

## THE ROLE OF THE UNITED NATIONS TOWARDS ACHIEVING A GLOBAL ANTI-TORTURE CULTURE\*

### Abstract

Globally, torture constitutes a serious violation of the physical and mental integrity of the human person. It involves the infliction of serious physical and/or mental pain on a person usually for the purpose of eliciting information or as a form of punishment. However, the unfortunate thing today in humankind's battle with torture lies in the fact that though torture has been rejected in principle by the world, it is yet to disappear as both *de jure* and *de facto* measures of political and legal control among many nations. Thus, this study considered the role of the United Nations (UN) in achieving a global anti-torture culture. The study found that to successfully actualize this ban on torture, nations should rely more on moral pressure as against threat of sanction which most often, are caught up in the web of inability to strike a balance between the commitment of UN member states and the sovereignty claims and ideological self-determination of individual nations involved. The study further found that the activities of human rights Non-Governmental Organisations (NGOs), local and international, if given more recognition within the operating mechanism of the UN, would better serve to enhance objectivity in the process of monitoring non-compliance with the ban on torture, this way helping the evolution of a robust norm.

**Keywords:** United Nations, Torture, Anti-Torture Ban

### 1. Introduction

Amongst the human rights issues of the current global order, torture has come to gain some prominence. It involves inflicting of serious physical and/or mental pain on a person usually for the purpose of eliciting information or as a form of punishment. Torture constitutes 'a serious violation of the physical and mental integrity of the person'.<sup>1</sup> Official definitions of torture have been offered by international instruments.<sup>2</sup> In practice, what is categorised as torture is what is perceived as the 'most serious offences against human dignity and personal integrity'; other less severe treatments are classified as 'cruel, inhuman or degrading treatment'.<sup>3</sup> Torture has been viewed to be intricately connected with the right to life as certain methods of depriving one his/her right to life could amount to torture.<sup>4</sup> Today, torture stands as a prohibited practice among nations. Notably, it was at the dawn of the Age of Enlightenment that humankind proscribed this practice as a *de jure* element in criminal procedure.<sup>5</sup> However, the new international order that followed upon the end of the World War II re-enacted this ban in a very emphatic and systematic manner through declarations, treaties and covenants.<sup>6</sup> However, the unfortunate thing today in humankind's battle with torture lies in the fact that albeit this practice has been in principle rejected by the world, torture is yet to disappear as both *de jure* and *de facto* measures of political and legal control amongst many nations. Thus, Smith<sup>7</sup> observes that while the Renaissance Era saw the birth of the ban on torture, the practice is today 'undergoing a most unfortunate' re-birth 'in many countries'.<sup>8</sup> Notably, these include states with supposedly an exemplary strong democratic culture such as the United Kingdom, Israel and most significantly the United States, particularly in the wake of the so-called War on Terror.<sup>9</sup>

### 2. Factors that Hamper a Satisfactory Realisation of the Anti-Torture Ban

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\*By **Chinemelum Nelson ARINZE-UMOBI**, Lecturer, Department of Public and Private Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria. Tel: +2348060913355. Email: cn.arinze-umobi@unizik.edu.ng nelsonzelo@gmail.com.

<sup>1</sup> R K Smith, *International Human Rights* (6th edn Oxford University Press, Oxford 2014) p. 235.

<sup>2</sup> Article 1 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

<sup>3</sup> A Smagadi, *Sourcebook of International Human Rights Materials* (British Institute of International and Comparative Law, London 2008) p. 106.

<sup>4</sup> *Ibid.*, p. 102

<sup>5</sup> J Herrmann, 'Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany', *Hastings Int'l & Comparative Law Review*. (2008)31 437, 459

<sup>6</sup> The Universal Declaration of Human Rights 1948 Article 5 declares 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

The International Covenant on Civil and Political Rights 1966 Article 7 declares 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984 Article 3 prescribes that 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'

<sup>7</sup> R K Smith, *op. cit.*, p. 235.

<sup>8</sup> See also J Herrmann, 459; Aphrodite Smagadi, p. 102.

<sup>9</sup> S Levinson, 'Precommitment' and 'Postcommitment': The Ban On Torture In The Wake of September 11'. *Texas Law Review* (2013) 81 2013, 2017.

Practically, as earlier noted, these factors stem from the fundamental incompatibility between the institutional set-up of the current international order and the quest to impose an enforceable set of uniform norms on nations that make up this order. What is the nature of this incompatibility? The international community as currently constituted is made up of sovereign 'enclaves' each with individual (and at times peculiar) needs and interests. This implies that while these nations participate in transnational affairs, they are still mindful of their domestic interests which they tend to guard jealously, at times even at the expense of their international obligations. Therefore, though it may be easy for nations to in principle subscribe to the ban on torture, upholding this in practice may be quite challenging as each state's domestic ideological, political, security and legal realities become an influential variable. The post-9/11 political cum legal discourses has so clearly underscored these seeming contradictions between states' commitment under the ban-on-torture regime and their domestic realities. In fact, during this time, some US state officials and commentators began to have a rethink over the proprietary of absolute exclusion of torture in the 'extraordinary' situation of threat posed by terrorism.<sup>10</sup> But whatever their arguments are, their conclusion would be *a priori* unjustifiable within the context of the existing international legal standards.<sup>11</sup> But the fact that such sentiments are coming from a clime as liberal as the United States lends strong credence to the observation that 'When human rights clash with the necessities of State security, it becomes difficult to view torture from a dispassionate perspective'.<sup>12</sup> Apparently, if there had been any agreement amongst these US commentators on the undesirability of torture, this has become unsettled by the shock of the 9/11 event and its seeming apocalyptic omen for the future of the country.<sup>13</sup>

Apart from the practical situations of threat to national security, there is also the no less influential factor of ideological differences among nations. Human rights generally tend to mean different things to different peoples depending on the ideological prism through which one is viewing.<sup>14</sup> Experience has shown that, like other aspects of human rights, torture is not immune to this uncertainty. There has not been agreement as to the exact meaning and scope of the wordings of the international human rights law instruments – including as they relate to torture. Many states ratify conventions subject to their cultural, religious and political ideologies. For instance, Islamic countries are not often willing to obey the dictates of Islamic laws to the force of international human rights treaties.<sup>15</sup>

These ideological variations in perceiving torture are sure to thrive against the backdrop of the fact that the very concept of torture, to some notable extent, has apparently remained amorphous. 'It is still very difficult to define the borderline, where pain or suffering turns into torture'.<sup>16</sup> This sentiment is equally trenchantly echoed in *Prosecutor v Delalic*.<sup>17</sup> The common tendency, therefore, has been for courts to approach each alleged instance of torture on its own merits given that no exhaustive *a priori* conception of torture has become attained.<sup>18</sup> Thus, as stated by Daniel Moeckli et al,<sup>19</sup> 'the land mark case of *Ireland v UK*',<sup>20</sup> the European Commission had to distinguish between treatment amounting to torture and other ill treatment. Needless to say, however, such an *a priori* (before the fact) conceptualization of torture would be fundamental to the success of any proactive engagement with the ban on torture.

In the face of these divergences in interests and ideologies among nations vis-à-vis the implementation of the ban on torture, the dilemma facing the world becomes clear given that the cooperation of these disagreeing states is still crucial to the successful implementation of this ban. As aptly observed by Tomuschat,<sup>21</sup> though 'human rights have become a concern of the international community as a whole, implementation processes still lie mainly in

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<sup>10</sup> S Levinson, p. 2020.

<sup>11</sup> In *Agiza v Sweden* (Committee against Torture, 24 May 2005) and *Aksoy v Turkey* Series A 1996-VI (1996) 23 EHRR 533, the courts reaffirmed the uncompromising stance of the international human rights law on illegitimacy of torture even in circumstances as grave as fighting terrorism.

<sup>12</sup> L-P F Rouillard, 'Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum,' *AM. U INT'L L. REV.* (2005) 21 10, 40.

<sup>13</sup> Joachim Herrmann argues that 'The question whether and to what extent torture and other kinds of ill-treatment might be justified is widely discussed in the United States today. To date, no satisfying answer has been found. There is doubt that a generally accepted answer could ever be found.' 437.

<sup>14</sup> C Tomuschat, *Human Rights: Between Idealism and Realism* (3<sup>rd</sup> edn Oxford University Press, Oxford 2014) p. 3.

<sup>15</sup> R K Smith, *op. cit.*, p. 164.

<sup>16</sup> A Smagadi, p. 104.

<sup>17</sup> ICTY-96-21-T (1998) para 469. Here the Tribunal for the Former Yugoslavia had affirmed that it 'is difficult to articulate with any degree of precision the threshold level of suffering at which other forms of mistreatment become torture'.

<sup>18</sup> A Smagadi, *op. cit.*, p. 104.

<sup>19</sup> D Moeckli et al, *International Human Rights Law*, (2<sup>nd</sup> edn Oxford University Press 2014) p. 178.

<sup>20</sup> *Ireland v UK* (1978) 2 EHRR 25, PARA 96.

<sup>21</sup> Tomuschat, 165.

the hands of states as holders of territorial sovereignty'.<sup>22</sup> There remains, thus, the question as to how much commitment individual nations, in their obstinate cling to sovereignty claims, would be willing to put in towards realisation of the goals of international human rights law. Secondly, even where a nation is genuinely committed, one may not entirely rule out the reality that deficiencies in the domestic criminal justice system could frustrate this goal.<sup>23</sup>

Therefore, in the face of this crucial role of individual sovereign states in ensuring satisfactory implementation of the ban on torture, the United Nations is surely constrained as to the much it can do. But nations have failed to cooperate, particularly where they face the bitter reality of choosing between sacrificing some domestic interest and complying with international law. They have done this often without having to face any sanction thereafter. A striking illustration of the potential frustrating effect of this scenario on realisation of the ban on torture could be found in *International PEN and others v Nigeria*<sup>24</sup> where the Nigerian government foisted a *fait accompli* on the international community by going ahead to execute the condemned nine activists in spite of the provisional order by the African Commission on Human and People's Rights for the execution to be stayed to allow it determine the case of alleged unfair trial and torture brought by the defendants. Consequently, the eventual ruling by the Commission indicting Nigeria must have only amounted to mere rebuke of the state authority and with no real redemptory value to the wronged. Secondly, Nigeria faced no sanction from the Organisation of African Unity (OAU).

Recently, on the 10<sup>th</sup> of February, 2020, the BBC published a documentary titled: 'The Torture Virus: Tabay 'rampant' among Nigeria's Security Forces'.<sup>25</sup> The documentary revealed the rampant use of tabay as a torture technique amongst security forces in Nigeria. It also revealed a flagrant disregard of the Nigeria's *Anti-Torture Act*<sup>26</sup> which was enacted to penalise the acts of torture and other cruel, inhuman and degrading treatment and to prescribe penalties for such acts, and for related matters. The Act provides in its *Section 2* acts that amount to torture and went ahead to provide an imprisonment period of 25 years in *Section 9* for contravention of *Section 2* of the Act. In a case involving 2 teenagers, the torturer by name Umara Bukau Kawumi was arrested and prosecuted alongside 4 others for a minor charge of causing hurt without provocation and were sentenced to 3 months imprisonment<sup>27</sup> as against being prosecuted under the Anti-Torture Act of 2017 which provides for 25 years imprisonment for such acts.

But be that as it may, it could be argued that if international human rights law is to retain any meaning in theory and practice, its force must transcend national sovereignty claims given that the very idea of upholding human rights at the international level is founded on the philosophy that the individual, though subject to the authority of his/her respective state, is an autonomous entity with full natural rights which enjoyment should not be subjected to the whims and caprices of the state power.<sup>28</sup> Thus, Tomuschat<sup>29</sup> may have summarised the 'incompatibility' the study is referring to here when he observes that 'qn the one hand, human rights seek to protect the individual against arbitrary governmental interference... On the other hand, individuals depend to a large extent on assistance by their governmental authorities'. Of course, this assistance includes the protection of the individuals' human rights.<sup>30</sup> Thus, from the perspective of the individual, his/her state is at the same time a potential violator and a potential protector of his/her human rights.

### 3. Torture and the Role of the United Nations (UN)

The pertinent question to be asked is, what could be the way out? Can humankind still optimistically look up to the United Nations for a more satisfactory performance in terms of safeguarding individuals' rights against torture? Within the context of the points so far made, it would be pertinent to first point out that the popular notion that the United Nations is too weak or even impotent to enforce her laws may be of very little benefit to us in

<sup>22</sup> This role of individual states in enforcing international human rights law was affirmed in *E Blanco Abad v Spain* (Committee Against Torture, 14 May 1998).

<sup>23</sup> In Nigeria for instance, systemic delays and corruption in the justice system have appeared to pose formidable obstacles to the nation's quest to realize the ideals prescribed by the contemporary liberal justice culture.

<sup>24</sup> African Commission on Human and People's Rights (1998).

<sup>25</sup> Available at <https://www.youtube.com/watch?v=AzqP7z62iIU&bpctr=1581597629> Accessed 13 February 2020.

<sup>26</sup> Anti-Torture Act, 2017.

<sup>27</sup> The Torture Virus: Tabay 'Rampant' among Nigeria's Security forces – BBC Africa Eye Documentary Available at <https://www.youtube.com/watch?v=AzqP7z62iIU&bpctr=1581597629> Accessed 13 February 2020.

<sup>28</sup> Tomuschat, p. 2.

<sup>29</sup> *Ibid.*, p. 2.

<sup>30</sup> Smith aptly notes that 'for international and regional human rights instruments, primary responsibility for the enforcement of human rights treaties rests with States. States accept the obligations enshrined in the treaties and must strive to ensure full enjoyment of rights and freedoms within their jurisdiction. Thus, for individuals, the immediate remedy should be internal to the State, national human rights institutions where they exist play a significant role in this process,' 154.

exploring possible solution to the problem we have with us. In the opinion of this writer, such argument may be self-defeating as it fails to hold anyone responsible for the perceived failings of the international order. The UN as it is currently constituted is nothing but a group of sovereign nations that have decided to unite under one umbrella. By coming together under such a political body, each of these nations' *ipso facto* has accepted to cede some of her sovereign power to this body for the sake of common good – a sort of re-enactment of the Social Contract at the transnational level. Consequently, this body – the UN – can be powerful only to the extent these constituent sovereigns permit her to be. Put in another way, the United Nations, as a joint creation of these consenting sovereign states, would wield power and authority only to the extent these states have *willingly* ceded their individual sovereign power and authority to her. Therefore, accusing the United Nations of weakness in terms of enforcing her laws (such as the ban on torture) may only serve to blur our understanding of our problem and hence our ability to apply a genuine solution; conversely, the blame – if ever there is any – should go to the individual nations whose creation the UN is.<sup>31</sup> It is from these nations that the UN evolved and not the other way round. Power flows from these nations to the UN and not otherwise. For instance, the fact that none of her human rights expert bodies can make any binding ruling<sup>32</sup> would not be the fault of the United Nations. Therefore, if as a way of attempting to solve the problem of the apparent poor enforcement of the ban on torture, we begin to talk about *empowering* the United Nations, such a project would appear *a priori* impotent as it amounts to putting the cart before the horse; attending to the symptom in place of the disease.

So in approaching the problem of enforcing the ban on torture, our attention should first focus on the member states of the United Nations. As in the absence of these member states, the UN becomes non-existent. The question then becomes; what actions could these member states take to bring about a more effective enforcement of the ban on torture? As earlier stated, the institutional set-up of the current global order will continue to resist any absolute enforcement of common normative standards on each and every nation of the world. Hence, while the deterrence of sanctions will play its role, persuasive force will be inevitable in bringing nations to offer their cooperation. By *persuasive force* is meant the *force of moral persuasion* that will motivate every nation to cede some of her ideological autonomy and sovereign pride whenever the exigencies of the ban on torture calls for that. In other words, what is paramount is an established global pro-human rights culture that will naturally foster free compliance with international human rights law by states – including as it relates to torture. This is what Addison Harris refers to as 'norminternalization' – evolving of internationally acceptable norms that would be freely internalised by individual nations. He contends that with the evolution of such globally popular norms, attitude of nations towards ban on torture would move from conformity to compliance to obedience... As you move from grudgingly accepting a rule one time only to habitually obeying it, the rule transforms from being some kind of external sanction to becoming an internal imperative'.<sup>33</sup> Harris<sup>34</sup> opines that international human rights law is enforced through what he calls 'transnational legal process' which works in three phases: 'the institutional *interaction* whereby global norms of international human rights laws are debated, *interpreted*, and ultimately *internalized* by domestic legal systems'.

Hence, Smith<sup>35</sup> wonders why states have been so much disposed to comply with the Convention on the Rights of the Child and have been 'willing to provide a full range of civil, political, economic, social, and cultural rights to children but not adults. He guesses that the reason for this 'is that States will follow global political will, and the wave of popular support for children's rights enables this extraordinary success story'. In other words, Rights of the Child as a philosophy has gained formidable global prominence and persuasion; it has emerged as an irresistible global culture which nations have come to internalise.

So, how would this culture be achieved? In line with the argument of this study, this is to be done through the agency of the member nations of the UN. These nations need to reflect inward to search for those actions and inactions of theirs that may have hampered the growth of this culture. After all, the wordings of all the UN and other international bodies' instruments on human rights clearly show that it was, at least in principle, the intention of these consenting nations to work towards the emergence of a global order where no one's human rights would be abused. More importantly, the very philosophy of founding a body such as the United Nations presupposes a desire to work towards emergence of common positive culture with global persuasion.

<sup>31</sup>Smith makes the point well when he argues that 'The lawyers have drafted the Standards of international human rights, cooperation from politicians is necessary to secure realisation.' In other words, while the UN experts have written down the texts of the law, the extent of implementation would ultimately depend on the extent of cooperation of the politicians of member states', 154.

<sup>32</sup>Tomuschat observes that, 'It is clear that none of the human rights expert bodies has the power of issuing binding determinations. The 'concluding observations' are no more than recommendations to the state concerned', p. 233.

<sup>33</sup> A C Harris, 'How Is International Human Rights Law Enforced?' *Indiana Law Journal* (1998) 74 1397, 1399.

<sup>34</sup> *Ibid.*

<sup>35</sup> R K Smith, *op. cit.*, p. 162.

Practically speaking, this search for a persuasive normative culture vis-a-vis the ban on torture ought to be led by the more powerful member states. By the more powerful member states, we are here particularly referring to the holders of the UN Security Council permanent seats, who, not so coincidentally, are also the major founding members of the UN. Driven perhaps by their sovereign ambitions, these victors of the World War II *ab initio* contrived and literally imposed on the world a body that was from the day one handicapped as a fully credible moral authority that would successfully midwife the evolution of such culture and absorb all nations of the world into its womb. By rushing to irreversibly constitute themselves into the most powerful organ of the UN (the permanent membership of the Security Council), these nations laid the foundation for much of the suspicion and allegation of hegemony that have significantly undermined the position of the UN as a trustworthy champion of global norms. Thus, like with other norms which the UN is meant to foster, the very beginning of the international human rights culture becomes grounded in ideological contestations. For instance, Tomuschat,<sup>36</sup> aptly argues that in drafting the declaration on human rights, the West and the USSR had to settle for a compromise as each side sought to preserve its internal ideological sphere against the emerging international order. So far, these powerful nations have dominated the UN that it has become difficult for the United Nations to, without inciting controversy, 'enforce a set of prescribed human rights in the present global environment' given the perception 'that human rights are prescribed by the privileged few for the world at large'.<sup>37</sup>

That these more powerful member states should lead the quest for evolving of a morally persuasive global anti-torture culture is both practical and symbolic – the real time political, economic and cultural influences of these nations will give some practical impetus to this objective; on the other hand, their prestigious office in the UN will afford it some symbolic persuasiveness. In other words, they should begin to lead by example. But unfortunately, some of these nations have appeared to be equally guilty as others in terms of disobeying the ban on torture. For instance, while the human rights credentials of China have been generally questioned, the United States has been found by courts to have employed torture. Notably, in the wake of the War on Terror, the US, for the purposes of achieving its objective of extracting information using torture, had transferred terror suspects to allied countries (such as Egypt, Jordan and Morocco) where there is less institutional barrier against torture. Interestingly, these nations are signatories to international treaties prohibiting torture.<sup>38</sup>

A similar situation of not leading by example is found in the failure of the United States to sign the Rome Treaty establishing the International Criminal Court; an action that imposes a serious moral burden on the United Nations as she seeks to assert her authority as a global watchdog against human rights abuses. Significantly, this non-cooperative attitude of the US is not limited to the ICC treaty but extends to some other principal treaties relating to international human rights law.<sup>39</sup> And given her 'role in promoting human rights globally',<sup>40</sup> this attitude by the world's 'beacon' of democracy and freedom would continue to sabotage the much desired emergence of a morally persuasive global human rights culture.

Generally, the ideological contestations among nations of the world which have undermined the evolution of a global culture of human rights have, in many cases, resulted from the ideological contestations among these powerful nations. Stated differently, because these powerful nations have failed to agree, the world has failed to agree. When, for example, the US fails to agree with Russia on alleged human rights abuses in war-torn Syria, the world would tend to become polarised between supporters of the US and supporters of Russia. But conversely, if the two agree, the world may become united behind the two giant nations against a common enemy Syria. This is a hypothetical picture but it is certainly instructive.

In a nutshell, the point being advanced is that by applying their global strength and influence towards affirming the legitimacy of the United Nations and her legislations, the powerful countries would be doing a lot towards the evolving of the culture of moral persuasion and moral authority around the will of the UN, including as it relates to torture. Thus, while this writer concurs with Addison Harris's 'norminternalization' thesis (referenced above) which recognises debating and interpretation as leading to internalisation of global legal norms on torture, she is of further opinion that such internalization would be realized only to the extent the nation's leading this debating and interpretation exclude live above their ideological differences in doing so.

Another step that could be taken by the UN member states towards furthering a persuasive global no-torture norm is pursuing further clarification and operationalisation of the principles contained in the human rights instruments. Determining what amounts to torture could be controversial in many instances as the wordings of the instruments

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<sup>36</sup> Tomuschat, 32

<sup>37</sup> R K Smith, *op. cit.*, p. 174.

<sup>38</sup> S Levinson, p. 2021.

<sup>39</sup> R K Smith, *op. cit.*, p. 163.

<sup>40</sup> *Ibid.*, p. 163.

could lend themselves to varying interpretations. This is true of the UN documents as it is of those of other international bodies such as the European Union which definitions of human rights, as observed by Anderson Sanders, Richard Young and Mandy Burton<sup>41</sup>, 'are particularly vague (and modest in scope), reflecting the need to achieve consensus amongst states with radically different legal traditions.' The dilemma of this situation is trenchantly echoed by the Tribunal for the Former Yugoslavia in *Prosecutor v Delalic*,<sup>42</sup> where it was admitted that it 'is difficult to articulate with any degree of precision the threshold level of suffering at which other forms of mistreatment become torture'.

Against this backdrop, it is the opinion of this writer that this situation could be helped by more detailed articulation of acts that constitute torture in UN human rights instruments. It may be helpful, drawing on practical experiences of the world over the years, to add as annexure to each of these instruments, a wordlist of acts that would constitute torture as a way of minimising the controversies. Admittedly, in rejecting this option, the Tribunal for the Former Yugoslavia<sup>43</sup> made a salient point that such measure may only succeed in giving some escape route to the torturer who might just have to adjust his/her skill (the court spoke in favour of continuing with the existing practice of treating each instance of alleged torture based on its particular facts). Nevertheless, this study argued that the way out would be to leave such wordlists open ended (i.e. inconclusive) such that the courts would still retain the right to declare as torture acts that are not precisely mentioned in the instruments, in which case such acts would be included in the word list upon any future amendment of the instrument.

It may be further helpful to the course of achieving a stronger global anti-torture culture if the existing mechanisms for such enforcement are well streamlined. Today, there are other regional and sub-regional bodies with legislations against torture and mechanisms for their enforcement. Ensuring coherence and synergy between the UN (as the overall coordinating authority) and these various regional and sub-regional mechanisms would help the enforcement of the ban on torture and international human rights law in general. Under this arrangement, for instance, all cases regarding torture must not come to the UN courts or tribunals; a case might be commenced, say before the African Commission for Human and People's Rights, while appeal would lie from there to a UN Court or Commission. This way, the UN becomes the overall interpreter of statutes whose decisions would serve as the overall guiding norms for regional and sub-regional judicial bodies. This arrangement would ensure the integration of the resources of these regional and sub-regional bodies in the implementation of the ban on torture thus potentially addressing the problem of resources and backlogs afflicting UN human rights implementation bodies.<sup>44</sup> As observed by Smith,<sup>45</sup> the growth in the membership of the UN has brought pressure on the resources of the UN as this enlargement in membership did not come with any corresponding increase in the existing resources. Significantly, integrating regional bodies in the human rights project of the UN would be a crucial step towards addressing the burden of accusation of *western hegemony* borne by the body.

#### 4. The Role of Non-Governmental Organisations (NGOs)

Similarly, attaining a more robust global human rights culture (including as related to torture) would benefit from the integration of the role of the Non-Governmental Organisations (NGOs). The role of an NGO like Human Rights Watch in bringing to the fore cases of human rights abuses within nations cannot be obscured. While as 'a matter of fact, no country actually admits to engaging in 'torture,' especially as a systematic act of public policy',<sup>46</sup> communications of 'neutral' bodies like NGOs may help in scrutinising the claims of nations vis-a-vis their compliance or otherwise with the anti-torture laws. Harris<sup>47</sup> in arguing in favour of his *norm-internalization* thesis as the most practical means of enforcing the ban on torture points out that:

Many efforts at human rights norm-internalization are begun not by nation-states, but by 'transnational norm entrepreneurs,' private transnational organizations or individuals who mobilize popular opinion and political support within their host country and abroad for the development of a universal human rights norm. Such norm entrepreneurs first became prominent in the nineteenth century, when activists such as Lord William Wilberforce and the British and Foreign Anti-Slavery Society

<sup>41</sup> A Sanders et al, *Criminal Justice* (4<sup>th</sup> edn Oxford University Press, Oxford 2010) p. 31.

<sup>42</sup> ICTY-96-21-T (1998) para 469.

<sup>43</sup> *Prosecutor v Delalic* ICTY-96-21-T (1998) para 469.

<sup>44</sup> Smith points out that 'Financial problems beset the treaty-monitoring bodies. At present most of them meet on a regular but infrequent basis, often as little as twice a year for two-or-three-week periods. At such levels, it is almost impossible to process the reports and complaints they receive. In some ways, this is a natural problem. When many of these treaties were drafted, the number of potential contracting States was less than half the current membership of the United Nations. The increase in workload is inevitable with increase in the number of independent States', p. 169.

<sup>45</sup> *Ibid.*, p. 169.

<sup>46</sup> S Levinson, p. 2039.

<sup>47</sup> A C Harris, p. 1409.

pressed for treaties prohibiting the slave trade, Jean-Henri Dunant founded the International Committee of the Red Cross, and Christian peace activists, such as America's William Ladd and Elihu Burritt promoted public international arbitration and permanent international criminal courts.

The significance of according more recognition to the role of the NGOs is highlighted by two factors. First is that the 'reporting system' which is the most common monitoring mechanism employed by the UN<sup>48</sup> involves member states giving account – nay verdict on their human rights performance – a situation that will potentially make them a judge in their own case. Second is the fact that United Nations human rights committees which are supposed to act impartially on matters of human rights (including torture) have ministers and other state servants working as their personnel.<sup>49</sup> This situation contrasts with what is obtained within nations where separation of powers ensures some reasonable degree of credibility in the activities of judicial bodies. Contrarily, with the NGOs acting as 'advocates' of human rights victims, some form of checks and balances might be within sight.

Importantly, when NGOs are local as against foreign NGOs, their scrutiny of human rights performance of their host nation tends to come with greater credibility, thus potentially refuting claims of external ideological hegemony. 'Comments by national NGOs on the official reports of their own government lack all the overtones of Western cultural domination which similar information may have that is submitted by international NGOs'<sup>50</sup>.

## 5. Conclusion and Recommendations

In conclusion, the study summarised its argument by recalling its earlier position that improving the current rate of compliance with the global ban on torture can be attained only by *moral pressure* and not *threat of sanction* given that the UN, as currently constituted, lacks the capacity to so impose herself – at least not on all nations of the world. In other words, while the UN may lack the capacity to in real time punish nations for torture and other human rights abuses, its moral authority could effectively serve to pressure the states to act in accordance with globally approved standards.<sup>51</sup> This moral authority, it has been argued, can be enhanced by having the leading member states of the UN lead by example, better clarification/operationalisation of the texts of the no-torture instruments, integrating the regional and sub-regional bodies in the implementation of the ban on torture, and integrating the role of the NGOs. This argument is concisely echoed by Smith<sup>52</sup> when he concurs that:

There is little that can be done to prevent the States that choose to disregard the international standards from so doing. Yes, there are deterrents, but no, they cannot deter everyone... What is of paramount importance is that the United Nations continues to provide an international standard for all peoples, a set of fundamental rights and freedoms which could form the basis of human dignity.

Against the foregoing background, this study argued that the failure of the world, particularly within the context of the United Nations, to enforce the ban on torture is rooted in the fundamental incompatibility between the very institutional set-up of the current international order (which has the UN as the ultimate authority) and the quest to impose an enforceable set of uniform norms on nations that make up this order. This incompatibility, it will be argued, has kept the ban on torture in constant and seemingly unending battle against the sovereignty claims and ideological self-determination of individual nations – these nations resisting, as it were, absolute imposition of the UN's will on them. This study contended that as things stand now, it would amount to a utopian dream for anyone to assume that our world will any soon transcend this incompatibility between sovereignty claims and fully compact international order. Consequently, the study suggested that within the limitations of the existing international order, more compliance with the ban on torture could be achieved among nations by relying more on *moral pressure* as against *threat of sanction* which, from all indications, would prove ineffective.

Stated differently, the world should explore ways of evolving a strong anti-torture culture whose moral force would exert considerable influence on internal policies and choices of nations. In another sense, what is required is a kind of anti-torture 'bandwagon' which all nations would like to follow. Achieving this persuasive culture would require a number of actions from nations of the world. First, the leading member states of the United Nations – particularly those wielding enormous powers within the Security Council – should begin to lead by example in terms of complying with the ban on torture. This would ensure that the UN asserts her moral authority in the face of the perception that she has not been completely impartial. Second, the texts of the UN legislations on torture might need some further clarification/operationalisation as a way of reducing ambiguity; a measure so

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<sup>48</sup> R K M Smith, p. 155.

<sup>49</sup> Tomuschat, Pp. 219 – 220.

<sup>50</sup> Tomuschat, p. 230.

<sup>51</sup> *Ibid.*, Pp. 233 – 234.

<sup>52</sup> R K Smith, p. 172.

critical to the emergence of a generally accepted anti-torture norm among nations. Thirdly, it would also be helpful for the UN to integrate the regional and sub-regional bodies in the implementation of the ban on torture; streamlining their activities with those of the UN agencies as a way of mobilising all regions of the world towards arriving at a uniform or nearly uniform anti-torture culture. Lastly, the activities of human rights NGOs, local and international, if given more recognition within the operating mechanism of the UN, would better serve to enhance objectivity in the process of monitoring non-compliance with the ban on torture, this way helping the evolution of a robust norm.

However, while this writer is convinced on the effectiveness of the above suggestions, he is still of the view that the long-standing, more radical, suggestion for the reform of the UN should not be overlooked by the world as enforcement of the ban on torture would receive its greatest impetus from such measure. This reform would involve the UN member nations reflecting backward to the very moment of the founding of the body to address some of the foundational 'mistakes' such as the structural imbalance as reflected in the Security Council, which as has been argued here, has contributed in no small measure to inhibiting so far the capability of the UN to foster a persuasive global moral culture. In other words, fully bridging the gap between the legislation against torture and its implementation is to a large extent tied to the correcting of this fundamental structural error in the set-up of the United Nations. If the problem is foundational, no complete solution can be achieved by scratching on the surface of the issue. So, the world ought to go back to the drawing board, to the very spot where the current UN began its journey; where the first wrong step was taken - the wrong step of allowing ideological ambitions to dictate the rest of the journey. What is being advocated here, stated differently, is for a balance of power that would ensure that all nations of the world cede equal amount of their sovereignty to the UN. A few member nations have remained much more powerful than others simply because they *ab initio* craftily avoided ceding as much of their sovereignty as others would eventually cede to the world body. Such inequality negates the quest for emergence of global cultural homogeneity including of course as it relates to the ban on torture.