

Promotion of the Right to Dignity of Person: The Need for Criminalization of Torture in Nigeria.

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Executive Summary

The idea for this research was drawn from information received while practicing and implementing a project on the Promotion of the United Nations Convention against Torture. Indications revealed that most Nigerians are not fully aware of their rights as protected by the constitution and other legislations and if the rights are violated they do not use the available remedies to redress the wrongs, due to ignorance. It was equally indicative that law enforcement agencies make use of torture as a form of investigation of crimes committed. The law enforcement agencies are not fully equipped with modern forms of investigation and even when that is available the use of torture is the first option.

This research is calling for the criminalization of torture in Nigeria with a view to uphold the right to dignity of person. The research believes that criminalization of torture in Nigeria will ensure compliance with the objectives of the United Nations Convention against Torture and proffer effective mechanism for the adjudication of cases of torture and in particular enforcement of judgments in favor of victims of torture. The research believes that the criminalization of torture in Nigeria will reduce impunity and ensure award of compensation for victims of torture.

The lack of awareness on prohibition of torture calls for public sensitization on human rights and training of law enforcement agencies on modern forms of investigation.

Acknowledgment

My thanks and utmost appreciation is to God, for giving me the opportunity to study once more.

I express my sincere gratitude to George Soros for using his resources and heart to touch people all over the world; I am a living beneficiary to his benevolence, and I say thank you. To the team of staff of Open Society Justice Initiative and the Central European University, I express my profound appreciation for to you all for awarding me the Justice Initiative Fellowship. To the staff in the Legal Studies Department, I say thank you for your commitment to see others and me through this challenging year of re-educating ourselves on human rights, more grease to your elbows.

My gratitude goes to my family members, Mr. & Mrs. John Maigari, Fr. Jude, Dongnaan, Tongkwap & Mais, Yendong, Kwalmi, Milat, Lulu for their prayers and support while I was battling with my studies. My hug goes to my nephews Ian and Allen, thank you for being cheerful kids, may you continue to be source of joy to your parents. I express my appreciation to all my cousins, aunties, uncles both maternal and paternal for their encouragement.

I also express my thanks to and congratulate my colleagues, 2013 Legal Studies CEU graduates for being supportive and allowing me learning with them. I wish you all well. I also appreciate the parishioners at the Sacred Heart Chapel at no. 70 Taragota Utca for their prayers during my study year.

Once more thank you all.

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Introduction

The concept of dignity of person is an inherent and inalienable right given accrued to all human beings as a divine right. The right upholds the positive image of the person in the eyes of the society and in the view of the person enjoining the right. This right originates from birth and lingers with man until life ends. A deprivation of the right affects other rights, since it is the source of other rights. The right flourishes where there is no interference with the personality of a human being. A prevalent form of disregard for the right to the dignity of person is infliction of torture and ill-treatment.

The Nigerian society is faced with prevalence of impunity and disrespect for the right to the dignity of person, not minding the constitutional provision upholding the right. Torture is meted out on inmates in detention centers with impunity and disregard of their rights to dignity. The act of torture is prohibited in the Nigerian constitution; however, obedience to the provision in the ground norm is rarely practiced. This results in a pattern of violation of human rights by agents of the state.

It is pertinent to note here that Nigeria set up a National Committee on Torture in 2009 which was mandated amongst other things to receive and consider communications on torture from individuals, NGOs and CSOs; to visit detention centers and review any allegations of torture and propose an Anti-torture Legislation. The committee worked for a while; however, it's rarely in existence and is yet to come up with an anti-torture legislation as required by its mandate.

This research intends to advocate for legislation in Nigeria that will criminalize torture in a bid to protect the right to the dignity of person. It will comprise of five chapters.

The first chapter will focus on the right to human dignity and legal history of torture. The aim here is to highlight the torture as was practice in the years past in various jurisdictions. The chapter will highlight time torture was prohibited and considered an infringement of human dignity; the evolution of the United Nations Convention Against Torture and adoption of same by Nigeria. This part of the thesis will also compare the definitions of torture proffered by the United Nations Convention Against Torture and the Inter-American Convention to Prevent and Punish Torture.

The second chapter of the research will review the international, regional and national legal regimes prohibiting and or preventing torture and the obligations of states to instruments. Though there are several international instruments prohibiting torture, the focus of this thesis will be on the United Nations Convention against Torture, the Inter-American Convention, the African Charter on Human and Peoples Rights and the Nigeria Constitution. The chapter will commence with a review of the prohibition of torture in relation to the right to human dignity as provided by the Universal Declaration.

Chapter three of this research work will advocate for legislation in Nigeria to criminalize torture. The chapter will highlight cases of torture in Nigeria, a discussion on the need to create a criminal law prohibiting torture, the prospective positive effects the law will yield, bearing in mind the height of impunity with the society. There intends to be an altercation of the role of relevant stakeholder in torture prevention. The research will focus on international and national non-governmental organizations, judicial authorities and the society. The positive obligations required by state parties to the convention against torture will be reviewed to highlight the need for Nigeria to abide by its obligations. The mandate of the National Committee on Torture set up in Nigeria in 2009 will be reviewed to strengthen the call for criminalization of torture.

The fourth Chapter of the thesis is a comparism of the African human rights mechanism and its Inter-American counterpart on their efforts to combat torture. The Inter-American human rights system has a convention that prevents and punishes torture, which allows for sanctions against state that are in violation. Though the African human rights system has a committee on torture, it is not an effective way of combating the menace. The research will look at the positive effects of the torture preventive measures in the American System and advocate for an effective procedure on prohibition of torture in Africa. In the African system there is no fully impartial and effective mechanism to investigate allegations of torture and no independent mechanism to systematically monitor government detention facilities¹. This chapter will equally highlight judicial remedies obtained in Nigeria for torture victims and advocate for enforceable remedies especially concerning award of compensation for victims of torture. The Chapter will reiterate the responsibility of the state on prevention, prohibition and accountability for any acts of torture and the responsibility of law enforcement agents as individual when found guilty of torture.

Chapter five of the research will highlight the observations of the research, make recommendations to ensure effective mechanisms in particular to Nigeria and generally to the African human rights system and conclude on its findings.

¹ Umar Lydia , Member Board of Trustees, NOPRIN, A Paper Presented at a Commemorative Seminar on the 10th Anniversary of the Robben Island Guidelines: The Criminalization of Torture and the Challenges of Prosecuting Acts of Torture in Africa (Aug. 21, 2012)

Chapter One:

Concept of Human dignity, and the Legal history and definition of Torture

Concept of Human dignity

The concept of “dignity” as a right of every human being is deemed the cornerstone of other rights in most jurisdictions of the world. The right to dignity of person² or right to human dignity or right of respect for human dignity promote personal autonomy and integrity of person in the individual image and that of the society. The concept of dignity emerged in response to indiscriminate impudence and coarseness against people through acts of torture and ill-treatment. Human dignity connotes a class of dignity derived from the idea of “objective order of values inherent to all human beings”³. Other types of dignity may include dignity attached to the behavior of a person in the form of mildness or gentle attitude; or dignity resulting from the attainment of a person in society.

The idea of dignity as an inherent value originated from the “Stoic tradition”. One’s ability to think and reason, whether as freeborn or a slave, and be aware of happenings in the world gives that person a sense of dignity and satisfaction with self, which value cannot be quantified. The coming of Christianity made people to accept that human beings were made in the divine image of God.⁴ This divine origin of dignity has been developed by philosophers such as the elaboration made by Immanuel Kant.

Till date, this traditional reasoning enormously continues to dominate our ideological perception of dignity in the subject of human rights study, that is to say “as inherent to every human

² CONSTITUTION OF NIGERIA (1999) S. 34. It provides for the “right to dignity of human person”.

³ Donrich W. Jordaan, *Autonomy as an Element of Human Dignity in South African Case Law* Vol 9 J Philos Sci Law 1(Sept. 8, 2009) <http://www6.miami.edu/ethics/jpsl/archives/all/Autonomyaselementofhumandignity.pdf> (Dec. 18, 2012 3:50pm)

⁴ *Id* at 1

being”⁵. In present day human rights law, this type of inherent dignity acceptably stands for *human dignity*. Human dignity has been given a principal value in both the moral or legal spheres of life, thereby connoting that “humanness *per se* is valuable”.⁶

Human dignity is held at high value in today’s society as a priority and it is the source of other rights. The right of human dignity is therefore inherited as a birthright from God, and as such devaluing it connotes depriving one of a right given every other person.

Notwithstanding the highest value attached to human dignity, history indicates that it has been devalued as a result of man’s cruelty and ill-treatment to man through acts of torture. Torture, inhuman treatment has been a challenge to the destruction of a person’s dignity and image in the eyes of other human beings and the person who is been tortured.

Pre-Twentieth C. History of Torture

Throughout history, torture has been used as form of punishment or means of obtaining information from the person alleged to have committed a wrong in the community. Antiochus Epiphanes the then King of Syria in his rejection of Judaism meted out torture on men, women and children who were of Jewish origin.⁷ He exercised his authority over citizens by inflicting pain and suffering. Different forms of torture were practiced in other places at time.

⁵ *Id* at 1

⁶ *Id* at 1.

⁷ Daniel P Mannix. *The History of Torture* 5 2003

The Greeks and the Romans were the first people to systematically use torture.⁸ The Romans developed their principles on torture based on practice on Greeks where they used it on slaves in criminal and civil cases, because slaves were regarded as persons without morals and thus the need to torture them to obtain just confessions. However, the slaves could not testify against their masters or their master's family and the testimonies obtained from the slaves were for corroboration of other testimonies. Thereafter the Romans used torture on free citizens charged with treason because they were deemed to have lost their rights.⁹

In pastoral law, the inception of torture began at the time "Jesus Christ was arraigned before Pontius Pilate"¹⁰, for claiming that he was the King of the Jews and he would pull down the temple and rebuild in three days. On trial, although Pontius Pilate found that Jesus Christ did not really commit the offences alleged against him by the Jews, all the same he passed a death sentence against him and slapped him in order to appease the Jews.¹¹ Jesus was then taken into the Praetorium by soldiers who placed a crown of thorns on His head, while others "spat on him and struck him on the head with a staff."¹² Jesus Christ was later ordered to carry his cross to Golgotha where he was later executed.

During the medieval period in Europe, torture was not used as a means of proving the commission of crime. Prove of evidence on commission of crime was relied on divine intervention. After a certain period the divine proof of evidence was abandoned as it seldom proved problematic and thus the Roman-canon procedure of legal prove was developed which

⁸ Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment*, 17 B.C. Int'l & Comp. L Rev. 275 (1994), <http://lawdigitalcommons.bc.edu/iclr/vol17/iss2/3> [accessed Dec. 10, 2012 @ 18:42pm]

⁹ *Id.* at 276

¹⁰ IKPANG, A. J: *Criminalization of Torture in Nigeria: A Desideratum*; Sacha Journal of Human Rights, Volume 1(No 1), 1-13 at 2 http://papers.ssrn.com/sol3/papers.cfm?abstract_id= [accessed Nov. 11, 2012 @ 8:38pm.

¹¹ IKPANG, *supra*

¹² IKPANG, *supra*

allowed judges to interrogate persons they believed had information on an alleged crime¹³. This procedure which was created in the thirteenth century entailed judges relying on legal rules to prove the guilt of an offender.

For heinous crimes, the procedure required evidence from two eye witnesses or confession to the judge by the offender. However, since eye witnesses were not forthcoming and voluntary confessions were not easily obtainable from the offender owing to the likely result of the sentence, the judges started obtaining evidence by duress.¹⁴ This practice, in effect, permitted judges to inflict punishment on individuals based on circumstantial evidence and they asserted the right to dish out criminal penalties to individuals in cases in which the evidence did not amount to certainty as well as cases in which individuals did not confess under torture. Capital punishments were substituted with more acceptable forms of punitive measures. With this development, evidence needed to be corroborated before the courts could arrive at the guilt of a person. The system now relied on the intelligence of the judges who no longer tolerated the rigidity of the system of proofs or the inhumanity of torture. In situation of serious crimes where the required evidence of proof has not been met, for instance because the offender has been able to withstand torture and refused to confess, the judges if convince of his guilty will convict him of that crime but with a lesser sentence.

Torture though introduced at that time to help ascertain the guilt or innocence of the offender, it was only relied on when there were cogent incriminating evidence against the offender. In serious crimes, circumstantial evidence was used in collaboration with torture to find evidence,

¹³ DAMASKA Mirjan R., *"The Death of Legal Torture"* (1978). Faculty Scholarship Series. Paper 1587. (accessed 23 Jan 2013) http://digitalcommons.law.yale.edu/fss_papers/1587

¹⁴ Id.

whereas torture was prohibited for petty crimes and circumstantial evidence was enough to warrant conviction. The forms of torture used then include the strappado also known as “queen of torments” which was a widely used. Others included the “leg screw” “leg brace” and binding and progressive tying of cords around the wrist.

In Michael Foucault’s view, torture as punishment was exhibited in public spectacle. The offender was tortured in a ceremonial way for different purposes. One reason was to reveal all secrets to the public. The magistrates who conducted these investigations did so in secret and in the process torture was meted out on the offender. A second purpose of the public spectacle of torture was to “show the effect of the investigation on the confession.” Where the torture carried out during the investigation does not produce a confession the offender was presumed innocent. Thirdly, the use of torture legitimized by law was a way of exacting revenge on the offender and showcasing the power of the sovereign over the offender.

However, after a certain period, the use of torture yielded unexpected results and thus was problematic to manage. It provided a forum where the offender’s body enjoyed the sympathy of the spectators; the public viewed the executioner with shame and thereby resulting to a re-distribution of blame; lastly during or after each execution there was an uproar in support of the offender between the sovereign and the masses.

According to Damaska’s review of Langbien’ book on “Torture and the law of proof” maiming and killing which were used as ways of punishing serious crimes later declined as calls were made for them to be abolished between the sixteenth and seventeenth centuries. As torture

became useless, the Roman-canon legal procedure of prove was equally losing its value, and was only written in the books but not practiced.

The call for a turnaround in the cruel some ways of investigation in Europe were by the “great reformers” – “Cesare Beccaria, Servan, Dupaty, Larcretell, Duport, Pastoret, Target, Bargesse, the compliers of the Cahiers, or petitions and the Constituent Assembly...”¹⁵ According to Lippman, Beccaria drafted the most comprehensive and influential critique of torture. Beccaria was said to have developed a rationale that assisted in the speedy emergence of reform which worked towards protection of individuals against punishment for crimes which they had not been found guilty for¹⁶. The criminologist believed that meting out torture is adverse with the natural law of “self-incrimination” which place the person on trial in the situation of being “the accuser and the accused at the same time”. Beccaria was of the view that the public spectacle and the inflicted punishment on an accused was of more gravity than the alleged crime the accused is been charged for.

In Lippman’s view, Beccaria’s most important argument was his call for reform since the use of torture is not likely to lead to the truthful testimony and its questionable to use pain as “the crucible of the truth, as though the criterion of truth lay in the muscles and fibers of a poor wretch” which will more often lead to the release of guilty persons and conviction of innocent ones¹⁷. He says the likely result will be to have the guilty strong-hearted who can withstand torture be freed from detention, while the innocent ones that are weak and are afraid of pain and be sentenced. When tortured, people had to speak to gain relief, and not to say the truth. Beccaria

¹⁵ *Id.* at 75

¹⁶ *Id.* at 282

¹⁷ *Id.* at 282

wondered how the secrets of secluded torture may be judged, while he laments the difficulty of finding out who has committed torture, when it cannot be redressed.¹⁸

As a result of Beccaria's work in 1754, Frederick the Great abolished torture in Prussia and authorized conviction and punishment on less than full proof¹⁹. This was followed in Austria, Belgium, and France under Louis XVI in 1780, Denmark, Brunswick, and Saxony abolished torture in 1770; Poland in 1776; Tuscany in 1786; Lombardy and the Netherlands in 1789; Norway in 1819; Portugal in 1826; Greece in 1827; and Spain following the Napoleonic conquest in 1808.²⁰ The abolition of torture in the late eighteenth century was celebrated as marking the end of a long, cruel, and inhumane era²¹.

Post –Twentieth Century History of Torture

The early twentieth century promised technological and political developments. However, it came with scourge of problems as most of the governments were autocratic, communist, totalitarian and military and they used torture against citizens in the exercise of their duties. The development by Russian scientist of the technique known as “brainwashing” lifted up modern torture method to such a degree that it became a matter of concern to the military and opened a new field of psychological experts.

Torture has been used in long time for different purposes. To the sovereign, it was a way to show their power over the led. For officers enforcing the law, it was used as means of extracting

¹⁸ Beccaria: *On crimes and Punishments and other Writings* 40 (Richard Bellamy ed; Richard Davies trans; 1995) (1738 – 1794)

¹⁹ *Id* at 283

²⁰ *Id.* at 283

²¹ Lippman *supra* at 283

information from persons suspected to have committed crimes; while for others, it was applied as punishment or sentences on convicts.

In the latter situation, prisoners in concentration camps in Germany were tortured, as a form of disciplinary measures and to study their reaction to pain. In the Americas, the Indians in the North used torture, whereas torture was an unknown subject to their counter-part in the south. In Chile, civilians were tortured and killed in gruesome ways by the government in the 1970s. This form of torture was to exact the authority of the then regime over the citizens of Chile.

In Africa, the situation was not different in the early centuries, as torture was used as a means to obtain information from persons and also as punishment. As indicated by Mannix, in North Africa, paratroopers tortured Algerian rebels using the devices developed by the Spanish²². Research has shown that the techniques used in torturing people during the Mau Mau uprising in Kenya and the rebellion in Angola were far more sophisticated than the ones used by Antiochus.

In the Argentina law enforcement agencies under the regime of Juan Peron employed torture not only to inflict pain and obtain information, but also to undermine the prisoners' reason .

Due to the atrocities during the war and after the creation of the United Nations, in 1948, the UN General Assembly adopted the Universal Declaration of Human Rights UDHR. The UDHR prohibits torture. In 1984, human rights NGOs such as Amnesty International advocated the abolition of torture and campaigned for a separate convention prohibiting torture. On 10th December 1984 the United Nations Convention Against Torture and Other Cruel, Inhuman and

²² *Id at 9.*

Degrading Treatment or Punishment (UNCAT) was adopted and opened for signatory and it came into force on 26th June 1987.

History of Torture in Nigeria

In the early centuries in Nigeria, use of torture was a usual way of life of communities. Men who had committed crime in Kano had their legs built in walls and those who stole had to face the punishment of mutilation of fingers, while in Calabar, nailing in palm was a form of punishment for committing a crime. “Depending on the gravity of the offences committed, the culprits were punished with their bodies tied up with robes, kept in the open and they were made to look straight to the rays of the debilitating sun”.²³ Others were excluded or totally banished from the community and some deprived of food for about a week, traded as slaves, or had their heads cut off in a designated evil forest.²⁴ In 1963, the Nigerian Republic Constitution abolished the customary criminal law and as such, the customary ways of torture had to change.

For the period of military regimes in Nigeria, torture was effected by security operatives who were not subjected to the rule of law and used their opportunity to oppress opponents of the then government administration.²⁵ Members of the press and pro-democracy advocates were arrested and held in detention centers with poor sanitary and medical conditions.²⁶ Citizens were violated and the government was unwilling to accept international human rights standards.

With the emergence of democracy in Nigeria in 1999, promotion of human rights were slightly respected, though it is still unclear whether observance on human rights is better in the civil era

²³ IKPANG, id; at 3

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

than the earlier autocratic regimes. Nigeria has ratified several human right treaties and conventions including the UNCAT.

Nigeria' Adoption of the United Nations Convention Against Torture

Nigeria signed the United Nations Convention Against Torture in 1988 and ratified in 2001. It is pertinent to note that it was the autocratic military regime that signed the torture convention while democratic government ratified the convention. The ratification of the convention signaled Nigeria's commitment to live up to its "positive" and "negative" obligations. However, torture is today prevalent and the state has not shown the political will to address the issue.

Being a party to the convention, Nigeria is expected to punish "public officials" who use torture with impunity. Nigeria is expected to promote create awareness on the convention to all stakeholders within its jurisdictions on the need to prevent and ensure torture is avoided. This is however, not the case. Torture is exercised with impunity even though there exist a ground norm and convention that prohibit it. It is one think to ratify a convention, and yet another to ensure the objects of the convention are adequately implemented by state parties.

Torture is carried out on the innocent and those reasonably suspected to have committed crimes. These acts of torture are carried out by public officials, either as law enforcement agents or prison staff or other public officials. Torture by "public officials" is what the convention prohibits. Currently torture is not a crime in Nigeria and for long, it has been prosecuted in civil cases or as a means of mitigating sentences. Cases that arise challenging acts of torture are instituted as civil cases, as the lack of a legislation criminalizing it, makes it impossible for

criminal charges to be made. The question however is, why then is it prevalent? Why is the state not living up to its obligations in ensuring that persons who use torture face justice? If torture is criminalized, would it help in the observance of the convention and therein a right to the dignity of persons as protected by ground norm of Nigeria? An attempt to answer these questions will be made in the course of the thesis.

Definitions and forms of Torture

According to Mannix, there is no exact definition of what constitutes torture, however he says the word was borrowed from the same origin as “distort”²⁷. He believes that the word “torture” was first linked to “distortion of the human body on rack or some other instrument” but in recent times it has diversified. Torture literarily means inflicting severe pain. Torture is also defined as²⁸:

“the infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure”

With this definition therefore, torture entails purposeful infliction of pain on a person’s body or minds with the intention to punishing the person or to retrieve confession or information to for the purpose of seeing another person suffer. However, the universally recognized definition of torture under international human rights is as included in the convention against torture.

²⁷ Mannix supra at 9

²⁸ Black’s Law Dictionary (9th ed. 2009), torture

1. United Nations Convention against Torture and Other Cruel Inhumane and Degrading Treatment Punishment (CAT) 1984²⁹

The Convention Against Torture is currently the universal international instrument that defines torture. The Convention's definition states that:

Article 1

".....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 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 from, inherent in or incidental to lawful sanctions."

The definition by the convention encompasses many issues that need to be unbundled for clearer understanding of the drafters intentions.

For an act to be covered by the convention, it must be such that it is intentional by nature.

This means that accidental pains or suffering will not be covered by the convention. The person meting out the torture must have an intention "*mens rea*" in wanting to inflict the pain. He/she must therefore plan to inflict the pain and it should not be out of coincidence.

²⁹ The convention came into force 26th June 1987 which date is celebrated as the International day in Support of victims of Torture.

The “severe pain and suffering” intentionally inflicted could be mental or physical. Mental suffering includes a situation where a person is confined in a room without food water, access to sanitary facilities and deprivation of proper medical treatment. Physical pain includes beating a person with a on the any part of body with a stick, baton, tying ones hands behind the back, tying a person’s legs to his hands, beating a person as a result he/she uses a part of the body, genital mutilation etc. The convention divides the purpose of inflicting the severe pain and suffering into four parts:

- i) *“obtaining from him or a third person information or confession”;*
- ii) *“punishing him for an act he or the third person has committed or is suspected of having committed”;*
- iii) *“intimidating or coercing him or a third person”;*
- iv) *“or for any reason based on discrimination of any kind”;*

The intention of the drafters of the convention inserting these purposes must have been to ensure a reasonable coverage of all forms of pains and suffering inflicted by a person acting in official capacity is prevented. However, the convention in Article 16 allows for state parties to enact laws that can widen the definition of torture.

As earlier indicated, torture is usually used for different purposes. The current research is broadly concerned with torture used in obtaining information or confession from offenders. Torture as a means of obtaining information is that which is commonly carried out during and after arrest of offenders who are reasonably suspected to have committed crimes or breached the law. Torture here is meted out on the offender from the point of rest and during interrogation in detention centers. More often, officials assigned to investigate and determine the commission of an act

alleged to have been committed by an individual or group of individuals, inflict pain on them in order to obtain unverified information or confession of the offence.

The second purpose identified by the convention entails punishing a person for an act he or a third party has committed. The punishment referred here does not include that flowing from lawful sanctions, as that will not amount to torture, rather it would be termed “sanctions, or sentence”. This punishment connotes person-imposed punishment for an act that the person is deemed to have committed or suspected to have committed. This means that where a person in authority intentionally inflicts pain or suffering on a person because he reasonably suspects that persons to have committed a crime, the person in authority would be in contravention of the convention. The definition includes intimidation or coercion of a person or a third person to ensure that authorities do not use positions occupied by them to intimidate and coerce people.

The last part on purpose for inflicting pain and suffering is that “*for any reason based on discrimination of any kind*” as elaborated by the United Nations Committee Against Torture³⁰ was designedly inserted in the definition to discourage a pattern of using discrimination to inflict pain and suffering. The Committee says that non-discrimination is one of the fundamental promotions of human rights and including it is to ensure probation of discrimination. In determining torture discrimination will be an important factor to be taken into consideration.

Where the person inflicting the pain or suffering is acting with the consent, instigation or acquiescence of a public official or a person acting in official capacity, the act will be deemed as

³⁰ Committee against Torture, General Comment 2, CAT/C/GC/2, S. 20

torture based on the definition. This part of the definition has highlighted four steps of involvement of a public official.

Where the public official “consents” to the infliction of torture on a victim he will be deemed to have inflicted torture on that persons. He does not necessarily need to have personally carried out the act, but the consent is sufficient to find hold the person responsible for torture.

According to Black’s Law dictionary³¹ “ to instigate” means “to incite another person to do something”. In this situation the incitement is to make the person commit the crime of torture. Such a public official will be held liable for prompting another to carry out such an act.

Thirdly where the public official’s involvement is in the form of an “activity or inactivity” such a person will be deemed to have been in “acquiescence” of such an act. Therefore whether the official directly participates or is in position to stop the act from happening but does not so do, the public official will be held liable under this definition. In *Agiza v. Sweden* (CAT 233/2003)³², the complainant’ right as protected in Article 16 of the Torture Convention was said to have been violated based on the manner he was forcefully deported from Sweden to Egypt by U.S security operatives. In its decision, the CAT Committee held that Sweden had of its own volition handed to the US authorities the complainant, who was a suspected terrorist, thereby consenting to the ill-treated meted on the complainant at both the Swedish airport and enroute flight to Egypt.³³ The last part of public official’ involvement covers participation of a “person acting in official capacity.”

³¹ <http://thelawdictionary.org/instigation/> (accessed 23 February 2013)

³² OMCT, Jurisprudence of the CAT Committee, at 211, http://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf (accessed 24 February 2013)

³³ OMCT, Jurisprudence of the CAT Committee, *supra* at 211.

It is pertinent to note that the CAT does not explain what a “public official” or a person in “official capacity” means. However it has been held by the courts that a person acting in official capacity does not include a teacher who instructs students and thereby inflicts pain on them for the purpose of reprimand and training. The European Court of Human Rights (ECtHR) has stated that in order for the punishment to be "degrading" and in breach of Article 3, “the humiliation or debasement involved must attain a particular level of severity and exceed the usual element of humiliation inherent in any punishment.” **See: Costello-Roberts v. The United Kingdom, 16 ECtHR, no. 13134/87, 1993; Tyrer v The United Kingdom, 26 ECtHR, (Series A) 1978.** This means that not all forms mistreatment will amount to torture as intended by the CAT. For an act to be deemed as torture, it must be severe in nature and each situation should be determined independently and on case by case bases to ascertain whether the act alleged or complained of amounts to torture as required by the CAT.

The prerequisite for the involvement of a public official in the Convention’s definition of torture is aimed at ensuring States are not held responsible for acts that they are not in control of but to also guard against States absolving themselves from responsible for any act of torture they might have instigated, consented or acquiesce to.³⁴

In practice individuals representing government who inflict torture to inflict torture have been deemed public official. These may include law enforcement agents and detention center’ officials. The CAT Committee has held that if there is no government involvement, the situation will not amount to torture under Article 1 of the convention. In the case of **G.R.B v. Sweden**

³⁴ OMCT, Jurisprudence of the CAT Committee, supra at 210

(CAT 83/97), the complainant claimed that it is highly possible she would be tortured by rebels in Peru if she is deported there,³⁵ as such she alleged that her deportation would be in violation of Article 3 of the Convention. The Committee did not find in her favor, as Article 3 did not apply in this case, since it protects a person from being deported to another State if the person is likely to face torture by public officials, as defined in Article 1 of which the rebels were not.³⁶ “The Peruvian government could not be said to “acquiesce” in the acts, or future acts, of a terrorist group that it was actively fighting against.”³⁷

The purpose of separating the definition of torture from assault and other types of crime is to ensure that states promote the purpose of the convention in their jurisdictions by preventing torture and ill-treatment.³⁸ The Committee against Torture points that naming and defining the crime is to promote the objectives of the convention by making people aware of the crime and informing them of the gravity of it. Another reason for distinguishing torture from other crimes is to empower states with universal jurisdiction to try crimes of torture. Article 5 (2) of CAT provides that:

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.”

³⁵ OMCT, Jurisprudence of the CAT Committee, supra at 211

³⁶ *Id.* at 211s

³⁷ *Id.* at 212

³⁸ Committee against Torture, General Comment 2, *Id.*, S. 11

With this provision a State that has within its jurisdiction an offender who is alleged to have committed acts of torture to prosecute such a person if it cannot extradite the person back to the State where the crime was committed.

Universally, torture is an absolute right and cannot be derogated from whether as lawful sanction, in times of war or emergency or any situation thereof. However, pain and suffering “incidental to lawful sanctions” is the only exception provided for under the convention. This exception refers to sanctions that are lawful both under national and international laws³⁹. What is lawful within a state may not necessarily be law under international standards. Therefore, it safe to say that only sanctions that fall within international standards will be deemed as lawful under the convention’s definition. The purpose of making this distinction is to ensure that States do not avoid liability for acts of torture by prescribing them in their legislations as lawful sanctions.

2. **Inter-American Convention to Prevent and Punish Torture**⁴⁰

The definition provided by the Inter-American Convention to Prevent and Punish Torture seems wider than the United Nation’s. Article 2 defines torture as:

“..... any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

³⁹ UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Note by the Secretary-General*, 9 August 2012, A/67/279, at 28, available at: <http://www.unhcr.org/refworld/docid/509a69752.html> [accessed 13 December 2012]

⁴⁰ The Convention was adopted by the General Assembly of the Organization of American States on 12/09/1985, however the convention came into force on 02/28/1987.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article”

Looking at the IACHR’s convention there are differences with its definitions and that of the United Nations. The IACHR’s convention isolates infliction of pain for the purpose of “criminal investigation” as a core competent of its definition. This precludes other forms of pains arising from other exercises. Where pain and suffering arises from “teacher parent” as disciplinary measure, the convention will not apply.

The convention goes further to insert “personal punishment” as a purpose of torture. It expands its definition by including “obliterate the personality of a victim...or diminish capacity” in the convention. This is to prevent and ensure that persons who try to erase all traces of victim of will be held responsible for torture. It is a wider scope than the United Nations definition because it incorporates diminishing of person’s dignity as part of the definition of torture, even if such does not include pain or suffering. This goes to the root of the right to dignity, which is the actual essence of the prevention of torture.

In Article 3 of the IACHR Convention on Prevention and Punishment of Torture provides *if “a public servant or employee... acting in that capacity orders, instigates or induces the use of torture, orcommits”* it or can but does not prevent it, he will be held liable for torture. This provision imposes positive and negative obligations on public servants. The latter must not only refrain from torture, but must ensure that when they are in a capacity to stop it they do so, or if brought to court under the convention it is likely the will be found responsible. The obligation of

prevention therefore is upon the state and its employees. This is a divergence from the scope of the United Nations Convention against Torture explicitly covers torture by public officials as against that of the IACHR which will hold employees liable.

The African Commission on Human and Peoples Rights has a Committee for the Prevention of Torture in Africa⁴¹, but does not have a convention prohibiting or punishing torture. It relies on the United Nations Convention against Torture for its definition of torture in correlation with the African Union Charter which prohibits torture to ensure prevention of torture in the continent. The Constitution of Nigeria (1999) prohibits torture, but does not define torture. The criminal and penal code as applicable laws on crime do not equally define torture.

The purpose of this research is to contribute in the development of a credible criminal justice system in Nigeria by advocating for the criminalization of torture and which legislation would proffer a definition of torture. The reason why there is a need to distinguish torture from other crimes in Nigeria, is because torture as indicated above is not allowed at any time, whether in emergency or as a means of investigation. It is therefore unlawful for law enforcement agencies to torture persons within their custody for the purpose of obtaining information or confession from a person who has committed or a third party to a crime. This research hopes to further broaden the knowledge of people and create awareness within Nigeria to ensure that people report all forms of torture inflicted on them or theirs.

⁴¹ It was established in 2002 and was initially set up as the *Robben Island Guidelines Monitoring Committee* and the name was changed to Committee for the Prevention of Torture in Africa in 2009.

Chapter Two:

Legal frameworks on prohibition of torture

The abolition of torture was introduced during the last years of the eighteen century, as a result of the judicial system's inability to reconcile the purpose of inflicting the torture and the crime alleged to have been committed by the offender. For a long time after the abolition, legal systems managed to avoid the use of torture, however it still surfaced in the 20th century during the cold war.

After the cold war, having seen the heinous crimes committed during the war, nations gathered and developed a document that would bind everyone and ensure that the dignity of human beings are upheld and prohibition of interference with the rights accrued each individual is documented for onward observance by individuals and states.

i) Universal Declaration of Human Rights (UDHR) 1948

The Universal Declaration of Human Rights (UDHR) was adopted on 10th December 1948⁴² by the General Assembly of the United Nations after considerable deliberations had been made by representatives from different parts of the world. The UDHR was drafted to complement the United Nations Charter on the rights and freedoms of the all human beings. It represents the universal acceptance that fundamental rights and freedoms are inherent, inalienable and equally applicable to everyone irrespective race, religion, age, gender, origin, colour etc.⁴³

⁴² <http://www.un.org/en/documents/udhr/history.shtml> (accessed August 12, 2013 at 1:19pm)

⁴³ *Id.*

The introduction of the UDHR signaled the recognition that all human beings are to be treated equally with dignity and in justice. It also elaborated rights and freedoms which must be respected and entailed every individual as long as such a person is human. One of the fundamental rights upon which the UDHR lays its foundation is the right to dignity. Its preamble commences with recognizing the inherent dignity of all human beings as the bases upon which freedom, justice and peace can be attained in the world.

The UDHR invariably recognizes respect for dignity of human beings as the bedrock of all freedoms having in mind that where a person is unduly deprived of his right to freedom of thought, freedom of expression, freedom of association, tortured, brutalized, such a person's dignity is injured. The dignity of a person subjected to torture is the feeling s/he experiences while going through such an ordeal.

In upholding dignity as sacrosanct for the enjoy of all freedoms, UDHR in Article 5 in an absolute form and without restriction prohibits torture. It provides that:

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

Unlike other rights which maybe qualified or have exceptions, the prohibition of torture is not subject to any restrictions. The phrase “No one shall” includes all persons without exemptions. The provision protects all persons be the free or in confinement and equally protects persons reasonably suspected of having committed any form of offence. By the wordings of the provision the gravity of the offence committed cannot be used to vitiate the absolute protection against torture. It does not allow for usage of torture to obtain information or confession, as such it does

not have exemptions and guards against any form of torture, cruel inhuman or degrading treatment.

It can therefore be concluded that the UDHR adequately provides and protects against torture and ill-treatment. Although the UDHR is not a binding document, it is said to form part of customary international and is *jus cogens* as most states have adopted its provisions into national constitutions and it has been adopted in several UN resolutions. The UDHR later formed the basis for development of other international human rights documents which protect human beings from infliction of torture.

ii) United Nations Convention Against Torture, Other Cruel Inhumane and Degrading Treatment Punishment (CAT) 1984

The United Nations Convention Against Torture, Other Cruel Inhuman or Degrading Treatment or Punishment (the Torture Convention) was adopted by the UN General Assembly on 10th December 1984 and came into force on 26th June 1987 after 20 states had ratified the convention. The idea of an instrument prohibiting torture came into lime light sequel to an international campaign against torture organized by Amnesty International in collaboration with like human rights organizations. The campaign called for a worldwide abolition of torture and ill-treatment by state actors. Owing to the success of the campaign and subsequent campaigns, advocacy, strategic litigations, years later the United Nations adopted the Torture Convention.

The Torture Convention came about sequel to the adoption of the “*Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading*

Treatment or Punishment (the “Torture Declaration”) by the General Assembly on 9 December 1975. The convention has been ratified by 153 states with 78 signatories.

The Torture Convention was established for three main objectives, namely; “*to fight impunity, to provide victims with the right to remedy and reparation and; obligation to prevent torture*”⁴⁴.

Today, the objectives of the convention are barely being achieved as impunity is being practiced in different parts of the world. This has yielded a negative trend, wherein exceptions to use of torture are being proffered in order to achieve the investigation of crimes. However, this does not vitiate the fact that prohibition of torture is an absolute and non-derogable right.

To begin with, the convention in *Article 1 (1)* provides that:

“.....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 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 from, inherent in or incidental to lawful sanctions.”⁴⁵

From the convention’s definition pain or suffering arising from physical or mental infliction on a person for the purpose of obtaining information, or coercing, intimidating, forcing a person who has committed an offence to confess and if instigated by or acting on behalf of a public official.

It is worthy of note that the definition excludes punishments from lawful sanctions.

⁴⁴ Nowak, Manfred. “Panel 1: Are Adequate Legal Frameworks in Place at the Domestic Level? Protections Provided by International Law.” Human Rights Brief 16, no.4 (2009): 5-8. <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1082&context=hrbrief> (accessed August 8, 2013 12:48pm)

⁴⁵ Since chapter one of this research had previously given an elaborate understanding of the convention’s definition of torture, only an overview of it will be discussed here.

From the foregoing, brutality, infliction of pain, beatings, hanging of persons under pre-trial detention are not permitted under the definition. Situations where detainees are tortured in the guise of investigations are therefore unlawful and not covered by the law, since the Torture Convention only exempts punishments from lawful sanctions, pre-trial suffering or infliction of pain are therefore prohibited. The definition equally protects persons reasonably suspected to have committed acts of terrorism, it being the current threat to the society, law enforcement agencies tend to employ means of torture to obtain information to mitigate a probable menace.

The absoluteness on prohibition of torture is further heightened under *Article 2* of the Torture Convention indicating that no matter the circumstances, “be it war”⁴⁶ “internal political instability” or “public emergency” may be invoked to justify the use of torture. It is however worrisome that detention centers employ torture as a means of obtaining confession from detainees. To further strengthen the non-derogability of the right, *Article 3* of the convention stipulates that:

“An order from a superior officer or a public authority may not be invoked as a justification of torture.”

Therefore law enforcement agencies who carry out such heinous acts are not exempted by the law. Superior officers who order such acts to be carried are equally not protected and are expected by the convention to be investigated and prosecuted.

⁴⁶ Article 2 (2) United Nations Convention Against Torture 1984

The lack of investigation, prosecution and access to justice to persons tortured has resulted in today's growth of impunity in most nations. However, to serve as a prior safeguard the convention expects states to take "effective" administrative, legislative and judicial measures to prevent torture being carried out within any area under their jurisdiction.⁴⁷ These measures entail ratification of instruments prohibiting torture, creation of laws criminalizing torture and bringing to justice perpetrators of acts of torture within states. In a bid to safeguard against impunity the Torture Convention in Article 4 mandates states to establish laws criminalizing torture. The provision states that:

"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 4 places a positive obligation on state parties to ensure that torture is an offence in the criminal law of their jurisdictions. The convention expects states to look into the convention's definition of torture and develop laws criminalizes torture. All acts that fall within the convention's definition of torture must be created as offences under the criminal laws of states, and no exemptions whatsoever must states create to exonerate acts related to torture from being criminalized.

⁴⁷ See: Article 2 (1) United Nations Convention Against Torture 1984

The act of torture and the attempt to commit torture are both regarded by the convention as offences⁴⁸ and states are called upon to make “attempt to commit torture” as offences. The gravity or the sanction to be attached on “an attempt to commit” torture will certainly differ from the act of torture. Criminal laws on torture must therefore differentiate between such acts.⁴⁹ Accomplices and persons who assist in committing torture are regarded by the convention as offenders and states are called upon to criminalize such acts with appropriate sanctions.⁵⁰

The Torture Convention obliges states to take measures necessarily possible to ensure that the exercise jurisdiction over acts that are committed within their territory or jurisdiction. The convention places a strict liability on states and will hold a state responsible for an act of torture committed on “board a ship or aircraft registered by a state”⁵¹. A state will be held strictly liable for acts deemed as torture, even if such acts form part of an acceptable existing internal law of the state⁵². This means that where a state permits through its laws the use of torture to achieve some purposes, the convention will hold such a state liable for torture, so long as such acts fall within the definition of torture. For instance, if the systemic use of torture to obtain information or confession from offenders has become a law or internal policy, the convention regards that a violation of the state’s negative obligation to refrain from torture.

State parties to the Torture Convention are obliged by the convention to, after receiving adequate information on allegation of torture or attempt therein, place in custody the person alleged to have committed the offence for a reasonable period of time⁵³. Such information must be

⁴⁸ See: Article 4 (1) UNCAT

⁴⁹ See: Article 4 (2) UNCAT

⁵⁰ See: Article 4 (1) UNCAT

⁵¹ Article 5 (1) (a) UNCAT

⁵² Article 5 (2) UNCAT

⁵³ Article 6 UNCAT

investigated and inquiry properly undertaken. However, where the person alleged to have committed the act of torture is not a national of the state where the act was committed, the state in custody of the person shall hand over the offender to the state of nationality or where such person is stateless, to a representative state⁵⁴. This approach is to avoid exoneration from liability by the state where the offence was committed or by the state of nationality.

By the above provision, Article 6 creates a universal jurisdiction on all acts of torture. States cannot vitiate themselves from preventing torture merely because the person is not a national of the state where it was committed or that he/she did not commit the act in his state of nationality. Both states have an obligation to ensure that the alleged act is investigated and justice seen to be done. The convention invariably prevents states from committing torture in other territories which are not under their jurisdiction.

Education and information dissemination through training of civil or military law enforcement personnel, medical personnel or other persons responsible custody, interrogation or treatment of persons who have been subjected to arrest, detention or imprisonment is mandated by the torture convention⁵⁵. Duty manuals for such personnel are expected to include such prevention and prohibition information. Invariably, personnel in the armed forces, police, prisons, state security service, medical and psychiatric are expected to be trained on the ways prohibition against torture. In Nigeria such personnel will include customs, civil defence, immigration, EFCC, SSS, ICPC NIA and all agencies responsible for detention and interrogation. Medical practitioners

⁵⁴ *Id.*

⁵⁵ Article 10 (1) UNCAT

who treat patients for either medical or psychological issues are expected to be trained on prevention and prohibition of torture.

However, it is difficult to say, whether such trainings occur in reality, as the acts of torture have become systemic and are carried out on daily basis. Even where some jurisdictions have inculcated such trainings, the height of impunity does not allow for substantial remedying of torture in most jurisdictions.

While it is relevant to train relevant personnel on prevention and prohibition of torture, it is yet of essence for states to periodically review their interrogation procedures, rules, methods to conform with up to date standard and serve as preventive measures against torture⁵⁶.

Persons who allege to have been tortured, have a conventional right to complain on the act alleged.⁵⁷ States are mandated to ensure that such complaints are properly and impartially investigated and persons making such complaints or their witnesses therein are protected from further intimidation as a result of the complaint⁵⁸. Where a complaint is received, the relevant competent authorities of a state party are mandated by the convention to conduct proper investigation on the alleged act complained therein. This mandate is placed on state parties as a positive obligation in the fight against torture.

In a bid to ensure that persons who are subjected to torture, obtain effective justice, the Torture Convention provides in Article 14 that:

⁵⁶ Article 11 (2) UNCAT

⁵⁷ Article 13 UNCAT

⁵⁸ *Id.*

“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”.

The convention mandates states to make available to victims of torture, effective remedies within their legal systems to that the crime committed is redressed. The remedy must not only be available, but it must be effective and enforceable. Institutions such as the courts must be available and be able to determine on the allegation of torture by a victim. Rulings from the courts must be enforced against the person found guilty of torture and such rulings must avail the victim a right to “fair and adequate compensation”.

To determine what is fair the deciding authority, for instance must assess the wounds of the victim through the assistance of medical experts and determine the amount of compensation that maybe adequate. The primary requirement of the provision is the ability for the victim to access redress. States must ensure that independent mechanisms exist for determine such allegations.

While the convention provides for a fair and adequate compensation, it equally requires states to make provision for rehabilitation in especially where compensation may not be adequate. This is likely to occur, when a victim suffers permanent physical damage to any part of the body or mental or psychological disorder as a result of the torture. In such a situation awarding such a

person a monetary compensation may not be adequate, as the person will still not have been restituted to status quo and the nearest to that will be to avail him/her treatment or rehabilitation that may assist in reintegrated him/her back to society.

Sub-paragraph (2) refrains states from depriving a victim an available national compensation which has been provided for by a national law. Therefore the victim has a right to claim compensation based on convention or the national and the relevant authority may award both or consolidate, as it may deem adequate, but cannot strict the victim from seeking for both.

As an oversight function for judicial authorities of state parties, the Torture Convention mandates states to ensure that “statements established to have been obtained through torture are not used as evidence in any proceedings”⁵⁹, save the proceedings “against a person accused of torture” and is used to proof that the statement was made. By implication, the convention does not allow usage of torture induced evidence for any purpose, be it tendering of such evidence in court for a serious or non-serious crime. It only permits use of such evidence, if it will be for the purpose of proving that torture was meted out and it must applied against the person who carried out the act.

Article 16 of the Torture Convention makes a specific provision prohibiting other acts which do not form part of the convention’s definition of torture and mandates state parties to prevent such acts from occurring. It provides that:

“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

⁵⁹ Article 15 UNCAT

in article I, 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.....”.

The convention mandates states parties to ensure that other acts of cruel, inhuman or degrading treatment or punishment are prevented within their jurisdictions. This implies that mechanisms must be provided by state parties as preventive safeguard against other acts which do not fall under torture. The definition and scope of what constitutes other acts that are cruel, inhuman or degrading has not provided for by the convention. Invariably a wide margin has been given to state parties to determine what is cruel, inhuman or degrading treatment or punishment.

The Torture Convention establishes a Committee against Torture⁶⁰ which is made up of ten (10) members who must be experts of “high moral standing and experienced in the field of human rights. The committee members are elected by state parties bearing in mind geographical representation.

The Convention empowers the committee to investigate any verified information on which indicate that torture is systematically being practiced within the jurisdiction of a state party⁶¹. It enjoins the committee to call on the state party co-operate and allow for investigation on the received information, while availing the state party opportunity to submit observation on the information. Upon any observation made by the state party, the committee can mandate any of its members to conduct a proper inquiry into the information received and such inquiry may

⁶⁰ Article 17 (1) UNCAT

⁶¹ Article 20 (1) UNCAT

include visit to the territory.⁶² Where the inquiry by the member(s) has been submitted, the committee shall communicate the report to state party.

State parties are mandated by the convention to submit reports to the committee on the observance of their obligation to the convention.

A careful look at the above discussed provisions of the Torture Convention indicates that positive and negative obligations rest on the shoulder of states to combat torture and other ill-treatment. It is also indicative, that the purpose of the convention is to criminalize torture and where a state does not achieve this objective, it is deemed to have failed in its obligation, more so when such acts are prevalent within its jurisdiction.

iii) The African Charter on Human and Peoples Rights (ACHPR) 1981

The Charter of the Organization of African Unity (now African Union) was the first instrument enacted by the governments of the African states in recognition of their past history of colonialism and the need to reunite and ensure territorial integrity. The purpose of the AU Charter was to ensure unity amongst the African States while preventing interference from external powers. That being the case, the notion of human rights as is known today, was not a priority for the African States, even though the preamble of the AU Charter recognized the freedom, equality, justice and dignity. It also reaffirmed the Universal Declaration of Human Rights.

⁶² Article 20 (3)

This author however argues that, the AU' desire for the emancipation of Africa and prevention of slavery can be deemed as protection of fundamental human rights. It therefore may not be right to say that the AU Charter was silent on human rights. It may not have explicitly indicated protection and promotion of human rights, however, its wordings can be inferred therefrom.

Based on the lack of precise and adequate instrument regulating human rights on the African Continent, The African Charter on Human and Peoples Rights (ACHPR) was adopted. Today, the human rights mechanism is built on the ACHPR which has been ratified by 53 states of the continent. The Charter was adopted in 1981 and came into force October 21, 1986.

The Charter followed the line of other regional human rights instruments and provides for respect for human rights with particular interest in the *elimination of colonialism, neo-colonialism and apartheid*. The system's interest in human rights protection was not accidental, but as a result of the continent's historical experiences. However, unlike other regional human rights systems, the African Charter attaches duties to enjoyment of rights. As a result of this, the system has been criticized for its attempt to whittle down human rights especially as it does not have a general provision restricting derogation from absolute rights.

The Charter established the African Commission on Human and Peoples Rights with headquarters in Banjul. The Commission is charged with the responsibility of protection and promotion of human rights and the interpretation of the African Charter. As a result of the formation of the Commission, its procedure has been criticized for being ineffective and unenforceable. The criticism against the Commission is based on the fact that its judgments are

not persuasive and only serve as recommendations. Decisions of the Commission come in forms of observations, recommendations, and request. Its decisions can be referred to as unbinding as the cannot direct a state to do an act in favor of a victim of human rights violations.

As a result of the ineffectuality of the Commission, in 1998, the Organization of African Unity (now African Union) adopted the Optional Protocol to the African Charter on Human and Peoples Rights creating the African Court on Human and Peoples Rights, with the intention for the latter to compliment the Commission especially with regard to enforcement of decisions. However the Optional Protocol was not a laudable solution because it subjects the Court's function to "*acceptance of the jurisdiction*" by Member States. This implies that human rights proceedings cannot be made against a Member state unless the state has consented to the jurisdiction of the court. One then wonders whether there was a need at all to create a Court that cannot function.

Notwithstanding the above mentioned, the Charter has been applauded by some scholars for being progressive as it provides for the three generation of rights, i.e civil and political rights, economic, social and cultural rights and the solidarity rights. Among the first generation rights protected by the Charter, is the enjoyment of the right to dignity of human beings and inherently the freedom from torture, cruel, inhuman or degrading treatment. Article 5 provides that:

"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."

Unlike other human rights instruments, the Charter does not make provision for non-derogation from prohibition of torture. A circumspect look into Article 5 indicates that, torture is prohibited, but it does not provide a sound warning like the Torture Convention which does not allow for restriction from prohibition of torture. This might have resulted in the prevalence of torture within law enforcement agencies in the African continent, and gives a lee way for states with the region to deviate from the prohibition of torture in times of emergency, war or national security as the situation permits. In this situation, the non-derogable provision of the UNCAT applies and the use of torture cannot be justified under any circumstance.

The Charter obliges Member states in Article 1 to:

“.....recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”

The duty of recognition of the rights provided is upon all Member states, which mandates them to take measures be the legislative, administrative or judicial to give effect to those rights. This may entail criminalization of torture, establishment of independent mechanisms that will serve to prevent torture, effective and impartial investigation of allegations of torture etc. The broad scope of duties place on states in the fight against torture gives them a wide margin in combating the menace. The provision therefore places a positive obligation on Member states to ensure that torture is prevented and prohibited.

In support also, Article 25 obliges Member States to promote fundamental freedom and human rights in the Charter by educating, training, informing and making such the rights are understood.

Training and education of law enforcement agencies on torture prevention and prohibition within the regional lies on Member states. The provisions of the Charter may therefore not be as inadequate as it seems, however, more of it would depend on implementation and enforcement of the rights therein.

It is also pertinent to note here that the Commission in 2004, established the Robben Island Guidelines Committee which nomenclature was in 2009 changed to the Committee for the Prevention of Torture in Africa. The Committee' mandate are the prohibition of torture, prevention of torture and rehabilitation of victims. This special mechanism assists the Commission in fulfilling its mandate on prohibition of torture in Africa. However, more is desired of the Committee as most of its practical work entails administering the Robben guidelines as against state visits to detention centers and proactive decisions on Member states, which is applicable in other regional human rights systems. Having said this, detailed information on the Committee will be discussed in Chapter Four of this research.

Upon the above discussion, this research opines that more is desired of the African human rights in general and specifically with regards to prevention and prohibition of torture. Although there exist a Committee to prevent torture in Africa, there is need for a specific legal instrument on prohibition of torture within the region. There is also a need for steady and effective periodic visits to detention centers in states by the Committee for the Prevention of Torture. Enforcement and implementation of recommendations made thereon to be should be undertaken by the Assembly of State as is applicable in the Council of Europe. Appropriate sanctions for non-

compliance to recommendations made by the Committee should be placed on defaulting Member States.

iv) Inter-American Convention to Prevent and Punish Torture 1985

The regulation of human rights system in the Americas can be traced back to the Charter of the Organization of American States. The Charter established the Organization of American State (OAS) with a mandate to, amongst other things, strengthen peace and security, proclaim “fundamental human rights of the individual” without distinction based on race, nationality, sex or creed. Based on the framework of the OAS, the American Convention on Human Rights and the Inter-American Commission on Human Rights (IACHR) were established. While the Charter is applicable to all member states of the OAS, the Convention merely applies to those who have ratified it, while non-state parties to the Convention are bound by the American Declaration of the Rights and Duties of Man.

The Charter recognizes the principles of human rights and duties of states. Member States are obliged therein to recognize the fundamental rights and freedoms of all persons within their jurisdictions and that of others. Unlike the Charter, the Convention explicitly provides for the prohibition of torture. The Convention in Article 5 provides that:

“1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

.....”

This provision protects two related rights, i.e the “right to respect of dignity and integrity of person and the freedom from torture. It is opined the dignity of human person affects all other rights. Therefore where a person’ dignity is injured, his/her self-esteem and ability to enjoy other rights are affected. It is argued, that where a person is tortured, or inhumanely treated, his/her dignity is invariably tampered with. Persons who are tortured are deprived of their right to dignity of person.

Article 6 (1) in conjunction with Article 1 (1) of the Convention places a positive responsibility on State Parties to ensure that all persons within their jurisdiction enjoy the right to respect of their integrity. It is the responsibility of States to ensure that law enforcement officers, and individuals respect the integrity of every individual. On the other hand, Article 6 (2), also in conjunction in Article 1 (1), places a negative obligation on States to ensure that torture is not meted on any person. This obligation will entail States being proactive and educating the public on prevention and prohibition of torture. The Convention also prevents State Parties from derogating from their duty to prohibit torture, whether in time of war, national security, emergency etc.⁶³

As an off-shoot of the Convention, the Inter-American Convention to Prevent and Punish Torture, (IACPPT)⁶⁴ is the bedrock of the protection from torture in the Americas. It was adopted on 12 September 1985 barely one year after the UNCAT by the General Assembly of the OAS, and came into force 28th February 1987.

⁶³ Article 27 (2) Inter-American Convention on Human Rights.

⁶⁴ For the purpose of this research and to avoid confusion when referencing other conventions, the Inter-American Convention to Prevent and Punish Torture will be referred to as the “IACPPT”.

The IACPPT places a positive obligation on State Parties to prevent and punish torture⁶⁵ and defines torture as:

“.....any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

*The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.”*⁶⁶

The IACCPT’ definition of torture is a broader spectrum to that of the UNCAT. Firstly, an act will be deemed as torture if it is intentionally inflicted to derive physical or mental pain, or suffering with the aim of achieving a criminal investigation, intimidating the person, or as “personal punishment, preventive measure, as penalty or any other purpose”. The last four reasons do not form part of the UNCAT definition of torture. It is further argued that this definition is wider in scope because it makes provision for “any other purpose” which will cover other aims of torture that are not envisaged or may arise subsequently. It is therefore this author’s opinion that the IACCPT’ definition will easily be applicable and can prevent the use of torture in today’s “war against terrorism”.

A further reason for arguing that the above definition is broad and progressive, is because it incorporates acts that diminish an individual’s personality and mental capabilities as a

⁶⁵ Article 1 IACPPT

⁶⁶ Article 2 IACCPT

definition of torture. It is irrelevant if such acts do not cause injury. Therefore where a person's dignity is violated or mental reasoning diminished as a result of any act therein, the IACPPT says such an act is torture. Although the IACPPT allows for physical or mental suffering and pain incidental from lawful sanctions, such sanctions must be carried out in such a way that they do not form part of acts considered as torture under the convention. Implicitly imposition of sanctions must be in conformity with human treatment. This is yet another extension from the UNCAT.

A public servant or employee acting in that capacity orders, or instigates the use of torture, or commits it directly or who was in a position to prevent it but did not is guilty of torture under IACPPT⁶⁷. In comparison to the UNCAT, the IACPPT's scope of who can be held liable is once more broader, as it recognizes a "public servant" or "employee" whereas the former only allows for a "public official" to be held liable. The inclusion of "employee" makes it difficult for persons who may carry out acts of torture, to escape liability. A preventive measure has equally been included in the IACPPT's scope of culpability, to ensure that superior officials who can prevent other officials from meting out torture, are not exonerated from culpability. Equally, a person directed to commit such acts is guilty of torture. The mere fact that the person was ordered by a superior official does not exonerate the person from liability.⁶⁸

The IACPPT provides the prohibition of torture as an absolute right, and no justification whatsoever, be it public emergency, war, political instability, character of the detainee or security of detention center can warrant for use of torture.⁶⁹

⁶⁷ Article 3 (a) IACPPT

⁶⁸ Article 4 IACPPT

⁶⁹ Article 5 IACPPT

State parties are mandated to (a) criminalize torture and “make sure acts punishable by severe penalties” that take into account the seriousness of the acts,⁷⁰ (b) take effective measures that will prevent and punish cruel, inhuman, degrading treatment or punishment,⁷¹ (c) train police officers and other public officials on prohibition of torture and take measures to prevent cruel, inhuman, degrading treatment or punishment.⁷² Article 8 provides for initiation of proceedings before an international fora where domestic proceedings have been exhausted. The convention also mandates states to provide for compensation for victims of torture, under their national laws, irrespective of whether the victim is entailing to an already existing compensation under national laws.

The IACPPT obliges states to carry out an impartial examination and investigate of any allegation of torture, and initiate criminal proceedings where necessary.⁷³ It also prohibits usage of statement obtained through torture as evidence in any proceeding except if against a person who has committed the crime of torture.⁷⁴

Like the UNCAT, the IACPPT obliges State parties to extradite persons who are accused of having committed torture, or sentenced for such act, as the law permits.⁷⁵

It is pertinent to note here that, the IACPPT stands out as the only regional Torture Convention. It serves to compliment the UNCAT within the Inter-American human rights mechanism. It is

⁷⁰ Article 6 IACPPT

⁷¹ Article 6 IACPPT

⁷² Article 7 IACPPT

⁷³ Article 8 IACPPT

⁷⁴ Article 10 IACPPT

⁷⁵ Article 11 IACPPT

progressive in nature and has a broader scope on torture, cruel, inhuman, degrading treatment or punishment.

Notably, the European human rights system has an effective Committee on the Prevention of Torture (CPT) that carries out periodic and spontaneous visits to detention centers in the region, and makes recommendations to states, which is supervised by the Council of Ministers. Any state that does not comply with the decisions of the CPT is sanctioned by the Council of Ministers. On the contrary, the African human rights mechanism, though has a committee against torture, the mechanism effect is barely felt within the region. It only serves to assist states within the region understand the Robben Island Guidelines, and it barely undertakes state visits to detention centers.⁷⁶

The African human rights system is therefore called upon to enact a legal instrument that will serve as effective legal frameworks to combat torture within its jurisdiction.

v) The Constitution of the Federal Republic of Nigeria, 1999 (as Amended)

The administration of fundamental human rights is based on the Constitution which provides for civil and political rights in Chapter IV, which can be enforced through the Fundamental Enforcement Civil Procedure Rules (2009). Although it provides for economic, social and cultural rights in Chapter II, such rights cannot be enforced, based on their formulation.

Section 34. (1) provides that:

“Every individual is entitled to respect for the dignity of his person, and accordingly -

⁷⁶ So far, the committee has undertaken only one state visit to assess condition of detention.

(a) no person shall be subject to torture or to inhuman or degrading treatment; ”

The prohibition on torture, although exist in the ground norm, its prevalence is yet the height of the day in the country. The right to respect for dignity of person is protected by the constitution. Infliction of torture, cruel inhuman or degrading treatment has a great impact on the dignity of a human being. The intention of the drafters can be inferred to mean that where a person is tortured, or ill-treated his/her dignity is violated. The dignity of the person is what he/she feels and what others or the society think. Therefore, if a person feels his/her right to respect for dignity of person has been violated he/she can have it enforced by the High Court of the land.

It is however, pertinent to note here that, unlike what is obtainable and acceptable under in international instruments the Nigeria Constitution *does not explicitly prohibit derogation from* torture. It is silent as to derogation. It is argued that this has a negative impact and can be inferred to have resulted in the lack of observance of the right. In most international human rights instruments and also under customary international law, derogation from prohibition of torture is “explicitly stated” for avoidance of doubt and as a preventive measure.

It is also important to emphasis the need for an explicit inclusion of non-derogation of the right, since in there exist no other law within the Nigerian jurisdiction prohibiting or criminalizing torture. Having a stated non-derogation clause in the Constitution will serve as precedence for possible futuristic laws that may be enacted prohibiting torture, and that might provide for a non-derogation clause. It will therefore avoid a conflict between the Constitution and the law.

Although, only the Constitution provides for prohibition of torture in Nigeria, the Evidence Act prohibits usage of evidence obtained through duress. The protection against torture however, needs to be broadened and a law enacted specifically for it. This is relevant because based on the current author' experience in the fight against torture, claims have been made by law enforcement agents on their being not aware of the prohibition of torture. Torture is systemic and has become part of enforcement of the law. It permeates most police detention centers, though the Constitution stares them in the face, prohibiting it.

From the already discussed, it can be inferred that there are legal instruments prohibiting torture which Nigeria is obliged to observe. Nigeria is bound under customary law to ensure that torture is prohibited and prevented within its jurisdiction. It is a signatory to the UNCAT and thus obliged to stand by its obligations therein. It is a Member of the African Union and thus bound by the African Charter, to prohibit and prevent torture. It is equally expected to ensure that the fundamental human rights in its own Constitution are observed by all within its jurisdiction.

However, as the situation is currently, even with the prohibition in the Constitution, torture exist a great deal, while Nigeria is failing on its obligation to prohibit torture. The giant of Africa is therefore called upon to look into the Inter-American human rights mechanism which seems more effective on the fight against torture. The situation calls for criminalization of torture in order to serve to inform those who claim to be ignorant of the prohibition. It will equally ensure that its indiscriminate practice is limited and eventually eradicated. It will also help Nigeria to observe its international obligation on the prevention and prohibition of torture. It will help in the enforcement of the right, as the non-existence of a law to that effect makes it difficult for the

courts to effectively take decisions on torture and place sanctions therein. It will also serve as a way to protect persons under detention ensures that their right to dignity of the person is protected.

Chapter Three:

Criminalization of Torture in Nigeria; an aid to stop impunity

The incessant abuse of human rights by law enforcement agents in Nigeria calls for an immediate and effective response. From the police to the military, the state security service to the economic and financial crimes commission, human rights abuse is prevalent and impunity is the call of the day. The rights of persons *reasonable suspected to have committed crimes* are violated from the point of arrest till the level of judicial proceedings.

In recent times and base on the need to curb insecurity in the country, security agents killed persons involved in violence and those detained were held incommunicado without trial, while some were held in inhuman detention conditions.⁷⁷ The poor condition of service and bad salary earned by the police has increased corruption and resulted in the lack of effective policing and protection of citizen's rights. The poor condition detention centers falls below the acceptable international standard of pre-trial detention. Individuals are arrested without been made aware of their rights. Citizens lack the knowledge and are barely aware of the fundamental human rights. Even where they have an idea of their rights, the force of the police weights their claims.

One of the major violations that occur on daily basis within and without detention centers in Nigeria is torture. Individuals are brutalized from arrest through detention and interrogation, until judicial decisions have been pronounced on their cases. Torture is prevalent and its practice can be said to have formed part of practice in law enforcement in Nigeria. It has been argued by

⁷⁷ <http://www.hrw.org/world-report/2013/country-chapters/nigeria> (accessed August 26, 2013 2:02pm)

those within the police force, that lack of *modern equipment for effective interrogation and investigation* attributes to the police' resort to torture to obtain information.

The author of this research argues that most of the blame is on the government, as it has been unwilling to curb human rights violations and bring to justice the perpetrators, at the inception stage. The government lacks the political will to investigate, and prosecute persons involved in such violations. The law enforcement agencies are pre-occupied with enforcing law and order, without protecting citizens.

Based on this author's experience working with relevant stakeholders in a bid to combat torture in Nigeria, a sudden action such as *criminalization of torture* must take place to ensure law enforcement agents do not claim ignorance of prohibition of torture (though it exist in the Constitution), and make citizens more aware of what to do when they such situations present themselves.

i) Torture in Nigeria

The lack of confidence in the police and invariably other security agents has yielded serious insecurity and ineffective policing in Nigeria. The recurrent human rights abuse and torture by the police during arrest and interrogation has eroded the police of efficient and competent policing. Based on a research undertaken by the Network of Police Reform in Nigeria (hereafter referred to as NOPRIN) and the Open Society Justice Initiative (hereinafter referred to as OSJI)

there has been a “*loss of public confidence in the integrity of police personnel.*”⁷⁸ “*The police have become generally regarded by the public as corrupt, inept and inefficient.*”⁷⁹

The average Nigerian police operates with a baton on the street and in most situations confidently threatens usage of it on innocent persons walking on the streets. In some cases, individuals are brutalized and released, while in other situations they are detained and tortured unendingly. One of the main reasons for using torture by the police is to threaten the suspect or detainee and course him/her to confess. In most situations, persons who are tortured confess, even where they may not have committed the offence for fear of pain and suffering.

The use of torture takes place in Nigeria often when a person contacts the police, such as at check-points, during arrests, interrogations and detention. According to a report released by REDRESS⁸⁰, Sexual torture is said to occur during detention. This includes “*vaginal or anal rape, inserting objects such as bottles into the vagina or anus, or inserting a broomstick into the male urethra....*”⁸¹

The REDRESS conference report also indicates that it is common practice for detainees to be denied food, water, light and medical assistance due to condition of detention thereby amounting to ill-treatment and as a deliberate act by the relevant authorities.⁸² Officials are said to force individuals to witness the killing or torture of others and the use of mosquitoes, flies, roaches, spiders, rats or snakes is common as part of the torture, since most people have a phobia

⁷⁸ NOPRIN & OSJI: “*Criminal Force: Torture, Abuse and Extrajudicial Killings by the Nigeria Police Force*” 25 (2010) published by Open Society Institute, www.soros.org

⁷⁹ *Id.*

⁸⁰ REDRESS: “Torture in Africa: The Law and the Practice” Regional Conference Report, 8, 2012, <http://www.redress.org/downloads/publications/Africa%20regional%20report%20FINAL%208%20OCT%202012.pdf> (accessed August 27, 2013, 4:14pm)

⁸¹ *Id.*

⁸² *Id.*⁹

for these things⁸³. Many persons who are arrested and detained are deprived of access to their family and the right to counsel, which right is guaranteed in the Constitution under Section 35 (2).

Torture is facilitated through the use of specialized equipment and by trained “torture” personnel. The orchestrate and carry out torture in special rooms and by designated persons who in some stations are called “O/C torture (officer in charge of) Torture”⁸⁴. The O/C Torture who often enjoys a mythical status usually has a “workshop or torture chamber” where uncountable methods of torturing is exercised with a view to obtain confessions for police investigation.⁸⁵

In yet another light, and based on interviews conducted by ProCAT⁸⁶ and its lawyers (a project implemented in Nigeria by Avocats Sans Frontieres France ASF France) on persons held in police detention, torture was inflicted on most of them during interrogations.

In a particular situation, a detainee who was kept in a police cell was threaten with an “AK 47”; in another situation the victim⁸⁷ had his hand and legs joined together and hung between two desk with a rode passing through his legs and hand, and was beaten severely. Unable to bear the pain, he “confessed” to committing the crime. In most police stations relatives of detainees often pay bribes during detention in exchange for bail or a release without charge.

⁸³ Id.

⁸⁴ NOPRIN & OSJI, Id., 66.

⁸⁵ Id.

⁸⁶ Promoting the United Nations Convention Against Torture (implemented in Kaduna, Kano, Lagos and Plateau State of Nigeria). The project which lasted for about 3 years had collated data on persons who were tortured during detention.

⁸⁷ For the purpose of this research, “Victim” means a person who has been tortured, of ill-treated in the cause of criminal investigation or other purposes by a public official.

On 12th May 2003, **Haruna Mohammed** was allegedly tortured to death by a police sergeant, while he was in custody in Bauchi State⁸⁸. Mohammed was suspected to have stolen N10,000 (equivalent of about 62 USD) from the Speaker of the Bauchi State House of Assembly.

Mr. Wisdom, a detainee at Kirikiri Prison, Lagos was arrested on 25th June 2005 on suspicion of having committed robbery.⁸⁹ During interrogation at Panti Police Station, he alleged to have been flogged and beaten. His fundamental human rights was later by enforced by the court in Lagos and he was released from detention.

In December 2009, **Mr. Samuel**⁹⁰ was arrested on suspicion of burglary. In order to obtain a confession from him during interrogation, the police tortured as a result his left toe nail was broken. However, as at the time of this research, he had been released by the high court in Jos, when his fundamental right was enforced.

In December of 2008, one **James Ute** was brought home from Ketu Divisional police Station by police officers from Anti-Robbery Squad⁹¹. He was beaten with an “iron bar and rifle-butt”. Due to the pain of the beating, he died prior to the arrival of his family to the hospital. Amnesty International reported that the police involved in his killing are were still working in that area and pay visits to the community⁹².

⁸⁸ Yemi Akinseye-George: “Justice Sector Reform & Human Rights in Nigeria” 204, 2009 published by Center for Socio-legal Studies (CSLS) with support of MacArthur Foundation. www.censolegs.org

⁸⁹ ASF France, ProCAT case file database 2009 -2012.

⁹⁰ Id.

⁹¹ See: Amnesty International -AI: Nigeria: *Killing at will: Extrajudicial executions and other unlawful killings by the police in Nigeria* [AFR 44/038/2009], 9

December 2009, <http://www.amnesty.org/en/library/asset/AFR44/038/2009/en/f09b1c15-77b4-40aa-a608-b3b01bde0fc5/af440382009en.pdf> (accessed August 26, 2013 6:35pm)

⁹² Id.

According to NOPRIN victims of torture that are not executed are “*routinely made to crawl out of the station or into court.*”⁹³ In the case of **Lawal Yahuza**, the police made him to crawl on his bottom into a Magistrate Court in Abuja, for him to be arraigned for stealing,⁹⁴ his ankles were broken at Maitama police station due to beatings meted on him with iron rods and batons.

Amnesty International reported in 2011 that detainees were often held in police detention for more than 48 hours (period guaranteed by the constitution) before being taken to court.⁹⁵ On a regular basis detainees are held for weeks or months before their charges are taken against them. In its 2011 Annual Report, Amnesty International reported that Shete Obusoh and Chijioke Olemeforo who were arrested by police officers from the Special Anti-Robbery Squad were detained for 17 days in police detention during which they were beaten with gun butts and machetes and hung on the ceiling of the police station⁹⁶. They were later taken to court and remanded in prison.

Based on NOPRIN’ research, the Nigerian police were said to have created different methods or ways of inflicting torture on detainees, such as “freeze-up”, “third-degree”, “suicide”, and “J5”.⁹⁷ A “suicide” way of torture involves suspending the detainee “at the end of a rope tied to the ankles”⁹⁸ and the legs hang in the air, while the hands are tied to the back.⁹⁹ Atimes the method may be accompanied with beating and the duration for such act is at the discretion of the officer to determine, not minding the health effect it may cause the detainee.

⁹³ NOPRIN & OSJI Id., 68

⁹⁴ Id.

⁹⁵ Amnesty International: “Annual Report 2011: The state of human rights in the world, Nigeria” <http://www.amnesty.org/en/region/nigeria/report-2011#section-104-7> (accessed August 28, 2013, 11:54am)

⁹⁶ Id.

⁹⁷ NOPRIN & OSJI id., 69.

⁹⁸ Id.

⁹⁹ Id.

The report indicated that sometime in February 2007, one Jude John was said to have undergone the “suicide” method of torture at the State Criminal Investigating Department (SCID). John had informed NOPRIN researches that *“he was suspended from the hook of the ceiling fan by his ankles while his hands were handcuffed behind him with what he called a “Chinese handcuff”*¹⁰⁰ and that he was beaten with an electric cable by the police. The researchers reported to have seen *“visible lacerations and scars on his chest and back”*¹⁰¹

The “J5” method involves putting a detainee in a prolonged standing position and depriving him of sleep, which may result in the detainee to collapsing or passing out.¹⁰² The “third degree” method of torture was reported to entail the following:

*“The victim is made to lie face down.”*¹⁰³ *“His legs are then folded upwards at the knees and tied together at the ankles, and his arms are raised upwards and tied together at the wrists.”*¹⁰⁴ *“A pipe or rod, attached at its ends to a rope hanging from [a] hook in the ceiling, is passed between both legs and both arms.”*¹⁰⁵ *“The suspect is raised towards the ceiling by pulling at the loose end of the rope until suspended in the air in the form of a human bow.”*¹⁰⁶ *“This position soon generates excruciating pain all over the body but particularly in the shoulders, the spine, and the waist.”*¹⁰⁷ *“While the suspect is yet suffering this pain, the interrogating officer subjects him to beating with horsewhips, batons, wire cables or other instruments.”*¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ NOPRIN & OSJI *Id.*, 70

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Though there rights are protected in the constitution and specifically section 34 (1) prohibits torture, the police in Lagos State were said be operating specialized cells known as “*German cells*”¹⁰⁹ where congestion was the method applied to inflict torture. The research indicated that the cells:

*“are usually extremely narrow and have a ventilation hole that.....only allows a thin stream of light.”*¹¹⁰ *“The police stuff these narrow enclosures with so many inmates that the only barely have enough room in which to stand. The press of bodies is so great that may weaker inmates faint from the pressure and heat.”*¹¹¹ *“In all cases, the heat and stench....is suffocating.”*¹¹² *“It is into these German cells that the Police often put detainees undergoing interrogation”*¹¹³

Similarly, in a research organized by CLEEN Foundation in 2009¹¹⁴ a lawyer representing 18 victims of torture by police of the Special Anti-Robbery Squad lamented that his clients were torture and “*the unbearable torturing of the suspects to elicit confessions allegedly led to the death of Ekene Elechi on August 5th, 2008.*”¹¹⁵

In a recent interview conducted in Jos Prisons¹¹⁶ by the author of this research, a victim indicated that torture still exist in police detention and lamented that “*except you are not held in police detention, but almost everybody that passes through police detention is tortured*”. The victim informed the interviewers that at about 9:00pm on the day he was detained on alleged

¹⁰⁹Id. 71

¹¹⁰Id.

¹¹¹Id.

¹¹²Id.

¹¹³Id. 71

¹¹⁴ CLEEN Foundation: “*A Cry for Justice: Proceedings of a Public Tribunal on Police Accountability in Nigeria*” 2009 p.15
<http://www.cleen.org/Cry%20for%20Justice.pdf> [accessed November 10, 2013; 6:30 pm]

¹¹⁵Id.

¹¹⁶ The interview was conducted by me with the assistance of a colleague Mrs. Bola Eniola Umar on 25th October 2013 at a Nigerian Prison in Jos for an anonymous victim of Torture. The interview was conducted in Hausa, but translated by this author.

commission of murder, the four (4) police at Katako police station made him to remove his clothes and they handcuffed him at the back and they started beating him. He reiterates:

“I was made to lie on the floor on my stomach and they beat me on my back.....I was later made to stand up and they handcuffed my handed and folded it in between my knees, while a stick was placed behind my knees. They lifted the stick with my knees hanging on it and placed it in between two tables, while my head was dangling. They then used their batons to hit me at my joints and my legs. I became unconscious and later found myself in the cell.”

The victim stated that the next day the police told him that he had admitting having knowledge of what had transpired on the day the alleged crime was committed. He was detained in Katako police station for about 3 weeks and was taken to the State Criminal Investigation Department (SCID). Three (3) days into his detention at the SCID, at midnight, the about five (5) to six (6) police officers took him out of the cell and requested him to say the truth about the crime. He states:

“I was handcuffed and all my clothes were removed. I was made to lie on the floor on my stomach and I was beaten on my back with batons by three (3) police officers. They used a hammer claw to hold my sexual organ and I started screaming, but they did not release me. After that I became unconscious. I slept on the floor of their office with handcuffs still one me.”

One cannot but state here that, these forms of interrogation are most unacceptable and must, urgently be addressed through enabling laws, to ensure that detainees do not undergo severe sentences before they are found guilty. These ways of punishment are not in any way acceptable modes of sentencing and should not, even if they were, at any time be employed on persons still

“presumed innocent”. The conditions of detention fall below acceptable standards and must be corrected.

The practice of torture exist because there are no existing “effective” mechanisms in Nigeria that can control activities of the police, or other law enforcement agencies. The agencies responsible for police accountability do not have the will to reprimand the police and other security are alleged to have violated rights of people. The government’ attitude towards prosecuting law enforcement agents who violate human rights is loath, and this has resulted in great impunity. Lack of modern models of interrogation has led law enforcement agents to adopt extreme and unacceptable means like torture to obtain confessional statements.

Though these situations exist and may seem difficult to remedy at the moment, a quick step must be taken to reduce the decay in the system by enacting a legislation that will provide for torture as a crime in Nigeria.

ii) Review of the mandate of Nigeria’ National Committee against Torture.

Sequel to the adoption of the Optional Protocol to the United Nations Convention Against Torture (OPCAT) on 22nd June 2006, which mandated state parties to establish national torture preventive mechanisms, Nigeria ratified the OPCAT on 27th July 2009 and inaugurated its National Committee against Torture (NCAT).

The NCAT has the mandate to “*visit places of detention in Nigeria and investigate any complaints on torture...*”¹¹⁷, to receive communications from NGOs, government organizations and individuals and “*carry out educational enlightenment programmes for law enforcement agencies*”¹¹⁸ and the general public.

The 2012 report indicates that, the NCAT in collaboration with law enforcement agencies have organized seminars and workshop on the prevention of torture. Equally in collaboration with relevant international and local organizations, the NCAT developed a syllabus for teaching at training schools of police officers. The committee also participated in conferences organized by prison services.

Having said the above however, the present author is of the view that the impact of the NCAT is rarely felt. There is no public awareness on the powers and activities of the committee. There is no report to indicate if complaints received by the NCAT have successfully been attended to. There are no indicators to show that the work of the NCAT has deterred law enforcement agents from torturing detainees. There is therefore no means of measuring the success or otherwise of the committee. The present author having been practices in Nigeria for a while, believes that some of issues raised, will more effectively be addressed if a law criminalizing torture is enacted. This will carter for compliance and will go a long way to serve as deterrence.

¹¹⁷ See: *National Report of Nigeria to the Committee Against Torture September 2012*; p.2, §4.00

¹¹⁸ *Id.*

iii) Criminal law on torture

At the 2009 UN Human Rights Council' Universal Periodic Review of Nigeria' (UPR)¹¹⁹ human rights situation, participating states called upon Nigeria to among other things maintain a standing invitation to the UN Human Rights mechanisms e.g the Special Rapporteur against torture, in a bid to ensure that the conditions of detention are within acceptable international standards and leave up to its international obligation. A recommendation was equally made to the effect that Nigeria legislates on extra-judicial killings and torture. Of particular interest to this research was a recommendation made by Ukraine, Netherlands and Ireland stated as follows:

“Prevent using cruel, inhuman and degrading punishment (Ukraine); Complete the process of adopting legislative measures to prevent and prosecute acts of torture and other ill-treatment, according to international standards (The Netherlands); Fully implement the United Nations Convention against Torture, including by introducing national legislation prohibiting torture, and ensure that ill-treatment in custody is not used as a substitute for proper criminal investigation of suspects(Ireland);.....”

These recommendations are of importance, because they call for the full implementation of the UNCAT, by criminalizing torture in Nigeria. The UNCAT' main purpose as indicated in the previous chapter is to ensure that state parties “make torture a crime” within their jurisdiction and territory under their effective control. A state which merely signs and ratifies but does not implement the stated provisions of the Torture Convention is failing in its obligation, since what the convention wants, the state is unwilling to carry.

¹¹⁹ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review - Nigeria, 3 March 2009, A/HRC/WG.6/4/L.12; A/HRC/11/26, p. 21, <http://www.refworld.org/docid/49f964f30.html> [accessed August 28, 2013 1:15pm]

Based on the UPR working group' report Amnesty International conducted an "Assessment of state' implementation of the recommendations from the previous UPR"¹²⁰ which indicated that though Nigeria had adopted the Freedom of Information Act and strengthened its National Human Rights Commission (NHRC), more needs to be done to ensure that all the recommendations made are implemented in order to strengthen the country's human rights system. Notably, detainees were said to still be kept in detention without trial, while torture continue with impunity.

Amnesty International equally reported that because of the "*overbroad defences for police use of force and/or unwillingness by the state to prosecute*"¹²¹ the police are rarely charged for assault or murder as provided in the Criminal Codes. Impunity has permeated within the system and incessantly, law enforcement officials violate abuse human rights and are rarely called to answer for such atrocities.

While the existence of anti-torture legislation is not a gauge that it will be effective in practice, however advocating for such a law will create awareness and provides pertinent advocates the opening to scrutinize and tackle structural elements that hamper accessibility to justice and accountability. This will enable civil society and government stakeholders dialogue and contribute in the development of an anti-torture legislation. This will serve as an advocacy for change on practice of torture and a way of informing people on the menace which can lead to a broader debate on torture.

¹²⁰ Amnesty International: "Amnesty International assessment of state' implementation of recommendations from the previous UPR": <http://www.amnesty.org/en/library/asset/IOR41/011/2013/en/f7aa2539-9993-4134-919b-85b5aa3bbe7e/ior410112013en.pdf> [accessed August 28, 2013 4:08pm]

¹²¹ Id. 8

This research therefore calls for the criminalization of torture and proffers incites on possible provisions of the law as follows:

- a. **Scope of the law:** The law should cover all acts of torture, cruel, inhuman, degrading treatment or punishment.
- b. **Definition:** The law should use the UNCAT and the Inter-American Convention to Prevent and Punish Torture as a guide to develop a definition that best suits the Nigerian situation. The definition should not only involve law enforcement agencies, but include medical and psychological personnel and all other relevant organizations that are responsible for detention. The law should specifically define cruel, inhuman, degrading treatment or punishment to ensure that acts that fall within the definition are managed.
- c. **Independent investigative authority:** As a way of ensuring accountability to the people, the state and for the conduct of security agencies, independent mechanism should be created by the law to investigate any acts of torture by the law enforcement agencies. In particular a “Police Independent Investigative Directorate” should be established under the law to investigate and ensure prosecution of all acts of human rights abuse by the police. Similar mechanism could be established for other security agencies to serve to check excesses when carrying out their duties.
- d. **Jurisdiction:** Jurisdiction to entertain all cases of torture, and acts that are cruel, inhuman, degrading treatment or punishment should lie with the High Court.

- e. **Sanctions:** Specific terms of imprisonment or punishment thereon should be provided by the law bearing in mind the gravity of the offence.
- f. **Compensation:** Victims who have suffered torture or ill-treatment should be provided with range of compensations, such as monetary terms and public apologies. However, cases of torture should be instituted by the victim himself/herself as the injury is more often personal and not necessarily transferred. Therefore a person instituting a violation of right to prohibition of torture must have suffered torture or ill-treatment and compensation can only be awarded to the person who has suffered such pain and suffering.
- g. **Interrogations:** The law should provide for acceptable forms of interrogation and investigation of crimes. Though this should ordinarily come under the rules of interrogation, there may be need to have inserted within the law how interrogations can be conducted. The acceptable form should be that during interrogation, the legal counsel of the person being interrogated should be present before such interrogation can be accepted in evidence before the court. In addition to that, videos or at least audio recordings must be carried out during interrogations. This will serve as safeguard to against torture and ill-treatment during interrogations. It could therefore entail restricting the courts from accepting mere confessional statements without collaboration from the lawyer to the accused person on the fact that torture was not applied or videos /audio tapes of the interrogation.

iv) Prospective effects of criminalization of Torture in Nigeria.

A legislation on torture will serve to reduce activities of torture and modes of criminal investigation. It will equally serve to ensure that Nigeria abides by its international obligation on prohibition of torture. A criminal law on torture will ensure that an independent mechanism is created which will serve to prevent, prosecute and punish acts of torture. This will avoid a claim of ignorance of such acts by relevant authorities and exoneration of defaulters.

It is the present author believe that the emergence of law criminalizing torture, will not only reduce the commission of the acts and possibly eradicate it, but will also contribute to developing a better criminal justice administration in Nigeria. The current criminal justice system is loose and lacks efficiency. By the official banning of torture through the existence of a law, the system will be cornered into creating minimum guarantees for suspects such as presence of a lawyer and video or audio recording during interrogation. The ideology of having a law criminalizing torture, is not just to float the system with more laws on paper, but to contribute in creating an effective and efficient criminal justice administration in Nigeria.

The law will equally avail victims the opportunity to institute cases against any perpetrators. Most people in the society are not adequately aware that the police is not supposed to torture a suspect. It is a usual parlance that once you are picked by the police for an allegation of crime, you must be torture. It is also common knowledge that once an act has been made a crime, people are almost always conscious that it is a crime. However, since there exist no law stating that torture is a crime, (even though it is prohibited in the constitution) people living in Nigeria can only file applications before the high court for a declaration that the act committed amounts

to torture. But how about prosecuting the perpetrators? How can that take place without a law guiding the courts on what to do. Sanctions flowing from such a law will serve as deterrence to intending offenders.

v) Role of relevant stakeholders in torture prevention in Nigeria.

Oversight agencies, civil society, human rights defenders, human right defenders and the general public have a major role to play in terms of documenting, reporting and monitoring human rights violations, including torture. The Police in Nigeria is established by the constitution. The system creates external oversight agencies responsible for the supervision and regulation of the police by monitoring their activities and calling them to attention when there are allegations of misconduct or abuse of powers. The National Human Rights Commission (NHRC), Police Service Commission (PSC) the Ministry of Police Affairs (MOPA) and the Public Complaints Commission (PCC) are the main government agencies responsible for checking the police in Nigeria.

The MOPA has a mandate to ensure that the police “*operates at the highest level of professionalism, dedication and discipline to ensure public safety and internal security of the country.*”¹²² On the other hand the PSC is empowered “*to appoint, promote, discipline and dismiss all officers of the Nigeria Police Force(NPF) except the Inspector-General of Police (IGP).*”¹²³

¹²² <http://www.nigeria.gov.ng/2012-10-29-11-06-51/executive-branch/116-federal-ministry-of-police-affairs/135-federal-ministry-of-police-affairs> [accessed October 15, 2013; 3:10pm]

¹²³ <http://www.psc.gov.ng/node/47> [accessed October 15, 2013; 3:12pm]

A look at the mandate of MOPA and PSC indicates that both agencies can reprimand police officers for abuse of powers which may include violation of human rights. Since torture is prohibited by the Constitution in Nigeria¹²⁴ any acts of torture by the police is unprofessional and the PSC is mandated to call and ensure such officers are disciplined. It is argued by the author that discipline means abiding by the law. Therefore any act of torture is indiscipline by the culprit and action must be taken to ensure deterrence. However, in practice these agencies subsume themselves as part of the police and lack the will to reprimand the police. This has led to impunity within the security sector as a whole.

The PCC¹²⁵ is the ombudsman and is created to act as the “*whistle blower*” in Nigeria. Its mandates are broad and are intended to investigate, prosecute, and report administrative irregularities and criminal issues. The PCC has the power to inform law enforcement agencies of crimes being committed for further action. It is also mandated to report an arring officer of an organization for disciplinary action. This will occur where a person who has been tortured lays a compliant, the PCC can report such matter to the police authority for necessary action. *However and sadly so, the powers of the PCC to investigate abuse of human rights by the police is limited by Section 6 (1) (d) of the Public Complaints Commission Act.*¹²⁶

It is argued that such a restriction vitiates the purpose of having an Ombudsman, as it does not allow for independent investigation of the police even when the police is alleged of having violated the rights of individuals. This plays a great role and contributes to the police reluctance

¹²⁴ See Section 34 (1)

¹²⁵ http://www.publiccomplaints-ng.org/about_mandates.html [accessed October 15, 2013; 3:34pm]

¹²⁶ <http://www.placng.org/lawsofnigeria/node/408> [accessed October 15, 2013; 4:14pm]

to stop torture, as the existing Ombudsman is restricted from being able to investigate the police. One then wonders whether the PCC can in practice be referred to as an Ombudsman.

However, that does not mean violation of human rights is left untouched in Nigeria, as there exist a human rights commission, the National Human Rights Commission (NHRC) mandated to protect, promote and enforcement human rights. The NHRC was established in 1995 as a result of a United Nations resolution enjoining member states to create national human rights mechanisms to promote and protect human rights. The NHRC has the powers to:

“deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria 1999, the African Charter on Human and Peoples Rights, the United Nations Charter and the Universal Declaration on Human Rights and other International Treaties on human rights to which Nigeria is a signatory...”¹²⁷

The Act also empowers the NHRC to monitor and investigate cases alleging of human rights violation and make *“appropriate recommendations to the president for the prosecution and such other actions as it may deem expedient in each circumstance..”¹²⁸* In this regard the NHRC can prosecute security officers alleged to have committed acts of torture. Research has shown that though cases of human rights are instituted by the NHRC, there impact is yet to be felt by the general public. Victims of human rights abuse are expected to be assisted by the commission in seeking on their behalf, redress and remedies.¹²⁹ It is has the powers to do anything necessary in the execution of its duties¹³⁰, such as to pay scheduled or unscheduled visits to detention centers and assess the conditions of detention, whether the fall within or below acceptable human rights

¹²⁷ Section 5 (a) National Human Rights Commission Act, 1995 as amended by NHRC Act 2010. <http://www.placng.org/lawsofnigeria/node/453> [accessed November 2, 2013; 11:55am]

¹²⁸ Section 5 (b) *Id.*

¹²⁹ Section 5 (c) *Id.*

¹³⁰ Section 6 (b) *id.*

standards. The NHRC is empowered to make recommendations to the President for prosecutions of human right offenders. However, and sadly so, the current author is not aware of any such recommendations made by NHRC to the President.

However, while the political will to enforce human rights is been addressed, human rights defenders and lawyers have a pivotal role in combating torture in Nigeria. In the early 1990s¹³¹, NGOs and human right lawyers in Israel instituted untiring cases before the courts to determine, the meaning and legality of torture, as its practice was authorized on security detainees. Security agents in Israel justified the use of torture and ill-treatment on the basis of “ticking time bomb” scenarios. However, the battle to combat torture was immensely fought by lawyers and human rights advocates who could not see any justifiable reason for torturing detainees.

In the light of the above, the present author opines that lawyers and human rights advocates in Nigeria must rise up to the challenge and standard against violation of the right to dignity. Lawyers in Nigeria should initiate a strategic litigation on cases of torture; challenging the legality of the use of torture on detainees, be they ordinary criminals or security detainees. This may entail taking a list of detainees that have been tortured (which could be a substantial amount, considering that its practice is prevalent) and instituting a class action against the relevant security agency including the government of Nigeria. Such a case should challenge the legality of the use of torture and ensure the court makes a pronouncement that bans its application in by security agencies in Nigeria.

¹³¹ *Amnesty International*: “Combating torture: a manual for action”2003, p.g 27; www.amnestyinternational.org [accessed June 4, 2013 6:26pm]

Lawyers and human rights advocates could make applications before regional and international human right mechanisms with a view to calling the attention of the public to the combating the menace and a campaign for change. For instance, the ECOWAS Court of Justice, ably situated in Nigeria was recently given the mandated to determine human rights cases. Advocates in Nigeria should seize the opportunity of proximity and file class action or strategic litigation challenging the usage of torture in Nigeria, the latter having signed and ratified several treaties prohibiting torture. The action will serve as a way of informing the general public, call for a criminalization of the torture in Nigeria. Such public outcry should not be underestimated as the have yielded positive results in Israel and in the fight against torture campaign organized by Amnesty International.

International and local non-governmental human rights organizations have a role to play in fighting torture in Nigeria. Organizations such as Avocats Sans Frontieres France (ASF France) have implemented projects promoting the United Nations Convention against Torture while rendering free legal assistance to victims of torture.

ASF France¹³² implemented a project known as ProCAT for over three (3) years in four states in Nigeria. The project trained judges, magistrates, lawyers, prison staff, police officers and prosecutors on the convention and the need for all to adhere to the provisions in carrying out their duties. Awareness activities were organized in the project states to inform the public on the need to be alert and report acts of torture to relevant authorities. The project also rendered free legal assistance to victims of torture, which lead to several awaiting trial victims being released from detention for being tortured and being kept in detention for unwarranted time. This project

¹³² See: http://avocatssansfrontieres-france.org/files/pmedia/public/r63_9_ra_asf-france_2010_en.pdf [accessed Nov. 10, 2013 @ 6:52pm]

created more publicity on the convention and made detainees more aware of their rights to dignity.

A combine effort is therefore required to ensure a total eradication or at least reduction of torture in Nigeria. In this author's view, criminalize of torture in Nigeria, will have a great impact in reducing the menace.

Chapter Four

Comparism of torture preventive mechanisms in Africa and America

The African and American regions have existing human rights protection mechanisms. These systems serve to complement the United Nations human rights mechanism and ensure closer monitoring of state' compliance with human rights within the regions. At the initial stage both regions had no much interest in the pursuit for protection of human rights. While the American system was interested in uniting the states in the region for commercial purposes, even though a cardinal principle upon which OAS is established is the "*fundamental rights of the individual*", its African counterpart on the other hand was hinged on protection of territorial integrity of its states against external influence. With time though, both regions saw the need for a more guaranteed human rights protection mechanisms within their regions.

The notion of a human rights mechanism on the American continent was first born upon adoption of the American Declaration of Rights of Duties of Man in 1948. Later in 1959 the Organization of American States (OAS) Charter established the Inter-American Commission on Human Rights (IACHR) with the mandate to "*promote the observance and protection of human rights and to serve as a consultative organ of the Organization.....*"¹³³. In 1969, at a conference of American States an upon seeing the need to have a juridical institution that will enforce human rights, the American Convention on Human Rights was adopted which later came into force in 1979. The Court is mandated to *apply and interpret the Convention* with both juridical and advisory functions.

¹³³ See: <http://www.oas.org/en/iachr/mandate/what.asp> [accessed Nov. 18, 2013 @ 10:45pm]

The concept of establishing a human rights protection mechanism in Africa was first conceived at a congress of Jurist held in Lagos in 1960 that adopted a declaration known as the “*Law of Lagos*.”¹³⁴ Sequel in 1979 the then Organization of African Unity (OAU) now African Union (AU) through a committee of expert drafted a human rights instruments which was adopted in 1981 and came into force in 1986 as the *African Charter on Human and Peoples Rights*”. The Charter established the African Commission for Human and Peoples Rights with a mandate to *promote and protect human and peoples’ rights and interpret the Charter* amongst other things. However as a result of a non-binding nature of the decisions of the Commission, an optional protocol was adopted in 1998 and came into force in 2004 creating the African Court on Human and Peoples Rights.¹³⁵ The court is mandated to “*complement and reinforce the functions of the African Commission on Human and Peoples Rights*.”¹³⁶

Applications on violation of the right against torture have been filed before the African Commission and declarations made against states on torture. However the commission being a quasi-judicial body has been able to effectively enforce its judgments against member states. The alternative to this was the establishment of the African Court. This has however not solved the predicament, as the Protocol creating the court has a provided a requirement on acceptance of jurisdiction by member states before enforceable human rights cases can be instituted. This has therefore posed a challenge on the ability to combat torture from a regional perspective.

¹³⁴ See: <http://www.achpr.org/instruments/achpr/history/> [accessed Nov. 18, 2013 @ 6.42pm]

¹³⁵ See: [accessed Nov. 18, 2013 @ 9:40pm]

¹³⁶ *Id.*

i) Comparism of Preventive Mechanisms

Specifically relating to prevention of torture, the African human rights system relies on the African Commission on Human and Peoples Rights, the African Court on Human and Peoples Rights, Special Rapporteur on Prisons and Conditions of Detention, the Committee for the Prevention of Torture in Africa, the Special Rapporteur on Extra- Judicial, Summary, or Arbitrary Executions. The Inter-American mechanism on the other hand has the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture

In both regional human rights systems, visits to detention centers are undertaken to ensure compliance with prohibition and prevention of torture. The CPTA mostly undertakes visits to detention centers in collaboration with the Special Rapporteur on Prisons and Other Conditions of Detention which was set up before the CPTA was created.

The African human rights system does not have a specific regional instrument for the prevention of torture, save the United Nations Convention against Torture of which most African states are party to. However, the Organization of African Union (OAU) now African Union (AU) adopted a torture preventive guideline known as the “*Robben Island Guidelines for the Prevention and Monitoring of Torture in Africa*” (RIG). The RIG is implemented by the Committee for the Prevention of Torture in Africa set up after the RIG was adopted. The American human rights system on the other hand has a convention against torture known as the Inter-America Convention to Prevent and Punish. The convention empowers the Inter-American Commission to monitor implementation of the provisions of the instrument.

With respect to reporting, states parties to the Inter-American Convention are mandated to inform¹³⁷ the Commission of any legislative, judicial or administrative measures taken to implement the convention. The situation with the CPTA is the reverse, because African States do not report to the CPTA. The CPTA rather makes recommendations to the African Commission on strategies to promote the Robben Islands Guidelines (RIG), on how to adopt measures to ensure the promotion and facilitation of the implementation of the guidelines by Member states. It also reports to the African Commission at each regular session on the level of implementation of the guidelines, while responsible for the organization of seminars to disseminate the guidelines.

In line with provisions of both instruments, the RIG prohibits torture and calls on states to ratify existing instruments prohibiting torture, and enjoin states to integrate such provisions in their domestic laws. It also calls for the acts of torture to be *criminalized* and prosecuted.¹³⁸ On a more progressive level the IACPPT defines torture and obliges states to punish, severely, perpetrators.¹³⁹

With respect to preventive measures, both the RIG and the IACPPT provide for the prevention of torture and other ill-treatment. However, while the former highlights safeguards such as due process in criminal procedure, arrest and detention of which states are enjoined to follow, the latter on the other hand places a positive obligation on state parties to set up preventive measures to guard against torture and other ill-treatment.

¹³⁷ See: Article 17 Inter-American Convention to Prevent and Punish Torture, 1987 www.iadb.org [accessed Nov. 19, 2013 @ 10:50pm]

¹³⁸ See: <http://www.achpr.org/mechanisms/cpta/about/> [accessed Nov. 20, 2013 @ 8:30pm]

¹³⁹ See: <http://www.apt.ch/en/inter-american-human-rights-system/> [accessed Nov. 20, 2013 @ 8:41pm]

In another vain, while the RIG advocates and calls on states to set up educational training and public awareness for the public and law enforcement,¹⁴⁰ the IACPPT mandates states to take measures to ensure that training on prohibition and prevention of torture form part of the curriculum of individual's responsibility for detention of persons. This is yet another measure that weights down the effectiveness of the African system on the fight against torture when compared to its American counterpart.

This author argues that, although both systems have measures to guard against torture, the procedure in America seems more effective. In support of this, it is argued that while the IACPPT creates a positive obligation on state parties to prevent and punish torture by placing a mandate on them to report to the Commission any legislative, judicial or administrative measures undertaken by them to implement the convention. Member states in African however, are not mandated to report to the CPTA as its role is more of making recommendations that is at the discretion of states to adhere to. This has also attributed to the unwillingness of member states to adopt laws criminalizing torture, and has increased impunity within the region.

Notwithstanding the above, it is pertinent to note that the inability of the special mechanisms in the African region particularly the CPTA to effectively prevent and combat torture can be attributed to several issues.¹⁴¹ The lack of political will to prevent torture, lack of legal framework defining torture as a crime, few ratification of the OPCAT by African states resulting in ineffective visits to detention centers, lack of state' cooperation to the CPTA to undertake mission visits etc. have all hampered the effectiveness of the CPTA.

¹⁴⁰ *Id.*

¹⁴¹ <http://www.achpr.org/sessions/53rd/inter-session-activity-reports/cpta/> [accessed Nov. 21, 2013 @ 8:56pm]

It is therefore submitted that an effective African torture preventive mechanism can only be presented, when the regional system consolidates all the approaches and creates an instrument defining torture as a crime. This will serve to assist the UNCAT and drive home the need for state laws criminalizing torture. The ineffectiveness of the CPTA will also be remedied if a binding instrument is established.

ii) Judicial remedies for victims of torture in Nigeria.

Through various means organizations and advocates have been able to obtain judicial remedies for victims of torture in Nigeria. Individual advocates instituted some of these cases while other were by organizations that assists of torture. One of such is a project implemented in four states of Nigeria by Avocats Sans Frontieres France (ASF France). The project known as the *“Promoting the United Nations Convention against Torture (ProCAT)”* was implemented through capacity building of judges, magistrates, police officers, lawyers, prison staff; public awareness of the Torture Convention and; legal assistance of victims.

The legal assistance rendered to victims of torture led to enforcement of the fundamental rights of sixteen (17) victims of torture in Nigeria. The high courts in Nigeria declared that the acts of the authorities that detained the victims were torturous and some were ordered to pay damages to the victims. About seventy seven other victims were either granted bail or released pending trial.

In the course of implementing the project, some judicial officers advocated for the criminalization of torture and placing of sanctions on such crimes, for ease of reference in the

dispensation of judgments. To this effect, the present author who participated in the implementation of the project, drew the concept of advocating for the criminalization of torture in a bid to promote its prohibition in Nigeria. The present state of the laws makes it difficult to refer torture as crime, as the applications made to the courts can only be instituted through civil procedures.

Apart from initiatives by non-governmental organizations, applications have been decided by government agency responsible for human rights enforcement. One of such is the National Committee Against Torture set up by Nigeria in 2009, upon her ratification of the Optional Protocol to the United Nations Convention against Torture (OPCAT). In the 2012 report¹⁴² to UN Committee against Torture it was indicated that the NCAT receives complaints on torture. In yet a seminar on recently organized for NGOs and police oversight agencies, the Chairman of the NCAT stated that the committee has received applications from victims of torture.

However these procedures have not deterred perpetrators and has not effectively assisted victims, thus the call for the criminalization of torture in Nigeria, which in the author's believe and experience will be more effective in combating torture.

¹⁴² See: Nigeria' *National Report to the Committee Against Torture*, dated September 29, 2012 by the Chairman of the national committee.

Chapter Five:

Observations, Recommendations and Conclusion

Observation

1. It has been observed that acts of torture are prevalent in Nigeria in public space and within detention centers. This trend has been attributed to lack of public awareness on human rights and particularly the right to dignity of person. Another reason for its prevalence is the fact that modern day equipment used in crime investigation and interrogation are scarcely made available to security agencies in Nigeria.
2. There is a lacuna in the administration of criminal justice in Nigeria, thereby giving opportunity for torture to occur during interrogation.
3. Torture is an absolute right that has become jus cogens and cannot be derogated from.
4. The application of torture in the medieval eras was seen to be tantamount to commission of a crime in the investigation of another crime; as such it was abolished because it violated the right to the dignity of person.
5. The African Charter on Human and Peoples Rights though prohibits torture, but does not provide it as a non-derogable right. This could lead to abuse by African Member states may take advantage to apply torture as a means of obtaining confession or information from persons suspected of having committed crimes.
6. Nigeria has ratified the United Nations Convention Against Torture and Other Cruel, Inhuman Treatment or Punishment (UNCAT) however it is yet to criminalize torture in its domestic laws.
7. Nigeria ratified the Optional Protocol United Nations Convention Against Torture and Other Cruel, Inhuman Treatment or Punishment (OPCAT) in 2009 and in the same year

set up a National Preventive Mechanism known as the National Committee against Torture. However the impact of the committee is rarely felt.

8. The Constitution of the Nigeria, 1999 (as amended) prohibits torture, however torture is yet to be *criminalized* in Nigeria, and the violation of the right to dignity is mostly instituted as civil matters before the courts which cases are rarely enforced against the perpetrators.
9. There is a lack political will from the legislative and executive arm of government in Nigeria to criminalize torture and to address the situation. The judicial arm of government is handicapped in its pronouncement with respect to torture cases, since there is no law criminalizing torture.
10. Nigerian has government oversight agencies mandated to enforce the violation of human rights and public complains, such as the National Human Rights Commission (NHRC) the Public Complain Commission (PCC) which Nigeria' Ombudsman. However, in practice these agencies seem reluctant to address cases of torture by security official. The Act creating the PCC ironically prevents it from addressing issues from the police or military.
11. The courts in Nigeria have awarded judicial remedies against acts of torture meted by security official. Some of these cases have resulted in declarations of acts of torture by the police, award of damages against the police, release or bail of victim from detention pending trial. However, it is sometimes difficult to obtain these damages from the police.
12. The Inter-American Convention to Prevent and Punish Torture in its definition of torture includes acts by medical personnel and all persons responsible for the detention of people. This is an extension of the UNCAT.

13. The Robben Islands Guidelines (RIG) is a non-binding instrument, which is use by the Committee to Prevent Torture in Africa (CPTA) to plead with African States to set up national torture preventive mechanism. It is non-persuasive and member states are at discretion to abide by the guidelines. This has a detrimental effect on the RIG and the CPTA.
14. Although over forty African States are parties to the Torture Convention, there is no regional convention or enforceable instrument to serve as guiding law for states to adopt laws against torture.

Recommendation

1. The National Human Rights Commission (NHRC) in collaboration with the National Orientation Agency (NOA) should carry out sensitization campaigns to enlighten the public on the rights, particularly on the prohibition of torture.
2. The Executive and Legislative arm of government should provide modern equipment for investigation of crime, to curtail the acts of torture by security agencies during interrogation. Philanthropic groups or donor agencies could also undertake this.
3. The legislative arm of government both at national and state level should urgently pass into law the Administration of Criminal Justice Bill, which allows for videoing and presence of counsel during interrogation of suspects, to avoid illegal forms of interrogation.
4. *A law criminalizing torture should be passed in Nigeria to reduce the menace, prevent claim of ignorance, create more awareness of the right to dignity of the person and make enforcement of the prohibition of torture more effective.*

5. An optional protocol to the African Charter on Human and Peoples Rights should be adopted making *torture a non-derogable right*. This may lead to the adoption of a convention against torture for the regional level.
6. Public orientation should be organized bring to the knowledge of people the National Committee Against Torture (NCAT). The mandate of the NCAT should be reinforced to enhance its quasi-judicial function, as this can serve to handle applications, which are not speedily addressed by the courts.
7. Advocacies by civil society organizations be organized to ensure oversight agencies are reenergized to carry out their mandates. The mandate of the PCC should be amended to ensure that it actually serves as an ombudsman regardless of whom the complaints are against.
8. More human rights training should organized for security agencies to ensure that they further equipped to carry out their duties.

Conclusion

Having undertaken this research, it is the author's conviction that the menace of torture will reduce and prevented a legislation is created criminalizing torture. The need for capacity building of security personnel and provision of modern equipment for investigation of crime cannot be over-emphasized as it has been attributed as a reason for torturing of suspects and accused persons. Nigeria needs to stand by its international obligation and political will to prevent and prosecute perpetrators of torture. It is the present author's view that this menace will reduce if there is a law to serve as deterrence. The African human rights mechanisms should adopt the strategies practiced in other jurisdictions, while being mindful of local setting, to combat torture.

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