

LEGAL FRAMEWORK ON TORTURE PREVENTION IN NIGERIA: THE WAY FORWARD*

Abstract

The issue of torture and ill treatment of citizens in Nigeria worsens every day and remains widespread particularly in places of detention despite legislations even enshrined in the 1999 Constitution as part of our Fundamental Human Rights against such. Torture has been seen to be a routine occurrence in Nigeria, largely used to extract confessions or as punishment for alleged crimes. Hundreds of suspects in police and military custody across the country are being subjected to a range of physical and psychological torture/ ill-treatment. This paper is aimed at awakening the Nigerian government to look into the rampant violation of the right against torture and an advocacy to not just ensure that perpetrators are brought to book but to make provisions for rehabilitation. It looked into the legal framework for torture in Nigeria, both national and international instruments. It particularly examined the Nigeria Anti- Torture Act and highlighted its lacuna. One of such lacunae is the Rehabilitation Rights for victims of torture as conditions in most detention places constitute at the very least cruel, inhuman or degrading treatment. Human rights violations of victims of torture in Nigeria are on the extreme. It was strongly recommended that the Anti Torture Act provide for rehabilitation rights of victims and support institutional and sustainable structures for its implementation, provide an effective framework for monitoring and evaluation of the enforcement of its legislations on this issue. This is expedient to curb this menace eating deep into the fiber of our justice system and create a society where human rights and the rule of law are not mere articles of faith.

Keywords: Torture, Prevention, Nigeria, Way Forward

1. Introduction

In November 2016, the African Commission after undertaking a promotional mission in Nigeria, expressed concern about allegations of violations of human rights and humanitarian law norms including excessive use of force by security forces and civilian militia groups and the lack of independent investigations into these allegations. The African Commission recommended that Nigeria expedite the adoption of the Bill on Torture and urged it to open independent investigations into violations of human rights and humanitarian law committed in the North East region in the context of the fight against Boko Haram.¹ The US State Department found in 2015 that in fighting Boko Haram and crime and insecurity in general- 'security services perpetrated extrajudicial killings, and engaged in torture, rape, and arbitrary detention, mistreatment of detainees and destruction of property.'² While the atrocities committed by members belonging to Boko Haram have been universally condemned, the security forces have also come under criticism for their disproportionate use of force during counter-insurgency operations. The allegations of human rights violations committed by security forces increased in particular following a State of emergency declared by former President Goodluck Jonathan in 2001 which was subsequently extended several times until November 2014. The State of Emergency gave overly broad powers to security forces³ that are reportedly responsible for widespread serious human rights violations including extrajudicial and summary executions, torture and enforced disappearance and rape.⁴

Torture and ill- treatment in Nigeria are not however confined to the Security Forces' fight against terrorism. It is also a significant problem in the context of general policing and detention. Civil society organizations have documented how security and law enforcement agencies including the police, military, State services and prison staff of the Nigerian Security and Defence Corps are allegedly responsible for widespread torture and ill treatment⁵. As far back as 2007, the UN Special Rapporteur on Torture concluded 'that torture and ill treatment are widespread in police custody and particularly systematic at CIDs (Criminal Investigation Department).'⁶ The Special Rapporteur concluded that 'Torture is an intrinsic part of how the police operate within the country.'⁷ Former detainees reported to Amnesty International in 2016 that officers from the 'Special Anti- Robbery Squad' (SARS) subjected them to horrific methods of torture, including hanging, starvation, beatings, shootings and mock executions.⁸ SARS, set up to combat violent crime has reportedly used these methods of torture as a means of extracting confessions and lucrative bribes.⁹ A 2010 study by the Network of Police Reform in Nigeria (NOPRIN) reported that the practice of torture is informally institutionalized in police detention centres with torture facilities referred to as 'torture chambers' and officers designated to torture suspects referred to as 'OIC Torture' (officer in charge of

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¹African Commission, 'Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples Rights to the Federal Republic of Nigeria', 2 December 2016 at <http://www.achpr.org/press/2016/12/d335>.

²United States of America State Department, 'Nigeria 2015 Human Rights Reports', p. 1 at <https://www.state.gov/documents/organization/597.pdf>

³ See further, Amnesty International, 'Stars on their Shoulders, Blood on their Hands: War Crimes Committed by the Nigerian Military', June 2015, (Amnesty International, Stars on their shoulders) pp. 4-9 at <http://www.amnestyusa.org/research/reports/stars-on-their-shoulders-blood-on-their-hands-war-crimes-committed-by-the-nigerian-military>

⁴ UN OHCHR 2015 Report para 56

⁵International Rehabilitation Council for Torture Victims, 'Torture and Ill treatment in Nigeria,' p. 5, November 2016, at https://wsuu.com/irct/docs/nigeria_report

⁶ UN Special Rapporteur on Torture, 007 Mission Report, para 40.

⁷*Ibid*

⁸Amnesty International Nigeria: Special Police Squad 'get rich' torturing detainees and demanding bribes in exchange for freedom, 'Amnesty International, SARS Report, 21 September 2016, at <https://www.amnesty.org/en/latest/news/2016/09/Nigeria-special-police-squad-get-rich-torturing-detainees/>

⁹*Ibid*

torture)¹⁰. According to NOPRIN's research, notable forms of torture in police detention centres have included clubbing of soles of the feet and ankles, banging of victims head against the wall, burning of victims with cigarettes, hot irons or flames, squeezing or crushing of fingers and ripping out of the fingers or the nails.¹¹ The UN Special Rapporteur on Torture had similarly found following his mission to Nigeria in 2007 that 'detainees in Nigeria cells were frequently tortured to extract confessions'¹² The Nigerian human rights organization, 'Access to Justice' reported in 2005 that the Nigerian Police Force was using torture as an 'institutionalized and routine practice in its criminal investigation process.'¹³ This is in spite of the fact that Nigeria is a state party to several regional and international human rights mechanisms that prohibit the use of torture and other ill-treatment. These include the Universal Declaration of Human Rights (UDHR), the Convention Against Torture and Other Cruel, Inhuman/ Degrading Treatment/ Punishment (UNCAT); and its Optional Protocol (OPCAT); the International Convention for the Protection of All Persons from Enforced Disappearance (ICERD); and the African Charter on Human and Peoples' Rights (ACHPR). Nigeria has also signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of a Child (CRC). Unfortunately, only 24 out of the 36 States of the Federation have signed and passed it into State laws. The 12 states yet to pass these treaties into state laws are all states in the Northern part of Nigeria. In addition to being a state party to several regional and international human rights mechanisms as well as ratifying some international conventions against torture, inhuman and degrading treatment, the Nigerian Constitution prohibits torture and other inhuman and degrading treatment. Section 34 (1) states that: 'Every individual is entitled to respect for the dignity of his person and accordingly, a) no person shall be subjected to torture, or to inhuman or degrading treatment.' Nigeria's criminal and penal codes fail to explicitly prohibit the use of torture and other forms of ill treatment to extract information. As such, everyday practice is inconsistent with the constitutional provision prohibiting torture. In 2017, a legislation against Torture was finally enacted which is the Anti-Torture Act of 2017 which is a step in the right direction though it did not do holistic justice to the issue of torture and equally importantly rehabilitation rights for torture victims.

2. Definition of Torture

Torture has been an object of study within a number of academic disciplines. It is a national problem even though it has an international dimension. The Black's Law Dictionary, 9th edition defined torture as the infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure. 'By torture I mean the infliction of physically founded suffering or the threat immediately to inflict it, where such infliction or threat is intended to elicit, or such infliction is incidental to means adopted to elicit, matter or intelligence or forensic proof and the motive is one of military, civil or ecclesiastical interest.'¹⁴ Amnesty International equally defined torture. It was the first organization that defined torture from a political and operational point of view to be used in eligibility for care, human rights advocacy, and for surveys and epidemiological research. The initial simple and broad definition of torture was used in the 'Report on Torture' in 1973. Torture was defined by Amnesty as 'the systematic and deliberate infliction of acute pain on another, or on a third person, in order to accomplish the purpose of the former against the will of the later'¹⁵ The definition by Amnesty International was similarly adopted by the World Medical Association in its Tokyo Declaration in 1975. Gofter defined torture as an intentional excessive suffering which an individual experiences against their will and cannot independently stop.¹⁶ According to him, there are not so many principles in international human rights law which are absolute and therefore cannot and should not be disputed. One of few principles rarely or never questioned is the prohibition of torture and cruel and inhuman treatment/punishment in particular by agents of the state. According to former UN Special Rapporteur on Torture, Manfred Nowak, there is a requirement of intent for an act to constitute torture. 'A detainee who is forgotten by the prison officials and suffers from severe pain due to lack of food is without doubt the victim of a severe human rights violation'. However, this treatment does not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food for the purpose of extracting certain information, that ordeal in accordance with Article 1, would qualify as torture.¹⁷ Schmid defines torture to include killings, summary executions, killing in presumptive armed conflicts, fatal torture, killing by abuse of power in a legal process, killing by death squad, genocide, detained-disappeared and torture.¹⁸ Torture is any act by which severe pain or suffering, whether physical or mental is intentionally inflicted by the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent

¹⁰ Network of Police Reform in Nigeria, NOPRIN Criminal Force: Torture, Abuse & Extrajudicial killings by the Nigerian Police Force,' 2010 at <http://www.noprin.org/criminal-force-0100519.pdf>, p.68 accessed 16th July 2021

¹¹*Ibid* p. 69

¹² UN Special Rapporteur on Torture, 2007 Mission Report, para. 37

¹³ Access to Justice, 'Breaking Point: How Torture & Police Cell System violate justice in the Criminal Investigation process in Nigeria,' 2005 p.5

¹⁴ J. Health (1989), Torture and the English Law 3 (1982), Black's Law Dictionary 9th edition.

¹⁵ Amnesty International, 1973

¹⁶R. Carver, L. Handley PhD, 'Does Torture Prevention Work?' Research project commissioned by the Association for the Prevention of Torture, report of Exploratory Phase

¹⁷Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN DOC A/HRC/13/39/Add.5, 5 Februsry 2010, para 34.

¹⁸A. P. SCHMID (1989), Project Interdisciplinair Onderzoek Naar Oorzaken Van Mensenrechtensch Endigen (P.I.O.O.M.) *Research On Gross Human Rights Violations* (1989) note 1, at 25-26

consistent with Standard Minimum Rules for the Treatment of Prisoners.¹⁹ For an act to amount to torture the following elements must be established:

Severity of physical or mental suffering caused to the victim²⁰

It has been established that the infliction of severe pain or suffering will amount to torture or other cruel, inhuman or degrading treatment.²¹ Even though the courts are yet to establish a clear-cut threshold of severity that differentiates torture from other cruel, inhuman or degrading treatment, there is an agreement that in the hierarchy of pain inducing acts, torture stands at the apex.²² The brutality being inflicted by security agents particularly the then Special Anti Robbery (SARS) is so severe that deaths often results from these acts.²³ Even when such acts do not lead to death, it is enough that they inflict severe pain upon the victim. The victim's 'point of view' must be a factor in determining the severity of an act.²⁴ In determining the severity or gravity of an act, there must be an appraisal of its effect or impact on the particular victim and not a mere analysis which takes no consideration of the victim involved.²⁵ For example what constitutes torture to a 78-year-old man may not constitute torture to a young athletic man of 28 years. This is due to the fact that the same acts of torture may inflict a different level of pain on the old man than it would on the young man. The threshold of torture is subjective and is determined putting into consideration factors beyond the act.

Intentionally inflicted²⁶

The harm inflicted must be intentional.²⁷ The *mens rea* for torture is met by evidence that the accused intentionally inflicted severe pain or suffering on a person.²⁸ The acts and extent of brutality inflicted by the Nigeria Police Force especially the SARS unit as revealed in gory details during the #ENDSARS saga in 2020 and even before then proves that these are well thought out acts not that arising out of mistake or negligence.²⁹ Furthermore, intention will be presumed where an individual is taken into police custody in good health but returns injured and it becomes incumbent upon the State to provide a plausible explanation of how those injuries were caused.³⁰

Specific purposes³¹

In order for an act to amount to torture, it must have been inflicted for the purpose of achieving one or more of the following prohibited purposes: obtaining information; punishing; intimidating or coercing; or for any reason based on discrimination of any kind.³² For an act to constitute torture, there must be a targeted end in mind, which motivates the infliction of pain on the victim.

Consent or acquiescence of a public official or other person acting in an official capacity³³

It has been established that even the most heinous acts or inhuman treatment inflicted by an individual will not be considered as torture.³⁴ The focus of torture under international human rights law is on acts being perpetrated by agents of the state and in 'respect of which the machinery of investigation and prosecution might therefore not function normally'.³⁵

3. National Legislations on Torture Prevention

Constitution of the Federal Republic of Nigeria

The Nigeria Constitution clearly prohibits torture and made it a non derogable right. Section 34 of the Constitution³⁶ provides that:

¹⁹Article 1(1) of the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

²⁰*Prosecutor v Delalic et al*, International Criminal Tribunal of the Former Yugoslavia, 468; *Ireland v. United Kingdom*, European Court of Human Rights, para 167.

²¹*Prosecutor v Delalic*, International Criminal Tribunal of the Former Yugoslavia, 470; *Ireland v. United Kingdom*, ECtHR, 167

²²G Miller. *Defining torture*, Floersheimer Center for Constitutional Democracy, New York, 2005, 8.

²³Babatunde Elkanah, "Torture by the Nigerian Police Force: International Obligations, National Responses and the Way Forward" *Stathmore Law Review*, January 2017

²⁴A Cullen, 'Defining torture in International law: A critique of the concept employed by the European Court of Human Rights; 34 *California Western International Law Journal*, 33

²⁵C Inglese, The UN Committee against Torture: An assessment, *Kluwer Law International*, The Hague, 2001, 209.

²⁶*Selmouni v. France*, ECtHR Judgement of 28 July 1999, para 403, 426. Also see Hathaway O, Nowlan A and Spiegel J, "Tortured reasoning: The intent to torture under international and domestic law", 52(4), *Virginia Journal of International Law*; 2012, 791-837, 801.

²⁷Article 1 *United Nations Convention Against Torture*.

²⁸O Hathaway, A Nowlan and JSpiegel, *Tortured reasoning: The intent to torture under international and domestic law*, 801

²⁹<https://www.amnesty.org/download/Documents/AFR4495052020ENGLISH.PDF>; Human Rights Watch, Rest in Peace: Police Torture and Deaths in Custody in Nigeria, Human Rights Watch, New York, 2005, 27 accessed 16th August 2021

³⁰*Selmouni v France*, European Court of Human Rights, 403, 426

³¹*Prosecutor v Delalic*, International Criminal Tribunal of the Former Yugoslavia, 470.

³²Article 1, *United Nations Convention Against Torture*.

³³Article 1, *United Nations Convention against Torture, Prosecutor v Delalic*, ICTY, 473.

³⁴Miller, *Defining Torture*, p. 17

³⁵Wendland I, *A handbook on state obligations under the UN Convention against Torture*, Association for the Prevention of Torture, Geneva, 2002, 28-29

- 1) Every individual is entitled to respect for the dignity of his person, accordingly:
 - a) No person shall be subjected to torture or to inhuman or degrading treatment
 - b) No person shall be held in slavery or servitude and;
 - c) No person shall be required to perform forced or compulsory labor
- 2) For the purposes of subsection (1) (c) of this section, 'forced or compulsory labor' does not include-
 - a) Any labor required as a consequence of the sentence or order of court;
 - b) Any labor required of the members of the armed forces of the Federation or the Nigeria Police in pursuance of their duties as such;
 - c) In the case of persons who have conscientious objections to service in the Armed Forces of the Federation, any labor required instead of such service
 - d) Any labor required which is reasonably necessary in the event of any emergency or calamity threatening the life or well being of the community,
 - e) Any labor or service that forms part of-
 - i) Normal communal or other civic obligations for the well being of the community,
 - ii) Such compulsory national service in the armed forces of the Federation as may be prescribed by an Act of the National Assembly or
 - iii) Such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an act of the National Assembly

The provision of the Constitution is absolute and has no exception. This means that the provision preventing torture, inhuman and degrading treatment is an essential and a non derogable right.

Anti-Torture Act 2017

The Anti-Torture Act undoubtedly presents an important step forward in Nigeria's fight against torture and ill-treatment. It defines and criminalizes torture and ill-treatment, emphasizes on the non-derogatory nature of the absolute prohibition of torture, provides for an express right to complain about torture and for victims' right to reparation. The Act has a title, explanatory memorandum and 13 sections. Section 1³⁷ of the Act titled *Duty of Government*, imposes an obligation on government to ensure that all persons, including suspects, detainees and prisoners are respected at all times and that no person under investigation or held in custody is subjected to any form of physical/mental torture. It admonishes government to adhere to domestic and international standards on absolute condemnation and prohibition of torture. Section 2³⁸ titled *Acts of Torture*, defines what amounts to torture. It states that 1) torture is deemed committed when an act by which pain and suffering, whether physical or mental, is intentionally inflicted on a person to – a) obtain information or confession from him or a third person; b) punish him for an act he or a third person has committed or suspected of having committed; or c) intimidate or coerce him or a third person for any reason based on discrimination of any kind.' It goes on to suggest Torture does not include pain or suffering in compliance with lawful sanctions. It then lists what constitutes torture, some examples in the Act include:

1. Systematic beatings, head-banging, punching, kicking, striking with rifle butts and jumping on the stomach.
2. Food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eaten
3. Electric shocks
4. Cigarette burning, burning by electric heated rods, hot oil, acid by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices directly on the wounds
5. The submersion of head in water or water polluted with excrement, urine, vomit or blood;
6. Blindfolding;
7. Threatening a person or such persons related or known to him with bodily harm, execution or other wrongful acts;
8. Confinement in solitary cells put up in public places;
9. Confinement in solitary cells against their will or without prejudice to their security;
10. Prolonged interrogation to deny normal length of sleep or rest and
11. Causing unscheduled transfer of a person from one place to another, creating the belief that he shall be summarily executed etc.

Section 3³⁹ titled *No justification for torture*, is the stand out provision of the Act. It states that no exceptional circumstances whatsoever, a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture. It prohibits secret detention facilities, solitary confinement, incommunicado detentions where torture may be carried out. It makes it very clear that evidence obtained from torture is inadmissible in any court except for use against a person accused of torture. Section 4⁴⁰ titled *Right to complain*, allows a person alleging that torture has been committed, whether the person is the victim of the offence or not, a right to complain to the police, National Human Rights Commission or any other relevant institution or body having jurisdiction over the offence. It provides that the victim and complainant must be protected. Section 5⁴¹ titled *Assistance to filing complaints* provides that a person who has suffered torture or any interested party on his behalf may seek legal assistance in the proper handling and filing of the complaint from

³⁶ The Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended 2011

³⁷ Section 1 of the Anti Torture Act 2017

³⁸ *Ibid* S. 2

³⁹ *Ibid* S. 3

⁴⁰ *Ibid* S. 4

⁴¹ *Ibid* S. 5

the Human Rights Commission/NGOs/Private persons. Section 8⁴² titled *Penalties*, provides that a person who commits torture shall be liable on conviction to imprisonment to a term of 25 years. If death occurs as a result of the torture, the person involved will be charged with murder. It goes on to say that this does not in any way take away the victim's right to civil claim in court for damages or compensation for the torture. Sections 9, 10 and 11⁴³, titled *Regulatory Agency, Education Campaign, Rules and Regulations* respectively, empowers the Attorney-General of the Federation and other law enforcement agencies to ensure effective implementation of the Act. This includes training and education of personnel involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. It also empowers the Attorney-General of the Federation with the approval of the President to make rules and regulations for the effective implementation of the Act. Section 12 and 13⁴⁴ are *Repeal and Citation* sections. Significant features of the Anti-Torture Act 2017 are:

- 1) The Anti-Torture Act 2017 provides a comprehensive definition of torture. It goes on to give elaborate instances of what constitutes torture.
- 2) The Act criminalizes torture. It prescribes offences and penalties for any person who commits torture or aids, abets, counsels or procures any person to commit torture.
- 3) It makes freedom from torture a non-derogable right. It states clearly no exceptional circumstances whatsoever, a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture. It states further that an order from a superior officer or from a superior in the office or public authority shall not be invoked as a justification for torture.
- 4) It imposes an obligation on the police to inform a person arrested, detained or under custodial investigation of his right to demand a physical and psychological examination by an independent and competent doctor of his choice after interrogation.
- 5) The Act protects victims and witnesses of torture.
- 6) The Act allows for personal civil action in damages and compensation for torture.⁴⁵

Violence Against Persons (Prohibition) Act (VAPP Act) 2015

Section 4 of the VAPP Act⁴⁶ contains provisions against physical violence or torture. It states that a person who willfully causes and inflicts physical injury on another person by means of any weapon, substance or object has committed an offence and punishable with imprisonment not exceeding 5 years or a fine not exceeding N100 000.00 or both. Where an attempt to commit the act is made, the punishment is imprisonment not exceeding 3 years or to a fine not exceeding N200 000 or both. Anyone who however incites, aids, abets or counsels another person to commit the act is guilty of an offence with the punishment of imprisonment not exceeding 3 years or to a fine not exceeding N200 000 or both.⁴⁷ Its restrictive position on sentencing which is imprisonment for not more than 5 years unfortunately does not show the gravity that should be attached to the crime of torture.

Nigeria Police Force (Establishment) Act, 2020

The new Nigeria Police Force (Establishment) Act, 2020 is a welcome development with laudable provisions which if implemented will go a long way to curb the incidence of torture and other inhuman and degrading treatment prevalent amongst the Nigerian Police Force.

Some of its new provisions particularly on torture prevention include the following⁴⁸:

- a. When a person is arrested and kept in custody, the Police have a duty to inform the next of kin or any other relative of the suspect of the arrest, at no cost to the suspect.⁴⁹ Before now it was possible in fact commonplace for a person to be arrested and denied the right to inform his/her people that he has been taken into custody but this has been expressly prohibited under the new Police Act.
- b. Torture and inhumane treatment was expressly prohibited. A person who is arrested must not be subjected to any form of torture, cruel, inhuman or degrading treatment.⁵⁰
- c. Under the new Act there should be prompt notification of delayed detention. Where a suspect who is arrested for an offence other than a capital offence is not released on bail within 24 hours, a court having jurisdiction with respect to the offence may be notified by application on behalf of the suspect. While it is unclear whether the application is to be made by a relative or an interested person on behalf of the suspect or by the Police, the New Act provides that the application for bail may be made orally or in writing, and the court shall consider the reason for continuous detention and grant the suspect bail if it is necessary to do so.⁵¹
- d. In the new Act the police officer in charge of a police station has a duty to make a report to the nearest Magistrate on the last working day of every month on cases of persons arrested without warrant whether they have been

⁴² *Ibid* S. 8

⁴³ *Ibid* S. 9, 10, 11

⁴⁴ *Ibid* S. 9, 10, 11

⁴⁵ Anti-Torture Act 2017: Issues, Implication for political officers- Vanguard news-<https://www.google.com/amp/s/www.vanguardngr.com/2018/05/anti-torture-act-2017-issues-implication-police-officers/amp> accessed 18th July 2021

⁴⁶ Section 4 of VAPP Act 2015

⁴⁷ [https://www.ajol.info> viewPDF Page I 39 VIOLENCE AGAINST PERSONS \(PROHIBITION\) ACT 2015](https://www.ajol.info/viewPDFPageI39VIOLENCE%20AGAINST%20PERSONS%20(PROHIBITION)%20ACT%202015) accessed 17th July 2021

⁴⁸ <https://lawpavilion.com/blog/things-you-should-know-about-the-new-police-act-2020/> accessed 17th July 2021

⁴⁹ Section 35(3) Police Force (Establishment) Act, 2020

⁵⁰ *Ibid* Section 37

⁵¹ *Ibid* Section 64

granted bail or not. The Magistrate shall forward the report to the Criminal Justice Monitoring Committee who shall analyze and forward the reports to the Attorney General. The Chief Magistrate or any other Magistrate who has been appointed by the Chief Judge is now also required to conduct an inspection of the Police Station within his territorial jurisdiction.⁵²

- e. In ensuring that the Nigeria Police Force promotes and protects the fundamental human rights of persons as provided for by the Constitution, the African Charter on Human and Peoples Right, and other international legal instruments on human rights. The Police Force is forthwith expected to collaborate with relevant agencies to provide legal services to accused person where necessary.⁵³

In order to further achieve this, the new Act requires that every Police Division must be assigned a police officer who is qualified to practice as a legal practitioner whose responsibility will be to promote human rights compliance by the officers of the Division. These additional provisions are laudable, the issue remains with its application.

Administration of Criminal Justice Act (ACJA) 2015

Section 8(1) of the Administration of the Criminal Justice Act provides that any person who is arrested must not be subjected to any form of torture, cruel, inhuman or degrading treatment.⁵⁴ Generally in criminal matters where the defendant is found guilty of the alleged crime, the only 'remedy' was sentencing. Victims of crimes are often neglected and left without any form of compensation. The ACJA has however brought succour to victims of crime by broadening the powers of the court to award commensurate compensation in deserving cases to victims of crime.⁵⁵ Further, the Act provides that a court may, within the proceedings or when passing judgement, order the convict to pay compensation to any person injured by the offence, a bonafide purchaser for value, or for defraying expenses incurred on medical treatment of a victim injured by the convict in connection with the offence.⁵⁶ This is a very commendable provision of the law in that it does not seek to punish the offender, but also to ameliorate the hardship occasioned by the commission of the offence thus, serving justice in both ways.⁵⁷

4. Torture Prevention under International Law

The UN Human Rights Committee has stated that the obligation not to subject people to torture or ill-treatment is a rule of customary international law and the prohibition of torture is a pre-emptory norm.⁵⁸ In addition to customary international law the following international conventions prohibit torture:

Nuremberg and Tokyo Charter: The war crimes tribunals convened immediately after the World War II in Nuremberg Germany and Tokyo, Japan treated torture as a crime against humanity.

Universal Declaration of Human Rights: The Universal Declaration of Human Rights in Article 5 stated that, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' However the declaration was not binding which means that it did not have the force of international law.

Geneva Conventions on the Laws of Armed Conflict: The four Geneva Conventions establish rules for the conduct of international armed conflict and especially for the treatment of persons who do not or who no longer take part in hostilities including the wounded, the captured and civilians. All four conventions prohibit the infliction of torture and other forms of ill-treatment.

International Covenant on Civil and Political Rights (ICCPR) and the Human Rights Committee (HRC): The 1966 International Covenant on Civil and Political Rights was the first universal human rights treaty explicitly to include a prohibition of torture and other cruel, inhuman or degrading treatment which aims to protect both the dignity and the physical and mental integrity of the individual.⁵⁹ The two provisions of the ICCPR particularly relevant to this prohibition are Articles 7 and 10. The Covenant in Article 7 reads, 'No one shall be subject to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. While it forbids them in absolute terms, Article 7 does not contain a definition of the prohibited acts. In its General Comment on Article 7, the Human Rights Committee (HRC) stated that it did not consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between torture and other forms of ill-treatment though such 'distinctions depend on the nature, purpose and severity of the treatment applied'.⁶⁰ The HRC has indicated that the assessment of whether particular treatment constitutes a violation of Article 7 'depends on all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.'⁶¹ Elements such as the victim's age and mental health may therefore aggravate the effect of certain treatment so as to bring it within Article 7.

⁵² *Ibid* Section 69 &70

⁵³ *Ibid* Section 5

⁵⁴ Section 8(1) of Administration of Criminal Justice Act 2015

⁵⁵ *Ibid* Section 314

⁵⁶ *Ibid* Section 319

⁵⁷ <https://lawpavilion.com/blog/the-administration-of-criminal-justice-act-2015-acja/> accessed 17th July 2021

⁵⁸ *Prosecutor v. Delalic & Ors*, ICTY 16/11/1998 stating that the prohibition of torture constitutes a norm of *jus cogens*

⁵⁹ HRC, General Comment No 20, "Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment" (1992) S 2 in UN Doc. HRI/GEN/1/Rev. 7

⁶⁰ *Ibid* S. 4

⁶¹ *Violanne v Finland*, HRC Communication No. 265/1987, 7 April 1989 S. 9.2

However, it is not sufficient that treatment be capable of producing an adverse physical or mental effect; it must be proven that it has occurred in a specific case.⁶² The second sentence of Article 7 ensures that the prohibition is understood to include any medical or scientific experimentation conducted without the free consent of the subject. This specific prohibition was a response to atrocities committed by doctors in Nazi concentration camps during World War II. In this regard, the Committee has stated that special protection is necessary for persons not capable of giving valid consent, in particular those deprived of their liberty, who should not be subjected to any medical or scientific experimentation that may be detrimental to their health.⁶³ In contrast to the UNCAT, there is no requirement in the ICCPR for a level of involvement or acquiescence by a State official for an act to be qualified as torture or ill-treatment. Rather, 'It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.'⁶⁴

Article 10 (1) ICCPR states: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

Article 10 complements, for those who have been deprived of their liberty, the prohibition of torture and ill-treatment. Not only may detainees not be subjected to treatment contrary to Article 7, but they also have a positive right to be treated with respect. This provision means that detainees may not be 'subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'⁶⁵ It therefore covers forms of treatment which would not sufficiently severe to qualify as cruel, inhuman or degrading under Article 7.⁶⁶

Convention Against Torture (CAT)

In 1984, for the purposes of describing specific measures against torture, the UNCAT included a definition of torture: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions.⁶⁷

The UNCAT also requires States to prevent 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture...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.'⁶⁸ However, the UNCAT provides no definition of such acts. The Committee against Torture has itself recognised that 'In practice, the definition threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear'.⁶⁹ One common element of the definition of torture and other forms of ill-treatment under the UNCAT is that all must involve a public official or someone acting in an official capacity. However, for the purposes of the UNCAT, cruel, inhuman or degrading treatment may 'not amount to torture' either because it does not have the same purposes as torture or because it is not intentional or perhaps because the pain and suffering is not 'severe' within the meaning of Article 1.

Under the CAT, torture is never permitted even in times of war. Article 2 explicitly states that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.' Article 3 stipulates that state parties are prohibited from returning or extraditing a person to another state where there are substantial grounds to believe the person would be in danger of being subjected to torture.

Optional Protocol to the Convention against Torture

In 2002 the UN General Assembly adopted the Optional Protocol to the Convention against Torture, which allows independent international and national experts to conduct regular visits to places of detentions within the State parties to assess the treatment of prisoners and make recommendations for improvement.⁷⁰

⁶²*Ibid*

⁶³*Ibid* s. 7

⁶⁴HRC, General Comment No. 20, 1992, S.2

⁶⁵HRC, General Comment No 21, "Humane treatment of persons deprived of their liberty" (1992), S 3 in UN Doc. HRI/GEN/1/Rev.7

⁶⁶Notwithstanding this lower threshold level of severity, and the fact that Article 10 as a whole is not included in the list of non-derogable rights in Article 4 ICCPR, the HRC has concluded that Article 10(1) expresses a norm of general international law, and is therefore not subject to derogation. See HRC, General Comment No. 29, "Derogations during a state of emergency", s 13(a), in UN Doc. HRI/GEN/1/Rev. 7

⁶⁷ Article 1 UNCAT

⁶⁸Article 16 UNCAT

⁶⁹CAT General Comment No 2, "Implementation of article 2 by State Parties" UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007) s. 3. This lack of a clear distinction potentially poses a problem as regards those State obligations which apply only to torture and not to other acts of ill-treatment.

⁷⁰ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res A/RES/57/199, adopted Dec 18, 2002 [reprinted in 42 I.L.M. 26 (2003) 64 parties, 54 depositaries]

Statute of the International Criminal Court (ICC)

Articles 6, 7(2) (c), and 8 of the ICC expressly prohibit torture.

Istanbul Protocol

The Istanbul Protocol is a manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. It was finalized in August 1999 and has since been endorsed by the United Nations regional organizations and other bodies. It is intended to serve as a set of international guidelines for the assessment of torture or cruel, inhuman or degrading treatment or punishment and for investigating such allegations, and reporting findings to the judiciary or other investigative bodies.⁷¹

African Charter on Human and Peoples' Rights

Article 5 of the African Charter on Human and Peoples' Rights prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment. The Charter is enforced by the African Commission on Human and Peoples' Rights (the Commission).⁷² Article 1 of the ACHPR places an obligation on State parties to create such measures- legislative and administrative to ensure compliance with the provisions of the Charter. Thus every State party to the ACHPR has an obligation to ensure that all individuals within its jurisdiction and authority are protected from torture and other forms of inhuman treatment. This is evident in the decision of the Commission in *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, where the Commission held that failure of the Chadian government to protect its citizens from torture constituted a breach of the State's obligation under Article 5 of the ACHPR.⁷³ One of the options that the Charter expressly provides for as measures to be taken by states is the enactment of domestic laws prohibiting and criminalizing torture and other forms of inhuman treatment.⁷⁴ The Commission in expounding on this provision has made it clear that the mere existence of domestic legislation will not suffice, States must ensure that effective functioning of such legislation and its enforcement to the extent that any incidents of torture and other inhuman treatment are investigated and prosecuted.⁷⁵ The Commission has also interpreted State obligation under Article 1 of ACHPR to include an obligation to compensate victims of abuses. In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission held that the obligation to respect and protect means that 'any person whose rights are violated would have an effective remedy as rights without remedies have little value'.⁷⁶ The right to compensation is not affected by the existence or absence of a prosecution in the said case.⁷⁷ Thus a victim will be entitled to compensation whether or not the perpetrator is being tried. Thus, Nigeria as a party to the ACHPR has an obligation to compensate those who have suffered one form of torture or the other in the hands of the police. Without such compensation in place, the State cannot be said to be protecting the rights of its citizens and fulfilling its obligation under the ACHPR. It must be noted that unlike the CAT and the ICCPR, the ACHPR has been passed as a domestic law in Nigeria.⁷⁸ this implies that its provisions are enforceable in the country and before the national courts in the same manner as a domestic law is. Thus the obligation of Nigeria under the Charter is double-fold. Nigeria is obliged under the Charter both as an international instrument and as a national law. In *Fawehinmi v Abacha*, the Supreme Court of Nigeria held that having passed into domestic law, 'the Charter possesses a greater vigour and strength than any other domestic statute'.⁷⁹ Despite this affirmation by the apex court of the country, the implementation of the provision of this Charter is still in question in Nigeria.

The Commission has a responsibility to ensure compliance with the ACHPR but is handicapped by the fact that it lacks the power to enforce its decisions. A decision of the Commission is to be treated with confidentiality and can only be made public upon the permission of the Assembly of Heads of States and Governments.⁸⁰ The subjection of the Commission to a political arm of the African Union makes it impossible to guarantee its impartiality in the discharge of its functions and responsibilities. A state also enjoys protection from public scrutiny and the media pressure even when it has been decided that such a State is guilty of the contravention of the provision of the ACHPR.

5. Shortcomings of the Anti-Torture Act 2017

In spite of the important progress brought by the promulgation of the Anti Torture Act 2017, the current Act raises a number of concerns as its provisions fall short of Nigeria's obligation under international law in the following ways.

- 1) Section 2 of the Act provides for a definition of torture that does not expressly state that the list of enumerated purposes is non-exhaustive.

⁷¹ EA Oji. (2013) *'Responsibility for Crimes Under International Law'* Odede Publishers, 2013 pp 62-68

⁷² Article 30, African Charter on Human and People's Rights, 1520 UNTS 217

⁷³ *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, AfrCommHPR, Comm No. 74/1992, Activity Report (1995), *Purohit and Moore v The Gambia*, AfrCommHPR, Comm No. 241/2001, 16 Activity Report (2003)

⁷⁴ Article 1 and 5, African Court on Human and Peoples' Rights.

⁷⁵ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, African Commission on Human and People's Rights, Comm No. 245/2002, 21 Activity Report (2006) 159; *Amnesty International and Others v Sudan*, African Commission on Human and People's Rights, Comm Nos. 48/1990, 50/1991, 52/1991,89/1993, 13 Activity Report (1999), 56.

⁷⁶ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, 171

⁷⁷ Association for the Prevention of Torture, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*, 2008, Article 50.

⁷⁸ African Charter on Human and Peoples' Rights in Nigeria (Ratification and Enforcement) Act (Cap. A9 of Nigeria).

⁷⁹ *Fawehinmi v Abacha*, para 15

⁸⁰ Article 59, African Charter on Human and People's Rights, 1520 UNTS 217.

- 2) The Act lists forms of criminal responsibility yet does not criminalize attempts to commit torture as required by CAT.⁸¹
- 3) The Act's provision does not include provisions barring amnesties,⁸² immunity for the crime of torture,⁸³ statute of limitations,⁸⁴ and other impediments to prosecution and punishment of torture.⁸⁵
- 4) The Act also does not highlight that it is an obligation for the authorities with investigatory powers such as police to investigate wherever there are reasonable grounds to believe that an offence under the Act has been committed, even if there has been no complaint.
- 5) There is no provision for refolement as required under Article 3 of CAT
- 6) The Act also did not make provision for rehabilitation rights of victims of torture as required under CAT⁸⁶
- 7) According to Article 4 of CAT, an attempt to commit torture and an act by any person which constitutes complicity or participation in torture should be made an offence under State's criminal law. This provision is however not contained in our Anti-Torture Act of 2017
- 8) The penalty for torture which is a maximum sentence of 25 years' imprisonment is restrictive and not in line with international best practices to show the gravity of the offence of torture and deter offenders. A mandatory minimum imprisonment sentence will better serve this purpose.

Nigeria should in compliance with its regional and international human rights obligations ensure that its Anti-Torture Act aligns completely with international best practices to curb this menace. Beyond legislations, torture violations should be thoroughly investigated and perpetrators sanctioned to deter recurrence. Effective systems for monitoring and evaluating progress on the implementation of the extant provisions should be set up if not legislations no matter how beautifully drafted will be obeyed more in breach defeating its essence. Law enforcement and security forces in Nigeria must accept human rights as part of security governance in a democratic dispensation and appreciate that respect for human rights is central to fighting torture within the criminal justice system and during counter terrorism operations.

6. Conclusion and Recommendations

Torture is a systemic problem in Nigeria, as an instrument of political repression/suppression, as a tool used in law-enforcement and as one of the methods employed in war/conflict situations. Thousands of survivors suffer from the physical injuries and psychological consequences of torture. They also suffer from a lack of recognition and justice for the wrongs done to them. Even following the large scale atrocities committed in Nigeria's past by the Boko Haram, Fulani herdsmen insurgent groups as well as our security agencies as exposed in the 2020 #ENDSARS protest, the current government has only taken half-hearted steps to improve the human rights situation. There is yet no prosecution or conviction for perpetrators of torture and rehabilitation for people that were clearly torture victims is yet to materialize. The National Human Rights Commission carries the burden of being expected to provide justice and reparation even with limited financial support from the government and our slow judicial system. While there is progress in criminalizing torture by virtue of the Anti-Torture Act of 2017, as well as some other legislations on torture prevention like the Administration of Criminal Justice Act of 2015, the new Police Act of 2020, the issues of enforceability and implementation of these laws come to fore. Furthermore, till date, the cases of litigation on this issues bordering on torture has focused mainly on habeas corpus and prevention, with only a handful seeking to assert victims' rights, ensuring accountability and prosecution of erring officials. There is no developed culture of strategic litigation that would assist in tackling systemic problems, either before domestic courts or regional bodies such as the African Commission on Human and Peoples' Rights.

Having an effective torture prevention and rehabilitation system for victims of torture in Nigeria is not going to work with an instant solution. An unfortunate program that allows torture, sees it as normal and is perpetrated by especially those in positions of authority is already running in our society. It is going to take a process, an effective and organized system built on knowledge to gradually rid our society of this menace over time as well as seeing to it that the rights to rehabilitation for those already tortured are given to them. The following are the recommendations of this research.

- The leadership (those in authority) and the citizens should always be regularly sensitized on the harmful effects of torture. There is a quiet lack of trust in the government and leadership as people see the dehumanizing way the citizens in custody are being treated by those who have sworn to protect them. The lack of trust cripples the support system the government needs from the people to be effective leading to general decadence in governance and democracy. The awareness should include reminders of the legal and institutional framework available such as the provisions of the law dealing with such offence, attendant punishment, where are how to lodge a complaint. Situations of torture most time thrive in environments of ignorance.
- Adequate human rights education should be periodically given to security and law enforcement agents and members of the judiciary. A combination of targeted training on required skills in torture prevention, joint selection and litigation of key cases promises to set the needed precedents for the benefit of large groups of torture survivors and those at risk of torture. Beyond the human rights education which is in place presently especially in Eastern Nigeria, systems for monitoring and evaluation of compliance of security agents should be put in place.
- A thorough, independent and impartial investigation into allegations of torture should be set up with systems to follow through every investigation panel till the purpose for its establishment will be achieved. Case management

⁸¹UNCAT, Article 4

⁸²Committee Against Torture, General Comment No 2, para 11.

⁸³*Ibid*, para 5

⁸⁴Committee Against Torture, General Comment No 3, para. 38

⁸⁵Committee Against Torture, General Comment No 2, para 5.

⁸⁶Article 12-14 of CAT

system of data accounting for numbers of tortured victims should be set up within police detention facilities and out of the facilities. In 2020, following the #ENDSARS protest investigation panels to look into the complaints of torture by the Special Anti Robbery Squad (SARS) was set up. After the initial emotional excitement of having an investigative panel of inquiry in various states to look into this issue had died, the outcome of the panels' investigation is yet to be made public. This is because systems were not put in place to follow through the purpose for which the panels were set up till it is realized. This should be followed up.

- Public officials alleged to have engaged in torture and any other dehumanizing act should be prosecuted and if found guilty adequately punished according to the law to serve as deterrence to their colleagues.
- All detainees in military and police custody should have immediate and unhindered access to their family members, lawyers as well as medical attention. The guidelines as provided by the Constitution under Chapter IV should be complied with *strictu sensu*.
- Equally, there should be register of all persons placed under arrest and a comprehensive database of all places of detention, including their location, number of persons detained, their compliance with international human rights and every other relevant information with systems for periodic updates.
- Institutions/ organizations publicly or privately owned dealing with human right issues such as National Human Rights Commission should be given unhindered and unrestricted access to detention facilities across Nigeria with or without notice across Nigeria.
- Civil society organizations should develop legal programmes in close consultation with victims, victims associations and community groups as the ultimate beneficiaries. It is important that such legal programmes are made sustainable in the long run. International actors have a role to play in this especially donors in consistently making available the required funding. Equally international human right organizations can aid this goal by sharing their expertise and collaborating on projects with a view to enhancing capacity as well as developing and implementing appropriate strategies for continuity.
- The Anti Torture Act of 2017 needs to be reviewed to bring it at par with international best practices. Its shortcomings have been highlighted in detail in the preceding part of this paper. The reviewed Act should clearly make provisions for rehabilitation of torture victims whether their perpetrators were prosecuted or not. As a short term measure, the government can include rehabilitation in the standard operating guideline for the implementation of the existing law on torture. In addition, certain words used in the Act need to be removed. For instance the words 'severe torture' in the act needs to be amended to read torture as there is no level of torture that should be condoned and to remove all ambiguity. On what constitutes acts of torture Section 4(a) (5) should be amended and the words '...until the brink of suffocation...' be removed. Equally in Section 4(a) (8) the word 'essential' be removed as every part of the body is essential and in Section 4 (a) (12) the words 'point of asphyxiation' should be deleted. The part of section 5 of the Act reading, '...refers to a deliberate and aggravated treatment or punishment...' should be amended to read, '...refers to an aggravated treatment or punishment...'
- Furthermore, for effective implementation, monitoring and evaluation, the National Human Rights Commission in the various states and FCT should oversee its implementation with periodic reports that should contain the number of cases involving torture which have been or are being prosecuted, conviction and sentence secured and rehabilitation given to victims so far. The Committee that drafted the Anti Torture Act should equally be in charge of monitoring and evaluating its implementation to ensure compliance with its provisions.