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# CRIMINALISATION OF TORTURE IN NIGERIA: A DESIDERATUM

IKPANG, Aniedi J.
Faculty of Law, University of Uyo, Nigeria

## ABSTRACT

The use of torture as a mechanism of extortion and a routine method of interrogating persons suspected of having committed criminal offences has assumed an alarming proportion. In Nigeria, security operatives particularly the police, adopts torture for obtaining confessional statements. The country is yet to adopt the United Nations Convention Against Torture 1987. This paper explores the nature and use of torture by the state and private entities in Nigeria and, evaluates the constitutional standpoint thereof. It presents arguments for the necessity of criminalising torture in line with instruments adopted by the international legal community and the criminal statutes enacted by many jurisdictions.

Keywords: Torture, Confession, Convention, Criminalisation.

## INTRODUCTION

The word 'torture' comes from the French *torture*, originating in the Latin *tortura* and ultimately derives from *torquere*, meaning - 'to twist'. The word is also used loosely to describe more ordinary discomforts that would be accurately described as tedious rather than painful.[1] It is used as a method of interrogation, punishment and coercion.

The ancient Greeks and Romans used torture for interrogation. Until the 2nd century AD, torture was used only on slaves. After this point, it was used against all members of the lower classes to the extent that a slave's testimony was admissible only if extracted by torture, on the assumption that slaves could not be trusted to reveal the truth voluntarily.[2]

In the Old Testament Period, when Adam and Eve violated the sacred ordinance of God and ate the forbidden fruit in the Garden of Eden, God did not use torture to extract confessions from them. The Biblical account records that He only used question and answer approach in eliciting the confessions.[3] Even after their confessions, He had compassion on them, did not torture them but made garments of skin for Adam and his wife in order to cover their nakedness.[4]

In ecclesiastical jurisprudence, the origin of torture started when Jesus Christ was arraigned before Pontius Pilate on the allegation that, He claimed to be the King of the Jews and that He would pull down the ancient temple at Jerusalem and rebuild it in three days. But during the trial and findings by Pontius Pilate the

[1] Available at http//en.wikipedia.org/wiki/torture, retrieved on 10/08/2011.
[2] *Ibid*.
[3] *The Holy Bible*, Genesis 3: 9 – 13.
[4] *Ibid*, Genesis 3: 21.

governor, he discovered that Jesus Christ did not actually commit the offences levelled against him by the Jews, but he nevertheless sentenced him to death and slapped him in order to pacify, pamper and placate the Jews. The soldiers took Jesus into the Praetorium and put a crown of thorns on His head, some spat on him while others struck him on the head with a staff. They ordered him to carry his Cross to Golgotha,[5] the place of execution. This was an act of torture against him. The Jews also tore his garments and by casting lots and dividing it among themselves and almost would have rendered him naked or nude but for a small parchment of the lion or a piece of clothing which they used in covering his manhood. Finally, instead of shooting him with a gun to die instantly, they nailed him to the Cross of Calvary, which they had strategically mounted in order to mock him and deride His followers. They gave him vinegar to drink.[6] The purpose of nailing him on the Cross, in the view of this piece, was to make him feel the pangs of pains and death gradually. But in contemporary times, the Roman Catholic Church has changed its medieval approach towards torture.[7]

Thus, the concept of torture was regarded to be compatible with society's concept of justice during the time of Jesus Christ. For example, Romans, Jews, Egyptians and many others cultures during that time-included torture as part of their justice system. The Romans had crucifixion, Jews had stoning and Egyptians had desert sun death. In the Middle Ages, the Dominicans gained a reputation as some of the most dreaded innovative torturers in medieval Spain as torture was usually conducted in secret in an underground cell. In England, particularly in Tudor and early Stuart periods, torture was commonly used but was abolished around 1640. It was also in use in America during the colonial period.[8]

In Europe, torture was widespread in many jurisdictions, but it was abolished in Spain in 1808, Portugal in 1826, in Frances in 1780 in Denmark in 1770, in their criminal justice systems. This was a paradigm shift from the inhuman treatment of torture, which had characterised their aristocratic administrations. It is, however, instructive to opine that torture is abolished today in the United Kingdom and the United States of America through the 5th amendment to the American Constitution, which protects against self-incrimination.

In Nigeria, there were incidents of torture in the ways of life of the indigenous communities.[9] This was undoubtedly interlarded in their unwritten customary criminal law. One of such indigenous communities is the *Ibibio* ethnic group. The *Ibibios*, according to historical accounts, are the semi Bantu people who migrated from the Southern part of Africa through central Africa particularly the Cameroon. It was during the Stone Age that the ancestors of the *Ibibio* occupied the Central *Benue* valley; evolved the *proto – Bantu* language and other common religious and social institutions including the conception of God.[10] Eventually, from the Central *Benue* valley, there was a further southward migration into the forest regions most probably using both the Cross River waterway. The *Ibibio* eventually moved down to *Ibom* and *Usak Edet* through the Cameroon grassland.[11] The movement continued until they have settled in the present *Ikot Oku Ikono* village in the outskirt of *the Uyo metropolis.*

[5] Mathew 27:33. Golgotha was a place in which the torturers called 'The Place of the Skull'.
[6] See generally Mathew 27.
[7] See the Catechism of the Catholic Church, No. 2297 - 2298 (1994) .
[8] See note 1 above.
[9] Nigeria is a country with more than 250 heterogeneous ethnic groups.
[10] Abasiattai, M. B; . *Akwa Ibom And Cross River States, The Land, The People and Their Culture*, 1st ed. (Calabar: Wusen Press Ltd, 1987), p. 52.
[11] Abasiattai, M. B; *The Ibibio: An Introduction to the Land, The People and Their Culture*,.1st ed. (Calabar: Alphonsus Akpan Press, 1991), p. 65, See also, E. A. Udo; *Who Are the Ibibio* (Onitsha: Africa Rep. Publishers Ltd, 1983), p.150.

In the area of customary criminal law, which had hitherto applied in *an Ibibio ethnic group*, people whom *Obong* in Council[12] adjudged as thieves were stripped naked, beaten up and paraded around the village. Depending on the gravity of the offences committed, the culprits were punished with their bodies tied up with robes, kept in the open and they were made to look straight to the rays of the debilitating sun. Some were ostracised from the community or banished out rightly, while others were denied food for upward of one week, sold into slavery or beheaded at the evil forest maintained for such purpose[13]. But the foregoing is now history with the abolition of customary criminal law in Nigeria by virtue of the repealed 1963 Republican Constitution[14], which dramatically changed the modes of torture/punishment.

During the military regime in Nigeria, torture was perpetrated by security forces, which adopted the rule of men rather than the rule of law, as the underlying basis in order to subdue any form of opposition against the administrations of the dictators who rule one after another. Members of pro- democracy groups, the critical press and some social critics were arrested and clamped down upon in detention centres under unsanitary conditions, poor medical attention, while others were detained in underground cells with the poor lightings.

Torture affects the essential physical and psychological integrity of a human being. It is, therefore, not surprising that torture is prohibited by international, regional and national law, the goal being complete eradicate of torture globally. In Sub-Saharan African region, about thirty three countries provide evidence of torture or ill-treatment by State operatives, and twenty countries are implicated in deaths attributable to torture, ill treatment or negligence through inhuman and degrading prison conditions. In the Middle East and North Africa, at least eighteen countries reveal evidence of torture or ill treatment, and at least eight countries show evidence of deaths resulting from torture. In Europe, there were reports of people tortured or ill - treated by State operatives in some thirty-one countries; deaths in custody are confirmed or suspected in at least six countries. In the Americas, twenty-one countries practice torture or ill- treatment, and deaths attributable to torture or inhuman and degrading prison conditions occurred in at least twenty-two countries, and various forms of ill- treatment or torture are indicated in at least eleven countries. The statistics on torture shows that during 1998, no less than 125 countries reportedly tortured people[15].

State use of torture degrades the authority and legitimacy of the state, provokes or intensifies social conflict, undermines the idea of peace and challenges the idea of the rule of law. Agents of state or governmental officials, more often than not, carry on torture; Nigeria must therefore make some splendid effort in checking it. Indeed, one of the important developments relevant to the elimination of torture emerged in 1961 with the creation of a non-governmental organization, Amnesty International. This human rights body's focus, on individual participation for individual victims, was an important innovation in the development of human

[12] This is a council in which the head of the community (Obong) sits with some selected elders and principal members of the community.

[13] Interview (on file) with Madam Rosah Sampson Ikpang, aged 85 years, at Ikpang's compound, Ikot Udo Abia, Etinan Local Government Area, Akwa Ibom State, Nigeria, on 20/06/2011.

[14] See Republican Constitution 1963, s. 22 (10) which stated that no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law.

[15] Amnesty International's Annual Report, 1991;. Some examples of acts that have been cited as constituting torture or ill treatment in certain circumstances *include corporal punishment* (UN Human Rights Committee, General Comment 20, Article 7, 1992. para. 5), prolonged solitary confinement in detention, ) handcuffing, hooding and sleep deprivation General Comment 20, Article 7, 1992 para. 6 (UN Human Rights Committee (63rd Session), Concluding Observations: Israel, Aug 18, 1998. UN Doc CCPR/C/79/Add 93, paras 19 -20), threats and restraint in painful Positions. (UN Committee Against Torture (18th Session), Concluding Observations: Israel, 1997, UN Doc. A/52/44, para. 257) and wall standing (*Ireland v. UK*. ECHR. Judgment, Jan. 18, 1978, Ser. A No. 25, para 162)

rights law generally and, more particularly, in the development of a grassroots-based global initiative to support and complement the work of the United Nations. Amnesty International's early monitoring of torture on a worldwide basis provided the form of interest articulation, pressure, and support for governmental initiatives.[16]

This paper, therefore, scintillates on the need for legislation on torture as a crime in Nigeria. This will be in confluence with other countries and even more in conflux with many international treaties, which have elevated torture to the level of a crime. The framework of this paper comprises the definition of torture, civil law dimension of torture as exemplified by the constitutional provision, advocacy for criminalisation of torture in other jurisdictions, jurisdictions which criminalise torture in their criminal justice system; evidence obtained through torture, prescriptions by this present writing and wraps it up with a conclusion.

## DEFINITION

Literally, torture means extreme physical pain that someone is forced to suffer as a punishment or as a way of making them to give information. It may also mean the infliction of intense pain to the body or mind to punish, to extract a confession or information, or obtain sadistic pleasure.[17] In his view, James Heath defines torture to 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 the means adopted to elicit, matter of intelligence or forensic proof and the motive is one of military, civil or ecclesiastical interest.[18]
Against the foregoing definitions, three fundamental reasons arise in torture, the first is punishment from the torture, the second is a sadistic pleasure he enjoys and the third is the desire to extract information or a confession from the person tortured; all these results from pain, physical and mental injuries suffered by the tortured.

Under the Rome Statute of the International Criminal Court,[19] torture is listed as one of the crimes against humanity. For purposes of clarity, the Statute states that crime against humanity means any of the following acts when committed as part of the widespread or systematic attack directed against any civilian population, with knowledge of the attack such as murder; extermination; enslavement; deportation or forcible transfer of population; and imprisonments or other severe deprivation of physical liberty in violation of fundamental rules of international law. It also includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of comparable gravity. Under the legal instrument, torture enforced disappearance of persons, the crime of apartheid and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health[20].
Furthermore, the statute succinctly defines torture to mean the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.[21]

The statutes also empowers the International Criminal Court[22] to exercise jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes, and war crimes

[16] *Ibid* .
[17] Garner, B. A., *Black's Law Dictionary*, 9th ed. (US : Thomson West, 1991), p. 1627.
[18] Heath, J ; *Torture and English Law* (1982) as articulated in note 1 particularly at p. 1528.
[19] Entered into force on July 1, 2002. Nigeria, for example, ratified the ICC treaty on the 27th day of September, 2001, but has not yet adopted the implementing legislation .
[20] *Ibid,* Article 7 (1) a - k
[21] *Ibid,* Article 7 (2) e.
[22] *Ibid,* Part 1 Article 1.

amongst others, include torture or inhuman treatment, including biological experiments[23] and other grave breaches of the Geneva Conventions.[24] The United Nations Convention Against Torture[25] defines torture:

> "As any act by which severe pains or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or 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"[26].

It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. To qualify as torture under the United Nations Convention Against Torture (UNCAT), an act shall contain the following constitutive elements: (a) severe pain or suffering (whether physical or mental; (b) intentionally inflicted. Here, the UN Committee against Torture emphasizes that elements of intent and purpose in Article I do not involve a subjective injury into the motivations of the perpetrators, but rather, must be objective determinations under the circumstances,[27] (c) for the specific purpose and (d) with the direct or indirect involvement of a *de jure or de facto* official.

Under South Africa draft bill[28], the crime of torture is defined as: Any act by which severe pains or suffering, whether physical or mental, is intentionally inflicted on a person (a) for such purposes as (i) obtaining information or a confession from him or her or a third person; (ii) punishing him or her for an act he or she or a third person has committed or is suspected of having committed, (iii) intimidating or coercing him or her or a third person or (b) 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, but torture does not include pain or suffering arising from, inherent in or incidental to lawful actions.

It seems suitable to state, therefore, that one thing is clear about torture, the infliction of severe pain obviously by public officials and the subsequent suffering arising from such pain by the tortured, with a view to gaining a confession or obtaining information.

The United Nations Convention Against Torture itself is supplemented by several other U.N General initiatives promulgated in part as a result of pressure from global society. These developments included the drafting of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Code of Conduct for Law Enforcement Officials, and the Principles of Medical Ethics. In 1985, the U.N Commission on Human Rights

[23] *Ibid,* Article 8 (2) ii.
[24] Dated 12 August 1949.
[25] United Nations Convention Against Torture, of June 26, 1987. As of January 2010, 146 nations including Nigeria are parties to the treaty, and another ten have signed but not ratified it.
[26] *Ibid,* Article 1 (1). Furthermore, the prohibition of torture is also absolute and non-derogable under International Covenant on Civil and Political Rights (ICCPR), Articles 7 & 4 (2), ICCPR. This means that no interest whatsoever, including national security, can balance or limit this prohibition.
[27] Committee against Torture, General Comment 2, CAT/C/GC/2, S. 9,
[28] The general intendment of the Bill is : "To provide for the crime of torture, in compliance with the United Nations Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment; to provide for the prosecution in South African courts of persons accused of having committed the crime of torture in South Africa and beyond the borders of South Africa in certain circumstances; and to provide for matters connected therewith".

established the office of the Special Rapporteur on Torture. The treaty-making process and the enforcement mechanisms created by the United Nations are in itself an extremely important part of the effort to universally eradicate torture, which has gained notoriety in many jurisdictions.

Nothing sums up who a torturer is, than the immortal words of the United States of American case of *Filartiga v. Pena-Irala* [29] to the effect that a torturer has become like the pirate and the slave trader before him, *hostis humani generis* , and an enemy of all mankind.

## LEGISLATION ON TORTURE IN NIGERIA

In Nigeria, under the right to dignity of the human person of the Constitution,[30] torture has been legislated on as a fundamental right. Thus, the Constitution provides that every individual is entitled to respect for the dignity of his person, and accordingly, no person shall be subjected to torture or to inhuman or degrading treatment.[31] This is a pioneering effort by the *grundnorm* in Nigeria. Torture also violates the principle of presumption of innocence. The constitution provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.[32] It is therefore a constitutional breach to subject to torture a suspect or accused person whom the law has raised a presumption of innocence in his favour, more so, when a court of competent jurisdiction has not found him guilty of committing any offence.

Under the Child's Rights Law,[33] under the right to the dignity of the child, every child is entitled to respect for the dignity of his person, and accordingly, no child shall be subjected to physical, mental or emotional injury, abuse, neglect or maltreatment including sexual abuse; or subjected to torture, inhuman or degrading treatment or punishment.[34] Similarly, under the Child's Rights Act, every child is entitled to respect for the dignity of his person and accordingly, no child shall be (a) subjected to physical, mental or emotional injury, abuse (b) subjected to torture, inhuman or degrading treatment or punishment.[35]

Clearly, there is a synergy between the provisions of torture in the Child's Rights Act as a national legislation and the Child's Rights Law of *Akwa Ibom* State, which is a unit within the Federation of Nigeria. It appears as if the provision in relation to torture in the Child's Rights Law of *Akwa Ibom* State was drawn substantially from the Child's Rights Act[36], a municipal legislation in Nigeria.

In accordance with the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[37] every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave

[29] 630 F. 2d 876 (1980).
[30] Constitution of the Federal Republic of Nigeria 1999, Cap. C. 23, Laws of the Federation of Nigeria 2004 .
[31] *Ibid* , s. 34 (1) a. This provision is similar to Article 35 (5) of the Constitution of Bangladesh which reads that no person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.
[32] *Ibid* , s. 36 (1) 5.
[33] Child's Rights Law, 2008. This law came into effect on the 14th day of August, 2008.
[34] *Ibid* , S. 11 (a) & (b) .
[35] See Child's Rights Act, Cap C 50, LFN, 2004, s. 11 (a) & (b). The Act actually came into effect on the 31st day of July, 2003.
[36] The Child's Rights Act, a national legislation came into effect on the 31st day of July, 2003 whereas the Child's Rights Law of Akwa Ibom State came into effect o the 14th day of August 2008. Thus, it seems that the Child's Rights Act precedes the Child's Rights Law of Akwa Ibom State.
[37] Cap. A 9, Laws of the Federation of Nigeria, 2004, Article 5

trade, and torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.[38]

In Nigeria, the Constitution [39] has made far-reaching provisions for the protection of the right against torture to the extent that an action could be maintainable against anyone who violates such rights, at the suit of the aggrieved or the person tortured. In the area of criminal law, nothing at all has been done to protect the tortured by criminalising the conduct, which would have opened the portal for the prosecution of the accused person engaged in torture.

## CRIMINALISATION OF TORTURE IN OTHER JURISDICTIONS

The call for the criminalisation of torture, more recently, has been very intense in other jurisdictions. For example, the Asian Legal Resource Centre[40] has stated that the constitutional provision regarding the strict prohibition of torture, as a fundamental right seems hollow in Bangladesh, as torture is rampant, and there are no effective available remedies in reality, apart from the lame luck provision in the Constitution[41] of that country. The Centre noted that the fundamental provision of the Constitution has been rendered unattainable throughout the previous decades of political instability and increasing power of the military and other law enforcement state agencies[42]. Thus, whenever local human rights groups attempt to raise the issue of torture and grave human rights abuses, the authorities protect the perpetrators and use suppressive laws and institutions of the rule of law that are dysfunctional to punish the human rights defenders and the victims.[43] This is worrisome particularly when it is considered that Bangladesh has been a party to the Convention against Torture, other Cruel, inhuman or Degrading Punishment and Treatment[44] and has also acceded to the International Covenant on Civil and Political Rights (ICCPR).

In Indonesia, there is a growing agitation about the reluctance shown by the government to immediately incorporate provisions of torture in its penal legislation, notably in the Penal Code (KUHP). Instead of adopting, without further delay, the draft Penal Code, the government asserts that acts of torture have been prosecuted under the provision of maltreatment[45]. But it pertinent to observe that maltreatment as defined in the Penal Code[46] of that country only covers physical injury, not mental pain or suffering. Besides the absence of a definition of torture, the working Group on the Advocacy against Torture (GAT)[47], notes that the Penal Code provides no appropriate penalty for acts of torture, for example, the Penal

[38] Ibid

[39] Constitution of the Federal Republic of Nigeria 1999, s. 34 (1) a. See also the Evidence Act Cap. E 14 LFN 2004, s. 28 which contains provision relating to the irrelevancy in criminal proceedings of statements obtained through promise, threat and inducement.

[40] The Asian Legal Resource Center is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. It is the sister organisation of the Asian Human Rights Commission. The Hong Kong-based group seeks to strengthen and encourage positive action on legal and human issues at local and national levels throughout Asia. In a written statement entitled " BANGLADESH : Criminalisation of Torture is a must", for immediate release on February 16, 2008, ALRC- CWS –10 – 02 – 2009, through www.alrc/doc/mainfile. phplalrc -st 2009/529/Cached, retrieved on 4/3/2011 at 2 pm.

[41] See note 15 above.

[42] See note 23 above.

[43] With effect from 5th October 1998 .

[44] With effect from 6th September 2000.

[45] Penal Code (KUHP), Articles 351 - 358

[46] *Ibid,* Article 351.

[47] The working Group on the Advocacy against Torture (WGAT) and the World Organization Against Torture (OMCT) presented their joint report on torture and ill-treatment in Indonesia, during a constructive and fruitful dislogue with the UN Committee against Torture (CAT) during its 4th session in connection with its review of Indoniesia's Second Periodic Report, in Geneva, Switzerland, from 5 to 7 May 2008.

Code[48] only provides a maximum imprisonment of four years, for any official, who in criminal proceedings uses coercion, either to extract a confession or to obtain information.

In their said report, WGAT and OMCT are seriously concerned about the widespread torture and ill treatment of and insufficient safeguards for detainees. The Committee, as affirmed by the report of the Special Rapporteur on Torture stresses that torture and ill-treatment in Indonesia are routine practices to extract confessions or information to be used in criminal proceedings[49]. The Committee also highlights three main concerns relating to insufficient safeguards for detainees namely the long periods of detention in police custody (up to 61 days); the absence of systematic registration of all detainees, including juveniles, and the failure to maintain records of all periods of pre-trial detention; and the limited access to lawyers and independent doctors, as well as the failure to notify detainees of their rights at the time of detention, including their rights to contact family members.[50]
India is another jurisdiction, which has failed to criminalise torture or which takes a legal framework in which torture is committed. The police consider torture as an effective and thus essential tool for crime investigation and to maintain control over people.

Although some provisions exist in the Indian Penal Code, they neither define torture as clearly as in Article 1 of the Convention nor make it criminal as called for by Article 4 of the Convention on Torture. For the ratification of the Convention, therefore, the domestic laws of India would be brought in tune with the provisions of the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code 1861 or bringing a new piece of legislation on Torture. Thus came the Prevention of Torture Bill 2009, which is yet to be passed into law. The Upper House of the Indian Parliament, the *Rajya Sabha,* recently constituted a Parliamentary Select Committee to review the prevention of Torture Bill 2010[51]. The purpose of the legislation must be to criminalise torture, encourage complaints of torture, prescribe a reasonable procedure for investigation and prosecution and provide punishment for the crime. All this must be conceived as aiming towards ending the practice of torture.

So far, the settled position of law in India is that the right not to be tortured has attained the status of a fundamental right[52], just as is obtained in Nigeria. The National Human Rights Commission of India has repeatedly recommended that the government criminalise torture. The UN Human Rights Committee as early as 1977 had expressed its concern about the widespread use of torture by the law enforcement agencies in India.[53]

As early as 1981, the Supreme Court in India said: ". . . Is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wounds on our constitutional culture than a state official running berserk regardless of human rights"[54]; this aptly demonstrates the level of judicial attitude to torture in India.

In Australia, torture is not a criminal offence in all-Australian jurisdictions. It is encouraged, however, by the commitment of the government that took office in November 2007 to develop Commonwealth legislation-prohibiting torture.[55]

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[48] Penal Code, Article 422.
[49] See note 29 above.
[50] This was the fourth in the total of five prominent issues highlighted in the joint report raised by WGAT and OMCT and echoed by the UN Committee in its Concluding Observations released on 16 May. 2008.
[51] This was done of the 31st of August 2010.
[52] Constitution, Article 21.
[53] (CCPR/C/79/Add.81) . The Committee on Elimination of Racial Discrimination has expressed similar concerns (CERD/C/IND/CO/19) in 2007 and the Committee on Economic, Social and Cultural Rights (E/C.12/IND/CO/5) in 2008.
[54] *Kishore Singh v. State of Rajasthan*, AIR 1981 SC 625.
[55] Concluding Observations of the Committee against Torture, 40th Session, 28 April & 16 May 2008.

There is, therefore, a glimmer of hope that in the near future torture will be made a crime in all Australian jurisdictions.

In the Pacific, at least one court in the region particularly in Tonga has accepted submissions based on breaches of CAT, even when the State concerned had not ratified the Convention and did not have an anti-torture provision in its Constitution. The recent Tongan Supreme Court case of *Nafai Tavake v. The Kingdom of Tonga*[56] is apposite. The case centred on assault, ill treatment and alleged torture of the plaintiff by Tongan law enforcement officials. During the hearings, the plaintiff's counsel described his client's treatment as torture but also acknowledged that Tonga was not a party to the CAT. The Chief Justice, who presided over the case, stated that it was accepted by most international jurists that the prohibition against torture is part of customary international law, and furthermore, it is a *jus cogens* rule from which States cannot derogate, whether they are a party to the various treaties which prohibit it or not.

The increasing disdain with which many nations and human rights groups see torture is likely to hasten the process of criminalisation of torture in those countries in the Pacific. In a democratic framework, torture undermines democracy and the rule of law. Its open or clandestine use undermines the fundamentals of democratic governance. Thus, a law enforcement agency, particularly the police, practicing torture reduces itself into an instrument of fear.

## JURISDICTIONS WHICH CRIMINALISE TORTURE

In Libya, torture is a crime. Islam is the basis for the country's legal system. Libya ratified the ICPR in 1976, the ICCPR – OPL and CAT in 1989, but is not a party to ICCPR OP2 and OPCAT. The Promotion of Freedom Act stipulates that it is prohibited to subject an accused person in any form of physical or mental torture or cruel, degrading or inhuman treatment.[57] The Libyan Penal Code does not contain a precise definition of physical and mental torture although torture is criminalised in it[58]. It provides that any official personally committing or ordering torture of accused persons is liable to a penalty of three to ten years' imprisonment. The Penal Code further stipulates that any public official who, in the discharge of his duty, uses violence against any person in such a way as to undermine his dignity or cause him physical pain is liable to a penalty of imprisonment and a fine of 250 *dinars*.[59]

The Supreme Court in its rulings[60] has established the principle that confessions extracted from detained persons through coercion are to be regarded as null and void. Also, under the Promotion of Freedom Act,[61] Libya as a State Party remarked in its 1999 CAT State report that, the provision of that Act can be invoked if a victim of torture seeks legal investigation into his or her case.

Similarly, the Civil Code provides for compensation for an individual whose rights have been violated;[62] and the Code of Criminal Procedure allows individuals to request compensation both before the civil and criminal courts.[63] According to the 1999 CAT State reports, individuals may directly invoke the provisions[64] of the Convention before the courts. The heirs of a deceased person may also exercise this right.

[56] Supreme Court C.V 296 of 2007.
[57] Promotion of Freedom Act, No. 20 of 1991, Article 17; This is a Libyan domestic legislation.
[58] Penal Code, Article 435.
[59] *Ibid,* Article 431 . For more, *dinars* is the official currency in use and circulation in Libya.
[60] SC/26/534 and SC/24/89.
[61] Promotion of Freedom Act, Article 30.
[62] Civil Code, Article 166.
[63] Code of Criminal Procedure, Articles 7 & 60.
[64] CAT, Article 14.

In the national laws of Libya, the Convention against Torture has been articulated therein. But in spite of the fact that the law on torture is in place in Libya, that country does not seem to do well in terms of human rights protection. In 2007, the United Nations Human Rights Committee found Libya to be involved in acts of torture and several other human rights violations.[65] The situation is even worse at the moment because of the internal conflict, which bedevilled or engulfed that country where scores of civilian population have been tortured and killed as the result of the armed conflict. The International Criminal Court has recently issued a warrant for arrest against the Libyan leader, Col. Muamar Gaddafi , for war crimes, offences against humanity and genocide.

The above discourse in Libya shows that it has a lot of legislation on Torture but does not do much in the prevention of torture. This seems to explain the double standard employed by that country when it comes to human rights protection.

## EVIDENCE OBTAINED THROUGH TORTURE

All criminal trials against the accused person are based on proof beyond reasonable doubt. Proof beyond reasonable doubt is dependent on the admissibility of evidence given by witnesses and accepted by the court. Proof, therefore, is the method by which the existence or non- existence of a fact is established to the satisfaction of the court.[66] When used against the matrix of criminal law, proof is premised on beyond reasonable doubt. If the evidence is strong against an accused person as to leave only a remote possibility in his favour, of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.[67] Burden of proof is a party's duty to prove a disputed assertion or charge to the satisfaction of the court.

As a prelude, the Constitution provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty: provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts. [68] The above constitutional provision is the basis upon which the Evidence Act provides for the burden of proof in criminal matters. [69]

The burden of proof in respect of the guilt of the accused in criminal cases remains on the prosecution and never shifts. In *R. v. Basil Ranger Lawrence*,[70] Lord Atkin pointed out that in criminal cases, the true direction would be that the onus was always on the Crown and it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond a reasonable doubt.

In *State v. Onyeukwu*, the Supreme Court of Nigeria per Katsina – Alu JSC (as he then was), now CJN, held that in criminal trials, the onus is on the prosecution to prove its case beyond reasonable doubt. Criminal trials, in common law, are accusatory in nature. This may result in a finding of guilt or innocence. [14] In the accusatorial procedure, the accused is deemed innocent until found guilty. But the inquisitorial procedure is inquisitorial in nature. It is characterized by continuing investigations conducted initially by the police and then more extensively by an impartial examining magistrate. This system assumes that an accurate verdict is most likely to arise from a careful investigation. This examining

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[65] See the case of *El Hassy v. Libya Communication* Nr. 1422/2005. See also Articles 2 (3) , 9 and 10 of the ICCPR which are reported to have been violated.

[66] Curzon, L. B; *A Dictionary of Law* , p. 277.

[67] *Miller v. Minister* of Pensions (1947) 2 *All ER* 327.

[68] S. 36 (5), Constitution of the Federal Republic of Nigeria. 1999, Cap. C.23. *LFN* 2004 . See also Article 6 of the European Convention on Human Rights (ECHR).

[69] S. 138, Evidence Act, *Cap E* 14 *LFN* 2004.

[70] (1932) 11 *NLR* 6 at 7 (PC)..

magistrate serves as the head or lead investigator. It is the magistrate who determines whether there is sufficient evidence of guilt in the matter to proceed to trial.

The position in Nigeria is that evidence obtained through torture is irrelevant in criminal proceedings[71], and cannot be used for proof of guilt of the accused person. Thus, confession caused by inducement, threat or promise is irrelevant in criminal proceedings. This is consistent with international practice and standard. Similarly, the Convention Against Torture obliges each State Party to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.[72]

There are some jurisdictions, for example, in the Pacific Islands Forum, which prohibit the use of evidence that has been obtained under threat or promise by a person in authority[73]. Others allow such evidence if a judge finds that the threat or promise did not affect the truth of the confession[74]. However, in some jurisdictions, the courts have applied their evidence laws in line with international standards. In the case of *Nifai Tavake v. Kingdom* of *Tonga*,[75] the Chief Judge of that country referred to a *vior dire* proceeding involving suspects who had been charged for offences relating to the 2006 riots. He concluded that the documents that were being tendered as evidence in that particular *war dire* proceeding were inadmissible because the statement of confession had not been given voluntarily. It was clear in his decisions that handcuffs had been used to force many of those admissions (confessions).

The Extradition Act[76] in Nigeria does not contain any provision close or similar to what obtains in Australia and New Zealand in relation to the prohibition of extracting confessions from persons who may be subjected to torture. It is the sublime view of this paper that an amendment should be effected in our Extradition Act and the salient provision or model in Australia and New Zealand articulated therein.

## PRESCRIPTIONS

The background discourse has shown that Nigeria does not have any criminal law on torture. This paper has, therefore, advocated for the criminalisation of torture in Nigeria. The Federal Government of Nigeria should as a matter of urgency, send and executive Bill to the National Assembly for deliberation and passage into an Act to criminalise torture. Similarly, States' Houses of Assembly should also commence the process of or seize the initiative in criminalising torture. In case of delay by the Federal and States Governments in criminalising torture, members of the National Assembly and States' Houses of Assembly could on their own, send a private members' Bill to their respective legislators for criminalisation of torture.

Although the right against torture has been entrenched in the Constitution,[77] there is no straightjacket law criminalising torture in Nigeria. Similarly, although our laws of evidence[78] forbid the evidence obtained by inducement, threat or promises in criminal proceedings, the legislation are silent on specific matters concerning the use of torture by state agents.

[71] See Evidence Act, Cap E14, S. 28.
[72] CAT, Article 15.
[73] For example, Evidence Act 1975, s. 28 (Papua New Guinea); Evidence Act( Cap. 15), s. 19 & 21 (Tonga).
[74] See Evidence Act 1968, s. 19 (Cook Islands); Evidence Act 1961, s. 18 (Samoa) .
[75] *Supra* .
[76] Cap E. 25 LFN 2004 .
[77] See note 14 above.
[78] See note 22 above.

During criminalising torture, Nigeria will be at home with the global trend, more so, when she is one of the signatories to the Convention Against Torture (CAT) and has also gone further to ratify the said Convention. CAT has by the provision of Article 4, enjoined all State Parties to ensure that torture is criminalised in their jurisdictions and this piece pleads with Nigeria to follow suit. There are few countries such as Indonesia, India, Australia, etc. which have not yet criminalised torture as a crime in their jurisdictions. Specifically, in Indonesia and South Africa, there is an intense and growing advocacy for criminalisation of torture in those jurisdictions. In South Africa, there is a Torture Bill 2003, which engages the attention of that jurisdiction. In India, the Lower House of the Indian Parliament, the *Lok Shabha*, passed a Bill entitled the Prevention of Torture Bill, 2010,[79] and in concert with the position of the Lower House, the Upper House of the Indian Parliament constituted a Parliamentary Select Committee to review the Prevention of Torture Bill, 2010. Nigeria is hereby advised to key into this trend and criminalised torture for a more effective criminal justice administration.

In Libya, torture has been criminalised. The Libyan Penal Code provides for a penalty of three to ten years' imprisonment and a fine of 250 *dinars*.[80] Also, the Civil Code of that jurisdiction provides for compensation for an individual whose rights have been violated,[81] and the Code of Criminal Procedure allows individuals to request compensation both before the civil and criminal courts[82]. The Libyan legislation on torture represents a paradigm for adoption, even if with modification, in Nigeria.

The criminalisation of torture in Nigeria, if done, will be in synergy with the law in New South Wales, Western Australia and Tasmania. It will also be in converge with the law on torture in New Zealand and even more in synthesis with what obtains in many other jurisdictions around the world. The Extradition Act in Nigeria should be amended to incorporate provisions wherein an eligible person is only to be surrendered in relation to a qualifying extradition offence if the Attorney General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture. Such will be in confluence with the situation in Australia, New Zealand and under Article 3 (1) of the CAT.

Nigeria should adopt non-legislative protection mechanisms. These are mechanisms that can effectively check the torture and assist in the protection of detainees. For example, the United Nations Code for the Conduct for Law Enforcement Officials[83] (the Code) provides such a non-legislative mechanism for the promotion of the human rights of detainees. Article 2 of the Code states that while performing their duty, law enforcement officials[84] shall respect and protect human dignity and maintain and uphold the human rights of all persons. The Code clearly states that no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment.

The Police Service Commission in Nigeria, the Minister of Police Affairs and the Inspector - General of Police are hereby called upon to create and adopt such codes of conduct for police officers in handling detainees in their custody. After all, the catchphrase adopted by the Police in Nigeria is that the Police are friends and not enemies of the people.

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[79] See note 34 above.
[80] See note 43 above.
[81] See note 47 above.
[82] See note 48 above.
[83] Resolution 34/169 adopted by the UN General Assembly on 17th November 1979; While the Code does not have the same legal and moral authority that an international treaty or convention commands, the fact that it was adopted by consensus in the UN General Assembly gives it certain standing under international law. Having been adopted by the UN General Assembly, it is incumbent upon UN Member States to incorporate these standards into their domestic laws and standards.
[84] The term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers especially in the powers of arrest or detention, Article 1 (a) Code of Conduct for law Enforcement Officials.

Nigeria can also draw substantially from the Standard Minimum Rules for the Treatment of Prisoners[85] which states that all members of the (prison/corrections) personnel shall, at all times, so conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect.[86] Torture by the correction and prison personnel cannot achieve the purpose contemplated the said Rules.

There should also be created, a complaint mechanism for victims of torture and ill treatment whereupon the right of a detained or imprisoned person or his counsel to be able to make a confidential complaint to and impartial body requiring his treatment[87] will be guaranteed. Every of such request or complaint should be promptly dealt with and replied to without undue delay.[88]

The National Human Rights Commission[89] of Nigeria is hereby urged to galvanise government and sensitise the public on the need to criminalise torture. This will be in synthesis with the situation in India whereby the National Human Rights Commission has repeatedly recommended that the government criminalise torture. The foregoing recommendations are introduced to Nigeria so that her laws on torture, when enacted, will be total, holistic and all – embracing for the good of the detainees.

## CONCLUSIONS

This exposition has brought to the fore the fact that torture is used for extraction of confession, as a measure of punishment, for spite and for the sadistic gratification of the torturer. It has also discovered that the police, the military, the paramilitary forces as well as opposing forces, frequently adopt it. The opposition forces during armed conflicts also adopt it. Nigeria, therefore, has international obligations to eradicate torture by criminalising it under its national legislation and to provide adequate remedies to victims of torture while bringing perpetrators to justice.

Nigeria supposedly propagates modern and model democracy in Africa; democracy is founded on the rule of law. The rule of law amongst other things, underlines the need for the protection of the dignity of human persons, and indeed, the right for protection against torture. Torture has a serious adverse impact upon democracy, the rule of law and democratic institutions. Nigeria, therefore, needs urgently a domestic or municipal law as well as rules and regulations against torture, in order to deal with the central deficit in her policing. The most auspicious time to criminalise torture in Nigeria is now because of the need to protect the fundamental rights of her citizenry and the wave or level of criminalisation of the conduct in other jurisdictions. This will certainly constitute a boost to the criminal justice administration in Nigeria and present a positive approach to human rights protection.

[85] Adopted by the First UN Congress on the Prevention of Crime and Treatment of Offenders in 1955, and approved by the Economic and Social Council resolution 663 c (xxiv) 1977.
[86] Standard Minimum Rules for the Treatment of Prisoners, Article 48.
[87] This will be consistent with Principle 33 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Principles 33 require also that, if requested by the complainant, the request or complaint must be kept confidential. Article 13 of the Convention against Torture includes that the complaint must be examined impartially.
[88] See Article 13 of the Convention against Torture. In order to be able to deal 'promptly' with the reply to complaints without undue delay: as required complaint mechanism must be established and must be sufficiently well resourced, with adequate human resources and a broad investigative mandate. Importantly, Article 33 requires also that the complainant must not suffer prejudice for making a complaint.
[89] Established by National Human Rights Commission Act Cap. N 46, LFN 2004. This is an Act to establish the Human Rights Commission, for the protection of human rights, dignity and freedoms. The Act came into effect on the 27th day of September, 1995.