

Central Lancashire Online Knowledge (CLoK)

Title	The Effectiveness of International Law: Torture and Counterterrorism
Type	Article
URL	https://clock.uclan.ac.uk/30854/
DOI	
Date	2016
Citation	Anwukah, Ogechi Joy (2016) The Effectiveness of International Law: Torture and Counterterrorism. <i>Annual Survey of International and Comparative Law</i> , 21 (1).
Creators	Anwukah, Ogechi Joy

It is advisable to refer to the publisher's version if you intend to cite from the work.

For information about Research at UCLan please go to <http://www.uclan.ac.uk/research/>

All outputs in CLoK are protected by Intellectual Property Rights law, including Copyright law. Copyright, IPR and Moral Rights for the works on this site are retained by the individual authors and/or other copyright owners. Terms and conditions for use of this material are defined in the <http://clock.uclan.ac.uk/policies/>

2016

The Effectiveness of International Law: Torture and Counterterrorism

Ogechi Joy Anwukah

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>

 Part of the [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Anwukah, Ogechi Joy (2016) "The Effectiveness of International Law: Torture and Counterterrorism," *Annual Survey of International & Comparative Law*: Vol. 21: Iss. 1, Article 4.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol21/iss1/4>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

THE EFFECTIVENESS OF INTERNATIONAL LAW: TORTURE AND COUNTERTERRORISM

OGECHI JOY ANWUKAH*

I. INTRODUCTION

International law has developed both in significance and degree.¹ The progressive globalization of the world system, however, raises a pertinent question regarding the relevance of international law. In spite of the denigration towards the effectiveness of international law and the challenges of its enforcement,² there exists a conviction that international law counts. This conviction inspires the work of international scholars and lawyers who deliberate on how to make international law more effective.³ Notably, the complexities of the world's problems, and in some cases its interconnection, make it practically impossible for nation states to single handedly attend to such problems when they arise. Hence, international law becomes a likely solution to those challenges which transcend the orbit and competence of individual nation states.

* MPhil/Ph.D. Candidate, University of Central Lancashire, Lancashire Law School, U.K., with current work on legal conceptions of national security relevant to counter-terrorism and human rights law and policy; LL.M., International Business Law, University of Central Lancashire, Lancashire Law School, U.K.; B.L., Nigerian Law School; LL.B. (Hons.), Imo State University, Nigeria; Barrister & Solicitor at Law, Supreme Court of Nigeria; Former Associate Law Lecturer, University of Central Lancashire, Lancashire Law School, U.K.

1. C. Bradley et al., *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. (1997).

2. D. Adia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT'L L. (1998).

3. A. Chayes et al., *On Compliance*, 4 INT'L ORG. 175-207 (1993).

2 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

International terrorism and human rights are at a crossroads. After 9/11, counterterrorism measures have tested the tension that exists between these two areas. International law is not an illusion. Nevertheless, it is a primordial system with obvious limitations on its effectiveness. Although it is a principal medium of developing solutions, it cannot, on its own, solve the world's problems. Therefore, the effectiveness of international law in regulating the conduct of nation states and other international actors in practical circumstances has been questioned by many. The puzzle surrounding the effectiveness of international law is propagated on the practice of states, groups and individuals to engage in internationally unlawful actions without any checks on their conduct by the international legal system. Such unlawful conduct includes the detention of terrorist suspects without trial, the use of torture in the 'war against terror,' the United States led invasions of Iraq and Afghanistan, the unhindered resort to indiscriminate violence against civilians by groups based in existing states (with or without the support of another states government) and the denial of procedural and substantive rights to those being detained by the United States in Guantanamo Bay.⁴ These unlawful actions constitute grave human rights violations under international law. As a result, international law is perceived as a failure in one of its principal purposes of maintaining an orderly society where the weak are shielded from the arbitrary actions of the strong.⁵

The right not to be tortured is a universal right governed by international human rights law. As such, the question becomes: how effective is the international human rights law in deterring extraterritorial state conduct? How relevant is it in prescribing the behavior of state entities that do not exercise or aspire to adhere to its principles? The flagrant violations of human rights laws, such as Article 3 of the European Convention on Human Rights (ECHR),⁶ sparks serious concerns about the efficacy of international law. One begins to wonder if international law excuses some nation states from complying with its rules and principles irrespective of the fact that those nation states are signatories to treaties and conventions that oblige them to uphold those rules and principles. Considering most of the counterterrorism measures, policies and legislations that have been passed by nation states since 9/11, the question as to the 'force' of international law becomes a matter of grave concern.

4. M. DIXON, TEXTBOOK ON INTERNATIONAL LAW (7th ed., Oxford Publishing Press Ltd. 2013).

5. *Id.*

6. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 (formerly titled the Convention for the Protection of Human Rights and Fundamental Freedoms) [hereinafter ECHR].

For instance, the United Kingdom responded to the war against terror by enacting the Anti-terrorism Crime and Security Act 2001. The Act curtails some civil liberties of alien non-nationals suspected of terrorism.⁷ Part 4 of the Anti-terrorism Crime and Security Act, for example, allows the Home Secretary to certify any non-British national whom he suspects to be a terrorist and detain them ‘indefinitely’ pending deportation, even when such a deportation would be prohibited.⁸ As discussed under Section 23 of the Act, a suspected international terrorist must be detained irrespective of the fact that his removal or departure from the United Kingdom is prevented by international law. More extensive legislation was enacted by the Australian government. Under the Australia Security Intelligence Organization (ASIO) Security Legislation Amendment (Terrorism) Act 2002, non-suspects can be detained merely for the purposes of questioning and intelligence gathering, which is incompatible with Australia’s legal commitment under the International Covenant on Civil and Political Rights⁹ (ICCPR).¹⁰ Yet, it could have been more reasonable, assuming detention for questioning is essential, for such detention to be confined to persons who are reasonably suspected of being terrorists or who are involved in terrorist activities.¹¹ One of the most alarming sections of the ASIO Act is s.34NA, which permits the detention of children between the ages of sixteen to eighteen for the purpose of questioning if it is likely that such a child will commit, is committing or has committed a terrorist offense. This contravenes Article 37 of the U.N. Convention on the Rights of the Child, of which Australia is a party.¹² Legally speaking, a child is to be presumed innocent until the contrary is proven.¹³ The enactment of some of these measures plunge human rights protection into a dilemma. The implementation of these types of counterterrorism legislation facilitates the offense of torture and ill, degrading and inhuman treatment, which is an aberration under international human rights law.

7. V. Henning, *Anti-Terrorism Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights*, 17 AM. U. INT’L L. REV. 1263-97 (2002).

8. Anti-terrorism, Crime and Security Act, 2001, c. 24 (U.K.).

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

10. C. Michaelsen, *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? A British-Australian Perspective*, 17 TERRORISM & POL. VIOLENCE 131-155 (2005).

11. *Id.*

12. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

13. Michaelsen, *supra* note 10.

4 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

Terrorism invokes very compelling emotional responses, which often lead to morally conflicting decisions. Thus, nation states ought to align their counterterrorism measures with the principles of the rule of law. The fact that sovereign states are at liberty to enact counterterrorism measures that are in consonance with their particular national interests does not preclude them from complying with their obligations under international law, including the basic responsibility of protecting the rights of all individuals, devoid of discrimination of any kind.¹⁴ States have continually overstepped the limits of permissible actions in their counterterrorism measures or legislation. The enduring threat of terrorism, coupled with an enduring need for well-articulated anti-terrorism legislation, has been sustained as a pragmatic prospect for nation states.¹⁵

This paper sets out to address the following question: to what extent has international law effectively curtailed the practice of torture in a democratic society within the context of the 'war against terror'? This paper will first provide an overview of the current regime of international law prohibiting torture. Next, this paper will discuss the absolute ban on torture and violations that have occurred in the name of the 'war against terror.' This paper will then address the consequences of the use of torture as a counterterrorism measure. Finally, this paper will critically analyze the effectiveness of international law on addressing torture. This paper will ultimately conclude on the topic and offer recommendations.

II. THE CASE OF TORTURE

In current counterterrorism rhetoric, terrorism is pictured as a danger of massive magnitude.¹⁶ It threatens not only our lives, but "our way of lives" and "civilisation to the extent that"¹⁷ it is perceived as a threat so great that any existing international norms seem inadequate. After the Madrid train bombings, British Home Secretary David Blunkett stated that ". . .the norms of prosecution and punishment no longer apply."¹⁸ It is in this frame of mind that the U.S., in its efforts to combat terrorism, held more than 700 detainees at Guantanamo in 2002 and continued to

14. C. Lumina, *Counterterrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice*, 7 AFR. HUM. RTS. L. J. 35-67 (2007).

15. C. Walker, *The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!*, 37 MELB. U. L. REV. 143-88 (2013).

16. J. Wolfendale, *Terrorism, Security and the Threat of Counterterrorism*, 30 STUDIES IN CONFLICT & TERRORISM 75-92 (2007).

17. *Id.*

18. *Id.*

hold approximately 400 as of 2007.¹⁹ Most of the detainees were incarcerated for over four years and were precluded from protections of any legal framework, such as the Geneva Convention.²⁰ As Ronald Dworkin observed in “The Threat to Patriotism,” there is a tendency to think that the gravity of terrorist acts is a reason in and of itself to erode the legal protections of suspected terrorists.²¹ Following this reasoning, in times of crisis nations resort to torture as a tool to gain immediate intelligence and counteract terrorist threats. Despite these justifications, the spirit of international law maintained a complete ban on torture. International conventions, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²² (UNCAT) and the European Convention on Human Rights state that torture and any form of cruel, inhuman or degrading treatment or punishment is against international human rights law.

Although it persists in the contemporary world, torture is universally condemned as barbaric and ineffective under international law.²³ Adopted by the U.N. General Assembly in 1948, Article 5 of the Universal Declaration of Peoples’ Rights (UDHR) states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁴ Following this, in 1966 the U.N. opened for signature the International Covenant on Civil and Political Rights, now ratified by 165 countries.²⁵ Article 7 of the ICCPR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . .”²⁶ Effective in 1987, the U.N. also specifically addressed torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which has been ratified by 146 countries.²⁷ The UNCAT requires states to take affirmative steps to prevent torture.²⁸ At a regional level, the Council of Europe, with 47 member states as of now, opened the ECHR for signature in 1951. Taking a cue from the UDHR, Article 3 of the ECHR states: “No one shall be

19. J. Hafetz, *Torture, Judicial Review and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433 (2007).

20. *Id.*

21. Wolfendale, *supra* note 16.

22. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT].

23. P. Miller, *Torture Approval in Comparative Perspective*, 12 HUM. RTS. REV. 441 (2011).

24. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

25. ICCPR, *supra* note 9.

26. *Id.* art. 7.

27. UNCAT, *supra* note 22.

28. *Id.*

6 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

subjected to torture, inhuman or degrading treatment or punishment.”²⁹ The Council of Europe went even further in its fight against the use of torture when, in 1987, it opened for signature the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which solely focused on the issue of torture.³⁰

A. DEFINITION OF TORTURE

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the most comprehensive body of law on torture and provides the most complete and recognized definition of torture. Under Article 1, “torture” is generally defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for . . . obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³¹

While the offense of torture basically involves government officials or agents who obtain information from ‘suspects’ or ‘accused’ persons forcefully, for an act to constitute torture, as defined under Article 1 of the UNCAT, it must possess some significant elements. The first element, under Article 1(a), requires severe mental or physical suffering or pain must be inflicted on the ‘accused’ or the ‘suspect.’³² Of note, acts of torture are not always physical, but also include the infliction of mental pain or suffering. Case law has reiterated this principle of the UNCAT. In *Sanian v. Lithuania*,³³ the court stated that “Article 3 does not refer exclusively to the infliction of physical pain but also of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault.”³⁴ Further, torture must be inflicted by a public offi-

29. ECHR, *supra* note 6, art. 3.

30. I. Turner, *Freedom From Torture in the “War Against Terror”: Is It Absolute?*, 23 *TERRORISM & POL. VIOLENCE* 419-37 (2011).

31. UNCAT, *supra* note 22.

32. *Id.* art. 1(a).

33. *Sanian v. Lithuania*, App. No. 32293/05, Eur. Ct. H.R. (2011).

34. *Id.* ¶ 47.

cial or a government agent who deliberately inflicts the pain in order to obtain information or a confession.³⁵ Notably, the judgement of a judicial authority cannot constitute torture. The person tortured may be a suspect or may be tortured on behalf of a third person, but cannot be the culprit.³⁶ The basis for torture may also include discrimination.³⁷ Torture can also take the form of intimidation and coercion.³⁸

The pain and suffering, whether mental or physical, must rise to the level of ‘severe’ in order to constitute torture. Case law offers guidance as to when pain and suffering is sufficiently ‘severe.’ In *Aksoy v. Turkey*,³⁹ the detainee, amongst other things, was subjected to a ‘Palestinian hanging,’ in which his hands were tied to his back and he was strung up by his arms. As a result, the detainee suffered severe pain at the time of the hanging, and, thereafter, suffered from paralysis of both arms.⁴⁰ The European Court of Human Rights (ECtHR) found such treatment to be ‘severe’ and ‘cruel.’⁴¹ The ECtHR considered the Palestinian hanging to be ‘torture’ since it was deliberately inflicted with a certain degree of preparation and exertion required to carry it out.⁴² The ECtHR held that such treatment could only be intentional with the purpose of obtaining information or admissions from the detainee.⁴³ The court in *Ireland v. United Kingdom*⁴⁴ similarly held that torture involved a certain ‘intensity’ and ‘cruelty,’ attaching a special stigma to deliberate inhuman treatment causing very ‘serious’ and ‘cruel’ suffering.⁴⁵ In that case, Northern Ireland authorities systematically applied the “five techniques,” including wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food. However, the court found that those techniques did not constitute torture as contemplated under Article 3 of the ECHR.⁴⁶ Accordingly, for an act to constitute torture, ‘severity’ and ‘cruelty’ must be one of its defining elements.

According to the Bybee memo, the severity of the pain is such that it is associated with serious physical injury so severe that death, organ failure,

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997).

40. *Id.* ¶ 64.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25 (1978).

45. *Id.* ¶ 167.

46. *Id.*

8 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

or permanent damage resulting in a loss of significant body function will likely result.⁴⁷ The memo added that severe mental pain not only required suffering at the moment of infliction, but also lasting psychological harm, such as post-traumatic stress disorder or another mental disorder. Thus, the severity of the mental or physical pain that constitutes torture is of higher degree than the pain emanating from a cruel, inhuman or degrading treatment or punishment.⁴⁸

The second element, under Article 1(b) of the UNCAT, requires the act to be intentional. An inadvertent act does not qualify for this element even if such an act culminates into 'severe' pain or suffering. Pain or suffering only arising from, inherent in or incidental to lawful sanctions, such as detention facilities, does not amount to torture.⁴⁹ The crime of torture warrants a specific intent as opposed to general or basic intent. The reasoning for this higher standard of intent is explained in *D.P.P. v. Morgan*, where Lord Simon noted that in crimes of basic intent, the *mens rea* does not go beyond the *actus reus*.⁵⁰ Therefore, in order for an act to be intentional, the accused must not only intend to inflict pain or suffering, but must do so for a purpose prohibited by the UNCAT.⁵¹

The third element, under Article 1(c), requires the purpose of the act to be for obtaining information or a confession.⁵² In the absence of this element, it is immaterial whether the mental and physical pain suffered is 'severe.' In effect, it is the purpose of such act that will determine whether the severity of the pain to be inflicted for the act amounts to torture. Cruel, inhuman or degrading treatment can also cause severe pain and suffering, but the distinguishing element between it and torture is the purpose behind the act. For example, in *Keenan v. United Kingdom*, the ECtHR pointed out that it is the purposive element of torture, the intent that motivates the conduct, which basically differentiates it from cruel, inhuman and degrading treatment and not the severity of the treatment itself.⁵³

The last element, under Article 1(d), requires the pain or suffering to be inflicted by someone acting in an official capacity, such as a public offi-

47. C. De Vos, *Mind the Gap: Purpose, Pain, and the Difference Between Torture and Inhuman Treatment*, 14 HUM. RTS. BRIEF 4-10 (2007).

48. *Id.*

49. Oona Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791 (2012).

50. *D.P.P. v. Morgan*, [1976] A.C. 182 (H.L.) 216-17.

51. *Id.*

52. UNCAT, *supra* note 22, art. 1(c).

53. *Keenan v. United Kingdom*, App. No. 27229/95, 33 Eur. H.R. Rep. 38 (2001).

cial or on their behalf.⁵⁴ The crime of torture is, therefore, being committed by the state through its agents. A typical torturer will be a law enforcement officer or a member of a security or intelligence service, specifically seeking to obtain, in the course of or in furtherance of his duties, information or confessions.⁵⁵ Pursuant to the UNCAT description of a perpetrator, any official who instigates, consents or acquiesces in torture qualifies as a torturer. However, there is a tendency for a direct perpetrator of the torture to act in collusion with and to advance the intentions of a civilian political authority that might be indifferent to the excesses of the law enforcement or security officials.⁵⁶ A perpetrator is, thus, not limited to the official who directly inflicts the torture. It may also be a person without official status, acting in collusion with and to advance the purposes of public officialdom, usually in order to cloak the duties of the members of that officialdom. In sum, a public official has to either directly or indirectly be the perpetrator of torture in order for the act to constitute torture under the UNCAT and trigger a violation of the right to be free from torture.

B. ABSOLUTE BAN ON TORTURE

Torture is characterized as a ‘heinous crime’ which threatens ‘civilized values’ and transcends borders.⁵⁷ Since the 19th century, torture has been considered “the supreme enemy of humanitarian jurisprudence and of liberalism and the greatest threat to law and reason” by Western societies.⁵⁸ As a consequence, unlike other rights and protections that may be curtailed, the prohibition on torture is absolute under major international conventions addressing human rights and humanitarian law.⁵⁹ For instance, Article 3 of the ECHR provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁶⁰ The absolute ban is deemed universal and has become part of customary international law.⁶¹ Torture is generally characterized as a violation of both

54. UNCAT, *supra* note 22, art. 1(d).

55. N. RODLEY, *THE DEFINITIONS OF TORTURE IN INTERNATIONAL LAW* 467-93 (Oxford Univ. Press. 2002).

56. J. BURGERS ET AL., *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT* 119-20 (Martinus Nijhoff Publishers 1988).

57. M. GOODALE, *HUMAN RIGHTS AT CROSSROADS* 87 (Oxford Univ. Press 2013).

58. O. GROSS, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481-1551 (2004).

59. J. LOKANNETA, *TRANSNATIONAL TORTURE: LAW, VIOLENCE AND STATE POWER IN THE UNITED STATES AND INDIA* (N.Y. Univ. Press 2011).

60. ECHR, *supra* note 6, art. 3.

61. Gross, *supra* note 58.

10 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

international law and *jus cogens* norms.⁶² In spite of this absolute prohibition on torture, there are revelations that law enforcement agents or military personnel apply excessive force while interrogating suspects. When these revelations come to light, governments often reassure the public that such actions are not reflective of any general policy. Nevertheless, the 9/11 incident and the war on terrorism opened a new chapter in the story of torture.⁶³ Beginning with the development under the Bush Administration of an unprecedented detention system tailored to operate outside any established legal framework,⁶⁴ governments increasingly confront terrorism with tools of torture.

The offense of torture is perpetrated through diverse mechanisms. These unlawful and counterproductive practices especially prevail in law enforcement organisations charged with fighting terrorism.⁶⁵ The systematic torture and cruelty terrorist suspects are subjected to include water boarding, extended sleep deprivation, forced nudity and physical abuse, such as slamming suspects into walls and forcing them into painful and stressful positions for hours at a time.⁶⁶ One notable case of torture is the treatment of the applicant in *El-Masri v. The Former Yugoslav Republic of Macedonia*.⁶⁷ In that case, the applicant was subjected to degrading treatments before he was handed over to the CIA rendition team at Skopje airport. For instance, amongst other things, he was blindfolded, handcuffed and sodomized (a suppository was forced into his anus).⁶⁸ During his flight to Afghanistan, two injections and an anaesthetic were administered over his nose. These practices contravene the second arm of Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “. . .no one shall be subjected without his free consent to medical or scientific experimentation.”⁶⁹ The forceful insertion of an object into the applicant’s anus can be described as a ‘degrading treatment.’ The facts of the present case reveal that the interrogation by the respondent’s government agent was accompanied by threats, insults, pushing and shouting.⁷⁰ These practices are contrary to

62. J. Gathii, *Torture, Extraterritoriality, Terrorism and International Law*, 67 ALBANY L. REV. 335-70 (2004).

63. Gross, *supra* note 58.

64. Hafetz, *supra* note 19.

65. L. Shetret et al., *Promoting Organizational Change to Ensure Respect for Human Rights While Countering Terrorism* (Ctr. on Global Counterterrorism Cooperation, Policy Brief 2012).

66. D. Cole, *Where Liberty Lies: Civil Society and Individual Lies After 9/11*, 57 WAYNE L. REV. 1203-67 (2012).

67. *El-Masri v. Macedonia*, App. No. 39630/09 Eur. Ct. H.R. (2012).

68. *Id.*

69. ICCPR, *supra* note 9, art. 7.

70. *El-Masri v. Macedonia*, App. No. 39630/09 Eur. Ct. H.R. (2012).

the provisions of Article 16 of the UNCAT obliging nation states to ensure that cruel, ill or degrading treatment is prevented within their jurisdiction.

In ensuring the prevention of torture, international law not only makes it incumbent on states to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory within its jurisdiction, under Article 2 of the UNCAT,⁷¹ but imposes additional obligations on states. States are further required to prevent individuals within their custody from being subjected to torturous treatment in the jurisdiction of another state. By virtue of Article 3 of the UNCAT, state parties are prohibited from expelling, returning or extraditing a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁷² If it is expedient that a suspect or an accused person must be returned to his country or a third country where there is a likelihood of torture, the contracting country must, of necessity, obtain a diplomatic assurance from the returning country.⁷³ In international law, this rule is referred to as the principle of “non-refoulement.”⁷⁴

The principle of non-refoulement is supported by the U.N. and the jurisprudence of the ECHR. In *Chahal v. United Kingdom*, an applicant of Indian origin who was arrested in the U.K. for political activity and criminal investigations claimed that his deportation to India would violate Article 3 of the ECHR because there was a high risk of torture if he were returned to India.⁷⁵ The ECtHR found the deportation to be a violation of Article 3.⁷⁶ It held that the guarantee under Article 3 was absolute and the U.K. could not justify the deportation on national security given the risk of torture that the applicant would face in India.⁷⁷ The U.N. further reiterated this principle in the 2002 U.N. General Assembly Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punish-

71. UNCAT, *supra* note 22, art. 2.

72. *Id.* art. 3.

73. Under UNCAT, art. 3(a), States are obliged to take an affirmative step to obtain a diplomatic assurance where there is a likelihood of torture or ill or degrading treatment in another jurisdiction.

74. UN High Commissioner for Refugees (UNHCR), *The Principle of Non-refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BVR 1938/93, 2 BVR 1953/93, 2 BVR 1954/93*, (1994), <http://www.refworld.org/docid/437b6db64html>.

75. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1996).

76. *Id.*

77. *Id.*

12 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

ment, maintaining that states must not surrender persons intended for extradition under terrorist or other charges unless the government of the receiving country has provided an unequivocal guarantee that the right of the persons concerned, under Article 3 of the ECHR, will not be violated.⁷⁸ On the other end, the receiving country must also put an effective monitoring system in place to ensure that the personal dignity of the persons concerned is respected.⁷⁹

Should a case of torture arise, international law imposes an additional duty on states to ensure that an 'effective' and 'independent' investigation is carried out whenever there is an allegation of 'torture' or 'ill' or 'degrading treatment' from an 'accused' or a 'suspect.'⁸⁰ These measures, however, are not consistently employed by states. For example, in *El-Masri v. The Former Yugoslav Republic of Macedonia*, the respondent government never demonstrated that it obtained such diplomatic assurance on behalf of the applicant.⁸¹ The respondent government also never showed that any monitoring mechanism was put in place to ensure the protection of the applicant's personal dignity while in Afghanistan.⁸² Further, the government did not fulfil its duty to effectively investigate the applicant's claim as the facts of the case reveal that the internal inquiry set up within the Ministry of Interior to investigate the case never even invited the applicant to produce any evidence nor was he informed of the outcome of the inquiry. Impliedly, the facts upon which the inquiry acted on were one-sided. Serious allegations of ill or degrading treatment should, ideally, presuppose rigorous investigation. The effectiveness of the investigation must be measured by certain procedural thresholds, such as fairness and transparency.

Despite the clear ban on torture and the principle of non-refoulement, in the war against terrorism, states collaborate to commit torturous acts in violation of international law. The International Law Commission has acknowledged that internationally wrongful conduct often emanates from the collaboration of two or more states as opposed to one state.⁸³ Complicity in torture by states or their agents is deemed unlawful under the general principles of international law regarding state responsibility for

78. U.N. General Assembly, *Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/57/173 (Feb. 7, 2002).

79. *Id.*

80. UNCAT, *supra* note 22, art. 3(b).

81. *El-Masri v. Macedonia*, App. No. 39630/09 Eur. Ct. H.R. (2012).

82. *Id.*

83. JOINT COMMITTEE ON HUMAN RIGHTS, ALLEGATIONS OF UK COMPLICITY IN TORTURE, 2008-9, H.L., H.C. (U.K.).

internationally wrongful acts. Article 16 of the U.N. Resolution 56/83, adopted by the General Assembly in 2001, holds a state which aids or assists another state in the commission of an internationally wrongful act internationally responsible for doing so.⁸⁴ The occurrence of states acting in complicity to bypass more stringent rules in their own jurisdictions and commit torture is high. As seen in El-Masri's case,⁸⁵ for example, the applicant was transferred from the respondent state to Afghanistan, where his right not to be subjected to torture was violated. No doubt, the event of 9/11 changed the way most nation states react towards the issue of national security, especially in relation to international terrorism. The fight against terrorism ignited a persistent, intentional erosion of fundamental rights by state actors. Nation states have connived to subject innocent nationals to torture, which is an impermissible act under international human rights law.

States act with complicity to commit torture through special government administered programs, such as the high value detainee program (HVD Program) adopted by the United States. The HVD Program, also known as the rendition detention interrogation program (RDI Program), is intended as a counterterrorism measure where suspected terrorists are subjected to special interrogation (torture) and detention. One key feature of this program is that the CIA is granted extended competences relating to its clandestine actions, namely its authority to detain terrorist suspects and to establish secret detention facilities outside the United States, in collaboration with the governments of the concerned nations.⁸⁶ These practices were seen in *Al-Nashiri v. Poland*,⁸⁷ where the applicant was captured in Dubai and transferred to a secret CIA run detention facility in Afghanistan called 'Salt Pit.' From there, the applicant was taken to another secret CIA prison in Bangkok, code-named 'Cat's Eye,' where he was subjected to enhanced interrogation techniques.⁸⁸

Another key feature of the HVD program is the use of black sites for the commission of torture. Under the program, government agents representing one country detain terrorist suspects in another country, kidnap them and then deliver them to a second country to be subjected to enhanced interrogation techniques (torture). For this purpose, the CIA established

84. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

85. *El-Masri v. Macedonia*, App. No. 39630/09 Eur. Ct. H.R. (2012).

86. *Al-Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. (2014).

87. *Id.* ¶¶ 47, 48.

88. *Id.* ¶¶ 83-86.

black sites that are operated in Cuba, the Middle East and Europe.⁸⁹ Black sites include Guantanamo Bay (Cuba), Bagram Air force Base (Afghanistan) and Abu Ghraib (Iraq). This procedure is referred to as extraordinary rendition, where terrorist suspects are detained from any part of the world before they are turned over to the CIA agents, who render the suspects to a black site where they will be subjected to the complete control of United States government.⁹⁰ This type of rendition is problematic and distinct from 'irregular rendition,' even though irregular rendition is also problematic as it evades internationally established processes for acquiring control over non-citizens. The detainees are subjected to three phases in the black sites.⁹¹ The first is the initial condition phase, where they are photographed naked and evaluated. The second is the transition to interrogation phase, where the interrogators try to ascertain the detainees' responsiveness towards the release of information. In this phase, the degree of the detainees' readiness to release information catapults him to an intense level of interrogation. The third is the full blown interrogation phase, where interrogators employ different kinds of techniques to achieve their goals. Detainees are subjected to a variety of physical and mental abuses during this phase, including white noise, sleep deprivation, prolonged nakedness, displays of constant light during interrogations, electric shock treatments, walling, slapping, threats of sexual torture, wall standings and cramped confinement.⁹²

C. CONSEQUENCES OF TORTURE

The offense of torture is ultimately not devoid of consequences. One such consequence is that the use of torture to combat terrorism only perpetuates a never-ending cycle of violence. When torture is committed by democratic governments, in direct violation of their own vocalized principles, the people of those states are held equally responsible with the government and its actors. The constituents of those states committing torture are put at a greater risk of becoming innocent victims of retaliatory terrorist acts.⁹³ Terrorists go so far as to rationalize the targeting of innocent bystanders on the basis of cruel acts that some have committed against others. For example, the terrorist who detonated the Edgware Road bombs on London's underground trains on July 7, 2005 made the

89. K. Tucker, *Abduction, Torture, Interrogation—Oh My! An Argument Against Extraordinary Rendition*, 10 BRAZ. J. INT'L L. (2014).

90. *Id.*

91. *Id.*

92. *Id.*

93. W. STRITZKE ET AL., *TERRORISM AND TORTURE: AN INTERDISCIPLINARY* (Cambridge Univ. Press 2013).

following statement in rationalization of his actions: “Your democratically elected governments continuously perpetrate atrocities against my people all over the world. Your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters.”⁹⁴

The hypocrisy of using torture against terrorist suspects has the potency of radicalising people who ordinarily are not connected to terrorism or acts related to terrorism. In some instances, enemies who ab initio were not there are created. The illegal methods used against terrorist suspects can mistakenly help to justify the goals or ideology of the terrorist suspect. Out of sympathy for their religious affiliation or ethnicity, some innocent individuals answer the call to activities that use terrorism as they witness or access information concerning the type of treatment (torture) their ‘brothers’ are subjected to as terrorists’ suspects. This complicates the challenges caused by terrorism.

Another set of consequences stems from the inefficiency of torture as a tool to combat terrorism. One consequence is the torture of innocent people due to the overzealousness of torture programs to find suspects. This can lead to interrogators receiving false information. If an innocent person is being tortured as a terrorist suspect for the purpose of obtaining information or a confession, his likely response might be to either remain silent since he knows nothing about terrorism or to release false information to his interrogator in order to bring the treatment (torture) on him to an end. In the latter case, the falsity of the information is immaterial to the innocent person as he wants the torture to end. There are additional circumstances under which torture has produced false leads. For instance, false information obtained from torture helped to justify the Iraq War.⁹⁵ A further consequence is that since the tool of torture is costly, with unsuccessful results, it becomes a large waste of economic resources. For example, U.S. officials and agents have wasted millions of dollars and innumerable man hours chasing multiple false leads.⁹⁶

The enforcement of the right not to be tortured is of such importance that it cannot be overlooked by international humanitarian law. The degree to which Article 3 of the ECHR (an equivalent of ICCPR Article 7) is flagrantly violated by nation states who are signatories to the Convention raises an eyebrow about the efficacy of current international law governing the use and prevention of torture.

94. A. CLARKE, *RENDITION TO TORTURE* (Rutgers Univ. Press 2012).

95. *Id.*

96. *Id.*

III. A CRITICAL ANALYSIS OF TORTURE AND INTERNATIONAL LAW

Some authors argue that international law is principally a product of states hunting for their own interest in the international terrain. Foreign policy decisions, together with decisions to sign treaties and comply with international law, are made based on the assessment of a state's national interests. Suggestively, international law has no life of its own, no special normative authority. It is just the working out of relations among states, as they deal with relatively discrete problems of international cooperation.⁹⁷ Hence, states see no justification for complying with treaties if those treaties do not align with their current interests or as their interests and powers change. It becomes a huge challenge for international law to be effective when there are close to 200 states with independent interests, agendas and ideologies.

The American military response to the Al-Qaeda threat raised serious questions about international law. The national security interests of the United States took a drastic turn post 9/11. The Bush Administration reacted swiftly and resolutely with military force against any nation that might harbor international terrorists who have the proficiency of threatening U.S. security interests. Consequently, traditional legal limits on the use of force had to make way for a new perception of national security⁹⁸ in the war against terror. Most nations of the world responded to both domestic and international obligations after the 9/11 incident. On September 28, 2001, the United Nations Security Council passed Resolution 1373, which required states to "take necessary steps to prevent the commission of terrorists' acts."⁹⁹ Following this call to action, nations of the world hastened to legislate. The United States enacted the U.S.A. P.A.T.R.I.O.T. Act on October 26, 2001, which stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."¹⁰⁰ The United Kingdom enacted the Anti-terrorism, Crime and Security Act of 2001. New Zealand enacted the Terrorism Suppression Act 2002 and Australia enacted a variety of measures galvanized into several various Acts.¹⁰¹ The enactment of these

97. J. GOLDSMITH ET AL., *THE LIMITATIONS OF INTERNATIONAL LAW* (Oxford Univ. Press 2005).

98. *Id.*

99. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

100. *Highlights of the USA PATRIOT Act*, DEPARTMENT OF JUSTICE, <http://www.justice.gov/archive/ll/highlights.htm> (last visited Dec. 15, 2015).

101. G. William et al., *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*, 8 J. COMP. POL. ANALYSIS 43-62 (2006).

acts, and others, thrust human rights protection into a predicament. Most nation states enacted or expanded existing counterterrorism legislation to meet the challenges of terrorism. However, some of this counterterrorism legislation negates basic principles of international human rights law.

These types of legislation have departed from the fundamental principles underlying Western liberal democracies, such as the right to remain silent, the right not to be tortured or subjected to other ill, inhuman or degrading treatment or punishment, the right to freedom of expression and association and the right not to be detained except after a fair trial.¹⁰²

In taking necessary steps to prevent terrorism after 9/11, state actors have adopted torture as a strategy to obtain immediate intelligence concerning terrorist attacks or terrorist networks through confessions. However, the spirit of international conventions, as seen in the provisions of the Geneva Convention and the European Convention on Human Rights, is such that ‘torture’ and any form of cruel, inhuman or degrading treatment is an aberration of international human rights law. The right not to be tortured is absolute, unqualified and non-derogable. Pursuant to Article 4 of the ICCPR, “no derogation from article 7. . . may be made under this provision.”¹⁰³ Even though states adopt tactics of torture with the justification that it is necessary because of the extreme dangers of terrorism, international law firmly maintains an absolute ban on torture. State tendency to adopt such policies are at odds with international law, which expressly prohibits torture and characterizes it as a crime. Under international law, it is immaterial whether there is an extreme state of emergency in a nation. The right of freedom from torture and other forms of ill-treatment is legally “absolute” so that no limitations may be placed on the right under any circumstance. Indeed, Article 2(2) of the UNCAT states: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁰⁴ Thus, the law is not subject to any exceptions and cannot be deviated from under any circumstance, even for the enhancement of national security.¹⁰⁵

102. *Id.*

103. ICCPR, *supra* note 9.

104. I. Turner, *Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom from Torture*, 35 *STUDIES IN CONFLICT & TERRORISM* 760-78 (2012).

105. L. Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 *CASE W. RES. J. INT’L L.* 309 (2005).

Undeniably, sovereign states have the exclusive right to use force to protect their national security.¹⁰⁶ States, nevertheless, are bound by international humanitarian law, which prohibits excessive and indiscriminate use of force and reprisals. History is abound with abuses of individual liberty, rights and security carried out by state actors under the ploy of protecting national security. Unavoidable conflicts have arisen out of attempts to balance the security demands between nation states and its citizens, nations and sub-groups and national sovereignty and the global community.¹⁰⁷ As one scholar argued, there is a risk of nation states coming down to the level of terrorist organizations if they fail to adhere to the rules of international humanitarian law in their bid to enhance national security in the war against terror.¹⁰⁸ Against the background of human rights, it is essential that states and individuals adhere to fundamental legal principles established in important international treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is legally incumbent on liberal democratic countries, such as the United Kingdom, to uphold these rights even in the event of serious emergencies. It must be recalled that while these international treaties created room for derogation at the instance of any threat to national security, such derogation must necessarily comply with the international legal commitments of that nation. Subsequent to 9/11, this has not been the case. The anti-terrorism laws of most liberal democracies are inconsistent with their international legal commitments. Following the 9/11 attacks, a whole raft of new arrangements and legislations have been passed or foreshadowed in Australia, the United Kingdom, Canada and the United States.¹⁰⁹ Measures implemented or seriously contemplated include indefinite detention without trial or judicial review, trial of terrorists by military tribunal, removal of the right to silence and legal representation, eavesdropping on lawyer-client communications, use of torture and drugs to force confessions, increased surveillance and reduced privacy protections, and vastly expanded resources to those sections of the military and paramilitary police involved in 'homeland' security.¹¹⁰ For instance, under the Australia Security Intelligence Organization Legislation Amendment (Terrorism) Act 2002 (ASIO), non-suspects can be detained merely for the purpose of questioning and intel-

106. C. Gibbs, *Securing the Nation: Radicalism and Security in 1790s Britain* (Aug. 2013) (unpublished M.A. thesis, University of York) (on file with University of York Library system).

107. *Id.*

108. P. WILKINSON, *TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE* 125 (Frank Cass Publishers 2001).

109. J. McCulloch, *War at Home: National Security Arrangements Post 11 September 2001*, 27 *ALTERNATIVE L. J.* 87 (2002).

110. *Id.*

ligence gathering, which is incompatible with Australia's legal commitment under the ICCPR to respect an individual's civil and political rights, including due process.¹¹¹

With the current global war on terrorism, the existence of an international body of law followed uniformly by states is all the more significant. However, after the Cold War, and even more so after 9/11, the role of international law has received a lot of scrutiny concerning its effectiveness in being able to govern the conduct of states and non-state actors. A consideration of the roles of international law is integral to any determination of its effectiveness.¹¹² In analyzing the effectiveness of international law with respect to 'international terrorism' and 'torture,' this paper will endeavor to look into the role of international law in controlling states by 'inhibiting' or 'directing' their conduct both in their relations with other states and with the individuals of those states.¹¹³

International law has shifted away from a system predominantly concerned with international cooperation amongst states to a system that is a lot more engaged in the control of its subjects.¹¹⁴ Accordingly, the UN-CAT is often publicly celebrated as one of the most successful international human rights treaties. Nations that ratified the treaty consented to not intentionally inflict "severe pain or suffering whether physical or mental" on any person to obtain information or a confession, to punish that person or to intimidate or coerce him or a third person.¹¹⁵ Article 17 of the ECHR further provides that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.¹¹⁶

However, after 9/11, many of the suspects caught by the United States in the course of the 'war against terror' have been turned over to Saudi, Egyptian and Syrian officials who are all suspected of practicing tor-

111. Michaelsen, *supra* note 10.

112. It will be beyond the ambit of this paper to delve into all the roles of international law.

113. DIXON, *supra* note 4.

114. *Id.*

115. O. Hathaway, *The Promise and Limits of the International Law of Torture*, in *TORTURE: A COLLECTION* (Sanford Levinson ed., Oxford Univ. Press 2004).

116. ECHR, *supra* note 6.

ture.¹¹⁷ It was also popularly known that the United States used 'stress and duress' techniques that amounted to torture.¹¹⁸ It becomes not only a moral challenge to impose order in the international arena, but also a challenge to advocates of international law who believe in the effectiveness of international law.

Considering the flagrant violations of the right not to be tortured under international human rights law, one begins to ask the question: what has gone wrong with international law for these violations to persist? Were peculiar circumstances, such as international terrorism, not considered before the laws prohibiting torture were enacted? Or do states that have ratified the international treaties on torture not perceive international law as 'law' *sensu stricto*? Whichever the reason, it must be clearly stated that there cannot be international law without state actors. Nation states can be described as the 'web' of international law. The effectiveness of international law is, to a great extent, predicated upon the actions or compliance of state actors. For instance, the offense of torture, ill, inhuman or degrading treatment or punishment is predominant in cases of arbitrary detention such as secret detentions, enforced disappearance, extraordinary rendition, which all take place within state jurisdictions. A careful examination of Article 2 of the UNCAT reveals that it is incumbent on nation states who are party to the Convention to take necessary steps, such as legislative, administrative, judicial and other measures, to prevent acts of torture in any territory within their jurisdiction. To this degree, the onus of implementation of international human rights laws concerning torture has shifted from the international plane to the national orbit.

International law attaches great importance to the positive nature of the anti-torture right obliging states to take steps to prevent harm to its citizens.¹¹⁹ In *Osman v. United Kingdom*, the ECtHR further articulated the duty of states when an applicant complained of the failure of authorities to protect the right to life of her husband when he was threatened and later killed by their son's former teacher.¹²⁰ The Court pointed out that state obligation connotes putting in place effective criminal law provisions to deter the commission of offenses supported by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.¹²¹ In implementing this requirement, the Former Yugo-

117. Hathaway, *supra* note 115.

118. *Id.*

119. Turner, *supra* note 104.

120. *Osman v. United Kingdom*, 29 Eur. H.R. Rep. 245 (2000).

121. *Id.* ¶ 115.

slav Republic of Macedonia, one of the parties to the UNCAT, amended Article 142 of its Criminal Code to make it consistent with Article 1 of the UNCAT. Article 142 of the Criminal Code punishes acts of torture with a prison term of three months to five years. Further, Article 143 of the Criminal Code makes it an offense for a person acting in his official capacity to mistreat, intimidate, insult or treat another in such a manner that his or her human dignity or personality will be humiliated. The act of preventing, suppressing and sanctioning breaches of freedom from torture through the inclusion of these types of provisions in the Criminal Code can be seen as one of the ways through which states can prevent the offense of torture.

However, the following question could be asked: how effective will the provisions of these articles be in the prevention of torture when torture is perpetrated by government or public agents? After 9/11, states commit acts of torture with impunity. Without an effective justice system, constructive results from the enactment of such provisions in any criminal code will only be a mirage. The positive duty of preventing acts of torture by states extends to taking affirmative steps to prevent 'impunity' for the sake of justice for victims. Preventing impunity may deter or suppress future acts of torture on suspects. For this reason, it becomes pertinent for states to maintain an effective and consistent justice system where the rule of law is upheld and public confidence is guaranteed.¹²²

Existing international laws that cover the prevention of torture are not effectively upheld by state justice systems. For example, the Geneva Convention expressly obligates state parties to the Convention to enact domestic legislations essential for the prosecution of grave breaches of the Convention, including the right not to be tortured. States are additionally obligated to search for those accused of committing grave breaches and to either prosecute them or turn them over to another state for trial.¹²³ Nevertheless, it is well established that after 9/11, many nation states continue to be responsible for the offense of torture without consequence. Failure to hold these erring states accountable is of great concern. This concern gets more burdensome since the offense of torture incubates itself in other offenses, such as arbitrary detention, enforced disappearance, complicity and extrajudicial killing. As a result, the responsibility for these violations does not rest solely on one state, but also extends to other states.

122. El-Masri v. Macedonia, App. No. 39630/09 Eur. Ct. H.R. ¶ 105 (2012).

123. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

22 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

Article 12 of the UNCAT further enjoins state parties to conduct a 'prompt and impartial' investigation where they reasonably believe that torture has been committed. These provisions are not discretionary. The investigation into allegations of torture, as provided by the UNCAT, will most definitely be carried out by the state or its agents. However, these same state actors have also become complicit in acts of torture and are guilty of the offense. Practically speaking, these provisions of international conventions become illusory since acts of torture are often committed by the states that are expressly obligated through the rules of international human rights law to comply with its *jus cogens* norms. Had the offense of torture been committed by individuals in their personal capacity, rather than as a government actor, the degree of compliance with international laws against torture would be higher. The reasoning behind this is that in that circumstance the enforcement of the law would be by a superior over a subordinate. The situation becomes absolutely cumbersome where the enforcement of a law is meant to be carried out by the violator.

Additionally, under international human rights law, states are not permitted to transfer individuals to countries where there is a real risk of torture or ill treatment. Article 3 of the UNCAT prohibits states from expelling, returning or extraditing individuals to another state where there are substantial grounds for believing that there is a danger of being subjected to torture. Both the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR) also prohibit such transfer. However, the rate at which states violate this law is as though this rule never existed. For instance, in *Khaled El-Masri v. United States*, the circumstances under which he was rendered to the CIA was enough of a signal to the respondent state that he would be tortured. The facts of that case also revealed an uncertainty as to whether the required diplomatic assurance was ever obtained by the respondent state from the CIA.¹²⁴ Also, in *Ahmed Agiza v. Sweden*,¹²⁵ the UN Committee on Torture found that Sweden committed extraordinary rendition in violation of Article 3 of the UNCAT.¹²⁶ Similarly, the Human Rights Committee found in *Muhammad Al-Zery v. Sweden*¹²⁷ that Sweden was also in violation of Article 7 of the ICCPR by expelling Al-Zery to Egypt despite the real risk of torture there. The Committee found that Sweden could

124. *El-Masri v. Macedonia*, App. No. 39630/09 Eur. Ct. H.R. (2012).

125. *Agiza v. Sweden*, Communication No. 233/2003, ¶¶ 2.1-2.4, U.N. Doc. CAT/C/34/D/233/2003 (2005).

126. A. SINGH, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION* (Open Society Found. 2013).

127. *Al-Zery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 2006).

not demonstrate whether the diplomatic assurance obtained from Egypt was able to guard the rendition victim against torture.¹²⁸ Based on this, it could be argued that states obtain diplomatic assurances not because of a strict compliance with the non-derogatory right not to be tortured, but only as a mere formality.

The effectiveness of international law, to a considerable extent, is dependent upon some of the national policies or executive privileges of nation states. For instance, some states who ratified the UNCAT invoke the “state secrets privilege” when there is an allegation of torture against them.¹²⁹ Often times, this privilege violates international human rights laws, such as Article 14 of the UNCAT. In 2007, the United States, for example, invoked the states secret privilege in *Khaled El-Masri v. United States*.¹³⁰ In a lawsuit, the invocation of this privilege permits the government to bar the disclosure of any information where the disclosure would cause harm to national security.¹³¹ Under the Bush administration, this typically rare privilege has increasingly been used to dismiss entire suits before they even commence.¹³² As a result, this concept hinders the search for the truth and ultimately, suffocates the effectiveness of the law as the rights of tortured victims to redress and remedy cannot be enforced. The main goal of international human rights law is, undoubtedly, the protection of human rights. The anti-torture norm is often described as having the status of *jus cogens*, a peremptory norm of international relations from which no derogation is permissible. International human rights law makes it categorically clear that, even in cases of war or public emergency, torture and other ill or degrading treatment is prohibited. An argument can be made that a victim’s sense of helplessness and struggles suffered because of non-disclosure of the truth in their case and the denial of his right to redress and remedy is, in itself, torture. Where, then, is the ‘force’ of international human rights law in controlling the conduct of states and inhibiting the violation of fundamental rights of individuals? The interpretation and implementation of international human rights law should be such that these laws will be made effective and practicable. The practicability and effectiveness of these laws is not limited to the

128. SINGH, *supra* note 126.

129. AI International Secretariat, *USA: Federal Court Rejects Governments Invocation of ‘States Secret Privilege’ in CIA ‘Rendition’ Cases*, AMNESTY INTERNATIONAL, Apr. 29, 2009, <https://www.amnesty.org/en/documents/document/?indexNumber=AMR51%2F058%2F2009&language=en>.

130. *Id.*

131. *Background on the State Secrets Privilege*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/background-state-secrets-privilege> (last visited Dec. 15, 2015).

132. *Id.*

substantive provisions of international human rights law, but necessarily extends to its procedural provisions as well.

To guarantee the effectiveness of international law, sometimes certain provisions are included in the rules or body of international law to ensure the firm compliance of state actors. The UNCAT states that the existence of a state of war or public emergency does not provide justification for its breach, with the exception of self-defense.¹³³ For instance, pursuant to Article 4 of the UNCAT, states are obliged to criminalize all acts of torture. This provision serves as a tool to help ensure effectiveness. The criminalization of torture at the national level creates the perception that torture is an aberration. It follows that a strict adherence to the right not to be tortured at the national level will also play out at the international level since the offense of torture is committed by state actors or agents. However, this has not been the case and after 9/11, states have ignored not only the principles of international human rights law, but also their own national rules of criminal law. To this extent, can it still simply be said that the institution of international law is not effective?

The question of effectiveness cannot be divorced from the issue of compliance. Compliance refers to the degree to which state behavior integrates with the prescription or proscription of an agreement. However, the degree to which an agreement has an impact on state behavior touches on its effectiveness.¹³⁴ State compliance with the provisions of international law, as stipulated in international conventions and treaties, varies from the effectiveness of the provisions of the law itself. Therefore, even if states do comply with international law, does international law, as stipulated in conventions and treaties, meet the needs of the international community? Do the provisions of international law, in their practical terms, deal effectively with the challenges in the international orbit, such as the issue of international terrorism and the heinous violation of the right not to be tortured? Moreover, in the event of non-compliance, does international law have an 'effective' means of enforcement of its rules and principles which can compel future compliance?

IV. CONCLUSION

Historically, executive actions and court decisions lend credence to the perception that national emergencies necessitate a sacrifice of civil liber-

133. J. GASKARTH, *ENTANGLING ALLIANCES? THE U.K.'S COMPLICITY IN TORTURE IN THE GLOBAL WAR ON TERRORISM* (Blackwell Publishing Ltd. 2011).

134. J. von Stein, *International Law: Understanding Compliance and Enforcement*, in *THE INTERNATIONAL STUDIES ENCYCLOPEDIA* (Denemark A. Robert ed., 2010).

ties and a bypass of certain rights.¹³⁵ Texas Republican Lamar Smith contended that the restriction of liberties in the face of a threat to national security is something that has been practiced in free democracies “from the golden age of Pericles in Athens to the World War II.”¹³⁶ The downward adjustments of human rights have been justified by the outcry from governments for national and international security after 9/11. Nation states fight terrorism in defence of their proposition to make their political life free from violence. Defeating terrorism, however, can necessitate violence. It may also require coercion, deception, secrecy and the violation of human rights. It, therefore, becomes a puzzle as to how democracies will have recourse to these means without obliterating the values for which they stand.¹³⁷

International terrorism and human rights are at a crossroads. The tragedy of 9/11 sparked many questions about the relationship between the individual and the state.¹³⁸ Post 9/11, counterterrorism measures have tested the tension that exists between these two areas. The issue of creating a balance between national security and individual personal rights and freedoms remains unresolved and controversial. Nation states have different degrees of security threats. In response to these threats, states enact laws and formulate policies that infringe upon the principles of international human rights law. For the sake of security, unlawful acts, such as detentions and torture, are rationalised¹³⁹ and human rights are impaired.

Accordingly, the formulation and implementation of counterterrorism measures is one of the ways through which state compliance with international human rights laws and policies are tested. In the ‘war against terror,’ the right not to be tortured is one that has been widely abused. The systematic character of contemporary terrorism makes the practicability of the absolute nature of the right not to be tortured vague. In principle, nation states condemn the use of torture during interrogations of terrorist suspects, but, practically, most of them have mixed records in their efforts in the war against terrorism.¹⁴⁰ Individuals in many countries encourage strong implementation of security measures in response to do-

135. Adria Battaglia, *The Rhetoric of Free Speech: Regulating Dissent Since 9/11* (May 2010) (unpublished Ph.D dissertation, University of Texas Austin) (on file with author).

136. *Id.*

137. C. Moore, *The World Spins Madly On: How The P5 Caused a Paradigm Shift in Norm Diffusion*, 55 VA. J. INT'L L. 187 (2013).

138. *Id.*

139. *Id.*

140. A. de C Williams et al., *The Psychological Impact of Torture*, 7 BRIT. J. PAIN 101-6 (2013).

mestic terrorism threats despite the criticism of torture and inhuman practices.¹⁴¹ For instance, it is public knowledge that the United States declared that international law was to be no barrier to U.S. actions if its national interests were at stake.¹⁴² Nevertheless, in considering the absolute prohibition of torture, it is pertinent to recognise the fact that most of the international treaties or domestic laws that prohibit torture absolutely were enacted or ratified before the 9/11 attack. The ECHR, for example, was entered into force in 1953.¹⁴³ Although 9/11 did not usher terrorism into the world, the mechanisms of the event plunged the world into a historical dilemma.

Terrorism, as discussed, is an anathema that has destabilized national security and to a large extent, the international community. Measures have been adopted by nation states to counter this cankerworm of terrorism, which has eaten deep into the fabric of our societies. The adoption and implementation of most of these counterterrorism measures have added to the existing concerns about the effectiveness of international law. It has been argued that the 9/11 incident changed the Western world. The change was orchestrated not only by terrorism, but by counterterrorism also.¹⁴⁴ No doubt, the investigation into terrorist offenses presents acute challenges to state actors. These include the risk of maltreating the innocent.¹⁴⁵ However, for a viable form of democracy and global security to be maintained in practice, some fundamental values of international law have to be respected unfailingly. Agreeably, international law is not a perfect system of law, but at the same time, the flagrant violation of human rights could have been worse in the absence of any international human rights law. Therefore, in considering the effectiveness of international law, it will be misleading to view its effectiveness in line with the system of national law. There exist dichotomies between the two systems. For instance, national law is basically concerned with the legal rights and duties of legal persons within a body politic.¹⁴⁶ The law is primarily derived from a legal superior (parliament or legislator) who is seen as legally competent by the polity to which the law is addressed and

141. J. DAVIS ET AL., *INTERNATIONAL HANDBOOK OF WAR, TORTURE AND TERRORISM: PERSPECTIVES OF TORTURE IN GREAT BRITAIN, NORTHERN IRELAND, UNITED STATES, CANADA AND AUSTRALIA* 551-63 (Springer New York 2013).

142. *Id.*

143. Aisha Gani, *What is the European Convention on Human Rights?*, *GUARDIAN* (Oct. 3, 2014), <http://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr>.

144. C. LEWIS ET AL., *COUNTER-TERRORISM AND THE POST-DEMOCRATIC STATE* (Edward Elgar Publishing Ltd. 2007).

145. L. Arbour, *In Our Name and on Our Behalf*, 55 *INT'L COMP. L. Q.* 511 (2006).

146. DIXON, *supra* note 4.

in circumstances where the governing power has both the authority and practical capability to make and enforce the law.¹⁴⁷ On the other hand, international law is ceased with the rights and duties of states themselves. On this plane, states are legal equals. There is no likelihood of legal superiority in their relations with each other.¹⁴⁸ Hence, the legal system that will enhance the relations between these legal equals will be significantly different from the legal system required for national law, which is based more on exerting control over its citizens. These dichotomies present international law as a system of law which is unique in and of itself.

V. RECOMMENDATION

One of the basic ingredients of torture, as highlighted by Article 1 of the UNCAT, is the element of “deliberately inflicting pain or suffering for the purpose of obtaining information or confession.” By implication, there will not be a violation of the right not to be tortured if there is no ‘intention’ to ‘obtain information’ or ‘confession’ from an individual or a third person. Therefore, with respect to the effectiveness of international law in relation to the offense of torture, the right to remain silent should be expressly integrated into the body of international human rights law, irrespective of the fact that it is enshrined in most criminal law provisions of nation states. Considering the fact that the principal intent of torture is to obtain information, the express right to ‘remain silent’ becomes an integral component of the right not to be tortured. The right not to be tortured and the right to remain silent could logically be described as complementary rights. Complying with the right to remain silent will, ultimately, enhance the respect of the right not to be tortured. Thus, the right to remain silent should not be an implied right, but ought to be an express right under international human rights law.

Although the right to ‘remain silent’ is not expressly stipulated under international human rights law, the right to ‘fair trial,’ which is enshrined in most international conventions, including Article 6 of the ECHR, guarantees the procedural rights of parties in civil and criminal proceedings. In essence, the right to ‘remain silent’ and the right not to incriminate oneself under Article 6(1) of the ECHR both prevent an interrogator from obtaining information from a suspect or an accused by defying the will of that suspect or accused.¹⁴⁹ Impliedly, an accused person or a

147. *Id.*

148. *Id.*

149. D. Vitkauskas & G. Dikov, *Protecting the Right to a Fair Trial Under the European Convention on Human Rights*, COUNCIL OF EUROPE HUM. RTS. HANDBOOK 62-3 (2012), available at http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb12_fairtrial_en.pdf.

suspect has the right to remain silent and by law, should not be forced to divulge any information or intelligence against his will. Therefore, in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, presented earlier, the treatment the applicant was subjected to by the respondent government and CIA agents lacked any 'legal' and 'moral' justification regardless of whether the applicant had crucial information about a present or future terrorist threat against Macedonia. The applicant had the legal right not to disclose the information and should not be coerced to do so.

International law is an essential instrument, without which an interdependent world cannot function. International law facilitates the functioning of the international community of which we all depend. Nevertheless, considering the flagrant use of torture in the 'war against terror' by the very states who are signatories to international treaties and conventions, such as the UNCAT and the ECHR, could it be said that international law is effective in countering terrorism in the war against terror? It is incumbent on international human rights law to provide a framework with set standards that must be complied with by nation states through the collective medium of state responsibility and the rule of law.¹⁵⁰ It is pertinent the enhancement of its effectiveness that international law be given urgent attention in the areas of enforcement and implementation of its rules.

150. D. MOECKLI, *INTERNATIONAL HUMAN RIGHTS LAW* (Oxford Univ. Press 2d ed. 2014).