Why is it important to respect the right to be presumed innocent?

2. How does the presumption of innocence contribute to respect for the right to a fair trial?

3. How does the right of a person to be informed promptly of the charges against him or her contribute to respect for the right to a fair trial?

4. Why is it important for a person accused of a crime to be free from any compulsion to testify against himself or herself?

5. What are the essential qualities of a member specialised in the investigation of crime?

6. Describe briefly the risks to a member when he or she is managing a confidential informant. How may these risks be lessened?

7. Describe briefly the risks to the achievement of ethical policing in the use of confidential informants. How may these risks be lessened?

8. Should the ethical standards which apply to the investigation of major crime be the same as those which apply to the investigation of minor crime?

9. Criminals do not obey rules. Why should police?
CHAPTER 6
ARREST

Chapter objectives

To understand the right to liberty and the freedom from arbitrary and unlawful arrest and detention.

To specify the requirements for a lawful arrest.

Essential principles

Everyone has the right to liberty and the security of the person.

No person shall be subjected to arbitrary arrest or detention.

No person shall be deprived of his or her liberty, except on the grounds and in accordance with the procedures established by law.

Arrest and detention should be avoided where reasonably possible. Alternative means of securing the attendance of the person for trial should be considered.

Anyone who is arrested shall be promptly informed in a language that they understand of the reasons for the arrest.

Anyone who is arrested shall be promptly informed of any charges against him or her.

Anyone who is arrested shall be informed of their right to legal representation at the time of arrest.

Anyone who is arrested shall be informed of their right to remain silent at the time of arrest.

Anyone who is arrested shall be brought before a magistrate within a period of 48 hours of the arrest.

Information for presentations

Introduction

The right to personal liberty is a fundamentally important right guaranteed under the Constitution. Naturally, it is necessary to limit this right, because it would otherwise not be lawful to detain a person, for example, pending trial or after conviction and sentence. It may also be necessary to detain persons who are mentally ill or who are undergoing drug rehabilitation programmes, for example. The rights guaranteed under the Constitution and various international instruments therefore do not
absolutely prohibit the arrest and detention of persons, but rather provide procedural safeguards.

Article 7 of the Constitution provides that:

“No persons shall be deprived of personal liberty except according to procedures established by law.”

A person may therefore only be deprived of his/her liberty:

- for a lawful reason;
- according to a procedure established by law.

A person can be deprived of his/her personal liberty by arrest or detention. An arrest is the act of depriving a person of personal liberty. Detention refers to the state of deprivation of liberty, regardless of whether this follows from an arrest, a conviction, kidnapping or another act. See Nowak, CCPR Commentary, p. 169.

A person is therefore always detained when under arrest. But, a person can be detained not only by arrest, but also in other ways. It is not certain in our law whether a person is “detained” during a stop and search, or at a roadblock, or when asked to undergo a breathalyser test. This is however the position in Canada, as decided in the Canadian decision of R v Therens (1985) 13 CRR 193.

For law enforcement purposes, the most common deprivation of liberty takes place on arrest. It follows from article 7 that for an arrest to be in accordance with the Constitution it must (a) be for a lawful reason and (b) take place according to procedures established by law. This means that a member making an arrest must comply in particular with sections 39 to 50 of the Criminal Procedure Act.

The fact that an arrest must only take place in accordance with the procedures laid down by law was emphasised by the Namibian High Court in S v Boois, S v Thomas 1991 NR 455 (HC) at pp. 455I - 456B that:

“An arrest of a person is a very serious matter. It is not only a restriction of such person’s freedom but it is also an invasion of his privacy and a reflection on his dignity and reputation. The Legislature therefore prescribed the procedure for effecting arrests and the Constitution of Namibia confirmed this. Sight must not be lost of the object of an arrest. The object is to bring a person suspected of committing a crime, to trial. It is therefore effected in the interests of law and order. The Legislature and the Namibian Constitution therefore, in enacting the procedure to be followed in effecting an arrest did not intend to hamper or restrict police officers in the execution of their duties but wished to ensure that the rights of the individual will be protected.”

An arrest under the Criminal Procedure Act can only be made with the intention of:

- bringing the arrested person before a court to be charged, tried and convicted of a criminal offence;
• investigating a criminal offence against the arrested person, similarly with
the intention of bringing the arrested person before a court to be charged,
tried and convicted of a criminal offence.

See Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 819H - 820E.

An arrest is therefore unlawful if a member has no intention of bringing a person
before a court. A member may therefore not arrest a person only to frighten,
timidate, harass or punish that person. A person may also not be arrested on a
charge which is not a criminal offence, for example, for failing to repay a loan.

What is an arrest?

It is important to understand what constitutes an arrest under Namibian law. In a
decision of the South African Appellate Division, Isaacs v Minister van Wet en Orde
1996 (1) SACR 314 (A), the court contrasted the following two situations:

• where a suspect voluntarily accompanies the police to the station, so that
he can be interviewed;

• where a suspect is told to wait at the police station for a police officer to
arrive and whose requests that he be permitted to go home are refused.

In the first situation the suspect is not under arrest. It must be emphasised though
that the person must accompany the police voluntarily. If compulsion is used, even if
there is no physical force applied, the person will then be under arrest. The question
can be asked “could the person decline to accompany the police and/or was the
person at liberty to do what he/she wanted?” If the answer is yes, then the person
voluntarily accompanied the police and was not under a arrest.

In the second situation, he is under arrest, because he has been deprived of his
liberty. The following passage from R v Mazema 1948 (2) SA 152 (E) at 154 was
quoted by the court in Isaacs’ case at 321d:

“A person is under arrest as soon as the police assume control over his movements.”

To summarise, a person is under arrest whenever he/she is deprived of personal
liberty. An arrest does not only take place when a person is properly arrested in
terms of section 39 of the Criminal Procedure Act.

Prohibition of arbitrary arrest or detention

Article 11(1) of the Constitution provides that:

“No persons shall be subject to arbitrary arrest or detention.”

An arrest and detention would be arbitrary if it was not lawful, in other words if it took
place for an unlawful reason and without compliance with a lawful procedure (see
above). “Arbitrary” does not only mean “against the law”, but includes “elements of

What this means is that the arrest and detention must not be disproportionate, unpredictable, discriminatory or unjust. The arrest or detention must be appropriate in the context of the particular facts of the case (Nowak, *CCPR Commentary*, p. 173). For example, an arrest may be inappropriate or disproportionate if a well-known resident of a small village or town commits a minor or petty offence.

In other words, a person need not always be arrested to begin criminal proceedings against the person. Similarly, a person need not always be detained, even if the person has been arrested. There may be other means of ensuring that the person appears in court. “Arrest is the most drastic method whereby an accused person’s attendance at his trial can be ensured, and accordingly ought to be confined to serious cases” (Du Toit, *Commentary on the Criminal Procedure Act*, p. 4-1).

In *S v More* 1993 (2) SACR 606 (W), the accused was charged with negligent driving, because he had crossed a busy dual carriage-way while driving a slow moving tractor. There was no collision. The accused was arrested and spent two days in police custody. Judge Marais remarked (at p. 608e):

> “The fact that the right [to arrest and detain the accused] existed does not mean that this was a desirable procedure. Persons must not be deprived of their liberty lightly. Where there are other methods to bring them before a court it is not desirable to arrest them in cases of less serious offences” (our translation).

It may be useful to use Canadian law as a guideline as to when a person should be arrested. A person may only be arrested without a warrant if any one of the following four factors is present:

- the arresting officer is unable to establish the identity of the person;
- the arresting officer has to secure or preserve evidence relating to the offence (for example, possession of a prohibited substance, which may be found after a search at the police station);
- the arresting officer has to prevent the continuation or a repetition of the offence or the commission of another offence (for example, arrest is necessary to stop an assault or to stop or prevent an assault on the officer);
- the arresting officer has reasonable grounds to believe that if the offender is released, he or she will not attend court for trial.

Before an arrest a member should therefore always ask himself/herself whether arrest and detention is appropriate under the circumstances and whether the alternatives given below would not be as effective in bringing the person to trial. This principle is reflected in Standing Order H.1.a.2.1 (Operational Manual, chapter 2), which provides that a person should be arrested when alternate process is impractical. The wise use of these mechanisms should help to reduce the present high number of awaiting trial prisoners.
Alternative methods to secure the attendance of an accused at trial

There are three alternative methods other than arrest, detention and court granted bail to ensure the attendance of an accused at trial, namely:

- a summons in terms of section 54(1) of the Criminal Procedure Act;
- a written notice to appear in terms of section 56(1) of the Criminal Procedure Act;
- release on warning in lieu (in the place) of bail terms of section 72(1) of the Criminal Procedure Act.

In the case of a release on warning, the accused is in fact arrested, but can be released by a police officer without first appearing in court (the granting of police bail has a similar effect). These procedures are discussed below.

(a) Summons to appear in court

A prosecutor may in terms of section 54(1) of the Criminal Procedure Act summons an accused to appear in a lower court on any charge that can be tried in such a court. The prosecutor must first draw up the charge and fill in the name, residential address and occupation of the accused. The clerk of the court issues the summons (although in practice this is also done by the prosecutor) and it will then usually be served by the Namibian Police.

A summons must be delivered to the accused personally. If the accused cannot be found, then it must be delivered at the accused’s residential address or place of employment by handing the summons to a person apparently over the age of sixteen, who resides or is employed at the place of service (section 54(2)(a)). A return of service by the person who served the summons that service has been effected in terms of section 54(2)(a) is *prima facie* proof of service. *Prima facie* proof means that in the absence of contrary evidence, the return of service becomes conclusive proof of service. The summons must be served on an accused at least fourteen days (excluding Sundays and public holidays) before the trial date. It is preferable to serve a summons on an accused personally, because the person then cannot say that he or she did not receive the summons.

It is a criminal offence for an accused who has been summoned to fail to appear or to remain in attendance at the proceedings (section 55). A warrant of arrest will be issued by the court if the court is satisfied that the summons was served on the accused properly. The police officer executing the warrant:

- may (the officer has a discretion), where it appears to the officer that the accused received the summons and that the accused will appear in court in accordance with a warning under section 72;
- shall (the officer has no discretion if one of the three grounds is present), where it appears to the officer that the accused did not receive the summons or that the accused paid an admission of guilt fine in terms of
section 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused (the police officer may obtain an affidavit or affirmation for this purpose);

release the accused on warning under section 72 for the offence of failing to appear in answer to the summons (section 55(2)).

This method should be used in all cases where an accused has strong community ties (fixed residence, employment or family ties) and the offence is not very serious. A police officer who wishes to use this method should ensure that the following details of the accused are noted:

- the person’s full names;
- date of birth and identity number;
- occupation;
- residential address;
- work address/business address;
- details in respect of the charge.

(b) Written notice to appear

This procedure is similar to a summons to appear in court, except that a written notice may be given to the accused by a peace officer.

A written notice to appear in terms of section 56(1) of the Criminal Procedure Act may be given to an accused, whether in custody or not, where a peace officer on reasonable grounds believes that a court on convicting the accused will not impose a fine exceeding N$300. The written notice must:

- specify the name, residential address and the occupation or status of the accused;
- call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the particular offence;
- contain an endorsement in terms of section 57 i.e. make provision for the accused to pay a fine (up to a maximum amount of N$300) as an admission of guilt, without having to appear in court;
- contain a certificate signed by the peace officer that he or she has handed the original written notice to the accused and that he or she has explained to the accused what is stated in the notice.
An accused who has been given a written notice to appear must be released from custody immediately (section 56(2)). A duplicate of the notice must be sent to the clerk of the court (section 56(3)). If an accused fails to appear after receiving a written notice, the same procedures set out in section 55 are applicable (section 56(5)).

(c) Release on warning in lieu (in the place) of bail

In terms of section 72(1) of the Criminal Procedure Act, an accused may be released from custody by a police officer and warned to appear if the offence for which the accused has been arrested is not an offence referred to in Part IV of Schedule 2 of the Criminal Procedure Act. The following offences are listed in Part IV:

“Treason.
Sedition.
Murder.
Kidnapping.
Childstealing.
Rape.
Robbery.
Arson.
Public violence.
Bribery.

Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds N$600.

Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones in each case if the value involved in the offence exceeds N$600.

Any offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs.

Any offence relating to the coinage.

Any offence under the Controlled Game Products Proclamation, 1980 (Proclamation AG. 42 of 1980).

Any offence under the Nature Conservation Ordinance, 1975 (Ordinance 4 of 1975).

Any conspiracy, incitement or attempt to commit any offence referred to in this Part."

The accused is released from custody by the police officer without requiring him or her to pay bail. This form of bail is commonly known as “free bail” i.e. no money is paid and the accused is instead warned to appear in court. Section 72 should be considered in any case where the offence is not listed in Part IV of Schedule 2 and the accused is likely to stand trial and is unlikely to interfere with the investigation.

Section 72 can also be applied by a court, but in this case, the court is not restricted from granting bail by the reference to the offences listed in Part IV of Schedule 2 and can grant bail in respect of any offence.

If the accused is under the age of eighteen, the accused can be placed in the care of any person who has custody of the accused i.e. the person need not be the parent of the accused, if the accused lives with another adult. This person is then warned to bring the juvenile accused to court.

A police officer who releases an accused on a warning is required to complete and hand to the accused (or if the accused is a juvenile, to the custodian of the juvenile) a written notice specifying:

- the offence;
- the court before which the accused must appear; and
- the time and date on which the accused must appear.

While the section does not expressly state this, a copy should be made of the written notice and the person receiving the notice should acknowledge receipt of the original notice. The copy should be kept in the docket. A note should be made in the investigation diary.

It is an offence for an accused to fail to appear at the court proceedings, or for the custodian of a juvenile accused, to fail to bring the accused to the court proceedings. A warrant of arrest will be issued by the court if the court is satisfied that the accused or the custodian of juvenile was properly warned. When the person is brought before the court, the person is required to satisfy the court that his or her failure to appear was not his or her fault.

**Requirements for a lawful arrest**

As we have seen above, an arrest must take place under “procedures established by law” (article 7) and not be arbitrary (article 11(1)). The procedures established by law for an arrest are specified in the Criminal Procedure Act.
(a) **Arrest with a warrant**

Unless a person may lawfully be arrested without a warrant of arrest, a warrant of arrest should be used to arrest the person. Section 43 regulates the issuing of warrants of arrest and provides that:

> (1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general [now the Prosecutor-General], a public prosecutor or a commissioned officer of police-

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.”

The application must therefore mention:

(a) the offence alleged to have been committed. The name and some details of the offence should be mentioned. It is not necessary to describe the offence in the form of a charge i.e. as it would be put to an accused in court;

(b) preferably the name of the person to be arrested, but where this is not possible, an accurate description of the person so that it is possible to identify the person with reasonable certainty, will be sufficient;

(c) one of the following allegations concerning jurisdiction:

(i) that the offence was committed within the district of the magistrate, if the application is made to a magistrate;

(ii) if the application is made to a justice, that the offence was committed within the district of the magistrate where the application is made to the justice for the warrant;

(iii) where the offence was not committed within the area of jurisdiction where the application is made, that it is known or on
reasonable grounds suspected that the person is within the district where the application is made;

(d) a statement that from information taken on oath, there is a reasonable suspicion that the person to be arrested has committed the alleged offence. It must appear from this statement that there are reasonable grounds for the suspicion.

**Trainer’s note**

For further information see the commentaries on section 43 by J Kriegler, *Hiemstra - Suid-Afrikaanse Strafproses* (5th ed) and Du Toit *et al*, *Commentary on the Criminal Procedure Act*.

Where possible, it is generally advisable to first obtain a warrant of arrest, rather than arresting a person without a warrant. Ideally, the warrant of arrest and detention should be issued by a magistrate or by a commissioned officer who is unconnected to the investigation. This means that a neutral person will have to decide whether there are reasonable grounds for the suspicion. The arrest is therefore unlikely to be arbitrary. As discussed above, an arbitrary arrest is prohibited under article 11(1) of the Constitution.

(b) **Arrest without a warrant of arrest**

A person may only be lawfully arrested without a warrant in one of the particular situations specified by section 40 of the Criminal Procedure Act, which provides that:

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“(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence;

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) who has escaped or who attempts to escape from lawful custody;

(d) who has in his possession any implement of housebreaking and who is unable to account for such possession to the satisfaction of the peace officer;

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

(f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;

(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;```
who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;

(j) who wilfully obstructs him in the execution of his duty;

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

(l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;

(m) who is reasonably suspected of being a deserter from the Namibian Defence Force;

(n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

(o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;

(p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons.

(2) If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.”

The offences listed in Schedule 1 to the Criminal Procedure Act are the following:

“Treason.
Sedition.
Murder.
Culpable homicide.
Rape.
Indecent assault.
Sodomy.
Bestiality.
Robbery.
Assault, when a dangerous wound is inflictet.
Arson.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision.
Receiving stolen property knowing it to have been stolen.
Fraud.
Forgery or uttering a forged document knowing it to have been forged.
Offences relating to the coinage.
Any offence, except the offence of escaping from lawful custody in circumstances other than
the circumstances referred to immediately hereunder, the punishment wherefor may be a
period of imprisonment exceeding six months without the option of a fine.

Escaping from lawful custody, where the person concerned is in such custody in respect of
any offence referred to in this Schedule or in such custody in respect of the offence of
escaping from lawful custody.

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.”

Many of the various situations require a reasonable suspicion on the part of the
arresting member. What is meant by “reasonable” and by “suspicion”?

“Suspicion” is a lower standard than “certainty” or “adequate proof” that the suspect
has committed the offence. One of the definitions of “suspicion” in the Concise
Oxford Dictionary is a “partial or unconfirmed belief.” The South African Appellate
Division has on a number of occasions approved of the following paragraph in the
English Privy Council decision of Shaaban Bin Hussien and Others v Chong Fook
Kam and Another [1969] 3 All ER 1627 (PC) at 1630:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I
suspect but I cannot prove.’ Suspicion arises at or near the starting point of an investigation
of which the obtaining of prima facie proof is the end.”

“Reasonable” means that there are reasonable grounds for the suspicion. Another
way of expressing this is that a reasonable person would also have such a suspicion.
In other words, the situation is examined objectively, as if an outsider were looking at
the situation; rather than subjectively, which is the suspicion of the arresting
member. Another way of expressing the idea is that the arresting member is
required to act “as an ordinary honest man would act and not merely act on wild
suspicions but on suspicions which have a reasonable basis” per Jones AJP in
Rosseau v Boshoff 1945 CPD 135 at 137.

For a suspicion to be reasonable, the member must investigate the complainant’s
allegations to see whether they are well founded, reasonable or plausible, before
arresting the suspect. A member need not carry out such an investigation
immediately if this is not possible. For example, where the suspect is endangering
the safety of others, it would be better to remove the suspect from the scene by
arrest and detention, rather than to leave the suspect and to first carry out an
investigation.

On the other hand, in cases where there is no immediate urgency or emergency, it
would be necessary to conduct some investigations before arrest, to establish if the
suspicion is reasonable. In Nkambule v Minister of Law and Order 1993 (1) SACR
434 (T); 1993 (1) SA 848 (T), Mr Nkambule was arrested by a member of the South
African Police without a warrant of arrest on a charge of stock theft. The arresting
member neglected to read the statement of the complainant. If he had done so, he
would have noticed various discrepancies in the complainant’s account, which
should have been cleared up by further investigation. The court approved of the
following passage in the judgment of Jones J in Mabona and Another v Minister of
Law and Order and Others 1988 (2) SA 654 (SE) at 658F - H:
'It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'

The court held that Mr Nkambule’s arrest was unlawful because the arresting member’s suspicion was not reasonable and ordered the Minister of Law and Order to pay damages to Mr Nkambule.

(c) Arrest procedure

Manner of arrest

Section 39(1) of the Criminal Procedure Act provides that:

“An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.”

The person to be arrested must therefore be touched by the arresting member, unless the person by his/her conduct or statement clearly indicates that he/she acknowledges that he/she is under arrest. Force may also be used to detain a person that is resisting arrest. The use of force will be fully discussed in chapter 9.

Promptly informed of the grounds for arrest in language understood

Article 11(2) of the Constitution provides 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.”

Section 39(2) of the Criminal Procedure Act provides that:

“The person effecting the arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the accused person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person hand him a copy of the warrant.”

There are some minor differences in the wording of these two provisions. “Promptly” and the “grounds for such arrest” are used in article 11(2), while “immediately” and the “cause of the arrest” are used in section 39(2). It is suggested that there is no real difference in meaning. If there is any inconsistency, the courts will apply article 11(2), because the provisions of the Constitution override the provisions of other laws.

It should be noted that article 11(2) clearly states that no person shall be detained except in compliance with the provisions of the sub-article. It follows that any
detention where there is not full compliance with the sub-article will be unconstitutional and therefore unlawful. See the discussion of S v Matlawe 1989 (2) SA 883 (BG D), below.

“Promptly” means that the person should be informed of the reasons for the arrest as soon as it is practically possible. It does not mean immediately or simultaneously because the person may still be resisting arrest, for example, and it may not be possible to give the reasons at this stage, nor will the person be in a position to understand the reasons at this time.

The reasons for the arrest should nevertheless be conveyed to the person at the earliest reasonable opportunity. In the South African case of Minister van Veiligheid en Sekuriteit v Rautenbach 1996 (1) SACR 720 (A), Sergeant Lerm, a member of the South African Police force attempted to arrest a Mr Rautenbach at his home. Sergeant Lerm informed Mr Rautenbach that he intended arresting him with a warrant of arrest, but that the warrants of arrest were only available at the police station. The police station was approximately 15 minutes' drive away and the three warrants of arrest would then be printed out by computer. Sergeant Lerm touched Mr Rautenbach in terms of section 39(1) of the Criminal Procedure Act, but Mr Rautenbach said that he would not accompany Sergeant Lerm to the police station unless he showed him the warrants of arrest. Shortly after this Mr Rautenbach ran away, was shot and wounded by Sergeant Lerm and subsequently sued the Minister of Safety and Security for R2 000 000 in damages.

The court emphasised that the question of what is meant by “immediately” in section 39(2) of the Criminal Procedure Act will depend on the particular circumstances of each case (at 730g). The court considered that the conduct and attitude of the person to be arrested is an important component of when the reasons can be given “immediately”. If the person runs away in order to avoid arrest, for example, it will not be possible to give the reasons until the person is properly arrested and detained. In a case where the person violently resists arrest it may be sufficient to inform the person of the reasons for the arrest on arrival at the police station. See R v West and Wild 1953 (2) SA 675 (SR) at 678A.

On the other hand, where the person to be arrested asks why he or she is being arrested and is told by the arresting member that:

“I do not know. My commanding officer just told me to arrest you. You will be informed at the police station of the reason. Come along.”

This answer will not comply with section 39(2) of the Criminal Procedure Act, because the grounds are not given “immediately”, but only a statement that the grounds will be given later at the police station (at 731f - g). Similarly, any answer that the arresting member does not know the grounds for the arrest will not comply with section 39(2) (at 732a).

In the particular circumstances of this case, it was not sufficient compliance with section 39(2) of the Criminal Procedure Act to inform Mr Rautenbach that the warrants of arrest would be given to him at the police station (at 733i). Where the arresting member cannot comply with section 39(2), for example, because he/she does not have the warrant of arrest at the time of arrest, then the arrest and
detention is unlawful (at 735c - g). In terms of the Namibian Constitution, an arrest and detention will also be unconstitutional and therefore unlawful if the member does not comply with article 11(2).

The court concluded that because Mr Rautenbach’s arrest and detention were unlawful, he was entitled to flee and Sergeant Lerm’s actions in shooting at and wounding Mr Rautenbach were therefore unlawful (at 736e).

The reason for the requirement that the grounds for arrest be given promptly on arrest are that:

- arrest is a drastic invasion of the individual’s fundamental right to liberty. The arrested person should be given reasons for this invasion as soon as practically possible (See Minister van Veiligheid en Sekuriteit v Rautenbach at 731h);

- it promotes orderly and non-violent arrests. It is less likely that a person will try to flee or resist arrest if he or she is informed of the grounds for the arrest (See Minister van Veiligheid en Sekuriteit v Rautenbach at 731i);

- the arrested person may begin to prepare a defence if he or she is aware of the reasons;

- the arrested person may try to obtain his/her release if the reasons do not support detention.

Reasons for the arrest should be given regardless of whether the arresting member believes that the person arrested is in fact aware why he/she has been arrested. In other words, the person should always be informed of the reasons for arrest, even if the reason for the arrest appears obvious to the arresting member.

The reasons given for the arrest should be sufficient to inform the person in broad terms of what is alleged against him/her. What is sufficient will depend on the circumstances of the case. The surrounding circumstances or context of the arrest will also be taken into account. For example, a person apprehended for shoplifting at the exit of a shop, could simply be told “I arrest you for the theft of the batteries in your pocket.” The situation would be different if the person were arrested some time after the incident at a different place. Then the person would have to be informed when and where the alleged offence was committed.

In S v Matlawe 1989 (2) SA 883 (BG D), a decision of the Boputhatswana General Division, the court held that the accused was not guilty of resisting arrest, because he had not been given reasons for his arrest. The particular article of the Bill of Rights in Boputhatswana was almost identical to article 11(2) of the Namibian Constitution. All that the arresting officer said to the accused was that he should come with him to the police station. The court therefore held that the detention was unlawful, because it was contrary to the Boputhatswana Bill of Rights. This decision would be applicable to Namibia.
The requirement that the reasons for the arrest be given in a language understood by the person could create problems in Namibia where the inhabitants speak a large number of different languages. Few members of the police would be able to speak all of these languages. The person arrested could be a foreigner, who is unable to speak English. Fortunately, the requirement is that the reasons be given in a language understood by the person arrested.

A language may be understood by a person even if it is not his/her home language. In Naidenov v Minister of Home Affairs 1995 (7) BCLR 891 (T), the accused was a Bulgarian citizen, whose home language was Bulgarian. He argued that the reasons for his arrest should have been communicated to him in Bulgarian. It was clear however that he understood enough English, which was the language used to inform him of the reasons for his detention. The reasons did not have to be given to him in Bulgarian.

The failure of the arresting member to inform the person arrested of the grounds for the arrest in a language understood by the person, will mean that the subsequent detention of the person will be contrary to article 11(2) of the constitution. This is because article 11(2) provides that “no persons arrested shall be detained in custody”, without complying with these requirements. The subsequent detention of the person will therefore be unconstitutional and therefore unlawful. A person may therefore lawfully resist the arrest. In addition, the person arrested will have a case against the Minister of Home Affairs for damages because of his/her unlawful detention.

**Notification of charges**

Although there is no mention in the Constitution that a person arrested should be informed of the charges against him or her, this requirement is contained in article 9(2) of the International Covenant on Civil and Political Rights:

> “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

There is therefore the additional requirement that a person also be “promptly informed of any charges against him.” This means that the person should be informed of the legal basis for the detention in a similar way to the charges that will be put to the person in court.

This need not take place at the time of arrest. Here, the requirement is only that the person be informed of the reasons for the arrest. The person should be informed of the charges against him/her at the latest during the first interview, but preferably when the decision is made at the police station to detain the person.

**Notification of right to the silence**

Every person has the right to remain silent and not to answer any question which may incriminate himself/herself. This right cannot be exercised unless the person is aware of the right. It follows that persons should be informed of this right on arrest or before making any statement which may incriminate them.
Principle 13 of the Principles on Detention provides:

“Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention, or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”

This topic will be discussed in detail in chapter 7 (detention).

Notification of the right to legal representation

There is no specific requirement in the Constitution that an arrested person be informed at the time of his/her arrest of the right to be legally represented. Article 12(1) of the Constitution however guarantees the right to a fair trial and provides that:

“(a) In the determination of ... any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law ... 

... 

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during the trial, and shall be entitled to be defended by a legal practitioner of their choice.”

Section 73(1) of the Criminal Procedure Act provides that:

“All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during the trial, and shall be entitled to be defended by a legal practitioner of their choice.”

It follows from the right to a fair trial and the right to be defended by a legal practitioner that any person arrested or who intends making a statement should be informed of his/her right to be legally represented. Otherwise, for example, the arrested person may raise at trial that he/she was not aware of the right to legal representation when he/she made a confession or a pointing out. The person may argue that the confession or pointing out should not be admitted into evidence because otherwise his/her right to a fair trial will be violated. This may lead to the person being acquitted.

The right to notification of the arrested person’s rights in general, and the right to legal representation in particular, are also protected under international standards. Principles 13 and 17.1 of the Principles on Detention provide:

“13. Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention, or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.
17.1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authorities promptly after arrest and shall be provided with reasonable facilities for exercising it."

This topic will be discussed in detail in chapter 7 (detention).

**Arrested person to be taken to a police station**

The arrested person must be taken to a police station as soon as possible after the arrest (section 50(1) of the Criminal Procedure Act). This would in most cases mean that the person should be taken to the police station immediately.

**Right to appear before a court within 48 hours after arrest and the right to apply for bail**

Article 11(3) of the Constitution requires that:

“All persons who are arrested and detained in custody shall be brought before the nearest magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a magistrate or other judicial officer.”

Section 50 contains detailed provisions regulating when the period of 48 hours expires in particular situations. However, the Constitution takes precedence over ordinary legislation and these provisions do not apply if inconsistent with article 11(3). This topic is discussed in greater detail in chapter 7 (detention).

**Arrest of juveniles**

Members should consider whether the arrest and detention of a juvenile is necessary under the particular circumstances. The age of the juvenile is important, because it would generally be undesirable to detain a young child (for example, who is six or seven years old), but this would not be as applicable in the case of a seventeen year old.

If juveniles are arrested, they should receive special treatment because of their youth and vulnerability. Rule 10.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) requires:

“Upon the apprehension of a juvenile, her or his parents or guardians shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.”

Article 37(b) of the Convention on the Rights of the Child states:

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”
The treatment of juveniles is dealt with further in chapter 11.

Conclusion

The power to arrest is an essential police power. It is essential for the purposes of law enforcement and the administration of justice. The right to individual liberty is a fundamental human right. It is essential for the enjoyment of other human rights, and it is a prerequisite for democratic government and democratic citizenship.

The standards described in this chapter indicate how an essential police power can be reconciled with a fundamental human right. Members need to have a complete understanding of their powers in this respect, and the limits on them. They also require the necessary practical and tactical skills to put their powers into effect with due regard to those limits. It is in the actual practice of policing that powers are properly exercised or exceeded, and rights either respected or violated.

Reasons for arrest and explanation of rights

The following statement and explanation of rights should be given to the arrested person as soon as reasonably possible after the arrest. In most cases this would be virtually at the same time as the arrest. The statement and explanation must be given in a language understood by the person.
I arrest you for .....

*mention the offence; and*

*state the facts that give rise to the suspicion that the suspect is guilty of the
  offence.*

I must inform you that you have the right to silence. This means that you do not have to say anything to me or any other member of the Namibian Police.

If you give up the right to remain silent, anything that you say may be used in evidence against you.

I must also inform you that you have the right to consult a legal representative of your choice. You will be allowed to telephone a legal representative. You may decide not to make a statement until you have spoken to a legal representative. A legal representative may be present to represent you when you are questioned.

Do you understand these rights as I have read them to you? Do you require any further explanation of these rights?

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**Exercises and topics for discussion**

**Hypothetical exercises**

**Exercise 1**

A fundamental human right which is relevant to the actions of police officials is a person’s right not to be subjected to arbitrary arrest or detention. Discuss:

(a) How this right is protected under the Constitution and the Criminal Procedure Act.

(b) The effectiveness of any guidelines or the Standing Orders to assist police in respecting this right.

(c) The effectiveness of any specific instructions issued by police command on the exercise of powers of arrest, and on avoidance of arbitrary arrest.

(d) The ways in which supervisory systems within the Namibian Police seek to prevent arbitrary arrests.

(e) Draw up a brief list of guidelines and instructions to be issued to members, designed to ensure that only legal and necessary arrests are effected.
**Exercise 2**

You are required to arrest a person who is considered to be armed and dangerous. This person is hiding in a house in town occupied by four other people. The person to be arrested is not aware that police know of his whereabouts and considers the house a safe place to hide. In the past, he has resisted arrest and used a firearm against police.

1. What other information do you require to make your plans to effect an arrest with minimum risk of causing any personal injury?

2. Set out the essential elements of a plan to secure the arrest of the person effectively, lawfully and safely.

3. Describe the part of the briefing you would give to police, prior to the arrest operation, on the use of firearms in the operation.

4. What effect does the presence in the house of four people, apart from the person to be arrested, have on your operational plan?

**Exercise 3**

Over a period of six months, five women have been brutally murdered in Windhoek. The indications are that these murders are being committed by the same person - a man - and that they have a sexual motive. The general population is extremely worried, women are in great fear, and the media and politicians are questioning police competence. There has been no progress in the investigation.

1. Are these sufficient grounds for removing the protection against arbitrary arrest so that more men can be arrested and questioned about the crimes?

2. Set out the arguments for increasing police powers of arrest under such circumstances. What should those powers be?

3. Set out the arguments for retaining law, procedures and practice designed to protect people from arbitrary arrest under such circumstances.

4. Apart from exercising increased powers, what other steps can be taken by police to reassure the population?

**Topics for discussion**

1. Why is the right to liberty and security of the person such an important right?
2. On the question of unnecessary arrests, give reasons why it is not always appropriate to arrest a person even when you have the legal power to do so.


4. Article 11(3) of the Constitution expressly requires an arrested person to be brought before a magistrate within 48 hours. Why has such a provision been introduced?

5. Why are interpersonal skills, especially skills of communication, important when effecting an arrest?

6. Can interpersonal skills, including skills of communication, be taught successfully? Imagine that you have been asked to devise a course for training police in such skills. Prepare an outline course programme setting out the subjects to be covered.

7. Make a list of the main points of advice you would give a newly appointed member on effecting lawful, necessary, expert and discreet arrests.

8. For the purposes of discussion, imagine that a team of police officers has carried out the arrest of a number of suspects for a serious crime following a planned police operation. What points would you want to review during a debriefing exercise for this operation?
Chapter 7

DETENTION

Chapter objectives

To give members of the Namibian Police an understanding of the Namibian and international human rights standards on the conditions of detention and the treatment of detainees, emphasising in particular the recognition of the vulnerability, humanity and dignity of all detainees.

Essential principles

Pre-trial detention shall be the exception rather than the rule.

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

No detainee shall be subject to torture or to cruel, inhuman or degrading treatment or punishment, or to any form of violence or threats.

Detainees shall have the right to be informed of the reason for detention and any charges against them.

Detainees should be given the opportunity to notify their families of their detention and to contact a legal representative.

Every person who is arrested and held in custody shall be brought before a magistrate as soon as possible, and not later than 48 hours after arrest. No person shall be detained for longer than this period without the authorisation of a magistrate.

In police cells, juvenile detainees should be separated from adults and women should be separated from men.

Detainees have the right to have contact with the outside world and to visits from family members, and the right to communicate privately and in person with a legal representative.

Detainees shall be kept in humane facilities, designed to preserve health, and shall be provided with adequate food, water, shelter, clothing, medical services, exercise and items of personal hygiene.

The religious and moral beliefs of detainees shall be respected.

The rights and special status of women and juvenile detainees are to be respected.

No one shall take advantage of the situation of a detained person to compel him or her to confess or otherwise incriminate himself or herself or another person.
Measures for maintaining discipline and order among detainees shall only be taken in accordance with the Constitution, the law and the Standing Orders.

Information for presentations

Introduction

There is a distinction between a “detainee” and a “prisoner”. Both have been deprived of personal liberty. A detainee has however not been convicted of a criminal offence, while a prisoner has been convicted and sentenced. Police usually deal only with detainees and not with prisoners.

Detainees are therefore persons who have not been convicted of any crime. They are therefore innocent until they have been proved to be guilty in a court of law and should be treated accordingly.

A detainee is also in a weaker position because of detention. The detainee now has to rely on members to feed him/her, provide him/her with medical attention, assist in contacting family members etc. The vulnerability of detainees should not be abused.

It is vitally important for the maintenance of both the dignity and humanity of detainees that police conduct towards detainees should be in strict compliance with the Constitution, international standards and the Standing Orders.

General aspects of human rights during detention

Prohibition of torture and cruel, inhuman or degrading treatment or punishment.

(i) Introduction

Torture is outlawed under the Namibian Constitution. Article 8(2)(b) of the Constitution provides that:

“No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”

Torture has also been completely rejected by the international community as a method to be used under any conditions. Torture has no place in a civilised and democratic society, such as Namibia, which is founded on the principle of the rule of law.

It must be emphasised that torture is absolutely prohibited in any situation, in other words, the use of torture is always unlawful. For example, torture is prohibited even when the country is under a state of emergency or involved in a war (article 24(3) of the Constitution) or facing a violent terrorist campaign involving the murder of police officials and innocent members of the public.

As an indication of the commitment by Namibia to the complete eradication of torture in Namibia, Namibia has acceded i.e. become a state party, to the Convention against Torture by the President signing the Convention. The National Assembly
agreed to the accession on 6 October 1994. The Convention against Torture is therefore part of the law of Namibia in terms of article 144 of the Constitution.

Torture or the ill-treatment of any person is unacceptable as an investigative technique in the Namibian Police. Torture not only harms the victim, but also degrades the person who inflicts or authorises it. It should not be used under any circumstances by any member of the Namibian Police. Allegations of torture should be vigorously investigated and the perpetrators prosecuted. The use of torture by a few members will negatively affect the dignity and reputation of all members and the reputation of the Namibian Police in general.

Besides being indefensible in a civilised society, torture is also not a reliable investigative technique. A person may confess under torture not because he or she has committed the offence, but rather to end the torture.

Instead of using torture or “third degree” forms of interrogation, members should rather employ proper investigative techniques, in particular the use of sophisticated interview methods.

(ii) **What is torture or cruel, inhuman or degrading treatment or punishment?**

“Torture is defined in article 1 of the Convention against Torture as:

> “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.”

The European Court of Human Rights has held that interrogation methods were inhuman even if there was no physical injury to the victim. The methods are inhuman if they cause “intense physical and mental suffering” to the persons subjected to the treatment. The methods were also degrading because they caused the victims to feel “fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance” (*Ireland v United Kingdom*, paragraph 167 of the judgment of the European Court of Human Rights of 18 January 1978).

“Torture” was considered in the same judgment of the European Court of Human Rights as meaning to cause very serious and cruel suffering i.e. a more intense form of suffering than “inhuman or degrading treatment” would cause (at paragraph 167).

To give some examples, the use of an electrical shock device or beating with a sjambok or cane would be torture. The use of interrogation methods that fall into a category that can be termed “disorientation” methods such as sleep deprivation, deprivation of food or drink or enforced standing, would constitute inhuman or degrading treatment. These were some of the methods used by the British security forces in Northern Ireland that were condemned as inhuman and degrading.
treatment by the European Court of Human Rights in the *Ireland v United Kingdom* case.

(iii) **Evidence obtained by torture or cruel, inhuman or degrading treatment or punishment is inadmissible as evidence**

Any evidence obtained by using torture or by subjecting detainees to cruel, inhuman or degrading treatment is inadmissible in court. It is therefore counterproductive to use improper means to obtain evidence, whether a confession, admission or pointing out, because this evidence will not be admitted into evidence. Article 12(1)(f) of the Constitution provides that:

“No person shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons testimony which has been obtained from such person in violation of article 8(2)(b) hereof.”

In *S v Minnies and Another* 1990 NR 177 (HC); 1991 (1) SACR 355 (Nm HC), the first accused alleged that he had been tortured by members of the South West African Police force and that as a result of this he had pointed out certain equipment used to steal diamond bearing gravel. Minnies also pointed out the sacks of diamond bearing gravel, which had been stolen.

The court held that the pointing out by Minnies was inadmissible as evidence, because this evidence was obtained from an “interrogation conducted in a manner in conflict with article 8(2)(b) of the Constitution” (at 199H). The actual equipment and diamond bearing gravel found after Minnies pointed these items out was held to be admissible, but not any evidence that Minnies had pointed them out. Minnies was as a result found not guilty and acquitted.

(iv) **Torture gives rise to criminal and civil liability**

Torture constitutes the criminal offence of assault with intent to do grievous bodily harm, or common assault in more minor cases. A person who has been tortured or unlawfully assaulted may in addition institute an action for damages against the member or members responsible and against the Minister of Home Affairs in his capacity as the head of the Namibian Police and therefore their employer.

(v) **Any assault is contrary to the Standing Orders**

In terms of Standing Order C.5 (Administration Manual, chapter 11), when a member is convicted of “a violent crime, e.g. assault GBH, he/she shall be discharged from the Namibian Police.” Standing Order C.6 provides that in the “case of a conviction of common assault or a lesser offence, a discharge shall be seriously considered unless mitigating circumstances can be proven by the convicted member.”
(vi) **International standards**

In order to comply with Namibia’s obligations under the Convention against Torture, members of the Namibian Police must receive training on the prohibition of torture. Article 10 of the Convention against Torture specifically provides that:

1. Each State Party [i.e. Namibia] shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel ... 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 [i.e. the prohibition of torture] in the rules or instructions issued in regard to the duties and functions of any such persons.

A further aspect of the Convention against Torture is that the prohibition of torture is directed not only against the actual torturer, but against any person who orders torture to be carried out, or is aware of torture, but does nothing to stop it. Article 1 of the Convention against Torture defines torture as including any act when pain and 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.”

The situations where another person, such as a superior officer either consents, accepts or does nothing (i.e. acquiesces) in torture carried out by other persons is therefore regarded as if those persons had carried out the torture themselves.

Article 2 of the Convention against Torture provides that:

1. Each State Party [i.e. Namibia] 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 of a public authority may not be invoked as a justification of torture.”

Article 5 of the Code of Conduct for Law Enforcement Officers similarly provides:

“No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”

Section 14(1) of the Police Act requires members of the Namibian Police to:

“obey all lawful orders which he or she may from time to time receive from his or her superiors in the Force.”
An order to torture someone (or to inflict cruel, inhuman or degrading treatment or punishment) would be unlawful i.e. an assault, and would also be contrary to article 8(2)(b) of the Constitution. The Constitution is the supreme law of Namibia (article 1(6) of the Constitution). Such an order would therefore be an unlawful order. A member would therefore not have to obey such an order, nor should the member obey the order, because then he/she would be committing an unlawful act i.e. a criminal offence.

In addition, procedures should be implemented so as to curtail the use of torture. Article 11 of the Convention against Torture requires Namibia to:

“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 ... with a view to preventing any cases of torture.”

The basis for such a procedural system can be found in principle 23 of the Principles on Detention, which requires:

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.”

The Committee against Torture commented during 1997 on the Government of Namibia’s country report under the Convention against Torture as follows:

“114. The Committee is concerned that although torture and physical assaults by the Namibian Police have been reduced considerably since independence, treatment which falls under the notion of torture, cruel, inhuman or degrading treatment or punishment still occurs in certain areas of the country.

115. The Committee is also concerned at the State party's (i.e. Namibia's) failure in many cases to promptly and impartially investigate and to prosecute those responsible for past and present acts of torture or cruel, inhuman or degrading treatment. Namibia furthermore fails to consistently institute disciplinary proceedings against the public officials responsible for acts of torture or ill-treatment.”

The Committee against Torture recommended that:

“119. Education of members of Police Department, National Defence Force, Prison Service, other law enforcement personnel and medical officers regarding the prohibition of torture and other cruel, inhuman and degrading treatment should be fully included in their training, in accordance with Article 10 of the Convention, with special emphasis on the definition of torture as contained in Article 1 of the Convention and also emphasising the criminal liability of those who commit acts of torture.

120. Independent governmental bodies consisting of persons of high moral standing should be appointed to take over the inspection of detention centres and places of imprisonment. The government should also establish an independent police complaints authority dealing with complaints against the members of [the] Police Department.”
(vii) Conclusion

To summarise:

- torture is never justified under any circumstances;
- torture is illegal. It is a criminal offence. A member who commits torture may also be liable for damages if the victim institutes a civil action;
- no member has any defence available to him or her when committing torture;
- torture cannot be justified on the basis that the subordinate was carrying out the orders of a superior;
- a member should refuse to obey an order by a superior to torture a person;
- where a member believes that a person is being or has been tortured, he or she should take all reasonable steps to put an end to it. The incident should be reported to the station commander immediately, or where the station commander is himself or herself involved, to another superior officer;
- it is prohibited for a member, in particular for superior officers, to order, tolerate, consent to or to do nothing about torture carried out by other members.

The right not to incriminate oneself and the right to legal representation

One of the chief aims of a criminal investigation is to build up a case against the person thought to have committed the offence. The suspect will usually be interviewed, and as a result may point out objects or places, make a confession, make an admission, appear on an identification parade or provide real evidence, such as a blood sample or a fingerprint. Irrespective of whether a person has been arrested or not, or is in detention or not, the person has the following rights at all times:

- the right not to incriminate himself/herself;
- the right to be legally represented.

Every person is entitled to a fair trial under article 12(1)(a) of the Constitution, which provides that:

“In the determination of ... any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law ...”
The courts see the right to a fair trial as starting not in the court room, but at the “gates to the courts of justice” in other words, at the police station. This means that any evidence obtained in violation of the accused’s right to a fair trial, will probably be inadmissible in evidence. In other words, the court will be unable to consider this evidence. The court may therefore have to acquit the accused, because the remaining evidence is insufficient for a conviction. This is an undesirable state of affairs and it is first and foremost the duty of members to ensure that the provisions of the Constitution and the law are complied with, so as to avoid acquittals on technicalities.

The person should be informed of the right not to incriminate himself/herself and the right to legal representation at any time during the investigation when the person may provide evidence which could be used against him/her in court. An example of a model warning statement is given at the end of this chapter.

(a) Notification of the right not to incriminate himself/herself

Everyone has the right under common law (the unwritten law of the country) not to incriminate himself/herself. In addition, article 12(1)(f) of the Constitution provides that:

“No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of article 8(2)(b) hereof.”

It is clear from the use of the words “no persons”, that this sub-article applies to any person, whether that person is a witness, suspect or an accused.

During an interview, the person should therefore be informed that he/she may choose to remain silent and not answer any questions. The right not to incriminate oneself extends to any activity which may provide evidence against the accused, such as a pointing out. The right to silence can be seen as part of the right that a person not be required to incriminate himself/herself.

(b) Notification of the right to be legally represented

Everyone has the right during criminal proceedings to be represented by a legal practitioner of their choice. Article 12(1)(e) of the Constitution provides that:

“All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during the trial, and shall be entitled to be defended by a legal practitioner of their choice.”

Section 73(1) of the Criminal Procedure Act provides that:

“An accused who is arrested, whether with or without warrant, 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.”

It follows from the right to a fair trial and the right to be defended by a legal practitioner that any person who may provide evidence against himself/herself,
should be informed of this right at the latest at the time of arrest. The High Court has held in two judgments, *S v Kapika and Others* (unreported judgment of the High Court of 2 December 1997) and *S v De Wee* (unreported judgment of the High Court of 7 May 1998), that an accused has the right to be informed of his or her right to be legally represented. These cases are discussed below.

It should also be noted that the right of legal representation exists regardless of whether or not the person is charged. It is a fundamental right of every person to have access to a legal adviser, whether the person detained is an accused person, a suspect or is detained for any other reason. See *Ngqulunga and Another v Minister of Law and Order* 1983 (2) SA 696 (N) at 698B-C. In *S v Du Preez* 1991 (2) SACR 372 (Ck) the court held that the refusal of the police to allow a person who had been arrested to consult with his legal adviser was contrary to the provisions of section 73(1) and was also an abuse of power.

(c) **Waiver or giving up these rights**

Both the right to legal representation and the right not to incriminate oneself can be given up or waived by the person, provided that the waiver is made voluntarily, “knowingly and intelligently”. This was decided in the decision of the United States Supreme Court in *Miranda v Arizona* 384 US 436 (1966), but a similar rule will apply in Namibia. A South African court reached the same conclusion in *S v Melani* 1996 (1) SACR 335 (E) at 350e, the court holding that the accused must know and understand the right that he/she is giving up. In other words, the decision should be a well-informed decision, made with full knowledge of the effect of the waiver.

Where a person chooses not to be legally represented and gives up the right to silence, the possible consequences of making a statement should be fully explained. It will be insufficient to simply state that “the evidence may be used against you.” It should be explained that any statement that is made may or will be taken into account against the person for the purpose finding him or her guilty of the offence.

The fact that the accused has a right to be legally represented and a right to silence (or a right not to incriminate himself/herself), does not mean that a member should not question the person. It requires rather that the person be fully informed of these rights and that the caution then be noted down, so that any statement that is made will be admissible in court. It does mean that where a person chooses to remain silent, that this should be respected. It is however a common occurrence that even the obviously guilty make statements in order to try and explain their “innocence” rather than remaining silent.

(d) **Effect of not informing the person of these rights**

The usual result of failing to inform a person of the right not to incriminate himself/herself and the right to be legally represented is that the court will hold that any statement, admission, confession, pointing out, identification or other evidence obtained is inadmissible.

In a recent judgment, *S v Kapika and Others* (unreported judgment of the High Court of 2 December 1997), Mtambanengwe J ruled that four warning statements were
inadmissible. One of the grounds was that the statements were actually confessions and therefore inadmissible because they were made to constables in the Namibian Police i.e. the constables were peace officers, but not justices of the peace.

A further ground for decision was because the court rejected the evidence of the Namibian Police officers that they had informed the accused of their right to be legally represented before making the statements. The court then went on to refer to the judgment of S v Melani and Others 1996 (1) SACR 335 (E) at 347e – h, where Froneman J recognised the importance of informing an accused of his/her right to consult with a legal representative, so that the accused (particularly the “uneducated, the unsophisticated and the poor”) are not deprived of their right to remain silent and not to incriminate themselves.

While it is not expressly stated in the judgment, it appears that at the very least the failure to inform an accused of his/her right to be legally represented may result in the inadmissibility of the admission or confession. Unfortunately, the court did not consider whether evidence obtained in violation of a constitutional right or unlawfully would be automatically excluded or whether a court has a discretion to admit such evidence and how the discretion should be exercised.

Smuts (AJ i.e. Acting Judge) has now delivered an important judgment on the right to be informed of the right to be legally represented in the case of S v De Wee, unreported judgment of the High Court of 7 May 1998. Smuts AJ followed the judgment in Kapika’s case, finding that every accused has the right to be informed of his/her right to be legally represented. Where members of the Namibian Police do not inform a person of this right a court would have to be satisfied that it would be fair and right to allow the evidence. In this particular case, the confession was excluded i.e. held to be inadmissible.

In both the Kapika case and the De Wee case, the courts relied on the judgment in S v Melani and Others 1996 (1) SACR 335 (E). In this case, the accused had made a pointing out without being informed of his right to be legally represented. The court held that:

- the accused should have been informed of his right to be legally represented before he made the pointing out (at 347d);
- this information must be given in a way that the accused will be able to understand (at 349g);
- the right to legal representation can be waived, but the accused must know and understand what he is giving up (at 350e);
- it is preferable to inform an accused again of his right to legal representation if he makes a potentially incriminating statement or pointing out, some time after the first information was given. In this case it was five days after arrest, when the accused was informed of his right to legal representation (at 350g).
The court ruled that the pointing out was inadmissible as evidence, because the accused had not been informed of his right to legal representation before he made the pointing out.

In *S v Mhlakaza en Andere* 1996 (2) SACR 187 (C), the court held that the evidence of the identification of the accused on an identity parade was inadmissible because the accused had not been informed of their right to have their legal representatives present at the parade before it was held.

In *S v Mathebula and Another* 1997 (1) SACR 10 (W), the accused was not informed of his right to be legally represented before he made a pointing out. He was however informed of this right approximately one and a quarter hours before he made the pointing out. This information was even recorded in writing and the accused placed his thumbprint on the page. The court held that the accused should nevertheless have been informed of his right to be legally represented before he made the pointing out and held that the pointing out was inadmissible (at 20b - e and 30e ). See also the similar decisions of *S v Marx and Another* 1996 (2) SACR 140 (W) and *S v Nombewu* 1996 (2) SACR 396 (E).

In *S v Agnew and Another* 1996 (2) SACR 535 (C), the second accused was arrested in the early morning hours. He telephoned his attorney who advised him to say nothing to the police. The accused was to be taken to see his attorney, but before this he made a statement to a magistrate. The court held that the statement was inadmissible because it was obtained in violation of the accused's right to silence and to be legally represented. In effect, the accused should have first been given the opportunity to consult with his attorney before he made the statement. This was despite the fact that the accused had been advised of his right to silence in terms of the Judges’ Rules when he was arrested.

*Procedure during interviews*

The purpose of interviewing detainees is not to compel a person to confess, to incriminate himself or to obtain evidence to be used against others. There is however nothing wrong with any of these results, if obtained without the use of compulsion in any form, but rather through the application of sophisticated interview methods.

Interviewing detainees is part of the investigative process, and that involves information gathering or analysis. The interviewer should therefore approach the interview:

(a) with an open mind, that is not trying to use the interview to reinforce preconceived ideas;
(b) with the aim of fact-finding or information gathering, that is not solely for the purpose of securing a confession (or admissions) from the person being interviewed.

The interviewer should know and be aware of:

(a) ethical and legal standards on interviewing;

(b) all the information available on the crime or incident which is the subject of the interview;

(c) the psychological factors involved in the interview process, particularly those affecting the ability of individuals to make free decisions and rational judgments;

(d) the personality and character of the person to be interviewed.

Account should be taken of scientific developments in the field of psychology, which will help members interview suspects and obtain results, without needing to resort to physical assaults.

Trainer’s note: chapter 13 (Non-verbal communication), chapter 15 (Defusing hostile individuals) and chapter 16 (Crisis intervention techniques), Recruit Training Manual, (Justice Institute of British Columbia – Police Academy: New Westminster, undated) are particularly useful.

Access to legal practitioners

The right to be notified of the right to be legally represented has been discussed above.

It is not always possible to provide legal practitioners with consultation rooms at police stations due to a shortage of space or facilities, although this is ideal. A legal practitioner should however be provided with a place where he or she can consult with the detainee in private. This is because all communications between legal practitioners and their clients are privileged.

Privilege means that these communications can only be disclosed to another person with the consent of the client. The reason for legal professional privilege is so that clients can consult with their legal practitioners in full confidence in order to obtain legal advice. An accused may decide not to tell the whole truth to his/her legal adviser, if the accused knows that it will not be kept confidential.

Right to appear before a court within 48 hours after arrest and the right to apply for bail

Article 11(3) of the Constitution requires that:

“All persons who are arrested and detained in custody shall be brought before the nearest magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be
detained in custody beyond such period without the authority of a magistrate or other judicial officer."

Section 50 contains detailed provisions regulating when the period of 48 hours expires in particular situations. However, the Constitution takes precedence over ordinary legislation and these provisions do not apply if inconsistent with article 11(3).

Article 11(3) requires that all persons, who are arrested and detained in custody, must be brought before the nearest magistrate within a period of 48 hours from the time of their arrest. Only if this is not reasonably possible, then the person must be brought before the nearest magistrate as soon as possible. It was held in the Namibian High Court decision of S v Mbahapa 1991 NR 274 (HC); 1991 (4) SA 668 (Nm H) that the police must take all reasonable steps to bring the accused before a magistrate within the 48 hour period, including driving the accused to the nearest court. The convenience of the police is not a factor. The accused should be released if it is not possible to comply with the 48 hour requirement.

Article 11(3) of the Constitution and section 50 of the Criminal Procedure Act are important safeguards for the protection of arrested and detained persons. The essential principle is that within a period of 48 hours, a person is given the opportunity to appear in a magistrate’s court. A magistrate (and not a member of the police) then decides whether the person should continue to be detained or released on bail pending trial. This safeguard also means that a prosecutor may decide not to prosecute the person, because there is not a sufficient case for prosecution.

It should be noted that while a person may be detained for a maximum period of 48 hours, this does not mean that the person may not be released on bail before the 48 hour period has expired. Hannah J held in the High Court judgment of Garces v Fouche and Others (unreported judgment of 21 November 1997) that a person in detention may apply for bail at any time before the 48 hour period has expired, even if it means that a magistrate must hear the application outside of normal court hours. The court rejected the argument that a person could be held for up to 48 hours without being brought to court for a bail application, the court noting that:

“Article 11(3) does not, in my view, confer a right on the State to detain a person in custody for 48 hours at its whim if it is reasonably practical to bring that person before a magistrate at an earlier point in time. Section 50(1) of the Criminal Procedure Act, to which I now turn, and other provisions in the Act dealing with bail must be read in the light of the foregoing.”

It is also clear from the judgment that a bail application may be brought at any time, even outside of normal court hours (at p. 12):

“What is of importance, in my view, is that we are dealing with the liberty of the individual. There is nothing in the Criminal Procedure Act which limits an arrested person’s right to apply for bail only during normal court hours and to my mind justice dictates that in an appropriate case that person should have a right to apply for bail outside normal hours.”

Members should not frustrate an accused’s right to make a bail application by refusing to bring the accused to court, when an accused requests to be taken to court. It is for a court to decide whether an accused is entitled to bail, not for an
individual member. See Novick v Minister of Law and Order 1993 (1) SACR 194 (W) at 197F – H.

_Bail applications_

(a) **Introduction**

In terms of article 12(1)(d) of the Constitution, “all persons charged with an offence shall be presumed innocent until proven guilty according to law.” Any person who has been deprived of his or her liberty should therefore be given the opportunity to be released from detention pending trial. The detainee may otherwise be acquitted after trial, or the charges may be withdrawn, but in the meantime, the person has been deprived of his or her liberty, which can never be restored to the person. The right to liberty is a precious right and the Constitution therefore has a number of provisions which are directed at safeguarding this right, such as that no person shall be deprived of personal liberty except according to procedures established by law (article 7); no person shall be subject to arbitrary arrest or detention (article 11(1)); and that an accused is entitled to be tried within a reasonable time and failing this, to be released (article 12(1)(b)).

The purpose of bail is to strike a balance between the right of the accused to liberty pending conviction and sentencing (and the right to be presumed innocent) and the interests of the state and the community in ensuring that the guilty do not escape prosecution by not standing trial or being able to interfere with state witnesses.

The effect of the granting of bail is that an accused who is in custody is released upon payment of the amount determined as bail, or if the accused provides a guarantee for the payment of the bail amount if he or she breaches the bail conditions. The accused is released on bail until he or she acquitted or convicted. Bail may be extended by the court after conviction, pending the imposition of sentence. Bail may be withdrawn or cancelled in a number of situations, which are discussed below.

The granting of bail means that an accused can continue working and is therefore able to support his family and pay for his or her defence. The granting of bail can also help an accused prepare a defence, because the accused can more easily obtain and consult a legal practitioner, locate witnesses etc.

Pre-trial detention is often incorrectly viewed by the public as the norm. A common misconception is that an arrested person who is released on bail is escaping punishment and that the police and the courts are being soft on crime and criminals. These persons apparently do not understand that an arrest does not mean that the person has been convicted and sentenced to a term of imprisonment. Police officers therefore come under considerable pressure not to release persons on bail or to oppose the granting of bail. It is therefore important for police officers to understand the principles governing the grant or refusal of bail.

An accused does not however have a right to bail. The position is rather that an accused has the right to apply for bail and if the accused meets the criteria, he or she should be granted bail.
(b) Who grants bail?

Bail may be granted by:

- any member of or above the rank of non-commissioned officer in the Namibian Police i.e. of the rank of sergeant or above, before the accused’s first appearance in a magistrate’s court (section 59(1) of the Criminal Procedure Act);

- a magistrate’s court, when the accused appears for the first time or at any later time (section 60(1) of the Criminal Procedure Act);

- the High Court, if proceedings are pending in that court (section 60(1) of the Criminal Procedure Act).

An accused in custody for any offence, other than an offence referred to in Part II, Part III or Part IV of Schedule 2, may be released on bail by any member of or above the rank of non-commissioned police officer in terms of section 59(1) of the Criminal Procedure Act. The offences listed in Parts II and II of Schedule 2 are also listed in Part IV of Schedule 2. Part IV of Schedule 2 is reproduced in chapter 6 (arrest).

The accused is required to deposit the sum of money determined by the police officer at the police station. Police officers should bear in mind that the amount determined should not be so high as to amount to a refusal of bail. The accused should be able to pay the amount, either personally or with some assistance from family or friends. The accused should be given an opportunity to contact his or her family or friends, to obtain the amount.

At the time of releasing the accused on bail, the police officer must complete and hand to the accused a recognizance, which must include a receipt for the amount of money deposited as bail, the offence and the place, date and time of the trial of the accused. A duplicate original must be completed and forwarded to the clerk of the criminal court where the accused is due to appear.

Police officers should therefore in all cases where the granting of bail is possible, consider whether it would be appropriate (applying the factors governing the granting of bail set out below) to grant bail. This is particularly important over weekends, when the person would otherwise be detained for up to two days. Police bail may only be granted before the accused’s first appearance in court.

Bail applications are most commonly made in a magistrate’s court, when an accused appears for the first time. A bail application can be made in the High Court, if proceedings are pending against the accused in the High Court. Proceedings are only pending in the High Court once an indictment (similar to a summons in a magistrate’s court) is served on the accused.

(c) Principles governing the granting of bail
The most important question in a bail application is whether the interests of justice will be prejudiced by the release of the accused on bail. This has traditionally meant that the courts looks at three factors:

- whether the accused will stand his or her trial;
- whether the accused will interfere with witnesses or the criminal investigation;
- whether the accused will commit further crimes.

A useful summary of the factors that are used to determine whether an accused should be granted bail was given by Mahomed AJ in *S v Acheson* 1991 NR 1 (HC); 1991 (2) SA 805 (Nm) at 19F – 20F:

1. Is it more likely that the accused will stand his trial or is it more likely that he will flee and forfeit his bail? Relevant considerations include:
   - the accused’s connection to his place of residence;
   - the accused’s assets and the means that he has to flee the country, including travel documents;
   - whether there is an extradition treaty with the country to which the accused is likely to flee;
   - to what extent the accused can afford the forfeiture of the bail money;
   - the seriousness of the offence against the accused and the probable severity of the punishment if convicted;
   - the strength of the case against the accused;
   - the restricting nature of the bail conditions and how difficult it would be for the accused to evade the effective policing of his movements.

2. If the accused is released on bail, is it reasonably likely that he or she will tamper with witnesses or interfere with or destroy relevant evidence. Relevant factors include:
   - whether the accused is aware of the identity of any witnesses;
   - whether the witnesses have already made their statements and committed themselves to give evidence or whether it is still the subject matter of continuing investigations;
   - the relationship of the accused to the witnesses and whether or not it is likely that they may be influenced or intimidated by the accused;
• whether any condition attached to the granting of bail could prevent communication with any witnesses and can be effectively policed.

3. The prejudice to the accused by not releasing him or her on bail. Factors include:

• the length of imprisonment to date;

• the likely length of further imprisonment before the completion of the trial;

• the cause of any delay in the completion of the trial i.e. is the State or the accused to blame;

• the extent to which the accused needs to continue working to meet his or her financial obligations;

• the extent to which the accused may be prejudiced in engaging a legal practitioner and in effectively preparing his or her defence if the accused remains in custody;

• the health of the accused.

It is interesting that Mahomed AJ (who was the Chief Justice of Namibia for a number of years), omits the final requirement given above, namely whether the accused will commit further crimes. This requirement (if it is a requirement) must in any event be understood as meaning an accused’s tendency to commit crime (a “career criminal”). Examples of this are an accused that continues to steal or to deal in drugs, so as to pay for his or her legal representation or a possible fine.

In S v Bennett 1976 (3) SA 652 (C), the court held that the proper approach to the question of whether the accused would interfere with the investigation, was that where the accused had not up to then interfered with an investigation, the state must say that there is a real risk that that accused will (and not only may) interfere with the investigation.

Section 61 of the Criminal Procedure Act (following amendment by section 3 of the Criminal Procedure Amendment Act, Act No. 5 of 1991), now provides that if an accused is in custody on a charge listed in Part IV of Schedule 2 of the Criminal Procedure Act (reproduced in chapter 6 (arrest)), the court may refuse an application for bail if it “is in the interest of the public or the administration of justice that the accused be detained in custody pending his or her trial.” This is despite the fact that the court is satisfied that accused is likely to stand trial and will not interfere with state witnesses or the police investigations.

In interpreting the meaning of this section, O’Linn J held in S v Du Plessis and Another 1992 NR 74 (HC) at 85D – F that the section may mean that bail should be refused where the release of the accused would constitute a threat to the safety of the public or the maintenance of public order. A further example would be where the accused satisfies the court that he or she is unlikely to abscond i.e. not stand trial, or
interfere with state witnesses, but a reasonable possibility remains that this may happen.

Bail should not be set at such a high amount that the accused will be unable to pay it. A court should inquire into the means of the accused to pay the bail, although in practice this is ignored by many magistrates' courts. The setting of bail in an amount that an accused cannot pay is in effect a disguised refusal of bail. The Namibian Police has no control over the functioning of the courts, but it is a cause for concern that bail is frequently set by courts at an amount that is far beyond the reach of the poor, often for minor offences. These are often persons where there is no real risk that they will not stand their trial. This leads to the accused being detained for lengthy periods pending trial, which contributes to cell overcrowding in police stations and prisons and is costly to the taxpayer.

Conditions can be added to the granting of bail on the application of the prosecutor (section 62). An accused can be ordered to report at any place, to any authority, at any specified time (for example, at a particular police station). These conditions could make it more difficult for the accused to flee. Conditions can also be added to ensure that the accused does not tamper with state witnesses, by prohibiting the accused from going to particular places or prohibiting the accused from communicating with any prosecution witness. Finally, the court has a wide discretion to add any condition which would “ensure that the proper administration of justice is not placed in jeopardy by the release of the accused.” An example of such an order is that an accused be ordered to hand in his or her passport. A further example is that an accused inform the investigating officer if he or she intends leaving the magisterial district.

Where a police officer opposes the granting of bail, on one of these grounds, he or she should motivate properly, giving the public prosecutor, or if called to testify, the court, the reasons supported by evidence, if this is available. The search for evidence should be conducted as soon as possible, and before the bail application, so that it is available to the court. A police officer should also consider whether bail could be granted, but subject to conditions that would be in the interests of justice. Under no circumstances should the promise of bail be used to obtain a statement from the accused.

The prosecutor has the final say in deciding whether an application for bail should be opposed and can therefore overrule the investigating officer. The court is not bound by either the statements of the investigating officer or of the prosecution, but must exercise its discretion based on the factors set out above (S v Du Plessis and Another 1992 NR 74 (HC) at 83G – I).

(d) Failure by accused to observe the bail conditions (section 66)

If a court finds that the accused has:

- failed to observe the conditions of bail; and

- that such failure was the fault of the accused,
then the court may in terms in section 66 of the Criminal Procedure Act, cancel the bail and declare the bail money forfeited to the State.

(e) Failure by accused on bail to appear (section 67)

If an accused who is on bail fails to appear, the court is compelled to provisionally cancel the bail, to provisionally forfeit the bail money to the State and to issue a warrant of arrest (in terms of section 67(1), see S v Swartbooi 1990 NR 389 at 392C). If the accused appears before the court within a fourteen day period of the issuing of a warrant of arrest, the accused is required to prove that the failure to appear was not due to his or her fault. If the accused satisfies the court, then the provisional cancellation of bail and the forfeiture lapses (i.e. falls away). If the accused does not appear within fourteen days, then the provisional cancellation of bail and the forfeiture of the bail money becomes final. If the accused appears after the fourteen day period, then the order remains final and even if the accused gives a satisfactory explanation, the forfeiture and cancellation remain final. The court may nevertheless decide to grant the accused bail again.

(f) Cancellation of bail where accused about to abscond (section 68)

Cancellation of bail may take place where an accused has not breached a bail condition or has failed to appear, but where information is placed before the court on oath that the accused is about to evade justice or is about to abscond in order to evade justice. The court will issue a warrant of arrest in such a case. The bail money is not forfeited to the State.

Application is made to the court that granted bail. Convincing evidence must be placed before the court that the accused is about to flee in order to avoid standing trial.

(g) Release on a warning (section 72)

The release of an accused on a warning to appear can be distinguished from bail on the basis that no bail money is paid when the accused is released. If the accused fails to appear due to his or her fault, he or she can be sentenced to a maximum fine of N$100 or to imprisonment for a maximum period of three months.

General requirements on the treatment of detainees

(i) Respect for humanity and dignity of detainee

The Namibian Constitution clearly reflects an intention to break with the past and to recognise the dignity of all the people of Namibia. The Preamble to the Constitution begins:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;”
and continues:

“Whereas we the people of Namibia ... desire to promote amongst all of us the dignity of the individual ...”

Article 8 is headed “respect for human dignity” and provides in sub-article 1 that:

“The dignity of all persons shall be inviolable.”

Therefore, under the Constitution any detainee must be treated with humanity and with recognition of the dignity of the detainee.

Standing Order D.2.f (Administration Manual, Chapter 11) also provides that members must:

“treat persons in custody with respect, and never resort to abuse or harsh actions.”

(ii) Right to notify family of detention

Rule 92 of the Standard Minimum Rules for the Treatment of Prisoners guarantees the right to all detainees to notify family members of the detention and to communicate with family members. Rule 92 states:

“An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.”

Article 13(1) of the Constitution provides that there shall be no interference with the communications or correspondence of persons. Detainees should therefore be allowed to communicate with other persons by personal visits, letters, messages or other means. This right can however be restricted in the interests of public safety or the prevention of crime (see article 13(1) for the other grounds). An example of this would be where the authorities monitor visits for security reasons.

Any member who interferes with a detainee’s correspondence or communication will have to prove that the interference was justified on one of these grounds. There should therefore be an important and legally valid reason for denying this right.

(iii) Physical conditions of detention

Detainees should be provided with a minimum level of acceptable accommodation and food and with adequate medical care. This is because detainees are entitled to be treated with dignity and humanity under article 8(1) of the Constitution. Article 8(2)(b) of the Constitution also provides that no person shall be subjected to inhuman or degrading treatment.
It can also be noted that depriving someone of their liberty and detaining that person in custody, gives rise to an obligation on the part of the Namibian Police to detain that person under conditions which are consistent with the inherent dignity of all person. While it is recognised that the Namibian Police is subject to financial constraints, everything possible should be done to ensure that persons are detained under conditions which do not amount to inhuman or degrading treatment.

The Human Rights Committee, which supervises the implementation of the International Covenant on Civil and Political Rights, has recognised that poor detention conditions violate the detainee’s right to respect for human dignity.

There are detailed standards concerning the provision of adequate accommodation and food and the provision of medical care which are contained in the Standard Minimum Rules. Many of these provisions are similar to the provisions in the Standing Orders.

Detainees should also as far as is possible, be protected from physical injury while in detention, whether the injuries be caused by other members or by other detainees. A member is under a legal duty to a detainee to prevent the commission of a criminal offence (such as an assault) by any other person, when he or she is aware that an offence is being committed. In the South African Appellate Division decision of Minister van Polisie v Ewels 1975 (3) SA 590 (A), members of the South African Police had stood around and watched while an off-duty sergeant assaulted Ewels in a charge office. The Appellate Division held that the Minister of Law and Order was liable to pay damages to Ewels for the assault, because there was a legal duty on the members to stop the assault and to come to the assistance of Ewels. In other words, there was a legal duty on the police officers because of their role as law enforcers to stop the sergeant from committing the crime of assault.

The principle in Ewels’ case is reflected in Standing Order D.2 (Operational Manual, Chapter 2), which provides that:

“All members of the Namibian Police must exercise the powers and duties given to them by law.

a. Failing to perform a legal duty is a neglect of duty.”

(iv) Control measures at the start of and during detention

In order to prevent torture, to protect detainees from injury whether self-inflicted or by others and to provide medical care for detainees where needed, it is necessary to monitor the physical and psychological condition of the detainee at the time of detention in particular, but also while the person is detained.

All persons who are detained should be assessed by an officer with appropriate training as a routine part of the reception process. This assessment should note signs of illness or injury, the influence of alcohol or other drugs, and the apparent medical state of the detainee. Injured persons, persons under the influence of alcohol or drugs, and persons thought likely to commit suicide should be identified as “at risk” and placed under constant supervision until examined fully by a qualified medical practitioner. Persons who are unconscious should not be left unattended for
any period. Full notes should be made of any observations i.e. what was observed, in the case of injuries a precise description of the injuries and the action to be taken in response.

(v) Use of restraints

Any form of physical restraint such as handcuffs should only be used where strictly necessary to prevent injury or the escape of the detainee. The restraints should be removed as soon as the detainee has been secured. Prolonged or improper use of physical restraints violates the detainee’s right to respect for dignity under article 8(1) of the Constitution.

The use of physical restraints for an improper purpose may also be cruel, inhuman or degrading treatment or punishment, which is contrary to article 8(2)(b) of the Constitution.

(vi) Segregation of classes of detainees

The fact that all detainees are presumed to be innocent means that awaiting trial detainees should be separated from convicted prisoners. This will not cause any difficulties in practice because convicted prisoners are usually detained in prisons and not in police stations. Juveniles should however be detained separately from adults. Men and women should always be detained in separate cells, and preferably in separate sections.

Article 10(2) of the International Covenant on Civil and Political Rights, which forms part of the law of Namibia, reads:

“(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.”

Members should recognise that juvenile detainees should be treated differently from adults. Most importantly, juveniles should be detained separately from adult prisoners. This is both to protect the juvenile from physical harm, but also to try and prevent the juvenile from becoming further involved in criminal activities.

There are two requirements under article 10(2)(b). The first is that juvenile detainees should be separated from adult detainees under all circumstances. The second, over which the police have some control because the member investigating the case can speed up the investigation, is to ensure that the juvenile is tried as soon as possible.

Article 13 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) contain detailed provisions on the conditions of detention of juvenile detainees. Article 13.4 provides that:
“Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.”

**Conclusion**

Members of the police are required to treat detainees in a manner which respects their humanity and dignity. This is because detainees awaiting trial are presumed to be innocent, but also because all persons enjoy the right to dignity under the Namibian Constitution.

It follows that any form of torture or cruel, inhuman or degrading treatment or punishment is prohibited, both expressly under article 8(2)(b) of the Constitution, but also because it violates the right to dignity of all persons under article 8(1) of the Constitution.

The treatment of detainees is a measure of the level of humanity of any society. The treatment of detainees by members of the Namibian Police is a measure of their ethical standards and professionalism. It also reflects the extent to which it can be regarded as serving the community, rather than as being an instrument of repression. Providing detainees with proper care while they are in detention, is not to be soft on crime or on criminals.

**Suggested form of warning statement**

The Judges' Rules were agreed to at a judges' conference at Cape Town in 1931. The rules were adopted to prevent malpractice by police officers and to safeguard the accused’s right to silence. While a breach of the rules in the past did not generally have any effect on the admissibility of the statement, the position is different under the Constitution, where the right of an accused to a fair trial and the right not to be compelled to incriminate himself or herself is guaranteed by articles 12(1)(a) and 12(1)(f). As discussed above, the traditional warning should be extended to include a further advice to the accused that he or she is entitled to be legally represented.

It is a cause for concern that statements are frequently taken from an accused in an indigenous language, which is then translated and written in English by the police officer. The accused is requested to sign at the end of the statement, which he or she is usually unable to understand. Not surprisingly, accused then contest the admissibility of the statement on the basis that they did not say what is recorded in the statement. Many of the forms used for taking a warning statement refer to the person “stating in English”, which is untrue if the statement is not made by the accused in English. Rule 9 of the judges’ rules provides that:

> “Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and in the language in which it was made. It should be read over to the person making it and he should be given full opportunity for making any corrections therein that he may wish to, and should then be invited to sign it.”

While police officers face the difficulty that many persons still do not understand any English, it may be advisable for two statements to be prepared, the one in the original language and the other in English. Both statements should be signed by the
accused. The statement in the indigenous language could be translated if necessary if the correctness of the English version is disputed. This is particularly important where the accused makes an important admission or even more importantly, in the case of a confession.

At the very least, it is advisable that the following suggested warning statements be translated into Namibia's various languages. A suspect should sign the warning part of a statement in a language understood by him or her. An accused is otherwise likely to testify at his or her trial that he or she did not understand English when he or she signed the warning. A statement could be held to be inadmissible if the state is unable to prove that the accused was aware of his/her rights before making the statement.

Similar warnings (making the necessary changes) should be prepared for other types of potentially incriminating evidence provided by a suspect, such as confessions, pointing outs and attendance at identification parades.
WARNING STATEMENT BY SUSPECT

At ___________ (time) on ___________________ (date) at _______________________
________________________ (place) I, _______________________________________
(name) am conducting an interview with _________________________________ (name of
suspect). In my office there is myself, the suspect and _________________________
_______________________________________________________________________

The suspect is speaking the ______________________ language. An interpreter
_____________________________ is interpreting this language into the
English language (delete if not applicable).

I am a member of the Namibian Police and therefore a peace officer. My rank is
______________________ and I am therefore a justice of the peace / I am not a justice of
the peace. I show the suspect my appointment certificate. His / her reaction is:
_______________________________________________________________________
_______________________________________________________________________

I am investigating a case of _______________________________________________
_______________________________________________________________________
which was committed on ___________________ (date), at approximately ____________
(time) at _______________________________________________________________
(place).

RIGHT TO CONSULT WITH A LEGAL REPRESENTATIVE

You have the right to get a legal representative (in other words, an attorney or legal
practitioner) of your choice and to speak to the legal representative without delay. This
means that immediately and before we proceed with this interview you may call any legal
representative you wish. I will provide you with a telephone to telephone a legal
representative. If you do not know the name of a legal representative, I will provide you with
a list of legal representatives and a telephone.

I understand this right and I do not want to get, call or speak to a legal representative before
continuing with this interview or making a statement.
I understand this right and I want to get, call or speak to a legal representative before continuing with this interview or making a statement.

I understand my right to remain silent and I do not want to make a statement.
The following additional warnings should be given to children that are under the age of eighteen, before any of the above warnings are given. The second warning (to have a person present at the interview) replaces the above warning of the right to a legal representative in the case of children:

**CONSULTATION WITH PARENTS/ADULT BEFORE CONTINUING WITH INTERVIEW**

You have the right to consult with a parent or adult relative or any appropriate adult person you choose before we go further with this interview. If you want to call any of these persons I will provide you with a telephone and telephone numbers. If these persons do not have a telephone or you cannot telephone them, the police will take a message from you that you would like them to come to the police station.

I understand this right and I do not want to consult with a parent, or any adult relative or other adult person of my choice before continuing with this interview.

SIGNED: _________________________ Time: _____________

I understand this right and I would like to talk to ________________________________ before continuing with this interview.

SIGNED: _________________________ Time: _____________

**RIGHT TO HAVE A PERSON PRESENT AT THE INTERVIEW**

You also have the right to have a legal representative and one of a parent, adult relative or other adult person of your choice present while I talk to you about this charge and while you give your statement. If you want either or both of these persons present I will provide you with a telephone and telephone numbers. If these persons do not have a telephone or you
cannot telephone them, the police will take a message from you that you would like them to come to the police station.

I understand this right and I do not want a legal representative, parent, adult relative or other adult person of my choice present during this interview.

SIGNED: _________________________ Time: _____________

I understand this right and I would like ________________________________ to be present during this interview.

SIGNED: _________________________ Time: _____________

Note:

1. All optional answers should be deleted where appropriate.

2. If a suspect is unable to sign his / her name, his / her thumb print should instead be placed at the place indicated for signature.

Exercises and topics for discussion

_Hypothetical exercises_

**Exercise 1**

Article 6 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states:

“Each State shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.”

1. Devise a procedure, and compile a set of instructions, for use within the Namibian Police to secure:
(a) a systematic review of interview methods and practices;

(b) a systematic review of arrangements for the custody and treatment of persons deprived of their liberty.

2. Draw up a short list of guidelines and instructions for members designed to secure humane treatment of detainees between the moment of arrest and arrival at a place of detention.

3. Draw up another set of guidelines and instructions designed to secure humane treatment of detainees while they are detained at a police station.

**Exercise 2**

Article 6 of the UN Code of Conduct for Law Enforcement Officials states:

"Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required."

Deaths in police custody, whether from suicide, illness, or the effects of drink or drugs, are always of considerable concern to the public. In the event of such a death occurring, what can be done to reassure the public about police practice and procedures for dealing with vulnerable detainees?

**Exercise 3**

It is sometimes felt that access to legal counsel or family by a suspect can hinder a criminal investigation. Set out precisely the reasons why this should be so, then devise measures which could reconcile the requirement to detect crime with the rights of suspects to receive legal advice and to have their family informed of the fact of their detention.

**Exercise 4**

Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states:

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Imagine that you are a member of a working group with terms of reference to make recommendations on:

(a) supervision measures;

(b) training programmes,
necessary to ensure effective, ethical and lawful interviewing of suspects by police
officers.

Set out the main points of your recommendations and outline how these could be
implemented.

Exercise 5

Imagine that there have been a number of cases recently in Namibia in which people
have been convicted of serious crimes and sentenced to long terms of imprisonment
following confessions which were later shown to be false. This has led to a great
loss of confidence in the judicial and policing systems. The main reason for the false
confessions was ill-treatment by police, and especially by police conducting
interviews.

Police misconduct in these cases is being dealt with by means of normal criminal
investigatory processes and internal disciplinary processes.

The Commission of Inquiry appointed by the Government to make recommendations
on reforms to the criminal justice system and to police procedure for interviewing
suspects has made a number of recommendations, including the following:

(a) When a person suspected of crime is being interviewed by police, the
suspect's legal representative shall be present throughout the interview.

(b) All interviews of suspects by police shall be videotaped, and those recordings
shall be available as evidence in any subsequent legal proceedings.

(c) There shall be no conviction for a criminal offence based solely on evidence of
confession. Confession must always be corroborated by additional evidence
of guilt.

(d) When a person confesses to a crime to a police officer, that person shall be
brought immediately before a court so that a magistrate may verify that the
confession has been made voluntarily and without any undue pressure.

The Government has made it clear that it will introduce at least some of these
recommendations.

For the purposes of discussion, imagine that you are a member of a police working
group charged with drawing up the police response to the Government on these four
recommendations. Set out the arguments for and against each of them, and select
the recommendation or recommendations which you think should be adopted. Give
the reasons for your choice.

Topics for discussion

1. You have arrested a man who has concealed a bomb somewhere in
Windhoek city centre. It is due to explode within one hour and he will not tell
you where it is. Are you justified in torturing him to make him disclose its
whereabouts?
2. In what ways can the training of members of the Namibian Police ensure that full account is taken of the prohibition against torture, as required by the Convention against Torture.

3. What is the effect of not informing a suspect of his or her right to silence (or against self-incrimination) and the right to legal representation?

4. You inform a suspect of his right to be legally represented. He then telephones his legal practitioner, who speaks to you and tells you that under no circumstances should you take a statement from his client without the legal practitioner being present. The legal practitioner also tells you that he is coming to the police station now. You nevertheless take a statement from the suspect. Will the statement be admissible? (S v Agnew and Another 1996 (2) SACR 535 (C)).

5. What are the disadvantages and advantages to the justice system of the release on bail of accused?

6. Which police officers can grant bail and in respect of which offences?

7. Jack Damaseb is arrested on a charge of theft. He appears in court the following day. You would like to question Damaseb further and perhaps gain his co-operation in locating the stolen goods. The case against Damaseb is not very strong. Damaseb wishes to apply for bail. Damaseb is a long-term resident in your town and is permanently employed. Should you oppose bail?

8. What personal and psychological factors may affect the ability of a detainee who is being interviewed to make free decisions and rational judgements?

9. In what ways will the conduct of an interview differ if an approach is taken to use the interview for the purpose of fact-finding and information gathering, rather than purely to secure a confession?

10. What personal qualities are necessary in a member for that person to be an effective and ethical interviewer? Is it possible to train people to carry out effective and ethical interviews, or is this an inborn skill?

11. What are the advantages and disadvantages of making video recordings of police interviews of suspects? Specify all the purposes for which they could be used.

12. It has been shown that people who have falsely confessed to crime have been able to give convincing accounts of their involvement because police officers conducting interviews have unwittingly conveyed sufficient information about the crime for those accounts to be constructed. How can this be avoided?
CHAPTER 8
ENTRY, SEARCH AND SEIZURE

Chapter objectives

To provide guidance to members of the Namibian Police on the requirements for conducting a search and seizure with and without a search warrant, the effect that the violation of the Constitution and the Criminal Procedure Act has on the admissibility of evidence and the manner in which a search should be conducted so as to respect a person’s rights to privacy and dignity.

Essential principles

No one shall be subjected to arbitrary or unnecessary interference with the privacy of his or her home, correspondence or communications.

The dignity of all persons shall be respected.

Searches of a person, or the home of a person shall only take place with a search warrant. A search without a search warrant shall only take place where the delay in obtaining a search warrant would prejudice the objects of the search or the public interest.

Evidence that is discovered during an unlawful search will usually be inadmissible as evidence at the trial of the accused.

Information for presentations

Introduction

The right to privacy under article 13 of the Constitution protects persons from interference with the privacy of their bodies or of their homes. This right is therefore directly affected when a member searches a person or enters a home so that a search can be conducted.

The right to privacy and to be secure in one’s home from arbitrary search and seizure is one of the oldest human rights. The right was already recognised in England by the seventeenth century. As William Pitt wrote in 1763:

“The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - but the King of England cannot enter - all his forces dare not cross the threshold of the ruined tenement.”

Law and order would however break down if persons could carry out criminal activities secure in the knowledge that they could not be searched or that their homes could not be entered. It is therefore necessary for the right to privacy to be limited so as to allow searches and seizures by members of the Namibian Police. Any interference with the right to privacy should take place only if permitted under the Constitution and the relevant law.
The right to privacy

The right to privacy is protected under article 13 of the Constitution, providing that:

(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.”

The article can be divided into two broad areas. Firstly, article 13(1) guarantees a general right to privacy. Specifically, there may be no interference with the privacy of a person’s home, correspondence (for example letters) or communications (for example telephone tapping). “Home” is a broad concept and includes any place where a person lives, whether the home is a shack or a mansion or whether the person owns the home or not.

The right to privacy in respect of a place of business (unless it is also a home) or in a public place is not protected. A search of a business may however interfere with a person’s correspondence or communications. It should be noted that a person in any place may only be searched in compliance with article 13(2). This right may be exercised regardless of where the person is, for example in a police station, in a public place, in a business, at home etc.

The right to privacy is not an absolute right. An example of an absolute right which cannot be interfered with or limited is the right that no person shall be executed in Namibia, which is part of the right to life (article 6). The right to privacy can be interfered with if the interference is:

- authorised by law; and

- the law is necessary in a democratic society; and

- the law was passed by Parliament for the purposes of the interests of national security, public safety, the economic good of Namibia, the protection of health or morals, for the prevention of disorder, for the prevention of crime, or for the protection of the rights and freedoms of others.

Secondly, article 13(2) refers only to searches of the person or of the home of an individual. It is a specific example of an interference with the right to privacy.
guaranteed in article 13(1). Article 13(2) however goes further than article 13(1) and mentions searches of the person in addition to searches of the home. This would include searches of anything on or in a person’s body. Examples include searches of the person’s clothing, the objects carried by the person, cavities such as the mouth or rectum or even internal searches carried out by means of medical procedures. An example of the latter would be to examine the contents of a stomach in a case of suspected smuggling of cocaine, by way of a stomach pump. Using the usual method of x-raying the person would probably not be a search, because it does not affect the bodily integrity of the person. This is similar to taking a photographing, which is not a search.

According to article 13(2), searches of the home or of the body of an individual can only be justified:

- where authorised by a competent judicial officer;
- or -
- where the delay in obtaining a search warrant may prejudice the objects of the search or the public interest;
- and -
- procedures prescribed by an act of Parliament to exclude or prevent abuse are properly satisfied.

What is meant by a “competent judicial officer”? Competent means “legally qualified” (Concise Oxford Dictionary). The judicial officers who are qualified to issue search warrants under the Criminal Procedure Act are magistrates where criminal proceedings have not started (section 21(1)(a) of the Criminal Procedure Act) and the judge or magistrate presiding over criminal proceedings, when criminal proceedings have started (section 21(1)(b) of the Criminal Procedure Act).

Article 13(2) recognises that there are situations where the delay in obtaining a search warrant from a magistrate would defeat the object of the search. The suspect will in many cases be able to hide, move or destroy the incriminating items, unless the search can be carried out immediately.

It is only where there is the danger that this will happen that a member may carry out a search without first obtaining a warrant from a magistrate. In addition, the act of Parliament authorising the search must contain procedures that will prevent or exclude the abuse of a search without a warrant.

Searches with and without a search warrant

(i) Introduction

Members are given broad powers under section 20 of the Criminal Procedure Act to seize any articles:
• concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence (sub-section (a)); or

• that may be evidence that an offence was committed or suspected to have been committed (sub-section (b)); or

• which are intended to be used or on reasonable grounds believed to be intended to be used in the commission of an offence (sub-section (c)).

This includes virtually any article that may in some way be connected to an offence.

(ii) Searches with a search warrant

Section 21 of the Criminal Procedure Act provides that subject to certain exceptions, articles may only be seized under a search warrant. The usual rule is therefore that searches should take place with a search warrant. Section 21 should in addition be read subject to article 13(2) of the Constitution.

Section 21 reads:

“(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued -

(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or

(b) by a judge or judicial officer at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and to that end authorise such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

(3)(a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night.

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.”

Section 21(1)(a), as does section 25(1), also authorises a justice of the peace to issue a search warrant. This is contrary to article 13(2) of the Constitution, which only refers to searches authorised by a “competent judicial officer.” A justice of the peace is not a judicial officer. It is therefore suggested that the reference in sections
21(1)(a) and 25(1) of the Criminal Procedure Act to a justice of the peace should be ignored and that only a magistrate should issue a warrant under these sections.

This is recognised by Bulletin No. OM - 6 of 10 June 1994, in which commissioned officers (who are ex officio justices of the peace) are requested not to issue search warrants in terms of section 21(1) of the Criminal Procedure Act, but that search warrants should be obtained from a competent judicial officer.

A search warrant is applied for by the investigating member (or another person with sufficient knowledge of the facts) on affidavit i.e. on oath. The sworn statement must contain sufficient facts so that the magistrate may be satisfied that:

- there are reasonable grounds for believing that the article or articles to be searched for are of the kind referred to in section 20 (see above). The articles must be specifically listed, so that the search warrant is not vague or worded too widely. Some information would have to be given of the offence and why the particular article and the person (or the premises) concerned are connected to the offence. Witnesses’ statements may be attached, but the member may also rely on information, rather than an actual statement or evidence. Hearsay evidence may be used in the affidavit;

- there are reasonable grounds for believing that either the article is in the possession of a person or at any premises in the magisterial district of the magistrate. “Reasonable grounds” means the reasonable belief that an offence has been committed and that evidence will be found confirming the commission of an offence or articles which were used to commit an offence, if a search warrant is issued. See Cine Films (Pty) Ltd v Commissioner of Police 1971 (4) SA 574 (W) at 582D. In the case of a person, his/her name should be mentioned and information provided to show that he/she is in the magisterial district. In the case of any building i.e. premises, the address within the magisterial district should be mentioned.

A copy of the search warrant should be given to the occupier or owner of the house and the purpose of the search explained before the search starts. Section 21(4) only requires a police officer to hand a copy of the warrant to a person whose interests have been affected after the execution of the search. It is suggested that it is contrary to the right to privacy to present proof of lawful authority to search only after a search has been carried out. A search warrant should be presented to the person as proof of the authority to search before the right to privacy is invaded, rather than after.

(iii) Searches without a search warrant

(a) Introduction

The discussion of this area is complicated by the fact that four legislative provisions authorise members to search and seize objects without first obtaining a search warrant i.e. sections 22, 23 and 25(3) of the Criminal Procedure Act and section
14(4) of the Police Act. These sections of the Criminal Procedure Act have not been amended since independence and may in some senses be in conflict with article 13 of the Constitution.

Section 25(3) of the Criminal Procedure Act authorises members to search any premises or person for various purposes, including the maintenance of law and order. This section will not be discussed below.

Section 22 of the Criminal Procedure Act provides that

“A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 -

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes -

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.”

(b) The constitutionality of section 22 of the Criminal Procedure Act

Section 22 is still law, but its provisions are outdated and may be unconstitutional in the light of article 13(2) of the Constitution.

In terms of section 22, there are only two situations where a search may be made without first obtaining a search warrant:

- if the person affected consents to the search and seizure; or

- if a member on reasonable grounds believes that a search warrant would have been issued to him or her and the delay in obtaining a search warrant would defeat the object of the search.

The first situation is not mentioned in article 13(2) of the Constitution. Article 13(2) expressly states that searches of the person or home shall be justified only where (a) a search warrant is issued by a judicial official or (b) delay in obtaining a search warrant would prejudice the objects of the search or the public interest.

It is therefore arguable that section 22(a) of the Criminal Procedure Act should not be used, because it is in conflict with article 13(2) of the Constitution, which takes precedence i.e. it carries greater authority in law, over the Criminal Procedure Act. Any search which takes place without a warrant in which a member relies on section 22(a) of the Criminal Procedure Act may be contrary to the Constitution and therefore unlawful. The effect of this may be that evidence which is obtained unlawfully may not be admitted into evidence by a court. See the discussion below.
It can be argued to the contrary that section 22(a) can still be relied upon, as long as the person concerned knowingly waives (i.e. gives up) the rights guaranteed by article 13 of the Constitution. The waiver of the right to privacy and to a search without a search warrant must be voluntary, with full knowledge and understanding of the right and the effect of giving up the right. The member would therefore have to explain the right to the person, that the person is being requested to give up that right i.e. to require a search warrant and the effect of giving up the right.

(c) The requirements for a search under section 22(b) of the Criminal Procedure Act

For a search without a search warrant to be authorised in terms of section 22(b) of the Criminal Procedure Act, a member must on reasonable grounds believe that:

- a search warrant will be issued to him or her if he or she applied for one; and

- the delay in obtaining a search warrant will defeat the object of the search.

The requirement of reasonable grounds, is higher than a reasonable suspicion (as is required under section 40(1), when a person is arrested without a warrant of arrest). “Reasonable grounds” means facts which the member believes, determined on an objective basis as opposed to a subjective basis. A court would therefore ask whether a person in the same position as the member could have believed that there were grounds for the belief (objective), rather than the subjective view of the member concerned that there were such grounds. A hunch, suspicion or gut feeling is insufficient. The reasonable grounds for the belief must be those existing at the time when the member decides to conduct a search without a warrant. Finding incriminating articles after the search will not prove that reasonable grounds existed before the search.

The member must both believe that a search warrant would have been issued and that the delay in obtaining search warrant will defeat the object of the search. The member must therefore believe that the requirements of section 21(1) would have been satisfied, in other words that there was an actual legal basis for the issuing of a search warrant.

Only once this condition has been satisfied, must the member reach the conclusion that the object of the search will be defeated if there is a delay. This factor also requires the member to consider whether it is still possible to obtain a search warrant under the circumstances. It is submitted that the member should not unreasonably delay in obtaining a search warrant and then use this delay as a basis for a belief that further delay would defeat the object of the search. See Kriegler, *Hiemstra - Suid-Afrikaanse Strafproses* at p. 38.

The following example will illustrate the various alternative situations. A member receives information from a reliable informant that cannabis (dagga) is being sold at a certain address. He keeps the house under observation for a time and notices that a number of persons enter and leave it at regular intervals. He concludes that the
informant’s information is probably correct, because of the large number of different persons entering and leaving the house.

He establishes that cannabis is a prohibited dependence-producing drug in terms of Part I of the Schedule to the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, Act No. 41 of 1971. Dealing in such a substance is an offence under section 2(a) of the Act. Cannabis is therefore an article that may be seized under sub-section (a), (b) or (c) of section 20 of the Criminal Procedure Act.

A magistrate would issue a search warrant to the member on application, because there are reasonable grounds for believing that an article referred to in section 20 of the Criminal Procedure Act is in the house. The member’s grounds for the belief are based on the informant’s information, together with his own observation of the house.

The member will therefore have met the first requirement of section 22(b) i.e. that a search warrant would have been issued to him if he had applied for a warrant. The member will only meet the second requirement if he on reasonable grounds believes that the delay in obtaining a search warrant would defeat the object of the search.

The member can only reasonably believe this if he has information that the cannabis will probably be moved or disposed of in some way. This would be most unlikely on the facts available to him because it seems as if the dealing is small-scale and there is no likelihood that all the cannabis will be moved at once, because otherwise there would be nothing to sell.

The situation would however be different if the member is instead dealing with large scale distributors of cannabis and his information from the informant is that there is going to be a sale in an hour or two. This only gives him enough time to arrange the search and will not give him sufficient time to apply for a search warrant. He will then be justified in carrying out the search and seizure without applying for a search warrant.

(d) The requirements for a search under section 14(4) of the Police Act

In terms of section 14(4) of the Police Act, a member may also search without warrant:

“any person, premises, place, vehicle, vessel or aircraft or any receptacle if the delay in obtaining a warrant would defeat the object of the search …”

On analysis of section 14(4), four requirements must be satisfied before a member may conduct a search without a warrant:

- the search must be reasonably necessary for a purpose referred to in section 13 of the Police Act i.e. for one of the functions of the Namibian Police, such as the investigation of an offence or an alleged offence;
• if the member were to wait for a warrant to be obtained, the search would have no purpose. For example, evidence may be destroyed, moved or hidden if a member waits for a search warrant to be issued;

• the search must not be excessively intrusive when balanced against the offence or the danger posed by the person i.e. it must not invade the privacy of the person searched to a greater extent than is necessary when balanced against the offence or danger;

• the person, if present, must be informed of the object of the search.

While the section does not expressly state this, it seems to be implied that a member must also believe that a search warrant would be issued if it were applied for i.e. the same requirement under section 22(b)(i) of the Criminal Procedure Act. If the member must be satisfied that the delay in obtaining a warrant would defeat the object of the search, he / she must first be satisfied that a warrant would in fact be issued.

It is suggested that section 14(4) of the Police Act is a good balance between, on the one hand, the interests of society in ensuring that possible criminals are apprehended through quick searches, and on the other hand, the rights of all persons to be secure from arbitrary and unnecessary searches. For the reasons given above, it does not give members a licence to conduct searches without obtaining a search warrant, but it does recognise that there will be times where obtaining a search warrant will be time-consuming and therefore pointless.

(e) Searches before or following an arrest

A person can be searched under section 14(4) of the Police Act both before and after an arrest, provided that the requirements under this section are satisfied (see the previous section).

Members are also authorised under section 23 of the Criminal Procedure Act to search any person after he/she has been arrested and to seize any articles referred to in section 20 that are found on the person. Section 23 reads:

“(1) On the arrest of any person, the person making the arrest may-

(a) if he is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested and where such peace officer is not a police official, he shall forthwith deliver any such article to a police official; or

(b) ... [only applies to non-peace officers]

(2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to himself or others.”
It can be argued that this section is constitutional because a delay in obtaining a search warrant would prejudice the public interest. In other words, it would not be in the public interest, which includes the detection and prevention of crime, to require the police to apply for a search warrant each time that they arrest a person. It is also possible that the person may be carrying a dangerous weapon which he/she could use to injure a member of the police if there was a delay in searching the person. The same argument could be applied to section 14(4) of the Police Act.

(f) Stop and search

There are two possible situations where a stop and search may occur:

- a person on foot is stopped and searched in a public place;
- a vehicle is stopped and searched, often at a road block.

In the first instance, members frequently stop persons and then search them or the bags or containers that they have with them. These searches almost invariably take place without a search warrant. This is most probably because it would be inconvenient for both the person searched and the member conducting the search to first obtain a search warrant before conducting a search.

A search without a warrant of a person can be conducted by a member under section 22(b) of the Criminal Procedure Act or under section 14(4) of the Police Act. The requirements under section 14(4) of the Police Act were mentioned above.

Let us examine the requirements of section 14(4) of the Police Act as applied to an example of a member who sees a suspicious looking person carrying a large bag in a residential area. The member believes that this person may have committed the offences of housebreaking with intent to steal and theft.

The member must first believe that the search is reasonably necessary for one of the purposes referred to in section 13 of the Police Act. In this particular case, any one of subsections (b), (c), (d) or (e) could apply. The member must believe that the search is reasonably necessary. It is submitted that there should therefore be reasonable grounds for the belief that the search is necessary for one of the purposes referred to in section 13 of the Police Act. For example, there may be stolen goods in the bag, but it is also possible that the person is not doing anything unlawful. It is doubtful whether these facts would be sufficient for the member to form that belief on reasonable grounds. If however the person starts running away when he sees the police, this apparently guilty behaviour could mean that the person is involved in some way in the commission of an offence.

In addition, the member must on reasonable grounds believe that the delay in obtaining a search warrant to search the person (or any receptacle of any nature) will prejudice the objects of the search. In many cases, the member would not be lawfully entitled to arrest the person so any delay in carrying out the search would probably defeat the object of the search. This is particularly the case with possession of prohibited substances such as drugs, which can conveniently be carried and concealed in the clothing of a person, and are often sold in public places.
If a member conducts a search in this situation, he or she should weigh up the degree of intrusiveness of the search against the threat or offence. In the case of the search of a person in a public place, it would be degrading to the person concerned to conduct a thorough and intrusive search of that person in full view of the public. For example, it would be degrading and humiliating to require the person to remove items of clothing. Such a search could be restricted to a quick look in the person's pockets and the bag.

Before searching the person, he or she should be informed of the objectives of the search. It is suggested that:

- the member should identify him/herself as a member of the Namibian Police and give his/her name and rank;
- the person to be searched should be told what offence he/she is thought to have committed or is committing and what the member is looking for;
- the person should be asked to produce these articles before the search starts.

In the second instance i.e. the search of vehicles, members are given additional powers under section 14(5) of the Police Act to stop and search vehicles. The subsection provides that:

"(a) Notwithstanding anything to the contrary in any other law contained, but subject to the provisions of subsection (4), any member may, in the performance of the functions referred to in section 13, search without warrant any vehicle on any public road or railway in Namibia, or any vessel or aircraft in Namibia, or any receptacle of whatever nature in, on or attached to the vehicle, and seize any article referred to in section 20 of the Criminal Procedure Act, 1977 (Act 51 of 1977), found in, on or attached to the vehicle, vessel or aircraft, or in the receptacle.

(b) For the purposes of exercising the powers conferred by paragraph (a), a member may by means of an appropriate indication or direction, or in any other manner order the driver of a vehicle on a public road or railway to bring that vehicle to a stop and may, notwithstanding anything to the contrary in any law contained, display, set up or erect on or next to the road or railway such sign, barrier or object as is reasonably necessary to bring the order to the attention of the driver and to ensure that the vehicle will come to a stop.

(c) A person who refuses or neglects to stop a vehicle in accordance with an order under paragraph (b) shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

(d) The provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), with regard to the disposal of an article referred to in section 30 of that Act and seized under the provisions of that Act, shall mutatis mutandis apply in respect of an article seized under paragraph (a).

(e) To the extent that the provisions of this subsection authorise any limitation on a person's right to move freely throughout Namibia in that a member may order any driver of a vehicle on a public road or railway to bring that vehicle to a stop and to set up or erect any barrier or object for that purpose under those provisions, such
limitation shall be authorised only on the grounds of national security, public order or the incitement to an offence."

While an argument could be made that random searches of vehicles at road blocks could on occasion detect criminals and deter criminal acts, it should be recognised that searches without a reasonable suspicion that an offence has been committed or is being committed invade a person’s liberty, freedom of movement and privacy. There are no Namibian or South African decisions on this question at present. The Canadian Supreme Court has held that random checks of motorists for driving offences, possession of licences or other documentation, for vehicle roadworthiness or drunken driving etc. are not searches and are a minimal infringement of the right to privacy. It is therefore lawful to set up roadblocks in order to carry out these checks. It has been held in Canada that intrusive searches of the driver or of the vehicle, for example looking in the boot or looking in bags, violate the individual’s right to privacy and such a search should only be conducted where there are reasonable and probable grounds for a search. It would be advisable to apply these guidelines until the law is authoritatively stated by a Namibian court.

(iv) Searches contrary to the Criminal Procedure Act are a criminal offence

Section 28(1) of the Criminal Procedure Act makes it a criminal offence for a police official to conduct an unlawful search or seizure, providing that:

“(1) A police official-

(a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25 (1); or

(b) who, without being authorised thereto under this Chapter-

(i) searches any person or container or premises or seizes or detains any article; or

(ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25 (1),

shall be guilty of an offence and liable on conviction to a fine not exceeding R200 or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award under subsection (2)."

In terms of section 28(2), the police official may also be ordered to pay an amount of money to any person who has suffered damages because of the unreasonable or unlawful search.

In addition, members who unlawfully and intentionally damage someone else’s property, such as breaking down a door to enter a house, may be charged with the common law offence of malicious injury to property. Members who without the permission of the owner, the person in charge, or the lawful occupier of any land or building (or any person authorised to give such permission) unlawfully enter such land or building, may be guilty of trespass contrary to section 1(1) of the Trespass Ordinance, Ordinance No. 3 of 1962.
A search carried out by police officers is inherently intrusive and an intrusion on a person’s rights to privacy and dignity. Members should therefore respect the person’s right to dignity when carrying out a search. If possible, searches should be carried out during the day. A search warrant should expressly authorise a night search if a search is to be conducted at night. Searches should not be used to demonstrate superiority or power and members should be as polite and courteous as possible under the circumstances.

(v) Unlawful search and seizure - evidence generally inadmissible

If members conduct a search without a search warrant, when the search cannot be justified as being a case where delay would prejudice the object of the search, then they run the risk that any evidence seized or found during the search may be inadmissible. Such a search would be unconstitutional because it is contrary to article 13(2) of the Constitution and unlawful because it is contrary to section 22(b) of the Criminal Procedure Act. It is also a criminal offence for a member to search for or seize any article when not authorised under any section of the Criminal Procedure Act or another law (section 28 of the Criminal Procedure Act).

There are no Namibian decisions to date on the admissibility of evidence found during an unconstitutional and unlawful search. Our courts are however likely to follow South African decisions, because the South African and Namibian Bills of Rights are very similar.

In the South African case of *S v Motloutsi* 1996 (1) SACR 78 (C); 1996 (1) SA 584 (C), members of the police had searched the accused’s room without a search warrant. The owner of the house had consented to the search, but this consent did not extend to the accused’s room, which he rented from the owner.

The decision of the court was based on the constitutional right to privacy. The right to privacy in the South African interim Constitution is similar to article 13 of the Namibian Constitution, providing that:

> "Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."

The court distinguished between an unlawful search which accidentally and unintentionally infringes (i.e. affects) the right to privacy of an accused and a deliberate and conscious breach by members of the police of the right to privacy of an accused. If the right to privacy is infringed accidentally then the evidence will usually be admissible. If the right to privacy is infringed intentionally then there will have to be "extraordinary excusing circumstances" for the evidence to be admissible.

This is what the court held in this case i.e. there was a conscious and deliberate violation of the accused’s constitutional rights and the evidence was therefore held to be inadmissible. To conclude, evidence discovered where members were fully aware or should have been fully aware that they should have obtained a search warrant, will usually be inadmissible in evidence.

In the later South African case of *S v Mayekiso en Andere* 1996 (2) SACR 298 (C), the police had conducted a search without a search warrant. They found and seized
a maroon bag belonging to accused number three under a mattress. The bag belonged to accused number three as well as the items found in it, which included a pistol holster, pistol magazine and bullets. The accused were charged with murder. The question to be decided was whether evidence concerning the finding, and subsequent seizure of the items was admissible.

The court rejected the evidence of the state given by a police officer that the accused had consented to the search. The court therefore found that the police did not have the right to search for and seize the bag under section 22 of the Criminal Procedure Act.

The court followed the judgment in Motloutsi’s case. Judge Van Reenen said that the violation of the accused’s rights by the unlawful search and seizure was accidental, until the policeman knew that the bag was the accused’s. Then the violation became “a deliberate and conscious violation” (at 306e).

Where the rights of an individual are deliberately and consciously i.e. not accidentally violated, then the evidence will usually be excluded unless there are exceptional circumstances justifying the admission of the evidence. One of the purposes of the rights under the Constitution was to protect individuals from abuse of power by state officials. There must be therefore be extremely important reasons for the court to condone these violations of the rights of an individual and admit the evidence (at 307e).

The effect of the court’s exclusion of the evidence was that any evidence linking the accused to the maroon bag and its contents was inadmissible. The maroon bag and its contents were admissible in evidence, but the importance for the prosecution in most cases is the connection to the accused and not just the actual object.

It is suggested that the general approach to the admissibility of evidence which is obtained contrary to the Constitution is whether the accused will still receive a fair trial. The South African and Namibian constitutions both have as a general principle the right of an accused to a fair trial. In the South African Constitutional Court decision of Key v Attorney-General, Cape Provincial Division and Another 1996 (4) SA 187 (CC), Kriegler J said at p. 195F - 196B:

“[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC), fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.”

(vi) *Gaining entry to the premises to be searched*
In keeping with the general principle that force should only be used when strictly necessary and that the application of force should be gradual i.e. more force is used when more force is required, members should always consider whether the use of force is appropriate under the circumstances. See in general the discussion on the use of force in chapter 9 (use of force and firearms).

Members who may lawfully search any person or any premises may use force in terms of section 27 of the Criminal Procedure Act, which provides that:

“(1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises.

(2) The provision to subsection (1) shall not apply where the police official concerned is on reasonable grounds of the opinion that any article which is the subject of the search may be destroyed or disposed of if the provisions of the said proviso are first complied with.

The steps to gain entry to premises should therefore be the following:

- the member should announce that he or she is a member of the Namibian Police in possession of a search warrant (to be omitted if no search warrant) and request entry so that a search can be carried out;

- only if there is no response after a reasonable interval or it is obvious that the occupiers of the premises have no intention of complying with the request can force be used to enter the premises;

- a request to enter does not have to be made if the member believes on reasonable grounds that the article(s) that he or she is looking for will be destroyed or got rid of if he or she first requests entry. Entry can be gained by force in this case, although the use of force should be restricted to the amount strictly necessary.

In addition, members may enter any building in defence of others or themselves or in a case of necessity. Force may be used to do so. Where, for example, a person is being held hostage or attacked, the police will be acting in defence of another person and may enter any building in order to protect that person. Similarly, the principle of necessity would justify entry into a burning building to save the lives of persons in the building. Section 15 of the Police Act specifically gives members the power to enter any premises or land in the case of fire, without the consent of any person.

(vii) Procedure during a search of premises

If a search warrant has been obtained, then it is suggested that the search warrant should first be shown to the person to be searched or affected by the search.
Section 21(4) requires that a copy of the warrant be given to the person at the end of the search. It does not however prohibit a member from giving the person a copy at the beginning. If the infringement of the right to privacy caused by a search is to be limited as much as possible, then persons affected by a search should be given the opportunity at the beginning of the search to examine the search warrant so as to establish the reason for the search and what the members are trying to find. It is only reasonable for the affected persons to be informed at the beginning of the search why their privacy has been invaded.

Members are specifically required under section 29 of the Criminal Procedure Act to conduct a search of premises with strict regard to decency and order. Steps should be taken to minimise the inconvenience to the person or the persons occupying the premises that are to be searched. Section 21(3) therefore provides that searches with a search warrant should take place during the day, unless a search at night is authorised in the search warrant. It may be necessary to search at night if the search is urgent.

Members should respect the general right to privacy and dignity of the persons involved and therefore try and limit the disturbance, confusion and embarrassment that may be caused.

(viii) Entering premises for the purpose of questioning a person

Section 26 of the CPA provides that:

“Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.”

It should be noted that this section only authorises a member to enter any building in order to interrogate a person and to obtain a statement from him/her. It does not authorise a member to carry out a search of the premises or to seize any object. However, if a person is arrested, the person may be searched in terms of section 23 of the Criminal Procedure Act.

The member must have a reasonable suspicion concerning the facts that the person is on the premises and that he/she may furnish information with reference to any offence. As to the meaning of “reasonable suspicion”, see further the section, “arrest without a warrant” in chapter 6 (arrest).

The member must first obtain the consent of the occupier of a private dwelling before entering the dwelling. Consent need not therefore be obtained if the member enters open land, a public place or business premises. Entering a private dwelling without obtaining such permission will be unlawful. See Minister van Polisie en ‘n Ander v Gamble en ‘n Ander 1979 (4) SA 759 (A) at 764D - E.

(ix) Manner of searching a person
Searching persons affects their right to dignity under article 8(1) and their right to privacy under article 13 of the Constitution. A search of a person should therefore be conducted with proper respect of these rights. For example, a search where the person is required to undress before a number of persons would violate the person’s rights to dignity and privacy. The correct procedure would be for the person to be searched in a private room.

Section 29 of the Criminal Procedure Act provides that:

“A search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.”

All searches of the person must therefore be conducted with strict regard to decency and order. A woman must be searched by a woman, who must be a member, unless this is not possible.

Searches which involve examinations of the intimate parts of a person’s body, such as the rectum, vagina etc. should be carried out by doctor.

Section 27 the Criminal Procedure Act permits a person to be searched by the use of reasonable force which is necessary to overcome the resistance of the person. Once again the person’s constitutional rights to dignity and privacy must be affected as little as is possible during the search. Force should only be used where strictly necessary. The application of force should be gradual as required under the circumstances.

**Exercises and topics for discussion**

**Exercises**

1. You would like to search business premises that you believe are being used to process stolen motor vehicles. Draft an affidavit applying for a search warrant.

2. Draft guidelines to be used by members when carrying out searches of persons and property to ensure that the searches are carried out professionally, respecting a person’s rights to privacy and dignity.

**Topics for discussion**

1. Under which circumstances does article 13(2) of the Constitution authorise searches without first obtaining a search warrant?

2. Under which circumstances can you enter premises for the purpose of questioning a person?

3. Describe briefly the guidance you would give a newly appointed member on how to carry out a personal search of an individual.
4. On what legal authority can you stop and search someone in a public place, such as a street?

5. Why is it counterproductive to effective law enforcement to conduct unlawful or unconstitutional searches?

6. Under which circumstances can force be used to gain entry to premises to carry out a search or to search a person?
CHAPTER 9

USE OF FORCE AND FIREARMS

Chapter objectives

To provide guidance to members of the Namibian Police on the use of force and of firearms; how the use of force and firearms impacts on the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment; and to specify and explain the constitutional, statutory and international requirements for the appropriate use of force and firearms for lawful policing purposes.

Essential principles:

The use of force

Non-violent means are to be tried first.

Force is to be used only when it is strictly necessary.

Force is only to be used for legal law enforcement purposes.

The improper use of force may violate the rights to dignity and life.

No exceptions or excuses shall be allowed for the unlawful use of force.

The use of force must always be proportional to the lawful objectives.

Restraint must be exercised in the use of force.

Damage and injury must be minimised.

Members should familiarise themselves with non-violent methods of resolving confrontation.

Essential principles:

Accountability for the use of force and firearms

All incidents of the use of force or firearms shall be followed by reporting and review by superior members.

Superior members shall be held responsible for the actions of members under their command if the superior knew or should have known of abuses, but failed to take meaningful action.

Members who refuse unlawful superior orders shall be given immunity.

Members who commit abuses of these rules shall not be excused on the grounds that they were following superior orders.
Essential principles:

**Permissible circumstances for the use of firearms**

Firearms are to be used only in extreme circumstances.

Firearms are to be used only in self-defence or defence of others against imminent threat of death or serious injury

- or -

To prevent a particularly serious crime that involves a grave threat to life

- or -

To arrest or prevent the escape of a person who poses the threat of committing a particularly serious crime that involves a grave threat to life and who is resisting efforts to stop the threat

- and -

In every case, only when less extreme measures are insufficient.

Intentional lethal use of force and firearms shall be permitted only when strictly unavoidable in order to protect human life.

Essential principles:

**Procedures for the use of firearms**

The member must identify himself or herself as a member of the Namibian Police

- and -

The member must give a clear warning that he or she will shoot

- and -

The member must allow adequate time for the warning to be obeyed

- but -

This shall not be required if the delay would result in death or serious injury to the member or others

- or-

If it is clearly pointless or inappropriate in the circumstances to delay.
Essential principles:

After the use of firearms

Medical aid should be given to all injured persons.

The relatives or friends of persons affected should be notified.

A full investigation should be carried out.

A full and detailed report of the incident should be made.

Information for presentations

Introduction

“Force” has the general meaning of compelling someone to perform a particular action or stopping someone from performing a particular action, often by the application of physical power.

Article 115 of the Constitution provides that:

“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.”

Section 13 of the Police Act provides that the functions of the Namibian Police are:

“(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; and
(d) the prevention of crime.”

Members of the Namibian Police are therefore given powers of arrest, detention, search and seizure etc. so that they can carry out these functions effectively.

The importance of the role of the police is recognised in the preamble to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which is the most important set of international standards in this fields. The preamble begins:

“Whereas the work of law enforcement officials is a social service of great importance and there is, therefore, a need to maintain and, whenever necessary, to improve the working conditions and status of these officials,

Whereas a threat to the life and safety of law enforcement officials must be seen as a threat to the stability of society as a whole,

Whereas law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights and reaffirmed in the International Covenant on Civil and Political Rights,”
In carrying out their duties, members will encounter situations where members of the public do not comply with a lawful request or demand made by the member. The question then arises, when may a member use force so that he or she is able to carry out effectively the functions entrusted to the Namibian Police under the Constitution and the Police Act?

It is recognised that the Namibian Police often has a difficult and delicate task to perform. Members may even be in personal danger of assault or injury when carrying out their work. Members are therefore allowed to use force under certain conditions, so as to protect themselves or other persons, or when it is strictly necessary to carry out a legal function.

The legitimate use of force must therefore try and strike a balance between two equally important interests:

- the interest of society in the Namibian Police carrying out its functions of safeguarding law and order and the security of all Namibians, while ensuring that the safety of members is sufficiently protected;
- the respect and protection of the individual concerned’s rights to life and dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment.

**General aspects of the use of force**

(a) **Fundamental principles**

The principles underlying the application of force in all situations are that:

- force may only be used when it is authorised by law and to the extent authorised by law;
- force may only be used when it is strictly necessary for law enforcement and for public order;
- the application of force should be proportional.

It will be noted that when the use of force is authorised by law and is strictly necessary under the circumstances for the legitimate purpose of law enforcement, this does not then give the member the right to use any amount of force. The member is still required to carefully limit the amount of force, so that only the amount of force necessary to achieve the goals of law enforcement or of maintaining public order is used.

“Proportionality” means that only as much force as is required for lawful law enforcement or for the maintenance of public order should be applied. Another way of expressing this concept is that a member may only use the minimum force which is reasonable under the circumstances. The seriousness of the offence will also have to be considered to determine whether the use of force is proportional. For
example, it will be extremely disproportionate to seriously injure a person, when arresting him for stealing an apple.

(b) Constitutional provisions

The articles of the Constitution which protect the right to life and respect for human dignity are most relevant. Article 6 provides that:

“The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No court or tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.”

Article 8 provides that:

“(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.”

(c) Force authorised by law

(i) Members may only use force when authorised by law and only such force authorised by law

Members are given general powers and duties under section 14(1) of the Police Act, which provides that:

A member shall exercise such powers and perform such duties as are by this Act or any other law conferred or imposed upon such member …”

Section 14 gives members both powers and duties. The member’s duties are those referred to in section 13 of the Police Act.

Section 14(10) of the Police Act specifically provides that:

“Any member may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large.”

A member’s powers (and duties) are not limited to those given under the Police Act, because the section refers to powers conferred by other laws as well. The Criminal Procedure Act in particular confers a number of additional powers on members. Members are also authorised under the Criminal Procedure Act to use force in certain defined situations.

It follows that members may only exercise those powers authorised by law. There is also no general power given to members to use force. Excessive use of force, for example, would not be authorised by law. In addition, it would be contrary to one of the functions (and therefore one of the member’s duties) of the Namibian Police,
which is the prevention of crime, because in this example the crime of assault would be committed by the member.

In addition, Standing Order D.1. (Operational Manual, Chapter 2), emphasises that during law enforcement the rights and liberties of individuals must be respected. This would include the rights to life and dignity. Standing Order D.3.a. prohibits members from exceeding or abusing police powers. These standing orders provide that:

“D.1. In enforcing laws, members of the Namibian Police always must observe the rights and liberties of the individual.

D.3. All members of the Namibian Police must know and understand the laws of Namibia.

a. All members must properly apply such laws and must never exceed or abuse police powers.”

(ii) Force used during an arrest

Section 49 of the Criminal Procedure Act specifically authorises the use of force to effect an arrest. Section 49(1) provides that:

“If any person authorised under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person -

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,

the person so authorised may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.”

Section 49(2), which regulates the situation where the person to be arrested is killed in order to arrest him or her, will be discussed below.

Section 49 should be read together with section 39(1) of the Criminal Procedure Act, which specifically authorises the arresting member to “forcibly confine” the body of the person to be arrested, if “circumstances so require.” Force may however only be used where the person to be arrested does not submit to being placed in custody. The use of force where the person submits to custody will be unlawful and will expose the member concerned to criminal prosecution, disciplinary proceedings and to a civil action for damages.

The member must believe on reasonable grounds that the use of force is necessary. The facts that may lead to such a conclusion include the conduct of the person to be arrested, his/her attitude, body language, words used etc. It would however be unreasonable for a member to use severe force where an unarmed person assumes an uncooperative attitude towards the member. The use of force should be gradual under these circumstances. A confrontational situation could be defused by first trying to persuade or negotiating with the person, until a situation is reached where the use of force is unavoidable.
Section 49(1) has been interpreted on the basis of decided cases to have four requirements, namely:

- the arresting member must be authorised under the Criminal Procedure Act to arrest the person or to assist in the arrest i.e. the arrest must be lawful;
- the arresting officer must first make an attempt to arrest the person. The purpose of the application of force must therefore not be to punish the person, but rather to arrest him/her;
- the person to be arrested must either (i) resist arrest so that he/she cannot be taken into custody without the use of force; (ii) flee when it is clear that he/she was going to be arrested; or (iii) resist arrest and then flee;
- the force which was used to overcome the resistance or to prevent escape was reasonably necessary under the circumstances. See also Standing Order H.4.b. (Operational Manual, Chapter two).

As has been stated above, even where the use of force is authorised by law, its use must be proportional. Stated in another way, this means that only the minimum force reasonably necessary under the circumstances may be used. This may also mean that no force at all should be used in the particular situation.

Standing Order C.3. (Operational Manual, Chapter 2) provides that:

“A member shall use only as much force as is necessary to make an arrest or prevent an escape.”

The principles decided on by international experts in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials are a useful guideline on the use of force in general and are also applicable to the use of force in effecting an arrest. The principles are discussed below.

(iii) Force used during search and seizure

The use of force during search and seizure is discussed in chapter 8 (entry, search and seizure), in the section “gaining entry to the premises.”

(d) Specific provisions on the use of force

(i) Non-violent means first

Principle 4 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

“Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”
Effective policing skills include the use of non-violent means to achieve lawful police objects, such as an arrest. The possibility that force may be used if a member of the public does not comply with the request, is often sufficient to overcome resistance. A competent member will assess the situation and use his/her authority as a member of the Namibian Police and his/her skills in handling people, rather than immediately taking coercive action.

(ii) Exercise of restraint and humanitarian assistance

Principle 5 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials reads:

“Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) Minimise damage and injury, and respect and preserve human life;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.”

(iii) Reporting of use of force

Principle 6 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

“Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.”

This provision is important to ensure that more senior members of the Namibian Police are made aware of incidents which cause injury or death. This is so that there can be a review of serious incidents (particularly death), by more senior members, who will decide whether it is necessary to take further action.

In addition, Principle 24 provides that:

“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.”

Standing Order H.5.f.1 (Operational Manual, chapter 2) regulates the procedure after any shot is fired or any order is given to fire a shot. In terms of this order:

• a member must immediately report the shooting incident to his or her immediate superior. If the immediate superior is not available, the incident
must be reported to a senior member at the police station in the area where the incident took place;

- the senior member, if not an officer, must immediately arrange a visit by an officer to the scene of the shooting;

- an officer must immediately visit the scene of the shooting where any one of the following conditions is present:
  - when someone was shot or wounded;
  - when property was seriously damaged;
  - when the events indicate the wrongful use of a firearm and/or the reckless or negligent handling of a firearm; or
  - when the incident may cause public interest.

- the member who used a firearm or gave the order to use a firearm, must immediately after the incident submit a full report to his or her Commanding Officer;

- where a member handles his or her firearm recklessly or negligently or where the member was not justified in using it, the Commanding Officer must, after the conclusion of any criminal and/or disciplinary action, give serious consideration to the question whether a board should be convened.

Standing Order H.5.f.2 contains orders as to how a shooting scene visit should be conducted, while Standing Order H.5.f.3 contains orders as to how a shooting incident report should be compiled.

(iv) Use of firearms

(a) General principles

The use of firearms by members is a particularly difficult and sensitive area, because it may lead to the fatal shooting of a person. On the other hand, members may need to protect themselves against serious injury or death when trying to apprehend an armed suspect. An armed suspect may also place the lives of other persons at risk, by holding them hostage or by firing in a crowded place. Members will have to make split-second decisions concerning the legality of the use of force and it is therefore vital that all members have a good understanding of when a firearm may lawfully be used.

(b) Use of firearms only to protect life or prevent grievous or serious bodily harm

Standing Order C.4. (Operational Manual, Chapter 2) provides that:
“A member shall not discharge a firearm at a person except to protect life or prevent grievous bodily harm.”

In addition, Standing Order C.13. (Operational Manual, Chapter 2) provides that:

“Firearms shall only be used as a last resort to protect your life or the life of another person(s) in immediate danger.”

It is suggested that there is a contradiction between these two Standing Orders, because C.4. includes the additional ground of the prevention of grievous bodily harm, which is not mentioned in C.13.

In terms of Standing Order C.4, the life to be protected could be either the life of a member or of another person i.e. either in self-defence or in defence of another. The principles applicable to self-defence are summarised in Standing Order H.5.a.2:

“According to Burchell and Hunt, "South African Criminal Law and Procedure", Volume 1 (General Principles of Criminal law), Juta & Co Ltd., 1970, Pages 272-280, in criminal proceedings a defence of "self-defence" (or private defence) will only succeed, if:

1. the attack was a positive and unlawful act or interference; and
2. the act of "self-defence" was (amongst others) a defence of life or personal injury; and
3. the attack had already commenced or was imminent; and
4. the act of self-defence was directed against the attacker, was necessary to avert the attack and did not use excessive force in reply to the attack.”

“Grievous bodily harm” can be expressed as “harm which in itself is such as seriously to interfere with health” (R v Edwards 1957 R & N 107 at 110), or “more than casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault” (S v Mbelu 1966 (1) PH H176 (N)). See Milton, South African Criminal Law and Procedure, Volume 2, 3rd ed at pp. 433 - 434.

Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials is more detailed than the Standing Orders, providing that:

“9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

According to principle 9, firearms may only be used in the following situations:

- in self-defence against the imminent threat (i.e. the event will happen soon) of death or serious injury;
- in defence of others against the imminent threat of death or serious injury;
• to prevent a particularly serious crime involving a serious threat to life;

• to arrest a person who may otherwise commit a particularly serious crime involving a serious threat to life and who resists arrest;

• to prevent the escape of a person who may otherwise commit a particularly serious crime involving a serious threat to life and only when less extreme means are insufficient to prevent the escape.

These instances should be distinguished from the intentional lethal use i.e. the deadly use of a firearm. A shot may be fired with the intention to kill only when it is “strictly unavoidable to protect life.” A shot may be fired with the intention of wounding the person in self-defence, even though the threat is only of serious injury and not a threat to life.

Under principle 9 and Standing Orders C.4. and C.13. the use of firearms is therefore severely restricted and a firearm may therefore not be used to arrest an escaping unarmed shoplifter, for example, because the offence is not a “particularly serious crime involving grave threat to life.” Other less extreme means to arrest the person could also be used, such as chasing after the shoplifter.

A member is not required to put his or her life on the line where a suspect is armed and will not disarm, despite demand. A decision may be made to use a firearm under these circumstances in self-defence, if the threat of death or serious injury is imminent. If it is at all possible to defuse the situation by non-violent means, by for example, negotiating with the person, withdrawing and monitoring the threat etc. then these alternatives should be used. Each situation will have to be determined on the facts, applying the general principles.

(c) Use of a firearm to arrest a fleeing suspect?

As discussed above, in terms of principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and Standing Orders C.4. and C.13. a firearm should not be used, for example, to shoot at a thief fleeing the scene of the crime.

Yet, in terms of section 49(2) of the Criminal Procedure Act, the killing of a person who is reasonably suspected of having committed a Schedule 1 offence is deemed a justifiable homicide, where this is the only way of arresting the person or preventing him or her from fleeing. Section 49(2) of the Criminal Procedure Act provides that:

“Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorised under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.”
Schedule 1 includes a number of more minor crimes, such as theft, breaking or entering, fraud etc. which do not fall within the category of crimes that are particularly serious and which involve a grave threat to life as required by principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The shooting must also take place before the crime has been committed i.e. to prevent the perpetration of the crime, rather than afterwards. As already pointed out, Standing Orders C.4. and C.13. similarly restrict the use of firearms.

It is therefore suggested that Standing Orders H.5.a.1. and H.5.b.1. (and some of the provisions of Standing Order H.5.a.3), which provide that a firearm can be used where permitted under section 49 of the Criminal Procedure Act, contradict Standing Orders C.4. and C.13. It is suggested that a firearm should not be used to arrest a fleeing suspect, except possibly where authorised under principle 9.

It is further suggested that for firearms to be used in the situations authorised by section 49(2) of the Criminal Procedure Act, which may lead to the killing of the suspect, is contrary to the right of life as guaranteed under article 6 of the Constitution.

In the Namibian High Court decision of S v Williams 1992 NR 268 (HC), Judge Hannah expressed the view that it is possible that section 49(2) of the Criminal Procedure Act violates the right to life and the prohibition of the death penalty under article 6 of the Constitution (at 271I). Judge Hannah recommended that the Law Reform and Development Commission be asked to consider whether the section should be amended or repealed (at 272I). This section has however not been amended or repealed to date.

(d) Procedure when firearms are used

Principle 10 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials specifies the procedure to be applied when the use of a firearm is permitted under principle 9:

“In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.”

Also see Standing Order H.5.a.3 (Operational Manual, chapter 2), which sets out the steps to be followed i.e. a loud (audible) warning to stop; if the offender is known and later arrest is possible, the offender should be left to flee; help of bystanders must be requested; a warning shot should then be fired; and as a last resort the person’s legs can be fired at. In accordance with principle 9, it is suggested that it is not necessary to give sufficient time for a warning to be observed if this would place members or other persons at risk of serious injury or death.

(v) Policing public assemblies
The Standing Orders in respect of policing public gatherings and riot control (Operational Manual, chapter 10, Standing Order C) emphasise that only “the minimum force shall be used and no more force shall be used than is necessary.” Force may also not be used before it is necessary and the use of force must cease immediately after achieving the objective. Firearms may not be used for crowd control. Teargas may only be used with the personal permission of the Inspector-General.

(vi) Use of force on detainees

The use of force on detainees is severely limited. Principle 15 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides:

“Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.”

(vii) Recruitment and training - stress counselling

The correct use of force and firearms is a physical and in particular a psychological challenge to members. The importance of the selection of the persons most suited to the moral, psychological and physical challenges that confront members in their daily work is recognised by principle 18 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

“Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.”

In accordance with principle 21, stress counselling should be made available to law enforcement officials who are involved in situations where force and firearms are used. This is particularly the case where the use of a firearm by a member results in death.

(viii) Unlawful orders - obedience to superior orders

As is the case with torture, an unlawful order by a superior to use force shall not be carried out. When such an order is carried out, it is not a defence that the subordinate was carrying out the orders of a superior. Principles 25 and 26 provide that:

“25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force or firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow
it. In any case, responsibility also rests on the superiors who gave the unlawful orders.”

The reference to the Code of Conduct for Law Enforcement Officials is a reference to article 5 of the Code, which provides that:

“No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”

Conclusion

Members of the Namibian Police are given considerable powers under various acts of Parliament to use force where it is necessary for the effective performance of their policing duties. Any powers given under law must however be exercised only to the extent allowed by the particular law. The use of force by members is at all times subject to the human rights guaranteed to all persons under the Constitution.

The Namibian Police may come under pressure from the public and the media to use more force against persons seen to be criminals. The Namibian Police may also be criticised when members have apparently used too much force on occasion. This is particularly the case where persons have been seriously injured or killed.

The plea to use more force against “criminals” can be answered that it is for the courts to punish convicted criminals. The criticism that too much force has been used can only be answered if the members concerned have used only as much lawfully authorised force as is strictly necessary under the circumstances. In particular, the use of firearms must be confined to exceptional circumstances, not the routine apprehension of fleeing suspects.

Exercises and topics for discussion

Exercise

For the purposes of discussion, imagine that the following incidents have occurred in the area you police:

(a) A patrolling officer witnessed a man rob a passer-by. The thief had threatened his victim with a handgun and stolen his wallet and briefcase. As the thief ran away, the officer shouted at him, ordering him to stop. The thief continued to run and the police officer drew his gun and shot him. The thief was fatally wounded.

(b) A patrolling police officer witnessed two people smashing the window of a jewellery shop and stealing a large quantity of jewels from the display. Neither appeared to be carrying a weapon. As they ran from the scene, the officer shouted at them, ordering them to stop. One of the thieves stopped, and the other continued to run away. The police officer drew his revolver and, after shouting once more to the escaping thief to stop, shot and killed him. The accomplice, who did stop, was arrested.
(c) A police officer is patrolling in a quiet street in the early hours of the morning. He surprises a person who is about to break into a motor vehicle. On identifying himself as a police officer, the person points a handgun at him. The police officer shoots and kills the person.

(d) Two men armed with imitation firearms entered a bank and ordered everybody in the bank to lie down. However there was a police officer present and he noticed that the firearms the men were carrying were clearly not real. He approached the men to arrest them, but they ran from the bank and made their escape by stealing a car parked nearby. The police officer reported details of the incident over his radio, including the fact that the men were carrying only imitation firearms. Because the description of the car stolen by the men had been given over the radio, two police officers patrolling in a police car were able to recognise the vehicle. They could see that it contained two men. As the car approached them, they opened fire and the two men in the vehicle were killed.

Comment on the legal justification for the use of lethal force in each case, in relation to:

(a) section 49 of the Criminal Procedure Act;

(b) the Standing Orders;

(c) the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Topics for discussion

1. How do abuses and excesses in the use of force by police make their task more difficult?

2. What is meant by the term “proportional use of force” in relation to policing?

3. What alternatives are there to the use of force? What technical policing skills do they require and how can police officers be trained in them?

4. Consider the various ways in which police officers protect the right to life.
Chapter 10

LAW ENFORCEMENT AND THE PROTECTION OF JUVENILES

Chapter objectives

To give members of the Namibian Police an understanding of the Namibian and international human rights standards that apply to juveniles in contact with the criminal justice system, to sensitise members to the vulnerability of children, the importance of protecting all children from abuse, and of measures to prevent juvenile crime.

Essential principles

All children enjoy the same human rights as adults.

Children shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Children shall be treated with humanity and respect for the dignity of all persons, taking into account the needs of their age.

Children should only be detained when this is absolutely necessary.

Children should not be unlawfully or arbitrarily detained.

If children are detained, the detention should be for the shortest time possible under the circumstances.

Children shall be detained separately from adults.

When a child is arrested or detained, the parents or another family member should be informed as soon as possible.

Detained children shall have the right to maintain contact with their families through correspondence and visits.

Information for presentations

Introduction

All children enjoy the same basic human rights as adults under the Constitution. For example, a child should not be arrested arbitrarily and should be treated humanely if detained. In addition, because children are both physically and mentally immature, they are particularly vulnerable to ill-treatment and should therefore receive additional care and protection from members. Children are the adults of tomorrow. Sensitive treatment of children by members could reduce the likelihood that a young offender becomes an adult criminal.

As an indication of the importance attached to safeguarding the rights and interests of its children, the President signed the Convention on the Rights of the Child on 26

It is unusual for the countries of the world to be united on any issue. Yet, this is the case in the area of children’s rights. The Convention on the Rights of the Child is the convention which has been adopted by the most countries in the world. As at 30 November 1997, of the 192 member states of the United Nations, only one state (Somalia) had not adopted the Convention.

A child is every person below the age of eighteen years (article 1 of the Convention on the Rights of the Child). Sections 73 and 74 of the Criminal Procedure Act provide for special procedures for an accused under the age of eighteen years.

A child under the age of seven cannot be convicted of a crime i.e. he/she is doli incapax (unable to form the intention to commit a crime). A child between the ages of seven to fourteen may be convicted if the prosecution proves that the child is capable of understanding the difference between right and wrong and that the child understood the consequences of his/her actions.

Children may at the same time be both offenders and abused or exploited. For example, where a child is an accomplice of an adult offender, the child may be committing an offence, but may have done so under the influence of the adult. Members should try to protect the child involved as much as possible from abuse and exploitation by adults, always trying to act in the best interests of the child.

**Fundamental principles**

(i) **Detention only where necessary and for the shortest possible time**

It is obviously undesirable to detain children, particularly younger children. Every effort should therefore be made to avoid resorting to detention, where this is possible.

Article 37(b) of the Convention on the Rights of the Child expressly recognises this principle, providing that:

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

Based on this article it can be stated that:

- children should not be unlawfully or arbitrarily detained. This protection is virtually identical to articles 7 and 11(1) of the Constitution, which applies to all persons, including children;

- children should only be detained when this is absolutely necessary;
• if children are detained, it should be for the shortest time possible under the circumstances.

The most important way in which the detention of children can be avoided is by making every effort to find the parents of the child. The parent can then be warned to attend the criminal proceedings in terms of section 74 of the Criminal Procedure Act and the child can be released into the custody of the parent.

(ii) Safeguards during detention

Besides the general provisions in the Constitution, which as has already been mentioned also apply to children, there are a number of specific provisions in the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the Criminal Procedure Act, which are directed at the protection of children while in custody.

Article 9(4) of the Convention on the Rights of the Child provides that:

“Where such separation [i.e. the separation of children from their parents against the will of the children] results from any action initiated by a State party [i.e. any part of the Namibian government, including the Namibian Police], such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party, shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.”

Article 37 of the Convention on the Rights of the Child provides that:

“(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

Article 10(2)(b) of the International Covenant on Civil and Political Rights provides that:

“Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.”
Section 73(3) of the Criminal Procedure Act states:

“An accused who is under the age of eighteen years may be assisted by his parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.”

Section 74 of the Criminal Procedure Act contains detailed provisions concerning the attendance of a parent or a guardian of a child at court proceedings. Section 74(1) makes the attendance of parents at court proceedings compulsory:

“Where an accused is under the age of eighteen years, a parent or, as the case may be, the guardian of the accused shall be warned, in accordance with the provisions of subsection (2), to attend the relevant criminal proceedings.”

These provisions give rise to the following obligations on members of the Namibian Police, regarding the treatment of children while in detention.

(a) Treatment to be humane and recognise the inherent dignity of the human person

The right to dignity of all persons is recognised under the Constitution, but is specifically repeated in article 37(c) of the Convention on the Rights of the Child. Recognition of the dignity of children includes the right not be subjected to torture or other cruel, inhuman or degrading treatment or punishment (identical to article 8(2)(b) of the Constitution) and the right to be detained under humane conditions i.e. a minimum level of acceptable accommodation and food should be provided and medical care when necessary.

It is likely that treatment that would not necessarily be cruel or inhuman if applied to adult detainees, would be cruel or inhuman if applied to children. For example, solitary confinement would almost invariably be cruel when applied to children.

(b) Separation from adults

Both articles 37(c) of the Convention on the Rights of the Child and 10(2)(b) of the International Covenant on Civil and Political Rights provide that children in detention shall be separated from adult detainees. Article 37(c) of the Convention on the Rights of the Child creates the possibility that children not be detained separately where it is considered “in the child’s best interests.” Article 10(2)(b) of the International Covenant on Civil and Political Rights is unconditional and provides that under no circumstances shall a child be detained with adults.

There is an apparent contradiction between these two articles, which are both part of Namibian law. It must however be stated that even under article 37(c) of the Convention on the Rights of the Child, a child may only be detained with adult detainees if it is in the child’s best interests. A child should not be detained with adult prisoners for the reason that there are no available facilities so that the child can be detained separately.
It is considered that it will rarely, if ever, be in the interests of a boy to detain him with adult male prisoners, due to the very real danger of physical abuse. On the other hand, it may be in a girl’s best interests to detain her with adult female prisoners, particularly if the girl would otherwise be in solitary confinement. The girl should in all cases be consulted before being placed in a cell with adult female prisoners.

(c) Right to contact with family

The effect of article 9(4) of the Convention on the Rights of the Child is that members are required to inform a parent, or if this is not possible another family member, when a child has been detained and of the place where the child is being detained. The exception that the parents need not be informed where it is not in the best interests of the child, mainly applies to the situation where it is believed that the parents are abusing the child. In this case, it may not be advisable to disclose the whereabouts of the child.

Article 37(c) of the Convention on the Rights of the Child provides that a child shall have the right to maintain contact with his or her family through correspondence and visits, while in detention. This right can only be exercised if the parents are aware of the place of detention of their child. This right therefore also imposes an obligation on members to locate the parents or other family members of the child.

Rule 10.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), emphasises that the parents of the child should be notified of the detention immediately where possible, providing that:

“Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.”

(d) Right of access to legal and other appropriate assistance

Under article 37(d) of the Convention on the Rights of the Child, children enjoy the same rights as adults to be represented by a legal practitioner. See the discussion in chapter 7 (detention).

The use of the phrase “other appropriate assistance” in article 37(d) is presumably a reference to the child being assisted by a parent, family member or older friend. The failure to inform a child of the right to be assisted by a parent, or possibly some other adult, and to allow such assistance, may lead to admissions, confessions or pointing-outs made by the child being ruled inadmissible i.e. that the court will not consider the evidence.

It appears from the South African Appellate Division decision of S v M 1993 (2) SA 487 (A) at 491a - b, that even where the child says that he/she does not want his/her parents present, it may be advisable to take steps to ensure the presence of the parents. A child in this situation may not appreciate that it is in his/her best interests to have the assistance of his/her parents, and will rather think that it is better to try and prevent his/her parents from hearing about the matter. In the same judgment, Eksteen JA observed at 490d - f:
“It seems to me that as a matter of general principle a young person in such circumstances ought to be afforded the assistance of a parent wherever this is reasonably possible. Our common law has always recognised the inherent intellectual immaturity and inexperience of youth, and made allowances for them (see eg Voet 4.4.42 and 45; 48.19.7 and S v Lehnberg en ’n Ander 1975 (4) SA 553 (A) at 560C-561F). Section 73(1) of the Act entitles any person who has been arrested to have the assistance of his legal adviser as from the time of his arrest, and ss (3) of the same section allows an accused who is under the age of 18 years to be assisted by his parent or guardian at criminal proceedings. In fact s 74 goes on to make it imperative for the parent or guardian to be warned to attend such criminal proceedings whenever he or she 'can be traced without undue delay', and makes it an offence for them to fail to attend and to remain in attendance unless excused by the court. The conjunction of ss (1) and (3) of s 73 in the same section would seem to indicate that a person under the age of 18 years would at least be entitled to the assistance of his parent or guardian as from the time of his arrest, in the same way as an adult would be entitled to the assistance of his legal adviser. In S v Gibson NO and Others 1979 (4) SA 115 (D) at 138B-C, Milne J had occasion to remark on the 'unwisdom of allowing a 17 year old unrepresented accused, who is not assisted by his parents or guardian, to plead to serious criminal charges'. (See also S v H and Another 1978 (4) SA 385 (E).)”

In S v Kondile 1995 (1) SACR 394 (SE), two juveniles had made confessions and pointing-outs without first being offered the opportunity to be assisted by their parents. The court held that the confessions and pointing-outs were inadmissible, because the State had been unable to prove that they were not for this reason unduly influenced in making the confessions and pointing-outs.

A model warning statement incorporating appropriate warnings to a juvenile under the age of eighteen is given in chapter 7 (detention).

Topics for discussion

1. Consider the various ways in which you could avoid detaining a child that has been arrested (or minimising the length of detention).

2. What measures should be taken to ensure that a child who is in detention is not exposed to violence or abuse by other prisoners or police officers?
CHAPTER 11

POLICING AND THE RIGHTS OF WOMEN

Chapter objectives

To give members of the Namibian Police an understanding of how effective policing can contribute to the protection of women, particularly women subjected to domestic violence and rape.

Essential principles

Women are entitled to equal enjoyment of all human rights in the political, economic, social, cultural, civil and all other fields.

Violence against women may be physical, sexual or psychological and includes battering, sexual abuse, rape and other sexual offences, harmful traditional practices, sexual harassment and exploitation-related violence.

Violence against women, in all its forms, violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.

Violence against women is a crime and must be treated as such, even when occurring within the family.

Arrested or detained women shall not suffer discrimination, and shall be protected from all forms of violence or exploitation.

Women detainees shall be searched by female officers.

Women shall be detained separately from male detainees.

Pregnant women and nursing mothers shall be provided with special facilities in detention.

Information for presentations

Introduction

Violence against women, both within and outside the home, is common in Namibia and appears to be increasing. While police will mostly be unable to prevent violence against women, they could through effective policing ensure the arrest and prosecution of offenders and provide comfort and support to the victims of these crimes. Women are usually physically weaker than men and are therefore vulnerable to abuse and require special protection from the police.

Women and discrimination
The principles in respect of non-discrimination were discussed in chapter 4. With respect to the application of these principles in the area of non-discrimination on the grounds of sex, it is significant that Namibia has committed itself to the eradication of all discrimination on the grounds of sex, by acceding (signature by the President and approval by the National Assembly) to the Convention on the Elimination of All Forms of Discrimination against Women. By acceding to the Convention, Namibia as a country binds itself to eliminate all forms of discrimination against women. Article 10(2) of the Constitution also prohibits discrimination on the grounds of sex.

**Women as victims of domestic violence**

*(i) Introduction*

Women are usually the victims of domestic violence and men are the perpetrators of the violent acts, but it does happen that the roles are reversed. Domestic violence can also include child abuse, whether physical, sexual or psychological, but this aspect will not be covered in any detail.

Domestic violence is in many ways a hidden and often secret crime, but police officers because of the nature of their work will encounter it repeatedly. It can occur in any society. Men who abuse women are often thought of as uneducated, unemployed or working class, but abusive men are not restricted to the poor. Men who abuse women include, doctors, lawyers, teachers and police officers. Domestic violence is present in all societies and in all countries. The problem may be greater in some countries than in others.

Preliminary research indicates that domestic violence may affect approximately half of Namibia's women and children. If this statistic is correct, it indicates that domestic violence is an extremely serious issue. Most Namibian languages have words for domestic violence, except for Oshiwambo.

Domestic violence can take various forms of physical and sexual violations, such as pushing, pinching, spitting, kicking, hitting, punching, choking, burning, clubbing, stabbing, throwing boiling water or acid, rape and setting on fire. The results of such violence can range from bruises to death. The abused woman may also suffer from depression, anxiety and stress. The abuse may lead to the woman committing suicide. A woman who is abused may react by killing her husband. Studies in other countries indicate that women who kill their husbands do so most commonly in response to an immediate attack or the threat of an attack.

Studies indicate that children in families where the mother is abused suffer from more behavioural problems and lack greater social competence than children from homes where there is no such violence. Violence in the home may produce street children. Research indicates that violence in the home was a significant cause of the children exposed to such violence becoming violent criminals as adults.

Despite regular and repeated violence, victims may remain in the violent relationship and may not support the arrest and prosecution of the abuser. A woman in an abusive relationship is often dependent on the man, either economically (for maintenance and support or the maintenance of the children), socially (belief that
domestic violence is normal), psychologically (feelings of inferiority, which are reinforced by the abuse or isolation from others caused by the abuse) or emotionally (love and affection for the abuser, belief that children should remain with father, belief that man will change his behaviour, attempt to maintain family unity, opposition to divorce etc.). Members should be sensitive to these factors, which could make the successful prosecution of an offender difficult.

A study of domestic violence in the south of Namibia indicates that victims only report the abuse after a long period, in three-quarters of the persons interviewed only after four years. Family members are usually first approached. Victims may also approach ministers of religion, social workers or friends. Victims usually approach the police only in cases of severe assault. Complaints against the police were that the police were generally unsympathetic, with some members siding with the abuser, asking questions like “what did you do to provoke your husband?” The work of the Women and Child Protection Units was apparently not yet widely known or understood.

Members interviewed in the same survey balanced the picture by explaining some of the problems that they encounter. One apparent difficulty was legal constraints on arresting the perpetrator. The complainant may also side with the abuser and turn against the member who tries to intervene. Members were frustrated by complainants who subsequently withdrew charges.

While there is no clear answer to what causes domestic violence, there are a number of theories. Some researchers focus on the individual abuser and attribute domestic violence to the influence of alcohol or drugs, mental illness, stress, frustration and violent families of origin.

Other researchers believe that domestic violence reflects the unequal treatment of women in society. According to this theory, abuse of women is a display of male power, reinforcing the belief that women are inferior to men, responsible to them and in need of protection by men. Women are seen as the possessions of men, to be treated as the men see fit. Another view is that in some cases, a man’s traditional role of providing for the family may be undermined by unemployment and poverty, causing him to turn on his family as an outlet for his frustration.

Societal attitudes and beliefs may also play a role in domestic violence and contribute to the belief that a limited degree of domestic violence is acceptable. Members of a number of ethnic groups in Namibia (both men and women) believe that “moderate chastisement” or discipline of a woman by her husband or partner is lawful and acceptable behaviour. The persons who are on the receiving end of the violence do not find any degree of violent behaviour acceptable. There is also apparently a belief among some Namibians, that unless a man assaults his wife or partner occasionally, then that man does not love his wife or partner.

(ii) An effective police response

Domestic violence usually takes of a circular process, which can be called the “domestic violence cycle”. Tension builds between a couple to the point where it explodes. This is followed by a period of reconciliation. Slowly the circle will turn again. If left unchecked and there is no effective intervention, the period between
reconciliation and the explosion shortens. If the explosion takes the form of violence, as the cycle repeats itself the violence tends to become worse.

Traditionally police officers have tended to limit their intervention in domestic violence cases. There are a number of reasons for this, which include:

- frustration with the victim, who often attempts to withdraw the charge and does not co-operate in the investigation and prosecution;
- this contributes to the view that domestic violence cases waste police time and resources;
- frustration with the prosecution system, which often fails to prosecute offenders;
- laziness;
- disgust with the victim who may be drunk;
- the officer involved may believe that domestic violence or a limited degree of domestic violence is acceptable;
- lack of awareness that domestic violence is a crime and it is instead treated as unimportant and as a domestic or a family matter;
- related to this is the view that responding to incidents of domestic violence is not crime-fighting or lacks prestige.

Research has indicated that mediation (as opposed to the criminalisation) of domestic violence has been ineffective as a long-term solution in most cases. While there are good arguments in favour of mediation, an argument against mediation is that it tries to preserve the family unit at the expense of protecting the victim from the violence. Studies show that arrest at the scene of the crime or at a police station tend to reduce the risk of recidivism in the abuser. Prosecution of offenders could result in the abuser realising that his acts are criminal and can have adverse consequences for him.

The Namibian Police is one of the few agencies that is available 24 hours a day, seven days a week. Its members therefore play a vital role in helping victims. Domestic violence should be seen as a serious social problem that usually continues and can lead to increased levels of violence. Research in Canada shows that one out of three homicides arise from domestic disputes. Of these, in 90% of the cases, police had attended at least once and in 50% of these cases, police attended at least five times or more.

The following policy that is based on the policies applied in Canada is suggested as a model for the Namibian Police in responding to domestic violence:
• domestic violence is defined as a criminal act of violence against a spouse or partner;

• domestic violence is not a private affair, but a serious social problem often resulting in violation of the law;

• victims of assault require special attention and police sensitivity because:
  ♦ they are not traditionally seen as the victims of crime;
  ♦ they are likely to be subjected to repeated violence;
  ♦ they require protection both within and outside their homes;
  ♦ they are often financially dependent on their spouses or partners;
  ♦ their victimisation may have serious consequences for their children.

• respond to and fully investigate all complaints of domestic disputes, assaults and violence;

• arrest the suspect in all cases where the arresting officer has a reasonable suspicion that the suspect has committed a Schedule 1 offence, which includes the offences of assault, when a dangerous wound has been inflicted, murder, culpable homicide, rape and indecent assault;

• in situations where members are of the opinion that releasing the man after arrest and an initial interview at the police station is appropriate and will not result in injury to the woman, the man may be released on a warning notice (form J 127, except if the offence is murder or rape), a notice to appear in court (form J 534, if the fine imposed will not exceed N$300) or police bail may be set (except if the offence is murder or rape);

• respond appropriately and sympathetically to the victim, using a technique such as victim crisis intervention (see the following chapter). Where possible and appropriate, members should consider referring victims for counselling. Institutions that may be able to provide counselling are listed in chapter 5 (criminal investigations).

• If there is a real risk that the man may assault the victim before the case comes to trial, or may interfere or tamper with the victim and other State witnesses, consider asking the public prosecutor to ask the court to grant bail with the condition attached that the man may not return to, visit or reside in the home;

• If there is an immediate risk of serious injury to the woman on the man’s release, refer the victim to a shelter for battered women (if there is one in the area), or consider advising the victim to live with relatives and friends for her own safety;
• investigate the offence effectively and properly.

Some hints on how to deal with domestic violence incidents:

• Be observant when approaching the house and entering. The use of violence against police officers is a distinct possibility, because perpetrators can transfer their violent acts from the women to the police;

• When gaining entry, introduce yourself, giving reasons why you are there. If you are denied entry, calmly explain that you need to know that there is no serious trouble inside. Force entry if there are signs that the victim is in danger, such as cries for help, display of weapons, signs of struggle, statements to this effect from eye-witnesses etc.;

• Avoid the kitchen, as it is a natural source of weapons;

• Check to see if the victim is injured. If so, administer first aid and consider taking victim for medical treatment if necessary;

• Interview witnesses as soon as possible. Check with neighbours to see if they heard anything and whether sounds of domestic violence incidents are often heard from the house.

Women as victims of rape and other sexual offences

Rape and other sexual offences are serious violations of a woman’s right to bodily integrity and dignity. It is likely that only a fraction of actual rapes are reported, because victims believe, wrongly or rightly, that laying a charge will not result in the detection, prosecution and conviction of the perpetrator. Women also fear that they will not be sympathetically treated by the first persons that they have to tell their story to, the police. A further factor is that the criminal trial may lead to the complainant being exposed to embarrassing cross-examination about her sexual history and intimate details of her life. Women often talk about being raped twice, firstly by the perpetrator, secondly, by unsympathetic and hostile police officers and the legal system.

The Namibian Police plays a vital role at all stages of a criminal investigation into rape and other sexual offences. The sympathetic treatment of victims (see the following chapter), may lead to more rapes being reported because victims will believe that they can trust the police. Victims may provide more information and the information may be more reliable, resulting in more successful prosecutions. Rape is difficult to prove, because usually the only witness for the State with personal knowledge of what happened is the complainant. Scientific evidence may therefore make all the difference and determine whether the perpetrator is successfully prosecuted.

There are a number of false perceptions or myths about rape, such as:
• women ask to be raped by dressing provocatively, engaging in inappropriate behaviour or being in the wrong place. In reality, women of all ages are raped i.e. children to grandmothers and victims include housewives, the mentally disturbed, nuns, professional persons etc. Women are also commonly raped in their homes and are not therefore “asking to be raped”;

• rape is a crime of passion. In reality, rape has very little if anything to do with sex or sexual attraction. Rapists often fail to achieve an erection or to ejaculate. Rape is in fact about power and violence. Rape seems to be more commonplace in violent societies and where men most often see women as inferior and powerless;

• rape is impossible without consent. It is simply not true that a woman who does not want to be raped can prevent it. Most men are stronger than most women. Women who may fear for their lives cease resisting. Women who have been raped report that resistance to a rapist can make him more violent. To prevent this escalation of violence, women stop resisting;

• women cry rape to be vindictive, for revenge or because they fall pregnant. While there are undoubtedly cases of false reporting of rape, statistics from the USA reveal that the incidence of the false reporting of rape is no higher than that for other serious crimes at 2%.

Members can respond to the problem of rape in our society by trying to prevent rape occurring where this is possible, detecting and ensuring the successful prosecution of perpetrators and responding sympathetically to rape victims.

General prevention strategies include giving advice to women on how to avoid becoming victims of sexual attacks, providing increased security and policing in known high-risk areas and carrying out effective and legal surveillance of suspects. Techniques for responding appropriately and sympathetically to rape victims are given in the following chapter. Specific additional guidelines are that:

• where possible, female members should as much as possible have contact with the victim, rather than male members. A female member should at the very least be present at all times during an interview and other contact with the victim;

• A complainant in a rape case should be taken to the medical examination by a member;

• The complainant and the suspect should not be transported in the same vehicle, unless this is unavoidable. Remember that the woman has been allegedly raped by this man and this could be detrimental to the woman’s psychological and even physical health. Where this is unavoidable, members should ensure that the woman is properly protected and is never left alone with the suspect.

Women as detainees
The fact that men and women should be separately detained is discussed in chapter 7 (detention). In addition:

- only a female member should search a female detainee;
- arrested or detained women should be protected from all forms of violence or exploitation while in detention. Any instance of physical or sexual abuse of a woman detainee by a member should be reported to a superior officer;
- pregnant women and nursing mothers should be provided with the necessary facilities and medical treatment while in detention.

Conclusion

Members have a vital role to play in protecting women, as a vulnerable group, from abuse at the hands of the physically more powerful. Women as victims should know that they can approach members with confidence that they will be treated sympathetically and with confidence that their abusers will be brought to justice.

Exercises and topics for discussion

Hypothetical exercise

Consider the proposed guideline for responding to domestic incidents that is given above. Is the guideline workable in practice? In particular, is it advisable to arrest the suspect in all cases where it appears that a criminal offence has been committed? Suggest changes or improvements that will make the guideline more workable.

Topics for discussion

1. Physical violence against women by her male partner is a crime. In view of this, why has it been necessary to change attitudes from one of non-intervention to the view that such crimes should be fully and fairly investigated?

2. It has been argued that social, economic and political inequalities of women in relation to men provide a structure in which men perpetrate violence against women. Do you accept this argument? If not, why not, and what alternative argument would you propose? If you do believe it is true, what can be done to correct the situation?

3. It is sometimes argued that for social and cultural reasons, police responses to domestic violence (or sexual offences) are not satisfactory. If this is true, what are the reasons for this and what can be done to correct the situation? If it is not true, why is it not correct?

4. You are told by the spouse of your friend and colleague that the bruises you saw on her were caused by your friend, and that this is not the first time that this has happened. What do you do?
5. For the purposes of discussion, imagine that a series of rapes and other violent attacks on women have taken place in a particular area that falls within your jurisdiction. The attacker or attackers have not been detected. Consider all the steps that you would take to advise women on how to avoid becoming victims, to prevent further attacks; and to reassure the general public.
Chapter 12

PROTECTION OF THE VICTIMS OF CRIME

Chapter objectives

To give members of the Namibian Police an understanding of the Namibian and international human rights standards applicable to the treatment of the victims of crime, including the principles that:

- victims should be treated with compassion and respect for their dignity;
- victims also have rights and interests in the criminal justice system.

Essential principles

All victims of crime shall be treated with compassion and respect for their dignity.

Victims are entitled to speedy redress for the harm they have suffered.

All victims are entitled to have effective access to the judicial system for the harm that they have suffered.

Victims shall be informed of their role and rights in the criminal justice system and the progress of their cases.

Unnecessary delay in the finalisation of victims’ cases shall be avoided.

Victims shall be informed of the possibility under section 300 of the Criminal Procedure Act that offenders may be required to compensate victims as part of their sentences.

Victims shall be informed of the availability of legal, medical, psychological and social assistance where this is appropriate.

Inconvenience to victims shall be minimised as much as possible.

The privacy of victims shall be respected.

The safety of victims, their families and their witnesses shall be ensured when necessary.

Victims, their families and their witnesses shall be protected from intimidation and retaliation when necessary.

Information for presentations
Introduction

The term “human rights” indicates that the rights are enjoyed by all humans, regardless of their age, race, sex, religion, social position etc. While it is important to emphasise that criminal offenders therefore also have the same rights as other persons, this does not mean that they are the only persons who have rights under the criminal justice system.

A crime will affect the victim in various ways, but in most cases will violate one or more of the victim’s human rights. For example, a woman’s right to dignity (article 8(1) of the Constitution) is violated by the crime of rape. A victim’s right to own property (article 16 of the Constitution) is violated by a robbery or burglary.

Victims’ rights and the compensation of victims has recently been examined by a judicial commission of inquiry appointed by the President. Mr Justice O’Linn was appointed by the President to examine and make recommendations on various aspects of criminal procedure. One of the aspects dealt with by Mr Justice O’Linn in his report to the President is the need to improve the protection of the victims of crime.

The Namibian Police is the major protector of the rights of victims. Members may prevent crimes from occurring through patrols or through an effective informer network. If a crime has been committed, members may detect and gather evidence so that the perpetrator can be successfully prosecuted. Through their professional, considerate and sympathetic conduct towards the victims of crime, victims receive some comfort.

The Namibian Police also relies on the co-operation of victims and of members of the public to report crimes and to provide information about crimes and the perpetrators of crimes. Statistical research shows that many, if not most crimes are solved not by detective work, but by information provided by the public. If members are not trusted by the community, then both the reporting of crime and the successful prosecution of offenders will suffer. Fewer crimes may be reported as the public lose confidence in the ability of the Namibian Police to find the offenders. This in turn could lead to vigilante groups, victims or communities taking the law into their own hands, social instability, insecurity and the breakdown of law and order.

Fundamental principles

There are two basic principles in the treatment of victims of crime by members, namely that all victims are entitled to:

- be treated with respect for their human dignity and understanding of their situation;
- prompt redress for the harm they have suffered.

“Redress” means to set straight again, to remedy or to make up for some wrong treatment or grievance.

Protection of victims of crime
The General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power on 29 November 1985. The Declaration specifically focuses on victims of crime, but the principle of the protection of the rights of victims can also be found in the Constitution and in the Criminal Procedure Act.

The Constitution guarantees various rights for all persons that may be violated by a crime, such as:

- the protection of the right to life (article 6). This right could be violated by a murder;
- the protection of the right to liberty (article 7). This right could be violated by a kidnapping;
- respect for human dignity (article 8(1)). This right could be violated by an assault or crimen injuria;
- protection of the right to own property (article 16(1)). This right could be violated by theft or a robbery.

The Criminal Procedure Act is entirely directed at regulating the criminal legal system, which is the major way of providing redress to the victims of crime. Section 300 in particular provides for compensation orders to be made in certain cases.

Paragraph one of the Declaration defines a “victim” of crime as:

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”

Put simply, a victim is any person (or persons), who has suffered any kind of harm or loss because a criminal offence has been committed. The second part of paragraph two provides that a victim also includes the immediate family or dependants of the direct victim and persons who have suffered harm by trying to assist the victim. The husband of a murdered wife, or the parents of a murdered child, would therefore also be victims of crime.

Whether the perpetrator of the crime has been found, prosecuted or convicted, the affected person remains a victim. A person can also be a relation of the perpetrator and still be a victim. This could happen in the case of domestic violence, in which a husband assaults his wife. See paragraph 2 of the Declaration.

Victim crisis intervention

Many victims of crime have undergone a crisis situation as a result of the crime, in other words a situation which is out of the ordinary, which is stressful and affects the stability of the individual, so that his or her ability to cope or function is seriously affected. An important part of policing is intervention in crisis situations involving the
victims of crime. The police officer should therefore understand what the effects are of a crisis so that he or she can support the victim effectively.

The five major components of a crisis reaction or critical incident from the victim’s point of view are:

- **unpredictability** – there are normal and predictable crises that one can plan for, such as starting a new job, taking a driving test etc. The severity of the impact is lessened by planning and anticipation. This is not the case if the incident is sudden and unpredicted;

- **arbitrariness** – the more arbitrary or random the event, the more stressful the crisis. This could be described as the “why me” or the “it’s not fair” syndrome.

- the victim’s **sense of control is jeopardised**;

- **disruption in beliefs and values** – basic assumptions about how the world works and how things should be are tested and at times destroyed;

- **physical (injury) or emotional loss** – loss of dignity, embarrassment, sense of violation, as well as different degrees of physical injury.

If a victim’s crisis is not dealt with properly, or there is no crisis intervention, the victim may deal with the crisis in some of the following forms of defence mechanisms:

- through denial or minimising the event, or its importance to them;

- inappropriate guilt or shame;

- escapism or age regression (acting like a child);

- amnesia (forgetting, memory loss) or blocking mechanisms;

- transference of anger or blaming others;

- rationalisation, perhaps in the form of “maybe I deserved it”;

- phobias (fear) – for example, sexual or a fear of open or confined spaces.

It may take some time for some of these defence mechanisms to come out, such as days, weeks, months or even years. This is known as delayed shock trauma. Members have two advantages over other persons in dealing with a victim’s crisis. These are:

- **early intervention** – members may be on the scene first. Victims often have their defences down at this time and are therefore more receptive to authoritative and knowledgeable intervention;
• **authority figure** – police have symbolic authority as the representative of the state and real authority because of the power given by society to the police. The uniform also helps to convey an impression of authority, strength and discipline. Police officers are also seen as professionals and persons generally follow the directions of a competent professional.

A very effective example of where crisis intervention theory can be used is in assisting a rape victim or the victim of another form of sexual assault. The victims of these crimes exhibit extreme reactions due to the violence of the attack, the intimate nature of the crime, or the victim’s feelings of shame and embarrassment.

The most important skill that a police officer will use in a sexual assault crisis situation are his or her interpersonal communication skills. The first few minutes of his or her interaction with the victim may make the difference as to whether the victim will be able to cope psychologically with the attack. It is important for the investigating officer to build a rapport and to support the victim as well as attending to her physical needs. Investigation of the crime should wait until these needs have been addressed.

A victim of a sexual assault is likely to exhibit three types of reaction:

- **expressed reaction** – a tendency to be very honest about her emotions, and those emotions may be very negative. Typical expressed reactions include:
  - shock, disbelief or dismay;
  - screaming, name-calling, crying and verbal abuse;
  - physical aggression.

- **controlled reaction** – the victim may be very matter-of-fact, as if unconcerned by the event or may joke or apparently take the event lightly, which may be leading to a denial on the part of the victim that the events happened or an attempt to minimise the event or its importance to the victim;

- **withdrawal** – this may take various forms such as regression to a child-like state, inability to make decisions or problems understanding questions, which if pressed too hard may lead to further complications.

A police officer should be aware that professional psychological intervention may be necessary. Counselling services are also available in some urban centres. See the table in chapter 5 (criminal investigations).

Techniques that can be used to deal with victims can be divided into two categories, namely non-verbal support techniques and verbal strategies.

**Non-verbal support techniques** and factors to bear in mind include:
• covering the victim with a blanket or a jacket. If the victim’s clothing has been ripped or removed, this will comfort the victim. Often victims are suffering from physical shock and providing them with a covering will warm them and lessen the effect of shock;

• offering a drink of water if there are no suspected internal injuries. This gives the victim an object to manipulate and so relieve some stress;

• using a soft, non-authoritative voice to assist you in gaining the victim’s trust and to build support;

• beware of touching the victim to comfort her, unless asked to do so. Touching a victim is a high-risk tactic that often provokes a violent or strongly negative emotional reaction. This would be the case particularly if the police officer is male, because the victim’s assailant was also male;

• not invading the victim’s personal space. This is related to the previous point, but includes the aspect of how closely you position yourself to the victim. Do not crowd the victim by sitting or standing too close to her;

• lowering yourself to the height of the victim. This aids the rapport building process. It is difficult to gain a victim’s trust if you are towering over her;

• allowing the victim a psychological “escape” route. Do not crowd the victim into a corner. If possible, allow the victim to choose where they wish to sit or where they would be most comfortable.

**Verbal strategies** that could be used include:

• avoiding “why” questions. This type of question may imply blame or appear to criticise the victim’s actions. Instead of asking “why did you walk down the dark alley?”, try something more neutral, such as, “where were you going?”

• reassuring the victim that it was not her fault. Try to remove inappropriate feelings of blame or guilt;

• listen carefully to what the victim has to say, rather than doing all the speaking;
• building rapport and gaining the victim’s trust. Do not claim that you know what they the victim is experiencing, such as “I know how you must feel.”

• avoiding the use of aggressive or violent terms, such as “rape, violate”, “beat”, “molest” etc. Instead use expressions such as “how did he hurt you?”

• not asking the victim about her feelings about the incident unless the victim’s consent may be in issue. Stick strictly to the physical events of the attack;
• redirecting the victim’s anger to catching the suspect and/or preventing him from re-offending. Try using “help me to catch this person!” or “let’s work together to catch this person, so that he cannot do this to anyone else!”

• developing persuasive themes in advance to deal with the victim having to go to hospital for a medical examination. Do not refer to pregnancy or disease. Instead use expressions such as “we will make sure that you are all right”, or “it might help us to get more evidence to catch him”;

• not showing any nervousness or embarrassment when asking questions of a sexual nature. Use medical or clinical terms, if the victim is sophisticated enough to understand them. Be professional when interviewing the victim. If the victim believes, even subconsciously, that you are embarrassed, it will inhibit her from disclosing all the details;

• obtaining complete disclosure of all aspects of the attack. Often the victim will self-edit due to embarrassment or shame. Ask “what else did he do?” and “what else did he make you do?” If you ask “did he do anything else?” it makes it easy for the victim to say “no”. If the victim does not give full disclosure, it becomes unlikely that you will ever obtain that information, which may be critical to identifying the suspect’s modus operandi, due to the victim blocking out the acts as part of a psychological defence mechanism resulting in denial;

• when canvassing the use of force by the victim (in self-defence), do not imply blame or criticism if your victim did not physically resist the attack. Avoid questions such as “did you fight back?”. Instead use “were you able to fight back at all?”

• inform the victim that the after-effects, which include the following, are normal:

  ♦ inability to sleep;
  ♦ onset of nightmares;
  ♦ fear of being alone;
  ♦ loss of appetite;
  ♦ inability to go to school or work;
  ♦ development of self-blame and guilt;
  ♦ onset of physical illnesses;
  ♦ development of child-like behaviour.
Remember that if you are taking a statement from the victim, that this will be made available to the defence at the trial. The complainant may be cross-examined on what was said, but most importantly, what was omitted or left out of the statement. It is therefore vitally important that you get the victim to “open up” about the events, because otherwise the statement will be incomplete and may lead to the acquittal of the accused.

Trainer’s note – This section is based on chapter 10, Victim Crisis Intervention & Theory, Recruit Training Manual, (Justice Institute of British Columbia – Police Academy: New Westminster, undated).

Specific aspects of the protection of victims of crime

(i) Non discrimination

Article 10 of the Constitution guarantees the equality of all persons before the law and prohibits discrimination on any grounds, providing that:

“(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.”

All victims of crime are therefore entitled to the same treatment and respect. This does not necessarily mean that all persons should be treated in the same way. It means that there is a minimum standard which applies to all persons. A woman who has been raped should be treated with particular sensitivity because of her experience. Older persons may need to be treated with greater respect and regard for their age.

(ii) Aspects of the treatment of victims in the criminal justice system

(a) Introduction

One of the most fundamentally important aspects of police work is assisting the victims of crime to obtain justice by bringing the perpetrators of crime before a criminal court. Paragraph 4 of the Declaration provides that:

“Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”

All victims should be treated with sympathy, compassion, respect and understanding. This is particularly the case where a person has undergone a traumatic experience, such as rape or other sexual or physical assault.

(b) Interviewing the victim or a witness

Modern psychological research indicates that witnesses recall events better where the interview is approached as part of ordinary social interaction, rather than a formal question and answer session. Research also shows that witnesses give a fuller and
more accurate account when they feel relaxed and have a good rapport with the interviewer. A witness who is made to feel valued by the interviewer, is far more likely to be co-operative, both during the interview and when called as a witness in court.

The interviewer should be calm and relaxed. The interviewer should not appear to be nervous because this is likely to affect the person interviewed.

An effort should be made to remove all distractions, such as people entering and leaving the room, police radios, telephones etc. This will help the person concentrate on remembering as much as possible. Particularly in the case of a traumatic event such as rape or sexual assault, the victim should be interviewed in a separate room where she can relate the events, rather than be required to recount what happened in a charge office.

It is important to allow the witness to recall the events, rather than being subjected to a series of questions. The witness should then participate more actively in the process, with a better recall of information. It may be more effective to first allow the witness to recall the events, restricting interruption by questions to a minimum. Once this has taken place, then a second stage which is more guided by questions can start.

Questions can be asked by the interviewer to guide the telling of the story, to clarify points that arise, or to request more detail. The questions should be open-ended, for example, “what kind of clothes was the person wearing?”, rather than closed, for example, “was his shirt red?” or “what colour was his shirt?” This kind of interview will avoid single word answers, which are not helpful when the interviewer is trying to achieve a full account of the events. The person interviewed should not be interrupted.

Another useful technique is to ask the witness to visualise the scene or events and then to describe the events as the witness “sees” them. Research indicates that persons recall events graphically and the description of the “picture” or scene, can help a witness recall information that was otherwise forgotten or thought unimportant. The interviewer can help by asking further questions about the image. In the case where a witness has been traumatised by the experience, it may be difficult for the witness to give a full account of the events, because recalling the events is stressful and traumatic. In the case of a sexual assault such as rape, the victim will have to describe embarrassing and intimate experiences. The following actions may help the witness to feel more comfortable and relaxed during the interview:

- the person interviewed should be treated with sympathy and understanding;
- the person interviewed should be reassured and told that their reaction to the events is normal and understandable if they are still in a state of shock from the experience;
• the person interviewed should believe that the interviewer understands what he/she has gone through;

• the interviewer should avoid being judgmental or confrontational. Gentle encouragement and reinforcement of the witness should be given where appropriate. Apparent inconsistencies can (and should) be clarified later;

• an effort should be made to interview the person in friendlier surroundings, for example, a comfortable or familiar place, rather than a cold, empty office, with uncomfortable chairs;

• the interviewer should make an effort to establish personal contact or a good rapport. It is often helpful for the member to introduce himself by first name and surname;

• the person interviewed should be made to feel that the case is important and not just adding to the workload of the member;

• it may be easier for the person interviewed to talk about the traumatic experience, if the questions relating directly to the experience are left for the end of the interview.

**Trainer’s note:**

The technique suggested in the previous paragraphs is known as the Cognitive Interview technique. The previous paragraphs are based on the book by Peter Ainsworth, *Psychology and Policing in a Changing World*, at pages 26 - 39 and on an article by A Memon and B Stevenage, “Interviewing Witnesses: What works and what doesn’t”, published in *Psycoloquy*, 1996. Memon and Stevenage note that under test conditions, the Cognitive Interview technique results in 35% more correct information being obtained from adult witnesses.

**Access to the mechanisms of justice**

The victim is often neglected in the criminal justice system. The focus is mainly on obtaining the conviction of the accused by the State. The prosecutor represents the interests of the State and is not the legal representative of the complainant or victim of the crime. For example, the victim would not usually be consulted if the State agrees to accept a guilty plea to a lesser charge or the charges are withdrawn. Even if the complainant could afford a legal representative, his/her legal representative would not be allowed to address the court. It should be said that many prosecutors do however see their role as obtaining justice for the victim of crime and do everything possible to represent the interests of the victim.

Members have an important role in trying to make the criminal justice system work in the interests of victims. For example, members could try and represent the interests of the victim, by communicating the views of the victim to the prosecutor. Victims should be told briefly how the system works, their rights and their role in the prosecution, so as to make it more understandable. Delay and postponements should be minimised as much as possible, to prevent inconvenience and frustration.
It is however true that delay and postponements can often be attributed to the prosecution, the defence or the court, rather than to the police.

(iii) Privacy and physical safety of victims

Article 6(d) of the Declaration provides that measures shall be taken to:

“minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.”

A criminal investigation often intrudes into the private lives of victims and may be inconvenient for them. Sometimes victims will be required to provide highly personal and intimate details about the experience, such as where a woman has been raped.

Some inconvenience and intrusion is unavoidable in any investigation if members are to successfully detect and prosecute the offender. The requirement under article 6(d) is therefore that this be minimised as much as is possible.

Victims may be concerned about their personal safety. For example, the decision to release an accused charged with an extremely violent rape on bail, may place the life of the victim at risk, in certain cases. If there is a realistic prospect that this may happen, then members should do everything possible to ensure that bail is not granted. It would be wise to inform the victim that the accused has been released on bail, where there is any risk of personal injury to the victim.

(iv) Assistance to victims

Articles 14 to 17 of the Declaration emphasise that victims should be assisted not only by the successful prosecution of offenders, but also through appropriate care for the victims themselves:

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above [race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.”

Members can assist victims by referring them to institutions, organisations or persons that may provide medical assistance, counselling etc. Some of these organisations are listed in chapter 5 (criminal investigations).
(v) **Restitution and compensation**

Restitution means to restore something to its original condition. This is an important part of victims’ rights.

Article 8 of the Declaration provides that:

“Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights.”

In many cases it will be impossible to restore the conditions that existed before a crime. For example, nothing can bring back to life a murdered family member. In many cases the offender will have no money or property, so that a compensation order will have no practical effect.

African society traditionally viewed a crime as creating an obligation on the offender to compensate the victim for any suffering or damages caused. Traditional leaders would ensure that the victim was compensated. The Western view is to see a crime as being contrary to the laws of the State, for which the offender is punished by the State. A fine, for example, will not be paid to the victim, but will be paid to the State. In many cases, the only compensation that the victim will receive is the knowledge that the offender has been punished.

Regarding the return of stolen property, whenever it is practically possible, members should return the property to the lawful owner. The person from whom the article was seized must first consent. In many cases, the person who was in possession of the item will be the accused. The accused may be reluctant to consent in some cases, because this may be tantamount to an admission of guilt. If the property is returned to the owner, he/she should be warned to keep the property in his/her possession, so that it can be used as evidence in the case. See section 30(b) of the Criminal Procedure Act.

A compensation order can be made in terms of section 300 of the Criminal Procedure Act, which provides that:

“(1) Where a person is convicted by a superior court, a regional court or a magistrate’s court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that-

(a) a regional court or a magistrate’s court shall not make any such award if the compensation applied for exceeds R20 000 or R5 000, respectively;

... 

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.
(3)(a) An award made under this section—

(i) by a magistrate’s court, shall have the effect of a civil judgment of that court;

(ii) by a regional court, shall have the effect of a civil judgment of the magistrate’s court of the district in which the relevant trial took place.

(b) Where a superior court makes an award under this section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate’s court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate’s court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate’s court.

(4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5)(a) A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subsection (4).

(b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made."

Section 300 is not used very much at present by our courts. This is probably due to ignorance of the section by prosecutors and the police, who do not therefore inform victims of the possibility of a compensation order. It can form an effective part of a sentence in suitable cases, where the accused has the financial ability to pay an amount to the victim.

A compensation order can also be included as a condition of the suspension of a sentence. This has the advantage that if the accused does not pay the amount, then a suspended sentence of imprisonment can then be brought into operation. A compensation order in terms of section 300 has the effect of a civil judgment, which means that the victim would have to use the services of a legal practitioner to make the accused pay if the accused does not pay voluntarily.

Compensation orders are particularly appropriate in economic offences, such as theft, fraud or malicious damage to property. A compensation order can only be made where there is damage to or a loss of property and not, for example, in a case of rape (S v Liberty Shipping & Forwarding (Pty) Ltd 1982 (4) SA 281 (D)).

A compensation order should not be made unless the accused is able to pay a substantial part of the order through monthly earnings or through the seizure and sale of the accused’s assets. There is no point in applying for a compensation order when the accused is sent to jail for a long period, because he or she will have no income during this period.

The victim or the prosecutor at the request of the victim must apply for a compensation order to be made. Members can play an important role in informing
victims of the section in suitable cases. Section 300(5)(a) provides that a victim may renounce a compensation order in writing within sixty days. This is because a civil claim cannot be made against the accused for damages if a compensation order is made (section 300(5)(b)). If a compensation order is therefore lower than the amount that would be awarded to the victim in damages by a civil court, it would be in the interests of the victim to renounce the order.

**Topics for discussion**

1. In addition to the Government having responsibility for the safety and security of citizens, both the community and private individuals must help to prevent crime and hence victimisation. What measures can the community and individual citizens take to prevent crime? How can the Namibian Police encourage them in their efforts to do so?

2. Studies show that a large proportion of the crime actually committed is not reported to the police. Should police encourage the reporting of a greater proportion of that crime? What would be the advantages and disadvantages of a higher proportion of actual crime being reported to the police?

3. What positive effects for the prevention and detection of crime arise out of police officers providing greater support and assistance to victims of crime?

4. Under which circumstances can property that has been seized be returned to the owners?

5. Persons suspected of crime and victims of crime each have rights. Some of these rights may conflict, examples being the suspect’s right to apply to be released on bail vs. the victim’s right to personal security and freedom from fear of further crime; the suspect’s right to a public hearing vs. the victim’s right to privacy; and the suspect’s right to have adequate time and facilities to prepare a defence vs. the victim’s right to timely justice and a resolution of the case. Identify other rights of suspects and victims that may conflict and discuss how the rights of the two groups may be reconciled.

6. Consider the various ways in which you could provide a sympathetic environment for interviewing a rape victim.
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APPENDIX

SELECTED HUMAN RIGHTS STANDARDS CONCERNING LAW ENFORCEMENT

I. The Namibian Constitution

1. The Namibian Constitution, Chapter 3

II. International and Regional Human Rights Declarations and Treaties

1. The Universal Declaration of Human Rights
2. The International Covenant on Civil and Political Rights
3. African Charter on Human and Peoples’ Rights

III. United Nations human rights standards concerning law enforcement

1. Code of Conduct for Law Enforcement Officials
2. The Convention against Torture
3. Basic Principles on the Use of Force and Firearms
4. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment
5. Declaration of Basic Principles of Justice For Victims of Crime and Abuse of Power
6. Declaration on the Elimination of Violence against Women
Part I

The Namibian Constitution

CHAPTER 3

Fundamental Human Rights and Freedoms

Article 5 Protection of Fundamental Rights and Freedoms

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Article 6 Protection of Life

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

Article 7 Protection of Liberty

No persons shall be deprived of personal liberty except according to procedures established by law.

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.

Article 9 Slavery and Forced Labour

(1) No persons shall be held in slavery or servitude.

(2) No persons shall be required to perform forced labour.

(3) For the purposes of this Article, the expression "forced labour" shall not include:

(a) any labour required in consequence of a sentence or order of a Court;
(b) any labour required of persons while lawfully detained which, though not required in consequence of a sentence or order of a Court, is reasonably necessary in the interests of hygiene;

(c) any labour required of members of the defence force, the police force and the prison service in pursuance of their duties as such or, in the case of persons who have conscientious objections to serving as members of the defence force, any labour which they are required by law to perform in place of such service;

(d) any labour required during any period of public emergency or in the event of any other emergency or calamity which threatens the life and well-being of the community, to the extent that requiring such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation;

(e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

Article 10 Equality and Freedom from Discrimination

(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 11 Arrest and Detention

(1) No persons shall be subject to arbitrary arrest or detention.

(2) 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.

(3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.

(4) Nothing contained in Sub-Article (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigration: provided that such persons shall not be deported from Namibia unless deportation is authorised by a Tribunal empowered by law to give such authority.

(5) No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in
accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.

**Article 12  Fair Trial**

(1)  (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

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

(c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

(2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of “previous acquittal” and “previous conviction”.

(3) No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.

**Article 13  Privacy**

(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public
safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.

Article 14 Family

(1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 15 Children’s Rights

(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by their parents.

(2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.

(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.

(4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.
(5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

Article 16 Property

(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Article 17 Political Activity

(1) All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.

(2) Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.

(3) The rights guaranteed by Sub-Article (2) hereof may only be abrogated, suspended or be impinged upon by Parliament in respect of specified categories of persons on such grounds of infirmity or on such grounds of public interest or morality as are necessary in a democratic society.

Article 18 Administrative Justice

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Article 19 Culture

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Article 20 Education
(1) All persons shall have the right to education.

(2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.

(3) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.

(4) All persons shall have the right, at their own expense, to establish and to maintain private schools, or colleges or other institutions of tertiary education: provided that:

(a) such schools, colleges or institutions of tertiary education are registered with a Government department in accordance with any law authorising and regulating such registration;

(b) the standards maintained by such schools, colleges or institutions of tertiary education are not inferior to the standards maintained in comparable schools, colleges or institutions of tertiary education funded by the State;

(c) no restrictions of whatever nature are imposed with respect to the admission of pupils based on race, colour or creed;

(d) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.

Article 21  Fundamental Freedoms

(1) All persons shall have the right to:

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;

(c) freedom to practise any religion and to manifest such practice;

(d) assemble peaceably and without arms;

(e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;

(f) withhold their labour without being exposed to criminal penalties;
(g) move freely throughout Namibia;

(h) reside and settle in any part of Namibia;

(i) leave and return to Namibia;

(j) practise any profession, or carry on any occupation, trade or business.

(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Article 22 Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Article 23 Apartheid and Affirmative Action

(1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

(2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory

(3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered
special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

Article 24 Derogation

(1) Nothing contained in or done under the authority of Article 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorises the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.

(2) Where any persons are detained by virtue of such authorisation as is referred to in Sub-Article (1) hereof, the following provisions shall apply:

   (a) they shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;

   (b) not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorised;

   (c) not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months, their cases shall be reviewed by the Advisory Board referred to in Article 26 (5)(c) hereof, which shall order their release from detention if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such persons;

   (d) they shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstances, having regard to the public interest and the interests of the detained persons.

(3) Nothing contained in this Article shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6, 8, 9, 10, 12, 14, 15, 18, 19 and 21 (1)(a), (b), (c) and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law.

Article 25 Enforcement of Fundamental Rights and Freedoms

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred
by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

Part II

International and Regional Human Rights Declarations and Treaties
THE INTERNATIONAL BILL OF RIGHTS

On 10 December 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. The Declaration subsequently served as the basis for the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) which were adopted by the General Assembly in 1966. Together, the Universal Declaration and the International Covenants form the International Bill of Rights, the foundation of international human rights law.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

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,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.
Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

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

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9
No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16
(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22
Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entered into force on 23 March 1976, in accordance with article 49. Namibia acceded to the Covenant on 28 November 1994 and the National Assembly agreed to the accession on 6 October 1994. Namibia has also acceded to the First and Second Optional Protocols. The First Optional Protocol gives individuals the right to make communications (similar to appealing against a judgment) to the Human Rights Committee in Geneva in respect of alleged violations of the Covenant. The Second Optional Protocol prohibits states from using the death penalty.

Preamble
The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and 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 these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

   (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

   (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

      (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

      (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

      (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

      (iv) Any work or service which forms part of normal civil obligations.

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 procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of 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 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 other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order 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

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

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

   (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;

   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS


PART I - RIGHTS AND DUTIES
CHAPTER I - HUMAN AND PEOPLES’ RIGHTS

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
(c) the right to defence, including the right to be defended by counsel of his choice;
(d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics rights and freedoms of others.

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.

2. Every individual may freely, take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:

   (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;

   (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.
Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Chapter II - DUTIES

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect, his parents at all times, to maintain them in case of need;

2. To serve his national community by placing his physical and intellectual abilities at its service;

3. Not to compromise the security of the State whose national or resident he is;

4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;

5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Part III

United Nations human rights standards concerning law enforcement and the administration of justice
CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS

Adopted by General Assembly resolution 34/169 of 17 December 1979

Article 1

Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

Commentary

(a) The term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

(b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

(c) Service to the community is intended to include particularly the rendition of services of assistance to those members of the community who by reason of personal, economic, social or other emergencies are in need of immediate aid.

(d) This provision is intended to cover not only all violent, predatory and harmful acts, but extends to the full range of prohibitions under penal statutes. It extends to conduct by persons not capable of incurring criminal liability.

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Commentary

(a) The human rights in question are identified and protected by national and international law. Among the relevant international instruments are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Prevention and Punishment of the Crime of Genocide, the Standard Minimum Rules for the Treatment of Prisoners and the Vienna Convention on Consular Relations.

(b) National commentaries to this provision should indicate regional or national provisions identifying and protecting these rights.

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Commentary

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is
reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

Commentary

By the nature of their duties, law enforcement officials obtain information which may relate to private lives or be potentially harmful to the interests, and especially the reputation, of others. Great care should be exercised in safeguarding and using such information, which should be disclosed only in the performance of duty or to serve the needs of justice. Any disclosure of such information for other purposes is wholly improper.

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Commentary

(a) This prohibition derives from 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, according to which:

"[Such an act is] an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights [and other international human rights instruments]."

(b) The Declaration defines torture as follows:

"... 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 did 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."

(c) The term "cruel, inhuman or degrading treatment or punishment" has not been defined by the General Assembly but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.
Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

Commentary

(a) "Medical attention", which refers to services rendered by any medical personnel, including certified medical practitioners and paramedics, shall be secured when needed or requested.

(b) While the medical personnel are likely to be attached to the law enforcement operation, law enforcement officials must take into account the judgement of such personnel when they recommend providing the person in custody with appropriate treatment through, or in consultation with, medical personnel from outside the law enforcement operation.

(c) It is understood that law enforcement officials shall also secure medical attention for victims of violations of law or of accidents occurring in the course of violations of law.

Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Commentary

(a) Any act of corruption, in the same way as any other abuse of authority, is incompatible with the profession of law enforcement officials. The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents and within their agencies.

(b) While the definition of corruption must be subject to national law, it should be understood to encompass the commission or omission of an act in the performance of or in connection with one’s duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted.

(c) The expression “act of corruption” referred to above should be understood to encompass attempted corruption.

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Commentary

(a) This Code shall be observed whenever it has been incorporated into national legislation or practice. If legislation or practice contains stricter provisions than those of the present Code, those stricter provisions shall be observed.

(b) The article seeks to preserve the balance between the need for internal discipline of the agency on which public safety is largely dependent, on the one hand, and the need for dealing with violations of basic human rights, on the other. Law enforcement officials shall report violations within the chain of command and take other lawful action outside the chain of command only when no other remedies are available or effective. It is understood that law enforcement officials shall not suffer administrative or other penalties because they have reported that a violation of this Code has occurred or is about to occur.
(c) The term "appropriate authorities or organs vested with reviewing or remedial power" refers to any authority or organ existing under national law, whether internal to the law enforcement agency or independent thereof, with statutory, customary or other power to review grievances and complaints arising out of violations within the purview of this Code.

(d) In some countries, the mass media may be regarded as performing complaint review functions similar to those described in subparagraph (c) above. Law enforcement officials may, therefore, be justified if, as a last resort and in accordance with the laws and customs of their own countries and with the provisions of article 4 of the present Code, they bring violations to the attention of public opinion through the mass media.

(e) Law enforcement officials who comply with the provisions of this Code deserve the respect, the full support and the co-operation of the community and of the law enforcement agency in which they serve, as well as the law enforcement profession.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT


Article 1

1. For the purposes of this Convention, the term "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 which he or a third person has 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 stability 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 purposes of determining whether there are such ground, 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 a board a ship or aircraft registered in that State;
   
   (b) When the alleged offender is a national of that State;
   
   (c) When the victim is 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 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 circumstance so warrant, any State Party in whose territory a person alleged to have committed any offence referred to 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, with 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 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 States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the 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 which has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. 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 criminal 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 person.

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, whenever 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 dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons 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 of references to torture of 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 prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS BY LAW ENFORCEMENT OFFICIALS


General provisions

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating
weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

   (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

   (b) Minimize damage and injury, and respect and preserve human life;

   (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

   (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

   **Special provisions**

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.
10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

   (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;

   (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;

   (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;

   (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;

   (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;

   (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Policing unlawful assemblies

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.

Policing persons in custody or detention
15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54.

Qualifications, training and counselling

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.

Reporting and review procedures

22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious
injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

24. 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.

25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT

Adopted by General Assembly resolution 43/173 of 9 December 1988

SCOPE OF THE BODY OF PRINCIPLES

These principles apply for the protection of all persons under any form of detention or imprisonment.

USE OF TERMS

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;
(d) "Detention" means the condition of detained persons as defined above;
(e) "Imprisonment" means the condition of imprisoned persons as defined above;
(f) The words "a judicial or other authority" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

**Principle 1**

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

**Principle 2**

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

**Principle 3**

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

**Principle 4**

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

**Principle 5**

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

**Principle 6**
No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (the term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time). No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

**Principle 7**

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

**Principle 8**

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

**Principle 9**

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

**Principle 10**

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

**Principle 11**

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest;
(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
(c) The identity of the law enforcement officials concerned;
(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other
appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

**Principle 17**

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

**Principle 18**

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against
the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

**Principle 19**

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

**Principle 20**

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

**Principle 21**

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

**Principle 22**

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

**Principle 23**

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

**Principle 24**

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

**Principle 25**
A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

**Principle 26**

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

**Principle 27**

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

**Principle 28**

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

**Principle 29**

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

**Principle 30**

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.
**Principle 31**

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

**Principle 32**

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

**Principle 33**

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

**Principle 34**

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs
shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

**Principle 35**

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

**Principle 36**

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

**Principle 37**

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

**Principle 38**

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

**Principle 39**

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that
may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER

Adopted by the United Nations General Assembly on 29 November 1985

A. VICTIMS OF CRIME

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

   (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and when they have requested such information;

   (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests
are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

**Assistance**

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

**B. VICTIMS OF ABUSE OF POWER**

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses or political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.
DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN

Adopted by the United Nations General Assembly on 20 December 1993

Article 1

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 3

Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, inter alia:

(a) The right to life;

(b) The right to equality;

(c) The right to liberty and security of person;

(d) The right to equal protection under the law;
(e) The right to be free from all forms of discrimination;

(f) The right to the highest standard attainable of physical and mental health;

(g) The right to just and favourable conditions of work;

(h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

Article 4

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

(a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;

(b) Refrain from engaging in violence against women;

(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether these acts are perpetrated by the State or by private persons;

(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provide for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;

(e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for this purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with this subject;

(f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of gender-insensitive laws, enforcement practices or other interventions;

(g) Work to ensure, to the maximum extent feasible in light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, health and social services, facilities and
programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;

(h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;

(i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;

(j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;

(k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;

(l) Adopt measures directed to the elimination of violence against women who are especially vulnerable to violence;

(m) Include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration;

(n) Encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration;

(o) Recognize the important role of the women's movement and non-governmental organizations world wide in raising awareness and alleviating the problem of violence against women;

(p) Facilitate and enhance the work of the women's movement and non-governmental organizations and cooperate with them at local, national and regional levels;

(q) Encourage intergovernmental regional organizations of which they are members to include the elimination of violence against women in their programmes, as appropriate.
The organs and specialized agencies of the United Nations should, within their respective fields of competence, contribute to the recognition and realization of the rights and the principles set forth in the present Declaration, and to this end should, inter alia:

(a) Foster international and regional cooperation with a view to defining regional strategies for combating violence, exchanging experiences and financing programmes relating to the elimination of violence against women;

(b) Promote meetings and seminars with the aim of creating and raising awareness among all persons the issue of the elimination of violence against women;

(c) Foster coordination and exchange within the United Nations system between human rights treaty bodies to address the matter effectively;

(d) Include in analyses prepared by organizations and bodies of the United Nations system of social trends and problems, such as the periodic reports on the world social situation, examination of trends in violence against women;

(e) Encourage coordination between organizations and bodies of the United Nations system to incorporate the issue of violence against women into ongoing programmes, especially with reference to groups of women particularly vulnerable to violence;

(f) Promote the formulation of guidelines or manuals relating to violence against women, taking into account the measures mentioned herein;

(g) Consider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments;

(h) Cooperate with non-governmental organizations in addressing violence against women.

Article 6

Nothing in the present Declaration shall affect any provision that is more conducive to the elimination of violence against women that may be contained in the legislation of a State or in any international convention, treaty or other instrument in force in a State.