

NIGERIA

I. INTRODUCTION

1. The legal framework

1.1. The Constitution

Nigeria has a population of 126,635 million people, which is composed of more than 250 different ethnic groups.

Nigeria gained independence from the United Kingdom on 1 October 1960. It is a federal republic, consisting of 36 states and one territory.

The present Constitution was adopted on 29 May 1999. The Constitution is the basic and supreme law of the country and any other legislation inconsistent with its provisions is void to the extent of its inconsistency.¹ In Chapter IV, the Constitution guarantees fundamental rights, such as the right to life, respect for the dignity of the person, including the prohibition of torture, right to personal liberty, right to privacy, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, freedom of movement, right to non-discrimination as well as the right to property. It also provides for a right to a remedy in law for any infringements.²

The judicial system consists of lower courts and superior courts of record. The lower courts are the Magistrate and Customary Courts (as well as *Shari'a* courts in the north). The superior courts of record are the Customary Courts of Appeal, the *Shari'a* Courts of Appeal, federal and state High Courts, the Court of Appeal and the Supreme Court. The Magistrate Courts deal mostly with petty crimes and can order the remand in police custody of criminal suspects until they are formally charged in the High Court. The High Courts have appellate jurisdiction over cases from the Customary Courts of Appeal and the *Shari'a* Courts of Appeal, they also have original jurisdiction over other matters. Dissatisfied parties can further appeal to the Court of Appeal and ultimately the Supreme Court, which is the highest court in the land.³

1.2. Incorporation and status of international law in domestic law

Nigeria is a party to the following relevant international treaties:

- Geneva Conventions (20 June 1966)

¹ Section 1(3) of the Constitution

² Article 46 (1) of the Constitution: "Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."

³ Chapter VII of the 1999 Constitution, Sections 230-296 provide for the establishment, jurisdiction and appointment of the judiciary. The judiciary is not however absolutely independent of the legislature under the Constitution. Section 231 provides for the appointments of the Chief Justice of the Federation and Justices of the Supreme Court, subject to the confirmation of such appointments by the Senate. Furthermore Section 232 (2) provides that the Supreme Court shall have original jurisdiction that may be conferred upon it by an Act of the National Assembly.

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- CERD (16 October 1967)
- Refugee Convention (23 October 1967)
- African Convention on Human and Peoples' Rights (22 June 1983)
- CEDAW (13 June 1985)
- Additional Protocols I and II to Geneva Conventions (10 October 1988)
- CRC (19 April 1991)
- ICCPR (29 July 1993)
- ICESCR (29 July 1993)
- Convention against Torture (28 June 2001)
- Rome Statute of the International Criminal Court (27 September 2001)

Section 12(1) of the 1999 Constitution provides that: "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly." In practice, every international instrument to which Nigeria wishes to be bound ought to be transformed into domestic law. It has been held by the Nigerian Supreme Court that an International Treaty even if transformed into domestic law while superior to other statutory legislation is still subordinate to the Constitution. In the case of *Abacha V Fawehinmi*, Justice Ogundare, who delivered the leading judgment, confirmed this with regard to the African Charter, which had long been transformed into domestic law.⁴ This issue is, however, not yet adequately settled as there is another opinion held by some others who argue that international treaties should be invoked and applied in Nigeria as other laws whether or not they have been specifically transformed into domestic law. Such persons argue that once a country signs and ratifies an international instrument, it should be bound by its provisions and such country should not be allowed to avoid its international obligation by recourse to domestic law inconsistent with the said obligation.⁵

Of all the international instruments dealing with torture of which Nigeria is a party, specific mechanisms to enhance implementation by way of judicial pronouncements are only in place with regard to the African Charter. As the African Charter does not contain any specific implementation procedure, Nigerian courts have held that in the absence of such a procedure, an action based on the provisions of the Charter can be commenced by way of an action by writ of summons or by any other permissible procedure such as the Fundamental Rights (Enforcement Procedure) Rules 1979.⁶

⁴ *Abacha v Fawehinmi* (2001) CHR 20 at 42: "No doubt Cap 10 [African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1990] is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the court below that the Charter possesses 'a greater vigour and strength' than any other domestic statute. But that is not to say that the Charter is superior to the Constitution..Nor can its international flavour prevent the National Assembly..removing it from our body of municipal laws by simply repealing Cap 10. Nor is the validity of another statute necessarily affected by the mere fact that it violates the African Charter or any other treaty." See in this regard also *Ubani v Director of State Security Services & Anor*, (1999) 11 NWLR 129, in which the court held that the fundamental rights protected in the African Charter and the African Charter Act are superior to all municipal laws in Nigeria, and cannot be ousted by decrees of the military government.

⁵ *Chief J.E. Oshevire v British Caledonian Airways Limited*, (1990) 7 NWLR (Pt. 163) p. 507 at pp.519-520: "In this regard an international treaty, like the Warsaw Convention in the instant case, is an expression of agreed, compromise principles by the contracting states and is generally autonomous of the municipal laws of contracting states as regards its application and construction. It is useful to appreciate that an international agreement embodied in a Convention or treaty is autonomous, as the high contracting parties have submitted themselves to be bound by its provisions, which are therefore above domestic legislation. Thus any domestic legislation in conflict with the convention is void"

⁶ In *Abacha v Fawehinmi*, supra, the Court stated concerning the jurisdiction of domestic courts to enforce articles of the African Charter that it is in the national courts such protection and remedies can be sought and if the case is established, enforced.

2. Practice of Torture: Context, Occurrence, Responses

2.1. The practice of torture:

i) Torture committed by past regimes and current practice

Torture is a frequent occurrence in Nigeria. Prior to 29 May 1999 during the 15 years of military dictatorship, the practice could best be described as endemic.⁷

Periods of military rule in Nigeria were mostly times of emergency rule when due process and the rule of law were completely suspended. Under such conditions, torture and other forms of human rights abuses were prevalent. In several cases, as was rampant from December 1983 to May 1999, torture and other human rights abuses could be said to be state-sponsored.⁸ Torture during this period was carried out by government agencies that operated with absolute impunity. The main perpetrators of torture were the police and members of the armed forces, mainly using torture methods of intimidation. Under the dictatorships of General Ibrahim Babangida (1985-1993) and the late Sani Abacha (1993-1998), military personnel operating under the State Security Services and Directorate of Military Intelligence are reported to have tortured many political opponents.⁹ Aside from horrifying detention conditions, there were institutionalised torture centres maintained and operated by military officers with the brief of dealing with enemies of the government.¹⁰ The victims of such torture were mainly opponents of the respective regimes, those perceived as opponents and those suspected of having committed non-political crimes. Members of specific minority ethnic groups were also targeted, as happened to the Ogonis between 1994 and 1995.¹¹

Since May 1999, torture continues to be widespread, particularly within the police institution.¹² The police and other internal security forces are said to carry out torture either as a tool for criminal investigation to extract confessions and information or as

⁷ See in this respect the brief of the Human Rights Violations Investigation Commission set up in 1999, see Amnesty International, Amnesty International, *Nigeria: Time for Justice and Accountability*, December 2000, AI Index: AFR 44/14/00, pp.14 et seq.

⁸ See on this point, Constitutional Rights Project, *Human Rights Practices in the Nigerian Police*, 1993, pp.28 et seq. and the Concluding Observations of the Human Rights Committee in 1996, quoted *infra* at I, 2.3.

⁹ See e.g. Amnesty International, Nigeria, A Summary of Human Rights Concerns, March 1996, AI INDEX: AFR 44/03/96 and AI, Nigeria, No significant change-human rights violations continue, September 1997, AI INDEX: AFR 44/020/1997.

¹⁰ See on this point Interim report on the situation of human rights in Nigeria prepared by Mr. Soli Jehangir Sorabjee, Special Rapporteur of the Commission on Human Rights, in accordance with General Assembly resolution 52/144 and Economic and Social Council decision 1998/262 of 30 July 1998, UN Doc. A/53/366, 17 September 1998, paras. 22 et seq. and 33 et seq.

¹¹ See joint report on the situation of human rights in Nigeria prepared by Mr. Bacre Waly Ndiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions, and Mr. Param Kumaraswamy, Special Rapporteur on the independence of judges and lawyers, in accordance with Commission on Human Rights resolution 1996/79 of 23 April 1996 and Economic and Social Council decision 1996/284 of 24 July 1996, UN Doc.A/51/538, 22 October 1996, paras.97 et seq. and Human Rights Watch, *The Ogoni Crisis, A case study of military repression in Southeastern Nigeria*, 1 July 1995.

¹² Amnesty International, Nigeria - security forces: serving to protect and respect human rights?, December 2002, AI-Index AFR 44/023/2002, pp.6 et seq.

a form of punishment.¹³ In a study carried out by the Nigerian Human Rights Commission and the Nigerian NGO, Centre for Law Enforcement Education (CLEEN) in 2000, over 77% of inmates in Nigerian prisons claim to have been beaten by police, threatened with weapons and tortured in police cells.¹⁴ The available evidence points to the fact that torture as a technique of investigation has become institutionalised in Nigeria, which has in the past been confirmed by members of the police forces themselves.¹⁵ Policemen conceded that in the absence of an efficient means of investigating crime, torture becomes the easiest method of extracting information from suspects.¹⁶ The victims of police brutality and torture are mainly criminal suspects of which there are a large number given the high rate of crime prevailing in Nigeria.¹⁷ The army has reportedly also been responsible for serious human rights violations, including torture.¹⁸

The introduction of armed vigilante groups in several parts of the country, with the tacit or explicit endorsement by some State governors, has multiplied allegations of human rights violations and torture in several states of the Federation. These armed groups receive no proper training in professional policing, are heavily armed and operate without the control of the Federal Government.¹⁹ There have also been several incidents of what has been referred to as intra- or inter-communal, ethnic, religious or political violence that resulted in gross human rights violations, often with the involvement of officers of the security agencies.²⁰

The prison conditions in Nigeria fail to meet basic international standards as most prisons are overcrowded and lack basic amenities. It is therefore not uncommon for inmates to go blind, contract HIV/Aids or die of preventable causes.²¹

ii) *Shari'a* Law and inhuman, degrading and cruel punishment in the Northern States of Nigeria

In a recent development, eleven Northern states re-Islamised their legal system in 2000 and 2001. Seven of these states introduced *Shari'a* Penal Codes (Bauchi, Kebbi, Jigawa, Kano, Zamfara, Yobe, Sokoto), one (Niger) amended the existing 1960 Penal Code with provisions of *Shari'a* criminal law and three others (Gombe, Kaduna,

¹³ According to REDRESS' sources, torture techniques have reportedly included the following: electrocution, solitary confinement, beating, threatening to torture family members, irregular feeding, shooting in the limbs, burning body with lit cigarettes, constant threats of death, binding with chains, running thin metal wire or broomsticks through urinary tract, hanging victims face down, withholding medication and treatment from e.g. asthma, diabetic, high blood pressure etc sufferers thereby causing pain or discomfort – all these are otherwise known as "treatment".

¹⁴ See Amnesty International, Nigeria - security forces: serving to protect and respect human rights?, supra, p.5.

¹⁵ See "Liberty and Security of Persons with particular reference to arrest, interrogation and police detention" in: Chukwuma Innocent & Akin Ibidapo-Obe (eds.), *Law Enforcement and Human Rights in Nigeria*, Civil Liberties Organization 1995, p.59.

¹⁶ *Nigeria and the Rule of Law: A study by the International Commission of Jurists*, 1996 p. 70.

¹⁷ See on this also Amnesty International, Nigeria - security forces: serving to protect and respect human rights?, supra, p.5.

¹⁸ Ibid., pp.16 et seq.

¹⁹ Amnesty International, Nigeria: Government responsibility in vigilante violence, November 2002, AI- index : AFR 44/020/20002, p. 1.

²⁰ See World Organisation against Torture (OMCT) and Centre for Law Enforcement Education (CLEEN), *Hope Betrayed? - A Report on Impunity and State-Sponsored Violence in Nigeria*, 2002.

²¹ See the annual reports of the Civil Liberties Organization since 1994 for more details.

Katsina) are expected to enact a *Shari'a* Penal Code in the near future. These newly introduced Penal Codes have adopted most of the provisions of the 1960 Penal Code and added new *Qur'anic* provisions. Punishments include stoning women to death for adultery, a hundred lashes for unlawful sexual intercourse outside marriage, amputation of the right hand for theft, death for robbery resulting in death, death by crucifixion for robbery in which life and property have been taken, amputation of both the right hand and the left foot if only property has been taken. In addition, in cases of homicide and injury, the victim or his/her heirs may demand the death penalty or the infliction of a punishment mirroring the injury inflicted on the victim.²² The Northern *Shari'a* courts have already sentenced several offenders to *Shari'a* punishments. In some cases relating to stoning to death, the execution of the punishment has been postponed while other punishments such as amputations and floggings have been carried out.²³

2.2. Domestic Responses

Under the Abacha regime, the National Human Rights Commission was established by Decree No. 22 of 1995. The broad mandate of the Commission was spelled out in section 5 of the Decree.²⁴ The Commission has dispelled the initial doubts of many Nigerians concerning its sincerity and independence, given the then prevailing regime of widespread human rights abuses, by collaborating with several NGOs to implement human rights promotional activities. It has, since its inception, examined numerous complaints, but has been criticised for its lack of accessibility and lack of assistance to victims of human rights abuses to obtain redress while its work of investigating human rights abuses and the rights of prisoners and detainees has been viewed positively.²⁵

On 14 June 1999, the new government established the Human Rights Violations Investigation Commission with the aim of unraveling decades of human rights violations in Nigeria and to facilitate the healing of wounds and reconciliation among Nigerians.²⁶

²² See Prof. Dr. Ruud Peters with the assistance of Maarten Barends, *The Reintroduction of Islamic Criminal Law in Northern Nigeria, A Study Conducted on Behalf of the European Commission*, Lagos, September, 2001, pp. 3 and 14 et seq.

²³ Amnesty International, *Nigeria: Time for Justice and Accountability*, supra, pp.6 et seq.

²⁴ "Deal with all matters relating to the protection of human rights as guaranteed by the Constitution, the African Charter on Human and Peoples Rights, the United Nations Charter and the Universal Declaration of Human Rights and other International Treaties on human rights to which Nigeria is signatory; Monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the Federal Government for the prosecution and such other actions as it may deem expedient in each circumstance; Assist victims of human rights violations and seek redress on their behalf; Undertake studies on all matters pertaining to human rights and assist the Federal Government in the formulation of appropriate policies on the guarantee of human rights; Publish, from time to time, reports on the state of human rights protection in Nigeria; Organize local and international seminars, workshops and conferences on human rights issues for public enlightenment; Liaise and cooperate with local and international organisations on human rights with the purpose of advancing the promotion and protection of human rights; Participate in all international activities relating to the promotion and protection of human rights; Maintain a library, collect data and disseminate information and materials on human rights generally; and carry out all such other functions as are necessary or expedient for the performance of its function under the decree."

²⁵ Obior Chinedu Okafor and Shedrack C. Agbakwa, *On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context*, in: Human Rights Quarterly, Vol.24 (August 2002), No.3, 662-720, pp.714 et seq.

²⁶ See on its mandate and work, infra, Part V.

However, several initiatives, such as a Bill presented by the NGO, Alliances for Human Rights Action (AHRA) according to which the Police Act would be amended to bring the police under a more rigorous regime of control and accountability and a proposal by the late Federal Attorney General in 2001 to make erring law enforcement officials personally responsible for their excesses, have not taken off.

While President Obasanjo in 1999 and the Federal Government in 2002 have both declared the *Shari'a* laws of the Northern States to be unconstitutional, the government has so far refrained from challenging it before the Constitutional Court.²⁷

2.3. International responses

Most international responses relate to the time when Nigeria was under military dictatorship. As Nigeria has not yet submitted its first report to the Committee against Torture, there have as of now been no comments and observations by the Committee on the practice of torture and ill-treatment in Nigeria.

The Human Rights Committee stated in 1996 that it: "is deeply concerned by the high number of extra-judicial and summary executions, disappearances, cases of torture, ill-treatment, and arbitrary arrest and detention by members of the army and security forces and by the failure of the Government to investigate fully these cases, to prosecute alleged offences, to punish those found guilty and provide compensation to the victims or their families. The resulting state of impunity encourages further violations of Covenant rights."²⁸

The Special Rapporteur on Nigeria expressed, in 1998, his concern about the widespread violation of human rights, the absence of the rule of law, the high number of cases of death in custody under unexplained circumstances and the indiscriminate and excessive use of force.²⁹

The introduction of *Shari'a* law and the imposition of punishments, in particular the case of a woman who was condemned to death by stoning for adultery in Sokoto in October 2001, provoked strong international reactions condemning such practices as a violation of human rights, in particular the prohibition of cruel, inhuman and degrading punishment.³⁰

²⁷ The Minister of Justice stated that such a move would only be possible in a specific, concrete case. Observers attribute the reluctance of the government in this regard to its wish to avoid an open political clash with the Northern States, see Christophe Ayad, *La Charia qui menace safia au Nigéria*, *La Liberation*, 15 January 2002 and *La loi islamique est déclarée contraire à la Constitution nigériane*, *Le Monde*, 22 March 2002.

²⁸ Concluding observations of the Human Rights Committee: Nigeria, UN Doc. CCPR/C/79/Add.65, 24 July 1996, para.284.

²⁹ See Situation of Human Rights in Nigeria, Annex: Interim report on the situation of human rights in Nigeria, prepared by the Special Rapporteur of the Commission on Human Rights in accordance with General Assembly resolution 52/144 and Economic and Social Council decision 1998/262, UN Doc. A/53/366, 17 September 1998 as well as the following report of the Special Rapporteur during the transitional period, UN Doc. E/CN.4/1999/36, 14 January 1999.

³⁰ See also the joint appeals sent by the Special Rapporteur on Violence against Women, the Special Rapporteur against extrajudicial, summary and arbitrary executions and the Special Rapporteur against Torture, referred to in Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, report submitted in accordance with Commission on Human Rights resolution 2000/49, UN Doc.E/CN.4/2002/83, Add.1, 28 January 2002, paras.92 and 93.

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Torture and inhuman and degrading treatment are prohibited under Section 34 (1) (a) of the 1999 Constitution: "Every individual is entitled to respect for the dignity of his person, and accordingly- a) no person shall be subject to torture or to inhuman or degrading treatment." Derogation of the right to freedom from torture is not permissible and cannot be restricted by either emergency or war.³¹ Further, Nigeria has ratified the African Charter on Human and Peoples' Rights, which spells out a prohibition of torture in Article 5. Nigeria has incorporated it into domestic legislation by way of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1990.

While the Criminal Procedure Code prohibits the extraction of confessions by means of force, neither it nor any other statutory laws contain any express provisions prohibiting torture.

There is no definition of torture in the Constitution or in any statutory law. Nigerian courts, while having pronounced on the meaning of torture, have not defined torture in line with Article 1 of the Convention against Torture.³²

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law

1.1. Criminal Law: Offences and Punishment

(i) Federal Criminal Code

Nigerian criminal law, which consists of the Criminal Code applicable to the Southern States and the Penal Code applicable to the northern part of the country,³³ does not recognise a specific criminal offence of torture.

However, under the Federal Criminal Code, acts of torture, to the extent that they amount to a deliberate infliction of physical pain, can fall under the crime of assault. Assault is defined as follows: "A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent, or with his consent, if the consent is obtained by fraud, or who by any bodily act, or gesture attempts or threatens to apply force of any kind to the person of another without his consent in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called assault. The term

³¹ Section 45 of the 1999 Constitution.

³² The Nigerian Court of Appeal, in the case of *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt. 200) 708 at p.725, defined torture as follows: "The word 'torture' etymologically means to put a person to some form of pain, which could be extreme. It also means to put a person to some form of anguish or excessive pain. The 'torture'... could be a physical brutalization of the human person. It could also be mental torture in the sense of mental agony or mental worry. It covers a situation where a person's mental orientation is very much disturbed that he cannot think and do things rationally, as the rational human being that he is. He lives in perpetual fear of an enemy attack."

³³ The Criminal Code, based on English common law and legal practice, applies in all parts of Nigeria except the Northern states. In the northern territories, the old Penal Code has recently been replaced by *Shari'a* law.

"applies force" includes cases of applying heat, light, electrical force, gas, odour, or any other substance or object whatever, applied in such a degree as to cause injury or personal discomfort."³⁴ The Code provides further that "An assault is unlawful, and constitutes an offence unless it is authorized or justified or excused by law."³⁵ Thus, "Any person authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess."³⁶

The various categories of the offence of assault, which can be invoked in instances of torture, are: ordinary assault which is a misdemeanour punishable by imprisonment for one year;³⁷ assault whereby a person unlawfully assaults another and thereby does him harm which is punishable by imprisonment for three years;³⁸ and assault on a person with intent to have carnal knowledge of the said person against the order of nature which is a felony punishable by imprisonment for fourteen years.³⁹

Grievous bodily harm, listed under offences endangering life or health, is, if committed intentionally, punishable with imprisonment for life,⁴⁰ and with imprisonment for seven years in other cases.⁴¹ Manslaughter is punishable with imprisonment for life⁴² whereas the punishment for murder is death.⁴³

The punishment for rape is life imprisonment with or without caning.⁴⁴ There is no separate offence of rape in custody.

ii) Northern Criminal Codes

Under the Penal Code applicable in the Northern States of Nigeria as well as the *Shari'a* Law recently enacted in some Northern States, acts amounting to torture may constitute such criminal offences as various types of injury, homicide and rape.⁴⁵ Under *Shari'a* Law, the perpetrator of homicide and injury can only be punished if the victim or relatives of a victim demand punishment. If committed intentionally, the punishment is *qisâs* (retaliation).⁴⁶ Accordingly, punishment may be death for homicide and a punishment mirroring the injuries inflicted for the crimes of injury.

³⁴ Section 252 Nigeria Criminal Code, 1990.

³⁵ Section 253 *ibid.* See for justified use of force by police officers in the course of arrest, quelling of riots etc. sections 261, 276, 277 and 278 *ibid.*

³⁶ Section 298 *ibid.*

³⁷ Section 351 *ibid.*

³⁸ Section 356 Criminal Code.

³⁹ Section 352 *ibid.*

⁴⁰ Section 332 *ibid.*: "Any person who, with intent to maim, disfigure or disable, any person, or to do some grievous harm to any person, ... 1) unlawfully wounds or does any grievous harm to any person by any means whatever."

⁴¹ Section 335 *ibid.*

⁴² Section 325 *ibid.*

⁴³ Section 319 *ibid.* See for the definition of which acts of homicide constitute murder, Section 316, in particular 2)"if the offender intends to do to the person killed or to some other person some grievous harm." ... it is immaterial that the offender did not intend to hurt the particular person who is killed."

⁴⁴ Section 358 *ibid.*

⁴⁵ See for further details on the Penal Code, E.H. Ofori-Amankwah, *Criminal Law in the Northern States of Nigeria*, Zaria, 1986.

⁴⁶ See for the various definitions of intentional homicide, the study by Ruud Peters, *supra*, pp.24 et seq. and 60 et seq. and for the criminal offence of hurt and grievous hurt, Articles 240 and 241 of the Penal Code Act, 1960.

The victim or his/her relatives may accept *diyya* (blood price), which is a fixed amount payable by the victim or his/her relatives or his/her tribe, in lieu of retaliation.⁴⁷ If the victim or the relatives of a victim demand neither *qisâs* nor *diyya*, the perpetrator might be sentenced to imprisonment, and in some states to additional lashing.⁴⁸ Rape, constituting *zina* (unlawful sexual intercourse), is punishable by stoning to death if the offender is married or has been married and hundred lashes in all other cases.⁴⁹

iii) Military Law

Members of the armed forces are responsible under military law for crimes committed in the course of their duty, in particular the military offences of rape, ill-treatment of officer or soldier, rating or aircraftman of inferior rank and civil offences, such as assault, manslaughter and murder.⁵⁰

1.2. Disciplinary Sanctions

According to the Police Regulations, police officers are subject to disciplinary punishment for unlawful conduct, ranging from cautions to demotions and dismissal from office in serious cases. Punishment is imposed by the Police Service Commission.⁵¹

2. The procedural law

2.1. Immunities

While there was legislation granting immunity during the Abacha regime, this has subsequently been repealed.⁵²

⁴⁷ The only exception being treacherous killing (*quatl ghîla*) which is defined as luring someone away to a deserted spot in order to kill him/her and can be punished with death regardless of the demands of the relatives. *Diya* is the only form of punishment in cases of non-intentional homicide and hurt. The amount of *diyya* is fixed by legislation, see as an example Section 68A (2) (f) of the Niger State Penal Code, setting an amount of 4 million Naira for homicide. See study by Ruud Peters, supra, p.9 and pp.24 et seq.

⁴⁸ Ibid., pp.26 et seq.

⁴⁹ Ibid., pp.19, 20.

⁵⁰ See sections 77, 92, 104-106 of the Armed Forces Decree, 1993.

⁵¹ See regulations adopted pursuant to Sec.46 b) of the Police Act, [CAP.359], Laws of the Federation of Nigeria, 1990.

⁵² The State Security (Detention of Persons) Act (CAP 414) also known as Decree No 2 of 1984 empowered the then Federal Military Government to detain persons for acts prejudicial to State security for a period of up to six months at a time. Section 4 (1) provide for exclusion from suit or other legal proceedings against any person for anything done or intended to be done in pursuance of the Act. Section 4 (2) suspends Chapter IV (fundamental rights chapter) of the constitution for the purposes of the Act. In *Abacha v Fawehinmi*, supra, the Federal Military Government contended that under the State Security (Detention of Persons) Decree No 2 it was immune from any legal proceedings in respect of any act carried out pursuant to the legislation. Consequently, it argued the court had no jurisdiction to hear the action in that its jurisdiction had been ousted by the said Act. The Supreme Court held that the immunity provided under Section 308 of the 1999 Constitution which states that no proceedings shall be instituted against the president etc during his office does not arise and does not apply in the case. Subsection 2 does not apply to the immunity of the person in question in his official capacity or to a civil or criminal proceeding in which such a person is only a nominal party. The immunity is to protect such a person from harassment while in office for an action done in his private capacity before or during his tenure in office.

Section 374 of the Police Regulations 1968 provides: "Nothing in these regulations shall affect or diminish the liability of any member of the force to prosecution before a court of summary jurisdiction for any offence against the Police Act; or to prosecution before any court of justice for any crime" Lastly, the Police Act provides in Section 44 that "Nothing in this Act shall be construed to exempt any police officer from being proceeded against by the ordinary course of law when accused of any offence punishable under any Act or law."

2.2. Statute of Limitations

The statute of limitations is laid down individually for the crime in question. There is however a specific act applicable to public officers according to which any action or prosecution can only be brought against them within three months after the act or omission in question.⁵³ In *Egbe v Adefarasin* the court held that under Section 2 of the Public Officers Protection Act the action of the criminal suit was statute barred as it was brought after 3 months of the commission of the action complained of. Action brought outside the prescribed period offends against the provision of the section and does not give rise to a cause of action.⁵⁴ Conduct of the defendant as to whether it was malicious or not is irrelevant to the determination of whether the cause of action is statute barred under Section 2 of the Act.

2.3. Investigation into acts of torture

2.3.1. Criminal investigations

The procedural law is set out in the Criminal Procedure Act, applicable to the Southern part, and the Criminal Procedure Code, applicable to the Northern States. In principle, unless otherwise stipulated with regard to a specific crime, any person may make a complaint against any other person alleged to have committed an offence.⁵⁵ The complaint may be made orally or in writing⁵⁶ and has, in cases where there is no specific time limit enacted for the particular offence, to be made within six months from the time when the issue arose.⁵⁷

The police are responsible for conducting investigations. In criminal trials, it is the police that conduct the bulk of prosecutions mostly at Magistrates' Courts. The office of the Attorney General of the state concerned is empowered to take over and conclude the prosecution, be it because of the seriousness of the case or because of a demonstrated lack of commitment on behalf of the police to effectively carry out

⁵³ See section 2, Public Officers Protection Act [CAP.379], 1916: "Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provision shall have effect- a) the action, prosecution, or proceedings shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof; Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the discharge of such person from prison." See for the definition of public officers, Section 4 (1) Public Officers (Special Provisions) Act, [CAP.381], 1983.

⁵⁴ *Egbe v Adefarasin* [1985] 1 NWLR (pt 3) 549.

⁵⁵ Section 59 (1) Criminal Procedure Act (hereinafter CPA) [CAP.80], 1945. This and the following references are to the federal Act.

⁵⁶ See for the requirements, sections 60 and 61 CPA.

⁵⁷ Section 63 CPA.

the prosecution.⁵⁸ There is no independent body charged with conducting investigations of alleged torture. There are several special units within the Criminal Investigation Department, such as an anti-corruption unit, but no similar unit exists in respect of torture or other serious human rights violations.

The police and the Attorney-General have wide discretion and may decline to investigate and/or prosecute at public instance any offence of which they have been notified by a private person.⁵⁹ The latter is however obliged to issue a certificate to that effect. If he/she fails to do so and thus does not exercise his/her discretion, a Court may compel the Attorney-General to perform his/her statutory duties by ordering a writ of *mandamus*.⁶⁰

The suspect may be detained by the investigating police officer if there is sufficient evidence for his/her guilt.⁶¹ Medical evidence shall be collected according to the procedure outlined in Section 311(1) Criminal Procedure Act: "It shall be the duty of a magistrate holding a preliminary inquiry- a) to make or cause to be made such local inspection as the circumstances of the case may require; and b) if necessary in any case of homicide or serious injury to the person, to cause the body of the person killed or, if he consents, of the person injured to be examined by a qualified medical practitioner, if any such can be had, and if not then, if the court considers it necessary, by the most competent person that can be obtained, and the deposition of such medical officers or other person shall afterwards, if necessary, be taken."⁶²

After the completion of the investigation, the investigating police officer may dismiss the case on the grounds of insufficient evidence or warn and discharge the suspect if he/she has no prior criminal record, the offence is a victimless crime or the suspect agrees to compensate the victim.⁶³

⁵⁸ Article 174 CPA: "The Attorney-General of the Federation shall have power: 1) a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly; b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person."

⁵⁹ See *Fajemirokun V CB (C.L) (NIG) LTD* (2002) 10 NWLR (pt.774) 95 C.A, p. 100.

⁶⁰ See J. Ademola Yakubu and A. Toriola Oyewo, *Criminal Law and Procedure in Nigeria*, Lagos, 2000, p.242, citing the cases of *Fawehinmi v Akilu* (1987) 4 NWLR (Pt.67) 797 and *A.G. Anambra State v Nwobodo* (1992) 7 NWLR (Pt.256) 711.

⁶¹ Under section 23 CPA, a warrant of arrest may be issued by a magistrate or judge in respect of any complaint or statement made on oath by the complainant or a material witness. Under section 28 (2) the police may arrest a suspect based on the warrant issued. Under Section 30 (1) of the Criminal Procedure Act any court issuing a warrant for the arrest of a person in respect of a matter other than an offence punishable with death may, if it thinks fit by endorsement on the warrant, direct that the person be released on arrest on entering into a recognisance for appearance as may be required in the endorsement. In such a situation the detention will be brief. Also, after a formal charge is made, the accused person may be admitted to bail if the court thinks fit, Section 118.

⁶² See for autopsies Coroners Act [CAP.489], 1945; Section 5(1): "Whenever a coroner is informed that the body of a deceased person is lying within his jurisdiction and that there is reasonable cause to suspect that the person has- a) died a violent or an unnatural death; or b) died a sudden death of which the cause is unknown; or c) died whilst confined in a lunatic asylum, or in any place or circumstances which, in the opinion of the coroner, makes the holding of an inquest necessary or desirable, the coroner shall, subject as hereinafter in this section provided, hold an inquest on the body as soon as is practicable."

⁶³ In the Federal Capital Territory Abuja and in some Northern States, the police sends a First Information Report to a court which may then direct that the police shall proceed with the investigation or proceed to hold an inquiry into or otherwise deal with the case. See Sections 119 and 120 of the Criminal Procedure Code Act [CAP.491], 1960.

Should the investigation yield sufficient evidence against the suspect, the police may prosecute the suspect before a Magistrate's Court. In cases of felonies, the case file will be transferred to the Attorney General. The latter will then, depending on the assessment of the available evidence, either file an indictment against the suspect before a magistrate's court or dismiss the case.

Where the state agents decline to prosecute, the victim may compel them to exercise their discretion or, alternatively, bring a private prosecution before the Magistrates.⁶⁴

Moreover, Article 7 (1) of the African Charter on Human and People's Rights, which provides that "every individual shall have the right to have his cause heard", might be invoked by victims when appealing against decisions of the prosecution.

There are no laws or programmes in place providing for victims and witness protection during investigation and trial.⁶⁵

2.3.2. National Human Rights Commission

Torture survivors or relatives of a torture victim can petition the Human Rights Commission. Such a petition could be made in writing or orally where it is not possible for it to be written. A staff of the Commission is permitted to interview a petitioner to elicit the substance of the petition. Such petition shall contain the name, identity, address, occupation of the victim, material facts about the violation complained of, the law violated and actions already taken in seeking redress. It must also identify the alleged perpetrator. As a general rule, the Commission is precluded from entertaining complaints on matters already pending in court unless where the proceedings have been unduly delayed or there is undue influence and interference by an official. A survivor could file the petition himself. Where this is difficult or impossible, his family or any other individual or organisation may present the petition. Generally, complaints may be lodged with the Commission by any of the following:

- Any person acting in his or her own interest.
- Any person acting on behalf of another person who cannot act in his or her own name.
- Any person acting as a member of or in the interests of a group or class of persons, and
- An association acting in the interest of its members.

The complaint must be signed or thumb-printed by the complainant or his agent. A complaint is not to be made in abusive language. On receiving the complaint, the Commission decides whether it falls within its jurisdiction. If it does, then the Commission forwards it to the person or the head of the body or organisation alleged to have committed the violation for comment. Such person or organisation has 21 days from the receipt of the complaint to respond unless the Commission specifies a longer period.

⁶⁴ See sections 342 CPA and 143 CPC.

⁶⁵ A court may however take some measures of protection in the course of proceedings, such as denying bail to an accused person if it deems it likely that such person would impede investigations.

If it deems fit, the Commission may assign an investigator or officer of the Commission to carry out a preliminary investigation into the complaint lodged with it. If following the preliminary investigation the Governing Council of the Commission decides that the complaint could not be mediated upon or settled, it may decide to institute a full investigation. Such a decision will be conveyed in writing to the complainant and respondent, who will also be informed of the date, time and place of the hearing. Persons appearing before the Council for investigation may appear in person or be represented by counsel of their choice. At the conclusion of the investigation, the Council will inform the complainant and respondent of its findings, and may thereafter forward its findings and recommendation to the Federal Government.

In respect of any complaint lodged with it, and which it finds admissible, the Commission may make recommendations with a view to resolving the issue, and forward these to the Federal Government or the agency responsible for the alleged violation. A recommendation may include:

- Recourse to a court of law at the behest of the Commission or of the person directly involved, or
- Appropriate sanctions against the offending officer.

2.4. Trials

If an indictment is filed, a case is heard by the local Magistrates Court or Area Court/*Shari'a* Court which is to apply the law applicable in the territory under its jurisdiction. Offences punishable under the Armed Forces Decree are to be tried by Court Martials.⁶⁶ The ordinary criminal trial is largely adversarial and modeled on the English system. In criminal cases, the burden of proof is on the prosecution to establish the allegation contained in the charge beyond reasonable doubt.⁶⁷

Evidence is generally governed by the Evidence Act, which allows direct and circumstantial evidence to be adduced as proof of the allegation.⁶⁸ Victims are at liberty to produce evidence which in their opinion would prove the allegation of torture, should the court permit such evidence, but they have no right of cross-examining or intervening in the trial since the proceedings are completely in the hands of the official prosecutor.

The applicable Criminal Codes do not envisage the possibility of suspended sentences. The President can exercise the Prerogative of Mercy in favour of convicts for federal offences⁶⁹ but has no power to grant amnesties. At the state level, a state Governor can exercise the power to order the release of prisoners convicted under state law.

⁶⁶ Sections 130 and 131 Armed Forces Decree.

⁶⁷ The standard of proof in criminal cases is proof beyond reasonable doubt of which the Supreme Court had this to say in the case of *Edamine V State* (1996) 3 NWLR (Pt. 438) 530 at 532 "If the case is strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence"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."

⁶⁸ See parts IV-VII Evidence Act.

⁶⁹ Article 175 Constitution.

3. The Practice

Torture survivors have only in very few instances made allegations against perpetrators of torture. These allegations tend to be made when the victims seek to repudiate confessional statements attributed to them that had been extracted through torture. The allegation in such a case is made before the court at which the survivor is standing trial for a particular offence. Torture survivors more usually suffer their fate in silence and hardly any have brought any complaints or private prosecutions against perpetrators of torture. This is for a number of reasons, such as lacking awareness that torture constitutes criminal conduct in the light of the fact that torture is seemingly used as a legitimate instrument of law enforcement, fear of further torture in retaliation for complaining, lack of confidence in the capacity of the criminal justice system to ensure punishment of the perpetrators and lacking legal advice and financial resources to undertake a private prosecution.

In a number of cases where torture survivors have complained, the police appear to have carried out either no investigations at all or only superficial ones.⁷⁰ For example, an Amnesty International delegation recently collected over thirty allegations of torture and cruel, inhuman and degrading treatment received in police detention centres made by inmates who claimed to have reported their allegations to either a magistrate or to the prison authorities. It appears that in none of these cases were the allegations investigated.⁷¹ The police are generally seen as reluctant to carry out investigations against their own members and, in most cases, measures envisaged by law, such as ordering medical examinations, appear not to have been taken. The Attorney-General has only taken vigorous action in some high profile cases that had attracted public attention. While the Commission for Human Rights has the power to investigate, its members have also been harassed by the police.⁷²

Nigerian courts have not taken an active stance in initiating investigations. During criminal trials, courts generally carry out *ex facie curie* investigations to determine the voluntary nature of confessions attributed to suspects. Confessions obtained through torture are not admissible in court.⁷³ The law is that if during a criminal trial an accused person alleges that he had been tortured to confess to having committed the offence for which he is standing trial the court should suspend the trial

⁷⁰ See Akin Ibidapo-Obe's assessment, which according to observers still holds true today, in, "Police Brutality: Dimension and Control in Nigeria " in: Chukwuma Innocent & Akin Ibidapo-Obe (eds.), *Law Enforcement and Human Rights in Nigeria*: Civil Liberties Organization, 1995, p.83: "In terms of mechanisms within the police force itself to contain the excesses of its members, there seems to be a lack of will to follow through on allegations of police brutality. Where there has been a public outcry against a particularly brutal police act, the police would hastily set up an in-house investigation. Predictably after the outcry has died down, the police panels quietly close their files."

⁷¹ AI, Nigeria - security forces, *supra*, p.5.

⁷² In one incident, Mr. Kunle Fadipe, a former Board member of the Commission and its rapporteur on prison conditions once narrated how he was brutalized on 4 January 1998 at the More police station in Ile-Ife Osun State. He had gone there to investigate a complaint that someone was being detained illegally and met a Superintendent of Police who asked his officers to assault him, his reason being that he had the effrontery to enter a police station to talk about human rights when he could not do the same in a military barrack. According to Mr. Fadipe, he later received a compensation of N20,000 when the police authorities confirmed his status as a member of the Commission.

⁷³ Section 28 of the Nigerian Evidence Act provides that "A confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature"

immediately. The court would proceed to organize a *voir dire* or “trial within trial” to determine whether or not the confession was voluntarily made. If the court decides at the end of the *voir dire* that the statement was not obtained voluntarily, it would not be admitted and *vice versa*. However, judges appear not to have followed up allegations of torture by calling for an investigation to be initiated. This is also to be seen against the background that the judiciary is still struggling for its independence from both the executive and legislative arms of government.⁷⁴

There have only been a few high-profile cases in which perpetrators of torture have been tried and convicted.⁷⁵ In some instances, when torture had been mentioned, it has been in an ancillary sense. For example, the case of *Uzoukwu V Ezeonu II*, referred to above, did not deal directly with torture *per se* or degrading treatment, but with what the court described as verbal abuse.

There have been few cases in which perpetrators of torture and ill-treatment have faced disciplinary sanctions, and have been dismissed from the force as well as handed over for prosecution. The practice of the authorities in imposing disciplinary sanctions lacks consistency and appears to depend largely on circumstances other than the nature of the offence.

IV. CLAIMING REPARATION FOR TORTURE

1. Available remedies

1.1. Constitutional Law

The Nigerian Constitution lays down an express right to redress for violations of fundamental rights guaranteed in Chapter IV, including torture. Article 46(1) stipulates that: “Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.” Article 46(2) provides that “Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within the state of any right to which the person who makes the application may be entitled under this chapter.”

Any person who alleges that any of the Fundamental Rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may, apply to the Court, i.e. the Federal High Court or the High Court of a State, in

⁷⁴ See on this e.g. International Commission of Jurists, Nigeria-Attacks on Justice 2000, Independence of Judges & Lawyers, Documents, 13 August 2001.

⁷⁵ Innocent Chukwuma: *Above the Law*: Civil Liberties Organisation 1994, p.109: “With the possible exception of the killing of Dele Udo, the Dawodu brothers and Colonel Israel Rimdan where the police culprits were publicly prosecuted and convicted, no known cases of torture or extra-judicial killing involving policemen...have been seriously investigated with a view to bringing their perpetrators to book. The typical attitude of police authorities is to sweep such matter under the carpet, except were (sic) the case concerned an ‘important’ person. This treatment contrast sharply with that given to ordinary victims.” While this assessment dates back some time, the practice appears not to have changed markedly after the end of the Abacha dictatorship. See on the lack of investigations Amnesty International, Nigeria - security forces: serving to protect and respect human rights, supra, p.7.

the State where the infringement occurs or is likely to occur, for redress.⁷⁶ Where the state official whose action forms the basis for the claim works for the Federal Government, the Constitution requires that the application for redress should be filed at the Federal High Court.⁷⁷ Proceedings have to be commenced within twelve months of the cessation of the violation. Otherwise, leave of court would be required to extend the period.⁷⁸ The proceedings are governed by the Fundamental Rights (Enforcement Procedure) Rules 1979 and the Federal High Court (Civil Procedure) Rules 2000. The burden of proof lies on the person who would fail if no evidence were given on either side whereby the standard of proof required is proof on a balance of probabilities.⁷⁹ The awarding of costs is at the discretion of the Court.⁸⁰ In the case of *Enuadubi V Akpovwovwo* (1990) the Court of Appeal held that this discretion must be exercised judiciously.⁸¹ In Nigeria costs mean the award made to a party to a suit to underwrite the expenses incurred in commencing and concluding litigation. It is mostly nominal. Legal Aid is not available for pursuing claims for compensation in torture and ill-treatment cases.⁸²

As a general rule, the Court or Judge may make such orders, issue such writs, and give such directions as it or he may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution to which the complainant may be entitled.⁸³ The Courts are thus not restricted in awarding reparation pursuant to Article 46 of the Constitution. However, as a general rule, the court may not award what has not been asked for.⁸⁴ The order would therefore depend to a large extent on the claim of the person applying for redress. Apart from awarding monetary compensation, the court may make whatever order it deems proper having regard to the peculiar circumstances of each case. The amount to be awarded or the nature of the award would depend on the extent of the injury suffered and includes pecuniary, non-pecuniary and exemplary damages. Damages are awarded to compensate for an established wrong. According to the Court of Appeal in the case of *Joseph Odogu V Federal Attorney*

⁷⁶ Order 1, Rule 2), (1) Fundamental Rights (Enforcement Procedure) Rules 1979.

⁷⁷ In the case of *Tukur V Government of Gongola State* (1989) 4 NWLR (Pt.17) 517 at 520 it was held that "Court" as used in the Fundamental Rights (Enforcement Procedure) Rules 1979 includes the Federal and State High Courts. Order 1 Rule (1)(1) of the said rules defines "Court" as "The Federal High Court or High Court of a State."

⁷⁸ Order 1 Rule 3(1) of the Fundamental Rights (Enforcement Procedure) Rules 1979.

⁷⁹ See sections 136 et. seq. Evidence Act.

⁸⁰ See Order 52, B, 3) of The Federal High Court Rules 2000. See also B, 4): "The Court shall not order the successful party in a suit to pay to the unsuccessful party the costs of the whole suit, although the Court may order the successful party, notwithstanding his success in the suit, to pay costs of any particular proceeding therein."

⁸¹ *Enuadubi V Akpovwovwo* (1990) 6 NWLR (PT.159) 745 at 746. See on costs also Fidelis Nwadiolo, *Civil Procedure in Nigeria*, Lagos, 1990, pp.598 et seq.

⁸² See section 7 (1) of the Legal Aid Act, 1977.

⁸³ Order 6, Rule 1 Fundamental Rights (Enforcement Procedure) Rules 1979. Rule 2 stipulates, that: "In default of obedience of any order made by the Court or Judge under these Rules, proceedings for the committal of the party disobeying such an order will be taken. Order of Committal is in the Form of the Appendix." See for text of Rules and Appendix, Constitutional Rights Project, *Guide to Human Rights Litigation in Nigeria*, 1994, p.80 et seq.

⁸⁴ See *Odogu v. Attorney General of the Federation & Ors*, 91(996) 6 NWLR 508: "Exemplary damages will not be awarded unless they have been pleaded and proved. The appellant did not specifically claim such damages in his application for the enforcement of his fundamental rights and no award can, therefore, be made." However, in the case of *Ezeaka & Ors v. The Commissioner of Police & Ors*, (2000) 2 HRLRA, 165, the Federal High Court held that: "To arrest someone else for an offence allegedly committed by another, no matter the degree of affinity, is a gross and violent human rights violation. This act alone should attract exemplary damages. Despite these type of damages not being claimed, the applicants are still entitled to a substantial award amounting to N200,000 to be paid jointly and severally by the respondents."

General & 6 Ors. "Where interference with a right is of substantial proportions and real damage has been shown, as in this case, it is erroneous to award in the name of compensation an amount which is almost contemptuous and derisory ... Whatever compensation is awarded in such cases as this should truly reflect not only the actual pecuniary loss of the victim but also the abhorrence of society and the law for such gross violation of human rights, particularly the right to personal liberty, as in this case. An unwitting trivialization of a serious matter by an inordinately low award should be avoided. Personal liberty of the individual is a commodity of an inherently high value."⁸⁵ In the case of *Minister of Internal Affairs V Alhaji Shugaba Darman*, the Court held that "In cases involving the infraction of fundamental rights of a citizen, the court ought to award such damages that would serve as a deterrent against naked, arrogant, arbitrary and oppressive abuse of power as in this case. However, such an award must not be excessive."⁸⁶ In the case of *Odogu v. Attorney General of the Federation & Ors.*, mentioned above, the court stated that "Exemplary damages would, however, have been awarded in this case if claimed since the conduct complained of was sufficiently outrageous to merit punishment (*Elichon (Nigeria) Ltd & Ors v Mbadiwe* (1986) 1 NWLR (PT14) 47) applied."⁸⁷

Moreover, the Courts have in several cases held that the applicants are entitled to an apology by the respondents.⁸⁸ An apology generally mitigates the requisite amount of monetary compensation.⁸⁹

1.2. Civil Law

In Nigerian civil law, which is largely based on the common law, damages may be claimed for the torts of assault and battery.⁹⁰ The common law remedies for tort may be claimed against the individual perpetrator in a case of reparation for torture. The public officers are individually liable,⁹¹ and the relevant state institutions vicariously liable for any wrongful damage caused. Damages may be awarded for pecuniary and non-pecuniary harm, or, if no harm is shown, as nominal damages. Specific damages for pecuniary harm cover financial losses incurred as the result of the injury, such as medical expenses and loss of earning. General damages include pain and suffering,

⁸⁵ *Joseph Odogu V Federal Attorney General & 6 Ors.* Suit No. CA/L/271/92. In this case the applicant was detained without trial from August 4, 1980 to March 31, 1988. In his suit for redress, the trial court awarded damages of two thousand Naira which was increased on appeal to seventy five thousand naira.

⁸⁶ *Minister of Internal Affairs V Alhaji Shugaba Darman* (1982) 3 NCLR 915.

⁸⁷ Confirmed by the Federal High Court in *Ezeaka & Ors v. The Commissioner of Police & Ors*, (2000) 2 HRLRA, 165: "Exemplary damages are awarded where the defendant's conduct is so outrageous as to amount to malice, fraud, cruelty and/or flagrant disregard of the law. Here, the applicants given their treatment at the hands of the respondents, in particular the barbaric detention of the wife and child of the fourth applicant, and the psychological trauma they suffered are entitled to substantial damages."

⁸⁸ In a case concerning unlawful detention and cruel, inhuman and degrading treatment, *Awaye & Ors V Controller General of Prisons & Ors*, High Court, Suit No FHC/L/CS/1113/97, unreported, Judge Odunowo held that the applicants are entitled to compensation and a public apology by the Commissioner of the Police." See also Chief *Fawehinmi v General Babangida* (President of Nigeria), Lagos High Court, (2000) 2 HRLRA 144, in which the Court held that the applicant was entitled to a public apology by way of recompense for an unlawful detention in police cells instead of prison contrary to a ministerial order.

⁸⁹ Constitutional Rights Project, *Guide to Human Rights Litigation in Nigeria*, 1994, p.31 with references to earlier jurisprudence.

⁹⁰ *Benedicta Ada Susu, Law of Torts*, Lagos, 1996, pp.11 et seq.

⁹¹ This is explicitly stated in section 341 of the Police Act CAP 359 of the laws of the federation of Nigeria 1990: "In the individual exercise of his powers as a police officer, every police officer shall be personally liable for any misuse of his powers, or any act done in excess of his authority."

loss of expectation of life, loss of amenities, loss of future earning capacity and possible future expenses. Aggravated damages may be awarded where the manner of committing the tort aggravates the injury to the plaintiff and exemplary damages where the court wants to express strongly its disapproval of the conduct, such as when the plaintiff has been the victim of "oppressive, arbitrary or unconstitutional action by the servants of the government."⁹²

A civil lawsuit has to be filed to the High Court of the State in which the act was committed. A suit against an individual officer has to be brought within a time limit of three months.⁹³ Moreover, the period in which a plaintiff can bring an action under for tort is restricted under state laws. For example, in *Gulf Oil Co (Nig) LTD V Oluba*⁹⁴, the Court of Appeal was of the view that by virtue of Section 4 (1) of the Limitation Law of Bendel state 1976, any action founded on tortuous act must be instituted in court within the period of six years of the accrual of the cause of action.

The present practice is for the person aggrieved by the action of a public officer to sue the institution that the said public officer represents and also join the said officer in person. If an order for reparation is made, it is usually against the institution and not the public official responsible for the injurious action. It used to be the case that where misbehavior amounted to both crime and civil wrong the victim must first allow the criminal prosecution to end before suing under civil law. That was under the rule in *Smith V Selwyn*.⁹⁵ This position has since changed and the civil and criminal cases can now be pursued simultaneously.⁹⁶ The success or otherwise of the civil claim would not depend on the outcome of the criminal prosecution. However, a conviction of the perpetrator strengthens the civil claim. Special damages have to be specifically pleaded and proven whereas general damages are to be determined by the court. The rules on proof and evidence and the award of costs are the same as in a fundamental human rights application before the High Court.

A torture survivor who wins an award or monetary compensation can enforce the judgment by obtaining a writ of *fifa (feri facias)*.⁹⁷ Another manner in which a

⁹² See on the various types of damages, Susu, Torts, supra, pp.324 et seq. With regard to aggravated and exemplary damages, Susu refers to the English case of *Rookes v Barnard*, (1964) 1 All E.R. 367 where the quotation is taken from and the case of *Shugaba Abdulrahman Darman v Minister of Affairs* (1981) 2 NCLR 459.

⁹³ Section 3 (3) Public Officers (Special Provisions) Act, 1983, see text supra, and Section 2 of the Police Officers Protection Act.

⁹⁴ *Gulf Oil Co (Nig) LTD V Oluba* (2002) 12 NWLR pt.780) 92 C.A.

⁹⁵ English case of *Smith V Selwyn* (1914) 3 K.B.98 to the effect that "An action for damages based upon a felonious act on the part of the defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted, and the proper course for the court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted."

⁹⁶ Nigerian Court of Appeal in the case of *Attorney General V Dawodu* (1995) 2 NWLR (Pt. 380) 712. There, the court held that the rule in *Smith V Selwyn* was contrary to the proper administration of justice. In the lead judgment delivered by Justice Muntaka Coomasie, the judge said "I agree with the learned justice that the rule is anachronistic, especially as it is now common knowledge that if an aggrieved person has to wait in this country for criminal action to be prosecuted before asserting his civil rights, he may have to wait till doomsday. It is generally known that simple criminal cases take several years to investigate and so also the compilation of case diaries. Worse still, criminal trials are often protracted and suffer long delay. The result is that the purpose of the rule is defeated and rather than assuage public feelings, these delays tend to exacerbate injured feelings"

⁹⁷ To obtain such a writ, the judgment creditor or his solicitor applies for a form or praecipe from the court registry, completes it and files it at the registry. The Registrar prepares the writ and hands it over to the Sheriff for execution. When the writ is issued, it authorises the relevant officials of the court to enter the house of the judgment debtor and seize whatever goods found there belonging to the debtor, i.e. moveable and immoveable property of the judgment debtor and Personal chattels of the debtor (the sheriff must, however, make an allowance for the debtors

survivor could enforce a compensation award is with a Garnishee Order.⁹⁸ The enforcement of a compensation award against the Government requires the prior consent of the Attorney General, whether at the state or federal level.⁹⁹

1.3. Criminal Proceedings

A supplementary lawsuit for damages cannot be filed in the course of criminal proceedings under Federal Law, as damages have to be claimed in a separate proceeding. In the laws applicable to the Northern States, a Court may order that compensation be paid in addition to, or in substitution for, any other punishment.¹⁰⁰ In cases of harm, injury and homicide under *Shari'a* Law, a victim or the relatives of a victim may opt for compensation in form of *diyya* (blood money), an amount fixed by law, instead of exercising retaliation against the perpetrator(s) who may however still be sentenced to a lesser punishment by the courts.¹⁰¹

2. The Practice

There are no statistics as to how many victims of torture have actually claimed reparation but there are hardly any cases in which victims of torture or ill-treatment have obtained reparation.

A torture survivor or relatives of a torture victim could in principle pursue his/her right to reparation along the lines outlined above, in which case the High Court in question or the Supreme Court could adjudicate such claims on the basis of their jurisprudence with regard to other infringements of fundamental rights. In practice, they have apparently largely refrained from taking legal action, ostensibly because of a variety of obstacles facing them when considering such a step. There is generally a lack of proper legal advice but for the few who can afford the services of a lawyer. Survivors or victims' families often do not have the resources to apply to court for reparation since the cost of litigation is unduly high and court cases are often long-drawn out, taking several years to complete. The legal aid machinery is grossly under-funded and inefficient. Moreover, torture survivors and relatives of torture victims fear harassment and further ill-treatment by the perpetrators in response to

wearing apparels and beddings to the tune of N10). He is not permitted to seize the instrument of the debtor's profession or property of a third party.

Such goods are subsequently auctioned after the expiry of seven days of grace to the debtor. The proceeds shall be applied to settle the fee for the execution of the writ, the Auctioneer's commission and the judgment debt.

⁹⁸ Attachment of money due to the judgment debtor by the judgment creditor for the satisfaction of the debt. The proceedings are commenced by the judgment creditor filing a motion *ex parte* accompanied by an affidavit in which a certified copy of the judgment of the court is exhibited. If the application is granted, a garnishee order nisi will be issued for service on the judgment debtor to show cause within 14 days why the debt should not be paid. If the debtor does not show any reasonable cause, the order will be made absolute.

⁹⁹ Section 75(1) of the Sheriffs and Civil Process Law provides that "Where money liable to be attached by garnishee proceedings is in the custody or under the control of a public officer in his official capacity or in custodia legis, the order nisi shall not be made under the provisions of the last proceeding section unless consent to such attachment is first obtained from the Attorney General in the case of money in the custody or control of a public officer or of the court in the case of money in custodia legis, as the case may be."

¹⁰⁰ See Section 365 of the Criminal Procedure Code: "Whenever under any law... a criminal court imposes a fine, the court may, when passing judgment, order that in addition... a convicted person shall pay a sum... b) in compensating in whole or in part for the injury caused by the offence committed, where substantial compensation is in the opinion of the court recoverable by civil suit... and d) in defraying expenses incurred in medical treatment of any person injured by the accused in connection with the offence."

¹⁰¹ See *supra*.

an application for reparation. If legal action were taken, the prospect of success is, according to REDRESS' contacts, limited since torture is difficult to prove unless there is corroborative evidence such as medical reports.

The judiciary in Nigeria has not been very receptive to human rights applications except in very few cases. In a highly criminalised society in which judges have also fallen victims to armed robbery and other violent crimes, they tend to presume every alleged criminal guilty until he can prove his innocence. Thus, the enforcement of the human rights of the alleged offender becomes of secondary consideration. In cases where compensation was awarded, the sums tended to be rather low and are not seen as reflecting the injuries suffered. In *COP Ondo State V Obolo* the lower court had awarded 250 Naira (around \$34.6) as damages to the respondent who complained that the police subjected him to "treatments which berated his dignity". The Court of Appeal increased the amount to 17,500 Naira and awarded 400 Naira for costs.¹⁰² This amount is nominal considering the cost of litigation in Nigeria.

The cost of litigation depends on a number of factors including the length of time the litigation has taken to conclude and whether there are any appeals and the number of any appeals. In most cases there are appeals and the costs tends to run into tens of thousands of Naira.

Finally, even if reparation were to be awarded by a court, there is no guarantee that the torture survivor or relatives of a torture victim will actually receive any reparation. Nigerian governments have a reputation for non-compliance with court judgments with which they disagree. In April 2001, the Federal Government of Nigeria, according to the then Attorney General, owed about Naira 1 billion (\$ 7,785,130 at the time of writing) in debts arising from damages and court fines. The Government has therefore not heeded the call of the Supreme Court in *Government of Gongola State V Tukur* "...as against a state functionary, a pronouncement on a right, with or without sanction, is enough and is expected to be instantly obeyed, the underlying principle in all civilized societies being that a coercive sanction against a government is unnecessary because it must obey any judgment of its own court."¹⁰³ The major obstacle in this regard is the impunity of Government, which operates above the law.¹⁰⁴ This is also due to the procedure of enforcement against the Government since the Attorney General tends to withhold his/her consent required for proceeding with the enforcement. According to Chief Rotimi Willaims (SAN), a leading lawyer, "The right to sue the government is empty and meaningless unless it carries with it the right to reap the fruits of any judgment against the government by execution" and "there is no direct authority on whether or not a writ of *fifa* will issue against the government. One school of thought considers that it is probably true to say that no court in Nigeria has ever issued such a writ against the government."¹⁰⁵

Thus, while it is easy for judgment creditors to levy execution against debtors who are private persons, this is not the case when the government is the debtor. The

¹⁰² *COP Ondo State V Obolo* (1989) 5 NWLR (pt 120) 130.

¹⁰³ *Government of Gongola State V Tukur* (1989) 4 NWLR 592 at 609.

¹⁰⁴ See *supra*, III, 3.

¹⁰⁵ Chief Rotimi Willaims, *Execution of Judgments Against Government*, in: *Journal of Nigerian Law* January 1993, pp. 2,3.

legal system thus fails sufficiently to secure the enforcement of awards against the Government.

V. GOVERNMENT REPARATION MEASURES

There is no general reparation scheme for victims of serious human rights violations, such as torture, or for victims of crime in general.

However, the Commission set up under the Obasanjo regime has the powers, *inter alia*, to deal with past human rights violations and recommend reparation as its mandate is defined as follows:

“a) Ascertain or establish the causes, nature and extent of all gross violations of human rights committed in Nigeria between the 15th day of January 1966 to the 28th day of May 1999; b) Identify the person or persons, authorities, institutions or organizations which may be held accountable for such gross violations of human rights and determine the motives for the violations or abuses and the victims of the atrocities; c) Determine whether such abuses or violations were the product of deliberate state policy or the policy of any of its organs or institutions or whether they arose from abuses by state officials or their office or whether they were the acts of any political organisations, liberation movements or other groups or individuals; d) Recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress the injustices of the past and prevent or forestall future violations or abuses of human rights.”¹⁰⁶

The Commission received well over 10,000 petitions from survivors of human rights abuses or families of late victims. Such survivors include victims of arbitrary arrests, detention and torture, extra-judicial killings, those implicated in contrived coups and jailed as well as several others. The Commission, in addition to the written petitions, also received oral testimonies. It has since submitted its report, in eight volumes, in May 2002. The report recommended the payment of compensation as a way of redressing abuses that were proved. The Chairman of the panel stated that such compensation would be in monetary terms but did not specify the amount to be paid to each complainant. Compensation might also take other forms, according to the Chairman, such as a development project for a community. Reparation should embrace any of the following:

- Reconciliation of the parties after confession and forgiveness
- Restitution
- Restoration
- Compensation (financially and otherwise)

President Obasanjo declared that he was willing to offer an apology on behalf of all Nigerian Governments since 1960 for the offences committed against the rights of

¹⁰⁶ Human Rights Violations Investigation Commission, 1999 Tribunals of Inquiry Act (CAP 447 LFN) Commencement 4th October 1999, Amendment of Instrument Constituting a Judicial Commission of Inquiry for The Investigation of Human Rights Violation.

victims.¹⁰⁷ Although the Oputa Panel was said to have been given one billion Naira (\$7,604 562.7) to compensate victims of human rights atrocities, this turned out to be grossly inadequate. Moreover, the government stated recently that it could not immediately act on the report because some of the cases covered in the work of the Commission are the subject of several pending court suits all over the country.

There are no government-run programmes providing financial aid or rehabilitation for torture survivors. NGOs are providing such services within the limits of scarce resources. Such programmes are largely restricted to newly released prisoners. In any case, torture survivors lack advice on the nature and consequences of their experiences both mentally and physically and so do not come forward for assistance. Even though the Government sometimes acknowledges the excellent work that such NGOs are doing, they offer no support.

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of acts of torture committed in a third country

1.1. The Law

1.1.1. Criminal Law

Nigerian criminal law does not in principle allow for the exercise of extraterritorial jurisdiction. The only exception to this rule is the Geneva Conventions Act.

Article 3 of the Geneva Convention Act provides the legal basis for the exercise of universal jurisdiction over perpetrators of war crimes:

“(1) If, whether in or outside the Federal Republic of Nigeria, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the Conventions as is referred to in the articles of the Conventions set out in the First Schedule to this Act, that is to say –

- (a) article 50 of the First Geneva Convention, 1949;
- (b) article 51 of the Second Geneva Convention, 1949;
- (c) article 130 of the Third Geneva Convention, 1949;
- (d) article 147 of the Fourth Geneva Convention, 1949;

he shall, on conviction thereof –

(i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the Convention in question, be sentenced to death, and
(ii) in the case of any other such grave breach, be liable to imprisonment for a term not exceeding fourteen years.”

According to Section 3, subsection 2 of the Act “A person may be proceeded against, tried and sentenced in the Federal Capital for an offence under this section

¹⁰⁷ See Suleiman Mohammed, Human Rights Violations: Oputa Recommends Compensation, in: Daily Trust (Abuja), 22 May 2002.

committed outside Nigeria as if the offence had been committed in the Federal Capital, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal Capital.”

However, the determination of the question as to whether the Convention applies in a given case is to be made by the Minister charged with responsibility for matters relating to defence. According to Section 3, subsection 3 of the Act, “a certificate purporting to set out any such determination and to be signed by, or on behalf of, such Minister shall be received in evidence and deemed to be so signed without further proof, unless the contrary is shown.”

Section 1 (1) of the Diplomatic Immunities and Privileges Act, 1962, accords every foreign envoy and consular officers as well as members of their family immunity from suit and legal process and inviolability of residence and official archives. By Section 2 however, the immunity or inviolability conferred under the Act may be waived by a foreign envoy or consular officer with the consent of his government.

1.1.2. Extradition Laws

Extradition is governed by the Extradition Act, 1967. The act may be applied to any other country with which Nigeria has an extradition agreement.¹⁰⁸ Every fugitive may be surrendered. This also applies to Nigerian nationals. However, this shall not be the case, *inter alia*, for offences of a political character and if there is a case against the concerned person in Nigeria.¹⁰⁹ For example, the extradition treaties between the Peoples Republic of Benin, the Republic of Ghana, the Federal Republic of Nigeria and the Republic of Togo (1984) in force in Nigeria provides for extradition of perpetrators of torture. Art 1 of the Treaty states “the contracting parties undertake to extradite to each other on the basis of reciprocity ... those persons who being accused or convicted of any of the crimes or offences referred to in Article 2 ...” Article 2 provides that “extradition shall be granted in respect of persons accused of crimes or offences punishable by the laws of the Contracting Party by at least two (2) years imprisonment”. Torture which results in grievous bodily harm or manslaughter is punishable by at least two years in Nigeria and thus extraditable under the terms of the Treaty.

The decision as to whether to grant the requested extradition is taken by the Magistrate upon request by the Attorney-General.¹¹⁰

1.2. The Practice

No cases are known in which Nigerian courts have exercised universal jurisdiction over war criminals or in which Nigeria has extradited alleged perpetrators of torture.

¹⁰⁸ Section 1 (1) Extradition Act.

¹⁰⁹ Section 3 *ibid*.

¹¹⁰ See sections 6 and 7 *ibid*.

2. Claiming reparation for acts of torture committed in a third country

As a general rule, Nigerian courts will have jurisdiction at the place where the defendant resides or carries out a substantial part of his or her business or in which the cause of action arose.¹¹¹ Accordingly, a case could only be brought against a foreign perpetrator if resident in Nigeria, but not in other cases. It may however be tried in the court where it has been commenced unless the Court otherwise directs or the defendant specifically objects to the jurisdiction before or at the time when he is required to state his answer or to plead his cause.¹¹²

Foreign diplomats are accorded immunity from suit according to the Diplomatic Immunities and Privileges Act.

The Nigerian Court of Appeal has recognized the absolute immunity of foreign states from suit in a case in 1989, which however did not concern a claim relating to the violation of human rights.¹¹³

¹¹¹ See Order 11, (1), 9) Federal High Court Rules, 2000.

¹¹² Order 11, (3) *ibid.*

¹¹³ In *Kramer Italo Limited v Government of Kingdom of Belgium and Embassy of Belgium, Nigeria* (1989) 1 CLRQ 126, the appellant appealed against the judgment that foreign envoys cannot be sued in Nigeria even for actions arising out of a contract entered into by them. The Court of Appeal, in dismissing the appeal, held that the absolute theory of sovereign immunity recognizes the fact that foreign sovereigns enjoy immunity both in respect of their governmental and commercial activities. It applied the absolute theory rather than the restrictive theory under which diplomatic immunity could be waived if it is ascertained that the transaction concerned was purely commercial as applied in some countries. The Court further stated that even if the immunity had been waived in the contract between the parties (as provided for under Section 2 Diplomatic Immunities and Privileges Act [CAP 99] 1962), the foreign envoy could invoke the immunity in court as the contract containing the waiver was made *inter-parties* and not an undertaking before the court. See also an earlier case, followed in the *Kramer* case where the court had held that the appellant, being a body formed by an international organization comprising of different states, could not be subjected to a suit in Nigeria because of immunity. See decision by the Supreme Court in *African Re-insurance Corporation v Abate Fantaye* (1986) 3 MWLR (Part 32) 811.