

Know your rights

Torture



ENGLISH

"TOGETHER AGAINST TORTURE"

"TU KONDJITHENI OMAHEPEKO ATUHENI"

"STAAN SAAM TEEN MARTELING"

"PAMWE OKUPIRUKIRA OMATATUMISIRO"

"KUMWE NOKUDIRA KUKWATE SAKO ETOONO"

"KUMWE TU RWANESE EHEPEKO"

"ÅGUIBA TSÛTSÛS !OAGU"

Acknowledgements

The aim of this publication is to create a better understanding of the rights and obligations of citizens and law enforcement agencies under the Namibian Constitution. We trust that it will contribute towards the building of a human rights based culture in our country.

We acknowledge with thanks the following contributors:

- The European Union and the Embassy of the Netherlands for their financial assistance. The opinions expressed herein are not to be attributed to the EU or the the Embassy of the Netherlands.
- Toni Hancox, who wrote the text of this booklet.
- Caroline Cohrssen and Associates who edited the booklet and did the layout.
- Zilaoneka S. Kaduma, for the illustrations.

Publisher:	HURICON Legal Assistance Centre P O Box 604 Windhoek Namibia tel: 061-223356 Fax: 061-234953 E-mail: info@lac.org.na http://www.lac.org.na
------------	---

© Legal Assistance Centre

Portions of this publication may be freely quoted or reprinted for educational purposes, provided that credit is given to the Legal Assistance Centre.

First edition, first impression May 2003

ISBN: 99916-740-7-1

Table of Contents

What is torture?	1
The main aims of torture	2
The effects of torture	2
International rules about torture	4
1. The Universal Declaration of Human Rights	4
2. The International Covenant on Civil and Political Rights	4
3. The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	4
What does our Constitution say about torture?	5
Is torture really a problem in the world today?	6
But there is no torture taking place in Namibia!	6
The right to reparation (redress)	7
What can we do to help?	8

ANNEXURES

Annexure 1: Article 8 of The Namibian Constitution	9
Annexure 2: The Robben Island Guidelines	10

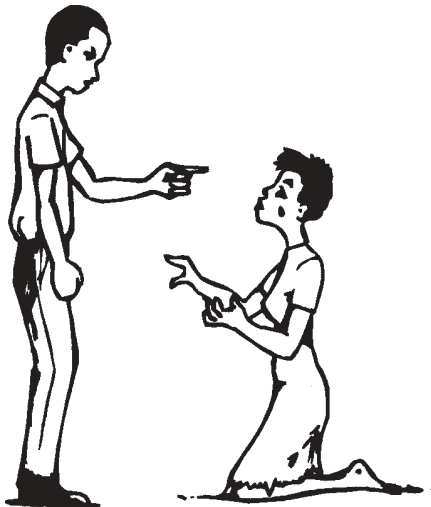
KNOW YOUR RIGHTS TORTURE

What is torture?

The United Nations Convention against Torture which was adopted in 1984 and entered into force in 1987, defines torture as the following:

“Any act carried out by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, 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.”

This is the official definition. However, the world is slowly coming to terms with the idea that this is not the only form of torture. Domestic violence, for example, is a very real form of torture and takes place daily in Namibia, much more than the official form of torture.



*Domestic violence is common
in Namibia*

The main aims of torture

- To break down the identity of the tortured person so as to obtain information from him/her.
- To spread fear and induce shock in individuals and communities.

The questions to be asked are:

- Can the need to obtain information ever justify the use of torture?
- From a practical point of view, can such information obtained be seen to be reliable in the light of the fact that many people will admit to anything to stop the torture.

The effects of torture

The effects can be physical and psychological.

Notwithstanding the fact that the physical effects are the most visible, it is the psychological effects that tend to linger.

Traumatic events, such as torture, can have a strong impact on a person and can lead to great changes that may last for many years after the traumatic event is over. Feelings of fear may continue long after the threat has disappeared and aggressive reactions may continue long after the need to fight back is over.

The effects of trauma can take on a life of their own and usually include more than one of the following:

- Thinking about the traumatic event over and over again.
- Outbursts of anger or aggression, nightmares, fear, anxiety.
- Difficulty trusting others and concentrating.
- Headaches, stomach aches or other physical complaints.
- Abusing alcohol or drugs.
- Loss of interest in sex.
- Withdrawing from family or friends.
- Loss of confidence.
- Feelings of sadness and loss, feeling guilty or betrayed.



International rules about torture

Let us now have a look at what international instruments have to say about torture.

1. The Universal Declaration of Human Rights

Article 5

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

2. The International Covenant on Civil and Political Rights

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.”

3. The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The state parties to this convention, of which Namibia is one, state in the preamble that they desire to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.

Namibia is a signatory to these three international instruments and in terms of our Constitution, *“unless otherwise provided...international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”* (Article 144, The Namibian Constitution.)

What does our Constitution say about torture?

Article 8 of the Namibian Constitution deals with respect for human dignity. Sub-paragraph (2)(b) of the same Article echoes the sentiments expressed in Article 5 of the Universal Declaration of Human Rights.

Furthermore, Article 8(1) confirms that the dignity of all persons shall be inviolable and 8(2)(a) ensures that respect for human dignity shall be guaranteed in any judicial proceedings, amongst others.

Remember: The Constitution is the supreme law in Namibia. This means that no one is above the premises set out in the Constitution. Everybody in Namibia must obey the Constitution, even government officials and the President himself.

Is torture really a problem in the world today?

Conflicts in regions such as Kosovo, East Timor and Rwanda have revealed the use of torture to suppress, intimidate and destroy individuals and communities. Furthermore, the UN Special Rapporteur on Torture receives information each year on acts of torture from 60-80 countries. It is also estimated that between 20 and 30% of refugee populations have been exposed to torture.

But there is no torture taking place in Namibia!

On the contrary. Read some of the headlines taken from *The Namibian* newspaper relating to the torture of the alleged Caprivi secessionists and you will see that torture is still used in Namibia.

Torture was systematic
Mwilima's horror
Wants N\$2,5m in torture damages
Cops face new
torture claims
Caprivi cops' torture
dockets handed over

What about the stories of domestic violence one hears on a daily basis, like the one of a husband who tied his wife to the back of his vehicle and dragged her for approximately one kilometre because she wished to attend her daughter's wedding, an act he had forbidden? This wife declined to sue her husband.

The right to reparation (redress)

What does this mean?

The right to reparation includes the rights to rehabilitation, restitution, compensation, satisfaction and guarantee of non-repetition. Reparation is important because, amongst other things, it recognises that the torture victim is worth something in financial and human terms and is entitled to resume a full role in society.



Torture victims have a right to rehabilitation. They need to understand that they are important members of society.

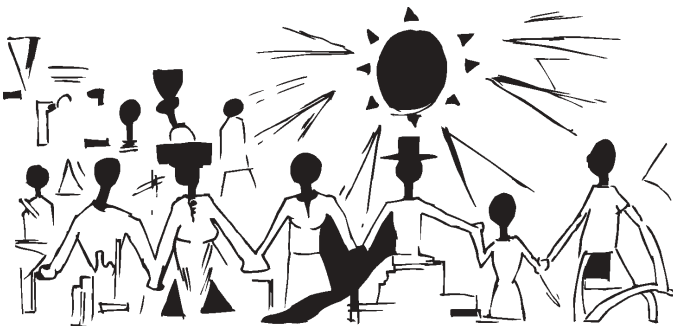
What can we do to help?

On 26 June every year we celebrate the UN International Day against Torture. Join in these celebrations by informing your family and friends of the evils of torture. Show support for the drive to eradicate torture by keeping yourself and others informed.

Advise victims of their right to reparation and explain that they should seek emotional assistance if necessary. Refer them to institutions that can help, like the Legal Assistance Centre, the PEACE Centre, the National Society for Human Rights, Breaking the Wall of Silence and the Office of the Ombudsman.

REMEMBER: It is not only the tortured person that requires emotional assistance, but also the torturer.

Spend some time thinking about ways to eradicate torture and discuss this with family and friends. Promote education, but always remember to respect the opinions of other people. If we do this, we will be contributing positively to a Namibia without torture.



ANNEXURES

Annexure 1: Article 8 of The Namibian Constitution

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.

Annexure 2: Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa. (The Robben Island Guidelines)

Preamble

Recalling the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment;

Deeply concerned about the continued prevalence of such acts;

Convinced of the urgency of addressing the problem in all its dimensions;

Recognising the need to take positive steps to further the implementation of existing provisions on the prohibition of torture, cruel, inhuman and degrading treatment and punishment;

Recognising the importance of preventive measures in the furtherance of these aims;

Recognising the special needs of victims of such acts;

Recalling the provisions of:

- Art. 5 of the African Charter on Human and Peoples' Rights which prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment;

- Art. 45 (1) of the African Charter which mandates the African Commission to, inter alia, formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
- Arts. 3 and 4 of the Constitutive Act of the African Union by which States Parties undertake to promote and respect the sanctity of human life, rule of law, good governance and democratic principles;

Recalling further the international obligations of States under:

- Art. 55 of the United Nations Charter, calling upon States to promote universal respect for and observance of human rights and fundamental freedoms;
- Art. 5 of the UDHR, Art. 7 of the ICCPR stipulating that no one shall be subjected to torture, inhuman or degrading treatment or punishment;
- Art. 2 (1) and 16 (1) of the UNCAT calling upon each State to take effective measures to prevent acts of torture and other acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction;

Noting the commitment of African States as reaffirmed in the Grand Bay Declaration and Plan of Action adopted by the 1st Ministerial Conference on Human Rights in Africa to ensure better promotion and respect of human rights on the continent;

Desiring the implementation of principles and concrete measures in order to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment in Africa and to assist African States to meet their international obligations in this regard;

The "Robben Island Workshop on the Prevention of Torture" has adopted the following guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment and propose that they are adopted, promoted and implemented within Africa.

Part I: Prohibition of Torture

Ratification of Regional and International Instruments

1. States should ensure that they are a party to relevant international and regional human rights instruments and ensure that these instruments are fully implemented in domestic legislation and accord individuals the maximum scope for accessing the human rights machinery that they establish. This would include:
 - a) Ratification of the Protocol to the African Charter of Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights;
 - b) Ratification of or accession to the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment without reservations, to make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 and recognising the competency of the Committee to conduct inquiries pursuant to Article 20;
 - c) Ratification of or accession to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the First Optional Protocol thereto without reservations;

- d) Ratification of or accession to the Rome Statute establishing the International Criminal Court;

Promote and Support Co-operation with International Mechanisms

2. States should co-operate with the African Commission on Human and Peoples' Rights and promote and support the work of the Special Rapporteur on prisons and conditions of detention in Africa, the Special Rapporteur on arbitrary, summary and extra-judicial executions in Africa and the Special Rapporteur on the rights of women in Africa.
3. States should co-operate with the United Nations Human Rights Treaties Bodies, with the UN Commission on Human Rights' thematic and country specific special procedures, in particular, the UN Special Rapporteur on Torture, including the issuance of standing invitations for these and other relevant mechanisms.

Criminalisation of Torture

4. States should ensure that acts which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems.
5. States should pay particular attention to the prohibition and prevention of gender-related forms of torture and ill-treatment and the torture and ill-treatment of young persons.
6. National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5 (2) of the UN Convention against Torture.
7. Torture should be made an extraditable offence.

8. The trial or extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards.
9. Circumstances such as state of war, threat of war, internal political instability or any other public emergency, shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.
10. Notions such as "necessity", "national emergency", "public order", and "ordre public" shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.
11. Superior orders shall never provide a justification or lawful excuse for acts of torture, cruel, inhuman or degrading treatment or punishment.
12. Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.
13. No one shall be punished for disobeying an order that they commit acts amounting to torture, cruel, inhuman or degrading treatment or punishment.
14. States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.

Non-Refoulement

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

Combatting Impunity

16. In order to combat impunity States should:
- a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process.
 - b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.
 - c) Ensure expeditious consideration of extradition requests to third states in accordance with international standards.
 - d) Ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody.
 - e) Ensure that where criminal charges cannot be sustained because of the high standard of proof required, other forms of civil, disciplinary or administrative action are taken if it is appropriate to do so.

Complaints and Investigation Procedures

17. Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.
18. Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.
19. Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and

effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)¹.

Part II: Prevention of Torture

Basic Procedural Safeguards for those deprived of their liberty

20. All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:
- a) The right that a relative or other appropriate third person is notified of the detention;
 - b) The right to an independent medical examination;
 - c) The right of access to a lawyer;
 - d) Notification of the above rights in a language which the person deprived of their liberty understands;

Safeguards during the Pre-trial process

21. States should establish regulations for the treatment of all persons deprived of their liberty guided by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment².

22. Ensure that criminal investigations are conducted by those subject to the relevant codes of criminal procedure.
23. Prohibit the use of unauthorised places of detention and ensure that it is a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.
24. Prohibit the use of incommunicado detention.
25. Ensure that all detained persons are informed immediately of the reasons for their detention.
26. Ensure that all persons arrested are promptly informed of any charges against them.
27. Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.
28. Ensure that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation and consider the feasibility of the use of video and/or audio taped recordings of interrogations.
29. Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.
30. Ensure that comprehensive written records of those deprived of their liberty are kept at each place of detention, detailing, inter alia, the date, time, place and reason for the detention.
31. Ensure that all persons deprived of their liberty have access to legal and medical services and assistance and

have the right to be visited by and correspond with family members.

32. Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.

Conditions of Detention

33. Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the UN Standard Minimum Rules for the Treatment of Prisoners³.
34. Take steps to improve conditions in places of detention which do not conform to international standards.
35. Take steps to ensure that pre-trial detainees are held separately from convicted persons.
36. Take steps to ensure that juveniles, women, and other vulnerable groups are held in appropriate and separate detention facilities.
37. Take steps to reduce over-crowding in places of detention by inter alia, encouraging the use of non-custodial sentences for minor crimes.

Mechanisms of Oversight

38. States should ensure and support the independence and impartiality of the judiciary including by ensuring that there is no interference in the judiciary and judicial proceedings, guided by the UN Basic Principles on the Independence of the Judiciary.⁴
39. Encourage professional legal and medical bodies, to concern themselves with issues of the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment.

40. Establish and support effective and accessible complaint mechanisms which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment.
41. Establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights⁵.
42. Encourage and facilitate visits by NGOs to places of detention.
43. Support the adoption of an Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places where people are deprived of their liberty by a State Party.
44. Examine the feasibility of developing regional mechanisms for the prevention of torture and ill-treatment.

Training and empowerment

45. Establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups.
46. Devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in

contact with persons deprived of their liberty such as lawyers and medical personnel.

Civil Society Education and Empowerment

47. Public education initiatives, awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons shall be encouraged and supported.
48. The work of NGOs and of the media in public education, the dissemination of information and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment shall be encouraged and supported.

Part III: Responding to the Needs of Victims

49. Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation.
50. The obligation upon the State to offer reparation to victims exists irrespective of whether a successful criminal prosecution can or has been brought. Thus all States should ensure that all victims of torture and their dependents are:
 - a) Offered appropriate medical care;
 - b) Have access to appropriate social and medical rehabilitation;

- c) Provided with appropriate levels of compensation and support;

In addition there should also be a recognition that families and communities which have also been affected by the torture and ill-treatment received by one of its members can also be considered as victims.

End notes

¹ *Annexed to UN GA Res. A/55/89 , 4 Dec. 2000, UN Publication No.8, HR/P/PT/8.*

² *UN A/Res/43/173, 9 Dec. 1988*

³ *UN ECOSOC Res. 663 C (XXIV), 31 July 1957, amended by UN ECOSOC Res. 2076 (LXII), 13 May 1977*

⁴ *UN Doc. E/CN.4/1995/39*

⁵ *UN ARes/48/134, 20 Dec. 1993*

Mission statement

The Legal Assistance Centre, being a public interest law centre, strives to make the law accessible to those with the least access, through education, law reform, research, litigation, legal advice, representation, and lobbying, with the ultimate aim of creating and maintaining a human rights culture in Namibia.



Legal Assistance Centre
Windhoek
May 2003