AN APPRAISAL OF THE CRIME OF GENOCIDE IN INTERNATIONAL LAW:

A CASE STUDY OF ITS APPLICABILITY TO SOME INCIDENCES IN NIGERIA

BY

Friday Atidoga DANIEL
Ph.D/LAW/11269/2010-2011

DEPARTMENT OF PUBLIC LAW,
FACULTY OF LAW,
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A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAW – PhD.

DEPARTMENT OF PUBLIC LAW,
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NIGERIA.

AUGUST, 2015

DECLARATION

I declare that the work in this Thesis entitled: **An Appraisal of the Crime of Genocide in International Law: A Case Study of Its Applicability to Some Incidences in Nigeria** has been carried out by me, in the Department of Public Law. The information derived from literature has been duly acknowledged in the text and a list of references provided. No part of this Dissertation was previously presented for another degree or diploma in any other institution.

Friday Atidoga DANIEL _____ _____

Signature Date

CERTIFICATION

This Thesis entitled: **An Appraisal of the Crime of Genocide in International Law: A Case Study of Its Applicability to Some Incidences in Nigeria** by Friday Atidoga Daniel meets the regulations governing the award of the degree of Doctor of Philosophy in Law of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

Prof. M.T. Ladan Chairman Supervisory Committee	Date
Prof. I.A. Aliyu Member Supervisory Committee	Date
Dr. I.F. Akande Member Supervisory Committee	Date
Dr. K.M. Danladi Head, Department of Public Law	Date
Prof. K. Bala Dean School of Postgraduate Studies Ahmadu Bello University, Zaria	Date

DEDICATION

This research is dedicated to the loving memory of my Father in-law, Late Chief Isa Edime (the Amanaata Ojikpadala), in whom I found my self a father. The cold hands of death took you away and extinguished your flaming brightness shortly before my Ph.D second seminar, by the cruel hands of your assassinators; whom I know have only murdered their sleep. This is dedicated to you, my friend, my father in-law and my father, because of your passion for learning and education. I shall strive to keep the dreams we dreamt together. Live on ABOO, because to live in the hearts of those you left behind is not to die.

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"When the Lord turns again the captivity of Zion we were like them that dream. Then was our mouth filled with laughter, and our tongue with singing …. "[1] My appreciation first and foremost goes to God Almighty, the giver and taker of life and the maker of destiny; who bestowed on me unquantifiable measure of unmerited favour in the course of this Ph.D programme. Then to my wife, Barrister Ojonigwu Atidoga, who had to endure numerous deprivations and sacrifices some of her matrimonial rights throughout the pendency of this programme.

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[1] Holy Bible, Psalm 126 v. 1

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The realization of these feet is a product of a dream that I dreamt with my brothers/friends they are; Umar Yakub, Enemali Sam Adeboh (The great yellow). Usman Isah, Isah Shuaibu (Egwu), David Ereh, Abraham Don Moses, Alex Eholor, Barr. Tanko

Mohammed, Hon. Yunusa Ejegbo, Barr. Agoli Abubakar Sadiq, Dr. Ibrahim Abdul who was my course mate at the PhD programme and others too numerous to mention. May God reward you richly.

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TABLE OF CASES

TABLE OF STATUTES

LIST OF ABBREVIATIONS

ABU	-	Ahmadu Bello University
AC	-	Appeal Cases
ANPP	-	All Nigeria Peoples Party
AU	-	African Union
ACHPR	-	African Charter on Human and Peoples Rights
BOSEPA	-	Borno State Environmental Protection Agency
CAN	-	Christian Association of Nigeria
CAR	-	Central African Republic
CEDAW	-	Convention for the Elimination of all forms of Discrimination Against Women
CRC	-	Convention of the Rights of the Child
CFRN	-	Constitution of the Federal Republic of Nigeria
CLR	-	Constitutional Law Report
DRC	-	Democratic Republic of Congo
ECOWAS	-	Economic Community of West African States
ERA	-	Environmental Right Action

FG	-	Federal Government
HRW	-	Human Right Watch
ICC	-	International Criminal Court
ICCPR	-	International Convention on Civil and Political Rights
ICJ	-	International Court of Justice
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for former Yugoslavia
ICID	-	International Committee of Investigation in Dafur
IHL	-	International Humanitarian Law
ILC	-	International Law Commission
ILR	-	Israel Law Report
ILO	-	International Labour Organization
ICJR	-	International Court of Justice Report
IYC	-	Ijaw Youth Congress
JTF	-	Joint Task Force
JSC	-	Justice of the Supreme Court
KB	-	Kings Bench

LFN	-	Laws of the Federation of Nigeria
LRA	-	Lord's Resistance Army
MOPOL	-	Mobil Police
MWO	-	Master Warrant Officer
MRS	-	Military Reception Station
MLC	-	Movement for the Liberation of Congo
NATO	-	North Atlantic Treaty Organization
NNTPC	-	Network for National Tranquility and Peaceful Co-existence
NWLR	-	Nigeria Weekly Law Report
NGO	-	Non-governmental Organization
NHRC	-	National Human Right Commission
NIALS	-	Nigerian Institute of Advance Legal Studies
OPC	-	Oduwa People Congress
PDP	-	People Democratic Party
PCIJ	-	Permanent Court of International Justice
QB	-	Queens Bench
RSICC	-	Rome Statute of International Criminal Court

SAN	-	Senior Advocate of Nigeria
SICTY	-	Statute of International Criminal Tribunal for Former Yugoslavia
SICTR	-	Statute of International Criminal Tribunal for Rwanda
SICJ	-	Statute of International Court of Justice
SICC	-	Statute of International Criminal Court
SSS	-	State Security Service
SWG	-	Special Working Group
SCNQR	-	Supreme Court of Nigeria Quarter Report
US	-	United States
UN	-	United Nations
UNSC	-	United Nations Security Council
UDHR	-	Universal Declaration on Human Right
UNHCR	-	United Nation High Commission for Refugees
USSR	-	Union of Soviet Socialist Republic
WACA	-	West African Court of Appeal

ABSTRACT

This dissertation entitled: 'An Appraisal of the Crime of Genocide in International Law: A Case Study of Its Applicability to Some Incidences in Nigeria', explored the crime of genocide in international law, with particular focus on some Nigerian crises. Consequently, the dissertation from a general perspective is aimed at examining the problem of conceptualization of genocide as a crime in international law, with a critical insight on its definitive inadequacies, segregation on groups that could be victims of genocide and the existing legal and institutional regimes. This is with the objectives of assessing the constitutive elements of the crime of genocide as projected by relevant international instruments in a desperate search for an enduring conceptualization. Another objective of this research among others is to identify and locate the practical operative mechanism of the instruments on the subject matter; whether or not the laws have in practice addressed the re-occurring malignant tumor of genocide, if not, then, to explore the reasons for the failure of the existing instruments, generally, and with specific emphasis on the Nigeria situation. The research amongst other findings found that, the instruments on genocide did not adequately provide for all conceivable groups that ought to be protected. It was also found that, there exists no political commitment for the domestication of international instruments on genocide in Nigeria; the consequence of which is the non-existence or inadequate domestic platform for prosecution of genocide and other international crimes. It was also observed that Nigeria lack institutions for prevention of identity conflict that may lead to genocide, a reason which accounted for the use of combative military option rather than the early preventive techniques of stampeding the occurrence of genocide and similar conflicts. The research recommended for the review of the extant instruments on genocide in some grey areas identified. It also recommended for the domestication of the international legal instruments on genocide and other international crimes in Nigeria, and to establish institutions for genocide prevention and control amongst other recommendations. The doctrinal research methodology was predominantly relied upon, where sources materials like text books, journal articles, newspapers/magazine, reports, secondary source interviews and internet materials, formed the basis of the legal expositions contained in this research.

TABLE OF CONTENT

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Research

Humanity is caught in a paradoxical epoch that is characterized by hope and great yearning for peaceful co-existence amongst people, yet there are conflicts and possibilities of more explosive conflicts based on the mobilization of various identities and deterioration of relations at different level of identity divide.[2] This deterioration of relations, which often spurs diverse crises, may be predicated on different divides, such as religious, racial, ethnic or national identity. Such crises on the basis of identifiable divides often degenerate to "genocide" the worse crime known to humanity.[3] Genocide has been commonly used particularly in political dialogue to describe atrocities of great diversity, magnitude and character.[4] Yet the prospect of the term arising in policy making often imposes an intimidating break on effective responses to the calamity of the crime.[5] The crime of genocide, has over the years, dug the steps of mankind, and aborted the age long conceived sanctity and dignity of man. It shook the conscience of Winston Churchill, yet eluding a description; Churchill thus, called the terrible horror he saw as "a crime without a name"[6] Scholars have also described genocide as "the crime of crimes".[7]

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[2] Toure, K.T. (2003) *Ethno-Religious Conflicts in Kaduna State*, Human Rights Monitor, Kaduna, p. 1.
[3] Scheffer, D. (2006) "Genocide and Atrocity Crime". *Journal of Genocide Studies and Prevention*, vol. 1, p.299.
[4] *Ibid.*
[5] *Ibid.*, p. 300.
[6] Kupar, L. (1981) *Genocide, its Political Use in the Twentieth Century*, Yale University Press, New Haven, p. 12.
[7] Schabas, W.A. (2009) *Genocide in International Law* (2nd edition), Cambridge University Press, Cambridge, p. 1.

The fact of genocide is as old as humanity.[8] The law is however, considered as younger than the aged long acts constituting the crime.[9] Schabas observed that this dialectic of an ancient fact yet a modern law of genocide flows from the observation that historically, genocide was unpunished.[10] Hitler's famous comment to the effect that nobody remembers the Armenians and the genocide perpetrated against them is indicative of the historic fact that genocide often goes unpunished.[11]

The biggest picture of genocide in African recent history is the Rwandan genocide. What subsequently degenerated into genocide was a build up of ethnic tension between majority Hutus and minority Tutsis. This tension flowed from Rwandan colonial experience, during which the ruling Belgians favoured the minority Tutsis over the majority Hutus, where the few oppressed the many, economically, politically and socially. This created a legacy of tension that exploded into violence, a minor one in 1959 and a major one in 1994.[12] On April 6, 1994 a plane carrying Hubyarimana (Rwandan President) and Cyprien Ntaryamira (Burundi's President) was shot down over Kigali killing all on board. Within an hour of the plane crash, Hutus set up a road block slaughtering Tutsis and moderate Hutus. The mass killing targeted at Tutsis spread from Kigali to the rest of the country, with 800,000 people killed within three months.[13] The horror of genocide as a dark crime could also aptly be visualized in the following accounts:

> Never shall I forget that night, the first night in camp, which turned my life into one long night, seven times cursed and

[8] Jean – Paul, S. (1971) "On Genocide" in Richard A. Falk et al (eds.) *Crime of War.* Random House, New York, p. 534
[9] Schabas, (2009), *op. cit.,* p.1.
[10] *Ibid.*
[11] *Ibid.*
[12] The Rwandan Genocide, obtained from http://www.history.com/topic/rwandan-genocide (Last visited March 14, 2015)
[13] *Ibid.*

> seven times sealed. Never shall I forget the little faces of children, whose bodies I saw turn into wreaths of smoke beneath a silent blue sky. Never shall I forget those flames which consumed my faith forever. Never shall I forget the nocturnal silence which deprived me for all eternity, of my desire to live. Never shall I forget those moments which murdered my soul and turned my dreams to dust. Never shall I forget those things even if I am condemned to live as long as God himself.[14]
>
> … I was shocked to see how every few minutes a group of men, women and children were ordered to disrobe and to stand on the edge of a long ravine… then they were killed by machine guns. I saw it with my own eyes, though I was far away from the ravine, I heard terrible cries and children soft voices: "mama, mama". I stood paralysed, thinking how could people be treated worse than animals and be brutally killed for the only crime that they were Jewish. Suddenly, I fully realized that fascists were not human beings but wild animals. I saw a young naked woman feeding a naked baby with her breast, when a ukarian policeman grabbed the infant and threw it into the ravine. The woman tried to save her baby running towards the child, but she was killed instantly. This I saw with my own two eyes. I would never believe this could happen. How can anyone believe?[15]

This was the picture and glimpse of a very myopic aspect of the great and outrageous genocidal atrocities of holocaust. Similar expressions of passionate pains, hatred and grief, have in the entire history of mankind characterized and depicted the global horror of inhumanity, cruelty and reckless impunity perpetrated by man on his fellow man of the human family;[16] from the Armenian massacre of 1915 which claim about 2/3 of the

[14] An Eye Witness Account of the Holocaust, cited in Wiesel, E. (1982) *Night*, Bentham, New York p.32.

[15] An Eye Witness Account of the Holocaust, cited in Dina, M. (1983) "Greetings from Hell" in Vinokurov, J.J et al. (eds.) *Book of Remembrance,* Publishing House of Peace, Philadephia, p.45-47.

[16] An approximately 170 million people were said to have lost their lives consequent upon genocidal atrocities, crime against humanity and mass murder between 1900 and 1987. See: Rummel, R.J., Power, Genocide and Mass Murder, in Yacoubian, G.S et al, (2005) "Iraq and the ICC: Should Iraqi Nationals be prosecuted for the crime of Genocide?" *In War crimes, Genocide & Crime Against Humanity* , vol.1 No.1 p.54 obtained from http//www.aa.psu.edu/journal/war-crimes/articles/vi/vin192.pdf (accessed on 09/12/2010)

Armenian population, to the horrifying holocaust perpetrated by Nazi Germany on the Jews, which was said to have claimed the lives of six million Jews and to other subsequently re-occurring genocidal atrocities, including the murder of one million Bangali in 1971;[17] one hundred and fifty thousand Burundi Hutus in1972;[18] one million, five hundred thousand Cambodians between 1975 and 1979;[19] two hundred thousand Bosnian Muslims and Croats in the territory of former Yugoslavia in 1992;[20] eight hundred thousand Tutsis in Rwanda in 1994;[21] three hundred thousand Darfurians in Western Sudan;[22] the atrocities committed by the Lord's Resistance Army (LRA) against the Civilian population of Northern Uganda and Eastern Democratic Republic of Congo;[23] the post election crisis in Central African Republic; the Kenyan genocidal violence which claimed over one thousand lives in January 2008[24] and the numerous crises in Nigeria, which includes the civil war, Odi massacres, Zaki-Biam massacre and the on going Boko Haram insurgency. It must be noted that some of these crises may be adjudged as genocide while some may not be, but they all constitute atrocities of diverse propensity.

[17] Chalk, F. and Joanssohn, K. (1981) *The History and Sociology of Genocide,* Yale University Press, Yale, p. 183.

[18] Kuper, L. (1977) *The pity of it all: Polarisation of Racial and Ethnic Relations,* University of Minn. Press, p. 79.

[19] Kiernan, B., "The Cambodian Genocide: Issues and Responses", in Andreopolous, G.J., (ed) *Genocide Conceptual and Historical Dimension*, cited in Yacuobian, et al *op. cit.,* p. 56.

[20] Yacuobian, et al *op. cit*., p.54

[21] Destexhe, A. (1995) *Rwanda and Genocide in the Twentieth Century,* New York University Press, New York; Prunier, G. (1995) *The Rwandan Crisis: History of Genocide,* University Press, Columbian all cited in Yacuobian, et al, *op. cit.,* p. 54.

[22] Simon, M. (2010) "Sudan's Leader may be accused of Genocide. *New York Times*; http//www.nytimes.com/2010/02/04/world/African/04bashir.html. (accessed on 21 September, 2010).

[23] Human Rights Watch, Trial of Death, New York, 28 March 2010; cited in Mutua, M., "The International Criminal Court in Africa: Challenges and Opportunities. _ HYPERLINK http://peacebuilding:no/eng/publication_/Noref-Reports2/The -International-Criminal-Court-in-Africa-) challenges-and-opportunities. (accessed on 16 October, 2010

[24] Mutua, M. (2008) *Kenya's Quest for Democracy, Taming the Leviathan,* Lynne Rienner Publishers, Boulder, Cited in Mutua, M., *Ibid*.

The re-occurring phenomenon of mass destruction is no longer alien to man, this may possibly be because of the frequency of its occurrences. However, for any act of mass destruction, extermination, ethnic cleansing, crimes against humanity, war crimes and atrocity of any nature to be described as genocide, it must go far beyond the literal meaning of the word, and far beyond the social and political usage of the word "genocide". For an act or omission to constitute genocide under international criminal law, such an act or omission must not only be viewed from its social and political context, but it must be situated within the strict legal meaning of the word "genocide", the question and query as to whether the strict legal meaning of genocide is all encompassing to accommodate all perceived genocidal acts notwithstanding.

Literally, it has been argued that the term genocide is a hybrid of the Greek word "genos" which means race or tribe and the Latin suffix "cide", which means killing.[25] The word was coined and first used by a Polish Law Professor, Raphael Lemkin in 1944 in his work, "Axis Rule in occupied Europe".[26] Within one year of introduction of the word genocide into English and French Languages, it was used in the indictment of the International Military Tribunal for the Nuremberg, within two years it was a subject of United Nations General Assembly resolution, a resolution which spoke in the past tense describing genocide as a crime which had occurred in the past.[27] By the time the United Nations General Assembly completed its work and the Convention on the Prevention and Punishment of the Crime of Genocide, was adopted in 1948, genocide had a quite elaborate

[25] Nsereko, D.D. (2000) "Genocide: A Crime Against Mankind" in McDonald, G.K. and Swank-Goldman, (eds.) *Substantive and Procedural Aspects of International Criminal Law* Vol. 1, p.117.
[26] Lemkin, R. (1944) *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress*, Carnegie Endowment for World Peace, Washington, cited in Schabas, *op. cit.*, p.17.
[27] Schabas, (2009), *op. cit.*, p.17.

and highly technical definition as a crime against international law.[28] The preamble to that instrument recognizes that at all period of history genocide has inflicted great loses on humanity.[29] It follows, therefore, that genocide, though a recent coinage, is as old as humanity. Those atrocious acts that were committed in the past before the coinage of the word in 1944 such as Heroro massacre and Armenian solution could rightly be described as genocide.

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 is supposed to be the historic document that set out to prevent and punish the crime of genocide. But the dream of "never again" has been brazenly shattered severally. Since 1970s, there have been several more horrendous acts and events of genocide across the world.[30] Millions of innocent souls have been lost ever since.[31] Realizing the continuity and complications it involves, intellectual and legal interest has ensued on the crime of genocide.[32] Thus, high powered debate surrounds the nature, methods, typology, interest, causes and consequences of genocide.[33] Consequently, this research examines the conceptualization of the crime of genocide in international law, in pursuit of an all embracing descriptive nomenclature. It also examines some incidences in Nigeria in the context of genocide.

[28] *Ibid.*
[29] *Ibid.*
[30] Amjad Nazer (2010) "Physical and Cultural Genocide: Slaughtering the Rights of Indigenous People and other Minorities", Roe Hampton University, London, p.1.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*

1.2 Statement of the Problem

Because of the calamitous nature of genocidal atrocities perpetrated from pre-historic times, through the ancient period that was characterized by wars of annihilation of indigenous people, to the grave suffering of the Armenian nation from 1915 and the inglorious holocaust perpetrated against the Jews, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, was invoked with a frequency, familiarity and reverence rarely associated with instruments of law.[34] Sixty three years, after the draft of this Convention, which has come to represent the conscience of humanity, the moral promise of the Genocide Convention has not been redeemed. While states have belatedly honoured their responsibility to punish genocide, they have shown no corresponding will to prevent it, as required by the Convention.

Forty five years passed after the adoption of the Convention on Genocide before the first International Criminal Tribunal was established with jurisdiction over the crime of genocide.[35] A similar tribunal was established a year later.[36] Even in the face of growing genocidal atrocities world over, it was not until September 2, 1998 – a half century after the United Nations General Assembly adopted the Genocide Convention – that the first verdict interpreting the Convention was rendered by an International Criminal Tribunal.[37]

The obligation of state parties to the Convention on Genocide to punish and prevent genocide is bedevilled with the problem of lack of will to act. Even though state parties are willing to punish genocide as a crime against international conscience and morality, they possess no corresponding will to prevent the crime or halt its further progress. Thus, state

[34] Orentlicher, D.F., "Genocide" *Crimes of War Project*, http:www.crimesofwar.org/thebook /genocide . html., (accessed on 24/04/2011. 2:28pm).
[35] That is the International Criminal Tribunal for former Yugoslavia (ICTY).
[36] That is the International Criminal Tribunal for Rwanda (ICTR).
[37] Orentlicher, o*p. cit.*

parties and even the United Nations tend to avoid the usage of the term "genocide" to describe crisis that clearly fall within the context of the crime. These, the state parties or United Nations often do by capitalizing on the inherent loop holes in the laws of genocide to suit their evasive purpose. For instance, when ethnic cleansing was going on in the territory of former Yugoslavia, legal experts in the U.S government were asked to perform legal gymnastics to avoid calling this "genocide".[38] As Tutsis were killed by Hutus in Rwanda the spokes persons of Clinton administration were instructed not to style what was happening as genocide to avoid public calls for action.[39] The Clinton's government's refusal to describe what was happening in Rwanda as genocide, prevented spontaneous and effective intervention which could have saved lives.

The government of George W. Bush, however declared in September, 2004 that the atrocities committed in Darfur by the government supported Arab Janjaweed Militia against the black population is genocide.[40] This however, is at variance with the opinion and position of the United Nations.[41] Despite the fact that the Darfur crisis was described as genocide by the then U.S government, the want of effective and spontaneous responses to stop the violence had echoed a shivering and fearful reality, that invoking the term "genocide" in a crisis situation does not signify a political determination to halt the crisis. Most worrisome is the fact that, since the coming into force of Genocide Convention of 1948 in January 1951, issues as basic as conceptualization of the crime is still hazy and gloomy, distantly away from a consensual stand on the import of the concept. How to define genocide became a very big problem.

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[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] See Report of UN's International Committee of Investigation in Dafur (ICID).

The meaning attributed to genocide seem confusing.[42] If the term genocide even as described[43] is genuine, then why is it often considered in a restrictive term? Why is the acronym "genocide" used only in relation to mass murder? Why are policies that are harmful in other dimensions to the culture of particular human groups not considered as genocide, even when such policies are aimed at bringing about the disappearance of the group? Why is it that only mass murder is considered as genocide and not some other ways of destroying the group's structure and/or reducing the group to a number of individuals with no common identity?

The identification of genocide, exclusively with killing has become a general phenomenon across all social strata. It is not limited to a vague, erratic or insufficiently informed opinion. Even amongst jurist of high eminence, this is the prevalent opinion.[44] The term "genocide" does not get mentioned if there are no deaths or if there are only few deaths and not a mountain of piled bodies. There is apparently no genocide without mass killing. A built up of dead bodies is the only reason for international intervention to forestall the evil of genocide. However, a cursory examination of the different international legal instruments on genocide will show that it is not simply mass murder, but some other acts such as causing grievous bodily harm to members of the targeted group, inflicting a condition of life calculated to bring about physical destruction of the victim group and forcible transfer of children of the victim group to the perpetrator group.

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[42] Art. 2 Genocide Convention, Art. 4(2) Statute of International Criminal Tribunal for former Yugoslavia, Art. 2(2) Statute of International Criminal Tribunal for Rwanda, and Art. 6 Rome Statute of International Criminal Court.

[43] Anderson, R. (2005) "Redressing Colonial Genocide under International Law: The Hereros' cause of Action against Germany" *California Law Review*, vol. 93, p.1155

[44] Churchill, W. (2004) *Kill the Indian, save the man: The Genocidal Impact of American Indian Residential School*, City Height, San Francisco, pp.3 – 12.

Jurisdictional matters; whether genocide as a crime is to be tried domestically or internationally, has seriously hampered the development of this area of law. Thereby creating technicalities and sacrificing justice at its altar. Domestic prosecution of the crime of genocide seem hardly feasible. It is with no positive results, as the legal process of prosecution and sanction is often controlled by the perpetrators. It is also worthy to note that, the technical issues involved in the domestication and application of international treaties on genocide is equally an issue of great concern. This often leads to non-adoption of international instruments in domestic domain, which may consequently lead to insufficient domestic platform for prosecution of genocide and other international crimes.

In recent times, Nigeria has been facing a resurgence of several form of identity crises, some of which manifests in ethnic and religious crises, leading to destruction of lives and properties and consequent displacement of communities and ethnic nationalities.[45] Faced with the history of numerous ethno-religious crises, can these numerous crises be rightly described as genocide, if situated in the context of the basic legal element of the crime? These are the issues and challenges emanating from the law of genocide in general and particularly the Nigerian situation which this work seek to address. Flowing from the foregoing, we have formulated the following research questions:

1. What actually constitutes the essential elements of the crime of genocide in international law?
2. Has the conceptualization of genocide in international law, provided sufficient platform for protection of all vulnerable victim group?

[45] Okoye, F., (ed.) (2000) *Victims: Impact of Religious and Ethnic Conflict on Women and Children in Northern Nigeria*, Human Rights Monitor, Kaduna, p. xi.

3. Does the Nigerian Civil War, Odi Massacre, Zaki Biam Massacre and Boko Haram insurgency amount to the perpetration of genocide?
4. What is the level of applicability of international instruments on genocide in Nigeria?

1.3 Aim and Objectives of the Research.

The aim of this research is to appraise the crime of genocide in international law generally, with specific focus on assessing some Nigerian crises in the context of genocide in international law. Consequently, the research set out to achieve the following objectives:

1. To determine the constitutive elements of the crime of genocide in international law;
2. To assess the conceptualization of genocide, and determine whether or not it has provided for all category of victim group;
3. To assess whether by the constitutive elements of the crime of genocide, the selected Nigerian crises qualify as genocide or not;
4. To determine the level of application of international instruments on genocide in Nigeria, whether or not they are applicable; and
5. To make recommendations for effective regime of the law of genocide and its application in Nigeria.

1.4. Justification of the Research

One of the greatest problems threatening the existence and civilization of man is the consistent recurring phenomenon of genocide. This proclivity of man towards infinite evil has over the years, defied concrete solution. International regulatory institutions like the League of Nations and the United Nations were products of man's passionate quest to halt

the unwanted evil of this ravaging monster called “genocide”. Yet, this effort is still very barren.

The Convention for the Prevention and Punishment of the Crime of Genocide, 1948, which became operational in 1951, was embraced with warm gloves, high expectations and hope. Unfortunately, genocide continued unabated, as numerous genocides occurred after the adoption of the Genocide Convention of 1948. The most calamitous were the Yugoslavian and Rwandan genocides. The United Nations set up the International Criminal Tribunals for the former Yugoslavia and for Rwanda respectively to try people accused of the heinous act. Yet there was no deterrence. The instrumentality of the paramount court with jurisdiction on the crime of genocide (International Criminal Court) also has no much effect; as genocide continued her monstrous mission unchecked. The most recent being the Darfur Genocide; the numerous crises in Nigeria which could be viewed with genocidal lenses which this research primarily focuses on; the activities of the Lord’s Resistance Army in Uganda; Kenyan genocidal violence; the massacres of protesters by government forces in the ongoing Arab revolution and a host of others.

Global mechanisms have yielded no result due to the inadequacies of the law of genocide and the instrumentalities of its prevention. Addressing these inadequacies generally, with particular reference to Nigeria, is the primary focus of this research. It is therefore believed that embarking on this research is justifiable in view of the benefit accruable to Nigeria in these bad times of great national insecurity. It is equally of immense importance to international, regional, sub-regional and national institutions, in understanding the fact of genocide and the appreciation of the dynamics of its meaning, and elements. This will go a long way in enhancing international and national tranquillity.

This research is equally justifiable, on the premise that it will be of immense benefit to researchers, legal practitioners, and students, actors in international law, particularly international human rights lawyers, international humanitarian lawyers, international criminal lawyers, investigators and prosecutors of the crime of genocide as well as Nigerian judges and Judges of the International Courts/Tribunals.

1.5 Scope of the Research

The scope of this research will cover an evolving area of Public International Law called "International Criminal Law" though with specific reference to the law of genocide – generally in its broad sense, and very emphatic on the legal meaning, elements, legal and institutional regimes for prevention and control of genocide. This, broadly speaking, will involve an incursion into specific areas of International Human Rights and the International Humanitarian Law.

This research, therefore, focuses on the law of genocide generally, with specific emphasis on its definitive inadequacies, descriptive shortcomings and failure of the existing legal and institutional regimes to effectively combat the crime; and the consequential effect on the near zero preventive efforts. The scope of the research will however, be limited to assessing some Nigerian crises in the light of genocide as a crime under international law. The international nature of genocide will no doubt broaden the scope of this research to consideration of issues of international concern.

The research makes frantic effort to consider available International legal instruments on genocide at the disposal of the researcher. There is however no specification as to the historic or current crises that may be considered in the context of the legal

instruments of genocide. However, Nigerian Civil War, Odi massacre, Zaki-Biam massacre and *Boko Haram* crises in Nigeria will be considered as the crux of this research.

1.6 Research Methodology

A legal research of this nature, which involves a consideration of legal meaning and elements of a crime of genocide, with its legal and institutional framework, no doubt predominantly employed a doctrinal research method. This involved primarily a library oriented research. Textbooks on public international law generally and specifically the ones on genocide were consulted. Articles and chapters in books written by experts in this area of law in both local and international publications were employed as a matter of practical necessity.

Principally, international legal instruments also formed the core reference point of this research, not without exploring decided cases in this embryonic area of law. The use of internet materials was a touch point in a research like this, in order to be at home with recent developments on the law of genocide. Magazines, Reports and international/local newspapers were also relied upon. It is equally very important to note that interviews conducted by some non - governmental organisations (NGOs) like the Human Rights Watch, Amnesty International etc also constituted part of the materials employed for the necessary legal expositions in this research as second source materials.

1.7 Literature Review

In a legal research of this nature, the imperative of literature survey or literature review cannot be underscored. It will, in fact, bring to fore the adequacy or inadequacy of

various research works carried out by scholars on genocide generally, specifically and emphatically on its meaning and elements in the context of its existing laws; the existing preventive mechanism, control and sanctions; and bring into focus the relevant areas which researchers have not delved into; and what the researcher intends to do.

William Schabas, in his book, *Genocide in International Law*,[46] wrote extensively on genocide from a strict legal perspective. The eleven chapters book, discussed genocide from its origin to the draft of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948. The book examined the groups protected by the Genocide Convention, observing the limitation of the scope of the protected group. However, sufficient solution was not proffered for this limitation of the Convention.

The book also discussed the physical and mental element of the crime of genocide respectively. However, he strictly limited his work to the requirement of mental element stipulated by the Convention in a restrictive sense. In this wise, he emphasized a paramount plan or policy pursuant to genocide as an element of the crime of genocide. The clarity of the meaning of this hazy concept-genocide and the appreciation of its elements can only be sufficiently visualized and comprehended if examined in the context of some specific crisis and situating same appropriately. The author did not devote any portion of his work to this venture. This research assessed some Nigerian crises in the light of the legal meaning of genocide.

John Hogan and Wenona Raymond-Richmond in their book, *Darfur and the Crime of Genocide*,[47] were very specific. They considered the Darfur crisis alone in the light of genocide. Theirs was an empirical research derived from eye witnesses' account and

[46] Schabas,(2009), *op. cit.*, pp. 27- 41

[47] Hogan, J. and Richmond W.R. (2009) *Darfur and the Crime of Genocide*, Cambridge University Press, Cambridge, pp. 1-227.

interviews of victims of the Darfur scourge. Their work was devoid of legal flavour and in-depth legal analysis of the law and elements of the crime of genocide. Perhaps, principally because their analysis took a sociological perspective. This research intends to fill the void, by giving a legal flavour and a legal face in the light of the meaning and elements of crime of genocide.

Helen Duffy in her book, *The War on Terror and the Framework of International Law*,[48] surprisingly failed to devote any portion of her work to the crime of genocide. One wonders why genocide, the crime considered as the greatest terror and horror to humanity will not be examined in a text, styled "*The War on Terror*…" There could not be any worse terror to mankind than the phenomenon of genocide. The author merely mentioned genocide at pages 24, 62, 75 and 90, on a passive note. This research assesses the terror of genocide generally in a broader sense, and specifically within the framework of Nigerian crises.

William Schabas in another book titled; *An Introduction to the International Criminal Court* (3rd edn.),[49] examined genocide as one of the specific crimes, which the International Criminal Court has jurisdiction to try. In chapter three he specifically assessed genocide under Article 6 of Rome Statute and Article II of the Genocide Convention.[50] The author very well stipulated the acts that may constitute the *actus reus* of genocide as well as its mental element.[51] He identified the special intent, requirement as a distinguishing feature of genocide from other crimes.

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[48] Duffy, H. (2005) *The War on Terror and the Framework of International Law*, Cambridge University Press, Cambridge, pp. 1-452.
[49] Schabas, W.A. (2007) *An Introduction to the International Criminal Court* (3rd edn.), Cambridge University Press, Cambridge, pp. 91-98.
[50] *Ibid*., p.94.
[51] *Ibid*., pp.93-94.

However, the author did not give any attention to the basic requirement of government plan or policy in pursuit of the act. This research fills this gap.

Mahmood Mamdani in his book entitled: *Saviours and Survivors; Darfur Politics and the War on Terror*,[52] captured the Darfur crisis and the politics of intervention to halt the crisis in nine exhaustive chapters. Chapter one dealt with the global glare of Darfur crisis, pointing out the calamity of the crisis and intervention of AU and US.[53] Chapter two dwelled on the global politics that ensued in the process of intervention.[54]

Chapter three to chapter seven was a trace of the history and sociology of Sudan, from ancient time to the emergence of an independent Sudan. Chapters eight and nine examined a tumultuous Sudan – civil war, rebellion and repression.[55] Of significant importance to the appreciation of the meaning of genocide which is of principal concern to this research, the author tried to assess, the meaning of genocide in a portion he couched; "the genocide debate".[56] In this portion, he visualized genocide from a very slim perspective. He limited genocide to the killing of different people of a group by the accused. The author did not avert his mind to other acts described as genocide by the Genocide Convention. This research sheds light on these other acts, and will go further to call for elastic interpretation of same, in the context of some global and Nigerian crises.

Another author, Malcohm Shaw in his book,[57] did not actively discuss genocide. He passively examined genocide in chapter six. He reaffirmed that genocide whether committed in time of war or peace was a crime under international law. He merely

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[52] Mamdani, M. (2010) *Saviours and Survivours; Darfur, Politics and the War on Terror*, Malthouse Press, Lagos, pp. 1-240.
[53] *Ibid*., pp.15-38.
[54] *Ibid*., pp.39-60.
[55] *Ibid*., pp.191-223.
[56] *Ibid*., pp.48.
[57] Shaw, M.N. (2003) *International Law* (5th edn.), Cambridge University Press, Cambridge, pp.262-266.

reproduced the provision of Article II of Genocide Convention as representing the definition of genocide.[58] The author did not sufficiently analyze this provision for the purpose of situating what the interpretation of Genocide Convention has been, and what it ought to be.

The author rightly observed the following; that the Genocide Convention do not have a system of implementation; that the question of intent is such that states may deny genocidal activity by noting that the requisite intent to destroy in whole or in part was in fact absent; that the groups protected do not include political groups; that the concept of cultural genocide is not included in the Convention; and that there was virtually nothing mentioned about the ways of preventing the crime. It must be observed however that, the author observed these fundamental anomalies in the Genocide Convention but did not proffer possible solutions. This work hesitate to broadly examines these issues and proffers the way forward, generally, but with bias on Nigerian crises.

Claire de Than and Edwin Shorts, examined genocide in chapter four of their book.[59] Their work is amply comprehensive and will be a very important source material for this research. One remarkable milestone achieved by these authors is their ability to identify some causes of genocide and linking such causes to specific crisis.[60]

However, these authors were more emphatic on the reproduction of the strict provisions of the Genocide Convention and the Provision of Rome Statute of International Criminal Court relating to genocide as a crime under International Law. It is humbly submitted that the book is devoid of thorough academic exposition of the elements of the

[58] *Ibid*., p.263.
[59] Than, C and Shorts, E. (2003) *International Criminal law and Human Rights*, Sweet & Maxwell, London, pp.65-85.
[60] *Ibid*., p.65.

crime and a broader meaning of the concept of genocide. This research addresses these inadequacies, and view same in the context of Nigerian crises.

Agarwal, H.O., examined the crime of genocide in chapter fifty-three of his book.[61] He considered the punishment for genocide as stipulated in the Genocide Convention. He further examined the application of Genocide Convention to some specific situations particularly in bosnia-herzegovina and in Kashmir. The author however did not critically examine the meaning or elements of the crime of genocide. This research delves into these areas, with emphasis on Nigerian crises.

Malcolm Shaw in the sixth edition of his book: *International Law*[62] reflected a new chapter on individual criminal responsibility in International Law.[63] This new chapter had no place in the earlier editions of his book. In this new chapter, shaw examined genocide[64] as one of the international crimes. Shaw captured genocide from the foundational meaning ascribed to the crime by the provision of Article 4 of the Statute of International Criminal Tribunal for former Yugoslavia (SICTY).

The author's assessment of genocide in this book was predominantly focused on case laws; specifically the decision of International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda in *Jelisic's case and Akayebu's* case respectively. The author rightly emphasized some fundamental principle of the law of genocide, for example, the need to establish specific intention to destroy the group in question in whole or in part. He further stated that, the intention as distinct from the actual

[61] Agarwal, H.O. (2010) *International Law and Human Rights*, 17th edn., Central Law Publications, Allahabad, pp.708-713.
[62] Shaw, M.N. (2008) *International Law* (6th edn.), Cambridge University Press, Cambridge, pp. 397-443.
[63] *Ibid*., Chapter 8, pp.397-443.
[64] *Ibid*., pp.430-433.

act is what gives genocide its specialty and distinguishes it from ordinary crime and other crimes against international humanitarian law.[65]

The author also interestingly noted the observation of the trial Chamber in *Akayesu's* case, where the trial Chamber outlined the difficulties in establishing the requisite intent requirement and held that recourse may be had in the absence of confessions to inferences from facts. The author further observed that in *Jelisic's case*, the ICTY pointed out the difficulty in practice of proving genocidal intention of an individual if the crimes committed were not widespread or backed up by an organization or a system; which situation is distinguishable from the *Ruggiu's case,* where a systematic scheme to destroy the Tutsis was not in doubt.[66] The author also shed light on the element of intention discussed by ICTY in *Kristic's case*, where it was observed that, the intent to eradicate a group within a limited geographical area, such as a region of a country or even a municipality, could be characterized as genocide, while the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within the group.[67]

In reviewing the *Kristic's case*, the author observed that, the judgment emphasized the necessity of each perpetrator possessing the necessary specific intent. It was equally observed that, the intention to destroy, means the physical or biological destruction of all or part of the group and not an attack on cultural or sociological characteristic of a group in order to remove its separate identity.

The author however, did not consider the highly academically debatable meaning of genocide. He only reproduced Article 4 of the Statute of ICTY. The author limited his work

[65] *Ibid*., p. 431.
[66] *Ibid.*
[67] *Ibid.*

to predominantly, the review of judgments of ICTY and ICTR specifically on the mental element of the crime, no portion was devoted to the assessment of the requisite physical element of the crime of genocide. This research attempts to address this void. This research shall further attempt to situate some Nigerian crisis in the context of the meaning of genocide, which had no place in this sixth edition of Shaw's book.

Toure Kazah Toure in his book entitled: *Ethno-Religious Conflicts in Kaduna State*[68] examined ethno-religious conflict in four exhaustive chapters. Chapter one examines ethno-religious conflict generally and the understanding of its dynamics. The chapter visualized the concept of ethno-religious conflict as a global phenomenon, assessing amongst others, the former Soviet Union identity based conflict. The author further observed that in a plural society like Nigeria, ethnic identities are stronger than national citizenship due to the fact that the colonial administration created artificial countries without reference to the people in them.

The author in chapter two of his work specifically examined ethno-religious conflict in Kaduna State of Nigeria from pre-colonial to contemporary times. In this chapter, the author rightly observed that, in Africa there are diverse conflicts of various dimensions, which may be political, economical, socio-cultural and ethno-religious. He observed further that Kaduna State of Nigeria has from 20th century occupied a volatile position in the history of ethno-religious tension and conflict in Nigeria; tracing such conflict to the pre-colonial ethno-religious setting of what constitute present Kaduna State. The author posits that the nature of colonial conquest and conflictuality, administration and education are bastion of ethno-religious fragmentation in Kaduna State. The author specifically examined the Zangon Kataf ethno-religious conflict with a critical insight into the nature and

[68] Toure, *op. cit.*, pp. 1-165.

dynamics of the conflict, with a bird's eye view on pre-colonial relations, colonialism and ethnicity as a bed rock of the emergence of the conflict.

This book will be very important for this research, because, it will lay a foundational basis for the appreciation of individual crisis in relation to intricacies of historical antecedents. This book is however, limited to the examination of specific crisis situation from specific perspective (ethno-religious). This research goes beyond consideration of genocidal crisis from specific perspective (ethno-religious) to a broader perspective.

Victims: Impact of Religious and Ethnic Conflict on Women and Children in Northern Nigeria,[69] is a collection of research conducted by different authors on the effect of numerous ethno-religious conflict on women and children. This collection of research essays was edited by Festus Okoye.

The essays examined the socio-economic and political perspectives to ethno-religious crises in Nigeria, particularly in Northern Nigeria. It considered numerous ethno-religious crises across Northern Nigeria in an exhaustive empirical mode of study. The strength of this work lies in its reproduction of victim's oral account; like hearing it all from the horse's mouth.

Crises that were investigated in this work include: 1991/1995 Tafawa Balewa conflicts, 1991/1993 Takum crisis, Kano crisis, 1992/1995 Bokkos/Mangu conflict, Zangon Kataf crisis and others. The work emphasizes the suffering of women and children in these crises with statistical analysis of findings. Sources of these conflicts were equally examined with a view of proffering solutions.

[69] Okoye, F. (ed.) (2000) *Victims: Impact of Religious and Ethnic Conflict on Women and Children in Northern Nigeria*, Human Right Monitor, Kaduna, pp.1-160.

This work is very important to this research, because it sheds light on the nature of empirical research on crises, which also boarders on victimology. However, this work did not examine these crises in the context of the crime of genocide. The consideration of some Nigerian crises in the context of genocide is very central to this particular research.

Rufai Muftau in his work, *Crime against Humanity in International Law* (unpublished)[70] in six pages considered genocide in chapter three of his work as one of the crimes against humanity.[71] He rightly observed that genocide was one of the crimes which featured during the Nuremberg and Tokyo trials, but was not included in the Nuremberg Charter. The author briefly examined genocide as a crime under International Law in the light of the Genocide Convention of 1948, emphasizing that the origin of the Genocide Convention points to the fact that it is the intention of the United Nations (UN) to condemn and punish genocide, which is an act contrary to the spirit and aims of the UN.

The author whose work centred on crimes against humanity, tried to establish a link between genocide and crime against humanity. In this regard he observed that, genocide is a specific category of crime against humanity. He also mentioned some specific tribunals established to try genocide amongst other crimes, and also identified places where the establishment of ad-hoc tribunals may be necessary.

The author however was very brief; he did not consider the controversial issue of the *mens rea* of genocide. This research will attempt to address this loophole. On the *actus reus* of genocide, the author made a very limited exploration of acts that may constitute genocide as stipulated in Article II of the Genocide Convention. This research attempts a

[70] Muftau, R. (2006) Ph.D Dissertation submitted to the Post-Graduate School, Ahmadu Bello University Zaria, in partial fulfillment of the requirements for the award of the Degree of Doctor of Philosophy (Ph.D Law) of Ahmadu Bello University, Zaria, pp.91- 96

[71] *Ibid.*

broader perspective. It is important to note that, the author, even as a Nigerian, who also conducted his research in a foremost Nigerian University, did not examine any Nigerian crisis in the context of the legal meaning of genocide. In the face of the recent numerous crises in Nigeria, and the overwhelming public and journalistic disposition to describing same as genocide; this work shall attempt to situate some crisis in Nigeria in the light of the legal meaning of genocide.

Henry R. Huttenbach in his article entitled: "…Genocide Prevention: Sound Policy or Pursuit of Mirage"[72], observed that the 1948 UN Genocide Convention promise of "Never Again!" totally failed to quicken international conscience. He further observed that the term 'prevention' in relation to genocide is often used in error. That what happened in Bosnia and East Timor and other thwarted instances of genocidal violence which were presented as examples of preventive effort; were in reality not prevention but intervention. He rightly observed that prevention is actions taken before the outbreak of radical violence, while intervention is depicts a situation where violence is already on going. Huttenbach posits that, this confusion in terminology is a fundamental flaw in the haphazard attempts that have been made to check genocide. The author emphasized the need for genocide prediction by studying the disposition of a polity for the purposes of effective prevention process, rather than clothing act of intervention with the garment of prevention.

This article will constitute a very rich material for this research, specifically in the area of genocide prevention. The article however is emphatic in genocide prevention generally. This research attempts to examine genocide prevention and control in the context of Nigerian crises.

[72] Huttenbach, H.R. (2008) "Genocide Prevention: Sound Policy of Pursuit of Mirage", *Journal of Genocide Prevention*, 10(4), pp. 471-473.

Michael J. Kelly authored an article entitled: "Genocide – The Power of a Label".[73] Kelly in this article reflected the problem of intervention and states obligation under the Genocide Convention, to punish and to prevent genocide. He rightly observed that, the obligation of state parties is often not activated, and the United Nations stands a loof and watch atrocities of varying degrees being perpetrated all because of the "Power of Label". The inability to describe atrocities as genocide, or the ambivalence of systematically avoiding such description. The author observed further that politicians, scholars, relief agencies and judges often agonize over whether to apply the label of genocide to crisis situations. The most concerned area of debate being the context of the definition of genocide and the legal duty of intervention, says Kelly. The author very well captured the political motives underpinning issue of genocide labelling – from the aged long Armenian massacres to the twenty-first century Darfur crisis. The author concluded that the ultimate application of genocide label to a given atrocity is still predicated on very high political calculation.

However, even though the author observed that there is a restrictive and expansionist perspective to the definition of the concept of genocide; he did not examine these extremes. He equally focused only on the physical acts of genocide and not the special motive requirement of genocide. This research addresses these salient issues.

"Genocide, Terrorism and the Conceptualization of Catastrophic Criminology" is an article written by George S. Yacoubian.[74] In this article, the author emphasized the fact of situating the study of genocide and terrorism within the specialized area of criminology called "catastrophic criminology". He rightly argued that crime cannot be solved without a

[73] Kelly, M.J. (2008) "Genocide – The power of a Label", CASE W. RES J. INT'L Vol.40, pp.147-162.
[74] Yacoubian, G.S. (2006) "Genocide, Terrorism and Conceptualization of Catastrophic Criminology". *War Crimes, Genocide and Crime against Humanity,* Vol.2, pp.65-85.

fundamental social change. The author observed further that, although research involving the study of collective violence in the United States from a criminological perspective does exist, the study of massive international criminality or victimization is absent within the criminological literature.[75] Through a content analysis of criminal justice conferences and major criminal justice periodicals, Yacoubian had shown that the study of genocidal behavior has been historically abandoned by the discipline of criminology.[76]

The author examined genocide from the Armenian massacres of 1915, when the word 'genocide' does not exist. He reproduced the definition postulated by Article II of the Genocide Convention of 1948. The author however observed that, despite the ratification of the Genocide Convention, the phenomenon continues unabated.

In this article, the author seeks an extension of the types of criminal acts encompassed by criminological theory to "catastrophic criminology", a framework emphasizing the calamitous nature of certain criminal acts. He in this context defined catastrophic criminology as "the study of previously neglected and calamitous phenomena that are deemed worthy of criminological exploration.

This article is very important to this research because of its perception of genocide from a social perspective. However, it did not address genocide from a legal perspective. It is more academic in its approach, far from the glaring practicality of the existence of genocide. This work attempts a more practical legal approach.

Another author, Rachel J. Anderson, in her article "Redressing Colonial Genocide under International Law: The Heroros' Cause of Action against Germany",[77] examined the

[75] *Ibid*., p.68.
[76] *Ibid*.
[77] Anderson R.J. (2005) "Redressing Colonial Genocide: The Heroros Cause of Action against Germany", *California Law Review*, Vol.93, pp.1155-1190.

genocidal war by colonial administrations against indigenous people, specifically Anderson assessed the annihilation of the Heroro people of the present day Namibia by German Imperialists. The author observed that some contemporary scholars and commentators assert that all forms of genocide were first criminalized in the Genocide Convention of 1948. Scholars therefore argue that the wars of annihilation perpetrated by colonial administrations were not illegal acts under contemporaneous international law.[78] This was the stance taken by German government on the massacres of the Heroros between 1904 and 1907.

The author interestingly posited that, by the end of the nineteenth century, specific forms of genocide were already criminalized under Customary International Law and multilateral treaties.[79] The author in part I of the article outlined German colonial policies in Heroro land, and a recount of the systematic annihilation of the indigenous Heroro population. Part II captured the illegality of wars of annihilation under international law as it stood by the end of 19th century. Part III focused on the German campaign of annihilation of the Heroros. Part IV explained how the Heroros could have a claim against German. Part V examined the impact of Heroros' cause of action upon other groups seeking redress for similar wrongs committed under colonial rule.

The author in this interesting article however did not, strictly speaking, consider the annihilation of the Heroro people in the context of the crime of genocide. The author sees the massacre of the Heroros as a war situation and a violation of customs of war; hence, within the premise of war crimes and/or crimes against humanity. In the light of the above,

[78] *Ibid.*, p. 1157.
[79] *Ibid.*, p. 1158.

the author did not consider the legal meaning of genocide and the appreciation of its elements. These issues formed the bedrock of this research.

David B. Kopel, et al wrote an article entitled: "Is Resisting Genocide a Human Right".[80] In this article, the authors closely examined the Darfur genocide, though making references to other genocides. The authors argued that the genocide prevention mechanisms which are currently favoured by the United Nations are ineffective.[81] The authors analyzed the Genocide Convention and some other sources of international human rights law. The article explored methods of enforcement of anti-genocide law, with particular emphasis to the Darfur genocide.

The authors in part I through III[82] observed the catastrophic inadequacies of current anti-genocide remedies. Part I shows how nonviolent economic and other sanctions have failed. Part II examines the failure of multilateral peacekeeping forces. Part III examines unilateral military action spurred by self interest. The authors in the second half of their article examined an alternative approach. They are of the opinion that, there must be some other anti-genocide remedy which is effective. In this regard, the authors focused on the alternative of empowering genocide victims with arms to resist genocide rather than waiting helplessly to be killed before intervention. The authors concluded by asserting that genocide victims are not obliged to wait for foreign governments or world organization to rescue them; that by normative principle of international law and positive international law,

[80] David B. Kopel et al. (2006) "Is Resisting Genocide a Human Right?", *Notre Dame Law Review*, Vol.81, pp.1275-1346.
[81] *Ibid*., p.1276.
[82] *Ibid*., pp.1280-1312.

genocide victims have the fundamental human right to use armed force to resist genocide as a form of self defence.[83]

The authors however did not address the fundamentals of the element of genocide. This work addresses these issues.

Susan Benesch authored an article entitled: "Vile Crime or Inalienable Right: Defining Incitement to Genocide".[84] The author distinguished incitement to genocide from hate speech in part I of the article. In part II, the author captured the role of incitement in genocide. Part III of the article was dedicated to examination of the existing laws on incitement to genocide. Part IV of the article addresses several issues that borders on the nature and effect of the speech.

The author rightly observed that the confusion over what constitutes incitement to genocide is alarming, as courts may mistakenly convict mere hate-mongers, lonely racist or even fervent supporters of democracy of one of the most serious crimes.

This research draws from this work and goes beyond incitement to genocide as an inchoate offence, to the consideration of incitement to genocide in relation to other inchoate offences in genocide.

John Shamsey in his article: "80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide",[85] examined the Armenian genocide, which he considered as the twentieth century first genocide, which took place between 1915 - 1918[86] in part I, II and III of this article, the author captured the history of the genocide, the

[83] *Ibid*., p.1345.

[84] Benesch, S. (2008) "Vile Crime or Inalienable Right: Defining Incitement to Genocide", *Virginia Journal of International Law,* Vol.48:3, pp.485-528.

[85] Shamsey, J. (2002) "80 Years too Late: The International Criminal Court and the 20th Century's First Genocide", *Journal of Transnational Law and Policy*, Spring, pp.327-383.

[86] Most western scholars seem to consider Armenian genocide as the first genocide of the twentieth century. One wonders why? Is it that these scholars do not recognize the 1904-1907 annihilation of 80% of the heroros by Germans as genocide?

definition of the crime and the seemingly glaring evidence of premeditation, preparation and perpetration of the genocidal acts respectively. In part IV, V and VI, the author examined reparation/penalties, failure of international community to properly deal with Armenian genocide and chances of reconciliation respectively.

Another author, Steven L Jacobs, wrote an article entitled: "The Last uncomfortable 'Religious' Question? Monotheistic Exclusivism and Textual Superiority in Judaism, Christianity, and Islam as Sources of Hate and Genocide".[87] The author in this article examined religious exclusivism and textual superiority of religions as the primary source of religious hatred and disposition towards genocide. The author in the article examined some texts of Islam, Judaism and Christianity, that appear to affirm exclusivism. The first part of the article is an examination of representative texts from the three main religions which affirm each in their own way. In the second part of this article, the author reflected the theological thinking upon the meaning and implication of such texts as they do or do not reinforce certain potentially hateful and pre-genocidal orientation of these three religious groups in relation to each other and other groups. The author conclude this article by asking question as to what is to be done to bring about a future devoid of hate and where genocide is but a historical memory.

This research draws much from this article in the search for socio-religious solution to the menace of genocide. This work goes further to proffer solution for harmonious co-existence.

[87] Jacobs, S.L. (2004) "The Last Uncomfortable 'Religious' Question. Monotheistic Exclusion and Textual Superiority in Judaism, Christianity and Islam as Sources of Hate and Genocide", *Journal of Hate Studies*, Vol.3, pp.133-143.

Carol Pauli, in an article entitled: "Killing the Microphone: When Broadcast Freedom should Yield to Genocide Prevention",[88] examined incitement to genocide. The author draws an empirical research from the field of communication to identify conditions in which media messages become so powerful as to mobilize audience for genocide. The author in this article suggested framework for determining when speech constitutes incitement to genocide to the extent of losing any protection under international law. The author stated that, the proposed framework in this article, unlike current definition of incitement to genocide, is not concerned with convicting the criminal, but its ultimate goal is prevention of the crime.[89]

This article serves as a very important material for this research. This research shall however go further to examine the legal element of the inchoate offence of incitement to genocide, which the author did not do.

Ladan in his work; "An Overview of the Rome Statute of International Criminal Court";[90] examined the Rome Statute of International Criminal Court generally, which includes the crime of genocide. The author rightly observed that the 20th century witnessed some of the worst atrocities committed in the history of mankind, which accounted for more than eighty six million deaths in over 250 conflicts in the past 50 years.[91] The author observed that, after 50 years discussion and exhaustive debate, the International Criminal Court finally saw the light of the day on July 17, 1998.

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[88] Pauli, C. (2010) "Killing the Microphone: When Broadcast Freedom should Yield to Genocide Prevention", *Alabama Law Review,* vol.61, pp.665-700.
[89] *Ibid.,* p. 665.
[90] Ladan M.T. (2005) "An Overview of the Rome Statute of International Criminal Court" in Guobadia, D.A. and Akper, P.T., (eds.) *An Introduction to Rome Statute of International Criminal Court,* Nigerian Institute of Advance Legal Studies, Lagos, pp. 27 – 65.
[91] *Ibid.,* p. 27

The author further noted that International Criminal Court came to fill a significant void in the International legal system; that the court will have jurisdiction over individuals, unlike the International Court of Justice which concerns itself only with issues of state responsibility. Furthermore, the author rightly stated that the court will be of permanent nature with a broad base jurisdiction, as oppose to the United Nations' *ad hoc* tribunals which are for specific time frame and limited to specific crises situation.[92] The author with a bird's eye view examined the definition of International Crimes in situation to the jurisdiction of the Rome Statute of International Criminal Court. In this regard, the writer considered Crime against humanity, Torture, Enslavement, Persecution, Enforced Disappearance and War Crimes.

This work is very important to this research, as it forms the basis for the appreciation of the jurisdiction of the Rome Statute in respect of International Crimes. However, this research goes further to emphasize a specific international crime, (i.e. genocide) and the import of Article 6 of the Rome Statute of ICC on contemporary law of genocide and its jurisprudence, as expounded by the decisions of the United Nations *ad hoc* tribunals. The research goes further to examine the provisions of Rome Statute of International Criminal Court on genocide in relation to some Nigerian domestic crises.

Akper in an article entitled: The Crime of Genocide under International Criminal Court (ICC) Statute"[93], assessed the crime of genocide under the Rome Statute in detail. The author rightly observed that, the International Criminal Court has jurisdiction over the crime of genocide, crime against humanity, war crimes and the crime of aggression.

[92] *Ibid.*, p. 29

[93] Akper, P.T. "The Crime of Genocide under the International Criminal Court (ICC) Statute", in Guobadia, D.A. and Akper, P.T., (2005) (eds) *An Introduction to Rome Statute of International Criminal Court*, Nigerian Institute of Advance Legal Studies, Lagos, pp. 66 – 90.

However, noting that the court will not exercise jurisdiction on the crime of aggression until the crime is further defined.[94]

In a fervent search for an appropriate meaning of genocide, the author critically examined the provision of Article 6 of the Rome Statute of International Criminal Court, which he described as "wholesale adoption of the definition contained in Article II of the 1948 Genocide Convention". The author is of the opinion that the legal definition of genocide is broad enough to include "such acts as murder, mental damage, preventing births, removing children from a group etc". He stated further that the definition is equally narrow because of its failure to include the intent to destroy political, economic and other groups.[95] After a thorough examination of definition of genocide by some frontline genocide scholars, Akper noted that the definition of genocide can be categorised into three broad types: the legal definition, the common definition and the general definition. The author concluded his work by assessing the causes of genocide under the Rome Statute of International Criminal Court.

To state that this article is a very important sources material for this research, is certainly to state the obvious. However, it must be stated that, the article was very brief in its analysis of the *actus reus* of genocide and its mental element. This research shall therefore consider the acts constituting genocide and the special intent requirement in detail, as expounded by the jurisprudential decision of the United Nations' *ad hoc* tribunals. This research also goes further to examine some Nigerian crises in the context of the crime of genocide.

[94] *Ibid.*, p. 70.
[95] *Ibid.*, p. 80.

It must be respectfully observed that, the entire literature reviewed, contributed immensely to the development of the law of genocide in one way or the other. However, none of the literature examined the International Crime of genocide in the light of Nigerian domestic crises. These shall be a primary focus of this research. As genocide shall be considered from a general perspective under the international law and narrowed down to specific crises in Nigeria to determine whether such crises constitute genocide in International Law.

1.8 Organizational Layout

This research work is made up of six chapters. Chapter one is the general introduction to the entire work. It therefore comprises of the background of the research, research problem, aims and objectives of the research, justification of the research, scope of the research, research methodology, and literature review.

Chapter two consider the origin and evolution of genocide and the origin of its legal prohibition; definition of key terms; legal elements of the crime of genocide; inchoate offences in genocide and stages of genocide.

Chapter three dwells principally on the legal and institutional regimes for the crime of genocide. To this end, it considers some regulatory international institutions and some Statutes, Convention and Laws prohibiting genocide, with a bird's eye view on the existing inherent loopholes in the laws.

Chapter four critically examines some selected Nigerian crises in the light of the legal meaning of genocide, it to analyze and situate them appropriately. In this respect, the chapter may also attempt an evaluation of some exemplary crises for the purpose of clarity

and understanding of the concept of genocide and whether or not this crises qualifies as such.

Chapter five considers domestic implementation of the treaties on genocide in Nigeria. Consequently, the chapter considers the relationship between international law and domestic law, and the application of treaty based laws and customary international law in Nigeria. The chapter also explode the place of treaties in the hierarchy of legal norms in Nigeria.

Chapter six ends the entire work. It comprises of the findings, recommendation and conclusion.

CHAPTER TWO

CONCEPTUAL CLARIFICATION, ORIGIN AND NATURE OF GENOCIDE

2.1 Introduction

This chapter, as the caption displays, is very important to this research work. It forms the bedrock of the subsequent legal exposition in this work. It is the general appreciation and in-depth understanding of the numerous sub-heads of this chapter that will give a clearer vision of the gloomy perception of genocide and the haziness, dynamics, elusiveness and the slippery nature of its meaning in international law. This chapter shall further bring to fore, the important legal issues for consideration in styling or naming a specific crisis as genocide in the context of the law of genocide and its jurisprudence, principally for a later purpose of assessing some Nigerian crisis with the search light of genocide.

Consequently, this chapter shall examine: The origin of genocide and the origin of its legal prohibition; conceptual clarification of key terms, where the terms 'Crime' and 'Genocide' will be considered in details; typology of genocide, where the stages of genocide shall also be considered briefly. The chapter shall further explore the very basis of crime, in this case, the elements of the crime of genocide. These shall consider the physical element of the crime (*actus reus*) and the mental element (*mens rea*), emphasizing the 'general intent' requirement (*dolus*) and the 'special intent' (*dolus specialis*) requirement in genocide.

Finally, the chapter shall wind up by considering preliminary offences pursuant to genocide and the offence of complicity in genocide. All these shall be considered in this chapter, with a view to assessing their relevance and efficacy in our modern world which is

characterized by multi-dimensional crisis, seeking attention and descriptive nomenclature, and threatening our human habitation and our civilization. *Lacuna* noted will be examined for the purpose of proffering suggestions and recommendation which shall be reflected in chapter six of this work.

2.2 Conceptual Clarification

This subhead is concerned with the appreciation of some basic concepts. It is to give a simple conceptualization to some term that are recurring decimal in this study; which understanding will greatly help the appreciation of the entire subject of this work.

2.2.1 Crime

Crime is a salient fact, and an integral part of the risk associated with the society. Crime encompasses harm to individuals, destruction of property and violence in the society. Dambazau[96] observed that it is difficult to present a universally accepted definition of crime. The reason being that, acts defined as crime may vary from one society to the other. It is his further observation that crime at one time may not be at another time[97]. Consequently, United Nations Research Institute for Social Development, observed, thus:

> Crime, in the sense of a breach of a legal prohibition, is a universal concept, but what actually constitutes a crime and how seriously it should be regarded, varies enormously from one society to another. Perception of crime are not

[96] Dambazau, A.B. (2007) *Criminology and Criminal Justice,* Spectrum Books Limited, Ibadan, p. 48.
[97] *Ibid.*

> determined by any objective indicator of the degree of injury or damage but by cultural values and power relations[98]

The above quotation is indicative of the fact that legal prohibition and sanction of certain acts is an objective phenomenon that has global acceptability, but the definiteness of acts that may constitute crime in the light of stipulated prohibition and their gravity may be subjective, thus peculiar and distinct from one society to another. It therefore means that, acts that may be perceived as socially and morally despicable and highly objectionable in one society may not attract such high repulsive disposition in another society.[99]

However, the *Oxford Dictionary of Law* sees crime as "an act (or sometimes a failure to act) that is deemed by statute or by common law to be a public wrong and is therefore punishable by the state in criminal proceedings".[100] This definition took into cognizance the very important aspect of 'omission' as an act, that may constitute the *actus reus* of a crime. The meaning ascribed to crime here, see the act exclusively as a legally prohibited behaviour.

Bohm and Haley prefer to avoid the social definition of crime. In their words "… to avoid the problem of social definition of crime;"[101] they therefore see crime as " an intentional violation of criminal law or penal code, committed without defence or excuse and penalized by the state". [102]

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[98] *State in Disarray*(1995) *The Social Effect of Globalization*, UN Research Institute for Social Development, cited in Dambazau, *Ibid.*

[99] *Danen Tofi vs. Usher Uba & Anor* (1987) 3 NWLR p. 77. Where, the Court of Appeal observed that Adultery is not a crime under Tiv Native Law and Custom. Though this position was highly criticized by Tiv elites, it may however, be predicated on the aged long conception that a Tiv man could offer or does offer one of his wives for sexual entertainment of his respected quest.

[100] Martin, E.A., and Law, J., (eds.) (2006) *Oxford Dictionary of Law* 6th edn., Oxford University Press, Oxford, p. 140.

[101] Bohm, R.M., and Haley, K.N. (1996) *Introduction to Criminal Justice*, Glencoe McGraw Hill, New York, p. 24.

[102] *Ibid.*

Ladan, like Bohm and Halay, emphasized the necessity for a legal definition of crime as oppose to sociological definition. He observed, the non-legal definition of crime is usually not specific enough to ascertain criminal acts and situate criminal responsibility.[103]

In the words of Robin," crimes are specific acts, or failures to act, defined by state legislatures or congress as been socially injurious to the society."[104] Upon conviction, crimes are punishable by the stipulated sentence of death, incarceration, probation or fine, depending on the stipulated sanction as perceived by a society, and often stipulated in its penal law.[105]

Adler, et al commenting on the concept of crime, states:" The word 'crime' conjures up many images: mugging and murder, cheating on taxes and selling crack. Penal codes defined thousands of different crimes. But all crimes have certain element in common. All are human acts in violation of law, committed by an actor who acted with intent to cause a specified harm."[106] Grappled with the difficulty of couching an all embracing definition of 'crime', a renowned legal writer states: "the task of giving a comprehensive definition is by no means easier when one tries to define the word 'crime' which is but a branch of law".[107] This renowned legal writer however, intelligently lightens this definitive burden by defining crime from a sociological approach and a strict legal approach. From the sociological approach, he defined crime as an anti-social .behaviour which encompasses in its purview numerous acts that a conventional lawyer may not regard as anything than

[103] Ladan, M.T. (1998) *Crime Prevention and Control and Human Rights in Nigeria*, Justice Watch, Abuja, pp. 5-6.
[104] Robin, G.D. (1980) *Introduction to the Criminal Justice System*, Harper &Row Publishers, New York, p. 2.
[105] *Ibid.*
[106] Adler, F. et al. (1998) *Criminology*, 4th edn., McGraw Hill, New York, p. 263.
[107] Chukkol, K.S. (2010,) *The Law of Crime in Nigeria*, A.B.U. Press, Zaria, p. 2.

minor deviant behaviours.[108] From the strict legal approach, he stated that, "crime is treated essentially as a legal concept and therefore best understood by reference to law"[109] It should be noted that, the writer did not define crime as a legal phenomenon; he just merely stated the fact of understanding crime is in reference to law.

The *Criminal Code* chooses to use the word 'offence' in place of 'crime'. It therefore states: "an act or omission which renders the person doing the act or making omission liable to punishment under this code, or under any Act or Law is called an offence".[110] The *Criminal Code*, took into cognizance the fact of 'omission'; that is failure to act, being capable of constituting the *actus reus* of a crime, once the requisite *mens rea* is established. The perception of crime or offence by the *Criminal Code* cannot be otherwise than from a strict legal perspective.

At the international domain, post World War II brought about aggressive disposition towards internationalization of acts considered as international crimes. These acts were made criminal by the instrumentality of treaties,[111] statutes of *ad hoc* tribunals[112] and the global acceptability of customary rules of international law, from which states can not derogate. The internationalization of numerous acts as crime gave birth to recognition of crimes, such as: Genocide;[113] Crime against Humanity;[114] War Crimes;[115] The Crime of aggression[116] etc. Crimes are therefore no longer restricted to the domain of municipal law

[108] *Ibid.*
[109] *Ibid.*
[110] Section 2, *Criminal Code Act*, Cap E14 Laws of the Federation of Nigeria (LFN), 2004.
[111] For example, Convention for the Prevention and Punishment of the Crime of Genocide, 1948.
[112] For example, Statute of International Criminal Tribunal for Yugoslavia; Statute of International Criminal Tribunal for Rwanda; Statute of the Special Court for Serre Lome etc.
[113] See: Art. 6, Rome Statute of International Criminal Court(ICC).
[114] Art. 7, *Ibid.*
[115] Art. 8, *Ibid.*
[116] Art. 5(1)(d), *ibid.*, The Crime of Aggression was not to take effect upon the coming into operation of Rome Statute of International Criminal Court. It was to be defined and effective at a specified later date.

and state responsibility. They are now matters of international concern and individual responsibility, as "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced".[117] International law therefore sees crime as the violation of criminal law through acts or omission, which causes persons to individually or collectively suffer harm, including mental injury, emotional suffering, economic loss or substantial impairment of their fundamental right.[118]

Worthy of examination, is the "vexed question: What conduct is generally proscribed and regard as criminal?"[119] Chukkol rightly observed that, three ensuing question flows from this:

(a) Does a human conduct become criminal because it conflicts with the society's moral code?

(b) Is a particular human conduct criminal because it causes harm to members of a society?

(c) Is crime in a society determined by what the rulers of the moment decided to categorize as such?[120]

The moralists' view is that crimes are sins or immoral acts. This view holds that for an act to be punishable as a crime, it must be a sin or moral wrong. The utilitarian view opined that crimes should be viewed and categorized on the basis of the injury visited on the society. The utilitarianists further contended that the fraction of criminal law should be

[117] France, et al. vs. Goering et al., 22 IMT 411, 466 (Int'l Mil. Trib. 1946) cited in Schabas, W.A. (2008) "State Policy and Element of International Crimes" *The Journal of Criminal Law and Criminology* Vol. 98, No. 3, p. 953.
[118] The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power G.A. Res. 45/111, annex, 45 U.N. GADR Supp. (NO. 49A) at 200, *U.N. Doc. A/45/49/1990.*
[119] Chukkol, *op. cit.*, p. 3.
[120] *Ibid.*, pp. 3-4.

limited to the prevention of harm and that criminal law should not be invoked for the enforcement of morality.[121] The positivists' see crime as a stipulated prohibition stated as crime(s) by the ruler of the moment, proscribed by threat of imminent penal consequences.

However viewed, crime in modern organized system is a legal concept, which represents acts or omissions that offends the dictates of a regulatory penal law, which defines such act or omission as a crime, and the punishment therein stipulated. A crime in law is constituted by a physical element (*actus reus)* and a mental element (*mens rea)*. For an act or omission to suffice as a crime, there must be the concurrence of the physical element and the mental element. Both can not exist independent of the other, to constitute crime. The physical element could be made up of conduct, its consequences and the circumstances in which the conduct took place.[122] The mental element or blameworthy mind is the 'intention' to bring about the occurrence of a prohibited act.[123] The elements of crime can not be definite because individual crimes may possess their physical and mental element.[124] However, to show the existence of mental element, it must be established that an individual intentionally, knowingly, recklessly, or negligently behaved in a given manner to cause the existence of a prohibited consequence. Crimes can be categorized into groups: serious and minor crimes; felony and misdemeanour; *mala inse* and *mala prohibita*; crimes against persons and crime against property;[125] crimes can be further categorized into crimes against the state; economic and financial crimes; municipal and international crimes.[126]

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[121] Mill, J.S. (1859) *Essays on Liberty*, London, Chapter 1, cited in Chukkol, *Ibid.*, p. 6.
[122] Smith, J.C. and Hogen, B. (1988) *Criminal Law*, Butterworths, London, p. 35.
[123] Chukkol, K.S., *op.cit.*,p.40
[124] Dambazau, *op. cit.*, p. 49.
[125] *Ibid.*
[126] Schabas (2008), *op. cit., p* 953

2.2.2 Genocide

The word "genocide" has always been used in different ways to describe different situations as percieved and understood by the discussant. It is often used to portray the fact of annihilation, destruction or disorganization of any nature; its strict legal meaning notwithstanding. In Aljazeera World News,[127] the dumping of fish by China in Brazil was loosely described as, "genocide of the fish industry" in Brazil.

Mahmood Mamdani observed the striking similarities of the Iraq and Darfur crises[128]. The estimated numbers of civilians killed are roughly similar in both crises. The killers are predominantly paramilitary, closely linked to the official military who supply arms to them. The victims in both crises are identified as member of groups, as opposed to being targeted as individuals. But the Iraq and Darfur crises were named differently. The Iraq violence is said to be a circle of insurgency and counter insurgency; while the Darfur crisis is christened "genocide".[129] Confused with the different descriptive nomenclature attributed to visually same crises situation, Mamdami exclaimed: "why the difference? Who does the naming? Who is being named? What difference does it make?"[130] The massacre of the Tutsi in Rwanda, jolted the conscience of humanity, and gained global acceptability as one of the grievous genocide in modern history; yet, there seem not to be a total acceptability of the fact that what happened in Rwanda was genocide. Barry Crawford

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[127] Aljazeera World News, 17 November, 2011.
[128] Though the Darfur Crisis and the Iraqi Crisis took place at difference place and time and by different actors.
[129] Mamdani, M. (2007) "The Politics of Naming: Genocide, Civil War, Insurgency" *London Review of Books*, Vol. 29,No. 5, dated 8 March, obtained from: http://www.ivb.co.uk/u29/no5/print/mamd01_html (accessed on 13 April, 2011).
[130] *Ibid.*

(in his submission to the United Nation Tribunal on Rwanda, London, 1995) states: "mass movement and social upheavals cannot be organized in advance by a secret conspiracy and brought into instantaneous action at the push of a button".[131] He stated further that what happened in Rwanda "was not genocide but bloody civil war between two bitterly opposed sides struggling for power"[132]

In like manner, while some scholars are fast at describing the annihilation of the Armenians by young Turks government as genocide,[133] others believe that the act cannot be genocide.[134] The Heroro struggle for reparation against German imperialist for the genocide against the Heroro nation has also been refuted as not constituting genocide.[135] The uncertainty and the haziness in the perception of acts that may constitute genocide makes the concept very difficult to understand, analyse or write about. Zwaan rightly observed that the term 'genocide', since its first introduction in 1944 has become well-established and gained wide currency.[136] However, it has been shown to be a very complex concept, amenable to variety of conceptualization. Thus it is observed as follows:

> In public discussion as reflected in mass media, the term is sometimes used quite loosely, while in other situations it has been used in strict limited sense and with every new case of alleged genocide since 1945 the meaning of the concept has been re-examined. Not withstanding a certain broad about the

[131] "Genocide", Information Project for Africa, In. Washington, 1999, p. 2.
[132] *Ibid.*
[133] See: Smith, R.W et al. (1995) "Professional Ethics and Denial of Armenian Genocide" *Holocaust and Genocide Studies*, vol.9, No.1. See also: Schabas W.A. (2005) "The Odious Scourge: Evolving Interpretation of the Crime of Genocide", a paper presented at the International Conference: *Ultimate Crime, Ultimate Challenge*, Yerevan, Armania.
[134] See: Stone, N., (2006) JTW News. Cited in Atidoga, D.F. (2010) "Genocide and Human Rights Violations: An Examination of the Armenian Genocide," *Human Rights Review*, vol.2, No.2, p.72. Professor Stone was quoted to have said: "there is no Armenian Genocide."
[135] Anderson observed that the government of Germany is seriously opposed to the fact of the existence of genocide against the Heroro people. See generally: Anderson,R. (2005) "Redressing Colonial Genocide Under International Law: The Heroros Cause of Action Germany." *Califonia Law Review*, vol.93, p.1156.
[136] Zwaan, T. (2003) On the Aetiology and Genesis of Genocides and other Mass Crimes Targeting Specific Group, Centre for Holocaust and Genocide Studies, University of Amsterdam / Royal Netherlands Academy of Arts and Science, Amsterdam, p. 7 .

> core meaning of 'genocide' amongst specialist in the field, the discussions about the most adequate definition are still being carried on at present. One may conclude that the meaning of the concept is not yet fixed other than where the legal concept is strictly defined.[137]

It goes to mean that, there is not yet definiteness and conclusion on the meaning attributable to the concept of genocide, as the debate is still on going, as different events perceived as genocide comes along with different perspective on the concept. The attempt by the Genocide Convention of 1948 to bring certainty, definiteness and conclusiveness on genocide has actually suffered immense criticism. Consequently, for a proper understanding of the meaning of 'genocide' in a work of this nature; we shall examine it from four perspectives:

I. The founders view

II. Treaty law perspective

III. Case law perspective

IV. Views of scholars

2.2.2.1 *The Founders View*

[137] *Ibid.,* for further discussion on the concept of genocide, see: Abrarez, A., *Government, Citizen and Genocide: A Comparative and Interdisciplinary Approach,* (Bloomington: Indian University Press, 2001) pp. 28-55, Weitz, E.D. (2003) *A Century of Genocide, Utopias of Race and Nation*, Princeton University Press, Oxford, pp. 8-15; Jensen, S.L.B., (ed.) (2002) *Genocide Cases, Comparisons and Contemporary Debate*, The Danish Centre for Holocaust and Genocide Studies, Copenhagen; Hogan, J and Rymond-Richmond, W. (2009) *Darfur and the Crime of Genocide*, (Cambridge: Cambridge University Press, Cambridge; Shaw, M.N. (2008) *International Law*, 6th edn., Cambridge University Press, Cambridge, pp.430-433; Schabas, W.A. (2009) *Genocide in International Law*, (2nd edn.), Cambridge University Press, Cambridge; Agarwal, H.O. (2010) *International Law and Human Rights* (17th edn.), Central Law Publications, Allahabad, pp. 708-712 and Kapoor, S.K. (2011) *International Law and Human Rights*, 18th edn., Central Law Publications, Allahabad, pp. 772-774.

Professor Raphael Lemkin was born in eastern Poland, near the town of Bezwodene. He worked as a lawyer, prosecutor and a university lecturer.[138] A polish Jew, Lemkin fled Poland in 1939, making his way to Sweden and eventually to the United States of America, finding work at Duke university and later at Yale University.[139] Professor Lemkin worked round the clock to promote legal norms directed against the crime of genocide. He therefore, initiated the World Movement to Outlaw Genocide. Lemkin acted forcefully behind the scene throughout the drafting of the Genocide Convention. John P.Humphery wrote in his dairies: "Never in the history of the United Nations has one private individual conducted such a lobby".[140]

Raphael Lemkin founded the term 'genocide' from the words, *genos,* which means race, nation or tribe in ancient Greek,[141] and *Caedere,* meaning to kill. The following definition of Genocide was proposed by Professor Lemkin:

> A co-ordinate plan of different action aiming at the destruction of essential foundations of life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of political and social institution, culture, language, national feelings, religion and economic existence of national groups and the destruction of personal security, liberty, health, dignity and even the lives of individuals belonging to such groups. Genocide is directed against the national group as an entity, and the action involved are directed against individuals, not

[138] Schabas, W.A.(2009) *Genocide in International Law 2nd edn.* Cambridge University Press, Cambridge, p. 28.

[139] Hobbins, A.J., (ed.) (1994) On the Edge of Greatness: *The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights,* Vol. I, 1948-9, McGrill University Libraries, Montreal, p. 30 cited in Schabas, W.A., *ibid.*

[140] Humphrey, J.P. (1984) *Human Rights and Unified Nations: A Great Advancement,* Dobbs Ferry, Transnational, New York, p. 54.

[141] Liddell, H.G. and Scott, R. (1996) *A Greek-English Lexicon,* Clarendon Press, Oxford, p. 344; Arndt, W.F. and Gingrich, F.W., (1957) *A Greek-English Lexicon of New Testament and other early Christian Literatures,* University of Chicago Press, Chicago, p. 155.

> in their individual capacity, but as members of the national group.[142]

Schabas,[143] observed that the definition is narrow in one sense and very broad in another sense. It is narrow in the sense that it addressed crimes directed against the national groups rather than against groups in general, and it is very broad because of its contemplation of not only physical genocide but also cultural genocide which was not expressly contemplated by the Genocide Convention of 1948. However, it must be observed that Lemkin perception of national groups might be far beyond what Schabas thought. The use of the word 'national groups' and not 'national group' (i.e plural of group) may just simply mean that Lemkin's contemplation is not the protection of a national group as a specific entity, but different individual groups within a nation, the aggregation of which makes up national groups. If this is the intendment of Lemkin, then 'national groups' in this context may be very-very broad. This may include all groups within a nation which possess special identifiable character. It may be broad to include ethnic, social, political and even economic groups with national colouration.

A few years after Lemkin proposed the above definition of genocide, he was once again on board in 1947, in a passionate determination to show how his contemplation of the concept of genocide is in a very broad sense. He states that; "….the crime of genocide involves a wide range of actions, including not only the deprivation of life but also the prevention of life (abortions, sterilization) and also devices considerably endangering life and health (artificial infection, working to death in special camps deliberate separation of

[142] Lemkin, R. (1944) *Axis Rule in Occupied Europe,* Carnage Endowment for International Peace, Washington, p. 79 cited in Zwaan, *op. cit*., p. 8.
[143] Schabas (2009), *op. cit.,* p. 30.

family for depopulation purpose…"[144]. By this, Lemkin envisaged a situation, where the prevention of procreation by enforced abortion and sterilization, deliberate separation of families to depopulate a group, with the requisite *mens rea* of destroying such a group as genocide. In totality, it is therefore respectfully submitted, that Lemkin's perception of the concept of genocide could be anything but narrow as partly observed by Schabas.

2.2.2.2 *Treaty Law Perspective*

The Convention for the Prevention and Punishment of the Crime of Genocide[145] is the first international instrument that criminalized genocide specifically as a crime against international law.[146] The Genocide Convention affirmed that, 'genocide' whether committed in time of peace or in time of war, is a crime under international law which state parties undertake to prevent and to punish.[147] The convention did not define 'genocide' in specific and definite terms. However, it gave a vivid picture of acts that, if committed with a particular disposition on a specified group will constitute genocide in the light of the convention. It therefore provide as follows:

> In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical racial or religious group as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to member of the group;

[144] Lemkin, R. (1947) "Genocide as a Crime under International Law" *American Journal of International Law*, Vol. 41, p. 147. cited in Zwaan, *op. cit.*, p. 8.

[145] Adopted by Resolution 260(III)A of the U.N. General Assembly on 9 December, 1948, which came into operation on 12 January 1951. (Hereinafter referred to as the Genocide Convention).

[146] See, preamble to the Genocide Convention. It must however be noted that before the Genocide Convention, United Nations by General Assembly Resolution 96(1) of 11 December, 1946, affirmed that genocide is a crime under international law, whether the crime is committed on religious, racial, political or any other grounds. The Resolution further described genocide as: "a denial of the right of existence of entire human groups, as homicide is the denial of right to life of individual human beings; See Generally; United Nations General Assembly Resolution 96(I): *The Crime of Genocide* (http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/RO/033/47/IMG/NR003347.pdf?OpenElement) accessed on 12th September, 2010 at 5:59 GMT.

[147] Art. I, Genocide Convention.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent birth within the group;
(e) Forcibly transferring children from the group to another group.[148]

The above provision of Art II of the Genocide Convention, which presumably defined 'genocide is the same in wording and import with the provision of Article 6 of the Rome Statute of International Criminal Court (ICC); Article 4(2) and Article 2(2) of the Statute of International Criminal Tribunal for former Yugoslavia and for Rwanda respectively. These instruments entirely reproduced the above provision of Article II of the Genocide Convention. It therefore follows that all discussions on the above provision is applicable to these other instruments.

Clearly visible on the face of the foregoing provision is the fact that, it is specifically for the protection of the groups stipulated in the convention. It equally provided for limited acts (a)-(e) that will constitute the *actus reus* of the crime, with a requisite *mens rea* being the intent to destroy in whole or in part, the specified national, ethnical, racial or religious groups. Than and Shorts,[149] observed rightly that the Genocide Convention is a seriously faulty document, from its loose definition of the word 'genocide' and the non availability of any detail meaning of its provisions.

The definition of genocide proffered by Article II of the Genocide Convention is a product of a negotiation and political compromise made in the light of concerns for ratification, which created a strong departure in fundamental areas from earlier works by

[148] Art. II, Genocide Convention.
[149] Than, C. and Shorts, E. (2003) *International Criminal Law and Human Rights,* Sweet & Maxwell, London, p. 66.

Raphael Lemkin and Nuremberg principles, and Resolution 96 (1)[150]. These previous works included a broader and more elaborate definition of groups protected from acts constituting genocide. For example, Lemkin's definition, examined earlier in this work states: "the objectives of such a plan would be disintegration of the political and social institution of culture, language, national feelings, religion and economic existence of national groups". Further problems associated with the definition of genocide proffered by the convention is, the absence of clarification and certainty of phrases like "serious bodily or mental harm"[151], "condition of life",[152] "measures to prevent birth",[153] "forcibly transferring children"[154]. Other hazy areas of monumental confusion includes, the meaning of the word 'group', and the reason for a limited rather than a general perception of the term; the meaning of the phrase "in the whole or in part"; and the attributable import of the acts, (a)-(e). The absence of clear and definite meaning of all these, leaves the legal definition and imports to varied and often contradictory opinions of their intended meanings. A sound definition, with clarity of terms will give little or no opportunity to adjudicating judges, in courts or tribunals to redefine these phrases in pursuit of political gains.

Labelling an act as 'genocide' has gained high sensitivity in politics, because it is the basis of international intervention in cases of mass murder. However, we must situate an agreeable, appropriate and definite label, because what Graham Fuller observed of terrorism is equally true of genocide that, "the scourge of terrorism cannot be dealt with

[150] Sungi, S. (2011) "Redefining Genocide: The International Criminal Court's Failure to Indict on the Darfur Situation" *Journal of Theoretical Criminology,* Special Edition Vol. 1, pp. 66-67; See also: Ratner, S.R. and Abrams, J.S. (2001) *Accountability for Human Rights Atrocities in International Law,* Oxford University Press, New York, p. 28.
[151] Art. II(b) Genocide Convention.
[152] Art. II(c) *ibid.*
[153] Art. II(d) *ibid.*
[154] Art. II(e) *ibid.*

either justly or effectively until we know and agree on what we are talking about".[155] Until we understand what we are talking about when we refer to genocide and the power of its label,[156] we can not conveniently face the dynamics of the scourge for effective and victorious combat. A more elaborate examination of the definitive components of genocide as proffered by Article II of the Genocide Convention and other legal instruments will be attempted at the later sub-head of this chapter, when considering the elements of the crime of genocide.

2.2.2.3 *Case Law Perspective*

The lack of compulsory enforcement mechanism to punish those responsible for genocides has until recently rendered the Genocide Convention virtually redundant. One might therefore be constrained to assess genocide in the light of the decisions of the International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court (ICC).

The Trial Chamber of ICTY in *Prosecutor vs. Krstic*, states:

> Genocide refers to any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means. There are two elements of the special intent requirement of genocide: (1) the act or acts must target a national, ethnical, racial or religious group. (2) the act or acts must seek to destroy all or part of that group.[157]

In Prosecutor vs. Blagojevic and Jokic. The tribunal has this to say on genocide: Article 4 of the statute characterises genocide by the following constitute elements: (1) one or several of the underlying acts of the offence, which consist of two parts:(i) *actus reus*

[155] Fuller, G. (2004) *The Future of Political Islam*, Palgrave Macmillan,New York, p. 89.
[156] Kelly, M.J. (2008) "Genocide – The Power of Label" *Case W. Res. J. Int'law*, Vol. 40, pp. 147-162.
[157]Case No: IT-98-33-T (Trial Chamber), August 2, 2001, Para. 550

enumerated in sub-paragraph (a)-(e) of Article 4(2); and *mens rea* required for the commission of each; and (2) the specific intent of the crime of genocide, which is described as the intent to destroy in the whole or in part, a national, ethnical, racial or religious groups, as such.[158]

The ICTY also in the case of *Prosecutor vs. Jelisic*, observed:

> Genocide is characterized by two legal ingredients according to the term of Article 4 of the statute: (1) the material elements of the offence constituted by one or several acts enumerated in paragraph 2 of Article 4; the *mens rea* of the offence, consisting of the special intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.[159]

These holdings of the ICTY are all predicated on the interpretation of Article 4 (2) of the Statute of International Criminal Tribunal for former Yugoslavia. The tribunal in these decisions dwelled exclusively on the import of the applicable provision of the statute, emphasizing the elements of crime strictly within the confines of the provision of Article 4(2), Statute of International Criminal Tribunal for former Yugoslavia. We should however, remember that, the provision of Article 4 (2), Yugoslavia Statute has same wording and effect with the provisions of Article 2(2), Statute of International Criminal Tribunal for Rwanda, Article 6, Statute of International Criminal Court.

2.2.2.4 *Views of Scholars.*

[158] (Trial Chamber) ICTY, January 17, 2005, para. 640; See also *Prosecutor vs. Brdjanin*, (Trial Chambers) ICTY, September 1, 2004, para. 681.
[159] (Trial Chamber) ICTY, December 14, 1999, para. 62.

Than and Shorts, in what they describe as conservative and general meaning, defined genocide as "the intentional annihilation of a specified group or groups".[160] Though very brief, the definition is concise and straight to the point. It gives a generalist perspective to the concept of genocide.

However, it is respectfully opined that, the definition is only sufficient to enlighten a common man of the fact of genocide, because it is grossly inadequate and devoid of legal flavour descriptive of the crime of genocide, which is a socio-legal phenomenon. The context in which the word 'annihilation' was used in the definition without a qualifying adjective, descriptive of the nature of annihilation is suggestive of total destruction and not a partial one. This may therefore mean that, genocide can only ensue, when the specified group or groups are destroyed in totality. The meaning of annihilation proffered by Macmillan English Dictionary for advanced learners [161] as "to destroy a group of people or things completely" gives credence to this thinking.

Irving Louis Horowitz briefly defined genocide as: "… a structural and systematic destruction of innocent people by a state bureaucratic apparatus".[162] It is humbly submitted that, even though this definition rightly contemplated a structural and systematic pattern of destruction as an indicator of genocide; it however failed to take into cognisance the very important indicator of genocide, which is destruction of targeted group or groups because of the group's identity. The use of the word 'people' in the definition is indicative of generalization and not specification. This may just simply mean that a structural and systematic destruction of people randomly is genocide.

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[160] Than, and Shorts, *op. cit.*, p 68.
[161] *Ibid.*, p. 51.
[162] Horowitz, I.L. (1997) *Taking Lives: Genocide and State Power*, 4th edn., Transaction Publishers, New Brunswick, p. 21.

It must be further observed that the use of the phrase "state bureaucratic apparatus" in the context of the definition, points to a definite perpetrator for genocide. It means that, destruction of people can only constitute genocide, if such destruction is perpetrated by state apparatus. At this point, it is important to state that Lemkin in his perception of genocide did not contemplate genocide as strictly an act done in pursuit of state policy to perpetrate the act. Genocide Convention in like manner, did not mention 'state policy' in the pursuit of genocide as a necessary indicator of genocide. It therefore follows that genocide can be perpetrated in the absence of any 'state policy' or absence of non involvement of any state bureaucratic apparatus. This shows that individuals or group not supported by the government can perpetrate genocide.

Another scholar of genocide, Isreal Charny defined genocide as: "… the mass killing of substantial number of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defencelessness and helplessness of the victims".[163] Respectfully, it is humbly submitted that, this definition might be with some fundamental defects, as follows:

(a) It considers as genocide only mass killing.

(b) The killings must be so massive to constitute a substantial numbers of human beings. The use of the phrase, "substantial number of human beings" without narrowing the substantial number to a definite group, may mean the substantial number of the whole human population.

(c) The use of the phrase "when not in the course of military action" presupposes that genocide can only be committed in the time of peace and not in time of war. This is

[163] Charny, I. (1994) "Towards a Generic Definition of Genocide", in Andreopolis, G.J., (ed.) *Genocide: Conceptual and Historical Dimensions*, University of Pennsylvania Press, Philadelphia, p. 66.

a negation of the intendment and spirit of the law of genocide encapsulated in the provision of Article I, of the Genocide Convention.

A front line genocide scholar, Helen Fein, has opined that genocide is the "... sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim".[164] Respectfully, this definition though seemingly broad, and at a glance encompassing; it must however be observed that the definition only emphasized physical destruction of a collectivity, and not more. The use of the phrase, "through interdiction of the biological and social reproduction of group members," is not suggestive of other forms of destructions other than physical destruction. It only stipulates the possible medium of achieving physical destruction of the collectivity.

Peter Drost sees genocide as: "…the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity…"[165] This definition proffered by Drost is broad because of its perception of the protected group in general terms. The use of the word "…any human collectivity…" is clearly indicative of the fact that Drost, did not intend a limitation of protected groups. The definition is narrow in its perception of genocide as being limited to the destruction of physical life of an individual as an integral part of a collective group.

[164] Fein,H. (1993) Genocide: A Sociological Perspective, Sage Publications, London, p. 24.
[165] Drost, P. (1959) "The Crime of State", *Leiden*, Vol. 2, p. 125; cited in *Genocide Definitions*, http://www.on.Genocide_definitions (accessed on 9th December, 2010 by 11:15 am)

In a very brief fashion, Henry Huttenbach defined genocide as: "any act that puts the very existence of a group in jeopardy".[166] As brief as this definition seem, it is at the same time very broad, seemingly far beyond any other definition known to this writer. The use of the phrase 'any act', may give room to situating series of acts as constituting genocide. The range of acts in this context will be unlimited, in so far as the acts are geared towards jeopardizing the very existence of a group. Furthermore, the definition is equally very broad in respect of the protected groups, which this writer considers very appropriate. The use of the phrase, "…the very existence of a group" means that any human group qualifies for protection against genocide irrespective of the nature and character of the group. It is, however, respectfully submitted that, the contemplation of 'any act' which jeopardize the very existence of a group as genocide is rather far fetched.

Akper, a Professor of Law at the Nigerian Institute of Advance Legal Studies, sees genocide as "mass killing or murder with intent to destroys a defined group of people".[167] This definition simply sees as genocide, only 'mass killing' or 'murder' and nothing more. In this context, it therefore simply means that no any other act targeted at the destruction of a group other than mass killing or murder may constitute genocide. On the group(s) to be protected against genocide, the learned professor's use of the phrase "…a defined group", makes the definition in itself inconclusive of the group or that, the nature of the group is to be defined else where.

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[166] Huttenbach, H., "Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization" *Holocaust and Genocide Studies*, Vol. 3, No. 3, pp. 389-403 cited in *Genocide Definitions, ibid.*

[167] Akper, P.T. (2005) "The Crime of Genocide under International Criminal Court (ICC) Statute", in Guobadia, D.A, and Akper, P.T., *An Introduction to Rome Statute of International Criminal Court*, Institute of Advance Legal Studies, Lagos, p. 71.

Faced with the enormous difficulty of proffering an encompassing and well articulated definition of the concept of genocide, some writers, tend to adopt the definition proffered by Art. II of the Genocide Convention of 1948 in the course of their work.[168]

2.3 Origin and Criminalization of Genocide

This subhead intends to deal with the origin of genocide, by tracing what may constitute the beginning of the perpetration of genocidal atrocities; it will further seek to locate the criminalization of genocide in contemporaneous and contemporary international law.

2.3.1 Origin of Genocide

Genocide is historically an ancient act. It is as old as human history, and an act which has plagued the very existence of man for centuries. In the words of Leo Kuper, the word genocide is new but the concept is an ancient phenomenon.[169] The root or the origin of genocide can not be easily located, as its root is said to be lost in distant millennia, and will remain so, unless an archaeology of genocide can be developed.[170] The difficulty of tracing the historic origin of genocide is predicated on the fact that historic records are generally unreliable, as many past historical account are geared towards praising the writer's hero or beliefs. Historical accounts may also be aimed at making fantastic stories with extreme exaggerations.

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[168] See: Serbyn, R. (2008) "The Holodomor: Reflection on the Ukranian Genocide" being a paper presented at the *16th Annual J.B. Rudnyckyj Distinguish Lecture*, Friday, November 7, The U of M Archives & Special Collections, 331, Elizabeth Dafoe Library p. 1; Dawson, G, and Boynton, R. (2008) "Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations *Ad hoc* Tribunals" *Havard Human Rights Journal*, Vol. 21, p. 242.

[169] Kuper, L. (1981) *Genocide: Its Political Use in the Twentieth Century*, Penguin, Harmondsworth, p. 9.

[170] Chalk, F. and Jonassohn, K. (1990) The History and Sociology of Genocide: Analyses and Case Studies, Yale University Press, New Haven, p. 64.

However, Ronald Wright has cited archaeological evidence suggestive of the fact that the annihilation of the population of the Neanderthal man of Western Europe, about twenty five thousand (25,000) years ago, may be the first genocide, or rather, the first of which evidence of its occurrence survives.[171] However lost the origin of genocide is today; it is not doubtful that its traces are clearly found in ecclesiastical account, dating back to the Bible days, which portrays God as "a despotic and capricious sadist"[172] who is very eager to perpetrate genocide at the slightest opportunity. The trend of ecclesiastical root of genocide began in the Bible where God decided to destroy all flesh in which is the breath of life from under heaven. Only Noah, his family and his protected animals were spared.[173] Still in the old testament of the Bible, the Lord of Host declared; "I will punish the Amalekites for what they did in opposing the Israelites when they came up out of Egypt. Now go and attack the Amalekites, and utterly destroy all that they have, do not spare them, but kill men and women, child and infant, ox and sheep, camel and donkey".[174] Still in the Bible, it was reported that the Lord commanded Moses to slay all male Midianites and keep their virgin women for themselves.[175]

In ancient wars, the nature of killings may be reflective of grave genocidal onslaught, perpetrated by the "strong" army against a "Week" army. The pronouncement of King Agamemnon when he filed out his strong army against Troy is clearly indicative of ancient war time genocide. King Agamemnon commanded; "We are not going to leave a

[171] Wright, R. (2004) *A Short History of Progress,* Anansi Press, Toronto, pp. 25-37.
[172] Armstrong, K., *A History of God* cited in Baumeister, R.F. (1999) *Evil: Inside Human Violence and Cruelty,* W.H. Freeman, New York, p. 171.
[173] Genesis 6:17-19; See also Qur'an 71:25-28.
[174] 1st Samuel 15:2-3.
[175] Numbers 31:7-18; See also *Joshua 6,* where the Israelites under the leadership of Joshua, were said to have carried out Gods instruction by, Destroying the entire population of Jericho, sparing only Rehab and her household; *Joshua 8,* where God instructed Joshua to do to Ai what he did to Jericho by destroying all the inhabitants of the city, taking only their cattle as spoil of war; *1 Samuel 10,* where King David of Israel utterly destroyed the entire population of the Ammonites.

single one of them alive, down to the babies in their mothers' wombs – not even they must live. The whole people must be wiped out of existence, and none be left to think of them and shed a tear."[176] This statement was a command to perpetrate genocide dished out by great King Agamemnon. Whether this genocidal command was successfully or effectively carried out by Agamemnon's army against the Trojans is a different thing, because when Troy finally fell, women and children were spared and taken as slaves.[177] It must be observed that, pre-historic and antiquity genocides were perpetrated not for the purpose of total annihilation, but for the purposes of exploiting vulnerable members of a group, particularly women and children, who were often spared murder. They were seen as groups least able to offer resistance, and a source of procreation for the perpetrators' dominant group. In such pre-historic and antiquity genocides every male was often killed, even the little ones were not spared. In this kind of situation, the targeted members of the oppressed group slatted for killing are the male members of the group.[178]

In the opinion of historian Ben Kiernan, the Roman seizure and eventual razing of cartage at the end of the Third Punic War (149-146 BC) is "the first genocide". At least 150,000 Carthaginians lost their lives. Kiernan further observed that, the Carthaginian solution found many echoes in the warfare of subsequent centuries.[179] Other victims of Roman Empire during its imperial ascendancy were the faithfuls of Jesus Christ. After the Romans killed him in 33 AD, his followers were subjected to grave persecution and mass killing.[180]

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[176] Quoted in Chalk and Jonassohn, *op. cit.*, p. 58.
[177] Charny, I. (1999) (ed.) *The Encyclopedia of Genocide*, ABC-CLIO, Santa Barbara, C.A, p. 273.
[178] "Origin of Genocide". http://www.genocidetext.net/gaci origins.pdf . p.5
[179] Kierna, B. (2004) "The First Genocide: Carthage, 146 BC" Diogens, 203, pp. 27-29; cited in "Origin of Genocide", *ibid.*
[180] Bell-Fialkoff (1999) *Ethnic Cleansing*, St. Martin's Griffin, New York, p. 13; cited in "Origin of Genocide" op. cit., p.6

There are, other historic mass killings that may be styled as genocide; though not in ancient or antiquity times, though still far away from modern times. These include the slaughter of over 150,000 Vandees in France by the Republicans in Paris, which implemented a campaign of root-and-branch genocide.[181]

Between 1810 and 1828, the Zulu nation under its legendary autocratic leader, Shaka Zulu, waged an ambitious expansionist war and annihilation. A large number of Swathes of present day South Africa and Zimbabwe were wasted by Zulu armies. Oral history helped to document the scale of the destruction.[182] To this day, people in Zimbabwe, Malawi, Zambia, Tanzania, Kenya and Uganda can trace their origin back to the refugees who flee from Shaka's expansionist warriors.[183] According to historian Michael Mahoney, Zulu armies do not only aim at defeating enemies, but at the total annihilation of the enemies. Those destroyed includes, combatants, prisoners of war, women, children, and even animals.[184]

Mahoney has described Shaka's expansionist policies as genocidal. In his words, "if genocide is defined as a state-mandated effort to annihilate whole people, then Shaka's action in this regard must certainly qualify". He pointed out the terminology adopted by the Zulus to denote their conquest, *Izwekufa*, derived from Zulu words Izwe, which means nation, people or polity, and *ukufa*, which means death, dying or to die. The term is therefore, very identical to the concept of genocide in both meaning and etymology.[185]

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[181] "Origin of Genocide" *op. cit.,* p 83,
[182] Mahoney, M.R. (2003) "The Zulu Kingdom as a Genocidal and Post-Genocidal Society, 1810 to Present Day", *Journal of Genocide Research,* 5:2, p. 263.
[183] Chalk and Jonassohn, *op. cit.,* p. 223.
[184] Mahoney, *op. cit.,* p. 254.
[185] *Ibid.,* p. 255.

The origin of genocide, though stated to be lost in pre-historic and antiquity times, its history however, spans from these distantly lost times, to the modern times as a recurring phenomenon that has seemingly defied man' s learning and civilization.[186]

2.3.2 Criminalization of Genocide

Genocide at its origin was seen as tool of conquest, domination and expression of reckless fantasies of kings and rulers; an unchecked evil, which has cost humanity grave loss from time immemorial. Though frowned at, as an anti-social and immoral conduct from antiquity time; however, the origin of criminal prosecution of genocide can not be said to be lost in distant millennia. The criminalization and prosecution of genocide commenced with the realization that, the persecution of ethnic, national and religious minority was not only morally outrageous, but also highly objectionable and sanctionable.[187] Hence, the legal prohibition of some forms of genocide such as wars of annihilation developed very long before their codification in the Genocide Convention of 1948. These prohibitions were embedded in treaties and customary rules of international law.[188]

International law as applied to the rights and obligations of nations was based in part upon custom. Until the twentieth century, customary international law is the dominant source of the law of nations.[189] Customs and conventions have shaped the development of positive law of nations since the beginning of the nineteenth century. Sources of customary

[186] Recent genocides in history includes: The Rwandan Genocide, the Bosnian Genocide, the Darfur Genocide and the Guatemalan Genocide etc. The re-occurring phenomenon even in a supposed modern era of civility, is indicative of the failure of existing preventive mechanism.
[187] Schabas, (2009), *op. cit.*, p. 17.
[188] Anderson, R.J. (2005) "Redressing Colonial Genocide: The Heroros' Cause of Action against Germany' *California Law Review,* Vol.93, p. 1158.
[189] *Ibid.,* p. 1169.

international law include state practice, bilateral agreements, domestic laws, non-biding decisions of international tribunals and works of jurists and authoritative text writers. Although the term "genocide" was not yet in existence, certain forms of acts that could be described as genocide today, such as wars of annihilation were violations of customary international law as early as 1878.[190] Customary international law are international norms called *Jus Cogens* which are core norms accepted by all civilized nations, from which derogation is not allowed, even if they is no treaty obligation. Some prohibitions fall within the rules of *Jus cogen*, the crime of genocide is one of such prohibitions.

It must however, be stated that in Europe, before 1878, the protection of national, racial, ethnic and religious groups from persecution can be traced to a treaty called, "The Peace of Westphalia of 1684", which accorded certain rights and guarantees protection for religious minorities.[191] Some other early treaties contemplated the protection of Christian minority within the Ottoman Empire[192] and the Francophone Roman Catholics within British North America.[193] These early bilateral and multilateral treaties aimed at the protection of the rights of national, ethnic and religious groups, metamorphosed into a doctrine of humanitarian intervention, which was often invoked to justify military activity at extreme occasions during the nineteenth century.[194]

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[190] Bluntchli, J.C., Das Morderne Volkerrecht Der Civilisirtin Staten (1878) 299-300 cited in Anderson, *op. cit.,* p. 1169.

[191] Treaty of Peace between Sweden and the Empire, signed at Osnabruck, 14(24) October, 1684; Dumont VI, part I, p. 469, Arts. 28-30; Treaty of Peace between France and the Empires, signed at Miinster 14(24) October, 1684; Dumont VI, Part I, p. 450, Art. 28. See generally; Schabas,(2009), *op. cit.,* p. 18.

[192] The Treaty of Peace between Russia and Turkey, signed at Adrianople, 14 Septerm, 1829, BFSP XVI, p. 647, Arts. V and VII.

[193] Treaty of Peace and Friendship between France and Great Britain, signed at Utrecht, 11 April, 1713, Dumont VIII, Part I, p. 339, Art. 14; Definitive Treaty of Peace between France, Great Britain and Spain, signed at Paris, 10 February, 1763 BFSPI, pp. 422 and 645, Art. IV.

[194] Schabas,(2009), *op. cit.,* p. 18.

Article 46 of the Hague Regulation of 1907 requires an occupying belligerent to respect family honour, the lives of persons, property rights as well as religious consideration and practice.[195] The preamble of the Hague Regulations also contains the 'marten's clause', which states that; The inhabitants and belligerents remain under the protection and the role of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[196]

Nothing in The Hague Regulation expressly suggests any particular focus or vulnerable national or ethnic groups. However, in 1914, an International Commission of Inquiry was set up to consider the atrocities perpetrated against minority national groups during the Balkan Wars to be a violation of Hague Regulation of 1907. The section of the Commission's report entitled: "Extermination, emigration, assimilation," documented atrocities that could rightly be described as genocide or crimes against humanity.[197]

The advent of a new world order which criminalized atrocities in the aftermath of the First World War brought about a growing passion for the international protection of human rights. This also took the form of treaties, bilateral and multilateral, geared towards special protection of national minorities.[198] At this time, the world also saw serious attempts being made at internationalization of criminal prosecution, accompanied by the suggestion that massacres of ethnic minorities within a state's own borders might give rise

[195] *Ibid.*
[196] Preamble to Convention (IV) Respecting the Laws and Customs of War by Land (1910) UKTS 9, Annex. The 'Martens Clause' first appeared in 1899 in Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 BFST 988.
[197] Report of the International Commission of Inquiry into the Causes and Conduct of Balkan Wars, Carnage Endowment for International Peace, Washington, pp. 148-58; cited in Schabas,(2009), *op. cit.*, p 42, p. 19.
[198] Schabas, (2009) *op. cit.*, p. 19.

to both state and individual criminal responsibility.[199] Some of the early treaties, trials, resolutions, declarations and commissions fostered by the conscience of humanity, at the advent of a new world, after the First World War includes; The Versailles and the Leipzig trials;[200] the treaty of Sevres;[201] the United Nations War Crimes Commission;[202] Nuremburg trial;[203] the General Assembly Resolution 96(1)[204] and finally the Convention for the Prevention and Punishment of the Crime of Genocide;[205] which remains the grundnorm of the existing world order, as far as the crime of genocide is concern. Other statutes which now criminalize genocide, such as the Statute of International Criminal Tribunal for former Yugoslavia,[206] the Statute of International Criminal Tribunal for Rwanda[207] and the Rome Statute of International Criminal Court;[208] which were all later in time, merely adopted the provisions of the Genocide Convention of 1948.

2.4 Nature of Genocide

[199] *Ibid.*

[200] Versailles and Leipzig Trials was a product of the Paris Peace Conference held on 25 January 1919 where a Commission on the responsibility of the Authors of the World War and on enforcement of penalty was created.

[201] The Treaty was signed on 10 August 1920. It proposed to punish Turks for the Armenian Massacres. However, the Treaty was never satisfied. See Hollaway, K. (1967) *Modern Trend in Treaty Law*, Steven & Sons, London, pp. 60-61.

[202] The United Nations War Crimes Commission was established immediately prior to the Moscow Declaration of 1 November, 1943.

[203] Art. 6(c) of the Charter of the International Military Tribunal, the indictment of International Military Tribunal at Nuremberg charged the defendants with 'deliberate and systematic genocide ;See*: France et al vs. Goering et al.*, (1946) 22 IMT 203, pp. 45-46. See also: (1947) 2 IMT, pp. 44-48.

[204] On 11 December 1946, the draft resolution was adopted by the UN General Assembly, declaring genocide as an international crime of "denial of the right of existence of entire human group…" See UN-GAOR, 96th Sess., 55th Plen. MOg., at 188-89, UN. Doc. A/96/PV.1 (Dec. 11, 1946).

[205] 78 UNTS, 9th December, 1948; is the historic convention that specifically sets out in an elaborate dimension, to punish and prevent genocide.

[206] UN. Doc. S/RES/808 (1993); UN. Oc. S/25795, Annex. 1993.

[207] UN. Doc. S/RES/955 (1994), Annex.

[208] The International Criminal Court became a reality on 17th July, 1998, after a prolonged debate on the creation of a permanent International Criminal Court. This was made possible by the adoption of Rome Statute of International Criminal Court, which was signed on 1st June, 2000 and satisfied by Nigeria and many other countries on 27th September, 2001. See generally, Ladan, M.T., *Materials and Cases on Public International Law,* (Zaria: ABU Press, 2008) p. 228.

This subhead intends to examine the nature and character of genocide as a crime in international law. This shall be done by appraising the typology of genocide, wherein genocide shall be considered based on the character of its classifications with a view to understanding the concept of genocide from an encompassing perspective not without highlighting the stages of genocide and the dynamics of its elements.

2.4.1 Typology of Genocide

Though genocide is perceived as the "crime of crimes" as generally observed, its application is still not clear today. The areas of controversies are enormous and numerous; not only limited to naming the crime, intent requirement and the appreciation of protected groups[209] but also to the understanding of the forms or typology of genocide. We shall in this work classify genocide from two broad based perspective:

(i) Classification based on protected group.

(ii) Classification based on character of the act.[210]

However, it must be noted that this classification may not be sufficient. There ought to be classification of genocide based on the perpetrator. i.e. base on the person or body that brought about the prohibited results such state, political group, individuals, religious groups etc.

2.4.1.1 Classification Based on Protected Group

[209] Hofmann, R. (2009) "The Genocide Convention" International Conference: Commemorating its 60th Anniversary (4-6 December, 2008 Marburg, Germany) *German Law Journal*, Vol. 10, No. 05, p. 621.
[210] Art. II Genocide Convention of 1948.

By this form of classification, typology of genocide is basically viewed from the perspective of the protected groups as envisaged by the Genocide Convention and other international instruments. These protected groups are, national, ethnical, racial and religious groups.[211] Consequently, the types or form of genocide derivable from this classification are; national genocide, ethnical genocide, racial genocide and religious genocide.

(I) National Genocide

According to the Trial Chambers of the International Criminal Tribunal for Rwanda, the term 'national group' refers to 'a collection of people who are perceived to share legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[212] According to Oppenheims international law: " 'nationality' in the sense of citizenship of certain state must not be confused with 'nationality' as meaning membership in a certain nation in the sense of race".[213] In his commentary on the Genocide Convention, Stefan Glaser observed that: "What characterizes a nation is not only a community of political destiny, but, above all, a community marked by distinct historical and cultural links or features. On the other hand, a 'territorial' or 'state' link does not appear to one to be essential".[214]

The concern of the Genocide Convention which informed the choice of 'national' group as a protected group is predicated on the fact of what was then known in Europe as 'national minorities'[215] and the determination to protect them in the emerging human rights

[211] Art. II Genocide Convention; Art. 6 Rome Statute of International Criminal Court; Art. 2 Statute of International Criminal Tribunal for Rwanda and Art. 4 Statute of International Criminal Tribunal for former Yugoslavia.
[212] *Prosecutor vs. Akayesu* (Case No. ICTR-96-4-T), Judgment of 2 September 1998, para. 511.
[213] Jenning, R. and Watts, A., *Oppenheims International Law, Vol. II 9th edn.,* (London and New York: Longman, 1996) p. 857.
[214] Glaser, S., *Droit International*, pp. 111-112, cited in Schabas, *op. cit.*, p. 135.
[215] Amann, D.M. (2002) "Group Mentality Expressivism and Genocide", *International Criminal Law Review*, p. 93.

regime; in this context, therefore, represents minorities within a nation. A more recent definition of 'national minority' was proffered by the European Commission for Democracy through Law (the 'Venice Commission'), an affiliate of the Council of Europe. It sees 'national group' as "a group which is smaller in membership than the rest of the population of a state, whose members, who are nationals of that state, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion and language."[216] International Law Commission Special Rapporteur Doudon Thiam noted that national groups often comprise several different ethnic groups, particularly in Africa, where territories were divided without being mindful of them.[217]

'National group' or 'national minority' whether viewed from the broad perspective, which may tend to encompass in its purview, racial, ethnic and religious groups or from the narrow perspective which emphasizes minority group in a nation could be victims of genocide. When members of an identifiable 'national group' or 'national minority' are targeted because of their membership of such a group, and are caused to suffer any of the series of acts constituting genocide by a perpetrator possessing the requisite special intent, "national genocide", could be said to have taken place. The Cambodian atrocities perpetrated by Khmer Rough leadership against Khmer Rough as a national group in Cambodia, could be termed "national genocide" within the meaning of the Genocide Convention.

[216] European Commission for Democracy through Law, *The Protection of Minorities,* (Strasbourg: Council of Europe Press, 1994) p. 12.

[217] Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, by Doudon Thiam, Special Rapporteur, UN. Doc. A/CN.4/398, para. 57.

It must, however, be noted that the classification of genocide from the perspective of protected groups could in some cases have an overflowing effect. This means that some groups may seemingly qualify as national groups and at the same time as racial or religious groups. For instance, the Armenians could pass as a racial group in their individual separate existence, as a national group in their collective co-existence with the Turks of the Ottoman Empire and as a religious group because they are of the Christian faith and the first nation to declare Christianity as a state religion.[218] The identifying point in this kind of situation is to determine the reason for which they were targeted by the perpetrator and the applicable nomenclature derivable. For instance, if the Armenians were targeted by the young Turks government of the old Ottoman Empire as a national group, then they were victims of national genocide, if they were slatted for slaughter because of their religious disposition, then they are victims of religious genocide. Another example of national genocide may be the extermination of Ukrainians as a nation by Stalin's famine, in Soviets Union.

(II) Ethnical Genocide

In supporting the Swedish proposal to include ethnical group in the Sixth Committee stage of the draft Convention, the Soviets Union stated that "[a]n ethnical group was a sub-group of a national group; it was a smaller collectivity than a nation, but one whose existence could nevertheless be of benefit to humanity.[219]

Stefan Glaser observed that, 'ethnic' as used in Article II of the Genocide Convention, was larger than 'racial' and it is seen as a community of people bound together

[218] The Christian Religion is deeply enshrined as a vital component of Armenian history, culture and civilization. It is the first state to pronounce Christianity as a state to pronounce 301 CE – See: Cohen, S. (2005) "A brief history of Armenian Genocide", *Social Education*, 69(6) National Council of Social Studies, p. 333.
[219] UN. Doc.A/C.6/SR.74 (Morozov, Soviet Union).

by same culture, same language and same race.[220] In its work on the Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission considered whether it was necessary to retain both 'ethnic' and 'racial', given the apparent repetition tendency. However, Special Rapporteur Doudou Thiam observed that, it is "normal to retain these two terms, which give the text on genocide a broader scope covering both physical genocide and cultural genocide". While agreeing that the distinction between the two was perhaps harder to grasp, Thiam stated that;

> It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common physical trait.[221]

This writer agrees with Doudon Thiam, that ethnic group generally speaking emphasizes cultural and linguistic bounds, which bring about a unified or collective values and ways of life of a people while racial group is more of a people unified by common physical trait. In *Akayesu*, a Trial Chamber of International Criminal Tribunal for Rwanda stated that: "An ethnic group is generally defined as a group whose members share a common language or culture.[222] Also in *Prosecutor vs. Kayishema et al*, another Trial Chamber of the Rwanda Tribunal states that: "An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or a group identified as such by others, including the perpetrator of the crimes (identification by others)".[223]

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[220] Glaser, S., *op. cit.*
[221] Fourth Report on Draft Code on offences against Peace and Security of Mankind, *op. cit.*, para. 58.
[222] *Prosecutor vs. Akayesu*, *op. cit.*, para. 512.
[223] *Prosecutor vs. Kayishema et al* (Case No. ICTR – 95-1-T) Judgment of 21 May, 1999, para. 98.

However, viewed, an ethnic group is simply a group of people unified by common culture, language, values and heritage. Consequently, any act contemplated in the provision of Article II of the Genocide Convention and other corresponding provision of other instruments,[224] perpetrated against a collectivity unified as such, will amount to *ethnical genocide;* which simply means the act of genocide against an ethnic group.

It must be further observed that, because of the thin and blurring distinction between 'ethnical group' and 'racial group', and their inter-woven nature; some acts that constitute genocide may be viewed as both 'ethnical' and 'racial'. This may often arise where, the oppressed group, unified by common language, culture and heritage is still unified by a common physical trait, as opposed to that of the perpetrator. For instance, in Darfur, the oppressed group is the African tribes (The Furs, the Massalit and the Zaghawas); while the perpetrators are the Arab militia, who belong to the Arab race. The Rwanda Genocide, which sprang from the ethnic rivalry between the Hutu ethnic group and Tutsi ethnic group, is an example of *ethnical genocide.*

(III) Racial Genocide

'Racial group' as a term, was not excluded at any time throughout the drafting process of the Genocide Convention. In General Assembly Resolution 96(1), the Secretariat draft,[225] and the drafts submitted by the United States,[226] France[227] and China.[228] The *Penal*

[224] SICTY, SICYR, RSICC.
[225] The Secretariat decided to adopt the General Assembly Resolution 96(I), in its explanatory comment on the Issue of 'groups' to be protected: UN. Doc. E/447, pp. 17 and 22.
[226] UN. Doc. E/623 art. 1.1.
[227] UN. Doc. E/623/Add. I, art. I.
[228] UN. Doc. E/AC.25/9, art. I.

Codes of Bolivia[229] and Paraguay[230]being a domestic legislation avoided the use of the term 'racial' groups in their genocide provisions, the legislators perhaps, considered the use of the term a duplicity, redundant and unnecessary. This may still be the reason why the Code of Costa Rica excluded 'ethnic' group in preference to 'racial' group. It is this writer's opinion that, for a domestic legislation, given the meaning of 'ethnic' group and 'racial' group; the use of the word 'ethnic' should be preferable to 'racial'. This is because the existence of ethnic collectivity is prominently visible in domestic sphere, than racial bond that may cut across states and more often than not, a specific attribute of a continent.

According to the Rwanda Tribunal, the definition of a racial group is based on hereditary physical traits often identified with geographical region, irrespective of linguistic, cultural, national or religious affinity.[231] The United States genocide legislation adopted a similar view. It defines 'racial group' as "a set of individuals whose identity as such is distinctive in terms of physical characteristics and biological descent".[232] Again, in the words of Stefan Glaser; "'racial' means a category of persons who are distinguished by common and constant, and therefore hereditary features".[233]

However perceived, a 'racial group' is distinguishable and identified by its peculiar physical traits and characteristics. It follows, therefore, that genocidal acts as prohibited under international law, committed with the requisite mental element, perpetrated against a specific identifiable group, identifiable by physical traits and biological characteristics is *'Racial Genocide'*. This simply means that, the genocidal acts that are targeted at a racial

[229] Art. 138, Cap. IV, *Penal Code* of Bolivia, 23 August, 1972.
[230] Art. 308, *Penal Code* of Paraguay.
[231] *Prosecutor vs. Akayesu, op. cit.,* p 116, para. 513. See also: *Prosecutor vs. Kayishema and Ruzindana, op. cit.,* para. 98.
[232] Section ,1093 United State Genocide Convention Implementation Act (Proximate Act) of 1987.

[233] Glaser, cited in Schabas, (2009), *op. cit.,* p. 140.

group. As observed earlier in respect of ethnical genocide, some racial groups that are victims of genocide may still posses the linguistic and cultural affinity that characterizes an ethnic group. Such groups are prone to being loosely described as ethnic groups, and consequently, possible victims of ethnic genocide.

An example of racial genocide is an attempt to extermination the Jewish race by the Nazi regime of Germany. Though with distinct identifiable physical feature and character, the Jewish race can also be said to have both linguistic and cultural affinity as a collectivity. It therefore, means that, this type of classification is not disposed to strict water tight separation. [234]

(IV) Religious Genocide

'Religious' groups were part of the list of protected groups in General Assembly Resolution 96(1) and in the early drafts of the Genocide Convention. However, unsuccessful attempts were made by the United Kingdom, Soviets Union and Yugoslavia to either expunge or redefine the concept: 'religious group'.[235] In support of retaining 'religious group', Wahid Fikry Raafat of Egypt gave an example of the St. Bartholomew massacre of the French Protestants in the late sixteenth century, observing that, "recent events in India, Pakistan and Palestine also provided examples of destruction of religious and not racial or national groups".[236]

The International Criminal Tribunal for Rwanda sees religious group as a group which includes denomination or mode of worship or a group sharing common beliefs.[237]

[234] *Ibid.*, p. 146.
[235] Schabas (2009), *op. cit.*, pp. 47 and 48.
[236] UN. Doc. A/C.6/SR. 75 (Raafat Egypt).
[237] *Prosecutor vs. Kayishema et al, op. cit.*, para. 98.

United State Laws defines 'religious group' as "a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices or rituals".[238] Lippman stated that, "religious group encompasses both theistic, non-theistic, and atheistic communities which are united by a single spiritual deal".[239] Religious group however, viewed, is primarily associated with a group that holds common spiritual beliefs, practices and rituals.

Flowing from the foregoing perception of religious group, any act that may constitute the physical element of the crime of genocide, perpetrated against a group of a particular religions adherents, with the required mental element of genocide, may be called '*Religious Genocide'*. This means genocide targeted at a religious group. A good instance of religious genocide is the massacre of Bosnian Muslims in Srebrenica.[240] Another example of religious genocide may be the persecution of the Iranian Baha'is community. The Baha'i faith is an independent religion founded by Mirza Husayn Ali, known as Baha'ullah.[241] It must be observed, as earlier noted that some national groups, ethnic groups or racial groups may possess an identifiable religious colouration. This may give the persecution of such a national, ethnic or racial group a religious outlook. Thus, national, ethnic or racial genocide may equally have a religious undertone, if the targeted group belong to the same religious group.

2.4.1.2 Classification Based on Character of the Act

[238] S. 1093(7) United States Genocide Convention Implementation Act (Proxmire Act) of 1987.
[239] Lippman, M. (1994) "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five years Later"*Temple International and Comparative Law Journal,* Vol. 8 p. 29.
[240] Schabas, W.A. (2001) "Was Genocide Committed in Bosnia and Herzegovina? First Judgment of International Criminal Tribunal for former Yugoslavia" *Fordharm International Law Journal,* Vol. 25, pp. 28 and 30.
[241] See generally: Affolter, F.W. (2005) "The Specter of Ideological Genocide: The Baha'is of Iran", *War Crimes, Genocide & Crimes against Humanity,* pp. 75-144.

This type of classification views typology of genocide from the perspective of the nature of the perpetrators acts on the victim, whether it is an affront on the physical existence of the victim as a group or a ferocious attack on the culture and heritage of the victim group, aimed at the destruction of the groups identity. Derivable from this classification are; physical genocide, biological genocide and cultural genocide.

(I) Physical Genocide

The emphasis of most scholars in contemporary times is the perception of genocide strictly from the perspective of physical destruction. The trend is that, genocide is often identified with killing. Fowl cries and forceful agitations for intervention only ensues to forestall genocide when there is a build up of dead bodies in crises situations. Physical atrocities and murder are often seen as the key criteria of establishing genocide.

The provision of Article II of the 1948 Genocide Convention, the Rome Statute of International Criminal Court (ICC),[242] the Statute of International Criminal Tribunal for former Yugoslavia (ICTY),[243] the Statute of International Criminal Tribunal for Rwanda (ICTR);[244] defined the crime of genocide in terms of stating the series of physical acts that may constitute genocide. It follows therefore, that the law of genocide is also emphatic on the physical destruction of a group in whole or in part. The series of act (a) – (e) stipulated in the Genocide Convention are physical act, which if perpetrated with the necessary mental element, will only amount to genocide of a physical nature called *"Physical Genocide"*. It must be observed that, the emphasis on only physical destruction by the Genocide Convention and some other international instruments falls far short of Rapheal

[242] Art. 6, Statute of ICC.
[243] Art. 4(2), Statute of ICTY.
[244] Art. 2(2), Statute of ICTR.

Lemkin's Comprehensive understanding of genocide and its typology. Lemkin's perception of genocide did not limit the act of genocide to physical destruction of a group. It goes far beyond that to contemplate the destruction of cultural identity of a group, as genocide.

(II) Biological Genocide

This type of genocide is biological, but with the ultimate aim of achieving physical destruction of a group. It is employed with the primary aim of depopulating a specific group as a tool of actualizing the general policy of annihilating the targeted group. Such depopulation may be achieved by any of the following means; forced castration, forced abortion, rape, enforced starvation, deliberate affliction of contagious and terminal diseases and child transfer.

Demographic policies aimed at depopulating a targeted group, with the requisite mental element of destroying the group in whole or in part, may constitute genocide. For instance, the Nazi concentration camps provided a platform where millions of people perceived as inferior elements in German society were sterilized and huge contraceptive agents disseminated amongst population considered as undesirable by the Nazis.[245] Hermann Rauschning, who defected from the Nazi party in 1930s, sounded serious warning on the secret plan of the German leaders. He quoted what Hitler said about the people of Eastern Europe as follows:

> We are obliged to depopulate… We shall have to develop a technique of depopulation…I don't necessarily mean to destroy; I shall simply take systematic measures to dam their great natural fertility…. There are many ways, systematic and comparatively painless, or any rate bloodless, of causing undesirable races to die out…. By

[245] *Genocide;* Information Project for Africa (1999), Library for Congress Catalogue-in-publication Data, U.S.A, pp. 5-6.

> doing this gradually and without bloodshed, we demonstrate our humanity.[246]

The pursuit of the above Nazi policy statement on the prevention of birth within a group may constitute biological genocide. This is because, biological genocide consist of placing enforced restriction upon birth of a targeted group.

Unlike cultural genocide which had no place in the Genocide Convention of 1948; Article II(d) of the Convention seems to clearly contemplate biological control as a form of prohibitive act that may constitute genocide. The provision states that, imposing measures intended to prevent birth within a protected group is an act of genocide. It therefore seems right to conclude that, the Genocide Convention of 1948 actually criminalizes biological genocide.

(III) Cultural Genocide

Destruction of a group more often than not usually begins with a vehement attack on the groups' culture, particularly language, religion, cultural monuments and institutions.[247]Acts and measures undertaken to destroy a targeted collectivity through the destruction of the groups culture with the required mental element is what is referred to as, cultural genocide.[248]The fact of cultural genocide is said to characterize numerous historic atrocities. On Armenian genocide Vandan Levoru Tadevosyan observed as follows:

> Many proven facts concomitant with the massacres and deportation are witnesses to the fact that young Turk government premeditated and planned a systematic method aiming to destroy the material testimonies of Armenian civilization….They knowingly massacred Armenian Clergymen, destroyed Churches, Monasteries…along with

[246] Rauchning, H. (1940) *The Voice of Destruction,* cited in *Genocide ibid.,* p. 5.
[247] Schabas (2009), *op. cit.,* p. 207.
[248] Tadevosyan, V.L., *The Genocide of Armenian Culture Destruction of Civilization,* p. 4.

> thousands of medieval hand written illuminated manuscripts…. [249]

It was further observed that, at the tail of the 1920s, the Turkish government began the process of changing the names of certain places in Western Armenian. Today almost all Armenian cities, towns and buildings in Eastern Turkey (Western Armenia) have been "Turkified".[250] These acts that seek to destroy things that represent the cultural values and civilization of the Armenian people, could rightfully be described as cultural genocide, if the ultimate goal is to annihilate the identity of the Armenian people.

During the post war trials, attention was focused at a point on the cultural aspect of Nazi genocide. Thus, in *Rusha's case,* the accused persons were charged with participation in a 'systematic' programme of genocide that was characterized by limitation and suppression of national dispositions.[251] It was revealed by evidence that Greifelt and his accomplices carried out 'Germanization' orders.[252] In another post war decision, Arthur Greaser was found guilty of genocidal attack on polish culture and learning.[253] These post war decisions point to cultural genocide as a form of genocide.

However, it must be regretfully observed that, the concept of cultural genocide which was very central to Lemkin's conceptualization of genocide was discarded in the final draft of the Genocide Convention. This therefore, means that attacks on the culture and civilization of a targeted group with whatever intention, can not amount to genocide within the meaning of the Genocide Convention of 1948.

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[249] *Ibid.*
[250] *Ibid.*
[251] *U.S.A. vs. Greifelt et al*. cited in Schabas,(2009) *op. cit.,* p. 207.
[252] *Ibid.*
[253] *Poland vs. Graiser* (1948) 13 LRTWC 70 (Supreme National Tribunal of Poland) pp. 112-114.

It is humbly submitted that, the non-inclusion of cultural genocide in the Genocide Convention, is in the opinion of this writer, a fundamental flaw of the Convention. This is because, the destruction of a groups' culture, values and civilization, actually destroys the distinct peculiarity and identity of such a group. If what gives a group her identify is destroyed; then the group is simply programmed for assimilation into the dominant or perpetrator's group. It follows therefore that, if such is done, nothing of such groups' collective values and culture can be transmitted to their children, hence, the extinction of such a group. This represents the cultural death of the group.

2.4.2 Stages of Genocide

Staton[254] classified the stages of genocide into eight distinct phases. The first stage according to him is the stage of *Classification* of people. This stage involves division along cultures, races and ethnic divides. The second stage is *Symbolization*, where physical characteristic, names or symbols are given or attributed to certain groups. The third stage is the stage of *dehumanization,* at this stage, the humanity of the group is denied. The group is often labelled with names of animals or derogatory objects. The fourth stage is the stage of *organization*. This may include informal organization too. This may be done by a state or other hate groups. The fifth stage of *polarization*, this according to Staton, involve the

[254] Staton, G. (1996) "The 8 Stages of Genocide", cited in Johanna Helena Du Toit, *An Analysis of the Element of Genocide with Reference to the South African Farmer's Case* (2011) *Unpublished Masters thesis of the Faculty of Law, Nelson Mandala Metropolitan University*, p. 5.

killing of moderate people belonging to the group geared at speeding the genocidal process.[255] Stage six is the stage of *preparation,* at this stage victims are clearly identified and separated based on their identity. This may take the form of expropriation of property and forceful concentration of victims in structures like extermination camps.[256]

The penultimate stage is the stage of *extermination*. The use of the word extermination rather than murder is informed by the fact that the victims group are not considered as human by the perpetrators group. This seems to be the reason why this stage is characterized by mutilation of bodies, mass graves and burning of bodies. The eight stage, which is the final stage is the stage of *denial*. This stage is depicted by acts in pursuit of denial, subversion of truth and destruction of records or evidence of genocide. It is at this stage that mass graves are dug and bodies buried in hidden places to cover up the crime. At this stage, reports of genocide are branded as propaganda, number of people killed are ridiculously minimized and an outright and deliberate isolation of the acts away from genocide. This therefore, brings about different descriptive nomenclature to situate the evil.[257]

Staton's appreciation of the stages of genocide is quite exhaustive and informing, however, it must be observed that, the stages identified, are very appropriate to the extent of physical genocide. It may not totally be the case if genocide is understood from a broader perspective, encompassing cultural genocide.

The paper by Gregory Staton in 1996, which classified the stages of genocide into eight, was presented at the State Department, shortly after the Rwandan genocide. Therefore, much of the analysis is based on why that genocide occurred. The preventive

[255] *Ibid.*
[256] *Ibid.* pp. 5-6.
[257] *Ibid.* p. 6.

measures suggested, given the original targeted audience, were those that the United States could implement directly or use their influence on other governments to have implemented.[258]

The stages of genocide as observed by Staton, their characteristics and possible preventive measures are represented in the following table:

STAGES	CHARACTERISTICS	PREVENTIVE MEASURES
1 (Classification)	People are divided into 'us' and 'them'.	Development of universalistic institutions that transcend division.
2 Symbolization	Symbols are forced upon unwilling members of a group.	Hate symbols should be legally prohibited.
3 Dehumanization	One group denies the humanity of another group. Members of such group are equated to animals.	Hate speech should be condemned and sanctioned.
4 Organization	Organization and existence of special army unit or militias.	Embargo on arms for genocidal state and sanction for violators.
5 Polarization	Hate group broadcast and polarization propaganda.	Protection of modern leaders, assistance to human right groups. Coup de' by extremist should be opposed by international sanction.
6 Preparation	Identification and separation of victims because of their common identity.	Declaration of genocide emergency.
7 Extermination	It is extermination because the killers do not believe their victims to be fully humans.	At this stage, only rapid and overwhelming armed intervention can stop genocide. Real safe areas or refuge escape corridors should be established with heavily armed international protection.
8 Denial	Blatant denial of perpetrators as to the commission of the crime.	Denial should be responded to by punishment by International Tribunal or National Courts.

Source: Rummel, R.J., "Genocide" obtained from http://en.www.Genocidecite_note-83 (accessed on 19th July, 2012).

2.5 Elements of the Crime of Genocide

[258] Rummel, R.J., "Genocide" obtained from http://en.www.Genocidecite_note-83 (accessed on 19th July, 2012).

In criminal law, a crime is only said to be committed if there exist an act or omission to act, which constitutes the *actus reus* (physical element) of the crime in question.[259] The prohibited act must be consequent upon a blameworthy mind or an intention to ensure that the prohibited acts ensue.[260] This intention to cause a prohibited result is called *mens rea* or the mental element of a crime. The concurrence of the physical element and the mental element of a crime produces the crime.[261] This basic principle of criminal law is predicated on the Latin maxim *actus non facit reum nisi men sit rea*; which means an act or omission to act as the case may be, only becomes criminal if accompanied with the requisite intention. This intention is deducible from stipulations and/or conduct of the accused person or circumstances surrounding the commission of the prohibited act, which may be inferred by law.[262]

Genocide, being a criminal infraction is constituted by a physical element and a mental element, which culminate in the commission of the crime. The definition of genocide in the 1948 Genocide Convention clearly separated the physical element and the mental element of the crime. The mental element is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". While the physical elements are acts listed in the five sub-paragraph of Article II of the Genocide Convention.

2.5.1 Physical Element (Actus reus)

The physical acts which make up the *actus reus* of genocide are as enumerated in Article II of the Genocide Convention of 1948, which were further so listed in subsequent

[259] Ladan, M.T. (1990) *An Introduction to Nigerian Criminal Law*, M.S.S.N, Zaria, p. 1.
[260] Chukkol, K.S. *op. cit.*, p. 26. See also Ocheme, P.A. (2006) *The Nigerian Criminal Law*, Liberty Publications Limited, Kaduna, pp. 29-30.
[261] Chukkol, K.S., *op.cit.*, p. 24.
[262] See generally: Ladan, (1990), *op. cit.*, pp. 1-2.

instruments like the Statute of International Criminal Tribunal for former Yugoslavia;[263] Statute of International Criminal Tribunal for Rwanda[264] and Rome Statute of International Criminal Court.[265] These acts are:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent birth within the group;

(e) Forcibly transferring children of the group to another group.

To amount to genocide, it is not the requirement that these series of act (a) – (e) conjunctively occur. The happening of one of these acts alone, with the required mental element may constitute genocide. It is important at this point, to examine those series of acts with a bird's eye view.

2.5.1.1 *Killing*

This is the first act stipulated by the Genocide Convention as amounting to genocide, if perpetrated with the qualifying intent against a protected group. A Trial Chamber of the International Criminal Tribunal for Rwanda(ICTY) in *Akayesu* identified two material elements in this regard: (a) that the victim is dead; (b) that the death resulted from an unlawful act or omission of the accused or a subordinate.[266] The use of the phrase

[263] Art. 4(2), Statute of ICTY
[264] Art. 2(2), Statute of ICTR
[265] Art. 6, Statute of ICC
[266] *Prosecutor vs. Akayesu*, *op. cit.*, para. 588.

'members of the group' as victims of genocide in Article II(a)[267] as well as other paragraph of same Article II is grammatically suggestive of the fact that the act must involve the killing of at least two members of the group. However, judgment of the Tribunals points to the fact that only one victim is required to satisfy the killing requirement.[268] In *Prosecutor vs. Ndindabahizi*,[269] International Criminal Tribunal for Rwanda held that: "there need not be a large number of victims to enter a genocide Conviction.

In *Akayesu*, the killing of a person in the cause of genocide who is not a member of the targeted group may not constitute genocide. The Chamber stated that the act would have constituted genocide if the victim was Tutsi, the victim being a Hutu, conviction for genocide on that particular act cannot suffice.[270]

2.5.1.2 *Causing Serious Bodily or Mental Harm*

The district court of Jerusalem in *Eichmann case* stated that serious bodily and mental harm of members of a group can suffice as a result of enslavement, starvation, deportation and persecution and by detention in transit camps and concentration camps in conditions aimed at causing inhuman suffering and torture.[271] The International Criminal Tribunal for the former Yugoslavia sees causing serious bodily or mental harm to include, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogation combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted must not be of a permanent nature.[272]

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[267] Genocide Convention of 1948.
[268] *Prosecutor vs. Mpampara* (Case No. ICTR-01-65-T), Judgment of 11 September, 2006, para. 8.
[269] (Case No. ICTR-01-71-A) Judgment of 15 July, 2004, para. 135.
[270] *Prosecutor vs. Akayesu, op. cit.*, para. 588.
[271] *A.G. Israel vs. Eichmann* (1968) 36 ILR 5 (District Court of Jerusalem), p. 340 cited in Schabas, *op. cit* n. 42, p. 182.
[272] *Prosecutor vs. Stakic* (Case No. IT-97-24-T), Judgment of 31 July, 2003, para. 516.

The *Akayesu* Trial Chamber further affirmed that rape and other sexual violence may qualify as genocide under paragraph (b). The Chamber states:

> The Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy in whole or in part, a particular group, targeted as such. Indeed rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even one of the worst ways of inflict (sic) harm on the victim as he or she suffers both bodily and mental harm. In the light of all the evidence before it, the Chamber is satisfied that the act of rape and sexual violence described above were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilation, and raped several times, often in public, in the Bureau communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities…[273]

The *Akayesu* judgment has contributed immensely to the progressive development of the law of genocide, on the subject of rape and sexual assault as acts of genocide. What the prosecution need to prove on this ground is that, one or more victims suffered physical or mental harm; if the physical element of the act is perpetrated with the necessary mental element.

2.5.1.3 *Deliberately Inflicting on the group Conditions of Life Calculated to bring about Physical Destruction in whole or in Part*

At the *Ad hoc* Committee stage of the draft Genocide Convention, China's proposal noted that the *actus reus* of genocide, is not only destruction of the physical existence of the group but also subjecting such group to such condition of life as to cause the groups'

[273] *Prosecutor vs. Akayesu*, *op. cit.*, para. 731.

physical destruction in whole or in part.[274] The element of crime of the International Criminal Court provides: "the term 'condition of life' may include, but is not necessarily restricted to deliberate deprivation of resources indispensable for survival, such as food, or medical services, or systematic expulsion from homes".[275]

International Criminal Tribunal for the former Yugoslavia was of the opinion that Article 4(2)(c) of the Tribunal's Statute was breached by the conditions in detention camps where inmates were deprived of proper food, medical care and subjected to dehumanizing conditions, calculated to bring about the physical destruction of the detainees, with the intent to destroy in whole or in part the Bosnian Muslims and Croats groups.[276] In *Sikirica Case,* the prosecutor submitted that the detainees in Keraterm had been systematically expelled from their homes, and left in a condition totally insufficient for physical well-being and survival of life.[277]

The Commission for historical clarification in Guatemala arrived at a finding that genocide had been committed against the Mayan people by the army in 1981-83. The Commission observed that, acts which include burning of villages, destruction of harvests leaving the communities without food amounted to infliction of conditions of life that could bring about the physical destruction of the Mayan people in whole or in part. In like manner, the International Criminal Tribunal for Rwanda held that:

> …the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part should be construed as the methods of destruction by which the perpetrator does not immediately kill the

[274] China's Proposal UN Doc. E/AC.25/9.
[275] Element of Crime, ICC- ASP/1/3, p. 114.
[276] *Prosecutor vs. Kovacevic et al* (Case No. IT-97-24-I) Indictment, 13 March 1997, paras. 12-16.
[277] *Prosecutor vs. Sikirica et al* (Case No. IT-95-8-T), Judgment on Defence Motion to Acquit, 3 September, 2001, para. 42.

> members of the group, but which ultimately seek their physical destruction. For the purposes of interpreting Article 2(2)(c) of the Statute (and Article II(c) of the Convention), the Chamber is of the opinion that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include *inter alia*, subjecting a group of people to subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.[278]

The suffering of the Armenian people in old Ottoman Empire at the hands of the young Turks government may suffice as a situation of inflicting a condition of life, which essential goal is the destruction of the targeted group. What the Armenians suffered went far beyond deportation, it involves the deprivation of fundamental basic human needs, which consequently led to massive death at the hand of diseases, malnutrition and exhaustion.[279] In further exploration of the *actus reus* of genocide under the provision of Article 4(2) (c) of the Statute of International Criminal Tribunal for former Yugoslavia [Article II(c), Genocide Convention] Cherif Bassiouni argued vehemently, that rape and sexual assault can equally be accommodated. He stated that rape may be deliberately employed to create conditions of life calculated to actualize the destruction of a group in whole or in part. He noted that Islamic law provides that women who have sexual intercourse outside marriage are not marriageable; therefore, targeting Bosnia Muslim women for rape in order to separate them from Muslim men may create a condition of life calculated to bring about the groups destruction.[280] It is humbly submitted that, rape of whatever nature in perpetration of genocide can be conveniently accommodated in the

[278] *Prosecutor vs. Akayesu, op. cit.,* para. 505. See also *Prosecutor sv. Rutaganda* (Case No. ICTR-96-3-T) 6 December, 1999.
[279] Schabas, (2009), *op. cit.,* pp. 192-193. See also Cohen, *op. cit.,* p. 16
[280] Bassiouni and Manikas, International Criminal Tribunal, p. 587 cited in Schabas, *op. cit.,* p. 195.

actus reus of causing bodily or mental harm in Article II(b) of the Genocide Convention. The contemplation of Cherif Bassiouni, though not out of place is rather far fetched.

2.5.1.4 *Imposing Measures Intended to Prevent Birth*

This is a form of physical element of the crime of genocide encapsulated in the provision of Article II(d) of the Genocide Convention of 1948.This particular act often result in a form of genocide known as biological genocide. This is predominantly concerned with systematic arrangement to prevent birth within a targeted group, with the ultimate goal of destroying the group in whole or in part. This is often achieved by cruel and brutal means such as sterilization, castration, enforced abortion, and systematic rape of women and getting them pregnant with the underlying aim of transmitting a new ethnic identity to the child.[281]

It was argued that forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practiced when all municipalities were occupied by Serb forces entails a decline in the birth rate of the group given the lack of physical contact for a long time.[282] It was also argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming and founding a family.[283] The Rwanda Tribunal observed that rape could be subsumed within Sub - paragraph (d) of Article 2(2) [Article II (d), Genocide Convention]. The Tribunal states: "…the chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, force birth control, separation of the sexes

[281] *Prosecutor vs. Karadzic et al* (Case No. IT-95-18-R61, IT-95-5-R61) Transcript of Hearing, 2 July, 1996, para. 94.
[282] Case concerning the Application of the Conviction on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro), Judgment, 26 February, 2007, para. 355.
[283] *Ibid.,* paras. 358-360.

and prohibition of marriage…"[284]. It was rightly observed that paragraph (d) under review does not require that the measures to restrict births be calculated to bring about the destruction of the group in whole or in part, only that they be intended to prevent birth within the group.[285] This measure is therefore not a principal measure of genocidal plan or programme, but rather ancillary to principal acts of genocide.

(V) Forcibly Transferring Children

Forcible transfer of children as an *actus reus* of genocide suffices when a perpetrator group transfers the children of the victim group to itself or to other groups. This act is of serious destructive consequence on the culture, religion, language, civilization and the general way of life of the targeted group. This is because when children are transferred from one group to another, they may lose their cultural identity. The fact of being raised by a different group has the sure potency of eroding the cultural peculiarity and identity of the victim group. The International Law Commission was therefore right when it observed that, "the forcible transfer of children would have particular serious consequences on the future viability of a group as such".[286]

The elements of crime of the International Criminal Court states that: "The term 'forcibly' is not restricted to physical force but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment".[287] This writer will respectfully suggest that, the wilful handing over of a child to the perpetrator group or any other group by a member of the targeted

[284] *Prosecutor vs. Akayesu op. cit.*, para. 507. See also *Prosecutor vs. Rutaganda, op. cit*., para.212
[285] Schabas (2009), *op. cit.*, p. 201.
[286] Report of the International Law Commission on the Work of its Forty-Eight Session, 6 May – 26 July, 1996, UN Doc. A/51/10, p. 92.
[287] Elements of Crime ICC – ASP/1/3, p. 114.

group to save the life of the child in the face of imminent destruction, though not forcibly, should be interpreted as such in the context of the situation.

A 'child' for this purpose, even though the Genocide Convention was silent, may mean any one under the age of eighteen years.[288] By the provision of Article II(e) under review, only an act of forcible transfer of a person that qualifies as a child as defined can constitute an *actus reus* of genocide. The act of forcible transfer of an adult cannot be accommodated here. It is humbly submitted, that 'forcible transfer' as envisaged by Article II(e) did not contemplate the forcible transfer of adults because the provision seeks to be protective of the targeted group from the destruction of its identity, its culture and its values, which are only transmittable and sustainable through the children of such a group. The transfer of such children may endanger the very existence and survival of the groups' identity. It should therefore be noted that, the provision of Article II(e) of the Genocide Convention under review, may be protective of a groups' culture and identity.

2.5.2 Mental Element of Genocide (mens rea)

The mental element of genocide as stipulated by the Genocide Convention,[289] statute of the *ad hoc* tribunals[290] and Rome Statute of International Criminal Court[291] is the 'intent' to destroy in 'whole' or in 'part', a national, ethnical, racial or religious group.

[288] See: Article 1, Convention of the Right of the Right of a Child, UN Doc. A/RES/44/25, annex. S. 1093(1) United States *Genocide Convention Implementation Act* of 1987 also declare that, a child for the purpose of the crime of genocide is a person below eighteen years of age. Israel also adopted same position in s. 1(6) *The Crime of Genocide (Prevention and Punishment) Law*, Vol. 4, 5710-1949/50 p. 101, *Laws of the State of Israel.* However, in the Draft Elements of Crime submitted by United States to the First Session of the Preparatory Commission for the International Criminal Court, the age was reduced to fifteen years – See: *UN Doc. PC NICC/1988/DP.4,* p. 8.
[289] Art. II.
[290] Article 2(2) Statute of ICTR and Article 4(2) Statute of ICTY.
[291] Article 6.

'Intent' is therefore, very central to the definition of genocide.[292] All the acts enumerated as constituting the *actus reus* of genocide cannot ignite criminal responsibility for genocide, except such acts were accompanied with the requisite genocidal intent. This is basic criminal law. That was why Lord Goddard rightly posits that "the court should not find a man guilty of an offence against criminal law unless he has guilty mind".[293] It therefore, follows that, in genocide, the 'intent' which propels the necessary 'act' is the principal determinant of the crime of genocide. Emphasizing the mental element requirement of 'intent' in genocide, the International Criminal Tribunal for Rwanda observed: "Genocide is characterized by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the act described in the Convention, that act could still not be called genocide."[294]

The intent requirement for genocide is not the usual intent or general intent requirement for crimes called *dolus*. Genocide requires a special intent called, *dolus specialis* (special intent). This intent for genocide is said to have two components, 'knowledge' and 'intent'. According to the Rome Statute of International Criminal Court, "a person has intent where: (a) in relation to conduct, that person means to engage in the conduct, (b) in relation to a consequence, that person means to cause the consequence or is aware that it will occur in the ordinary course of event".[295] Knowledge on the other hand is defined as, "awareness that a circumstance exist or a consequence will occur in the ordinary course of event".[296] It must however, be observed that, 'intent' as defined by section 30 of

[292] Alangade, A.M. (2008) "Traversing the Contours of the Men rea of Genocide", Vol. 1, No. 2, A.B.U.J. P.I.L., p. 92.
[293] *Brend vs. Wovel* (1946) 62 LTR 462 at 463. See also: *Harding vs. Price* (1948) 1 KB 695 at 700.
[294] *Prosecutor vs. Akayesu, op. cit.* para. 519.
[295] Article 30.
[296] Schabas (2009), *op. cit.* p. 242.

the Statute of International Criminal Court seem to include 'knowledge' as a form of mental element of genocide in sub-paragraph (b). It follows therefore, that 'knowledge' is subsumed in 'intent'.

'Intent' being of the mind is very difficult to ascertain. The reason being that, individuals who intend to commit crime, do not often go about confessing the evil machinations of their heart. Consequently, short of confession, even the devil may not rightly determine the evil conceived in the heart of men. That is why in *Akayesu*, the Trial Chamber observed that "intent is a mental factor which is difficult, even impossible to determine", adding that, short of confession of the accused, intent can only be inferred from certain number of presumptions of fact.[297] The Trial Chamber in *Akayesu* considered the following as circumstances that can be indicative of intent:

(a) the scale and the general nature of the atrocities;

(b) the fact of deliberately or systematically targeting victims of a group, while excluding the members of other groups;

(c) the general political doctrine of the perpetrators of the crime;

(d) the repetition of discriminatory and destructive acts; and

(e) any speech or project preparing for the killing.[298]

The Trial Chamber in *Kayeshema and Ruzindana* added to the facts for consideration in locating the *mens rea* of genocide, *viz*:

(a) the number of victims from the group;

(b) the use of derogatory language towards members of the targeted group;

(c) the weapons employed and the extent of the bodily injury inflicted; and

[297] *Prosecutor vs. Akayesu, op. cit.,* para. 523.
[298] *Ibid.,* paras. 523-524.

(d) the methodical way of planning and the systematic manner of killing.[299]

It must however, be noted that, the accused need not know about all the planned policy of genocide before he could be said to possess the special intent requirement of genocide.[300] It should be noted that, the emphasis on the existence of a planned policy of genocide in numerous decisions and commentaries on genocide, even though may be a fact for consideration, is in no way a legal ingredient of the crime of genocide. The Genocide Convention made no reference to a 'planned policy' as element of the crime. This simply means that genocide can suffice in the absence of the much talked about planned policy in pursuit of the crime.[301] However, a Trial Chambers of the Rwanda Tribunal rightly observed that: "although a specific plan to destroy does not constitute an element of genocide, it will appear that it is not easy to carry out a genocide without a plan or organization",[302] the existence of such a plan will however be a strong indicator of the presence of the specific or special intent requirement for the perpetration of the crime of genocide. Schabas correctly observed that, "even if the judges are prepared to entertain the hypothesis of genocide without a plan or policy, evidence of a plan or policy has proven to be of fundamental importance in all the convictions for genocide by the International Tribunals, and especially those dealing with complicity".[303]

The specific or special intent requirement in genocide, according to the stipulation of the Genocide Convention, must be the intent to destroy a protected group 'in whole or in part'. Sadly, the Convention was silent about the interpretation of what the phrase 'in whole

[299] *Prosecutor vs. Kayishima and Ruzindana*, *op. cit.*, para. 93
[300] *Ibid.*, para. 94.
[301] *Prosecutor vs. Kunarac et al* (Case No. IT-96-23/1-A), 12 June, 2002, para. 98; *Prosecutor vs. Jelisic* (Case No. IT-95-10-A) Judgment 5 July, 2001, para. 48.
[302] *Prosecutor vs. Kayishima and Ruzindana*, *op. cit.*, para. 94.
[303] Schabas (2009), *op. cit.*, p. 248.

or in part' means. Therefore, the meaning and application of the phrase in relation to the special intent requirement of genocide must be sought else where. Consequently, it has over the years been subject to much discussion and different understanding by scholars. An Appeals Chamber of International Criminal Tribunal for former Yugoslavia held as follows:

> It is well established that where a conviction for genocide relies on the intent to destroy a protected group 'in part', the part must be a substantial part of the group. The aim of Genocide Convention is to prevent the intentional killing of the entire human group, and the part targeted must be significant enough to have an impact on the group as a whole.[304]

A Trial Chamber followed the Appeals Chamber holding in *Krstic* when it held that the term 'in whole or in part' must be interpreted as requiring that, the alleged perpetrator intends to destroy at least a substantial part of the protected group.[305] For what may amount to a substantial part of a group the Appeals Chamber in *Krstic* suggested some factors for consideration in ascertaining the substantiality, they include:

(a) the numeric size of the targeted part, which the Appeals Chamber identified as the 'necessary and important starting point', to be evaluated 'not only in absolute terms, but also in relation to the overall size of the entire group'; and

(b) The prominence or importance of the targeted part within the group.[306] Thus, the Trial Chamber of ICTY in same *Krstic* emphasized the nature of the substantial part of the group, which should be numerically or qualitatively.[307]

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[304] *Prosecutor vs. Krstic*, (Case No. IT-98-33-A) April 29, 2004 (Appeal Chamber) paras. 8-9.
[305] *Prosecutor vs. Blagojevic and Jokic op. cit.* para. 668. The Trial Chamber of ICTR in *Kayeshima* took the same stands.
[306] *Prosecutor vs. Krstic, op. cit.,* para. 12.
[307] *Prosecutor vs. Krstic, op. cit.,* para. 634.

Based on the foregoing factors for consideration, the Trials Chamber concluded that "the intent to kill all the Bosnia Muslim men of military age in Srebrenica constituted intent to destroy in part the Bosnia Muslim group within the meaning of Article 4 of the Statute and therefore must be qualified as genocide."[308] Cohen wrote that, from April 24, 1915 Armenian civil leaders, intellectual class, professionals, artists and businessmen were rounded up and killed.[309] Even if the number of the intellectuals, professionals and businessmen killed was very few in relation to the total numerical size of the Armenians; it may however constitute genocide not on the basis of the substantiality of the number killed in relation to the total population but on the basis of the quality of the few persons killed in relation to the importance of such persons to the existence and identity of the targeted group.

It must be observed that, the interpretations proffered by the numerous decision of the ICTY and ICTR in respect of the interpretation of the phrase 'in whole or in part' is far away from the basic grammatical understanding of the provision of the Convention and the Statutes. The use of the word member(s) in Article II(a) and (b), Article 4(2)(a) and (b) and Article 2(2)(a) and (b) of the Convention, the Statute of ICTY and Statute of ICTR respectively, means just more than one member of the group. The killing of two members of the targeted group with the intent to destroy the group in whole or in part should suffice. This is more so because, the term 'in whole or in part' could be visualized clearly as referring to the intent of the perpetrator and not the result. If a perpetrator intends to destroy a targeted group 'in whole or in part', and with the underlying intention killed two or more

[308] Judicial Supplement 27 to *Krstic* Judgment, *ibid.*
[309] Cohen, *op. cit.*,p. 334

members of the targeted group in pursuit of the actualization of his intention; should such not be seen as genocide within the meaning of the Convention and the Statutes?

Generally, in Criminal law, for an act to incur criminal liability, there must be concurrence of the *actus reus* of the crime and its *mens rea*. This means that the intention to bring about the occurrence of the prohibited act, and the actual performance of the prohibited act must ensue at a point in time in order to ground criminal liability. This principle of law is predicated on the Latin maxim: *actus non facit reum nisi men sit rea*, which means an act can not be criminal until it is clothed with the required blameworthy mind. This sacrosanct basic principle of criminal responsibility is equally applicable to the crime of genocide. The acts (a) – (e) enumerated in the Genocide Convention, Rome Statute of ICC and the Statute of ICTY and ICTR, cannot amount to crime, until any of such act (a) – (e) concurrently occur with the requisite mental element for genocide, which is the special intent to destroy a protected group in whole or in part.

2.6 Inchoate Offences in Genocide

In criminal law, inchoate offences are also referred to as preliminary offences. They are criminal acts which set in motion the wheels of crime, before the commission of the substantive offence. The criminalization of inchoate offences is borne out of the ambition of law to stampede evil machinations which fall short of the substantive crime. The wisdom behind this includes the protection of the victim and the society from actual suffering as a result of a completed act of criminality, and also to serve as deterrence to igniting the process of crime.

Aside from the crime of genocide, as defined in Article II of the Genocide Convention, Article III enumerated four other acts of participation in genocide. This four other acts which Schabas described as "other acts of genocide"[310] are: conspiracy to commit genocide, direct and public incitement to genocide, attempting genocide and complicity in genocide. These four other acts are not in the strict sense genocide; they are lesser crimes with lesser stigma as the one attached to the actual crime of genocide.[311] However, it was rightly argued that "complicity in genocide should hardly be viewed as being less serious than genocide itself".[312] This is because an accomplice in genocide may be the planner, the schemer and the sponsor while the executioner or the principal offender may just be a loyal subordinate, who zealously carried out the instructions of his superior; who may just see his act as a call to duty.

The criminalization of inchoate offences in genocide is very significant and highly central to the fights against the genocidal monster that has taken captive and unleashed terror on our human habitation, because of its role in the prevention of the crime.

The statutes of ICTY[313] and ICTR[314] also observed the difference between the 'actual act' of genocide and the 'other acts' of genocide stated in the Genocide Convention. The statute of International Criminal Court(ICC) however, toed a different part. It restricted the jurisdiction of International Criminal Court to the actual crime of genocide, without mentioning 'other acts' of genocide.[315] Article 25 of the Statute of ICC differently provided for individual criminal responsibility for genocide in cases of conspiracy, incitement,

[310] Schabas, (2009), *op. cit.*, p. 307.
[311] *Ibid.*
[312] *Ibid.*
[313] Art. 4. Statute of ICTY
[314] Art. 2. Statute of ICTR
[315] Art. 5(1)(a) Statute of ICC

attempt and complicity. The implication of this is that under the Statute of ICC, a person that commits the inchoate offences in genocide is guilty of the actual crime of genocide while under the Genocide Convention and statutes of the two *ad hoc* tribunals such a person is only guilty of committing an 'other acts' of genocide. It is humbly suggested that, the disposition of the Rome Statute of International Criminal Court in this regard though at variance with the principal statute (i.e. Genocide Convention) should be preferable in relation to the offence of complicity in genocide, while the conventional position of the Genocide Convention should be retained for the other three 'other acts' of genocide (i.e. conspiracy, attempt and incitement).

2.6.1 Conspiracy to Commit Genocide

The Black's Law Dictionary defines conspiracy as "an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and … action or conduct that furthers the agreement a combination of an unlawful purpose".[316] Conspiracy exists as a separate offence from the crime that is the object of the conspiracy. A conspiracy usually ends when the unlawful act has been committed or when the agreement has been abandoned.[317] Commenting on the offence of conspiracy, Chukkol observed as follows:

> So long as the intention to commit a crime rests on one person alone the criminal law will not interfere, however, if several persons in concert form an intention to commit a crime then the state intervenes and charges them with the offence of conspiracy. The rationale is that the modern state in its attempt to prevent criminal

[316] Garner, B.A., (ed.) *Black's Law Dictionary,* 9th edn., Thomson Reuters, USA, p. 351.
[317] *Ibid.*

> conducts does not need to fear the evil machinations of one individual but it is fearful of a group.[318]

Section 96 of the Penal Code of Northern Nigeria provides: "When two or more persons agree to do or cause to be done an illegal act or an act which is not illegal by illegal means such an agreement is called criminal conspiracy."[319] In respect of the crime of genocide, conspiracy to perpetrate the act is stipulated as a punishable conduct by the provisions of Article III (b) of the Genocide Convention. Conspiracy is usually the first or foremost step to be taken in pursuit of the agenda of genocide. This is because, the nature and character of the crime, makes it impracticable in the absence of the element of conspiracy which is principal, at the preparatory stage of its execution. The Secretariat draft of the Genocide Convention listed 'conspiracy to perpetrate genocide' as a punishable act.[320]The commentary to the Secretariat draft states that "the mere fact of conspiracy to commit genocide should be punishable even if no 'preparatory act' has yet taken place".[321]

Conspiracy to commit genocide did not feature significantly in the Bosnian case on the application of Genocide Convention before the International Court of Justice, neither was it a serious issue in the judgments of the International Criminal Tribunal for former Yugoslavia. However, the International Criminal Tribunal for Rwanda had numerously

[318] Chukkol, *op. cit.,* pp. 57-58.
[319] The *Criminal Code Act* of Nigeria has a similar provision
[320] UN Doc. E/447, pp. 5-13, Arts. II, II. 3.
[321] *Ibid.,* p. 31.

explored conspiracy to commit genocide in indictments before the tribunal.[322] In prosecuting conspiracy to commit genocide, the prosecuting authority must establish by evidence that, two or more persons agreed on a common plan to commit genocide.[323] In *Prosecutor vs. Musema*,[324] the Rwandan Tribunal, described conspiracy to commit genocide as an inchoate offence and held that, the crime of conspiracy to commit genocide is punishable even if it fails to produce a result, that is to say, even if the offence of genocide has not actually been perpetrated. However, for the offence of conspiracy to commit genocide to be complete, the conspirators must have reached an agreement to embark on a conduct that amounts to genocide. It is not sufficient to say that negotiations towards an agreement to perpetrate genocide were ongoing.[325]

On the mental element of conspiracy to commit genocide the prosecuting authority must lead sufficient evidence pointing to the fact that the accused intended to destroy in whole or in part, a protected group.[326] This means that, the *mens rea* for genocide is the same with the *mens rea* for conspiracy to commit genocide.

In the absence of clear evidence by either documents or statements from one or more of the conspirators, circumstantial evidence of conspiracy may suffice as sufficient.[327] The Rwandan Tribunal in *Prosecutor vs. Nahimana* also observed as follows; "Conspiracy may be inferred from co-ordinated action of individuals who have a common purpose and

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[322] *Prosecutor vs. Kambanda* (Case No. ICTR-97-23-S), Judgment 4 September, 1998, para. 40.

[323] *Prosecutor vs. Nkakirumana* (Case No. ICTR-96-10-T and ICTR-96-17-T), Judgment of 21 February, 2003, para. 789; *Prosecutor vs. Ntagerura et al* (Case No. TCTR-99-46-A), Judgment of July 7, 2006, para. 92; *Prosecutor vs. Kajelijeli* (Case No. ICTR-98-44A-T), Judgment 1 December, 2003, para. 789.

[324] (Case No. ICTR-96-13-T), Judgment, 27 January, 2000, para. 194; See also: *Prosecutor vs. Kajelijeli, Ibid.*, para. 788.

[325] *Prosecutor vs. Kajelijeli, Ibid.,* para. 787.

[326] *Prosecutor vs. Nahimana et al* (Case No. ICTR-99-52-A), Judgment, 28 November, 2007, para. 894.

[327] *Prosecutor vs. Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of acquittal, 26 June, 2007, para. 16; See also: *Prosecutor vs. Ndindabahizi* (Case No. ICTR-01-71-A), Judgment, 15 July 2004, para. 454; *Prosecutor vs. Bagosora et al* (Case No. ICTR-98-41-T), Decision on Motion for Judgment of acquittal, 2 February 2005, para. 12.

are acting within a unified framework. Where the evidence shows only a tacit conspiracy, the evidence must demonstrate that there was a will to act together and not simply similar behaviours"[328] In consonance with the foregoing thinking, a trial chamber deduced the fact of conspiracy to commit genocide from the accused person's involvement in meetings that took place for the purpose of slaughtering the Tutsi, his statements during such meetings and his role in weapon distribution to the assailants.[329] This researcher agrees in totality with the International Criminal Tribunal for Rwanda in its analogical deductions and inferences as it relates to establishing the fact of conspiracy to commit genocide. This is because, such can only easily be established by circumstantial evidence activities that may depict the existence of conspiracy.

2.6.2 Incitement to Genocide

Incitement has been defined as: "the act or an instance of provoking, urging or stirring up…the act of persuading another person to commit a crime".[330] Incitement to genocide is one of the 'other acts' of genocide listed in Article III of the Genocide Convention, which the Convention calls "direct and public incitement to commit genocide".[331] The *Ad hoc* Committee of the Genocide Convention rejected the definition of incitement to genocide contained in the UN Secretariat's draft convention, which tends to criminalize all form of public propaganda at provoking genocide; and in its place, suggested prohibiting direct incitement whether public or private or whether such

[328] *Prosecutor vs. Nehimana op. cit.*, para. 898.
[329] *Prosecutor vs. Nigitegeka* (Case No. ICTR-96-14-T), Judgment, 16 May 2003, paras. 427-428.
[330] Garner, B.A., *op. cit.*, p. 830.
[331] Article 3(c), Genocide Convention.

incitement is successful or not.[332] In the final draft, the drafters of the convention left out the phrase "whether such incitement be successful or not" but did not at the same time used any language limiting the crime to successful incitement.[333]

The statutes of ICTY and ICTR each re-produced the Genocide Convention's provision on incitement to genocide in Article 4(3)(c) and Article 2(3)(c), respectively. The statute of ICC also contains a provision on direct and public incitement to commit genocide, as it is in Genocide Convention except that incitement to genocide appears separate from the article on genocide.[334] Direct and public incitement to commit genocide is a form of complicity in genocide. However, while incitement as a form of complicity requires evidence of substantial contribution to the commission of the crime, direct and public incitement need no such proof;[335] all that is required to be proved is that the perpetrator had genocidal intent.[336] The genocidal intent is usually figured out from the content of statement complained of.

Basically, to commit incitement to genocide, the accused person must:

1. have specific or special intent to cause genocide, and
2. the incitement must be direct and public.[337]

Incitement is said to be 'public' *if the communication and call for criminal action is to a number of individuals in a public place or to members of the general public at large*[338]. The *Akayesu* Trial Chamber of ICTR reiterated this when it said: "words are

[332] Robinson, N. (2008) "The Genocide Convention: A Commentary" (1960) cited in Benesch, S., "Vile Crime or Inalienable Rights: Defining Incitement to Genocide", Vol. 4, No. 3, *Virginia Journal of International Law,* p. 508.
[333] *Ibid.*
[334] *Ibid.*, see also Art. 25(3)(e) Rome Statute of ICC.
[335] *Prosecutor vs. Nahimana, et al, op. cit.,* para. 678.
[336] *Ibid.,* para. 677.
[337] Benezch, S., *op. cit.,* p. 493.
[338] Schabas (2009), *op. cit.,* p. 329.

public where they are spoken aloud in a place that is public."[339] By definition, a public place is "any location that the local, state, or national government maintain for the use of the public, such as a highway, park, or public building".[340] On the other hand, the element of 'direct' incitement is to specifically urge another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.[341] Haven examined the meaning of 'direct' incitement and 'public' incitement; "direct and public incitement to commit genocide", is therefore a statement loudly made in public place directly and specifically urging another to engage on immediate criminal action as oppose to a vague and indirect suggestions.

The ICTR in the year 2003 convicted three media leaders of incitement to genocide. ICTR found that a broadcast that referred to the Tutsi as "enemies", promoted contempt and hatred for them. The broadcast, which further called on the listeners to attack the Tutsi people, was held to constitute incitement to genocide.[342] The same ICTR subsequently convicted a Rwandan singer and composer Simon Bikindi of direct and public incitement to commit genocide because it was established by evidence that he used public address system mounted on a truck to exhort Hutu people along the road (a public highway) to exterminate the minority Tutsi, and to ask later if they had done so – if they had killed the "snakes".[343]

The importance of direct and public incitement to commit genocide in the fight against genocide and its prevention is so important that some domestic laws have actually

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[339] *Prosecutor vs. Akayesu, op. cit* para 521.
[340] Garner, B.A., *op. cit.*, p. 1351; 'Public' as defined is also extended to include Radio and Television Broadcast in the Context of Incitement.
[341] See: The Report of International Law Commission on the Work of its Fourty-Eight Session, 6 May – 26 July, p. 26.
[342] Pauli, Carol. (2010) "Killing the Microphone: When Broadcast Freedom should yield to Genocide Prevention" *Alabama Law Review,* Vol. 61, No. 10, p. 671 (Citing *Prosecutor vs. Nahimana,* (Case No. ICTR-99-52-T).
[343] *Ibid.,* (citing *Prosecutor vs. Bikindi*,) paras. 423-424.

moved towards specifically criminalizing direct and public incitement to genocide. Canada[344] and Jamaica[345] are good examples of such.

2.6.3 Attempt to Commit Genocide

The Black's Law Dictionary define 'attempt' as: "an overt act that is done with intent to commit a crime".[346] In ordinary common understanding, 'attempt' may depict a situation of making an effort towards the accomplishment of a particular task, which is inconclusive or unsuccessful. In the process of perpetrating a crime, the perpetrator must first of all intend to commit the crime; then he would have embarked on some preparation towards the commission of the crime; thirdly, he would have attempted to commit the offence, and finally, he would have actually committed the offence. Attempt is therefore the last stage before the actual commission of the substantive offence.[347] The preliminary offence of 'attempt' is provided for in section 95 of the *Penal Code* Law of Northern Nigeria and section 4 of the *Criminal Code* Act. The provision of the said section of the Criminal Code states:

> When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act but does not fulfil his intention to such an extent as to commit the offence he is said to attempt to commit the offence.

This provision sees 'attempt' as only been committed where the intention to commit the substantive offence is manifested by overt acts which fall short of the actually crime.

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[344] Section 318, *Criminal Code* C46, RSC, 1985.
[345] Section 33, Offences against the Person (Amendment Act) 1968.
[346] Garner, *op. cit.*, p. 146.
[347] Chukkol, *op. cit.*, p. 61.

In relation to genocide Article III (d) of the Genocide Convention listed "attempt to commit genocide" as one of the "other acts" of genocide. Attempt to commit genocide is also contemplated by Statutes of ICTY and ICTR in Articles 4(3) (d) and 2(3)(d) respectively. These provisions merely produced the content of Article III (d) of the Genocide Convention. Under the Rome Statute of ICC, a person shall be criminally liable for a crime within the jurisdiction of the court, if that person attempts to commit the crime, by taking substantial step towards its actualization, but failed consequent upon a supervening circumstance independent of the person's intentions. However, a person who abandons the effort to commit the crime or prevents the completion of the crime shall not be liable for punishment for attempt to commit the crime, especially if that person completely and voluntarily gave up the criminal enterprise.[348] The Rome Statute of ICC is by this position aimed at distinguishing a person who voluntarily discontinues his criminal machinations and one who seeks to continue but was stopped by an intervening circumstance beyond his control. While the later should rightly be convicted of attempt, the former should be excused for his repentant disposition, since no harm is caused by his conduct.

Schabas, commenting on attempt to commit genocide rightly observed that, there is no case law on the subject matter because there have never been any prosecution for attempted genocide.[349] The International Law Commission observed that, an individual who has taken a significant step towards the commission of genocide should be punished for that.[350] The need to punish attempt as an inchoate offence in genocide, is because of the high determination of the Genocide Convention to nip in the bud the acts that may

[348] Article 25(3) (f), Statute of ICC.
[349] Schabas (2009), *op. cit.*, p. 337.
[350] *Ibid.*, p. 28.

metamorphose into genocide. All legal systems that criminalizes attempt require that, it should involve acts going beyond mere preparation to the extent that, the beginning of the execution of the crime has commenced.[351] However, the problem this may pose is that, there are no clear cut and definite indicators of when a preparatory act maybe deemed to have gone beyond preparation for the purpose of situating criminal responsibility in 'attempt to commit genocide'. Rome Statute in trying to solve this problem declared that attempt occurs when the offender commences its execution by means of 'substantial step'. Unfortunately, the problem is not solved rather it generated another problem of the determination of what should amount to a 'substantial step', in the execution of genocide. The International Law Commission did not equally resolve this problem when it said that, attempt involves a 'significant step towards completion'.[352] This seems more confusing, as it may depict a significant step in continuing perpetration, only short of completing the intended mission.

This confusion as to what amount to acts beyond mere preparation for the purposes of situating criminal responsibility for attempt has also generated controversies in some domestic decisions. In the Nigerian case of *R vs. Offiong,*[353] where the accused wanted to have forceful sexual intercourse with a girl. He undressed himself and they were struggling when he was caught. A charge of attempt to rape the girl failed. Commenting on this decision, Chukkol regarded the judgment as sound, stating that as rape means having sexual intercourse with a non-consenting female; the victim may express consent at anytime during the struggle before penetration.[354] It is humbly submitted that, this is rather far

[351] *Ibid*., pp. 337-338.
[352] *Ibid.,* p. 338.
[353] (1936) 3 WACA, 83.
[354] Chukkol, *op. cit.,* p. 64.

fetched. It seems to extend the contemplation of attempt too far. What then will amount to attempt? Moreover, the accused did not jettison his intention voluntarily. He was stopped by a circumstance beyond his control. It is this researcher's opinion that he ought to have been convicted of attempted rape.

2.6.4 Complicity in Genocide

Complicity has simply been defined as: "association or participation in criminal act; the act or state of being an accomplice".[355] An accomplice being, "a person who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory before the fact…"[356] Complicity in genocide is therefore a form of participation in the commission of the crime of genocide.

'Complicity' is the final 'other act' of genocide enumerated in Article III of the Genocide Convention, Article 4(3) of the Statute of ICTY and Article 2(3) of the Statute of ICTR. The concept of complicity is also recognized in the Covenant Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment in Article 4; and Article III of the International Covenant on the Suppression and Punishment of the Crime of Apartheid. The Rome Statute of ICC provided for complicity in Article 25.

Complicity in general term is more often than not described as secondary participation in crime, but in relation to genocide, nothing is 'secondary' about it. The 'accomplice' is often the real villain, and the 'principal offender' a small cog in the monstrous machine of genocide. For instance, Adolf Hitler apparently did not physically

[355] Garner, *op. cit.*, p. 324.
[356] *Ibid,* p.18.

murder or brutalize any body; technically, he might just be described as an accomplice to the crime of genocide. Consequently, the Appeal Chamber in *Tadic Case* observed:

> Although only some member of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns and villages etc), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often less or indeed no different – from that of those actually carrying out the acts in question.[357]

The prosecution for complicity in genocide is therefore very important to get at those who organize, direct or otherwise encourage the perpetration of genocide, but who never carry guns, cutlasses and arrows against the victims. It was on this basis that the District Court of Jerusalem declared Eichmann to be 'a principal offender' along side two others persons who collaborated in forging document.[358] The court further held that, a collaborator in the extermination of the Jews, who had knowledge of the plan for the 'final solution', should be regarded as an accomplice in the extermination of the millions of Jews who were destroyed between 1941-1945, whether his actions extended over the entire extermination front or not.[359] A Trial Chambers of International Criminal Tribunal for former Yugoslavia adopted the same thinking when it found General Krstic guilty of genocide as a principal offender;[360] even though the finding of the Trial Chamber was upturned by the Appeal Chamber, which chooses to describe General Krstic role as an act of aiding and abetting genocide.[361]

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[357] *Prosecutor vs. Tadic* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 191.
[358] *A.G Israel vs. Eichmann* /(1968) 36 ILR (District Court Jerusalem), para. 194.
[359] *Ibid.,* para. 193.
[360] *Prosecutor vs. Krstic,* (Case No. IT-98-33-T), Judgment, 2 August 2011, para. 644.
[361] *Prosecutor vs. Krstic*, *op. cit.* paras. 135-144

The treatment of complicity in genocide in the jurisprudence of the two United Nations *Ad hoc* Tribunals of former Yugoslavia and Rwanda, seem very confusing in relation to aiding and abetting genocide. It is so confusing that distinction could hardly be drawn. In trying to distinguish complicity in genocide and aiding and abetting as a form of complicity in genocide; the *Krstic* Appeal Chambers hypothesized that, complicity in genocide could encompass broader conduct than aiding and abetting.[362] The jurisprudence of the tribunals did not provide clearly for elements of complicity in genocide *per se*. This may be due to the fact that both Trial and Appeal Chambers have generally only made concrete observations about complicity in genocide in relation to aiding and abetting. It could therefore be rightly argued that elements of complicity in genocide are derivable from elements of aiding and abetting as a form of complicity.[363] However, in *Akayesu* a distinction was drawn between the elements of complicity in genocide and those of aiding and abetting. It held that aiding and abetting genocide required that the accused person also possess genocidal intent, whereas complicity in genocide only required 'knowledge' that ones action will assist in the commission of the principal offence.[364] On the physical element, *Akayesu* also differentiated the physical element required for complicity in genocide from the physical element of aiding and abetting. The Chamber found that, while aiding and abetting can be perpetrated by acts or omission, only positive acts can suffice for complicity in genocide.[365]

[362] Dawson, G. and Boynton, R. (2008) "Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations *Ad hoc* Tribunals", *Harvard Human Right Review*, Vol. 21, p. 241.
[363] *Ibid.,* p. 264.
[364] *Prosecutor vs. Akayesu,* para. 538.
[365] *Ibid.,* para. 548.

The Appeal Chambers of the two tribunals are unanimous on the fact that 'complicity in genocide' includes 'aiding and abetting'.[366] It must be observed that, the difference in the mental element of complicity in genocide and aiding and abetting, observed by the *Akayesu* Trial Chamber has been rejected by the Appeal Chambers in *Ntakirutimana,* where it required both aiding and abetting and complicity in genocide to possess the 'knowledge' of the *mens rea* of the perpetrator, without necessarily having specific intent to commit genocide. This means that 'knowledge' of the intent of the perpetrator is the required mental element for aiding and abetting and complicity in genocide. A Trial Chamber, trying to make sense out of *Ntakirutimana*, noted that for a broader complicity, the prosecution must prove that the accomplice, not only knew the principal's specific intent to destroy the protected group in whole or in part, but must also share that intent.[367] This again has ignited another confusion in the appreciation of the mental element of complicity in genocide in relation to aiding and abetting. The Trial Chamber's failure to render any explanation for the differences it proposed, leaves us more confused than we were. It is humbly submitted that, the thinking of the *Ntakirutimana* Appeal Chamber of International Criminal Tribunal for Rwanda, in this respect seem more intelligible. The fact that it is the decision of an Appeal Chamber as oppose to that of a Trial Chamber gives it an advantage.

2.7 Conclusion

In this chapter, we examine the meaning of crime, which tends to be very illusory. We found that crime could be seen in sociological light and in the strict legal sense; noting

[366] *Prosecutor vs. Krstic,* paras. 138-139; *Prosecutor vs. Nkakirumana,* (Case No. ICTR-96-10-A and ICTR-96-17-A) Judgment, 13 December 2004, para. 371.
[367] *Prosecutor vs. Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 8.

that we cannot do without appreciating crime in the context of law, which is the basis of situating criminal responsibility. We also considered the history and evolution of genocide; observing that the root of genocide which has caused great lost to humanity might be lost in distant millennia, yet locating it traces even to ecclesiastical accounts in the Bible and *Qur'an*. We also attempted an assessment of the nature of genocide, where we highlighted the character of acts that might fall within the purview of genocide. We unfortunately found that cultural genocide which is central to the perception of the founding father of the word 'genocide' has been eroded in our laws on genocide.

The chapter also attempted a lucid consideration of the contentious issues that boarders on the elements of genocide, wherein we made observations for a broader appreciation of the elements of genocide in order to check the growing global impunity. The chapter also assessed the place of inchoate offences in the law of genocide and the stages of genocide, which we found will certainly give early warning signals for the purpose of genocide prevention.

CHAPTER THREE

INTERNATIONAL LEGAL REGIMES FOR COMBATING THE CRIME OF GENOCIDE

3.1 Introduction

For half a century now, genocide as a phenomenon has been subjected to increasing scrutiny from legal experts, scholars, states persons and citizens alike.[368] It is in the course of such thorough scrutiny that Churchill called it "a crime without a name", the Genocide Convention described it as an "odious scourge" and numerous scholars styled it as "the ultimate crime, the pinnacle of evil".[369] Acts of genocide have doubtlessly assumed the status of a recurring malignant. Its recent occurrences in states like Cambodia, Rwanda, Bosnia, Darfur, East Timor, Iran, Kenya, and Uganda and contentiously in Nigeria have attracted further international attention and legal developments in addition to the existing ones. These past and present legal developments includes the establishment of legal regimes for combating the 'odious scourge' such as, the Genocide Convention of 1948, Statute of International Criminal Tribunal for Yugoslavia (SICTY), Statute of International Criminal Tribunal for Rwanda (SICTR), Statute of International Court of Justice (SICJ), Statute of International Criminal Court (SICC) etc. Corresponding executory institutions such as the International Court of Justice, International Criminal Courts and the ad hoc tribunals/special courts etc were also institutionalized for the purposes of combating genocide – "the ultimate crime".

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[368] Morton, J.S. and Singh, N.V. (2003) "The International Legal Regime on Genocide" *Journal of Genocide Research*, 5(1), p. 47.

[369] Nersessian, D.L. (2002) "The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals" *Texas International Law Journal*, Vol. 37, pp. 236-237.

The primary focus of this chapter therefore, is a critical examination of contemporary legal and institutional regimes on genocide with a view to identifying their weaknesses and proffering practicable solutions. This is very necessary because, the frequency at which genocide occurs may just be an indicator of the failure of the existing legal and institutional regimes for its prevention and punishment. Consequently, this chapter shall be devoted to the legal regimes on genocide encapsulated in the Genocide Convention, Statute of International Criminal Tribunal for former Yugoslavia (SICTY), Statute of International Criminal Tribunal for Rwanda (SICTR), Statute of International Court of Justice (SICJ) and Statute of International Criminal Court (SICC).

3.2 Legal Regimes for Combating the Crime of Genocide

3.2.1 Convention on the Prevention and Punishment of the Crime of Genocide, 1948[370]

3.2.1.1 General Overview

The law of genocide is the prohibition of the ultimate threat to the existence of protected groups. The law which is fashioned from a criminal law perspective though aimed at individuals yet focuses on the activities of such individuals as state agents in pursuit of state genocidal policies. "The centerpiece in any discussion of the law of genocide is the Convention on the Prevention and punishment of the crime of Genocide, Genocide Convention adopted by the United Nations General Assembly on 9 December 1948",[371] which became operational in January 1951. Surprisingly, sixty-four years after its adoption and sixty-one years after it became operational, the ratification of Genocide Convention is minimal in comparison with other more recent human rights treaties, as less

[370] (1951) 78 UNTS 277.
[371] Schabas, W.A. (2009) *Genocide in International Law* (2nd ed.), Cambridge University Press, Cambridge, p.3

than one hundred and fifty nations are signatories to the treaty. It was rightly observed that, the reason for less enthusiasm by states on the ratification of Genocide Convention cannot be the existence of doubt as to the universal condemnation of genocide that, it rather testifies to unease amongst some states because of the tasking obligation imposed on state parties to prosecute or extradict individuals, including heads of states for trial.[372]

In its advisory opinion on the reservation to the Genocide Convention, the International Court of Justice wrote that:

> The origin of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international law, involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and resulted in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from the conception is that the principles underlying the Convention are principles recognized by civilized nations as binding even without conventional obligations.[373]

The statement above may be a pointer to the judicial recognition of the crime of genocide as a prohibition in the light of customary legal norms from which no state can derogate. It may therefore follow that the prohibition of genocide is a customary international law which vest responsibility to prevent and punish all acts perceived as such by all civilized nations, irrespective of whether such civilized nations are parties to any treaty prohibiting genocide or not. This thinking was further emphasized in 2006, when the International Court of Justice observed that, the prohibition of genocide was assuredly a

[372] *Ibid.*
[373] Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) (1951) *ICJ Reports* 16, p. 23.

preemptory norm (*jus cogens*) of public international law, being the first time it has ever made such declaration about a legal rule.[374]

The Genocide Convention is an international treaty at the general realm of public international law, which draws on elements of international criminal law, international humanitarian law and international human rights law.[375] The prohibition of genocide is closely linked with right to life as provided in national law[376] and International Declarations and Conventions,[377] while these instruments concern themselves with individual rights to life, the Genocide Convention is primarily associated with the right to life of human groups. While states ensure the protection of the right to life of individuals within their jurisdiction by prohibition of murder in criminal law, the repression of genocide proceeds differently, the crime being directed against the entire international community rather than an individual.[378] "It is a frontal attack on the value of human life as an abstract protected value in a manner different from the crime of murder".[379]

A lot of energy has been dissipated by legal researchers in locating what is today perceived as the shortcoming of the Genocide Convention. It has been rightly argued that, the definition of genocide proffered by the convention seem too restrictive and narrow to accommodate acts that should fall within the purview of the crime of genocide. The Convention seem to have failed to take into cognizance, in clear and unambiguous manner,

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[374] Case concerning the Activities on the Territory of the Congo (New Application, 2002) *Democratic Republic of Congo vs. Rwanda,* 3 February, 2006, para. 64.

[375] Schabas (2009) *op. cit.*, p. 7.

[376] For instance, section 33 Constitution of the Federal Republic of Nigeria, 1999.

[377] Art. 4 American Convention on Human Rights (1979) 1144 UNTS 123 OASTS 36; Art. 3, Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/810; Art. 2, Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 UNTS 221, ETS 5; Art. 6, International Covenant on Civil and Political Rights UN Doc. E/CN.4/SR 310 & 311.

[378] Schabas (2009) *op. cit.*, p. 8.

[379] Kader, D. (1988) "Law and Genocide: A Critical Annotated Bibliography", 11 *Hasting International and Comparative Law Review*, p. 381.

many of the major human rights violation and mass killing perpetrated by dictators and their accomplices.[380]

3.2.1.2 Provisions of the Convention

The preamble to the Genocide Convention reflects both the accomplishments of the prior General Assembly resolution and sets the normative stage for the convention's binding article.[381] The preamble to the Convention states:

> The contracting parties having considered the declaration made by the General Assembly Resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by civilized world;
> *Recognizes* that at all period of human history genocide has inflicted great loss on humanity; and
> *Being convinced* that, in order to liberate mankind from such an odious scourge, international co-operation is required.

Hereby agree as hereinafter provided

The preamble to the Genocide Convention is followed by nineteen (19) articles which can be divided into three categories, as follows: Substantive Articles (I-IV); articles that border on procedures (V-IX); articles that boarder on technicalities (X-XIX).

Article I provides: "The contracting parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish".[382]The article clearly points to the fact that the obligation to prevent and punish genocide arises when genocidal activities are committed either at

[380] Schabas (2009), *op. cit., p*. 8.
[381] Morton and Singh, *op. cit.,* p. 54.
[382] Art. 1 Genocide Convention.

times of war or times of peace. It must however, be stated that the use of the word "in time of peace" is some how ambiguous because the existence of genocide of any nature does not depict peace. However, Zachariah may be right to have observed that "peace" in the context it was used in Article I of the Convention may be in contrast to "war" strictly so called.[383] Even though Genocide Convention has been criticized as merely reproducing crimes within the purview of domestic laws; while this may be true, Article I of the Convention however, re-situated such criminal conducts within the domain of international law, which consequently ignites state parties obligation to prevent and punish such conducts. This therefore gives right of intervention by outside parties to hold genocide, therefore piecing the shield of state sovereignty which often works against intervention.

Article II provides:

> In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent birth within the group;
> (e) forcible transferring children of the group to another group.[384]

The above definitive elements constituting the *actus reus* and *mens reus* of the crime of genocide have been extensively dealt with in the previous chapter of this research. However, the meaning ascribed to "genocide" by Article II of the Convention has sparked a

[383] Zakariah, M. (2011) *Genocide under International Criminal Law: Past, Present and Future Concern in Africa*, LL.M Thesis submitted to the Faculty of Law, University of Jos – Nigeria, p. 65.
[384] Art. II, Genocide Convention.

very hot scholarly debate over its utility and completeness.[385] This heated debate has over the years brought to fore some seeming inadequacies of the Conventions definition. The definition was limited to the protection of only the groups specified in Article II. Political, economic, social groups were excluded from protection by the Convention. Also visibly omitted from the convention is "cultural genocide", which was very central to Lemkin's perception of genocide as a phenomenon. Furthermore, the intent requirement for the crime stipulated in Article II of the Convention is very ambiguous and evasive. Having failed to provide a proper framework for the determination of the intent requirement of the crime, the Convention therefore leaves such heinous task to the subjective opinion of judges and jury. Intent should simply be viewed, as intent of general criminal responsibility to avoid excessive technicality of special intent requirement which is gloomy and evasive.

Article III provides, the following acts shall be punishable (a) Genocide, (b) Conspiracy to commit genocide, (c) Direct and public incitement to commit genocide, (d) Attempt to commit genocide, (e) Complicity in genocide.[386] This Article did a very fundamental thing in the jurisprudence of the law of genocide – It enlarged the scope of the law of genocide by extending the domain of acts that fall within its legal parameters. The article simply criminalized preliminary acts pursuant to genocide which may actually fall short of the commission of the actual offence of genocide. In the first ever verdict by an international court system handed down on the crime of genocide, delivered in 1998 against Jean Paul Akayesu, the International Criminal Tribunal for Rwanda (ICTR) found Akayesu

[385] Charny, I. (1984) (ed.), Towards the Understanding and Prevention of Genocide: Proceedings of the International Conference of the Holocaust and Genocide Studies, Westview Press, Boulder, C.O, p. 65; Dadrian, V.N. (1975) "A Typology of Genocide" *International Review of Modern Sociology*, Vol. 5, p. 123; Drost, P., *The Crime of State*, Vol.2 (Leyden: A.W. Sythoff); Feni, H., *Lives at Risk: A Study of Violation of Life Integrity in 50 States in 1987, based on the Amnesty International 1988 Report* (New York: Institute of Genocide Studies, 1990) pp. 23-25 all cited in Morton and Singh, *op. cit*, p.56.

[386] Art. III, Genocide Convention.

not only guilty of genocide but also of public incitement to commit genocide.[387] The ICTR later convicted Rwanda's former Prime Minister, Jean Kambanda of genocide, conspiracy to commit genocide, and inciting genocide.[388] Article III of the Convention has therefore expanded the sphere of genocide prosecution into new areas of inchoate offences.

It must be observed that Article III is somehow inexhaustive, because it only mentioned the acts that will be punishable by the Convention, without stating the constituent of the acts. It therefore means that what constitute conspiracy to commit genocide, attempt to commit genocide and complicity in genocide must be sought for else where and not in the convention, evidently leaves interpretation to the whims and caprices of the subjective opinion of a judge or jury. It is suggested that, the appreciation of the inchoate offences in genocide should be viewed from the general perception of inchoate offences in criminal law, in relation to the commission of genocide.

Article IV provides that; "Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals".[389]. This article tends to erode the contentious doctrine of immunity of some classes of leaders and public officials from criminal prosecution. The article seems very mindful of the historical antecedent of complicity at the highest level of state office in the commission of genocide and primarily sets out to water down the defence of sovereignty postulated by rulers. By clearly stating in Article IV that criminal responsibility extends beyond private individuals to state functionaries, the

[387] *Prosecutor vs. Jean Paul Akayesu* (Case No. ICTR-96-4-T), Judgment of 2 September, 1998.
[388] *Prosecutor vs. Jean Kambanda* (Case No. ICTR-97-23-S), Judgment of 4 September, 1998.
[389] Art. IV, Genocide Convention.

Convention expands the range of culprits that can be held accountable for genocidal acts committed by them.[390]

Morton and Singh argued vehemently that, Article IV should have been strengthened by express stipulation rejecting the plea of superior command as a defence to actions or inactions that results in genocide.[391] It must be observed that the plea of superior command hold no weight, as such are excusable only to the extent that the offender does not know that the command was illegal, and to a further extent that the command was not manifestly illegal.[392] In line with the suggestion and argument of Morton and Singh, to dispel any ambiguity on the place of the plea of superior command, the Charter of the International Military Tribunal for the Nuremberg excluded the defence of superior command altogether.[393]

Article V provides:

> The contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.[394]

This fifth article of the convention only sets out to internalize and domesticate the prohibition of genocide in the domestic laws of state parties to the convention. It seeks to create a flourishing ground for domestic prosecution of the crime of genocide. The article tends to recognize the fact that genocide often takes place within state boundaries and that

[390] Morton and Singh, *op. cit.,* p. 57.
[391] *Ibid.*
[392] *R vs. Finta* (1994) 1 SCR 701; Military *Prosecutor vs. Melinki,* (1985) 2 Palestine Year Book of International.
[393] Art. 8, Agreement for the Prosecution of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279.
[394] Art. V, Genocide Convention.

its criminalization by municipal laws of state parties is essential to the effectiveness of the legal regime on the crime of genocide.

Article VI provides:

> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.[395]

This article tends to limit the jurisdiction for prosecution of the crime of genocide. It is at variance with the original draft of the convention, which allows for universal jurisdiction in the prosecution of genocide. However, that was removed from the final convention after serious debate. Consequently, the first part of Article VI only recognizes the jurisdiction of the state in the territory of which genocide was committed, the second part of the article confers jurisdiction on international penal tribunals as long as the contracting parties have accepted that tribunal's jurisdiction.[396] The reference to international tribunals by Article VI was only activated in the 1990s when the ICTY and ICTR were established and the creation of International Criminal Court (ICC) in 2002, before this time it was not effective, since no such bodies were in existence.

Article VII provides; "Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. The contracting parties pledge their laws and treaties in force".[397] This article encourages the prosecution of genocide by eroding the possibility of falsely protecting culprits from extradition on the ground that, they are sought to be extradited on the basis of a political crime. This Article

[395] Art. VI, Genocide Convention.
[396] Morton and Singh, *op. cit.*, p. 58.
[397] Art. VII, Genocide Convention.

VII did by clearly situating the act of genocide in Article II and other acts enumerated in Article III outside political crime. By these, states that are complicit in genocide cannot rightly refuse the extradition of persons accused of genocide on the basis that genocidal acts are political crimes.

Article VIII provides:

> Any contracting party may call upon the competent organ of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.[398]

This article invest in contracting parties to the convention the power to ignite preventive and suppressive measures by the instrumentality of propelling a competent organ of the United Nations to action. It Is respectfully opined that the use of the phrase "competent organ of the United Nations" in a convention that relates only to the crime of genocide is vague. The article will be better with more precision and definiteness, if the organ of the United Nations with such responsibility upon a call from a contracting party is clearly spelt out.

Article IX provides;

> Disputes between the contracting parties relating to the interpretation, application or fulfillment of the present convention, including those relating to the responsibility of a state for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the party to the dispute.[399]

[398] Art. VIII, Genocide Convention.
[399] Art. IX, Genocide Convention.

This article gave International Court of Justice (ICJ) the power to interpret the applicability or otherwise of the convention at the request of any of the parties to a dispute. This article is a call upon the ICJ to adjudicate genocide cases and provide advisory opinion to the General Assembly of the United Nations and parties to the Convention. In 1951, the ICJ was requested by the General Assembly of the United Nations to give an advisory opinion on the consequence of reservation made by parties to the Genocide Convention, which was also objected to by parties to the Convention. The ICJ ruled that parties registering reservations, which are subsequently objected to by other parties to the convention remain parties to the convention.[400] On three instances in the 1990s, states explored Article IX of the Genocide Convention to initiate proceeding in the ICJ on the charges of genocide.[401] A good example is the case of *Bosnia Herzegovina vs. Serbia Montenegro*[402] where the ICJ final ruling on 26th February, 2007 on the case instituted by Republic of Bosnia against the Federal Republic of Yugoslavia on March 20th 1993 was given. In this case, the ICJ identified the elements of the Crime of Genocide as encapsulated in the Genocide Convention of 1948 and related it to the atrocities of the Serbian soldiers against the Bosnia Muslims. The court further noted that, state obligation to prevent is not to mandatorily succeed, but to exercise "due diligence" by engaging all reasonable means available to them to prevent genocide.[403] The legal exploration and exposition by ICJ in this case was a milestone achievement in the law of genocide.

Articles X-XIX. These are articles that border on technicalities of the convention ranging from languages of the convention; last date of signature; request for the revision of

[400] Morton & Singh, *op. cit.,* p. 59.
[401] *Ibid.*
[402] Case concerning the Application of Genocide Convention, Judgment of 26th February, 2007.
[403] *Ibid*., para. 430, see generally: Mayroz, E. (2012) "The Legal Duty to 'Prevent' after the onset of 'Genocide'" *Journal of Genocide Research,* Vol. 14(1), pp. 79-98.

the convention; life span of the convention; place of domiciliation of the original convention and the registration of the convention with the Secretary General of the United Nations on the date of its coming into force.

The articles of the Convention that border on technicalities have three important articles; Article XIV states in unequivocal terms that the convention is not intended to be of a permanent nature, it is to be in effect for ten years after which it became in operational, followed by a subsequent five years term. Article XV provides that where states denounce the convention such that the membership becomes less than sixteen, the convention will cease to be in force; which is highly unusual of a multilateral treaty. The provision of Article XVI, has decorated parties with the right to request a revision of the treaty's provision at any time. However, such request is subject to the action of the General Assembly.

3.2.1.3 Genocide Convention: Some Matters Arising

It is a common slogan that, the promise of "never again" which heralded the emergence of the Genocide Convention of 1948, had been severally fettered by the calamitous onslaught of the ceaseless genocidal atrocities that characterized our human habitation after 1948. The level to which Genocide Convention has contributed to the prevention of the acts of genocide was not impressive, even though by the 1990s there was a milestone achievement, at least at the interpretation of the concept of genocide in the context of some specific crises situation.

The potency of the Genocide Convention was primarily weakened by the divergent state interest and individual state objectives at the time of drafting the

convention, which undoubtedly led to a compromising situation, distantly away from what proponents of the Convention had envisioned.[404] Kuper emphatically states that, the compromises reached at the drafting stage jeopardized the convention's effectiveness and implementation.[405] Indeed, over six decades after the Genocide Convention, there was little reason to praise the convention for its contribution to either the prevention or punishment of the crime of genocide.

An effective assessment of the legal regime on genocide, midwifed by the Genocide Convention requires a consideration of the two operative terms – prevention and punishment – found in the title of the 1948 Genocide Convention. While prevention shares an equal status with punishment in the convention's title, there are however, no direct prevention provisions in the treaty. The omission of preventive measures is said to be a reflection of the general lack of knowledge of the cause or causes of genocide, as the divergent political position of states during the drafting process.[406] The causes of genocide are thus, argued to include, human nature,[407] fear of death,[408] material deprivation and ethnic diversity,[409] economic system[410] and the presence of war,[411] which serves as a cover for the elimination of individuals based on their common group features.

The absence of a compelling theory that uncovers the necessary and sufficient causes of genocide hinders the treaty from providing a clear cut preventive measures.

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[404] Kuper, L. (1985) *The Prevention of Genocide*, Yale University Press, New Haven, p. 100.
[405] *Ibid.*
[406] See Generally: Morton & Singh, *op. cit*, pp. 60-61.
[407] Lorenz, K. (1966) *On Aggression*, Bantam, New York; Kosler, A. (1978) Janus: A Summing Up, Hutchinson, London.
[408] Charny, I. (1984) (ed.) *Towards the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide*, Westview Press, Boulder, C.O.
[409] Falk, R. (1979) "Comparative Protection of Human Rights in Capitalist and Socialist Countries" *Universal Human Rights*, Vol. 1, pp. 3-29.
[410] *Ibid.*
[411] Markusen, E. (1996) "Genocide and Warfare" in Stragier, C.B. and Flynn, M. (eds.) *Genocide, War and Human Survival*, Rowman & Little Field, London, pp. 75-86.

Therefore, the prevention of genocide deducible from the convention relies mainly on deterrence which is a form of threat of punishment on those contemplating the perpetration of genocide.[412] Morton and Singh further argued that, for the prevention of genocide through the threat of punishment to be credible, a consistent record of bringing perpetrators of genocide to justice must be established.[413] Thus, while prevention remains a central purpose of the Genocide Convention, it is however dependent on the effective accomplishment of the punishment goal, which is more directly addressed in the treaty.[414]

On punishment for genocide, the Genocide Convention in a forceful attempt to replicated the Nuremberg principle in time of peace, by which captured enemies were held individually liable for acts of aggression and crimes against humanity. The problem here is that, while the Nuremberg Tribunal had physical custody of perpetrators for justice, the Genocide Convention provided for two judicial levels - domestic and international, as provided for in Articles V and VI of the Genocide Convention. The implication of this is that, punishment for genocide in domestic and international domain may vary considerably. It has been shown that, international prosecution of genocide seem to be more fruitful, as domestic prosecution is often hampered by complicity of the prosecuting state in the acts. This makes domestic prosecution of genocide much less likely. This certainly accounts for the unimpressive performance of national courts in the punishment of acts of genocide committed by their own citizens.[415]

If domestic prosecution of genocide is rendered ineffective due to complicity of state in genocidal atrocities, the only punishment avenue will remain international

[412] Morton and Singh, *op. cit.,* p. 61.
[413] *Ibid.*
[414] *Ibid.*
[415] *Ibid.*

prosecution, through the instrumentality of International Court of Justice (ICJ), as set forth in Article VI of the Genocide Convention. Since ICJ only enjoys jurisdiction on consenting states, the ICJ is limited in its ability to adjudicate in genocide cases. Hence, international prosecution of genocide is dependent on either the creation of *ad hoc* tribunals for specific instances of genocide, like was done in the case of former Yugoslavia and Rwanda, or the establishment of a permanent International Criminal Court.[416] It must be observed however, that the status of genocide as *urga omnes*, might have the potency of clothing ICJ with universal jurisdiction on prosecution of the crime, therefore eroding the limitation of consent of parties that is required for ICJ to activate its adjudicatory prowess.

3.2.2 Statute of International Criminal Tribunal for former Yugoslavia (SICTY).

3.2.2.1 General Overview

The International Criminal Tribunal for former Yugoslavia was established in 1993 by the instrumentality of its enabling statute (SICTY) for the prosecution of persons responsible for the serious violations of international humanitarian law in the defunct Federal Republic of Yugoslavia.[417] The fall of the Soviet Union in 1989, was trailed by the emergence of several independent Balkan States in Eastern Europe. A situation which came along with massive violation of human rights, catastrophic conflict and widespread humanitarian atrocities, which include an unprecedented, genocidal "ethnic cleansing" policies such as: organized torture, murder, existence of concentration camps, rape and other atrocities of varying degrees.[418] The lists of acts punishable under the SICTY are;

[416] *Ibid.*
[417] *Ibid.*
[418] *Ibid.*

Grave breaches of the 1949 Geneva Convention;[419] Violation of Laws and Customs of War;[420]Genocide;[421] and, Crimes against humanity.[422]

The crime of genocide which is the primary concern of this research is provided for in Article 4(a)-(e) of the statute. The article provides for the crime of genocide and its associated elements. It also provides for preliminary offences in genocide or other acts of genocide. These include conspiracy to commit genocide; attempting genocide; inciting genocide and complicity in genocide.

It must be observed however, that Article 4 of the Statute of ICTY is same, in wordings and import with the provision of Article II of the Genocide Convention of 1948 and the provision of Article 2 of the Statute of ICTR. It therefore follows that the strength and the weakness of the Genocide Convention examined earlier is also the strength and the weakness of the Statute of ICTY in relation to the crime of genocide as stipulated in Article 4 of the Statute. So the discussion on Genocide Convention also suffices here.

It must be noted however that, the Statute of ICTY vested on the Tribunal and the National Courts Concurrent Jurisdiction to prosecute persons for international crimes committed in the territory of former Yugoslavia.[423] Where there is conflict, the tribunal will have edge over the National Court.[424] By these, the International Tribunal is invested with legal teeth to masticate and override the jurisdiction of the national courts, and even demand that cases at the national court be referred to the tribunal at any stage of the proceedings.[425] A trial by the tribunal may not again be subjected to another trial before any

[419] Art.2, Statute of ICTY.
[420] Art. 3 *Ibid.*
[421] Art. 4 *Ibid.*
[422] Art. 5 *Ibid.*
[423] Art. 9(1) *Ibid.*
[424] Art. 9(2) *Ibid.*
[425] *Ibid.*

national court. However, an accused person tried before a national court may be subjected to trial again by the tribunal, where the crime for which such an accused person is tried was characterized as an ordinary crime and/or where there is evidence of bias at the trial.

3.2.2.2 Major Cases on Genocide Decided under the Statute of ICTY

There are some significant pronouncements dealing with the interpretation and application of Article 4 (genocide) of the Statute of ICTY. The trial chamber rulings in *Jelisic,*[426] *Krstic*[427] and *Sikirika*[428] and the appeals decision in *Jelisic*.[429] In the course of the judgments, the ICTY made important pronouncement on the nature and character of genocide[430] in the context of the Yugoslavian crises, which gave a lucid appreciation of genocide in the light of the Statute of ICTY.

Prosecutor vs. Radislav Krstic,[431] is a landmark case in which the ICTY handed down the tribunal's first genocide conviction in August, 2001, where the trial chamber held that, the 1995 Srebrenica massacres in which Bosnian Serb forces executed 7,000 – 8,000 Bosnian Muslim men constituted genocide.

The crises that engulfed Yugoslavia in the 1990s generated serious global outcry, consequent upon the scale of atrocities which was unprecedented in recent times. The Srebrenican massacre is pivotal to the Yugoslavian calamity. Southwick rightly observed

[426] *Prosecutor vs. Jelisic, Case No*. IT-95-10T, Judgment of ICTY of 19th October, 1999.
[427] *Prosecutor vs. Krstic,* Case No. IT-98-33-T, Trial Judgment of ICTY of 2nd August, 2001.
[428] *Prosecutor vs. Sikirica,* Case No. IT-95-8-T, Judgment of ICTY on Defence of Motion to acquit of 3rd September, 2001.
[429] *Prosecutor vs. Jelisic*, Case No. IT-95-10-A, Appeal Judgment of ICTY of 5th July, 2001.
[430] Schabas, W.A., "Was Genocide Committed in Bosnia and Herzegovina? First Judgment of International Criminal Tribunal for the former Yugoslavia" *Fordham International Law Journal* (2001) Vol. 25 (23) p. 22.
[431] *Krstic, op. cit.*

that, "the word 'Srebrenica' carries a pall of tragedy uttered with a mixture of historical import and regret, it has become a euphemism for un-speakable events.[432]

The decision in *Krstic* set forth a comprehensive account of the Srebrenican tragedy. The ICTY found that following the takeover of the town and the execution of Bosnian Muslims men of military age, the Serb forces further transported away from the area nearly all Bosnian Muslim women, children and elderly;[433] an act which the tribunal said resulted in "the physical disappearance of the Bosnian Muslim population in Srebrenica".[434] The *Krstic* trial chambers of ICTY concluded that, these acts, perpetrated by Serb forces constituted genocide.[435] For actively participating in the killings, Radislav *Krstic*, the Serb officer was tried, convicted and sentenced to forty six years imprisonment, though the Appeal Chamber of ICTY reduced the sentence to thirty five years in April, 2004.[436] The Appeal Chamber reduced *Krstic* sentence after establishing that *Krstic* aided and abetted genocide not as a co-operator, as initially determined by the Trial Chambers.[437] On 19th April, 2004, the ICTY Appeal Chamber Affirmed the Trial Chamber finding of genocide perpetrated by the Serb forces at Srebrenica.[438]

The finding of genocide in *Krstic* case by ICTY was based on a critical analysis of Srebrenican situation in the context of the law of genocide as encapsulated in the Statute of ICTY.[439] In arriving at a conclusion of genocide, the ICTY Chamber had to agree that, the atrocities were committed with the requisite specific intent set down in the laws of

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[432] Southwick, K.G. (2005) "Srebrenica as Genocide? The *Krstic* Decision and the Language of the Unspeakable", *Yale Human Rights and Development Law Journal,* Vol. 8, p. 189.
[433] *Krstic, op. cit.*, para. 52.
[434] *Ibid*., para. 595.
[435] *Ibid*.
[436] *Prosecutor vs. Krstic,* Case No. IT-98-33-A, Appeal Judgment, paras. 266-275.
[437] *Ibid*.
[438] *Ibid*., para. 38.
[439] Art. 4(2).

genocide,[440] particularly in line with the provision of Article 4(2) of the ICTY Statute. The ICTY found specific intent to destroy part of Bosnian Muslim group because of the clear imputation that, "the Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings[441] with the forcible transfer of women, children[442] and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica".[443] It is the further finding of ICTY that, "the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslim in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on the territory".[444] This observation was what informed the conclusion of ICTY that the activities of the Serb forces were within the meaning of Article 4 of the Statute of ICTY. Hence, that, genocide had indeed taken place at Srebrenica.[445]

In disagreeing with the finding of genocide arrived at by the ICTY, Southwick fiercely contended that, the ICTY failed to consider the defence substantial evidence which reasonably situate the Srebrenican massacre away from genocide, but as an effort to remove a military threat in one of the conflict's most hotly contested region.[446] She further contended that, "the chamber reached its questionable conclusion because it applied an overly broad standard of intent"[447] and that adequate consideration was not given to the possible motives underlying the execution. She stated further that, the chamber was too

[440] Arts. II and III Genocide Convention, Art. 4(2) Statute of ICTY; Art. 2(2) Statute of ICTR and Art. 6 Rome
Statute of ICC.
[441] Art. 4(2)(a) Statute of ICTY; Art. 4(2)(e).
[442] Art. 4(2)(e) *Ibid*.
[443] *Krstic, op. cit.,* para. 595.
[444] *Ibid*. Para. 593.
[445] Southwick, *op. cit.,* p. 196.
[446] *Ibid*.
[447] *Ibid*.

expansive in its interpretation of terms in the definition of genocide, thereby excessively broadening the circumstances under which genocidal intent may be inferred.[448]

In disagreeing with the contentions of Southwick, this researcher wish to humbly state that, the nature of the massacre that characterized the Srebrenican situation is depictful of nothing but an act of genocide. The contention that, the Serb forces only employ effort to remove a military threat in one of the conflict's hotly contested region could be anything but reasonable and intelligible argument in the light of the nature of atrocities perpetrated. It must equally be noted that, a conflict situation in a hotly contested conflict region is not a defence to genocide, because genocidal acts whether committed in time of peace or in time of war is a crime under international law.[449] Respectfully, it must be stated that, the comment by Southwick on the assertion that, the ICTY applied a broad standard of intent without giving adequate consideration to the possible motive underlying the killings, is tantamount to an argument in pursuit of a wild goose in a thick forest of a far fetched technicality. Even though the standard of intent and the motive for the crime of genocide was not expressly stated in the Statute of ICTY or the Genocide Convention of 1948, basic principles of criminal law demands that intention and/or motive of an accused person, which caused the prohibited act is derivable more from conduct of the accused or circumstances surrounding the prohibited act which gives room for inference on the state of mind of the perpetrator at the time of the commission of the crime.[450] Consequently, the researcher is in total agreement with the conclusion of ICTY in *Krstic* case on the finding of genocide in Srebrenica.

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[448] *Ibid*.
[449] Art. I, Genocide Convention.
[450] Atidoga, D.F. (2011) "Analysis of Darfur Crisis in the Context of the Crime of Genocide", *Journal of Private & Comparative Law* (JPCL), Vols. 4 & 5, p. 217. A Publication of Dept. of Private Law, Ahmadu Bello University, Zaria.

In querying the finding of genocide by the ICTY in *Krstic* case, Schabas is of the opinion that, where physical destruction is the intention of the Serb forces, the transportation of the women, children and the elderly to the more secured area would not have taken place. He states: "Would someone truly bent upon the physical destruction of a group and cold-blooded enough to murder more than 7,000 defenceless men and boys, go to the trouble of organizing transport so that women, children and the elderly could be evacuated".[451]

With respect, this opinion held by Schabas seems far away from the intendment of Article 4(2) of the Statute of ICTY and Article II of the Genocide Convention. The killing of men and boys of military age, means taking away the potent and procreating population of a group, which offends the provision of Article 4(2)(d) of the Statute of ICTY and Article II(d) of the Genocide Convention. The act of transferring the women and children of a targeted group whose active male population have been destroyed, can not fall short of offending the Statute of ICTY[452] and Genocide Convention.[453] The argument as to the intention and/or motive for the act of killing and forcible transfer should only be visualized and ascertained by the conduct and the circumstance created by the Serb forces. We certainly do not expect the Serb forces to disclose their true intention in the face of charges of genocide. This is only deducible from circumstantial evidence and the nature of recklessness in the conduct of perpetrator(s). It must be stated further that, Schabas in his opinion seem unmindful of the fact that the act of killing alone, without what he portrayed as the evacuation of women, children and elderly to safety, may simply amounts to genocide if the requisite intent is established. The issue of intent and/or motive, seem to

[451] Schabas (2009), *op. cit.,* p. 46.
[452] Art. 4(2)(e).
[453] Art. II(e).

have been driven too far to an illusory domain, distantly away from realities. Can a man in state of sanity who used an iron clob and delivered several fatal blows on the head of his victim be said not to have the motive or intention to kill? It is therefore our humble opinion that, the issue of intent and motive in genocide cases should be appreciated and understood in the light of the most basic principles of criminal law, which in our opinion is just what the ICTY did in *Krstic* case.

(a) Prosecutor vs. Goran Jelisic[454]

In this case, the ICTY gave its first judgment in a genocide case in October, 1999. The accused person Goran Jelisic was a "low level" thug, who was personally responsible for the extermination of several dozen of Muslim victims in concentration camps in the Brcko region of Northwest Bosnia and Herzegovina. Upon arrest and arraignment before the ICTY, Jelisic pleaded guilty to counts of war crimes and crimes against humanity but pleaded not guilty to genocide.[455] Nevertheless, the prosecutor proceeded with the trial on genocide. During the trial, the chamber announced that it would enter an acquittal on the charge of genocide. Consequently, a summary judgment was issued on October 19, 1999,[456] which was followed two months later by a more substantial ratio on 14th December, 1999.[457]

The prosecutor appealed against the decision of the trial chamber on the acquittal on the charge of genocide contending that the prosecution was prevented from being heard by the trial chamber. In July 2001 ruling, the appeal chamber held that the trial chamber ought

[454] Case No. IT-95-10-T, Judgment of 19th October, 1999.
[455] *Jelisic, ibid.*
[456] *Jelisic, ibid.*
[457] *Jelisic, ibid.*

to have allowed the case to proceed since there was sufficient evidence on the charge of genocide for the defence to rebut. Even though the appeal chamber sustained the grievances of the prosecutor, Jelisic's acquittal for genocide was allowed to stand in the interest of justice.[458]

(b) Prosecutor vs. Sikirica[459]

This case deals with persecution in concentration camps, the Trial Chamber granted a defence to dismiss the charge of genocide, this time after the prosecution has been heard.[460] Within a few days of the dismissal of the genocide charge, the accused agreed to plead guilty to a charge of crime against humanity.[461]

(c) Prosecutor vs. Brdjanin[462]

In this case, the trial chamber of ICTY examined whether specific intent for genocide could be inferred. The court considered four factors: (a) the extent of the actual destruction, (b) the existence of genocidal plan or policy, (c) the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct, (d) the utterance of the accused. The trial chamber concluded that examination of these factors in the situation of the targeting of Bosnian Muslims and Bosnian Croats of the Autonomous Region of Krajina do not allow the trial chamber to legitimately draw the

[458] *Jelisic, ibid.*, para. 77.
[459] *Sikirica, op. cit.*
[460] *Ibid.*
[461] Schabas (2001) *op. cit.*, p. 29.
[462] ICTY (Trial Chamber) Judgment of 1st September, 2004.

inference that the underlying offences were committed with the specific intent requirement for the crime of genocide.[463]

However, in *Prosecutor vs. Stakic,*[464] the Trial Chamber of ICTY observed: "It is generally accepted, particularly in the jurisprudence of both this Tribunal and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred either from the facts, the concrete circumstances, or a pattern of purposeful action".[465]. This position in *Stakic* buttresses our earlier opinion that intent and/or motive in genocide cases should be logically inferred from circumstances of the situation in question and general pattern of behaviour of the perpetrator. It is a further call to eschew the baseless academic exercise and legal gymnastics often canvassed in the interpretation of the intent requirement of genocide *dolus specialis* and embrace primary interpretation based on the basic principle of criminal law.

3.2.3 Statute of International Criminal Tribunal for Rwanda (SICTR)

3.2.3.1 General Overview

Ethnic violence was unleashed on Rwanda at the aftermath of the sudden death of Rwandan's President Habyarimana, as many as one million Rwandans were killed within 100 days. The ethnic division along which the violence took place between victims and perpetrators was indicative of the fact that the crimes of genocide were taking place. Having failed to prevent the destruction of lives, the UN Security Council took action to prosecute those believed to be responsible for the killings. In July 1994, the UN Security Council adopted Resolution 935, establishing the commission of experts to investigate human rights violations in Rwanda. Following the Yugoslavian model, the UN Security

[463] *Sikirica*, *ibid*., paras. 971-989.
[464] ICTY (Trial Chamber), Judgment of 29th July, 2003.
[465] *Ibid*., para. 526.

Council decided to establish the International Criminal Tribunal for Rwanda (ICTR),[466] by the instrumentality of its enabling statute, i.e. Statute of International Criminal Tribunal for Rwanda (SICTR).

The Statute of ICTR set out the category of crimes over which the tribunal has jurisdiction. These crimes include, Genocide,[467] Crimes against humanity,[468] and serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977.[469] The Statute of ICTR confers powers on the institution of ICTR to prosecute those responsible for the grave violation of international humanitarian and human rights law committed in Rwanda and the territory of neighbouring states committed between the period of 1st January and 31st December, 1994. Though the ICTR, aside from the crime of genocide, has jurisdiction to adjudicate on crimes against humanity and serious violation of Article 3, common to the Geneva Convention. These research is however concern only with the jurisdiction of ICTR on the crime of genocide.

As has been observed earlier, Article 2 of the Statute of ICTR seem to be a verbatim reproduction of the provision of Article II of the Genocide Convention which is still *in pari materia* with the provision of Article 4 of the Statute of ICTY and Article 6 of the Rome Statute of ICC. The provision is to the following effect:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, national, ethnical, racial or religious groups, as such:
> (a) killing member of the group;
> (b) causing serious bodily or mental harm to member of the group;

[466] UN Security Council Resolution 995, Annex, Nov. 8, 1994.
[467] Art. 2, Statute of ICTR.
[468] Art. 3, *Ibid*.
[469] Art. 4, *Ibid*.

(c) deliberately inflicting on the group a condition of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent birth within the group;
(e) forcibly transferring children of the group to another group.[470]

Above is the central provision for genocide under the Statute of ICTR. A thorough assessment of the above provision has already been considered in an earlier chapter. Since this provision seem to be a mere adoption of Article II of the Genocide Convention, it is therefore apt to state that all observations and commentaries on Article II of the Genocide Convention already done in this chapter and the previous chapter should also find a place in the construction of Article 2 of the Statute of ICTR.

3.2.3.2 Major Cases on Genocide Decided under the Statute of ICTR

On 9th January 1997, the ICTR held its first trial in the case of *Prosecutor vs. Jean-Paul Akayesu*[471] a case that was regarded as one of the most momentous cases in international law.[472] During the 1994 Rwandan Genocide, Jean-Paul Akayesu was the Mayor of Taba, a city in which thousands of Tutsis were systematically raped, torture and murdered. At the commencement of the trial, Akayesu was arraigned on 12 count charges of genocide, crimes against humanity and violations of common Article 3 of the 1949 Geneva Conventions in the form of murder, torture and cruel treatment. In June 1997, the prosecutor brought three additional counts of crimes against humanity and violations of

[470] Art. 2, *Ibid*.
[471] *Akayesu, op. cit.*
[472] Scharf, M.P. (2008) "Statute of International Criminal Tribunal for Rwanda" *United Nations Advisory Library of International Law*, p. 2 (obtained from www.un.org/law/avl (accessed on 26 October, 2012).

common Article 3/Additional Protocol II for rape, inhumane acts and indecent assault.[473] These additional counts marked the first time in the history of international law that rape was considered as a component of genocide.[474]

In 1998, the ICTR found Akayesu guilty of nine counts of genocide, direct and public incitement to commit genocide and crimes against humanity for extermination, torture, rape and other inhumane acts. This case marked the first in which an international tribunal was called upon to interpret the definition of genocide as defined in Article II of the Genocide Convention of 1948.[475] In interpreting the definition of genocide, the ICTR held that, the crime of rape was "a physical invasion of sexual nature, committed on a person under circumstances which are coercive".[476] The tribunal further emphasized that sexual assault could amount to "genocide in the same way as any other act as long as it was committed with specific intent to destroy, in whole or in part, a particular group, targeted as such".[477] Akayesu is now serving life imprisonment in Mali.[478]

In *Prosecutor vs. Jean Kambanda,*[479] the ICTR also evolved two major precedents. The accused person was the Prime Minister of the Interim Government of Rwanda throughout the period of genocide. Kambanda was arraigned before ICTR in October 1997 on six counts of genocide conspiracy to commit genocide, complicity in genocide and crimes against humanity, which he pleaded guilty. Kambanda's plea of guilt and subsequent conviction was the first time in international law that a Head of Government acknowledge his guilt for genocide and was accordingly convicted and sentenced for

[473] Report of ICTR (S/1997/868).
[474] *Ibid*.
[475] See: ICTR Fact Sheet No. 1, *The Tribunal at a Glance.*
[476] *Akayesu*, *op. cit.*, para. 598.
[477] *Ibid*., para. 731, see also: Obote-Odora, A. (2005) "Rape and Sexual Violence in International Law: ICTR Contribution" *New Eng. J. Int'l & Comp. L.,* Vol. 12(1) p. 137.
[478] Scharf, *op. cit.,* p. 3.
[479] Case No. (ICTR-97-23-S), Judgment of 4th September, 1998.

perpetrating genocide. Like Jean Paul Akayesu, Jean Kambanda is serving a life imprisonment term in Mali.[480]

Prosecutor vs. Nahimana & 2 Or,[481] in this case, the ICTR prosecuted Ferdinand Nahimana and Jean-Bosco Barayagwiza, leaders of Radio Television Libre Milles Collines (RTLM), and Hassan Ngeze founder and director of Kangura Newspaper. The ICTR consolidated the indictment of these three men into a single trial, commonly referred to as "The Media Case". The trial was the first time since Nuremberg, that the role of the media was considered as a component of international criminal law.[482] In 2003, the accused persons (Nahimana, Barayagwiza and Ngeze) were convicted on counts of genocide, and crimes against humanity. Nehimana and Ngeze were sentenced to life imprisonment and Barayagwiza was sentenced to 35 years on appeal, Nahimana's and Ngeze's sentences were respectively dropped to 30 and 35 years respectively.[483]

In a very recent development, precisely on 20th December, 2012 CNN News reported that, ICTR sentenced Rwandan former Planning Minister Augustine Ngirabatware to thirty five years imprisonment after being found guilty of genocide, incitement to genocide and rape as a crime against humanity by the provisions of the Statute of International Criminal Tribunal for Rwanda.

3.2.4 Statute of International Court of Justice (SICJ).

3.2.4.1 Powers of ICJ on Genocide

[480] Scharf, *op. cit.*, p. 3.
[481] Case No. (ICTR-99-52-T).
[482] Scharf, *op. cit.*, p. 3.
[483] *Ibid.*

Although the Statute of ICJ is binding only on cases before the ICJ, it must however, be stated that, Article 38(1) of the Statute of ICJ "is generally regarded as a complete statement of the sources of international law".[484] The Article provides:

> 1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59 (which provides that ICJ decisions bind only the parties to the case before the court), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means of determination of the rule of law.[485]

The above provision of Article 38(1)(a)-(d) of the Statute of ICJ provides the basis and scope of the adjudicatory powers of the ICJ in relation to the crime of genocide. Sub-paragraph (a) of Article 38(1)[486] particularly gave very clear mandate to ICJ to adjudicate on and interpret the Genocide Convention, Rome Statute of ICC, Statutes of ICTR and ICTY on genocide and even other areas which the treaties dwelled on. Furthermore, if genocide as a crime is regarded as *orga omnes* and which prohibition is seen as a customary rule of international law or *jus cogen* from which no derogation is allowed; then, sub-paragraph (b) of Article 38(1)[487] might have enough momentum to activate the adjudicatory powers of the ICJ in favour of adjudicating on genocide. The foregoing

[484] Brownlie, I. (1998) *Principles of Public International Law* (5th edn., cited in Nersessian, D.L., *op. cit.*, p. 237.
[485] Statute of ICJ, Art. 38(1) 59 Stat. 1055 (1945).
[486] Statute of ICJ.
[487] *Ibid*.

argument may also suffice for the provision of sub-paragraph (c) of Article 38(1),[488] if the prohibition and punishment for genocide is recognized as a general principle of law by civilized nations.

3.2.5 *Selected Decided cases on Genocide under ICJ*

The ICJ by the powers inherent in its enabling statute especially Article 38(1)(a) had delved into the domain of genocide in some of its decided cases;

3.2.5.1 Bosnia vs. Yugoslavia Case[489]

This was the first case heard by ICJ on the crime of genocide, brought before the court by Bosnia and Herzegovina against Yugoslavia in 1993. In its application, Bosnia claimed that the effort of the Serbs to establish a "Greater Serbian State" resulted in the systematic bombing of Bosnian cities and the intentional targeting of its Muslim citizens. The application of Bosnia before the ICJ also contends that the Serbs policy of driving out innocent civilians of a different ethnic or religious group from their homes, so-called "ethnic cleansing" was indulged in by Serbian forces in Bosnia on a scale that dwarfs any thing seen in Europe since Nazi times. The application declared that the evidence discloses a *prima facie* case of genocide committed against Bosnia and requested that all appropriate actions be taken by the court in line with the stipulations and standards of the Genocide Convention.[490]

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[488] *Ibid.*

[489] ICJ, Order on Request for the indication of provisional measure in case concerning the application on the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina vs. Yugoslavia*), April 8, 1993.

[490] *Ibid.*, see generally, Morton and Singh, *op. cit.*, p. 65.

The ICJ in its ruling in 1994, did not issue a finding of genocide or otherwise in Bosnia. However, the court did asked the Federal Republic of Yugoslavia to ensure that any military, paramilitary or irregular armed unit which may be directed or supported…do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia or against other national, ethnical, racial or religious group.[491]

3.2.5.2 Yugoslavia vs. NATO Cases[492]

The cases were instituted before the ICJ by the Federal Republic of Yugoslavia on 29th April, 1999. There were ten separate cases against Canada, Germany, France, United Kingdom, Belgium, United States, Italy, Portugal, Netherlands and Spain. The Republic of Yugoslavia accused each of these countries of bombing Yugoslavia territory in violation of their international obligation, including the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.[493] In two of the ten cases *Yugoslavia vs. Spain* and *Yugoslavia vs. United States of America*, the ICJ concluded that it manifestly lacked jurisdiction and it accordingly ordered that those two cases be removed from the docket. The reference to the "physical destruction of a national group" caused by NATO bombings brought about a charge by Yugoslavia of the commission of the crime of genocide.[494]

[491] Morton and Singh, *Ibid.*
[492] Judgment of ICJ.
[493] Art. II(e), Genocide Convention.
[494] Morton and Singh, *op. cit.*, p. 65.

By a majority vote of eleven (11) to four (4), the ICJ ruled that, the threat itself amount to an act of genocide within the meaning of Article II of the Genocide Convention. The court further ruled that, it does not appear at the present stage of the proceedings that the bombings which form the subject of Yugoslavia's application indeed entail the element of intent, towards a group as required. Article II of the Genocide Convention.[495] This research considers the above ruling as very appropriate in the circumstance.

3.2.5.3 Croatia vs. Yugoslavia Case[496]

On 2nd July, 1999 the Republic of Croatia instituted an action before the ICJ against the Federal Republic of Yugoslavia for alleged violation of Genocide Convention between 1991 and 1995. In its application, Croatia contended that, acts of genocide were committed on Croatian soil by Yugoslavian armed forces, intelligent agents and various paramilitary detachments. Croatia's application states further that, in "addition, by directing, encouraging, and urging Croatian citizens of Serb ethnicity, Yugoslavia engaged in a conduct amounting to a second round of ethnic cleansing".[497]

It must be observed that, while the ICJ did not give clear cut ruling in any of the cases that acts of genocide had been committed, its application of the provisions of the 1948 Genocide Convention further strengthens the convention's standing in international law; as the ICJ did not at any time stray away from the legal definition of genocide provided in Article II of the Genocide Convention.

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[495] *Ibid*. pp. 65-67.
[496] ICJ, Application of the Convention of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia vs. Yugoslavia*), 2nd June, 1999.
[497] *Ibid*.

3.2.5.4 Bosnia – Herzegovina vs. Serbia Montenegro[498]

In February 2007, the ICJ published its final ruling on the application of the Genocide Convention case, fourteen years after the commencement of the case. Notwithstanding the political happenings and changes that occurred during this period, the judgment was welcomed by many with much anticipation. In the judgment, the ICJ concluded that, the "undertaking to prevent" in Article I of the Genocide Convention is "normative and compelling",[499] unqualified[500] and bears direct obligation on states parties,[501] and that a referral to the Security Council does not absolve state parties of general obligation of prevention, the court observed.[502] The court further noted that, the obligation to prevent is not to mandatorily succeed, but to exercise "due diligence" by engaging all reasonable means available to them to prevent genocide.[503]

3.2.6 Statute of International Criminal Court (SICC)

3.2.6.1 Overview

The Rome Statute of ICC reflects states agreement over how to institutionalize a broad range of international criminal justice norms, while still protecting national sovereignty.[504] The Rome Statute of ICC established the International Criminal Court

[498] ICJ, Case concerning the application on the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina vs. Serbia and Montenegro*), February, 2007.
[499] *Ibid*., para. 427.
[500] *Ibid*., para. 162.
[501] *Ibid*., para. 165.
[502] *Ibid*., para. 427.
[503] *Ibid*., para. 430, see generally: Mayroz, E. (2012) "The Legal Duty to 'Prevent' after the onset of 'Genocide'" *Journal of Genocide Research*, Vol. 14(1), pp. 79-98.
[504] Schiff, B.N. (2008) *Building the International Criminal Court,* Cambridge University Press, Cambridge, p.

(ICC) as the first independent permanent International Criminal Court with global jurisdiction as opposed to territorial jurisdiction.

The International Law Commission (ILC) was mandated by the UN-General Assembly to prepare a draft Statute of ICC, by which act, the legal machinery for the establishment of the court was let loose. By the year 1994, a draft Statute of the ICC was presented to the UN General Assembly by the ILC, with a recommendation that a conference of plenipotentiaries be convened to negotiate the treaty. Based on the foregoing, the General Assembly created an *ad hoc* committee which midwifed a conference that lasted five weeks in Rome. After intense deliberation with the representatives of 160 states, the Rome Statute of ICC was given birth to.[505] The Rome Statute of ICC was then adopted on the 17th July, 1998 by a total vote of 120 to 7, with 21 states abstaining.

The Statute of ICC is made up of 128 Articles accompanied by the 'Elements of Crimes' provisions. It was on the strength of the legal instrument that the institution of ICC emerged on 1st July, 2002.[506]

3.2.6.2 Relevant Provisions on Genocide

The Rome Statute of ICC confers jurisdiction on the ICC to try cases that boarders on the crime of genocide,[507] crime against humanity;[508] war crime;[509] and the crime of aggression.[510] It is very important to state that, this research shall predominately dwell on the provisions of the Rome Statute of ICC that boarder on the crime of genocide. The

[505] *Ibid*., pp. 69-72; See also Zakariya, M., *op. cit.*, p. 76.
[506] *Ibid*.
[507] Art. 5(1)(a), Statute of ICC.
[508] Art. 5(1)(b), *ibid.*
[509] Art. 5(1)(e), *ibid.*
[510] Art. 5(1)(e), *ibid*, However, on the crime of aggression by Art. 5(2), the jurisdiction of the ICC will only be activated, at a later date on the fulfillment of certain acts.

preamble of the Rome Statute of ICC like in other treaties sets out the common aspiration of its partakers and a normative stage for the bindingness of subsequent provisions of the Statute. The preamble to the Rome Statute of ICC provides:

> *The state parties to the statute*, *conscious* that all people are united by common bound, their cultures pieces together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,
> *Mindful* that during this century millions of children, women and men has been victims of unimaginable atrocities that deeply shook the conscience of humanity;
> *Recognizing* that such grave crimes threaten the peace, security and well-being of the world;
> *Affirming* that the most serious crimes of concern to international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international co-operation,
> *Determined* to put an end to impunity for the perpetrators of those crimes and thus to contribute to the prevention of such crimes;
> *Recalling* that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes;
> *Reaffirming* the purposes and principles of the Charter of the United Nations, and in particular that all states shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations;
> *Emphasizing* in this connection that nothing in this statute shall be taken as authorizing any state parties to intervene in an armed conflict or in the internal affairs of any state;
> *Determined* to these ends and for the sake of the present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over must serious crimes of concern to the international community as a whole;
> *Emphasizing* that the International Criminal Court established under this Statute shall be complimentary to national criminal jurisdictions,

> *Resolved* to guarantee lasting respect for and the enforcement of international justice,
> *Have agreed as follows*[511]

The foregoing stipulations of the preamble to the Rome Statute of ICC is a clear statement of the goals and aspirations of the statute and an echo of the obligation of state parties; and the bindingness of the provisions of the statutes on all parties thereto.

The basis of applicability of the Rome Statute of ICC is established in a clear hierarchy of the various evidentiary sources of international criminal law deducible from the provision of the statute. It provides:

> The court shall apply:
>
> (a) In the first place [its] statute, elements of crime (meaning the elements of the offences of genocide, crimes against humanity and war crimes that are agreed upon and adopted by the parties to the convention),
> (b) In the second place, where appropriate, applicable treaties and principles and rules of international law of armed conflicts,
> (c) Failing that, general principle of law derived by the court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the ICC's] statute and with international law and internationally recognized norms and standards.[512]

The Rome Statute of ICC further provides that, "the court may apply principles and rules of law as interpreted in its previous decision".[513] This development is a progression of thought and a welcome development on the role of *stare decisis* in international law. This

[511] Preamble to the Rome Statute of ICC.
[512] Art. 21(1) Rome Statute of ICC.
[513] Art. 21(2), *ibid.*

emerging position presupposes that, a previous decision of the ICC can bind other parties before the court in subsequent trials, where issues to be resolved are identical or in fours. This position is at radical variance with the position of the Statute of ICJ, which is to the effect that legal rulings in ICJ decisions only binds the parties to the case before the court for which ruling proceeded.[514] The implication of this is that, the principle of *stare decisis* is unknown to the jurisprudence of ICJ. It must however, be observed that the bindingness of *stare decisis* evolved in the jurisprudence of ICC may only be limited to cases before the Court.

By the provision of Article 21(1) of the Rome Statute of ICC, it is very clear that the Statute emphasizes primarily the application of its own provision, as a basis for assuming its adjudicatory powers.[515] It is equally to embrace applicable treaties and established principles and norms of international law[516] in relation to the violation of its provision concerning crimes which the ICC has jurisdiction. By subjecting the principles derived from national laws of state parties to inconsistency test,[517] the Rome Statute of ICC has visibly demonstrated its preference for existing international standards to take precedent over norms derived from domestic criminal justice system.

On the crime of genocide which is the central nerve of this research; the Rome Statute of ICC in Article 5, listed it as one of the most serious crimes of concern to international community, of which the court has jurisdiction to entertain.[518] The definitive provision, which encapsulates the elements of the crime of genocide and series of acts that

[514] Art. 59, Statute of ICJ.
[515] Art. 21(1)(a), Rome Statute of ICC.
[516] Art. 21(1)(b), *ibid.*
[517] Art. 21(1) (c), *ibid.*
[518] Art. 5, Rome Statute of ICC.

may constitute genocide, is provided for in Article 6.[519] In identical wordings as the provisions of Articles II,[520] 2[521] and 4,[522] it provides:

> For the purpose of this statute "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent birth within the group;
> (e) forcibly transfer of children of the group to another group.[523]

This provision is a reproduction of statutes[524] earlier discussed in the previous chapter and even this chapter of the research. It must therefore be made clear that, its reproduction here in relation to the Rome Statute of ICC is for the purpose of emphasis. It follows therefore, that, all the earlier discussions on the elements of genocide discussed under other relevant laws applies here *mutatis mutandi*

3.2.6.3 The Utility of Rome Statute of ICC

Laplante asked, "how do we evaluate the effectiveness of ICC?",[525] such an inquiry it is observed, may focus on the number of arrest warrants, indictments and prosecution

[519] Rome Statute of ICC.
[520] Genocide Convention of 1948.
[521] Statute of International Criminal Tribunal for Rwanda (SICTR).
[522] Statute of International Criminal Tribunal for Yugoslavia (SICTY).
[523] Art. 6, Rome Statute of ICC.
[524] Art. 2, Statute of ICTR; Art. 4, Statute of ICTY; and Art. II, Genocide Convention.
[525] Laplante, L.J. (2010) "The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court Sphere of Influence" *J. Marshall L. Rev.* Vol. 43, p. 635.

credited to the court since it commences operation in 2002.[526] It was contended that such a criteria of assessment in so short a time, is rather far fetched; and that, the true test of assessing the success of ICC is whether the court has helped to combat impunity and deter future human rights atrocities across the globe.[527]

A culmination of work of over a century preceded the entry into force of the Rome Statute of ICC which gave the breath of life to ICC itself.[528] High aspiration is said to motivate the effort, with the emergence of the Rome Statute and the court representing "the hope of governments from all around the world, that the force of international law can restrain the evil impulses that have stained history with the blood of millions of innocent victims".[529]

The Rome Statute of ICC which creates the ICC differs from some of its sister laws like the Charter of the International Military Tribunal for the Nuremberg, Statute of ICTY, Statute of ICTR and the Statute of the Special Court for Sierra-Leone, because the Rome Statute of ICC created a permanent court with universal jurisdiction while these other statutes only created *ad hoc* tribunals/courts with limited territorial jurisdiction for a specific crisis situation covering a specified period of time. Also, the Rome Statute of ICC is much more detailed than those of the *ad hoc* tribunals. As earlier observed, the statute is made up of 128 articles in addition to the Elements of Crimes provisions incorporated into it. While the Statutes of ICTY and ICTR have only 18 and 11 articles respectively. The Statute of ICC unlike the Statutes of ICTY and ICTR also obliged and urges state parties to

[526] *Ibid.*
[527] *Ibid.*
[528] Burke-White, W.W. (2008) "Proactive Complimentarily: The International Criminal Court and National Courts in the Rome System of International Justice" *HARV. INT'L L.J,* 49, pp. 53-54.
[529] Newton, M.A. (Lieutenant Colonel 2001), "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of International Court" *MIL. L. Rev.* 167, 20, 23.

incorporate relevant articles of the statutes into their own domestic laws, pursuant to the much talked about principle of complementarities entrenched in the Rome Statute.[530]

It is now over 10 years after the coming into force of the Rome Statute of ICC, with all its perceived advantages. The pertinent question to ask at this point is, how has the Rome Statute fared so far?

So far, the ICC has opened cases against twenty six individuals in connection with five African countries. Twenty five of this cases remained opened, while the twenty sixth against Darfur rebel leader Bashar Idriss Abu Garda was dismissed by the judges. The cases evolved from investigations into crises in Libya, Kenya's post-election violence of 2007-2008, rebellion and counter-insurgency in the Darfur region of Sudan, the Lord's Resistance Army conflict in Central Africa, civil conflict in Eastern Democratic Republic of Congo (DRC), and the 2002-2003 conflict in the Central African Republic. The Prosecutor is also examining a 2010-2011 violence in Cote d'Ivoire, a 2009 military crackdown on opposition supporters in Guinea, and an inter-communal violence in Jos – North Central Nigeria, but has not opened formal investigation with regards to the Guinea and Nigeria situations.[531]

Democratic Republic of Congo, Kenya, Nigeria, Guinea and Central African Republic are state parties to the ICC. Sudan, Libya and Cote d'Ivoire are not state parties. Assuming jurisdiction in Sudan and Libya stems from referrals by the UN Security Council to ICC, while jurisdiction in Cote d'Ivoire was granted by virtue of a declaration submitted

[530] See: Arts. 17-19 and the Preamble, Rome Statute of ICC.
[531] Congregational Reseach Service,(2011) "International Criminal Court Cases in Africa: Status and Policy Issues", p. 6. www.crs.gov (Accessed on 1st1 December, 2012).

by the Ivorian Government on October 1st, 2003, which accepted the jurisdiction of the court as of 19th September 2002.[532]

The German complementarity law allows crime against humanity as defined in Rome Statute of ICC to be prosecuted by German domestic courts even if they are outside the jurisdiction of the court. Consequently, in December, 2005 Uzbekistan activist filed a complaint against Uzbek Interior Minister Zokirjon Almatov in connection with the Andijan massacre. Almatov was visiting Germany at the time for hospital treatment. However, the Prosecutor did not act in prosecuting Almatov saying that, chances of successful prosecution were "non-existent" as the government of Uzbekistan would not co-operate in the gathering of evidence.[533] In May 2011 the trial of *Ignace Murwanashyaka* and *Straton Musoni,* both Rwandan citizens began in Stuttgart, Germany. They were arraigned for twenty six counts charge of crimes against humanity and thirty nine count charges of war crimes, allegedly committed in the Democratic Republic of Congo.[534]

In United Kingdom, in the year 2007, Corporal Donald Payne became the first British person to be convicted of a war crime. He pleaded guilty under ICC implementing legislation for inhumane treatment of Baha Monsa an Iraqi detainee following the 2003 invasion of Iraq. He was sentenced to one year in jail and dismissed from the army. Three other soldiers were acquitted of war crimes in the same trial.[535]

3.3 Conclusion

[532] ICC Office of the Prosecutor Weekly Briefing, 15-21 February, 2011.
[533] Germany: Prosecutor Denies Uzbek Victims Justice, *Human Right Watch,* 6/4/2006.
[534] "Rwanda: Ignace Marwana and Straton Masoni Tried" *BBC News*, 4May, 2011, http://www.bbc.co.uk/news/world-africa-13275795 (Last visited 5th May, 2011).
[535] "UK Soldier Jailed over Iraqis Abuse" Channel 4, 30th April, 2007 cited in *International Criminal Court*. www.http://en/international-criminal-court-investigation-in-the-Democratic-Republic- of-the-Congo (Accessed on 21st December, 2012).

In this chapter, we have attempted an examination of the legal regimes for combating the phenomenon of genocide – the ultimate crime, the crime of crimes and the pinnacle of evil. These we have done in this chapter by a bird's eye view assessment of the statutory laws/conventions that created and invested some institutions with a legal teeth and legal claws to combat the ageing malignant tumor called 'genocide'.

In this chapter, we have found that the prohibition of genocide is not predicated on signing and/or ratification of treaty on genocide. Being a customary rule of international law, it is the responsibility of all civilized nations, whether they are parties to any treaty on genocide or not to pursue the prevention and punishment of genocide. This position of international law, as earlier stated was re-echoed in 2006, when the ICJ observed that, the prohibition of genocide was assuredly a pre-emptory norms (*jus cogen*) of public international law.[536]

We have equally found in this chapter that all the instruments and conventions on genocide emphasized the special intent requirement in genocide. We have observed that, the said special intent (*dolus specialis*) requirement is a hazy concept which has brought a lot of confusion in the appreciation of the jurisprudence of the law of genocide. We further observed that, the intent requirement of general criminal responsibility in criminal law will not do any harm if such is applied to genocide as in any other crime.

The instruments and conventions on genocide define genocide in the same wordings. No difference as to the meaning in all the treaties examined in this chapter. Regretfully the definition of genocide was found to be limited to the protection of only the groups specified in the Genocide Convention of 1948. The basis of this anomaly is hardly discernable. It makes the convention more unprotective than being protective; as most

[536] Case concerning the activities on the territory of the Congo, *op. cit.*, n. 7.

groups that might be victims of genocide are left out. Political, social and economic groups were excluded, and cultural genocide which forms the basis of Lemkin's perception of genocide was also excluded.

Though the existing legal regimes for combating the crime of genocide have scored a milestone achievement compares with the past, it must however be stated that a more efficient and effective step at enlarging the domain of their operation is necessary because of the relentless aggression and fierceness of their common enemy 'genocide', and its notoriety as a reoccurring decimal threatening the civilization of man.

CHAPTER FOUR

AN ASSESSMENT OF SELECTED NIGERIAN CRISES IN THE CONTEXT OF GENOCIDE

4.1 Introduction

In recent time, Nigeria has suffered numerous crises. These crises though numerous, are yet individually distinct and clothed with diverse colourations. Though the descriptive nomenclature used to identify these crises means nothing to the common man victim; who only appreciates and understands the nature of his suffering in crises situation. However, the understanding of the nature and character of crises, and situating same appropriately within its own particular descriptive nomenclature is very important in the domain of international criminal law, for the purpose of identifying and employing appropriate preventive and curative mechanisms. It is thus, very important to understand the nature and character of individual crises situation.

The heterogeneous nature of Nigerian society, and the dynamics of her collectivity in the face of overwhelming mistrust, sectionalism, regionalism, tribalism and nepotism amongst other disuniting forces, have no doubt over the years created a flourishing ground for emergence of multi-dimensional conflicts, ranging from political, ethnical, social and religious crises. These crises may be because of the nature of the emergence of the Nigerian state. It was argued that the Nigerian state emerged from series of predatory activities of the Europeans, which commenced with exploration of resources, then to slave trade, Berlin Conference of 1884 and colonialism.[537] In Nigeria, before the advent of colonialism, strong trade and social links had been established between communities; in some instances, the

[537] Okoye, F. (2000) (ed.) *Victims: Impact of Religious and Ethnic Conflicts on Women and Children in Northern Nigeria*, Human Right Monitor, Kaduna, p. 2.

communities were engaged in bitter battles of supremacy such as the battle of conquest by the *Jihadist* led by Uthman Dan Fodio, Queen Amina's expansionist wars, the Igala-Jukun battle of supremacy, the Igala-Benin war etc. It must therefore be stated that some of the factors of conflict in Nigeria today pre-date European incursion, while European incursion introduced new factors of conflict.[538]

Whatever factor is responsible, one thing is certain that Nigeria has most recently been facing a resurgence of several form of identity conflict. Some of these manifest in ethnic and religious form,[539] while some may be product of state policies.[540] The quest for supremacy and relevance of dichotomized identities tend to pose a calamitous threat to the Nigerian state and its structures, which have often led to destruction of lives and properties and displacement of communities and ethnic nationalities.

Because of the multi-dimensional nature of Nigerian crises at this point of her national life; it is therefore very difficult to attempt a holistic appreciation of these numerous crises that have engulfed our polity. Consequently, this chapter shall only examine some specific crises in Nigeria in the context of the international crime of genocide, hoping that the understanding of the selected crises in the light of genocide will give the necessary background for the appraisal of other crises and situating them within their appropriate descriptive nomenclature.

This chapter shall examine the Nigerian Civil War in the context of the international crime of genocide. This is with a view of ending the seemingly endless debate on whether the Nigerian Civil War constitutes genocide of the Igbo nation or not. The chapter shall also attempt an assessment of the Odi and Zaki-Biam massacres perpetrated by the

[538] *Ibid.*, p. 3.
[539] E.g. Jos Crises between 2001 to Date.
[540] E.g. Civil War, Zaki-Biam Massacre and Odi Slaughter.

administration of President Olusegun Obasanjo in the light of genocide; with a view of situating the crises within an appropriate description. In this chapter, the Boko Haram insurgency and the counterinsurgency of the Joint Task Force (JTF) will be examined in the light of the recent atrocities in northern Nigeria. This is with a view of assessing the nature of the insurgency and counterinsurgency in the light of genocide; and to further bring to fore the atrocities of both *Boko Haram* and JTF.

4.2 Nigerian Civil War (1967-1970)

4.2.1 Background to the Nigerian Civil War

The Nigerian Civil War like a bomb shell, rocked the emerging Nigerian state from 1967 to 1970; leaving its bloody stains on the heart of the embryonic Nigerian polity, a dreadful stain that still trails the socio-political existence of Nigeria as a collectivity. The thirty (30) months civil war was preceded by a configuration of pre-independent and post-independent crises.[541] It was rightly observed that the origin of the Nigerian Civil War could be located in a complexity of factors ranging from the remote causes which include the military coups d'etat of January 15, and July 29, 1966. Other remote causes include general unrest in the country like, the regional election crisis in Western Nigeria, in 1965; the Tiv riot of 1964; the federal election dispute of 1964; the massacre of the Igbos in Northern Nigeria from May to September 1966;[542] the structural imbalance inherent in the

[541] Thomas, A.N. (2010) "Beyond the Platitude of Rehabilitation, Reconstruction and Reconciliation in Nigeria: Revolutionary Pressure in Niger Delta" *J. Sustain Develop. Africa.* 12(1), pp. 56-57.

[542] Cervenka, Z. (1972) *A History of the Nigerian Civil War 1967-1970*, Onibonje Press, Ibadan, cited in Folade, A.J. (2011) "Nigerian Civil War, 1967-1970: A Revolution?" *African Journal of Political Science and International Relations,* Vol. 5(3) p. 120.

Nigerian state; and most importantly the perceived asymmetrical distribution of power among the various ethnic and geo-political groups.[543]

Between August and September 1966, the unrest in Northern Nigeria reached its peak, claiming the lives of between Ten thousand and thirty thousand Easterners mostly of Igbo extraction and about one million of them flee from the North to the East.[544] As the civil disturbance continued with the military and political leaders unable to reach an agreement, it was generally agreed that a new constitutional formula, which will give effect to the changes that had occurred was urgently needed. A Constitutional Conference of *ad hoc* nature was convened in mid September 1966, to find the way out of the lingering crises. The said *ad hoc* Constitutional Conference failed because of distrust and bitterness. After failed attempt to meet in Nigeria, the two sides met at *Aburi* in Ghana under the Chairmanship of General Ankrah, the Chairman of Ghana National Liberation Council. At *Aburi*, disagreement also erupted between the Federal Military Government and Eastern Region Military Government over the proposal to introduce a greater measure of decentralization by increasing the powers of the region vis-à-vis those of the Federal Government. These created a lot of tension as the military leaders from both sides gave conflicting interpretation of the *Aburi* accord.[545]

On May 26 1967 Lieutenant Colonel Chukwuemeka Odumegwu Ojukwu summoned an emergency meeting of the Eastern Nigeria Consultative Assembly to review the situation at hand. The following day, Lieutenant Colonel Yakubu Gowon, in a nation wide broadcast announced the creation of twelve states, dividing the Eastern region into three states. The Eastern Nigeria Consultative Assembly, already in session in Enugu,

[543] Folade, *ibid.*
[544] *Ibid.*
[545] *Ibid.*

responded same night by passing a resolution empowering Lieutenant Colonel Ojukwu to proclaim the region as Independent Republic of Biafra; Colonel Ojukwu on May 30, 1967 did so. Consequently, Colonel Gowon announced that Colonel Ojukwu had been dismissed from the Nigerian Army, and sacked as Military Governor of Eastern region.[546] Hostilities then broke out between Federal Troops and Biafran Forces on July 6, 1967.[547]

The implication of Ojukwu's declaration is an effective excise of the Eastern region from the Federal Republic of Nigeria. Thus, it was the frantic effort of the Federal Government of Nigeria to stop the secession bid of the Eastern region and the passionate desire of Ojukwu to ensure the survival of Biafra that erupted the civil war.[548] As common to all civil wars, the Nigerian Civil War is unique in the context of the nation's history, because it portrays the most vivid expression of a country turning against itself.[549] The Nigerian Civil War as it were, can be analyzed within the context of genocide as debates on its genocidal trait and otherwise still lingers and trails Nigerian history, crystallizing into disenchantments in the present.

4.2.2 The Question of Genocide

The crime of genocide can be committed in times of peace and in times of war.[550] However, in order to understand the occurrence of genocide in the context of civil wars, it is very vital to fully appreciate the nature of events in the civil war in question. In civil wars, there exists an armed conflict between two or more organized parties,[551] one of them being the government. What they all have in common is that in the hostilities each party

[546] *Ibid.*
[547] *Ibid.*
[548] Folade, *op. cit.*, p.121
[549] *Ibid.*
[550] Art. 1, Rome Statute of International Criminal Court (ICC).
[551] For instance during the Liberian Civil War, there were three organized parties viz: The Government Fanction led by Samuel Doe; The Charles Taylor fanction and the Prince Yome Johnson's fanction.

will explore and maximize its advantages and possibilities to defeat its rival party.[552] Consequent upon this dynamics of continuing hostilities in armed conflict, the defencelss civilian population is caught in the web of being utilized by the warring parties to either gain territorial control or reduce loyalty to rival party. This war antics and dynamics naturally flows into human atrocities of varying degree. Where the intention of the party at advantage is to end the life and existence of a group of the population or to seriously damage its legacy towards the greater aim of winning the civil war, in such situation, the possibilities of genocide is highly probable.[553]

Maria Balen Gonzalez rightly observed that in genocide, "it is possible to identify two components on the dynamic of violence: The perpetrator of the violence and the group towards which the violence is directed".[554] This perpetrator can be any organized party in the civil war. It must however be stated that, the government has held this position in majority of cases of genocide during civil wars.[555] This is principally because the government enjoys the advantage of access to state structures, powers and apparatus for carrying on violence towards a selected group. As Valentino rightly argued, more often than not, if government feels threatened by a particular group, genocide might be the tool to reinforce its position in power.[556] However, it must be emphatically stated that, for the atrocities of a perpetrator in civil war to amount to genocide, such atrocities must be carried out with the motive to end the life and existence of a group or to damage and extinct the

[552] Gonzalez, M.B. (2012) "Genocide: Assessing its determinant in Civil Wars". A draft paper written to support the poster presentation of the workshop: *Advancing the Scientific Study of Conflict and Co-operation: Alternative Perspective from UK and Japan* at 2nd meeting Colchester UK, 20-22 March, 2012 p. 5.
[553] *Ibid*.
[554] *Ibid*.
[555] Valentine, B., and Huth, I. (2004) "Draining the Sea: Mass Killing and Guerrilla Warfare", cited in Gonzalez, *ibid*.
[556] Valentine, B. (2004) *Mass Killing: The Final Solution*, Cornel University Press, London, cited in Gonzalez, *ibid*.

legacies of such a group as a collectivity. The victim groups are more often minority group identified by its national, ethnical, religious and racial identity.

In the context of Nigerian Civil War, it is very imperative to state that, the finding of genocide or otherwise, can only suffice after a thorough assessment of the nature of the conflict and the resultant atrocities in relation to whether the Federal government of Nigeria had the requisite special genocidal intent (*Dolus Specialis*) to bring about the resultant prohibited act – genocide. The conflict must further be considered in relation to some basic elements of the crime of genocide as stipulated by relevant instruments.[557]

4.2.2.1 Nature of the War

The hostilities during the Nigerian Civil War took place predominantly in the Eastern region, that is, the area that was proclaimed by Ojukwu as Republic of Biafra. Armed conflict commenced between the Federal troops and the Biafran soldiers upon the said proclamation of State of Biafra on 30th May, 1966 almost immediately. In July, 1966 the Federal troops attempted to exert control over the Eastern region after a determined and successful defence which did not yield much fruit. However, the Biafran troops moved across the River Niger into the Mid-West a month later. Aided by Igbo Officers and soldiers in that area, the Biafran troops installed a government under a Mid-Western Igbo officer, Major Albert Okonkwo. Upon this event, the Mid-West then proclaimed its own independence as a separate state from Nigeria and Biafra. This signaled an imminent danger of disintegration of Nigeria into shreds.[558]

[557] See for example: Art. II Genocide Convention of 1948; Art. 4 Statute of International Criminal Tribunal for former Yugoslavia; Art. 2 Statute of International Criminal Tribunal for Rwanda and Art. 6 Rome Statute of International Criminal Court (ICC).
[558] See generally: O'Connell, J., "The Scope of Tragedy" *African Report*, February 1968, pp. 10-15.

However, the advance of Igbos apparently panicked the resistance of the Yoruba dominated Western region, especially after radio Biafra promised that the West will also be liberated. At which point, Chief Obafemi Awolowo had to go to the Federal Government with other Yoruba political leaders to pledge their support for the oneness of the Federal Republic of Nigeria. By this act, the Yoruba and Hausa-Fulani people along with other minorities were apparently held together by Anti-Igbo sentiment and common pursuit of the war.[559]

As stated earlier, the Biafran troops in a surprise maneuver, not contemplated by the Nigerian Federal troops took over the Mid-West region. Ojukwu explained his plans, thus:

> Our motive was not territorial ambition or the desire of conquest. We went into the Mid-West (later declared the Republic of Benin) purely in an effort to seize the serpent by the head; every other activity in that Republic was subordinated to that single aim. We were going to Lagos to seize the Villain Gowon, and we took necessary military precautions.[560]

Notwithstanding the euphoric verbal heroics espoused by Ojukwu, John de St. Jorre, a reporter for *The Observer*, gave a far more subdued picture of Biafran Army readiness and organization.[561] He sarcastically stated:

> The Biafrans "stormed" through the Mid-West not in the usual massive impediment of modern warfare but in a bizarre collection of private cars, "mammy" wagons, cattle and vegetable trucks. The command vehicle was a Peugeot 404 estate car. The whole operation was not carried out by an "army" or even a "brigade"…but by at most 1,000 men, the majority poorly trained and armed, and many wearing civilian

[559] Memorandum from American Jewish Congress 15 East 84th St. New York, N.Y. 10028 T.R/9-4500/December 27.
[560] Ojukwu, C.O. (1969) *Biafra: Selected Speeches and Journals of Events*, Harper & Row, New York.
[561] Achebe, C. (2012) *There was a country: A personal History of Biafra*, Penguin, London, p. 128.

> cloths because they had not been issued with uniforms.[562]

After the Biafran invasion, Gowon re-organized his strategy preparatory to launching and offensive attack on Mid-West ("the Republic of Benin"). The Nigerian Federal troops successfully pushed back the Biafrans and arrived at "the Republic of Benin" in September, 1967. The retreating Biafran forces, according to several accounts, allegedly beat up a number of Mid-Westerners who they believed had served as saboteurs. Nigerian radio reports had claimed that the Biafrans shot a number of innocent civilians as they fled the advancing Federal forces.[563]

(a) Asaba Pogrom

After the capture of Benin from Biafran forces, the Federal troop advanced towards the River Niger, arriving at Asaba in early October, 1967. There are multiple versions of what transpired when the Federal troops arrived at Asaba. The fears of the people of the town before their arrival were realized. In few days, up to one thousand inhabitants of Asaba died as a result of the satanic cruelty of the Federal troops; the majority in a single and systematic pogrom of men and boys on October 7, 1967.[564]

In the evening of October 6, 1967 leaders of Asaba ordered town criers to summon every one to assemble to welcome the Federal troops and offer a pledge of loyalty to "one Nigeria". The people were asked to wear *akwa ocha*, their traditional ceremonial white clothing that signifies peace. The people in order to appease the Federal troops were matching, singing, drumming and chanting "one Nigeria". The expectation of the people of

[562] De St. Jones, *The Nigerian Civil War,* cited in Achebe, *ibid*.
[563] See generally: Achebe, *op. cit.,* pp. 132-133.
[564] Bird, S.E., and Ottaneli, F. (2011) "The History and Legacy of the Asaba, Nigeria Massacres" *African Studies Review,* Vol. 54, No. 3, p. 2.

Asaba was quickly dashed when the matchers were immediately flanked by Federal troops to prevent escape. Eye witnesses report that the soldiers selected males at random and executed them in full view of participant.[565] According to Peter Okonjo:

> Women who came with their sons were removing their skirts and gloves to disguise – so that their male children… are no longer men, but women. So when I saw this scenario going on and I felt something is wrong. If this women can disguise their children and my mother is not here, what do I do? And I looked at the whole place there is no where for escape.[566]

After the women had left the crowd, machine guns were revealed and mass shooting began at random. Ify Uraih, who was thirteen years old at that time, was at the disastrous welcoming parade with his father and three older brothers. Ify's narration is as follows:

> Some people broke loose and tried to run away. My brother was holding me by the hand; he released me and pushed me further into the crowd…they shot my brother in the back, he fell down and I saw blood coming out of his body. And then the rest of us…just fell down on top of each other. And they continued shooting…Host count of time, I don't know how long it took… After sometime there was silence. I stood up…my body was covered in blood, but I knew that I was safe. My father was lying not far away; his eyes were open but he was dead.[567]

Between five hundred and eight hundred people seem likely to have died in addition to many who have died the previous day. However, no precise number of casualties has been established in the Asaba massacre of the Nigerian Civil War. In1981, the Asaba Development Council compiled a list of names of 373 confirmed dead, but acknowledged

[565] Testimonies of John Kanayo, Hudson Odittah and Anyibuofu Onya-Onianwah, Ohaneze Petition, 1969, cited in Bird and Ottanelli, *ibid*., p. 10.
[566] Personal interview of Peter Okonyo, December 14, 2009. In Bird and Ottanalli, *ibid*. p. 10.
[567] Personal interview of Ify Uraih, October 9, 2009. In Bird and Ottanalli, *ibid*. pp. 10-11.

that many more were not included. Eye witness estimates range from 500 to more than 1,000.[568]

After the October 7, disaster worst killings stopped. However, Federal troops were said to remain in Asaba, waiting to cross the River Niger into Onitsha. Some remained in the houses of families whose men folk they have executed perpetrating individual violence, sexual assaults and rape.[569] Gertude Ogunkeye recounted how soldiers abducted a young woman for a week before they brought her back to her father, the father has this to say; "When she came back, she was a different girl…She couldn't talk to any body, she was very weepy… You see we come from a culture where talk like rape is a taboo, you know, a girl says she is raped, getting married is an impossibility".[570]

Just as mothers tried to disguise their sons from execution by dressing them in girls apparels on the October 7, 1967 pogrom, so do families try to protect their daughters by disguising them as old women. Victoria Nwanze in her early teens in 1967, recalled: "I carried my younger brother at the back, and my grandmother gave me her dress… so that I would look like an old woman. The same thing with my sister and cousin".[571] Martina Osaji also reported that her family protected her elder sister, who was then eighteen years old by dressing her in a grandmother like apparels to disguise her as an old woman.[572] According to Brid and Ottanalli, many other persons interviewed on the Asaba progrom spoke of rape, abduction and forcible marriage.[573] By the second week of October 1967, the people of Asaba had all vanished and taken refuge in near by bush, smaller towns and others fled for

[568] Bird and Ottanalli, i*bid*., p. 11.
[569] Personal interview of Medua Uraih, December 13, 2009. In Bird and Ottanalli, *ibid*., p. 12.
[570] Personal interview of Gertrude Ogunkeye, December 11, 2009. In Bird and Ottanalli, *ibid*., p. 12.
[571] Personal interview of Victoria Nwanze, December 16, 2009. In Bird and Ottanalli, *ibid*.
[572] Personal interview of Martina Osaji, October 4, 2011. In Bird and Ottanalli, *ibid*.
[573] Bird and Ottanalli, *op. cit.*, p. 25.

safety into the strong hold of Biafra.[574] It must however be stated that, the October 1967 Asaba massacre is virtually absent from published records and contemporary Nigerian news reports made no reference to the killings, only very limited coverage was said to be provided by international press.[575]

(b) Calabar Massacre

The Federal troop without much resistance took over Calabar in early 1968. "In an action reminiscent of Nazi policy of eradicating Jews throughout Europe just twenty years earlier, the Nigerian forces decided to purge the city of its Igbo inhabitants"[576] one thousand to two thousand Igbos were said to have been killed, most of whom were civilians.[577] It was equally reported that there were numerous other atrocities committed at the Calabar region by Nigerian Federal troops. *The Times of London* also reported that, "the Nigerian forces opened fire and murdered fourteen nurses and patients in the wards".[578] This incidence took place at Oji-River.[579] In Uyo and Okigwe numerous lives were said to have been lost to the Nigerian soldiers.[580] According to Achebe, after several weeks of sustained air, land and sea pounding, a period reportedly characterized by military atrocities – rape and looting. Port-Harcourt finally fell to the Nigerian Federal troops on May 12, 1968.[581]

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[574] *Ibid*., p. 12.
[575] *Ibid*., p. 13.
[576] Craig, D.T. (Rev.), Writing in *Presbyterian Record of December, 1967* (Scotland) cited in Achebe, *op. cit,* p. 137.
[577] Friendly, A. Jnr., "Pressure Rising in Nigeria to end the Civil War as Military Standoff Continues" *New York Times* January 14, 1968. Cited in Achebe, *ibid*.
[578] *The Times of London,* August 2, 1968.
[579] *Ibid*.
[580] *Ibid*.
[581] Achebe, *op. cit.,* p. 137.

Other Igbo cities like Aba, Owerri, Abakelike and Afikpo also fell to the Nigerian forces after recording good number of civilian Igbo casualties.[582]

(c) The Abagana Sector

The Biafran soldiers were certainly not spectators. The proclamation of the Eastern region of Nigeria as the Sovereign State of Biafra which brought about the existence of Biafra-"the land of the rising sun", necessitated the establishment of a formidable army to vehemently fight the Nigerian "intruders". The natural consequence of the proclamation of a Sovereign State is a sure emergence of an army which is a definite attribute of a recognized state. Biafra with her passionate quest for international recognition, did have one. She had an army irrespective of her glaring inadequacies and logistic depravity. She had an army that courageously fought foraciously to save her embryonic life from the Nigerian "vandals".

In numerous instances during the Nigerian Civil War, the Biafran soldiers had victorious outings, over powering the Nigerian forces. One of such victories was at the Abagana sector of the Biafran military formation. The Federal troop finally overcame the resistance of Biafran solders and broke through Onitsha on March 25, 1968. This was the second attempt after suffering great casualties at the hand of Biafran soldiers when they first attempted to do so. On March31, 1968 Colonel Murtala Mohammed quickly deployed a convoy of ninety six vehicles and four amoured cars to facilitate the plan of advancing and crushing the heart of Igbo land. On this plan of the Federal troops, Biafran intelligence was quick to respond, and Major Jonathan Uchendu capitalized on the intelligent report at his disposal to formulate a laudable counter-attack that sealed up the Abagana Road. Major Uchendu ordered his seven hundred men to lay ambush in the forest near Abagana waiting

[582] *Ibid*., pp. 137-140.

for the advancing large Nigerian troop, which was an amalgam of the first and second division of the Nigerian army. Major Uchendu's strategy was excellently successful. His troop plundered the troop led by Colonel Murtala Mohammed within one and half hours. The Nigerians suffered about five hundred casualties, while there was a very minimal loss of life on the Biafran side.[583] Nigerians who escaped were found wandering aimlessly in the bush. On this episode, the deceased Nigerian foremost literary icon Chinue Achebe related as follows:

> There were wide spread reports of atrocities perpetrated by angry Igbo villagers who captured this wandering solders. One particular harrowing report claimed that a mob of villagers cut their capture into pieces. I was an eye witness to one such (sic) angry blood frenzy of retaliation after a particularly tall and lanky solder – clearly a machinery from Chad or Mali wandered into an ambush of young men with matchets. His life less body was found mutilated on the road side in a matter of seconds. "Gifts" of poisoned water filled calabashes were left in strategic places throughout the deserted villages to "welcome" the thirsty federal troops.[584]

The aggression and stiff resistance put up by Biafran army was believed to be associated with the fresh supply of arms they got from Gabon[585] and France.[586] However, it was observed that throughout the period of war, the Igbo people were consistent in their charge that the Nigerians had a purposeful design to exterminate and extinct the Igbo people from the face of the earth. This genocidal calculation the Igbo's argued, was premised on a holy jihad proclaimed by mostly Islamic extremists in the Nigerian army.[587]

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[583] *Ibid*., p. 173.
[584] *Ibid*., p. 174.
[585] *The New York Times*, November 27, 1968; It was reported that the new arms reaching Biafra from what many believe are French sources have so stiffened Biafran persistence that there is little expectation of an early Federal victory – See generally Memorandum from American Jewish Congress, *op. cit.,* n. 26.
[586] *Ibid*.
[587] Achebe, *op. cit.,* n. 28, p. 219.

In response to the jihad postulation, Harold Wilson advanced a forceful argument to the effect that the issue of jihad by the Muslims against the Igbo race is watery because, according to him, only 1,000 of the 60,000 – 70,000 federal solders were Muslim Hausas from the North.[588]

A lot more journalistic and scholarly arguments had been advanced in favour of genocide. For instance, Dan Jacobs in his book *The Brutality of Nations*, uncovered a paragraph from an editorial in the *Washington Post* of July 2, 1969. It states; "One word describes the policy of the Nigerian military government towards secessionist Biafra: genocide. It is ugly and extreme but it is the only word which fits Nigerian's decision to stop the international committee of the Red Cross, and other relief agencies from flying food to Biafra".[589] Two Canadian Diplomats were said to have reported that genocide is in fact taking place against the Igbos in the civil war. One of them was said to state that, "anybody who says there is no evidence of genocide is either in the pay of Britain, or being a deliberate fool", after his visit to the war torn Eastern region.[590] Lloyd Ganison of the *New York Times* was also said to have reported the harrowing account of genocidal activity on the side of the Nigerian troop.[591]

Still on the assertion that the Nigerian Civil War constitutes genocide against the Igbo people, an American historian was said to have observed as follows:

> The terrible tragedy of the people of Biafra has now assumed catastrophic dimension. Starvation is now claiming the lives of an estimated 6,000 Igbo tribesmen, most of them children. If adequate food is not delivered to the people in the immediate future

[588] Memorandum from American Jewish Congress, *op. cit.*
[589] Jacobs, D., *The Brutality of Nations,* cited in Achebe, *op. cit.*, p. 230.
[590] Memorandum from American Jewish Congress, *op. cit.*
[591] *Ibid.*

> hundreds of thousands of human beings will die of hunger.[592]

Commenting on the civil war situation in Nigeria, American President Richard Nixon in his campaign speech on September 10, 1968, states:

> Until now efforts to relieve Biafran people have been thwarted by the desire of the central government of Nigeria to pursue total and unconditional victory… But genocide is what is taking place right now – and starvation is the grim reaper… The destruction of an entire people is an immoral objective of wars. It can never be justified; it can never be condoned.[593]

Many more writers, journalists, scholars and commentators hold firmly to the assertion that the nature of the Nigerian Civil War amounts to genocide against the Igbo people of Eastern Nigeria. However, some veterans, commentators and pictorial situations and accounts tends to suggest otherwise.

In a recent study conducted on the Nigerian Civil War, one Dr. Augustine Macaulay Ayeni, a civil war veteran, who fought in 124 Battalion of the First Division of the Nigerian Army, observed as follows:

> During the war every soldier from the lowest recruit to the general was given a Code of Conduct of war. The rules were followed strictly. If a place is captured, the commander will ask the populace to come out and food eaten by solders will be used to feed those people…Those of the civilians sick will be taken to MRS[594] for treatment.[595]

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[592] Schlesinger, A.M. (1983) *Dynamics of World Power: A Documentary History of U.S. Foreign Policy, 1945-1973*, Chelsea House, New York, p. 41.
[593] *Ibid.*
[594] M.R.S. means Military Reception Station – It is a military clinic facility.
[595] Personal interview of Dr. Augustine Macaulay Ayeni, in a study on the Nigerian Civil War, conducted by Network for National Tolerance and Peaceful Co-existence (NNTPC) on 4th day of March, 2013.

On the assertion that, the nature of engagement in the Nigerian Civil War constitutes genocide of the Igbo nation, Dr. Ayeni has this to say:

> Well, every body has right to his opinion, but basically, from my practical experience and the meaning of genocide, I will not agree with such an assertion, because I saw one on one how soldiers in fact behaved during the war. Between Nigeria soldiers and even the civilians. There are some instances where Biafran solders and Nigeria solders interact, smoking and drinking together, sometimes… More so, as most of them were members of Nigerian army before…I will not agree with such a conclusion that it was genocide.[596]

Commenting further on the Code of Conduct, which embodies the rules of engagement in combat; Dr. Ayeni, emphasized that the Code of Conduct which prohibits certain conducts in war was followed strictly. He stated that, any act of violation of the Code of Conduct is a deviant behaviour, which is met with strict punishment. He further stated that, he could remember instances where Nigerian soldiers who shot Biafran soldiers that surrendered were charged, tried, condemned and shot by firing squad.[597] On this issue Dr. Ayeni concluded thus; "if Nigerian army actually followed such steps, how can some body write and say it was genocide". He further stated that, when Nigeria soldiers are coming to an area, there is always an announcement to the people of that area, to remain inside lie down under their bed or a protective wall to avoid being harmed by wandering bullets.[598] Dr. Ayeni conclusively stated that the motive of the civil war is unification of the country, which he said brought about the much celebrated slogan; "keeping Nigeria one is a task that must be done".

[596] *Ibid.*
[597] *Ibid.*
[598] *Ibid.*

Another civil war veteran also interviewed in the said study is Idris Umar (MWO)[599] Rtd. He joined the military in 1967. He was of the Second Division of the Nigeria Army. He emphasized the strict adherence to the Code of Conduct by Nigerian soldiers during the civil war. He stated that the Code of Conduct enjoins soldiers not to kill until their own life is in danger. He further corroborated Dr. Ayeni's statement when, he narrated that as a Company Sergeant – Major, he usually ask the civilians and captured Biafran solders to line up with his solders to take food.[600] MWO Umar, during the interview, consistently reiterated the fact that, the civil war was a fight between brothers, with the motive of bringing back home a straying brother.[601] In his words, he states: "We don't want our brothers to go astray, that is why we fought back to see that we bring them back. They are trying to go astray, that is why we fought to bring them back".[602]

Capt. Ojotu (Rtd.) also fought the civil war. He corroborated most of the statement of Dr. Ayeni and MWO Umar (Rtd.). He observed that, the Nigerian Civil War was fought with the sole aim of bringing the Igbos back and nothing more.[603] He equally admitted the existence of a Code of Conduct which enjoins all solders on the Nigerian side not to kill indiscriminately in the cause of war; that the Code of Conduct often serve as a reminder to the soldiers that the Igbos are not real enemies in its strict meaning.[604]

It was contended that even proponents of Biafra for the most part, acknowledged that, it is not the official policy of Nigerian government to commit genocide against the

[599] M.W.O. means Master Warrant Officer.
[600] Personal interview of MWO Idris Umar (Rtd.) in a recent study conducted by Network for National Tolerance and Peaceful Co-existence (NNTPC) 4th day of March, 2013.
[601] *Ibid.*
[602] *Ibid.*
[603] Personal interview of Capt. Ojotu (Rtd.) conducted by NNTPC 5th March, 2013.
[604] *Ibid.*

Igbos.[605] As stated earlier, they however, contended that some over zealous local military commanders, intended and indeed tried to wipe out as many Igbos as possible;[606] stating that some Muslim commanders regard the war as a holy war (Jihad) against the Igbo people. An international military observer group, on the other hand reported that there was no evidence of intent on the part of Nigerian troops to wipe out the Igbo people.[607] At the time of the civil war, it was contended that, 30,000 Igbo people still lived in Lagos, and over 500,000 still stayed in the Mid-West, with some, still holding senior posts in Federal Government.[608] Some British officials were said to have seen abandoned property committees and reconstruction and rehabilitation committees in many states, and that those committees were administering Igbo peoples' houses and shops, that were abandoned in the hope that the Igbos will return.[609] The question that naturally flows from the foregoing is that, can such an act be found in a genocide heart that pursues a state policy of annihilation?

As stated earlier in this chapter, the Biafrans were ready for what they consider as a war of liberation. They were not like oppressed and helpless people at the mercy of the Federal troops. They fought fiercely; which actually caused the Federal troops unprecedented loss in human lives. Ojukwu's speech at the early stage of the war, firmly buttresses this assertion. Ojukwu states:

> In spite of initial handicaps, our brave and gallant forces on land, air and sea, have not only held their own but are giving the enemy exactly what they deserve. The initiative has now passed permanently into our hands. The daily toll on enemy lives has been heavy and sometime staggering. That the enemy has not called off aggression in the face of their heavy losses in human

[605] Memorandum from American Jewish Congress, *op. cit.*
[606] *Ibid.*
[607] New York Times, October 23, 1968.
[608] Memorandum from American Jewish Congress, *op. cit.*
[609] *Ibid.*

> lives is another evidence of their utter disregard for those lives…We have destroyed the enemy in Bonny and liberated that ancient and historic island. The remnants of the enemy in the Enugu sector are being systematically destroyed. The same is true of Nkalagu sector. In the Ogoja sector our advances and successes have been steady and consistent. In the Calabar sector, the enemy is being starved to death….[610]

In a rather cool and firm manner, the initial speech of Gowon at the early stages of the civil war was devoid of egocentrism and extreme pride of gallantry, as Ojukwu's speech. He only congratulated the solders and reiterated the need for them to consistently abide by the code of conduct and their oath as soldiers, clearly restating the objective of the war among other issues, he says:

> I congratulate you, members of the armed forces and the police, for the magnificent discipline which you have shown so far. You must continue to conduct yourselves strictly according to your code of conduct and oath as soldiers. The great cause for which we are fighting demands this of all of us. The objective of the current operations to crush the rebellion of Ojukwu and those whom he has blackmailed and misled…Our detractors have tried to confuse issues. Some of them have suggested that we are fighting a religious war – a war of "Federal Moslems" against "Christian rebels". This is non-sense. The entire world should know by now that more than sixty percent of the officers and men of the Nigerian Armed Forces are Christians and not Moslems…Let the malicious propaganda amongst our detractors cease. Let the rebels stop pushing innocent Igbo youths and others in their thousands to a senseless untimely death. I and my Government guarantee the Ibos (sic) a future of absolute equality with all the other ethnic groups in this country…[611]

[610] Faruk, U. (2011) *The Victors and Vanquished of the Nigerian Civil War 1967-1970: Triumph of Truth and Valour over Greed and Ambition,* Ahmadu Bello University Press, Limited, Zaria, pp. 186-187.
[611] *Ibid*., pp. 188-189.

From the afore-cited speeches of Ojukwu and Gowon at the initial stage of the civil war, it is instructive to note that, Ojukwu's statement was a forceful assertion and glorification of the gallantry and exploit of the Biafran soldiers against the Federal troops which he ceaselessly referred to as "enemy". While the statement of Gowon restated the determination of the Federal Government to keep a united Nigeria, with a promise to keep the cherished place of the Igbos in Nigerian politics. Unlike Ojukwu, Gowon used the word "detractors" in referring to the Biafran soldiers and not enemies. It is humbly submitted that, the choice of the word "detractors" by Gowon instead of "enemies" may just be a pointer to the fact of the Nigerian Government disposition on the war, which she sees herself as not fighting a real enemy but a straying brother. This mentality of the Federal Government might be the reason why all captured Igbos were found alive at Federal war camps at the end of the war while the perception of Nigerians by Biafran soldiers might have informed the total destruction of all except three of the hundreds of Nigerian solders captured by Biafran.[612]

The foregoing, gives an overview of the nature of the crisis and engagements of the Nigerian Civil War. The appreciation of this crisis situation in the light of the crime of genocide can only suffice after a consideration of the law of genocide.

4.2.2.2 The Law of Genocide

The legal prohibition of some forms of genocide such as wars of annihilation, developed ages before their codification in Genocide Convention of 1948 and the

[612] A report by General Adeyinka Adebayo after the war, revealed the gory details of inhuman treatment of captured Nigerian troops (especially Northerners) in the hand of their Igbo captors. The report revealed that out of the captured hundreds of Northern troops and other non-Northern soldiers, only THREE (3) were found alive in all the detention camps run by Igbos. The three were (1) Commissioner of Police Mr. Joseph Adeola an indigene of the Mid West, (2) Mr. Ibekwe – also Police Commissioner an Iika Igbo also from the Mid West, and (3) Another Mid Westerner. This is contrary to what is obtained in the Federal war camps after the war, where ALL captured Igbo war rebels were found alive and intact – See: Faruk, *Ibid*., p. v.

subsequent Rome Statute of International Criminal Court. These aged long prohibitions were clothed in treaties and customary rules of international law.[613] Even though, as it were, the term genocide was unknown, certain form of acts, which could be described as genocide in present days, were violations of customary international law, which prohibits such heinous acts.[614]

However, the crime of genocide which has ravaged humanity for as long as human history was finally codified in an International Instrument called the Convention for the Prevention and Punishment of the Crime of Genocide (CPPCG) 1948;[615] which became operational in 1951. The provision of this Convention was subsequently re-echoed in the same wordings in other instruments such as the Rome Statute of International Criminal Court (ICC);[616] Statute of International Criminal Tribunal for the former Yugoslavia (ICTY)[617] and Statute of International Criminal Tribunal for Rwanda (ICTR).[618] These are the extant laws regulating genocide in international law. It must however be stated that, the preemptory nature of the crime as a customary rule of international law may ignite the prosecution of such a crime even if a state is not signatory to the extanct instruments.[619]

The law of genocide therefore provides:

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[613] Anderson, R.J. (2005) "Redressing Colonial Genocide: The Hero's Cause of Action against Germany, *California Law Review,* Vol. 93, p. 1158.

[614] Bluntchli, J.C., Das Marderne Volkorrecht Der Civilisiritin Staten (1878) 299-300 cited in Anderson, *Ibid*., p. 1169.

[615] Adopted by Resolution 260(III) A of the U.N. General Assembly on 9th December, 1948, which became operational on 12th January, 1951.

[616] Art. 6, Rome Statute of ICC.

[617] Art. 4(2) Statute of ICTY.

[618] Art. 2(2) Statute of ICTR.

[619] Umozurike, U.O., "Human Rights and Democracy in the 21st Century – The African Challenges" in Ladan, M.T. (ed.) (1999) *Law, Human Rights and the Administration of Justice in Nigeria* (Zaria: A.B.U Press Limited, Zaria, p. 43. It was observed that, a state may not take part in treaty, but it may find that certain matters covered by the treaty are already part of customary rules of international law. A state that has not ratified or acceded to the Genocide Convention of 1948 will find no succour in committing genocide, because it is bound by the principle of the Convention which has become part of customary international law.

> Genocide means any of the following acts committed with intent to destroy, in whole or in part a national, ethnical, racial or religious group as such:
> (a) killing members of the group;
> (b) causing harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent birth within the group; and
> (e) forcibly transferring children of the group to another group.

4.2.3 Resolving the Question of Genocide in the Nigerian Civil War

In resolving this highly debatable question which has over the years adored pages of literature from a strict legal perspective; we shall formulate two fundamental issues for determination, which we shall set out to determine based on our examination and assessment of the nature of the crises in the Nigerian Civil War.

Issue 1

Whether by the nature and character of military engagement between the parties, genocide would be said to have been perpetrated against the Igbo people.

Issue 2

Whether the evidence of the nature and circumstances of the civil war crises satisfies the requisite *actus reus* and *mens rea* of genocide.

On Issue 1, Zwaan, rightly observed that, nearly all authors in the field of genocide studies are unanimous on the fact that genocide has to be carefully distinguished from war and civil war. War in modern sense usually entails a violent conflict between two or more sovereign states, primarily fought between their armed forces which may bring about a

number of military casualties and a large number of civilian casualties. Military casualties and civilian victims of war are not considered as victims of genocidal crimes. The same is true of civil war too.[620] Z'waan further contended that civil war may also lead to considerable number of casualties amongst the fighting forces of the parties involved and may even bring about many civilian deaths, either directly or indirectly or through atrocities related to military action, but again, the victims are usually not seen as victims of genocide.[621] Furthermore, it was posited that what distinguished genocidal situation in principle from situation of war and civil war is that during genocides one of the parties, that is the perpetrator group is armed and organized to use force which the other party, that is the victim group, is not armed or organized to use force. In genocidal situations, the means of violence and means of organization are extremely unevenly distributed, and overwhelmingly concentrated on the side of the perpetrators.[622] Genocide is therefore not war nor civil war, it is a form of one sided killing; where the victims are essentially defenceless and helpless against the powers of the persecutors, even when they do not pose any threat, they are targeted for persecution, forcible uprooting, deportation and potential and actual destruction.[623] However, even the Genocide Convention in Article I states that genocide could be committed in time of war or peace, the type of war envisaged is that of extreme defencelessness and where the means of violence are extremely unevenly distributed.

[620] Zwaan, T. (2003) "On the Aetiology and Genesis of Genocide and Mass Crimes Targeting Specific Groups", *Centre for Holocaust and Genocide Studies University of Amsterdam/Roofal Netherland Academy of Arts and Science,* Amsterdam, pp. 13-14, para. 14.
[621] *Ibid*., p. 14, para. 14.
[622] *Ibid*.
[623] *Ibid*.

This researcher agrees in totality with the foregoing postulations, which Zwaan rightly stated as the unanimous position of most scholars of genocide studies. From the above stand point, a lot of questions come to mind, viz:

(a) Are the Igbos (Biafrans) essentially defenceless and helpless against the Nigerian Federal troops?

(b) Are the Igbos (Biafrans) unorganized and unarmed?

(c) Are the means of violence extremely unevenly distributed and overwhelmingly concentrated on the side of the Nigeria Federal troops?

(d) Is the Nigerian civil war situation an entirely one sided killing of the Igbos?

In answering these questions, it is instructive to note that Biafra had an army that fought fiercely, which according to Ojukwu in his eloquent speech at the early stages of the civil war commended the army for fighting on the sea, air and land which he (Ojukwu) stated has caused the enemies very high and sometime staggering death toll, at a lot of sectors of the Biafran military formation. Also worthy of note is the systematic and highly technical ambush led by Major Jonathan Uchendu at Abagana sector, which saw to almost a total annihilation of a battalion of the Nigerian federal troop.

It should also be remembered, that the Biafran soldiers captured the Mid-Western region and made an offensive crackdown towards Ore with the passionate quest to "liberate" Lagos and capture "Jack" Gowon.[624]

It was equally on record, that some countries recognize the state of Biafra and supply of weapons started coming into Biafra from such countries, with France as the flagship.[625] This was believed to have fortified Biafra and strengthened her resistance.

[624] Achebe, *op. cit.,* p. 132, Ojukwu himself confirmed this when he said: "…I appoint Colonel Banjo to lead Biafran forces west across the Niger to Lagos… See: Ojukwu, E.O. (1989) *Because I am involved*, Spectrum Books Limited, Ibadan, p. x.

Based on the above, it is therefore safe to state that the Biafrans had an organized army that fought gallantly during the civil war, which led to the death of numerous Nigerian soldiers. Therefore the killings during the civil war can not be said to be one sided as the death on the part of the parties if considered in relation to the population will be enormous on the part of the Federal troop. Ojukwu himself had echoed this reality in his speech at the early stages of the war as earlier observed.

On Issue 2

The law of genocide examined earlier stipulates series of acts (a) – (e) as constituting the physical element of the crime of genocide, otherwise referred to as the *actus reus* of the crime. These acts that constitutes the physical elements if done to a group protected by the law of genocide with the requisite mental element or *mens rea*, may amount to genocide. The groups sought to be protected are national, ethnical, racial and religious group. The mental element of the crime of genocide is the special intent (*Dolus specialis*) to destroy any of the stipulated group in whole or in part. While the physical element as stated earlier are those series of act (a) – (e) viz:

(a) Killing members of the group;

(b) Causing serious bodily and mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent birth within the group; and

(e) Forcibly transferring children of the group to another.

The pertinent question and the basic issue sought to be determined at this point is whether the physical element of genocide enumerated above and the requisite mental

[625] *Ibid.*

element can find a place in the crisis situation of the Nigerian civil war to establish a claim of genocide against the Igbo people of South-eastern region of Nigeria.

4.2.3.1 *Protected Group*

It is without any doubt that the Igbo people as a collectivity could rightly fall within the groups protected by the Genocide Convention and other instruments on genocide. This is because the Igbo people could rightly be described as an ethnic group. Beyond ethnic group, they could even rightly be described in the context of Biafra as a national group, which is still a group that enjoys protection by the extanct law of genocide. Though the declaration of the state of Biafra might be seen by the Nigerian Government as illegal, a contravention of her constitution, and a crime against the state (treasonable felony); however, it must be stated that, the doctrine of recognition of state in international law stipulates that, the recognition of a state is an individual and independent act of the recognizing state.[626] Therefore, being recognized by some countries and haven satisfied the basic requirement of statehood in international law,[627] the Republic of Biafra within the thirty months of her existence could be said to be a national group. It is therefore very glaring, that the Igbo people of Eastern Nigeria fall within the group(s) envisaged by Article II of the Genocide Convention of 1948 and other relevant provisions of other international instruments on genocide.

4.2.3.2 *Physical Element (actus reus)*

[626] Ladan, M.T. (2008) *Material and Cases in Public International Law,* Ahmadu Bello University Press, Zaria, p. 32.
[627] For the Requirement of Statehood under International Law, see Generally: Ladan, *ibid.*

As earlier stated, the physical elements of the crime of genocide are the different acts specifically stated in Genocide Convention[628] and other relevant instruments on genocide.[629] These acts (a) – (e) is what constitutes the *actus reus* of the crime of genocide. To amount to genocide, it is not the requirement that the series of acts (a) – (e) conjunctively occur. The occurrence of one of the acts disjunctively, with the requisite mental element may amount to genocide.

In relation to Nigeria civil war crises situation, it can conclusively be said that killing members of the Igbo ethnic group actually took place. This is certainly not contentious in civil wars; even though it has been established that the killings were on both sides of the warring parties, since the Federal troop too recorded high toll of death. It will equally be true of the Nigerian civil war to say that serious bodily or mental harm has been caused to members of the Igbo ethnic group during the crises situation of the civil war. What may be debatable is the series of acts (a) – (e), is (c) Deliberate inflicting on members of the Igbo group conditions of life calculated to bring about their physical destruction in whole or in part; (d) Imposing measures intended to prevent birth within the Igbo group; and(e) Forcibly transferring children of the Igbo group to another. These later acts are said to be highly debatable because, there are no firm and conclusive evidence of their existence against the Igbo people during the civil war available to this researcher. However, their non existence or otherwise is not fatal to establishing the existence of the physical element of genocide, since the fact of killing members of the Igbo group alone, could disjunctively establish the existence of the *actus reus* of genocide if it crystallizes from a blameworthy mind with the required intent.

[628] Art. II, para. (a) – (e).
[629] Art. 6 Rome Statute of ICC; Art. 4(2) Statute of ICTY and Art. 2(2) Statute of ICTR.

Flowing from the foregoing analysis, it is very clear that, acts constituting the *actus reus* or physical element of genocide existed against the Igbo people in the Nigerian civil war crises. The critical determinant question is – whether these physical acts, that brought about prohibited results were product of special intent pursuant to a genocidal policy of Nigerian Federal Government.

4.2.3.3 *Mental Element (mens rea)*

The mental element of the crime of genocide envisaged by the Genocide Convention of 1948 and other related international instruments is the "intent" to destroy in whole or in part, a national, ethnical, racial or religious group. In the absence of the required intent, whatever degree of atrocity constitutes an act, and however similar it might be to the act described in the convention and other relevant laws, the act will still not be genocide.[630] Consequently, all the acts stated as constituting the *actus reus* of genocide cannot ignite criminal responsibility for genocide, except such acts were accompanied with the requisite genocidal intent.

The intent requirement is different from the usual intent or general intent requirement for crimes known as *dolus.* In genocide, special intent called *dolus specialis* is required. This type of intent is said to have the component of "knowledge" and "intent".[631] Intent being of the mind is very difficult to ascertain, that is why the *Akayesu* Trial Chamber observed that, "intent is a mental factor which is difficult, even impossible to

[630] Alagande, A.M. (2008) "*Prosecutor vs. Krstic Transversing* the contours of the *mens rea* of genocide", Vol. 1, No. 2, A.B.U.J.P.I.L p. 93. See also: *Prosecutor vs. Akayesu* (case No. ICTR – 96-4-T), Judgment of 2nd September, 1998, para. 519.
[631] Art. 30 Rome Statute of ICC.

determine",[632] stating further that, short of confession of the accused, intent can only be inferred from number of presumption and circumstances.[633] It is equally important to establish the existence of a planned policy in pursuit of genocide, which may be indicative of genocidal intent. However, a Trial Chamber of Rwandan Tribunal rightly observed that, even though a specific plan to destroy does not constitute an element of genocide, it will seem that it is not possible to carryout genocide without a planned policy or organization.[634] Therefore the existence of such a plan policy will be a strong indicator of the presence of the special intent requirement necessary for the crime of genocide.[635]

In relation to Nigerian Civil War, the crucial question is whether the Nigerian Federal Government led by Yakubu Gowon ha a special intent to pursue a genocidal policy against the Igbo people. In resolving this question, it is very important to review some vital indices of the crises already examined in this chapter while considering the nature of the war.

Dr. Augustine Ayeni and Master Warrant Officer (MWO) Umar (Rtd) in a study conducted by NNTPC stated that all soldiers were given a code of conduct by the military authority which enjoins soldiers to abide by the code of conduct in their military operations during the civil war.[636] Dr. Ayeni emphatically stated that the code of conduct was followed strictly. He said the code of conduct prohibits all form of inhuman conduct in combat. On this, MWO Umar (Rtd.) said the code of conduct categorically stated that they should not kill until they are at the danger of being killed.[637] Still on the code of conduct, Dr. Ayeni observed that, the violation of the code of conduct, which prohibits inhumane

[632] *Prosecutor vs. Akayesu, op. cit.,* para. 523.
[633] *Ibid.*
[634] *Ibid.*
[635] *Ibid.*
[636]Personal interview, Network for National Tolerance and Peaceful Co-existence (NNTPC), *op. cit.*
[637] Personal interview, Network for National Tolerance and Peaceful Co-existence (NNTPC), *op. cit.*

treatment of civilians and prisoners of war, is treated as a punishable deviant behaviour. He re-called an incident where a Nigerian soldier shot and killed a harmless pregnant Igbo woman and the soldier was charged, court martial, found guilty and equally shot to death.[638]

General Gowon's speech at the early stages of the civil war was not like the speech of Ojukwu which hailed the gallantry and exploit of the Biafran soldiers in destroying the enemies on the air, on the sea and on the land. Gowon in his speech consciously congratulated the Nigerian soldiers and the police and urge them to continue conducting themselves strictly in accordance to the code of conduct and their calling. The speech emphasized the objective of the civil war as:

(a) Preservation of the territorial integrity of Nigeria;

(b) Ensuring the equality of all ethnic groups in Nigeria;

(c) To strengthen the new administrative structure of Nigeria against the tendencies of domination;

(d) To create internal condition of stability and freedom of movement of persons and goods necessary for the most rapid economic and social development of Nigeria; and

(e) To win the respect of the outside world for ourselves and for the African and its ability to order its own affairs.[639]

Gowon in his speech also stated the conditions for lasting peace and cessation of military operations as; "First, the rebels must renounce secession… Second, the rebel regime must accept the present administrative structure of a Federal Union of Nigeria

[638] Personal interview, Network for National Tolerance and Peaceful Co-existence (NNTPC), *op. cit.*
[639] Faruk, *op. cit.*, pp. 188-190.

comprising of twelve states… Third, a body of men must come forward from the East Central state willing to work for national reconciliation, peace and reconstruction…"[640]

It is important to note that, Gowon in the speech under review promised the Igbo people a future of absolute equality with all the other ethnic groups in Nigeria.[641] Equally worthy of note and emphasis is the fact that about one million Igbo people were living in Lagos and Mid-West during the civil war, and there was no evidence of their being targeted for annihilation.[642] It is equally instructive for the determination of the question of genocide in the Nigerian civil war to recall the fact that, at the end of the civil war all captured Igbo rebels in Federal troop war camps were found alive and released while at the Biafran camp hundreds of Federal soldiers caught were killed except three who have some Igbo affinity.[643] Gowon's declaration of *no victor no Vanquish*, and the subsequent policy of Reconciliation, Rehabilitation and Reconstruction; and the assertion by British observers that some states had committees watching over the properties of Igbo people and managing the properties in expectation of their return, speaks volumes about the intention of Nigerian Federal Government.

In the face of all these indices of the crises, code of conduct, speeches and policy pronouncements; will the Federal Government of Nigeria be said to have pursued genocidal policy against the Igbo people of South Eastern Nigeria during the Nigerian Civil War? It is therefore apt to conclude that the Nigerian Federal Government did not pursue a genocidal policy against the Igbo people; neither did she possess the requisite mental element for the crime of genocide. Consequently, it is humbly posited that the Nigerian civil war crises

[640] *Ibid.*
[641] *Ibid.*
[642] Memorandum from American Jewish Congress, *op. cit.*
[643] Faruk, *op. cit.* p. v.

situation between 1967 to 1970, may not suffice as genocide in the strict legal sense, but pockets of war crimes and crimes against humanity might have been committed.

4.2 The Odi Massacre

4.3.1 The Odi People

Odi is a very small community in the present day Bayelsa State of Nigeria. The Odi people speak Ijaw language as their native language, like many other communities around the Niger Delta area. The Ijaw speaking people cut across state boundaries in Nigeria. They are found in Rivers State, Delta State, Bayelsa State, Cross River State and even some part of Ondo State in South-Western Nigeria. The Ijaw people particularly occupy the South-Southern region of Nigeria with the Efik and Ibibio people as their neighbours.[644] Because Odi is a river-rine community of Ijaw people, the people of Odi community are predominantly fishermen and subsistence farmers.

4.3.2 Background to the Odi Massacre

Some lawless elements who were political thugs, that worked for the victory of the ruling Peoples Democratic Party (PDP) in the 1998 to early 1999,local, state and federal elections conducted by the military government of General Abdulsalam Abubakar, became unemployed after the elections as they were dumped by their benefactors after assuming their elective offices. These political thugs resorted to criminality, harassing and terrorizing the law abiding people of Yenagoa, the Capital of Bayelsa State. Around September 1999, they were chased away from their base in Yenagoa by a combined force of soldiers and mobile policemen. The hoodlums shifted their base to Odi, the country home of their leader Ken Niweigha. At Odi, these criminals continued their atrocities unabated. At about the

[644] Uwechue, *op. cit.*, p. 1447.

same time, ethnic violence erupted between Ijaw residence of Ajegunle Lagos and a faction of the Yoruba Oddua Peoples Congress (OPC). Niweigha and his group of hoodlums took advantage of that crisis, using the Ijaw Youth Congress (IYC) slogans for resource control, environmental protection and political autonomy to mobilize other Ijaw youths for battle in Lagos.[645]

On November 4, 1999, seven policemen were detailed to Odi to investigate the rumour about Ijaw Youth Congress (IYC) preparation for an onslaught in Lagos to fight for their people. The said policemen were said to have been held hostage and later declared missing. The policemen were actually killed by their captors. On November 10, 1999, President Olusegun Obasanjo wrote a high worded letter of warning, on the eminent danger of a declaration of state of emergency in Bayelsa State; urging the Governor to ensure that the perpetrators of the wicked act are brought to justice within 14 days. Four days to the expiration of the ultimatum, President Obasanjo was said to have ordered killer soldiers into Odi. Thereafter, it was a heavy down pour of horror against the inhabitants of Odi.[646]

The Environmental Right Action a Non-Governmental Organization (NGO) lamented; "it was a mission to wipe out the community from the face of the earth. Nothing was spared".[647] Another NGO, the Civil Society Mission who visited the scene observed *inter alia*; "the action of the soldiers at Odi amounted to genocide".[648] The publication of Environmental Right Action in 2002 styled the situation as; "…images of Odi Genocide".[649] A lot more observers, commentators and journalists have often referred to the Odi massacre by the Obasanjo led Federal Government as genocide against the Odi people.

[645] A Blanket of Silence: Images of Odi Massacre. A Report of Environmental Right Action, 2002, p. 7.
[646] *Ibid.*
[647] *Ibid.*
[648] *Ibid.*
[649] *Ibid.*

The fact that mass atrocities were committed in Odi by the Nigerian troop is not in contention. The question is whether the atrocities amount to genocide as described in international criminal law. To arrive at a finding in this regard, the nature of the Odi massacre must be considered in relation to the stipulation of the law of genocide in international law.

4.3.3 Nature of Odi Massacre

To perpetrate the massacre, the Nigerian army was said to have assembled the following weapons, which were effectively utilized, 27 vehicles, 4 armoured personnel carriers i.e. APC's mounted machine guns, Three 8mm mortar guns which were used to shell Odi town between 2pm of November 20, 1999 and 6pm of November 21, 1999, 2 pieces of 105mm Howitzer Artillery guns,[650] and 2,000 troops effectively armed with thousand personal rifles.

An umbrella body called social action, which comprises of numerous NGO's,[651] visited Odi on December 8, 1999. They testified thus:

> We saw so many corpses by the roadside as we drove along. The body of an old man, still clutching firmly to a copy of the Holy Bible, lay decomposing in a pond behind the Anglican Church, a chilly testimony to the scorched – earth objective of the invading troops contrary to the officially declared objective of the mission: to arrest the hoodlums who allegedly killed some policemen. So complete was the destruction that crops were razed yam barns were burnt, garri processing plants were willfully wrecked, canoes were set ablaze and every house in the entire community, with exception of the First Bank, a Community Health

[650] *Ibid.*

[651] E.g. Civil Liberty Organization; Environmental Right Action; Ijaw Youth Movement; Niger Delta Women for Justice; Ijaw Council for Human Rights; Ikwene Solidarity Congress; Journalists for Democratic Rights; Pan African Youth Movement; Nigerian Institute of Human Rights; Human Rights Law Service; Committee for Defence of Human Rights; Institute of Human Rights and Humanitarian Law etc.

> Centre and the Anglican Church were burnt down. No aspect of the community existence was spared. Places of worship including other sacred places including sacred forest and groves, churches, ancestral shrines and burial places were demolished. We received reports that soldiers looted many of the buildings and made away with the valuables before setting them ablaze. A yet-to-be established number of persons arrested and taken away by the soldiers to military barracks in Elele, Port Harcourt and Warri, were yet to be seen two weeks after the operation. We saw no single livestock, poultry or other domestic animals except a stray cat. The communities 60,000 inhabitants have fled into the forest or been arrested or killed…[652]

These were the observation of the NGO's on the Odi massacre. It glaringly shows that it was not an operation in pursuit of the hoodlums that killed the policemen, but a forceful military aggression against the Odi people by the Nigerian army troops. The question that has been consistently asked is – why? Should a community of over 60,000 people suffer such fate for the criminal activities of few hoodlums, who have equally tormented the people of Odi by their criminal activities? Summary of the testimony of some of the victims will not be out of place.

Mrs. Irurua, a native of Odi was one of the numerous persons affected by the massacre. She states:

> I was in my house with my 90 years old husband when the soldiers came. They had already st (sic) fire around the house before I noticed their presence…. As we came out, I was pushed aside and thereafter, they shot my husband. The soldiers then took me to a house where I met some other elderly people who were being detained. I told them that the soldiers have killed my husband. The leader of the soldiers said his men killed no body. … I saw the man who killed my husband passing by and I drew the attention of the commander of the soldiers to this… But the commander said no

[652] A Blanket of Silence, *op. cit.,* p. 8.

> body killed my husband. But I am sure that the man that killed my husband was the one I identified. But the commander said the man should go away so he went away.
> The following day I complained again that they have killed my husband and left his corpse in the sun. For three days I pleaded with the soldiers before they eventually agreed to bury him. Even then, he was not properly buried, they merely dug about one foot and put the corpse there…[653]

Mrs. Irurua narrated her ordeal further to the effect that, since there were no young men left in the village she had to go in company of three other women to put more earth on the shallow grave of her husband so that his head may be covered.[654]

Worthy of note in Mrs. Irurua'a narration was the attitude of the military commander when she complained that soldiers have killed her husband. The non-chalance of the military commander and mockery of her complain and his disposition when she identified the soldier that killed her husband is only indicative of pre-meditated action. It shows that the soldiers were actually acting as they were instructed to do. So that was why there was no sanction for the supposed killer or any inquiry as to the claim of Mrs. Irurua, than an instruction to go back to work, possibly with a commander tone.

Another eye witness to the massacre named Isidiowei Asamaowei spoke to Environmental Right Action (ERA) in Yenagoa where he was taking refuge in December 1999. His own testimony gave a clear picture of shelling, burning of house and killings at

[653] Personal interview of Mrs. Irurua, a native of Odi, conducted by Environmental Right Action (ERA) in December, 1999; See: ERA Report, *op. cit.,* p. 14.
[654] *Ibid*.

Odi by the Nigerian soldiers. He recounted how he amongst others escaped from Odi to Ekpetiama floating on plantain stem with the cover of leaves and grass in the river.[655]

Mr. Jones Lugbo spoke to ERA in Yenagoa on December 15, 1999. His testimony was to the effect that, they received information about the impending attack on Odi in the afternoon of November 20, 1999 and that just immediately thereafter they started receiving artillery bombardments. In the process five "Asawana" boys were killed. Their heads cut off and their bodies mutilated. That the shelling and bombardments continued until 5am the next morning, when soldiers entered the city and started destroying all available buildings.[656] He further stated as follow; ''…We all ran into the bush we were peeping from there. Presently in Odi you can only pick the First Bank office and the Police post. Even King Bolou, the King of Odi was shot in the leg simply because he protested against the destruction of the buildings…''[657]

Tombara Gagariga another native of Odi whose mother vanished during the incident made statement to the effect that, they brought back their mother home after her 70th birthday party in October, just to come back and find out that their mother is no where to be found and the man living with her was said to have ran into the bush and had not returned.[658] Gagariga further stated:

> …A lot of our things were looted because we can not see their traces in the ashes of the things burnt down. Our television sets, video sets, our boxes (some of them are fire proof), our cloths, everything has been

[655] Personal interview of Isidiawei Asamaowei a native of Odi, conducted by ERA in December, 1999. See: ERA Report, *op. cit.,* p. 15.
[656] Personal interview of Mr. Jones Lugbo, a native of Odi, conducted by ERA on December 15, 1999. See: ERA Report, *op. cit.,* p. 16.
[657] *Ibid.*
[658] Personal interview of Tombara Gagariya held on December 15, 1999 at Odi, conducted by ERA. See: ERA Report, *op. cit.,* pp. 16-17.

> removed…they have written several things on the wall of our house. I don't know what they mean. If you go inside you will see the kind of things they have written: 'Bayelsa State will be silenced', 'Odi will talk no more….[659]

When the Odi people returned after the odious scourge; they found numerous written inscriptions on the walls of the remains of their houses, which were reasonably suspected to have been written by the invading soldiers. These inscriptions or write-ups were compiled by volunteers from Elimotu Movement, Environmental Right Action (ERA), Civil Liberty Organization (Rivers and Bayelsa) and Odi Coalition against Genocide. Some of the write-ups read:

i. We will kill all Ijaws by soldiers.
ii. Odi people take your time.
iii. Don't play with soldiers.
iv. Nobody can save you.
v. Odi people no be our fault na una government.
vi. Where is Egbesu.
vii. We were sent by government to kill and burn your community, take heart.
viii. Idiot, why Egbesu no save una!
ix. Idiot your governor is Egbebu.
x. Move according to arrow, kill and burn except government property.
xi. If you touch police again we will finish Bayelsa.
xii. Odi people oya come, and live in your community let us see.
xiii. You bagers of Odi (Egbesu boys) should be very careful with the living God.
xiv. F.G says no to Odi.
xv. The wicked shall never go unpunished.
xvi. The God almighty is the destroyer of any man made God.
xvii. Well done una well, well done.
xviii. Deep down! Deep, Deep down!!
xix. Bloody civilians.
xx. Odi is no more, gone to the past pity.[660]

These and many more written inscriptions were said to be found on the remains of the desolate habitation of Odi. It is humbly observed that, the write-ups are predominantly

[659] *Ibid*.
[660] A Blanket of Silence, *op. cit.,* pp. 17-18.

characterized by military slogans. It will equally not be wrong to state that the write-ups are hidden motive – deliberate and wanton systematic destruction of a people; an indication of the blameworthy mind of the perpetrator. However, does the acts perpetrated and the clear indicators of the blameworthiness of the perpetrator, suffice to qualify the Odi massacre as genocide in the context of the extant law of genocide?

4.3.4 The Question of Genocide

As stated earlier in this work, the principal convention on the crime of genocide in international law is the Genocide Convention of 1948, which became operational in 1951. Nigeria is not a signatory to the Convention. However, Nigeria is a signatory to Rome Statute of International Criminal Court (ICC) which adopted entirely the provision of the Genocide Convention of 1948 in its provision for genocide. It is equally noteworthy, to observe that, the Rome Statute of ICC became operational, after the Odi and Zaki-Biam massacres. That is not to mean that such crimes can escape prosecution, because of the said facts. By the nature of both Odi and Zaki-Biam massacres they fell within acts that are preemptory norm, which are prohibited by customary rules of international law.

Because of the consistent claims and counterclaims of genocide in the Odi massacre, this work is tailored toward assessing the nature of the massacre in relation to the extanct law of genocide.

4.3.4.1 *The Law of Genocide*

As observed earlier in this chapter, the Genocide Convention,[661] Rome Statute of International Criminal Court,[662] Statute of International Criminal Tribunal for former

[661] Art. II, Genocide Convention.
[662] Art. 6, Rome Statute of ICC.

Yugoslavia[663] and Statute of International Criminal Tribunal for Rwanda[664] described genocide as follows:

> Genocide means any of the following acts committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily and mental harm to members of the group;
> (c) Deliberately inflicting on members of the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent birth within the group;
> (e) Forcibly transferring children of the group to another.

As stated earlier, the *actus reus* of the crime are the series of acts (a) – (e) enumerated above; while the *mens rea* is the intent to destroy the stipulated protected groups in whole or in part. The perpetration of any of the acts (a) – (e) stands as a sufficient *actus reus* and may qualify as an act of genocide if accompanied with the requisite genocidal intent – *dolus specialis*. However, it must be noted that by law, to qualify as genocide, any of the series of acts (a) – (e) clothed with the required mental element must be directed at one of the groups stated in the law of genocide, that is national, ethnical, racial or religious groups

4.3.4.2 *Resolving the Question of Genocide in Odi Massacre*

The *actus reus* of genocide by the foregoing examination of the Odi crisis did occur. That is, killing of the inhabitant of Odi; causing serious bodily and mental harm to the people of Odi. Even some of the acts of the ravaging and rampaging soldiers may be

[663] Art. 4(2),Statute of ICTY
[664] Art. 2(2),Statute of ICTR.

depictful of an act of deliberately inflicting on members of Odi community conditions of life calculated to bring about its physical destruction in whole or in part. It follows therefore, that, the existence of the physical element of genocide in Odi massacre may not be contentious.

Next is the question of the mental element of genocide, that is, "the intent to destroy in whole or in part, a national, ethnical, racial or religious group". The numerous act of aggression unleashed on the Odi people by the Nigerian army which was accompanied by the clear statements they left behind on the remains of the fallen walls of Odi, may clearly imput intention on the part of the Obasanjo led government to bring about the existence of a prohibited result – genocide. Again, the extreme act of reckless disregard to life and property is an imputation of a desire to cause the existence of a prohibited act – genocide.

However, the problem in qualifying the Odi massacre as genocide from a strict legal perspective lies with the second arm of the mental element or *mens rea* of the crime of genocide as stipulated in the Genocide Convention and Rome Statute of ICC. That is, the component of the protected group, national group, ethnical group, racial group or religious group. The crucial question is, does the Odi community constitute a protected group within the meaning of the law of genocide?

The Odi community is certainly not a religious, racial or national group. Then, is the Odi community an ethnical group? The Odi people belong to the Ijaw ethnic group of Southern Nigeria, which is now known as the South-South geopolitical zone of Nigeria. As stated earlier, the Ijaw ethnic group cuts across state boundaries, but are predominantly found in Rivers State, Delta State and Bayelsa State. The people of Ijaw ethnic group are spread through numerous Local Governments in Rivers State, Bayelsa State and Delta

State. This means that the Ijaw ethnic group is not all concentrated in Odi community. Odi community is a very small fraction of Ijaw ethnic group, which might rightly be referred to as the Ijaw nation. The inhuman activities of the perpetrators of the Odi massacre was limited to the Odi community – a specific and identifiable geographical area, the hide out of the hoodlums who abducted and killed seven policemen. Beyond this specific community, no any other Ijaw community within and outside Bayelsa state was said to have been targeted by the soldiers. This means that, it was Odi as a community that was targeted for the massacre and not the Ijaw ethnic group or the Ijaw nation. It may suffice to state also that the inhabitant of Odi are not all Ijaws and that the slaughter also affected other ethnic nationalities resident in Odi.

Regretfully, the law of genocide as it is today does not list, attack on community or identifiable geographical area as a protected group for the purposes of genocide. Consequently, it may be very right to state that, there were grave violation of human right at Odi and perpetration of crime against humanity against the Odi people. But, from a strict legal stand point, the crime of genocide did not take place in Odi. This seemingly unfortunate conclusion should be seen as a product of the inadequacy and flaws of the law of genocide which have been vehemently criticized by numerous scholars of genocide. The principal flaw being the restrictiveness of the protected groups.

Recently, Justice Lambo Akambi of the Federal High Court Port Harcourt gave judgment against the Federal Government of Nigeria in favour of Odi community, ordering the Federal Government to pay a compensation of N37.618 billion to Odi community for the human rights violation perpetrated against the Odi people by soldiers in 1999.[665] It is

[665] *The Nation*, Tuesday February 26, 2013, p. 30.

important to note that the said Federal High Court did not predicate her judgment on the finding of genocide.

4.4 The Zaki-Biam Massacre

4.4.1 The People of Zaki-Biam

The choice of the name "Zaki-Biam Massacre" to describe the event is most probably because the town of Zaki-Biam is the largest community among the communities and towns invaded by soldiers on a brutal revenge mission, or may be because the bodies of the slained nineteen soldiers were found at Zaki-Biam. It is therefore very important to note that, the affected places included Zaki-Biam and its surrounding communities and villages and also Gbegi, Vaase, Kyado, Anyiin, Tse-Adoor and Sankera communities.[666]

The people of Zaki-Biam are of the Ukun Local Government Area of Benue State, Nigeria. Their native language is Tiv, they are predominantly farmers. The farming activities of the people of Zaki-Biam goes beyond subsistence farming. They farm cassava and yam for commercial purposes. As stated earlier, they speak Tiv language. The Tiv language is a major ethnic group in the North Central region of Nigeria. The population of the Tiv people cuts across Taraba, Nassarawa and Benue States, having their homes in numerous local governments. In Taraba State, Tiv people are found in Takum Local Government, Usha Local Government, Donga Local Government, Ibi Local Government, Wukari Local Government, Gashaka Local Government and Gafau Local Government.[667] In Benue State, where the Tiv people constitute the major ethnic group; as a single ethnic

[666] NIGERIA – Military Revenge in Benue: A Population under Attack, *Human Right Watch,* (April 2002) Vol. 14, No. 2(A), p. 1.

[667] The information about the presence of Tiv people in Taraba State, was obtained from Dr. T.F. Yerima, an Associate Professor of Human Rights Law, who is a native of Donga in Taraba State via a phone call at the early hours of Wednesday 15th day of May, 2013.

group they occupy more than half of the number of the local governments in the state alone. They are found in Buruku Local Government, Ukun Local Government, Konshisha Local Government, Gwe Local Government, Katsina-Ala Local Government, Gboko Local Government, Tarka Local Government, Gwe-West Local Government etc. Zaki-Biam and its surrounding communities belong to Ukun Local Government. All these and many more local governments in Benue State are Tiv speaking communities.

4.4.2 Background to the Zaki-Biam Massacre

The attack by soldiers which claimed more than two hundred lives in various locations in Benue State in October 2001 is said to have taken place within the context of a broader, longstanding inter-communal conflict in the area. It seems to be a culmination of series of attacks and counter-attacks by the Tiv and Jukun armed militia groups, primarily in Taraba State and areas around the Taraba-Benue border.[668]

However, the particular incident which culminated in the violent reaction of the military was the abduction and murder of nineteen soldiers, which took place two weeks before the incident under review. According to government source, the abducted and murdered soldiers were on a mission of restoration of peace in the area which was affected by the Tiv and Jukun crisis, when they got abducted by Tiv Militia in Vasse, in Benue State on October 10, 2001. The soldiers abducted were subsequently murdered and their bodies were found two days after their abduction at the field of a primary school in the town of Zaki-Biam, which is under Ukun Local Government Area of Benue State.[669]

Human Right Watch observed that the circumstances and motivation that brought about the attack on the soldiers by the Tiv armed group remain uncertain. However, many

[668] NIGERIA- Military Revenge in Benue, *Human Rights Watch*, *op. cit.*, p.5.
[669] *Ibid.*

Tiv people are doubtful of the identity of the slained soldiers. They believe some of them were armed Jukuns, operating along side Nigerian soldiers. These Tiv sources pointed to the fact that, while dressed in military outfits, the slained nineteen 'soldiers' were traveling in private pick-up trucks and not military vehicles, and that some of their weapons did not carry official Nigerian Army registration numbers.[670] Some sources also alleged that the real number of those abducted and killed was more than nineteen, and may have been close to thirty. Even the earlier statements by government authorities immediately after the incident show some contradictions as to the number of soldiers killed. The initial number cited in media reports was sixteen.[671]

4.4.3 Nature of Zaki-Biam Massacre

Barely two weeks after the discovery of the bodies of the nineteen soldiers Nigerian Army invaded several towns and villages in Benue State, between October 19 and 24, in a well co-ordinated operation strategized to take local residents by surprise. The invading soldiers were of the 23rd armored brigade of the 3rd Armoured Division of the Nigerian Army based in Yola, the Capital of Adamawa State. The soldiers targeted seven towns and villages in Benue State. These towns/villages include Gbegi, Zaki-Biam, Tse-Adoor, Kyado, Vaase, Sankera and Anyiin. The soldiers proceeded systematically from one town/village to the other, killing, destroying and pillaging as they move. Eye witnesses estimated that there were about two to three hundred soldiers, with several armored tanks

[670] Human Right Watch Interviews in Benue State of Nigeria, December 2001 Local Sources stated that it is sometime difficulty to distinguish real soldiers from Jukun fighters, as the later often wear military uniforms and use similar weapons. There have also been reports of Nigerian soldiers fighting alongside Jukun during some attacks, particularly in Taraba State.

[671] NIGERIA-Military Revenge in Benue, *Human Rights Watch, op. cit.* p. 6.

and several other military vehicles.[672] Some of the residents of the communities were able to escape death because they fled before the soldiers attacked, as they heard rumours of attack. The soldiers destroyed properties and looted freely without any hindrance.[673]

According to Human Right Watch, "there is little doubt that this operation was organized as a retaliation and a form of collective punishment for the murder of nineteen soldiers, as illustrated by comments made by some soldiers to local residents in the towns and villages they targeted".[674] The largest number of people that were killed in this sadistic military operation was at Gbegi village. Between 150 and 160 people were said to have been killed there, these death toll includes four women and at least eighteen children, amongst those said to be missing were children as young as five and seven years old. Some of the victims' bodies were said to be burnt beyond recognition.[675]

A forty years old farmer in Gbegi gave his own account of the incident, thus:

> On 19 October, the army arrived here. They called on us to assemble. They said they were on a peace-keeping mission. They told us to invite all members of the town to be present on market day, which is Thursday. They didn't come on Thursday but they came on Monday 22 October, at about 2pm. They said again that they had come for peace-keeping. They advised us to invite everyone for a meeting. They had four armoured tanks and nine trucks. They were more than three hundred soldiers…The soldiers had armored tanks stationed in three places to prevent escape.
> We assembled at the motor park at about 3pm. Most of the communities were there. Then the commander just said: "fire" and the soldiers opened fire. They had separated the women and the children but some women were killed. They

[672] *Ibid.*
[673] *Ibid.*
[674] *Ibid.*, several witnesses interviewed by the Human Rights Watch stated that soldiers had accused them collectively of having killed their colleagues and that the soldiers made other comments implying that the Tiv, as a people had brought the trouble on themselves – See: *Human Rights Watch*, *op. cit.*, p. 6.
[675] Information gathered by Human Right Watch from local sources in Gbagi, including a list of 150 people killed and 15 people missing compiled by Shima Ayati, Special Assistant to the Governor of Benue State and Chairman of Tiv Taraba crisis Relief and Rehabilitation Committee – See: NIGERIA- Military Revenge in Benue, *Human Right Watch*, *op. cit.*, p. 7.

> were targeting everyone. After shooting, they poured fuel and set fire. Some people were set on fire alive before they were shot. Some were cut on their necks with knives…The shooting lasted from 3pm to 6.45pm at about 7pm some people came out from the bush to see the damage. The next day, we took the bodies away for burial and made mass graves.[676]

Other survivors of the calamitous massacre stated that, the soldiers, after shooting randomly into the crowd and setting people ablaze, then checked to confirm whether those lying among the dead bodies were really dead. A boy of eighteen years pretended he had been hit by bullet when the soldiers opened fire on the crowd. He managed to roll away on the ground when soldiers set fire on the people. He stated: "one of the soldiers pointed at me and said; 'this one is not dead, let me not waste my bullet but slaughter him with a knife'. He then pulled his knife and started cutting my neck. I was still and he thought I was dead, and left me when the whistle blew".[677]

A fifteen years old boy narrated how he watched his father been shot to death. He was also injured but narrowly escaped death. He stated thus:

> When they opened fire, I saw my father hit at the forehead, and then a bullet hit me. I thought I was dead, and then I saw them pour petrol on the people. The petrol finished nears me and they went to refill. It was when they went for refilling of the petrol that I ran away. I lost my father, uncle and four cousins.[678]

A boy of about nine years old was also amongst those injured at Gbegi village. He narrated his ordeal to the Human Right Watch as follows:

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[676] *Human Rights Watch* interview at Gbegi, December 14, 2001.
[677] See "The story of Gbegi massacre, 22 October, 2001", compiled by Shima Ayati, the then Chairman of Tiv Taraba Crisis Relief Management Rehabilitation Committee.
[678] *Ibid.*

> The soldiers came on Monday. They gathered people and sent the women and children away. One soldier called me and caught me. They made me join the men. I was shot here (pointing to his amputated arm, his leg and side). I was going with the women but the soldier said I should come with the men. About four children were injured and brought to the hospital. Others died during the incident.
> I was shot in the market place. Someone fell on me. The soldiers check to see if I was dead, and then shot me three times. They were burning people. I got up and ran into the bush…My oldest brother died. He is about forty years old. He was shot in the head and the chest together with others in the meeting.[679]

The rampaging soldiers were said to have also attacked the village of Tse-Gube, very close to Gbegi, at about the same time. Local residents described how the soldiers were deployed all along the road while they communicate with their commander by radio messages. Just like what happened in Gbegi, the people at Tse-Gube were made to gather for a meeting, and then the soldiers opened fire on them. Six men were said to have been killed in that incident. For about two months after the pogrom, two third of the population of Tse-Gube were reported to still be hanging in the bush out of fear of returning to their village.[680]

At Vaase, where the nineteen soldiers were said to have been abducted, several youths who were present when the soldiers came stated that fifteen men and two women were killed by the soldiers at Vaase. They said, they were told to line up, and the soldiers asked! "Who killed the soldiers"? When the people said they don't know, the commander blew his whistle and the soldiers stated shooting at the crowd.[681]

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[679] NIGERIA-Military Revenge in Benue,*Human Rights Watch* interview at Federal Medical Centre, Makurdi, December 14, 2001, *op. cit.*
[680] *Ibid., Human Rights Watch* interview at Gbegi and Tse-Gube, December 14, 2001, *op. cit.*
[681] *Ibid., Human Rights Watch* interview at Vaase December 14, 2001, *op. cit.*

In Kyado, the sequential flow of the events was different from what happened in other towns and villages. The residents of Kyado said that, it was because of the timely intervention of soldiers from military formations in Benue State that no one was killed in Kyado, although several people were said to have been injured and numerous houses, shops and buildings were destroyed.[682]

At Anyiin the rampaging soldiers from Yola destroyed many buildings. No body was killed there because the people had already fled by the time the soldiers arrived. Residents of Anyiin said that the soldiers arrived in the afternoon and remained there until 8 pm. A local police official narrated how he was made to watch while soldiers burnt a vehicle. Another person described the manner which soldiers burned and shot at houses while others broke down doors with axes. They were said to pile up belongings from the battered houses and set them ablaze.[683]

Zaki-Biam which is situated about forty-five kilometers from the Taraba boarder was next to Gbegi in number of casualties of the infamous military operation. This was where the bodies of the slain nineteen soldiers were found. Between twenty to thirty people and possibly more were said to have been killed in Zaki-Biam. The ungodly operation commenced on October 23 and continued on October 24, 2001. On the morning of October 23, armed soldiers were all around the famous Zaki-Biam Yam market. When people became so frightened the soldiers began to shoot indiscriminately. Most of the victims in Zaki-Biam were shot dead in and around the famous yam market. Several traders and farmers were killed, including at least two Igbo traders. The military men also embarked on a wide spread destruction of shops, homes and other buildings. Shops belonging to Igbo

[682] *Human Rights Watch op. cit.,* p. 10.
[683] *Human Rights Watch* interview at Anyiin and Makurdi, December 2001.

people who played no role in the crisis were also burnt.[684] An eye witness in the Zaki-Biam yam market gave the following account:

> There were thirty four vehicles in total, including eight armored tanks. They (the soldiers) parked the vehicle at the entrance to the market end. Then they jumped down and surrounded us…We have never witnessed this before. They killed about eighteen people inside the market and about six outside. After a week we discovered about three bodies in the bush. Those who were killed included several market traders, farmers, a former councilor and a pastor…The next day they came to the main market. They destroyed many houses there. The majority belong to Igbos, not indigenes…[685]

It was also reported that some persons were apprehended by soldiers while traveling in a bus. That the soldiers stopped the bus and asked if there was a non-Tiv person on board. When the passengers answered that all of them were Tivs, the soldiers separated the women from the men and shot all the men to death. A former councilor, and a protestant pastor were amongst the victims of this particular incident.[686] The soldiers resumed their operation in Zaki-Biam on October 24 2001 with a high scaled destruction of people's property. One of the first houses they mercilessly destroyed was that of Benjamin Chaha, a former speaker of the house of representative.[687]

In Tse-Adoor an outskirt town of Zaki-Biam which is the country home of Victor Malu, former Nigeria Army Chief of Staff was not spared. The soldiers from Yola did not spare their own colleague as they destroyed the house of Victor Malu, his family compound

[684] *Human Rights Watch op. cit.,* p. 11.
[685] *Human Rights Watch* interview at Zaki-Biam, December 19, 2001, *op. cit.*
[686] *Human Rights Watch* interviews at Zaki-Biam, Makurdi and Abuja, December 2001, *op. cit*.
[687] NIGERIA-Military Revenge in Benue, *op. cit.,* p. 12.

killing five people at the village. A relative of General Victor Malu told the story of what soldiers did to them.[688]

In Sankera two young men were said to have been killed by the invading soldiers. Their names are Merve Beramo who was aged twenty and Luther Jima who was aged twenty three. A four years old boy, Tersen Tordue who was traveling on a motorcycle with late Luther Jima was injured.[689] The soldiers burnt down local government buildings, looting office equipment, vehicle and large sum of money belonging to the local government, they burned a lot of houses which includes that of the local government chairman, local government quest houses. They also raised down a large stockpile of food in a storage facility which had been intended to assist the large population of internally displaced Tiv people fleeing conflict in Taraba State.[690]

Reports of other form of human right violations perpetrated by the violent soldiers in the military operation were endless. Several cases of rape, harassments, extortion and looting are endless. Such numerous human rights violations seem to be carried out with the sole agenda of humiliating and intimidating the victims as well as the broader population of the area. Victims and witnesses observed that, in perpetrating these human right abuses, soldiers often make uncomplimentary, derogatory and insultive remarks to them on the basis of ethnicity.[691]

At the end of October and in November, soldiers were said to have committed a number of rapes on women and young girls. For example two sisters were said to have been raped by soldiers on the November 9, at about 2am in their house at Katsina-Ala. The

[688] *Human Rights Watch* interview at Tse-Adoor, December 16, 2001.
[689] NIGERIA-Military Revenge in Benue, *Op. cit.*, p. 13.
[690] *Ibid.*
[691] *Ibid.*, p. 14.

soldiers before raping the girls told them that they have killed "mama Tiv" (referring to Victor Malu's elderly aunt) therefore they could also kill them if they refuse to cooperate.[692] Several local sources were said to have reported that a young woman of about twenty years old was also raped by seven soldiers in Katsina-Ala on November 3. It was also reported that some soldiers who were stopping people at checkpoints around Katsina-Ala had told some of the men to leave and had abducted the women traveling with them and sexually abused them. There were allegations that some of them were kept by the soldiers in their camps.[693] While most of the rape cases took place between October and November ending, other forms of human rights abuse by the soldiers continued into December, 2001.

4.4.4 The Question of Genocide

The Zaki-Biam massacre in the light of the nature of the atrocities perpetrated by the Nigerian soldiers raises a lot of questions in the contextual conceptualization of the inglorious act. It has been described as genocide severally while some people see it as a mere revenge mission against the murderers of the nineteen soldiers. To situate the Zaki-Biam massacre within the context of the international crime of genocide is to consider the nature of the atrocities perpetrated by the soldiers in the light of the necessary legal elements of the crime. Consequently, a brief highlight of the law of genocide is necessary, since it has already been considered extensively in earlier subheads of this research.

4.4.4.1

[692] *Ibid.*

[693] As we have always emphasized in this work. The principal law of genocide in international is the Genocide Convention of 1948. However, the Rome Statute of International Criminal Court (ICC); the Statute of ICTY and the Statute of ICTR adopted the provisions of the Genocide Convention as representing their own position on Genocide. Article II of the Genocide Convention which stipulates the legal elements of the crime of genocide is the same in wordings and import with Article 6, Article 4(2), Article 2(2) of the Rome Statute, ICTY Statute and ICTR Statute respectively.

The Law of Genocide

The law of genocide[694] provides that:

> Genocide means any of the following acts committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such:
> (b) killing members of the group;
> (c) causing serious bodily or mental harm to members of the group;
> (d) deliberately inflicting on members of the group condition of life calculated to bring about its physical destruction in whole or in part;
> (e) imposing measures intended to prevent birth within the group;
> (f) forcibly transferring children of the group to another.

As earlier observed, the *actus reu* of the crime are the series of acts (a) – (e); while the *mens rea* is the intent to destroy in whole or in part, a national, ethnical, racial or religious group. This means that, the perpetration of any of the acts (a) – (e) will only amount to genocide if the acts were products of a blameworthy mind that possesses the intent to destroy the stipulated group(s) in whole or in part. The law did not however define what percentage of the population constitutes "in part" for the purpose of the crime of genocide. The ordinary meaning of the phrase "in part" may just mean any part, however small.

4.4.4.2 *Resolving the Question of Genocide in Zaki-Biam Massacre*

No doubt the *actus reus* of genocide was committed by the soldiers who invaded the people of Gbegi, Zaki-Biam, Tse-Adoor, Kyado, Vaase, Tse-Gube, Sankera, Anyiin and Katsina-Ala, all in Benue State of Nigeria. The acts of the soldiers as *actus reus* will fall particularly under the series of acts (a) – (b) as stipulated in the Law of Genocide (i.e.

[694] *Human Rights Watch* interviews in Katsina-Ala and other locations in Benue State, December 2001; also *Human Rights Watch* Telephone Interview, November 16, 2001.

killing members of the group and causing serious bodily or mental harm to members of the group). Over one hundred and fifty people were said to have been killed at Gbegi; between twenty to thirty persons at Zaki-Biam; six people at Tse-Gube; two people at Sankera; five people at Tse-Adoor and seventeen people at Vaase. No body was killed at Anyiin and Kyado. The people of all the communities invaded by soldiers suffered a lot of torture, which resulted in a lot of physical injuries. They also suffered mental harm as their houses were burnt and their barns destroyed. Cases of gross human rights violation and sexual assaults were equally reported. By this, the physical element of genocide *actus reus* of genocide is glaringly present in the Zaki-Biam massacre.

On the determination of the existence or otherwise of the mental element of genocide in the Zaki-Biam pogrom, a lot of questions come to fore, viz:

(i) Will the victim communities fall within the group(s) protected by the law of genocide?

(ii) Does the nature of the massacre depict genocidal intent?

The victim communities are different individual Tiv communities existing separately. The choice of the phrase Zaki-Biam massacre is not to mean that the atrocities were only committed in Zaki-Biam as already revealed by this research. Perhaps, may be because Zaki-Biam is the most famous of all the communities, because of its famous yam market. The whole communities that were targeted for the supposed 'revenge' were Tiv speaking communities, that is, they belong to the Tiv ethnic group. It was also revealed that soldiers had made insultive remarks to them on the basis of their ethnicity.[695] It will also be recalled that some soldiers stopped a moving bus and asked if there were non-Tiv speaking

[695]NIGERIA-Military Revenge in Benue, *Op. cit.*, p. 14.

people in the bus before unleashing their venom on all the Tiv male people in the bus.[696] At Sankera, the soldiers burnt down food storage facility meant for feeding Tiv refugees coming in from Taraba State.

In another local government area (Katsina-Ala) the soldiers also engaged in gross human rights violation against the Tiv people, this includes rampant rape of Tiv women and girls. We most humbly venture to conclude that, by these activities, the Tiv people as an ethnic group have been targeted for destruction 'in part'. Thus, the whole communities targeted can conveniently fall within the meaning of an ethnical group as a protected group within the meaning of the law of genocide.

This position is distinguishable from the Odi massacre because, Odi was targeted as an individual community and no any other Ijaw community targeted along with Odi for the supposed revenge. It therefore follows that, in Odi a geographical enclave was targeted, while in Zaki-Biam a collectivity of an ethnic group was target in part by the onslaught on numerous communities.

On whether the nature of the massacre depicts genocidal intent, it is humbly submitted that in criminal law, intentions are often derivable from the acts or circumstances of a crime and not often by express declaration or proclamation by the perpetrator of a crime. It is also trite that in criminal law, intention to cause a prohibited result may be imputed by law, flowing from the nature of the act. This falls within the premise of imputation of *mens rea* consequent upon extreme recklessness. In this situation, recklessness is a form of *mens rea*.[697] A reckless person in relation to criminality is one who does not give a damn as to whether or not a prohibited consequence results from his

[696] *Ibid*.
[697] Chukkol, K.S. (2010) *The Law of Crimes in Nigeria*, ABU Press, Zaria, p. 44.

action.[698] In relation to the crime of genocide, such a reckless person is one who acts with extreme recklessness not giving damn that his acts may constitute genocide.

In relation to the Zaki-Biam massacre, however difficult it may be to situate genocidal intent on the part of the perpetrators; the reckless nature of the atrocities committed by the soldiers may activate a legal imputation of intention against an already established protected group. On this technical premise we shall dare to humbly state that genocide might have been committed against the victims of the Zaki-Biam massacre.

4.5 *Boko Haram* Insurgency and Counterinsurgency

4.5.1 General Overview

Insurgency refers to a situation involving a violent move by a person or group of persons to resist or oppose the enforcement of law or running of government or revolt against constituted authority of the state or of taking part in insurrection.[699] The Macmillan English Dictionary for Advanced Learners sees insurgency as "an attempt by a group of people to take control of their country by force".[700] While counterinsurgency is "a military action, against people who are fighting the government of their own country".[701]

Ladan observed that, insurgency in the context of the above conceptualization becomes a violation of the Nigerian Constitution, criminal law and Nigerian's international treaty obligations in the following situations:

i. When such an insurgency act constitutes an attack on unarmed civilians, causing injuries and loss of lives and property, with massive internal displacement of people;

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[698] *Ibid.*
[699] Nehi, S.I. (1996) *The Nigerian Law Dictionary*, 1st edn., Tamaza Publishing Co. Limited., Zaria, p. 175.
[700] P. 786.
[701] Macmillan English Dictionary for Advanced Learners, 2007, p. 786.

ii. When it drives away businessmen and investors from an insecured domain; and

iii. When it displays the elements of crimes under domestic and international law such as treasonable felony, Terrorism, murder, crimes against humanity and genocide.[702]

Insurgency is a crime and at the same time, a human rights violation. It is an act against public order, with a pattern of internal disturbances and tensions that depict serious calamity to public safety and public order for the relevant authorities, which can eventually lead to situations that endanger the life of a nation and her corporate existence as a collective entity.[703] In relation to *Boko Haram* insurgency in Nigeria, it was rightfully observed thus:

> Undoubtedly, the *Boko Haram* insurgency essentially endangers public safety, security and peace; retards economic growth and development; undermines the state and democracy; constitutes crime against public order, crimes against humanity and terrorism. Above all, it violates the fundamental human rights to life, human dignity, liberty and freedom of religion, conscience and thought etc.[704]

It must however be stated that, the *Boko Haram* insurgency is just one of the numerous crises that have over the years characterized the socio-political existence of Nigeria. The country Nigeria, with her ethno-religious pluralism has had a long history of social, ethnic and religious crises. There have been numerous outbreaks of calamitous violence between different communities and different socio-religious settings. When viewed from afar, it could appear that these conflicts boil down to religious differences in form of tension between the Muslim bloc and the Christian bloc; when one preys further

[702] Ladan, M.T. (2012) "Diagnostic Review of Insurgency in Nigeria: The Legal Dimension", pp. 2-3. Being a paper presented at the National Institute for Policy and Strategic Studies, Kuru, Jos, Plateau State, August 28th – 31st 2012.
[703] *Ibid.,* p. 3.
[704] *Ibid.,* pp. 8-9.

and looks deeper, one may find that, politics and control of government patronage may be the primary cause of most of these conflicts threatening the collective existence of Nigeria.[705] *Boko Haram* insurgence is however, the major security threat facing the Nigerian government and her citizenry today. It is therefore very vital to examine the origin and underlying thinking behind the emergence of this violent

4.5.2 Boko Haram's Origin

Boko Harams is said to be a group of radical Islamist youths who worshipped at the Alhaji Muhammadu Ndimi Mosque in Maiduguri about eleven years ago.[706] The groups' origin is central to the groups self-definition and justification of violent tactics used to fight Nigerian's government and her perceived allies.[707]

In the year 2003, a group of about 200 people, many of whom were university students and unemployed youths migrated to a remote part of Yobe state and set up a camp close to the border of Republic of Niger.[708] The group then known as *Ahl Sunna Wal Jamma* (followers of the Prophet's Teachings), often referred to as the Nigerian Taliban, sought to withdraw from the "corrupt", "sinful", and "unjust" secular state of Nigeria to

[705] Special Report 308, United States Institute of Peace, June 2012, p. 2.
[706] *Ibid.*, p. 3.
[707] *Spiraling Violence: Boko Haram Attacks and Security Forces Abuses in Nigeria,* (2012) Human Rights Watch, U.S.A, p. 30.
[708] *Ibid.*

create a new community based on Islamic injunctions, law and dictates.[709] The leader of the group was known as Mohammed Yusuf.[710]

The name *Boko Haram* which is the name the said group is now commonly known is derived from a combination of the Hausa word "Boko" which means Western education and the Arabic word "Haram" which means ungodly or sinful. Thus, "*Boko Haram*" is not only the group's common name, but it is also a slogan to the effect that Western education (and its product) is sacrilege.[711]

The activities of *Boko Haram* sect is not definite and highly difficult to comprehend. The sect employs the use of violence against common innocent people and against government establishments. If the rationale for attacking government institutions is an expression of grievance against a corrupt and insensitive government; the purpose for the group's violent onslaught against innocent commoners is hardly discernable.

However, it has been argued that, even though *Boko Haram's* operations have often been very brutal, it is clear that the Nigerian military is guilty of extensive atrocities. It was observed that, the army has become gripped by a pattern of behaviour that has developed a momentum of its own in perpetration of atrocities, which may be beyond the control of central government.[712] An experienced journalist in Maiduguri was said to have reported that as many as sixty bodies are being delivered each day by the army to morgue at the

[709] Bego, A., "Religious Sect Invasion" *Daily Trust,* December 31,2003; Bego, A., "Taliban of Nigeria: Who are They?" *Weekly Trust,* January 5, 2004; "Detained Nigerian Militant Pledges Islamic Struggle", *Reuters,* January 13, 2004.

[710] *Nigeria: Trapped in the Cycle of Violence* AFR 44/043/201, Amnesty International, London, 2012, p.7.

[711] Okpaga, et al. (2012) "Activities of Boko Haram and Insecurity Question in Nigeria". *Arabian Journal of Business and Management Review,* Vol. 1, No. 9, p. 82; See also: Phaon, P.J., "Boko Haram's Evolving Threat" *News Brief: African Centre for Strategic Studies* (2012) Vol. 20, p. 2.

[712] Rogers, P. (2013) "Nigeria, the Boko Haram Risk", www.opendemocracy.net/paul-rogers/nigeria-boko-haram-risk (Last visited 20 July, 2013); See: Nigeria Trapped in the Cycle of Violence, *op. cit.,* pp. 19-23; See Spiraling Violence, *op. cit*., pp. 58-71; See also: National Human Rights Commission Report on Baga Incident (June, 2013) pp. 21-23. In all the above references, The Amnesty International, Human Rights Watch and National Human Rights Commission of Nigeria all observed the atrocities in form of grave human rights violation perpetrated by JTF.

hospital. In one case, it was reported that twenty nine bodies were at the point of being dumped when it was discovered that three of them were still alive; soldiers in the Joint Task Force (JTF) shot them dead immediately.[713]

Some journalistic appreciation of the *Boko Haram* insurgency and counterinsurgency has described the situation as genocide or holocaust.[714] The central issue of this research is to assess the *Boko Haram* activities and that of the JTF in the context of the international crime of genocide. These shall be achieved by a thorough assessment of the nature of the insurgency and counterinsurgency in relation to the question of genocide.

4.5.3 Nature of the Insurgency

The *Boko Haram* insurgency though very rampant, is however, very difficult to situate within the perspective of the group's definite target. This is because the nature of the group's numerous attacks discloses less about the group's principal aim and principal target. However, a statement credited to the leadership of *Boko Haram* particularly Abu Shekau may be a pointer to the group's mission and target:

> …our war is with government that is fighting Islam with the Christian Association of Nigeria (CAN) that are killing Muslims…and those who help them to fight us even if they are Muslims. Any one who is instrumental to the arrest of our members is assured that their own is coming.[715]

This declaration of war by *Boko Haram* seems to clearly identify three groups as likely enemies of the group. These are: The government, the Christians and some Muslims. However, the random and reckless nature of recent atrocities of *Boko Haram* group may

[713] Nossiter, A., "Bodies Pour in as Nigeria Hunts for Islamists" *New York Times*, 7 May, 2013.
[714] *Daily Trust Newpaper*, 23 April, 2013, p. 3.
[715] See "Boko Haram Drops Flyer All Over Kano after Bombing" *African Spotlight*, 21 January, 2013. cited in Nigeria: Trapped in the Cycle of Violence, *op. cit.*, p. 10.

ignite an imputation of random killing without specifically targeting a definite victim group. For instance, the recent random attack on Government Secondary School, Mamudo, Yobe State in the night of July 7, 2013 which left twenty students and a teacher dead,[716] speaks volume of the nature of the groups insurgency.

Since July 2009, *Boko Haram* have claimed responsibility for bombings and gun attacks across northern and central Nigeria. They have killed both Christian and Muslim clerics, journalists, lawyers, policemen and soldiers. Some killings by *Boko Haram* have been carried out in the streets, by shooting or detonating explosives, with the perpetrators escaping on motorbikes, or tricycles. Other killings have been carried out in people's homes, outside mosques and at the market place. Responsibility for bomb attacks on churches, busy markets and bars has also being claimed by *Boko Haram* group.[717] The group has perpetrated numerous atrocities, their atrocities still seem to be ongoing.

On 28 January 2011, Engineer Fannami Gubio, the All Nigerian People's Party (ANPP) candidate for Borno State Governorship and seven other people, including Alhaji Godi Modu Shariff, the brother of incumbent governor of Borrno State were shot dead, and *Boko Haram* claimed responsibility for the attacks.[718] On 6 June, 2011, a Muslim cleric Ibrahim Birkuti, who had always voiced his criticism of *Boko Haram* activities was killed by unidentified gunmen outside his house at Biu, Borno State.[719] On August 28, 2011, UN Headquarters in Abuja, Nigerian Capital was bombed, when a car drove into the reception of the building and exploded. Twenty three people were killed including eleven UN Staff.

[716] Editorial, *Tell Magazine*, 22 July, 2013, p. 55.
[717] Nigeria: Trapped in the Cycle of Violence, *op. cit.*, pp. 10-11.
[718] See: "Borno ANPP Guber Candidate, Governors Brother, 5 Others Shot Dead", *Thisday Newspaper* 29 January, 2011.
[719] See: "Boko Haram Gunmen Kill Nigerian Muslim Cleric Birkuti" *BBC Newsonline*, 7 June, 2011.

Boko Haram also claimed responsibility for this attack in a telephone conversation with journalists.[720]

On 4 November, 2011, about one hundred people were reported killed in gun and bomb attacks in Damaturu, the Yobe State Capital. Three police stations, Yobe State Police Headquarters, two banks and at least six churches were attacked. *Boko Haram* also claimed responsibility for the attacks.[721] Amnesty International received information to the effect that five workers at the Kasmi Bakery were killed in Maiduguri on the 19 April, 2012.[722]

It must be emphasized that, since 2009, the attack by *Boko Haram* on security forces is endless. They have used various tactics in striking at security targets and security operatives. Gunmen hiding AK47 rifles or improvised explosive devices under their robes often use motorcycles in drive-by attacks. During the five days violence in July 2009 in Bauchi, Borno, Yobe, and Kano States, *Boko Haram* members killed thirty two police officers in their homes, at police stations or in the streets.[723] According to eye witnesses and photos seen by Human Rights Watch, some of the police officers who died appeared to have had their throats slashed with knives or swords.[724] One journalist narrated to Human Right Watch how on 27 July, 2009, *Boko Haram* members, armed with cutlasses and guns, pounced on a policeman near the emir's palace in Maiduguri:

> The police officer told them he was a Muslim and begged for his life. He then recited the Muslim prayer of faith. They (Boko Haram) pinned him to the ground and pulled back his neck. I looked away and they sliced his neck. People started running away. He was gasping and he died.[725]

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[720] See: "Abuja Attack: Car Bomb Hits Nigeria UN Building" *BBC Newsonline,* 27 August, 2011.
[721] See: "Nigeria Boko Haram Attack Kill 63 in Damaturu" *BBC Newsonline,* 5 November, 2011.
[722] See: "Gunmen Kill Seven in Maiduguri" *Vanguard Newspaper,* 19 April, 2012.
[723] Spiraling Violence, *op. cit.,* p. 41.
[724] *Ibid.*
[725] Human Rights Watch Interview with a Journalist (name withheld), at Maiduguri, July 11, 2010. cited in Spiraling Violence, *ibid.*

According to media reports monitored by Human Rights Watch, since 2010, *Boko Haram* members have attacked more than 60 police stations and police facilities in at least 10 Northern States and Abuja, and have killed at least 211 police officers.[726] On January 20, 2012, *Boko Haram* group attacked the city of Kano in a co-ordinated onslaught where they wore police uniforms to gain access to police facilities. They attacked the regional and state police headquarters, three city police stations, a police barracks, and the home of the Assistant Inspector-General of Police in charge of the region. An office of the State Security Service (SSS) and an Immigration Department Office were also victims of the onslaught. At least 185 people died in the Kano city wide attacks.[727] A police officer's widow narrated to Human Right Watch how *Boko Haram* gunmen shot her on the leg, while prompting her husband, a serving police officer who had served for 30 years in the police force to come out of their house. She stated:

> I was standing in the door way. It was around 7 O'clock (in the evening). I saw five men in mobile police uniforms. They had AK 47. They didn't say anything. One of them shot me in the leg and I fell inside the house. My husband, he was in uniform, (sic) came out and saw them. He had no gun. He asked, "Colleagues, why did you shoot my wife?" And they shot him: bang, in the forehead. He fell down (dead).[728]

The police took the woman to the hospital the next day where her right leg was amputated.

[726] Spiraling Violence, *op. cit.*, pp. 41-42.
[727] Human Rights Watch Interviews with Kano Residents, Kano, May 2012. Cited in Spiraling Violence, *ibid.*, p. 42.
[728] Human Rights Watch Interview of a Police Widow in Kano (name withheld), May 24, 2012, Spiraling Violence, *op. cit.*, n. 175.

Aside from the security targets and security operatives, *Boko Haram* members are highly disposed to attacking Christians, Muslims, Churches and Schools. The Human Rights Watch observed that, a lot of Christians had lost their lives to the insurgents and many churches have been destroyed by *Boko Haram* members. The *Boko Haram* violence against Christians have included torching and blowing up churches, and carrying out abductions, forced conversions, and attacks during religious services with guns and explosive or by suicide bombers.[729] A fifteen years old girl narrated her experience where she took refuge in a church with her pastor, a security man and the pastor's brother:

> They (Boko Haram) asked the guard who he was. He said he was the gateman. He begged them to spare his life. The next thing I saw they cut his neck and push his body into the chair….The pastor's brother try to run they cut him by the head. He fell down inside the church. The pastor and I were hiding by the usher's table. (It was dark inside) they asked the pastor if he was a woman. They then cut him on his hand and head…That was the last I saw of him.[730]

Another Christian woman narrated how *Boko Haram* killed her husband for refusing to renounce his Christian faith. She stated:

> They told us to kneel down in front of the house…They asked me to do the Muslim prayer. I say, "No, I will not do the prayer". They then turned to my husband. They asked him if he was going to pray and he said "No". Then they told him to lie down. …They said if he won't pray they would kill him. After he refused, one of them took a knife and cut his throat. They then stood there quietly. They picked me up and took me to their mosque at the compound.[731]

[729] Spiraling Violence, *op. cit.*, p. 45.
[730] *Ibid.*
[731] Human Rights Watch Interview with a Christian Widow (name withheld), Maiduguri, July 10, 2010.

Human Right Watch also interviewed three Christian men who were taken by *Boko Haram* fighters to Yusuf's compound in July 2009. The three men said they were alive because they agreed to say the Muslim prayers, after which they assumed Muslim names. The three men further narrate that *Boko Haram* leaders explained to them that they were only fighting against corruption and injustice in Nigeria. They then freed them and released them.[732]

It was also observed that *Boko Haram* members usually attack churches on Christmas day, a plan which appears to be designed for the purpose of maximizing casualties.[733] On Christmas Eve in 2010, gunmen were said to have attacked two churches in Maiduguri killing six people including a pastor. On Christmas day of 2011, *Boko Haram* members attacked St. Theresa's Catholic Church in Madalla, Niger State killing forty three people. *Boko Haram* claimed responsibility for the said attacked.[734] A church was also attacked on the same day in Jos killing a police officer. Churches were also attacked in Gombe, Yola, Bauchi, Kaduna and Zaria, some of which set off days of reprisal and counter-reprisal killings between Christians and Muslims resulting in hundreds of dead casualties.[735]

What seem very unclear is the nature of the continuous attack on Christians and churches. Is the underlying intent of the sect geared towards the destruction of her institutions in Northern Nigeria? Even though the intention of the group in this regard remains highly illusive, observers have stated that *Boko Haram's* attacks on Christians are deliberate acts designed with the motive of weakening Nigerian existing government for

[732] Human Rights Watch Interview with Christian Man, Maiduguri, July 2010.
[733] Spiraling Violence, *op. cit.*, p. 48.
[734] Hamza, I., "Boko Haram Claims Responsibility", *Daily Trust Newspaper*, December 27, 2011.
[735] Spiraling Violence, *op. cit.*, pp. 47-51.

the purpose of exploiting existing ethnic and religious fault lines.[736] On this point, a Nigeria journalist who had an interview with some leaders of *Boko Haram* group observed thus:

> It is…a strategy by *Boko Haram* to bring government to its knees by creating a war situation… They know that the most important area that can bring down law and order is religion. So they are attacking Christians. When Christians decide to retaliate they don't know who is a *Boko Haram* member, so Christians will just retaliate against Muslims and that will further polarize the country.[737]

The above proposition in search of the motive and underlying intention of *Boko Haram's* forceful assault on Christians is a pointer to the pursuit of one ultimate motive – disorganization, destabilization, disruption and dismemberment of the existing Nigerian institution and government. It is an agenda in forceful chase of the disintegration of a perceived "morally and socially corrupt" Nigerian state. However, irrespective of the above proposition, the *Boko Haram* leader Abubakar Shekau said that, his group was at war with Christians because "they killed our fellows and even ate their flesh in Jos".[738] Apparently, Shekau might be referring to the August 29, 2011 attack on Muslims in the city of Jos during the *Eid-el Fitr* Muslim holiday, which caused the death of twelve people.[739]

The Muslim community is also not spared, as *Boko Haram* group at various instances had carried out attacks on Muslims. The group attacked and killed 44 people in a mosque at an outskirt town of Maiduguri.[740] They often attack Muslims who are publicly opposed to their activities. These includes traditional rulers, Islamic clerics, politicians and civil servants. The nature of the attacks involve gunmen arriving on motorcycles and

[736] Human Rights Watch Interview with a Senior Government Security Official, Abuja, July 2012.
[737] Human Rights Watch Interview with Ahmad Salkida, Abuja, May 29, 2012.
[738] "Boko Haram: Nigerian Islamist Leader Defends Attacks", *BBC Newsonline,* January 11, 2012.
[739] See: Bashir, "Police Begin Enquiry into Jos Eid Ground Clash", *Daily Trust Newspaper,* August 31, 2011.
[740] *Vanguard Newspaper,* August 13, 2013.

gunning down their target, inside mosque or at private homes.[741] A local vigilante leader, a Muslim was killed in a sporadic shooting along side other worshipers at a mosque in Kano on 24 February, 2012. The group accused the vigilante leader of collaborating with the police to arrest *Boko Haram* members. Between 2010 to 2012, *Boko Haram* members have killed at least twelve Islamic clerics in Borno State alone. According to media reports, most of the killings were done by gunmen riding on motorcycles.[742] At least eight traditional rulers, and district heads were said to have been killed. On July 13, 2012 a suicide bomber attacked the vicinity of central mosque Maiduguri after a Friday prayers, killing five people, in a clear assassination attempt on Shehu of Borno, the Chairman of Borno State Council of Chiefs.[743] *Boko Haram* no doubt has also extended the frontiers of their acts of terror beyond churches, mosques, security forces and perceived government collaborators to bodies and institutions that are regarded as allies with the government and opposed to their own goals, such as United Nations (UN),[744] media[745] and schools.[746]

Media reports of suspected *Boko Haram* attacks show that between July and December 2010, at least 85 people were killed in 35 separate attacks in four states in northern Nigeria including Abuja. In 2011, at least 550 people died in about 115 separate

[741] Spiraling Violence, *op. cit.*, p. 52.
[742] *Ibid.*
[743] See: "Suicide Blast in Northern Nigeria Kills Five Police", *AFP*, July 13, 2012.
[744] There was a *Boko Haram* Bomb Blast of United Nations Headquarters at Abuja, Nigeria 25 people including 13 UN Staff. See: *The Guardian Newspaper*, December 29, 2011.
[745] Boko Haram has also claimed responsibility for several attacks. On April 26, 2012 the sect bombed This Day Newspaper Office in Abuja and a building that housed several media outlets. Four people were killed in the Abuja attack of This Day Office, while three people died in the attack in Kaduna Office of This Day Newspaper – See: "This Day, Sun, The Moment Bombed", *Vanguard*, April 27, 2012; See also: "Boko Haram Threatens to Attack VOA, Guardian, Daily Trust Others", *Premium Times*, May 1, 2012.
[746] In 2012, *Boko Haram* members have attacked more than twenty schools in Northern Nigeria. All attacks occurred at night or early hours of the morning, when pupils and teachers not in school – See: "Nigeria: Boko Haram Targeting Schools" *Human Rights Watch News Release*, March 7, 2012. The most gruesome attack on schools was the recent attack of Government Secondary School, Memudo, Yobe State; where the insurgents attacked and killed twenty students of the college and a teacher – See: *Tell Magazine*, July 22, 2013.

attacks. In the first nine months of 2012, more than 815 people died in some 275 separate incidents in twelve northern states including the Federal Capital Territory.[747] Many more people have died in countless number of incidents from the later part of 2012 to date.[748]

As stated earlier, it must be noted that, the JTF have been accused of perpetrating atrocities against the civilian population they are meant to protect.[749] Consequently, it is very imperative to examine the nature of atrocities of JTF in a work of this nature; whether the force used by JTF is reasonably necessary in the context of civilian casualties; and to respond to the question of genocide.

4.5.4 Nature of Counterinsurgency

Nigerian government faced with the security challenge of *Boko Haram* insurgency has responded by a fierce counterinsurgency measures. The government security apparatus known as the Joint Task Force (JTF), has been accused of grave human rights violations. The JTF is made up of the military, the police and intelligence personnel. The JTF was said to usually conduct raids on communities, often in the aftermath of *Boko Haram* attacks.[750] The JTF were said to have executed men in front of their families, conducted arbitrary arrests, assaulted members of the communities; burned houses, cars, shops and stolen money while searching homes of innocent people. The JTF operatives were said to have raped a woman in one particular instance.[751]

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[747] Human Rights Watch Monitoring of Nigerian and Foreign Media reports of suspected Boko Haram attacks – See: Spiraling Violence, *op. cit.,* p. 40.
[748] Twenty five people were confirmed killed in Boko Haram's attack on a village in Borno State Yesterday – See: *Osun Defender*, July 28, 2013. http://www.osun-defender.org/?=113849 (Last visited July 30, 2013).
[749] Rogers, *op. cit.*
[750] Spiraling Violence, *op. cit.,* p. 58.
[751] *Ibid.*

4.5.4.1 Extrajudicial Killings by JTF

International law does not permit the killing of any body in custody or under control without trial. To kill a person in a situation of extrajudicial or summary execution is offensive to the basic tenants of the rule of law, and thus, constitutes a crime under international law, where perpetrators are to be brought to justice.[752] A lot of persons that were interviewed by Amnesty International described instances of extrajudicial killing of innocent people who were clearly no threat to life by JTF.[753]

A resident of Mai Sandari told Amnesty International that in May 2012, he was watching with other people when JTF came to their neighbourhood and brought a man from their vehicle, got the man necked, gave him a football shirt to wear and fired him at a very close range with AK47 rifle.[754]

In a related incidence on 9 March, 2012, Ali Mohammed and two other people were shot dead by JTF when they (JTF) opened fire on innocent people at an NNPC filling station at Rijiya Zaki, Kano. The five men killed were staff and customers of the filling station.[755]

In a similar occurrence at Kaleri ward in Maiduguri on 9 July, 2011, there was an explosion close to a JTF vehicle. Most of the men in the community were in the mosque and the women were in their houses. Residents reported that JTF operatives blocked the road preventing any one from coming in or going out. The JTF personnels entered about twenty houses, searching and bringing out residents who were made to lie on the ground.

[752] See: Article 18, UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Execution, recommended by Economic and Social Council Resolution 1989/65 of 24 May, 1989; See also: Human Rights Committee General Comment No. 31 on the Nature of the General Legal Obligation imposed on State Parties to the Covenant, para. 18.
[753] Nigeria: Trapped in the Cycle of Violence, *op. cit.*, p. 19.
[754] *Amnesty International* Interview (name withheld), Maiduguri, July 2012, *ibid.*
[755] *Amnesty International* Interview (name withheld), Kano, July 2012, *ibid.*

The JTF then set fire on homes, cars and motorbikes. Eighteen men were killed in that incident.[756]

Human Rights Watch also conducted an investigation into the allegation against security operatives of gross human rights violation and extrajudicial killings of innocent citizens. According to a civil society leader who spoke to Human Rights Watch, JTF abuses have in no small measure created growing resentments in communities, which consequently made community members more reluctant to provide information that could help check the excesses of *Boko Haram*.[757] It was also said that, "the abuses by the JTF have created more distance between the people and the government. Ordinary people are alienated by the activities of the JTF, so they don't want to co-operate".[758] With the same disposition on the manner of counterinsurgency by JTF, a lawyer who was representing the family of a young man killed by JTF personnel in Kano also emphasized that the tactics used by JTF is counterproductive. He said, "if you want to stop an insurgency, you have to be friendly to the host community".[759] It was observed that, the Nigeria police has a very long history of notoriety in extrajudicial killings. For instance, in Maiduguri in July 2009, the police after thirty of their colleagues were killed in a violence, responded to the attack by extrajudicial execution of *Boko Haram* suspects in their custody.[760]

According to witnesses, many of the public execution in July 2009, by security operatives took place at the police headquarters in Maiduguri; twenty eight extrajudicial killings were perpetrated by the police between 28 July and August 1, 2009 in Maiduguri.

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[756] *Amnesty International* Interview (name withheld), Maiduguri, June, 2012; and Telephone Interview, July 2011.
[757] *Human Rights Watch* interview with Ahmad Salkida, Abuja, May 29, 2012.
[758] *Human Rights Watch* interview with Shehu Sani, President of the Civil Rights Congress of Nigeria, Abuja, May 30, 2012.
[759] *Human Rights Watch* interview of a Lawyer (name withheld), Kano, May 22, 2012.
[760] Spiraling Violence, *op. cit.,* pp. 60-61.

Twenty four of the twenty eight extrajudicial killings were perpetrated outside the front gate or inside the compound of the police headquarters.[761] A twenty four years old woman narrated a story of how she saw police officers kill sixteen detainees. She said:

> There was a big MOPOL officer there. I don't know his rank. He was saying in Hausa, "Shoot them all. What are you waiting". Three MOPOLs did the shooting. Some of those killed wore kaftans with camouflage. They yelled "Allahu Akbar", and the police would know them *Boko Haram* and shoot them. Others denied they were *Boko Haram* members… One of them was crying…But police pushed them aside and shot them.[762]

The woman said she returned to the police headquarters the following day and witnessed the police executing six more people, three of whom were on clutches: "after watching this, I felt bad – I even cried", she said. "The police are not right because they are killing innocent people".[763] It was observed that, the action of the police was so open. They did not attempt concealing their reckless acts, members of the public and even some policemen video recorded the extrajudicial killings with their mobile phones. On 9 February, 2010 Aljazeera Television showed on air how police officers killed seven men outside the front gate of the police headquarters.[764]

The JTF were also accused of other forms of human rights abuses aside from extrajudicial executions. These include burning of houses, shops, cars, beating of residents, stealing money and a case of rape. Other abuses include non-legal detention, torture and inhumane conditions, death in custody.

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[761] *Ibid.*, p. 61.
[762] *Human Rights Watch* interview of a 24 years old woman (name withheld) Maiduguri, July 8, 2010 – See: Spiraling Violence, *ibid.*, pp. 61-62.
[763] *Ibid.*
[764] See: "Video Shows Nigerian Execution" *Aljazeera*, February 9, 2010.

4.5.4.2 Rape

At Kalari neighbourhood in Maiduguri on July 9, 2011 after the raid, which resulted in burning houses, cars, and killing men of the neighbourhood, two JTF soldiers were said to have raped a woman whose husband they had killed.[765] An eye witness to the incidence states:

> I saw two soldiers beat a woman in her compound. They then raped her – one after the other. It was very close to where I was hiding…She lay there until the morning when people came to carry her to hospital. They have since taken her to the village for treatment. Because of shame she can't come back.[766]

4.5.4.3 Stealing/Beating

In the Dorayi neighbourhood of Kano city, on May 13, 2012 raid, soldiers were said to have broken into houses, ransacked homes, and in some cases stole monies belonging to occupants.[767] In an interview with Human Rights Watch, one of the residents of Dorayi recalled:

> The soldiers asked us to come out of the house. They asked me for my hand set but I didn't have one. They beat me with their guns on my back and hit me with a hammer on my head. The soldiers went into the house. They brought everything out of the house. I had put money in a drawer. When I went back into the house the money was missing – 27,000 Naira… I went to the police and gave a statement to the police. I signed the statement.[768]

4.5.4.4 Wrongful detention

Many people allegedly suspected to be *Boko Haram* members have been detained for months and even years without any charge or trial. Relatives of nine men taken away by

[765] Spiraling Violence, *op. cit.*, p. 69.
[766] *Human Rights Watch* interview with a Kalari Resident (name withheld), Maiduguri, May 28, 2012.
[767] Spiraling Violence, *op. cit.*, p. 70.
[768] *Human Rights Watch* interview with a Dorayi Resident (name withheld), Kano, May 22, 2012.

JTF in Maiduguri since January 2012 all reported that, they had not received any official statement as to the where abouts and conditions of their relatives, neither were they informed of the charges against them. Even though the authorities in Maiduguri had permitted some lawyers to visit the detainees, such visits were not realized because moves for such were often truncated by JTF personnel.[769] It is instructive to note that even the Nigerian Military authority had admitted the fact of detention without trial. The authority revealed that one thousand four hundred *Boko Haram* terror suspects were held for many months without trial. The military authority stated that one hundred and sixty-seven suspects were to be freed while the case of six hundred and fourteen suspects were for review by the Defence Headquarters.[770]

4.5.4.5 Torture

Suspected *Boko Haram* members already captured and in custody of JTF often suffer inhuman forms of torture. Two former detainees at the Giwa Barrack described the detention facility as being highly unsanitary. The men said that for months they were handcuffed to a ring on the floor that stops them from standing up, and were only released twice a day to eat and use the toilet. There were nine calls with eighty detainees.[771]

One of the detainees was also said to have witnessed several instances of torture at Giwa Barracks. For instance, he said that while he was being interrogated by security operatives in an office at the said barracks, he saw soldiers at another table torture a detainee by pulling his penis with plier. He said he also saw a soldier attempting to peal the

[769] Spiraling Violence, *op. cit.,* p. 71.
[770] "Military Admits 1,400 detained without trial", *Daily Trust*, December 5, 2013, pp. 1and 5.
[771] Spiraling Violence, *op. cit.,* p. 72.

skin of a detainee with a razor; while another detainee was killed by being suspended on a tree in the barracks.[772]

4.5.4.6 Deaths in Custody of JTF

A lot of persons suspected to be members of *Boko Haram* were also reported to have died in custody of JTF operatives at the said notorious Giwa Barracks. The relatives of a man who died in detention at Giwa Barracks said the deceased Kaka Alhaji Ali was arrested on March 14, 2012 when he tried to pass between two JTF vehicles. Soldiers called him back, beat him up and took him to Giwa Barracks. On March 23, 2012 one of the relative saw Ali from a distance at the barracks alive with his hands tied to a pillar. The next day, around 8a.m, one of the relatives returned with a lawyer and asked about Ali. A soldier told him that Ali had left.[773] The said relative of Ali further states:

> I took that to mean they had killed him. I went to the University of Maiduguri Teaching Hospital around 1pm and found his corpse. There was a report that he was shot in an exchange of fire along Maiduguri – Damaturu Road, which I knew was a lie. The lawyer and I asked for the corpse which they surrendered to us.[774]

There are incidences of JTF operatives carrying suspects in their custody to outskirt of Maiduguri and killing them. A resident of a settlement about four kilometers from Maiduguri said that since the beginning of 2012, JTF patrols have pulled up in the bush

[772] *Human Rights Watch* interview with a former detainee (name withheld), Maiduguri, May 28, 2012.
[773] Spiraling Violence, *op. cit.*, p. 73.
[774] *Human Rights Watch* interview with a relative of Kaka Alhaji Ali (name withheld) Maiduguri, May 28, 2012.

near the village on several occasion shooting and killing suspects usually at nights.[775] The man said:

> Sometimes we see them (the JTF) they come by convoy to the bush and kill prisoners and leave their corpses. It happens at night. I have heard the shots several times, and in the mornings the bodies are there… The police forced us to burry the corpses. We buried them in our cemetery. This has happened several times in the past five months. We have buried about 20 people ourselves.[776]

These sampled opinions, occurrences and eye witnesses accounts certainly speak volumes of the nature of JTF counterinsurgency in the light of human rights atrocities against civilian population, including women and children. Another very sensitive episode of the suffering of innocent people, women and children is the insurgency and counterinsurgency action at Baga. This incidence is worthy of consideration because it seem to have recorded the highest casualties this year[777] and so much heavy whether have been made about the recklessness of the counterinsurgency measures by the JTF.[778]

The nature of the insurgency and counter-insurgency by the Nigerian forces was considered by International Criminal Court (ICC) within the scope of Article 8(2)(c) of ICC Statute and Article 3 of the Geneva Convention of August 12, 1949 with regards to treatment of prisoners of war in the case of armed conflict of domestic character. The result of the preliminary report of ICC in this regard disclosed that, the *Boko Haram* crisis in

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[775] Spiraling Violence, *Op. cit.,* p. 73.
[776] *Ibid.,* p. 74.
[777] See: "Boko Haram Blood Bath: Jonathan Orders Probe" *The Nation Newspaper,* April 23, 2013.
[778] See: "Baga Massacre: Borno Gov. Weeps over killing of 185" *Nigerian Tribune Newspaper,* April 23, 2013; Hamza, I., "How Soldiers Sacked Baga", *Daily Trust Newspaper,* April 23, 2013; Olarenwaju, T. and Ukpong, U., "Massacre of 185: Tension in Borno Towns", *Daily Sun Newspaper,* April 23, 2013; "We have proof of Baga Atrocities, says NHRC" at http://rogaltimes.net/news/we-have-proof-of-baga-atrocities-says-nhrc. (last visited July 9, 2013). See also Akingbole, G.S., "Baga Killings: Senator Alerts of Health" at http://www.compassnewspaper.org/index.php/component/content/article/35-headlines/12787-baga-killings-senator-alerts-of-health-crises.

North Eastern Nigerian qualifies as an armed conflict of non-international character (civil war). This is in view of the intensity, sustainability, geographic spread, number of combatants involved on both sides, frequency of attacks, movement of arms, level of organization, as well as the declaration of state of emergency in some states in North-Eastern Nigeria.[779]

However, the Nigerian government may not see the crisis as a civil war as the Attorney-General of the Federation and Minister of Justice in the 12th session of Assembly of State Parties to Rome Statute of ICC at The Hague made no allusion to civil war situation in North Eastern Nigeria. The minister only emphasized the fact that the Nigerian Federal Government has secured eleven (11) convictions in its prosecution of *Boko Haram* insurgents in the past one year.[780] At this, one may wonder if Nigeria possesses an effective legal framework for such prosecution, since the nature of the insurgency and counter-insurgency measures depict a situation of perpetration of wide-spread and systematic atrocities which unveil the existence of crimes against humanity; which unfortunately, Nigeria has no domestic legal regime for prosecution of such heinous international crimes.

4.5.4.7 Baga Episode

Baga is a border settlement in Kukawa Local Government Area in the North-East of Borno State, along Nigerian border with Chad and Cameroon. Baga is a centre of commercial activities such as trading, fishing and farming. The market at Baga usually attract buyers and sellers from various races ethnic and national origins from within and

[779] "*Boko Haram*: ICC declares conflict in North Eastern Nigeria Civil War" *The Citizen* online, November 25, 2013; See also *The Will* online, November 25, 2013.
[780] "*Boko Haram*: FG Secures 11 Convictions, says Adoke"*The Punch*, November 22, 2013.

outside Nigeria. The 2006 census exercise puts Baga's population at about 32,826 persons.[781]

It was reported that at the early hours of the evening of April 16, 2013, a soldier attached to JTF Lance Corporal Olomoja while drinking some beverages at a local convenience was shot dead by unknown persons, highly suspected to *Boko Haram* group. This incident was said to have taken place at Bulabulin ward in Baga.[782] This was said to be one of the numerous provocative acts perpetrated by the *Boko Haram* insurgents. It was further reported that, a reinforcement of JTF operatives returned to the town of Baga later that day shooing indiscriminately at anything in sight, men, women, children and even domestic animal were victims of the slaughter; an incident that caused great loss of lives and massive destruction of properties.[783]

Account of the incident varied widely depending on whether it was a resident that gave the account or JTF. The *Boko Haram* is silent on the incident. Account of the incident by residents has it that the town was sacked by angry soldiers in a revenge mission for the killing of a soldier. However, JTF has refuted this claim, saying that, the JTF security forces came under attack when soldiers went into a section of the town to conduct an operation. And that, soldiers only responded in self defence.[784] An eye witness Usman Doron Baga who spoke to *Daily Trust* correspondent said

> There is serious humanitarian crisis here because Dead bodies are still in the bush and there is apparent shortage of food for survivors. There is no medication for the injured and as effective plan to resettle the displaced….. The day of the incident was like the end

[781] "The Baga Incident and the Situation North-East Nigeria" *An Interim Report of the National Human Rights Commission* (NHRC) June 2013, p. 17.
[782] *Ibid.,* p. 19.
[783] See: Police Incident Report on Baga Massacre, para. 7, April 2013.
[784] Hamza, I., "How Soldiers Sacked Baga" *Daily Trust Newspaper,* April 23, 2013.

> of the world for us … it was fire every where because houses were set ablaze. **I swear to God I saw soldiers setting houses ablaze and shooting everyone they saw.** Many of us escape by the whiskers but many were not all that lucky, especially women and children who ran into the bush with gunshot injuries. Many died because of excessive bleeding.[785]

However, Brigadier General Austin Edokpaye, commander of the JTF told the Governor of Borno State that, the violence at Baga should be blamed on *Boko Haram*, who according to him opened fire on soldiers and use civilians as human shield. On the incident, President Jonathan is said to have ordered a full-scale investigation into reports of civilian victims. The investigation is to look at the rules of engagement for security operatives in relation to the Baga massacre to determine whether or not these rules were complied with by JTF.[786]

There seem not to be a unanimous stand on the number of people killed or injured in the Baga atrocities. A review team deployed by the Chief of Army Staff after a visit to Baga concluded that 36 persons mostly identified as members of *Boko Haram* had been killed in the incident. The police reported that 37 persons may have lost their lives.[787] Senator Maina Maaji, the senator representing that area said that up to 228 persons may have been killed in the encounter.[788] However, news papers reports seem to favour the fact that 185 persons lost their lives in the Baga mayhem.[789]

There also seem to exist divergent claims on the extend of destruction of property at Baga during the insurgency and counterinsurgency onslaught. Senator Maina Maaji Lawan

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[785] *Ibid.*
[786] *Ibid.*
[787] Wakili, I., "Jonathan Orders Probe of Civilian Casualties in Baga" *Daily Trust Newspaper,* April 23, 2013.
[788] Interim Report of NHRC, *op. cit.,* n. 249, p. 19.
[789] *Vanguard,* April 28, 2013 at http://www.vanguardngr.com/2013/baga-mayhem-we-are-still-picking-corpses-of-women.

says that, 4,000 houses were destroyed, mostly by fire.[790] Human Rights Watch (HRW) says an area of about 80,000 square metres, with at least 2275 houses were destroyed and another125 houses were seriously damaged.[791] The Nigeria police stated that at least five wards, were completely razed down by the soldiers (JTF), and properties worth millions of Naira were lost through fire which burnt 30 vehicles,57 motorbikes, one hundred bags of beans and rice.[792]

Commenting on the *Boko Haram* insurgency and counterinsurgency by JTF the National Human Rights Commission of Nigeria (NHRC) say that, they have received reports of grave human rights atrocities perpetrated by *Boko Haram* insurgents on the innocent civilian population of communities in Adamawa, Yobe and Borno States and against law enforcement agents and churches; including abduction and forced marriages of young women.[793] In like manner, the NHRC also said she has received "credible allegation of gross violations by officials of JTF…" these allegations include summary execution, torture, arbitrary detention and outrages against the dignity of civilians, rape and indiscriminate dumping of human bodies by JTF and Borno State Environmental Protection Agency (BOSEPA). Enforced disappearance of people was also reported to be very

[790] See: *Daily Sun* April 23, 2013; *The Nation*, April 23, 2013; *Daily Trust*, April 23, 2013; *Tribune*, April 23, 2013.
[791] Interim Report of NHRC, *op. cit.*, p. 19.
[792] *Human Rights Watch* Satellite Based Imagery Assessment of Baga Town, April 6 and 26, 2013.
[793] Interim Report of NHRC, *op. cit.*, p. 20.

prominent.[794] The NHRC emphasized that, no justification whatsoever can be invoked to sustain grave human rights violations, torture and enforced disappearance.[795]

Flowing from the fore-going assessment of the characterization of the insurgency and the JTF counterinsurgency response, a lot of questions come to mind in a research of this nature. The one which principally concerns this research is whether from strict legal perspective, genocide has been committed as often described by journalistic appreciation of the terror and counter terror activities.

4.5.5 The Question of Genocide

The activities subject to examination in the context of genocide shall be the activities of the Boko Haram insurgents and that of the JTF counterinsurgency. The insurgents, because of their glaring atrocities against government targets, security operatives, innocent worshippers, moderate Muslims who oppose their activities and innocent citizens; while the JTF, because of the heavy and overwhelming accusations against them in relation to atrocities committed against innocent civilians, women and children; Particularly, allegations of extrajudicial killings, torture, enforced disappearance, rape, stealing etc; and the destruction of Baga.

4.5.5.1 The Law of Genocide

As we have severally and consistently observed in this chapter, the law of genocide means the conceptualizing provisions of the extanct law of genocide which includes the

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[794] *Ibid.,* Article 1(2) of the International Convention for the Protection of All Persons from Enforced Disappearance (2006) defines enforced disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of state or by persons or group of persons acting with authorization, support or acquiescence of state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or where about of the disappeared person, which place such a person outside the protections of the law".

[795] *Ibid.,* pp. 21-22.

provision of Article II of the Genocide Convention of 1948, Article 6 of Rome Statute of ICC, Article 4(2) Statute of ICTY and Article 2(2) Statute of ICTR. These provisions are same in wordings and in their imports:

> Genocide means any of the following acts committed with the intent to destroy in whole or in part, national, ethnical, racial or religious group, such as:
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group a condition of life calculated to bring about the physical destruction in whole or in part;
> (d) imposing measures intended to prevent birth within the group;
> (e) forcibly transferring children of the group to another.

It should be noted that the Draft Protocol to African Court of Justice and Human Rights in addition to acts (a) – (e) that may constitute genocide added another act (f) which is rape.[796] It must however be observed that, even if the Draft Protocol to African Court of Justice and Human Rights fail to add its (f) component of acts, rape can still be subsumed in act (b) and act (c) of the extanct law of genocide.

As already observed in earlier subheads of this chapter, the *actus reus* of the crime of genocide are the series of acts (a) – (e), while the *mens rea* is the intention to destroy a national, ethnical, racial or religious group in whole or in part. As stated earlier, the execution of the acts (a) – (e) in the extanct law of genocide only constitute the crime of genocide if perpetrated with the necessary intent for genocide

[796] Art.28B, Draft Protocol to the Protocol on the Statute of the African Court of Justice and Human Rights.

4.5.5.2 Insurgency and Counterinsurgency in the Light of Genocide

The activities and atrocities of the Boko Haram insurgents specifically examined earlier did not disclose a specific targeted group, as the mode of the groups atrocities is widespread, which does not point to specific intent against a specific group.

Even though the *actus reus* of genocide, that is killing, causing grievous bodily and mental harm had been perpetrated by the insurgents. Such can not be said to have been directed at specific national, ethnical, racial or religious group(s), with the requisite special intent to annihilate the group.

On the part of the JTF, could it be said that, genocide has been committed by them? The nature of the counterinsurgency as disclosed earlier hardly portrays that JTF are targeting persons belonging to any of the groups specifically mentioned in the law of genocide. These alone have knocked their activities off the crime of genocide as contemplated by the extanct law of genocide.

However, even though the activities of *Boko Haram* insurgents and JTF counterinsurgency may not constitute genocide in its strict legal meaning; they may all amount to crimes against humanity under international law. Crimes against humanity include murder, torture, persecution, rape and other atrocities "committed as part of a widespread systematic attack directed against any civilian population with knowledge of the attack".[797] The attack must be widespread and systematic but need not be both.[798] By the character of the insurgency examined earlier, it is clear that the insurgents had severally

[797] Article 7, Rome Statute of ICC; See also Article 5 Statute of ICTY; *Limej et al* (Trial Chamber) ICTY, Nov. 30, 2005, para. 181.
[798] Article 7(1) *ibid.*, See: *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment of ICTY, (Trial Chamber) May 7, 1997, para. 646.

directed a widespread systematic attack against helpless civilian population at different instances. Just yesterday, the insurgents were said to have attacked and killed 44 persons that were praying at a mosque in Kondugu town, which is about 22 miles away from the heart of Maiduguri town.[799] The extrajudicial killings and grave human rights violations by JTF security forces which had already been assessed should definitely qualify as crimes against humanity in international criminal law.

4.5.6 Impact of the Insurgency and Counterinsurgency on Nigeria

The activities of the insurgents and the recklessness of the counterinsurgency measure have created very serious insecurity problem in Nigeria, especially at the affected regions; therefore, causing enormous negative impact on individuals, social groups, communities and the nation at large.[800] Some of these include:

i. Forced displacement[801]

ii. Refuge status for Nigerians[802]

iii. Loss of thousands of lives and property worth millions of Naira[803]

iv. Social dislocation and high number of internally displaced persons[804]

v. Disruption of family and community life

[799] *Vanguard Newspaper*, August 13, 2013.
[800] Ladan, (2012), *op. cit.*, p. 9.
[801] Interim Report of NHRC, *op. cit.*, p.26.
[802] *Ibid.*
[803] United Nation High Commission for Refugees (UNHCR) has reported sufficient flow of refugees or asylum seekers into Cameroon and Niger. UNHCR report of June 18, 2013 stated that more than 3,000 Nigerians have entered Northern Cameroon. The UNHCR also reported that over 6,000 people have reached Cameroon from Northern Nigeria in weeks – See: "Nigeria: Insecurity sees Refugee outflows to Cameroon" available at http://www.unhcr.org/51c05dd76.htmc. See also: "UNHCR concerned about displaced Nigerians, calls on neighbouring countries to keep boarders open" UNHCR Press Release, 29 May, 2013 – all cited in NHRC Interim Report, *op. cit.*
[804] Ladan, (2012), *op. cit.*, p. 9.

vi. General atmosphere of fear and mistrust between Northern Christians and Muslims; and between Northerners and Southerners residing in the North.[805]

vii. Social tension and polarized pattern of settlement which sees Muslims moving to Muslims dominated areas and Christians migrating to areas dominated by Christians[806]

viii. Dehumanizing situation against defenceless civilians, women and children. These include rape, child neglect and child abuse, and an ensuing situation of hunger and poverty in the society. This situation consequently brews an atmosphere of political instability and high insecurity; which also manifest in high decline of confidence in political leadership and her failed security system.[807]

ix. High rate of orphaned children with no where to go and no means of livelihood.[808] This, if not effectively managed may be a time bomb for explosion of social vices.

Nigeria as a country is facing a lot of security problems. The death toll of her citizens sacrificed at the altar of national unity today is so alarming. The *Boko Haram* insurgency has claimed so many lives. The Nigerian state seems to have failed woefully in meeting her obligation under the social contract theory. The State Security apparatus that is meant to protect the people and their properties have often been used as an instrument of destroying the people and their property. The Boko Haram counterinsurgency, Odi and Zaki-Biam phenomenon speak volumes of this disposition of the Nigerian state to her citizens, whether the acts legally constitute genocide or not, the victims do not care about

[805] *Ibid.*
[806] *Ibid.*
[807] *Ibid.*
[808] Muktar Ahmed, a public commentator in Maiduguri said that there are over 500,000 orphaned children in Maiduguri alone. A number which was brought about by the insurgent and counterinsurgency since 2009 – See Hamza Idris "Tears of Kids Orphaned by Boko Haram Insurgency" *Weekly Trust,* August 3, 2013.

the descriptive nomenclature of the acts by which they were killed; some times, by heinous atrocities perpetrated by their own state to whom they have willfully given themselves for protection.

That numerous crises in Nigeria may not constitute genocide in its strict legal sense, like the Odi massacre, is only an indication of the many inherent flaws and inadequacies of the law of genocide as it is today; with its unfortunate restriction of the groups protected by the law of genocide. This work advocates for the protection of all conceivable groups.

4.6 Conclusion

In this chapter we have examined some crises in Nigeria with the search light of the international crime of genocide. This we have done for the purpose of resolving the highly debatable question of genocide which has over the years adored the pages of literature and journalistic appreciation of the selected crises. The choice of the four Nigerian crises is because of the practical impossibility of examining all Nigerian crises. It is hoped that, the crises considered in the context of genocide, will form a solid basis for the appreciation and understanding of genocide in relation to other crises that has in recent time engulfed the geo-political entity called Nigeria; with a view of situating these crises within their most appropriate description. The basis of assessment of the four crises was the Genocide Convention of 1948; the Rome Statute of International Criminal Court (ICC); the Statute of International Criminal Tribunal for former Yugoslavia (ICTY) and Statute of International Criminal Tribunal for Rwanda (ICTR).

It was observed that, though Nigeria is not a signatory to the Genocide Convention of 1948, she is however a state party and a signatory to the Rome Statute of ICC which has

in totality adopted the descriptive disposition of genocide and the elements of the crime proffered by the Genocide Convention. It was further observed in this chapter that, aside from the bindiness of the Rome Statute of ICC's provision of genocide on Nigeria, the preemptory nature of the crime of genocide as a violation of the customary rule of international law could ignite obligation on Nigeria as a member of a civilized global community even without any treaty obligation.

In this chapter, by the indices available to us, we found that the Nigerian Civil War could be anything but genocide against the Igbo people of South-Eastern Nigeria; though pockets of war crimes might have been committed. In like manner, the Odi massacre may not constitute genocide, because the law of genocide did not contemplate the protection of a geographical area. Same applies to the *Boko Haram* insurgency and JTF counterinsurgency measures, because by the nature of the insurgency and counterinsurgency no specific target is disclosed. For the Zaki-Biam massacre, we dared to find that genocide might have been committed because the Tiv people were targeted as an ethnical group, which falls within the groups protected by the law of genocide.

CHAPTER FIVE

DOMESTIC IMPLEMENTATION OF THE LAW OF GENOCIDE IN NIGERIA

5.1 Introduction

The domestic implementation of any treaty is an exclusive responsibility of the implementing state. Consequently, it is the normal duty of a state party to a treaty to take necessary measures to ensure the provision of the treaty is given full effect.[809] Ladan, rightly observed that the easiest way to understand the workings of implementation of treaties is to look at the national measures that are specifically required for the implementation of the treaty in question.[810]

Till the early part of the 19th century, there was absolute dominance of domestic law over international law. This is partly because of the fact that the doctrine of State Sovereignty reigned supreme at that time. It was observed that the protection of the rights of individuals were at that time not the concern of international law.[811] "Virtually all matters that today will be classified as human rights were at that stage universally regarded as within the internal sphere of national jurisdiction".[812] It was rightly observed that, the strict obedience to the much-vaunted concept of domestic jurisdiction or sovereignty of state has caused grievous calamity to the promotion and protection of human rights.[813] This

[809] Ladan, M.T. (2011) "Domestic Implementation of International Humanitarian Law (IHL) Treaties in Nigeria" Lecture Delivered at the PGD-JAGBC Training Workshop for Officers of Legal Services wing, *Nigeria Army School of Military Police, Zaria,*. pp.13-14.

[810] *Ibid.*, see also: Ladan, M.T. (2009) "Overview of International Humanitarian Law: Issues in Domestic Implementation in Nigeria" A paper presented at the 4th Training Course in International Criminal Justice and Administration. *Institute of Advance Legal Studies, Lagos, 2nd to 6th November.*

[811] Oppeheim, L.H., *International Law*, cited in Yerima, T.F. (2010) "Still Searching for Solution: From Protection of Individual Human Rights to Individual Criminal Responsibility for Serious Violations of Humanitarian Law" *ISIL Yearbook of International Humanitarian and Refuge Law*, Vol. X, p. 41.

[812] Shaw, M.N. (2005) *International Law*, 5th edn., Cambridge University Press, Cambridge, p. 252.

[813] Yerima, *op. cit.*, p. 41.

doctrine of state sovereignty or dominance of domestic law and its jurisdiction on human rights violations was said to have reached its peak in the 1930s and 1940s. The concept did not only create an enabling environment for dictatorial regimes, but it also makes world principal democracies impotent as they all stand aloof.[814]

The internationalization and criminalization of conducts and the recognition of democracy and good governance as a customary norm of international law have altered this position; because, now, any gross violation of human rights of citizens by a state constitutes a breach of international human rights law and international criminal law.[815] However, it must be stated that international law is predominantly a treaty based law. Aside from customary norms of international law which has evoked a contentious argument of its bindingness on all civilized nations even without any treaty obligation; all other treaty based laws only impute obligation on states that have signed and acceded to the treaty. Such a treaty can only enjoy domestic application in the case of Nigeria by the instrumentality of the process of "domestication". The implication is that, any international or regional treaty that gets domesticated in Nigeria automatically acquires the status of a domestic law. By this act, the potency of an international or regional instrument is activated. That is when such an international instrument becomes useful. Dakas observed as follows:

> Contemporary human rights jurisprudence parades a glittering array of human rights norms and engenders one of the profound questions that task the intellect. These norms have been expressed in countless

[814] Acheampong, K.A. (1994) "Our Common Morality under Siege: The Rwandan Genocide and the Concept of Universality of Human Rights", *Rev. Afr. Common & Peoples Rts*. Vol. 4, p. 20.

[815] See: Nwoke, F.C. (2002) "The Concept of Domestic Jurisdiction in International Law Revisited" in Dakas, C.J.D. (ed.) *New Vistas in Law*, Vol. 2, Faculty of Law, University of Jos, Jos, pp. 117-118; See also: Umozurike, U.O. (2001) "Human Rights and Democracy in the 21st Century: The African Challenges", in Ladan, M.T. (ed.) *Law, Human Rights and the Administration of Justice in Nigeria*, Ahmadu Bello University, Dept. of Public Law, Zaria, pp. 42-44.

> instruments at the international, regional and municipal levels. However, unless these sparkling norms are transformed into concrete reality, they are no more than tissue – paper guarantees.[816]

This points to the fact that treaties without the force of law are without any potency, especially the existence of international treaty in the domain of domestic law.

It should be remembered that, the Convention for the Prevention and Punishment of the Crime of Genocide, 1948 (Genocide Convention) is the principal treaty on the law of genocide. Surprisingly, Nigeria is not a party to the Genocide Convention. This presupposes that she does not owe any obligation to observe the said treaty. The fact that the crime of genocide is recognized as a customary norm of international law will not absolve Nigeria of obligation relating to perpetration of the crime of genocide. In fact, genocide being a customary norm of international law, vests obligation on Nigeria as though she was a party to the Genocide Convention. It must also be noted that Nigeria is a party to the Rome Statute of International Criminal Court (ICC). The Rome Statute adopted the provisions of Genocide Convention in the provision of the statute relating to the crime of genocide.[817] Nigeria has not yet domesticated the Rome Statute of ICC to warrant its operation as part of the Nigerian domestic legal system. It must however be stated that the process of implementing the Rome Statute of ICC has commenced. The Federal Government of Nigeria has constituted a Special Working Group (SWG) of experts who submitted their report and a Draft Bill titled: A Bill for an Act to provide for the prevention and punishment of certain International Crimes and give effect to the Rome Statute of

[816] Dakas, C.J.D. (2002) "Activism, Ignorance, or Playing to the Gallery? Untying the Knots of the Jurisprudence of Nigerian Courts on the Domestic Application of International Human Rights Norms" in Dakas, C.J.D. (ed.) *New Vistas in Law*, Vol. 2, Faculty of Law, University of Jos, Jos, p. 398.
[817] See: Art. 6 Rome Statute of International Criminal Court (ICC).

International Criminal Court done at Rome on July 17, 1998 and for connected matters, 2011.[818] Since September 14, 2011 the Special Working Group (SWG) submitted their preliminary report and a Draft Bill, nothing fundamental has been done on the domestication process.

This chapter is concerned with the domestic implementation of the law of genocide in Nigeria. The fact that genocide is an international crime makes it impossible to consider its implementation in Nigerian domestic law without a critical assessment of the relationship between international law and domestic law. This chapter shall further consider some instances of application of international/regional or sub-regional treaties in Nigerian domestic courts. This is for the purpose of guiding us on the process of domestication and its effect on Nigeria. The chapter shall also attempt an assessment of the possibility of domestication of the law of genocide in Nigeria, and its possible efficacy. The chapter shall conclude by considering a sub-head genocide prevention.

5.2 Relationship between International Law and Domestic Law

International law is no longer confined to only the domain of regulating interaction between states. Its scope has continued to expand beyond what it used to be. It is no longer limited to the conduct of warfare and international diplomacy. The frontiers of international law have extended very far to include issues like health, education and economics which are of high social relevance. International law is more than ever before focused on individuals as subjects of international law.[819] In pursuit of this elaborate goal and purpose in favour of individuals; international law can only succeed if it builds a formidable

[818] Preliminary Report of the Special Working Group (SWG) on the Implementation of Rome Statute of ICC submitted to the Honourable Attorney-General of the Federation and Minister of Justice, Mohammed Bello Adoke, SAN, September 14, 2011.
[819] Wallace, R.M.M. (2005) *International Law*, 5th edn. Sweet & Maxwell, London, p. 36.

relationship with municipal law, to the extent that individuals can invoke international law before national courts and protect their internationally guaranteed rights by the operations of domestic legal system.

In order to help international law to achieve its goals, every nation is expected to obey international law. While some countries make international law automatically operational as part of their domestic laws, other countries provide for a situation that is akin to subjugation of international law to their own domestic law. This is achievable by the process of transformation and adoption which takes place after the legislative body of a state has re-enacted the provisions of international law into their domestic law. In this context, international law only becomes effective after passing the internal scrutiny and acceptability test.[820] Oji rightly noted that, the attitude of state in pursuit of implementation of international law in their domestic law is derived from the reflection of propositions adopted by different theories regarding the basis of obligation in international law.[821] While the voluntarist theory which situate the basis of obligation under international law to the consent of nations, which leads to *dualism*, the objective theory which ascribe the basis of obligation of international law outside the premise of human or state will favour *monism.* A third, but some what unpopular theory created by German militarism brings about *Nihilism.*[822]

5.2.1 Monism

Monists are said to be disposed to a unitary concept of law. They see all laws as the same. They see international law and domestic law as an integral part of the same law.

[820] Oji, E.A. (2010) "Application of Customary International Law in Nigerian Courts" *NIALS Law and Development Journal*, p. 156.
[821] *Ibid.*
[822] *Ibid.*

However, the monists are of the firm stand that, where conflict ensued between international law and municipal law, international law should prevail.[823] The monist believe that international law and domestic law must be viewed as a clear manifestation of a single conception of law, the reason being that both laws are geared towards addressing the same subjects.[824] France and some other countries strongly believe in this theory.

5.2.2 Dualism

This theory articulates the view that international law and domestic law differ, based on the fact that, they are meant to regulate different issues. While international law regulates states interaction, domestic law operates within the confines of a state, and regulates the relationship of citizens with one another and with the state or the government. Thus, both laws are said to have their separate scope of operation to the extent that non of the legal orders have the capability to create or alter the rules of the other.[825] Dualism is said to have the greatest influence in the19th century. The dualists believe that there may be conflict between the two separate and self-contained laws, but in the event of such contact and ensuing conflict, each law has primacy in its own area, international law at the international and domestic law at the domestic level.[826]

Dualism upholds the fact that international instruments cannot apply directly in domestic courts such international instrument must first of all undergo a process of specific adoption and get incorporated into domestic law before its rules and principles can find expression in domestic courts. This process brings about the transformation of an international instrument or treaty into national law before its provision can apply in

[823] Wallace, *op. cit.*, p. 37.
[824] Oji, *op. cit.*, p. 157.
[825] Dakas, *op. cit.*, p. 400.
[826] Ladan, M.T. (2008) *Materials and Cases in Public International Law*, Ahmadu Bello University Press, Zaria, p. 4.

domestic courts.[827] Ladan observed that: "it is only this process of transformation which validates the extension to individuals of the rules laid down in treaties".[828] For instance, by the provision of section 12, Constitution of the Federal Republic of Nigeria 1999, a treaty has to be enacted into law by the National Assembly to ground its applicability in domestic domain. In Nigeria, if the treaty relates to a matter that concerns the operation of state governance, it has to be ratified by a majority of the States House of Assembly in the federation. This process of transformation of treaty into domestic law does not apply to customary rules of international law in Nigeria just as it is in Britain. This is because, customary rules of international law are deemed to be part of domestic law.[829]

5.2.3 Nihilism

This is a very unpopular theory. That is why a lot of scholars often tie their arguments to only Monism and Dualism. This theory was said to have appeared under the favourable condition created by German militarism, which was employed to serve its predatory interest.[830] It preaches absolute supremacy of domestic law over international law.

International practice does not endorse any of the cognizance of only Monism and Dualism. It must be stated that amongst the two theories, international jurisprudence seems to tilt in favour of Monism, asserting the primacy of international law. Lauterpacht, was right when he observed that, "a critical and realistic monism is fully alive to the realities of

[827] *Ibid.*
[828] *Ibid.*
[829] *Ibid.*
[830] Oji, *op. cit.*, p. 156. See also Ladan, *op. cit.*, p. 5.

international life".[831] This view tends to be in tune with contemporary realities, because monism will entail the survival of international law while the logic behind dualism would not only be subversion, but also a negation of international law.[832] It is therefore on the basis of the foregoing, that a state cannot plead the provision of its domestic law as a defence for violation of international obligation before an international court or tribunal. In *Alabama Claims Arbitration*,[833] the United States succeeded in its claim of damages against Britain for breach of its obligation as a neutral party during the American civil war. It was held that a British legislation absolving Britain from responsibility cannot be projected as a defence for breach of Britain's international obligation. Britain was consequently held liable.[834]

Even though international disposition is said to favour monism, and dualism is said to be often seen as a weapon of subversion and negation of international law in our contemporary times. It must be emphatically stated that, this may not be true of dualism at all times. The practice of dualism especially in some African and other third world countries may be borne out of the desire of the people to sustain some of their cultural practices, norms and values that might be eroded by the tempest pressure of free flowing international human rights instruments. The practice of dualism in this regard is to monitor and prevent the influx of international law that may be against their cultural practices, norms and values.

5.3 Application of International Instruments in Nigerian Domestic Courts

[831] Lauterpacht, H., *International Law*, Collected papers, Vol. 1, Cambridge, 1970, p. 214 cited in Oji, *op. cit.*, p. 157.
[832] Oji, *op. cit.*, p. 158.
[833] (1872) Moore Arbitrations p. 653.
[834] See also: *Free Zones Case* PCIJ Rep. Ser. A/B 46, p. 47; the Graeco Bulgarian Communities case (1930) PCIJ Rep. Ser. B.NO. 17, p. 32; the case of *Polish Nationals in Danzig* (1932) PCIJ Rep. Ser. A/B No. 44, p. 24.

In the words of Zou Keyuan, "the effectiveness of international law depends on its application and enforcement by nation-states, including those within the domestic domain".[835] The application and effect of international law in Nigeria is differently clothed, depending on the nature of international law that is sought to be implemented or the stand of the international instrument which effect on Nigerian domestic law is sought to be understood. The application and effect of customary rules of international law in Nigerian domestic courts is very different from the application and effect of treaty based laws in Nigeria. While the effect of customary rules of international law is precise and sacrosanct, the effect and extent of application of a treaty law is dependant exclusively on the commitment of the implementing state to the treaty in question. Whether the treaty is one that is not ratified, one that is ratified but not domesticated, or one that is ratified and domesticated by Nigeria.

5.3.1 Application of Customary International Law

In the context of customary international law, Nigeria entirely adopted the disposition of Britain in its application in her domestic sphere. Most countries actually adopts this particular thinking; which is to the effect that customary international law are deemed to be automatically incorporated into domestic law and consequently, enforceable in domestic courts and tribunals. Wallace described this approach as "…essentially…a monistic approach to customary international law".[836] The British view on this was said to

[835] Keyuan,Z. (2010) "International Law in the Chinese Domestic Context". *Valparaiso University Law Review* Vol. 44, p. 935.
[836] Wallace, *op. cit.*, p. 40.

have been best presented by Lord Alverstone in the *West Rand Central Gold Mining Co. case*:[837]

> It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions for which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it…that the law of England, ought not to be construed so as to include as part of the law of England opinion of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *afortiori* if they are contrary to the principle of her laws as declared by her courts.[838]

Lord Alverstone in this decision of the English Court gave a clear manifestation of the thinking of Great Britain on the applicability of customary international law in British courts; a disposition which we earlier observed as being the position under Nigerian law. Lord Alverstone emphasized the fact that global recognition and acceptance of customary international law is the basis for its applicability as part of English law in English courts. This position of English law in respect of customary rules of international law has consistently been re-echoed in subsequent decisions of the English courts. For instance,

[837] (1905) 2 K.B. at 391.
[838] *Ibid.*, at 406-408.

Lord Macmillan in *the cristina case*,[839] held that national courts must acknowledge the fact that customary international law is part of domestic law upon being satisfied that such custom had the hallmark of acceptability and consent.[840] In *Chung Chi Cheung vs. The King*,[841] Lord Atkins stated thus:

> It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our domestic law. There is no external power that imposes its rule upon our code of substantive law and procedure. The courts acknowledge the existence of a body of rules which nations accept amongst themselves on any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.[842]

In re-affirming this position, Lord Denning in *Ihakrar vs. Home Secretary*,[843] said, "In my opinion, the rules of international law only become part of our law in so far as they are accepted and adopted by us".[844] Three years later, Lord Denning was again on board in *Trendax Trading Corporation v. Central Bank of Nigeria*,[845] however, in this case Lord Denning accepted that the principle of incorporation was correct, but went further to state that the doctrine of *stare decisis* does not apply to international law. If a court is satisfied that the rule of international law has changed it can go ahead and effect the change by its decision without waiting for the House of Lords to do so.[846]

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[839] (1938) A.C. 485.
[840] *Ibid.*, at 490.
[841] (1939) A.C. 160.
[842] *Ibid.*, at 167-168.
[843] (1974) Q.B. 684.
[844] *Ibid.*, at 701.
[845] (1977) Q.B. 529.
[846] *Ibid.*, at 554

In similar fashion, the Supreme Court of United States of America has held that customary international law is an integral part of the United State's law and must be ascertained and administered by courts of justice of appropriate jurisdiction.[847] In English law as well as in Nigeria, conflict between state's domestic law and her international obligation does not affect the effectiveness of that law within the territory of that state. Thus, a domestic law legislation that runs contrary to international law cannot for that reason be invalidated. The internationally unlawful and domestically lawful act may only be denied recognition by other state, and consequently denied external relevance.[848] This may explain the reason why Nigeria often avoids her international obligation to implement some international agreement within her state boundaries.[849]

Section 1 of the Constitution of the Federal Republic of Nigeria 1999 declared the supremacy of the Constitution and asserted that any law that is inconsistent with its provisions shall be null and void to the extent of such inconsistency. In the face of this provision, the question will be that, what will be the treatment of customary international law that is inconsistent with the provision of our constitution? Oji, suggested that customary international law should be subjected to a test of validity and repugnancy like our local customary law for it to be applied in our domestic court, and that the Nigerian policy consideration should equally be emphasized in the validity test of customary international law.[850] This position projected by Oji is to say the least, very far away from dualism. Nigeria will then be said to project the dominance of domestic law very close to the domain of nihilism. Oji rightly contended further that it only behooves on every peace

[847] The Paquete Habana case 176 U.S. 677.
[848] Oji, *op. cit.*, p. 159.
[849] *Ibid.*
[850] *Ibid.*

loving country to take steps to implement international customary law, as derogation within state boundaries may occur, without any redress mechanism.[851] It means therefore that in Nigeria, within her boundaries application of customary rules of international law is more of a moral obligation.

5.3.2 Application of Treaty Based Laws

The application of international treaties and their effect on Nigerian domestic law, as we have often stated, is dependant on certain facts consistent with the level of prominence accorded to such a treaty by its ratification status. The issue of implementation of a treaty is strictly at the premise of domestic law.

5.3.2.1 Instruments not ratified by Nigeria

These are instrument or treaties that Nigeria is not a party to. This means that Nigeria has not signed or acceded to the instrument or done any other act depictful of ratification. What will be the effect of a treaty not ratified by Nigeria on her domestic law? This researcher knows no any situation where such question was posed for determination of any court in Nigeria. However, it is doubtful if any such instrument have any legal efficacy or could invest Nigeria with any legal right or obligation.[852] It does not totally mean that a treaty which has not been ratified by Nigeria is without any importance. Bakar, J in the New Zealand case of *Bird's Galore Ltd vs. A.G. & Anor*[853] stated that, an international instrument that is not acceded to by New Zealand, can be looked at by the court on the basis that in the absence of express words, parliament will not work against it. In like

[851] *Ibid.*, p. 169.
[852] Osita, N.O. (2004) "Nigerian Courts and Domestic Application of International Human Rights Instruments" in Ibidapo-Obe, A. and Yerima, T.F., (eds.) *International Law, Human Rights and Development*, Petoa Educational Publishers, Ado-Ekiti, p. 90.
[853] (1989) 1 RC (Constl) 928 at 939.

manner, the Botswanan Court of Appeal in *A.G Botswana vs. Unity Dow*[854] held that, where a state is not a party to an international instrument, such an instrument can serve as an aid for the interpretation of domestic law, or the construction of the Constitution if such international instrument purports to or by necessary implication creates an international regime within international law, which is recognized by vast majority of states. By this decision of the New Zealand and Botswana, instruments not ratified by Nigeria may just simply have some import; this however is not binding but highly discretionary.

5.3.2.2 Instruments Ratified by Nigeria but not Domesticated

A treaty ratified by a state becomes binding on that state at the international level. This is predicated on the Latin Maxim *pactum sunt servanda*. A state party to an international instrument is under obligation to ensure that its domestic law is in conformity with its international obligations.[855] This principle extends beyond ordinary law or legislation to the constitution of the state. Consequently, a state cannot rely on the provisions of its constitution to avoid its treaty obligation.[856] The failure of a state to incorporate international law into its domestic law cannot affect the states international obligation created by the treaty. This principle only operates at the international domain and does not affect the operation of domestic law before a domestic court.[857]

Treaty being an agreement consciously entered into by Sovereign States,[858] is usually executed on behalf of the state by the executive arm of government which stands as the embodiment and representation of state sovereignty. Consequently, if treaties which

[854] (1998) 1 HRLRA 1.
[855] Roberts, A.H. et al.(1993) *Human Rights in Europe: A Study of European Convention on Human Rights,* Manchester University Press, Manchester, p. 25.
[856] Osita, *op. cit.,* p. 92.
[857] *Ibid.*
[858] Shaw, *op. cit.,*p.110.

were executed by the executive arm of government is to become enforceable in domestic courts without any other legislative act, then by implication, the executive would have taken over the law making powers of the legislature by making laws for the country.[859] This position was broadly appreciated by Lord Atkin in *Attorney-General of Canada vs. Attorney-General of Ontarior*[860] where the Law Lord said:

> …within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty dully ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day decides to incur the obligations of a treaty, which involves alteration of law, they have to run the risk of obtaining the assent of parliament of the necessary statutes. To make themselves as secure as possible, they will often in such cases before final ratification seek to obtain from parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting parliament, or any subsequent parliament, from refusing to give its sanction to any legislative proposal that may subsequently be brought before it. …while they bind the state, as against the other contracting parties, parliament may refuse to perform them and so leave the state in default.

Similar to the foregoing disposition of the English court, the Court of Appeal of Trinidad and Tobago in the case of *Darrin Roger Thomas & Anor vs. Cipriani Baptiste (Comm. of Prisons) & Anor*,[861] affirmed that, international convention do not alter domestic law, except if such conventions are incorporated into domestic law by a transformatory legislation. It therefore means that, the stipulation of an international instrument cannot

[859] *Ibid.*
[860] (1937) A.C. 328.
[861] Cited in Osita, *op. cit.*, p. 93.

effect any alteration to domestic law or deprive the subjects of domestic law of existing legal rights, unless such a treaty is enacted into domestic law under the authority of the legislation.

The position of Nigerian law is the same as in English law and as expounded by the decision of the Court of Appeal of Trinidad and Tobago. The Nigerian position is straight forward because it is supported by express constitutional stipulation. The Constitution of the Federal Republic of Nigeria 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".[862] The implication of this provision is that international instruments of whatever nature or description cannot apply in Nigeria upon mere ratification. For any such treaty to have the potency of law in Nigerian domestic sphere, it must be re-enacted in a body of a national legislation. The decision of the Supreme Court of Nigeria in *African Reinsurance Corporation vs. Fantaye*,[863] is instructive on this position. The court held that treaties do not constitute part of the law of the land merely by virtue of their conclusion by the country. This is the position under Nigerian law. The more recent decision of the Court of Appeal in *Mojekwu vs. Ejikeme*,[864] where the court held to the effect that mere ratification of CEDAW should provide legal teeth for its application in Nigeria is a decision in error, which does not give effect to the provision of the constitution. The effect of ratification of a treaty in Nigeria is only limited to vesting obligation on Nigeria at the international level, but not to the extent of having any effect on her domestic law. However, international human rights instruments ratified but not domesticated can be applied indirectly in Nigerian in an effective manner by infusing their

[862] Section 12, Constitution of the Federal Republic of Nigeria (CFRN) 1999.
[863] (1986) 1 NWLR (Pt. 14) 113.
[864] (2005) 5 NWLR, 402 at 439.

normative content into constitutional and statutory standard.[865] This was perfectly done in the case of *Mojekwu vs. Mojekwu*,[866] where Niki Tobi made reference to the provision of Convention on the Elimination of all form of Discrimination against Women (CEDAW) in declaring a customary law which discriminate against women as repugnant to natural justice equity and good conscience. In applying the repugnancy test, the court used the internationally accepted standard for treatment of women as evidenced in CEDAW. This was different from what Niki Tobi did in *Mojekwu vs . Ejikeme*,[867] in this case the court did not seek to apply the provision of CEDAW in Nigerian domestic court.

In some other countries, there is no need for transformation of an already ratified treaty before its provisions apply in domestic courts. Mere ratification ignites the flames of applicability in domestic courts. This usually relates to countries like France whose constitution or legal system cloths treaties with self-executing force, upon ratification.[868] In like manner, the United States Constitution stipulates that the United States Supreme Court shall be the Supreme Court of the land and the judges shall be bound by such treaty notwithstanding any thing in the Constitution or laws of any other state.[869] This means that in United States, self-executing treaties have primacy even above the Constitution of United States. Non-self-executing treaties are the ones that required transformation by municipal legislative actions before their applicability in domestic domain. In Nigeria by the provision of section 12, Constitution of the Federal Republic of Nigeria 1999 all treaties

[865] Osita, *op. cit.,* p. 95.
[866] (1997) 7 NWLR (Pt. 512) 283.
[867] *Mojekwu vs. Ejikeme*, *op. cit.*
[868] Art. 55 of the French Constitution of 1958 provides: "Treaties or Agreements duly ratified or approved shall upon publication have an authority superior to that of a domestic law".
[869] Art. VI, Section 2, United States of America Constitution. See also: Art. 25 of the Basic Law of Federal Republic of Germany; Art. 65 of the Dutch Constitution and Art. 10 of the Italian Constitution 1947 which gives a treaty or customary international law constitutional status superior to national legislation.

for all intent and purposes are non-self-executing. Self-executing treaties is a nomenclature that is unknown to Nigerian legal process.

5.3.2.3 Instruments Ratified and Domesticated by Nigeria

Before the much celebrated decision of the Supreme Court of Nigeria in the case of *Abacha vs. Fawehinmi*,[870] Nigerian courts had been wallowing in a scene of no direction on the status and application of international treaties which have been translated into Nigerian domestic law for applicability in Nigerian domestic courts by the process of transformation. The courts seem to be confused on the applicable operational principle of international treaties at the domain of international law with the status of such treaties in relation to our domestic legislation before domestic courts.

This confusion was observed to be orchestrated by the passionate desire of Nigerian courts in the dark era of military regime to cub the excesses of so many draconian decrees with their ouster clauses, which oust the jurisdiction of the courts in entertaining any case relating to any act done pursuant to the decrees. In order to place the African Charter on Human and Peoples' Right which has been domesticated by Nigeria outside the reach of Nigerian military government's draconian decrees, the courts were faced with only the option of stumbling over and projecting the theory that international law is superior to domestic legislations.[871] In *Oshivire vs. British Caledonian Airways Ltd*,[872] the Court of Appeal, Lagos Division held that international law is superior to domestic law in case of an ensuing conflict.[873] This decision became an anchor, which gave a flourishing ground for courts to resist ouster clauses in military decrees. This case was followed by the Court of

[870] (2000) 6 NWLR (Pt. 660) 228-259.
[871] Osita, *op. cit.,* p. 99.
[872] (1990) 7 NWLR (Pt. 163) 507.
[873] *Ibid.,* at pp. 519-520.

Appeal in *Chima Ubani vs. Director of SSS*,[874] and the case of *Comptroller of Prisons & 2 Ors vs. Adekanya & 27 Ors*,[875] the court held to the effect that, courts should not shirk its responsibility to consider issues bordering on infraction of human rights of Nigerians as guaranteed by the African Charter under the guise that there is an ouster clause in a decree promulgated by the military government of Nigeria. The court further held that, on question of fundamental rights guaranteed by African Charter, the provisions of the Charter are superior to the decrees of Nigerian Federal Military Government.

These decisions which set out to water down the wild fire of ouster clauses in military decrees, seem unmindful of the admonition of Wali JSC in *Ibidapo vs. Lufthansa Airlines*,[876] where the Supreme Court said:

> Nigeria like any other commonwealth country, inherited the English common law rules governing the municipal application of international law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found not to be over-ridden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both the multilateral and bilateral agreements *where their provisions are not in conflict with our fundamental law* (emphasis mine)

This admonition by Wali JSC which was earlier in tune than the decisions of the Court of Appeal in *Oshivire*,[877] *Ubani*[878] and *Adekanya*,[879] did not support the superiority of international law over our domestic law. It only made international law of whatever

[874] (1999) 11 NWLR (Pt. 625).
[875] (1999) 10 NWLR (Pt. 623).
[876] (1997) 4 NWLR (Pt. 498) 124.
[877] *Op. cit.*
[878] *Op. cit.*
[879] *Op. cit.*

nature subject to the fact that; it is not in conflict with our "fundamental law".[880] Wali's admonition did not however clearly specify what constitute our "fundamental law". Whether our fundamental law includes all our legislations or it only refers to our constitution was not expressly made clear by Wali, JSC. However, by the meaning ascribed to the term "fundamental law", as "the organic law that establishes the governing principles of a nation or state; especially constitutional law". Wali JSC might just simply mean that bilateral and multilateral treaties applicable in Nigeria are those that do not conflict with our constitution. The status of treaties in relation to other domestic legislations was not made clear by Wali's admonition in *Ibidapo vs. Lufthansa Airlines*.[881]

On the effect of treaties ratified and domesticated by Nigeria, the haziness surrounding its legal application in relation to other domestic legislations and the constitution was explored and settled in the highly celebrated case of *Abacha vs. Fawehinmi*,[882] where these issues were considered in relation to the applicability of African Charter on Human and Peoples' Right, which was ratified and domesticated in Nigeria by the instrumentality of African Charter on Human and People's Rights (Ratification and Enforcement) Act.[883] It is very important to review the said case of *Abacha v. Fawehinmi* which is often gleefully cited as representing the final statement on the effect of ratification and domestication of a treaty.

General Sani Abacha & Ors v. Chief Gani Fawehinmi (2002) 2 SCNQR 618[884]

Facts and Issues

[880] Garner, B.A., (ed.) *Black's Law Dictionary,* 9th edn., (U.S.A: Thomson Reuters, 2004) p. 744.
[881] *Op. cit.*
[882] (2000) 6 NWLR (Pt. 660) 228 – 259.
[883] Cap. 10 Laws of the Federation of Nigeria (LFN) 1990.
[884] Also reported in (2001) 51 WRN 29 and (2000) 6 NWLR (Pt. 660) 228 – 259.

The respondent in this case is Chief Gani Fawehinmi, a Lagos based lawyer and a social crusader. He was arrested at his residence by officers of State Security Service (SSS) on Tuesday the 30th day of January, 1996 at about 6.00 hours. His arrest was without warrant; and at the time of the arrest he was not informed he committed any offence. He was detained at SSS office, where he was subsequently moved to Bauchi prison as a detainee. The arrest of the respondent was done pursuant to a detention order dated 3rd day of February, 1996 duly endorsed by the Inspector-General of Police.

Contesting the fact that his detention was unlawful, illegal and unconstitutional. The respondent filed an application at the Federal High Court, Lagos pursuant to Order 1 Rule 2(1), (2) and (6) and Orders 4 and 6 of the Fundamental Rights (Enforcement Procedure) Rules 1979, and the inherent powers and sanctions of the court as prescribed by the Constitution of the Federal Republic of Nigeria, 1979. After been granted his exparte application, the respondent filed a motion on notice for the relief sought, which *inter alia* includes the following:

(a) A declaration that his arrest and detention is a violation of his fundamental rights guaranteed by the provisions of sections 31, 32 and 38 of the 1979 Constitution[885] and Articles 4, 5, 6 and 12 of the African Charter on Human and People's Right (Ratification and Enforcement) Act,[886] and therefore illegal and unconstitutional.

(b) An order of mandamus compelling the respondent to arraign the appellant before a court or tribunal as required by section 33 of the 1979 Constitution of Nigeria as preserved by Decree 107 of 1979 and Article 7 of the African Charter on Human and People's Right (Ratification and Enforcement) Act.

[885] Sections 31, 32 and 38 of Constitution of the Federal Republic of Nigeria (CFRN) 1979 are *pari materia* with sections 35, 36 and 41 CFRN, 1999 respectively.
[886] Cap. 10 (LFN) 1990.

The respondents in response to the motion on notice filed by the applicant (Chief Gani Fawehinmi) before the Federal High Court, filed a preliminary objection challenging the jurisdiction of the Federal High Court to entertain the case on the reason, *inter alia*, that by the combined effect of Decree No. 2 of 1984, and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1984 and the Constitutional (Suspension and Modification) Decree,[887] the court is not competent to entertain the reliefs sought by Chief Gani Fawehinmi.

The Federal High Court, Lagos, struck out the suit. The court per Nwadwugwu J. held that, it lacked jurisdiction to entertain the matter. The court stated that, any law including the African Charter that is inconsistent with the provisions of Decree 107 of 1993 is void. The court further held that, Decree No. 2 of 1984 has ousted the jurisdiction of the court.

Dissatisfied with the decision of the trial Federal High Court, the applicant (Chief Gani Fawehinmi) appealed to the Court of Appeal. The Court of Appeal in partly allowing the appeal unanimously held *inter alia*, that:

(a) The learned trial judge acted in error when he held that, the African Charter domesticated in Cap. 10 LFN, 1990 was inferior to the Decrees of the Federal Military Government;

(b) The Decrees of the Federal Military Government cannot oust the jurisdiction of the court when properly called upon to do so in relation to human rights under the African Charter.

Both parties were dissatisfied and appealed to the Supreme Court of Nigeria.

Judgment of the Supreme Court

[887] Decree No. 107, 1993.

Issues formulated by the appellants before the Supreme Court includes, among others:

> Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfill an international obligation which is voluntarily entered into and agreed to be bound and the government cannot be allowed to contract out its international obligations by local legislation.

Unanimously dismissing the appeal, and allowing the cross appeal, the Supreme Court held, *inter alia*, that an international treaty entered into by the government of Nigeria does not become binding, until such a treaty is enacted into law by the National Assembly. Before being enacted by the National Assembly, an international treaty has no force of law as to make its provision enforceable in our domestic courts. Where as in the case of African Charter,[888] a treaty is enacted into our domestic law, it becomes binding and our courts must give effect to it like all other courts falling within the judicial powers of the courts.

Furthermore, the Supreme Court agreed with the Court of Appeal that, Cap. 10 LFN, 1990 is a statute with international flavour and, thus, if there is any conflict between it and other statute, its provisions will prevail, based on the presumption that the legislature does not intend to breach an international obligation.[889] The court, however, warned that this should not be misconceived to mean that, the Charter is superior to the Constitution; nor also is the validity of another statute necessarily affected by the mere fact that, it violates African Charter or any other treaty. The court further held that, the mode of

[888] The African Charter on Human and People's Rights (The Banjul Charter) was adopted in 1981. See O.A.U Doc. CAB/LEG/67/3 Rev. 5. The Charter came into force on October 21, 1986.

[889] Yerima, T.F. (2004) "The Relevance of Constitution in the Application of Human Rights Treaties in Domestic Forum: *General Sani Abacha & Ors vs. Chief Gani Fawehinmi* in Perspective" *Fountain Quarterly Law Journal,* Vol. 1, No. 1, p. 97.

enforcement of the rights in the Charter is through Fundamental Rights (Enforcement Procedure) Rules or through any other mode of enforcement of human rights. The Supreme Court has thus, affirmed its earlier ruling in *Ogugu vs. State*,[890] where it had held that, the human rights provision of the African Charter are applicable and enforceable in Nigeria through the ordinary rules of court in the same manner as the fundamental rights set out in Chapter IV of the Constitution.

The Supreme Court's exposition in *Abacha vs. Fawehinmi* is a very relevant and very significant decision, which has paddled us to a definite shores of safety, away from the tumultuous wind of uncertainty, as to the effect and status of international treaty that has passed through the process of transformation vis-à-vis our domestic statutes and our Constitution. The conclusion derivable from this Supreme Court landmark decision is that:

(i) Any statute with international flavour, like the African Charter on Human and People's Right (Ratification and Enforcement) Act,[891] shall prevail over other statutes in case of any conflict.

(ii) Any international instrument ratified and domesticated by Nigeria like the African Charter on Human and People's Right is inferior to the Constitution of Nigeria.

(iii) The validity of other statutes can not be affected by the mere fact that it violates the African Charter, or any international instrument.

The foregoing conclusion of the Supreme Court of Nigeria is in tune with the position adopted by the Supreme Court of Cyprus in *Malachtus Toulla vs. Christodoulus*

[890] (1994) 5 NWLR (Pt. 336) 1 at 25.
[891] Cap. 10 LFN, 1990.

Armefit & Anor,[892] where the court held that, the Convention on the Legal Status of Children born outside wedlock was vested with superior force to any domestic legislation except the Constitution of Cyprus.

This clear and unambiguous safe landing preferred by the Supreme Court of Nigeria in *Abacha vs. Fawehinmi* is now under siege by the recent decision of ECOWAS Court of Justice in *Serap (Socio-Economic Rights and Accountability Right) vs. Federal Republic of Nigeria*,[893] delivered on 14th day of December, 2012 where the court in an action seeking the enforcement of International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights, and the African Charter on Human and People's Rights, for the people of Niger-Delta region of Nigeria, on their rights to healthy environment among others, held that, a domestic legislation of a state cannot prevail on international treaty or covenant, even if it is the Constitution of the State, once the concerned right for which protection is sought before the court is enshrined in an international instrument binding on a member state.[894]

This decision of a regional court (ECOWAS Court of Justice) seems gloomy, hazy and shrouded in indeterminable mysticism that may not be the position of Nigeria. This therefore, brings up the question of efficacy and enforceability of such ruling, which seemingly runs contrary to Nigeria's dualist disposition. The rights that the court set out to enforce were founded on instruments ratified by Nigeria, except African Charter which is equally domesticated. However, these rights were sought to be enforced at an international (sub-regional) court. Nigeria, not being a monist state, will not easily lean to accepting the supremacy of the said instruments over her constitution.

[892] (1987) 1 CLR 207.
[893] ECW/CCJ/JUD/18/12.
[894] *Ibid.*, para. 36.

5.3.3 Treaty Making and Implementation in Nigeria

We have so far in this chapter been concerned with treaties, their implementation and efficacy in domestic sphere. It is important, especially in a state characterize by federating component unit like Nigeria, to determine the intricacies of power play in treaty making and implementation. Which level of government is responsible for making treaties for the federation? Is it the function of federal government or the function is shared by the levels of governments?

It must however be noted that, the procedure for making of treaties in Nigeria is regulated by Treaties Making Procedure Act.[895] The Act provides, among other things, for the procedure of making treaty and the designation of the Federal Ministry of Justice as the depository of all treaties entered into between the Nigerian state and any other state or institution.[896] The Act also provided for classification of treaties and the effect of such classification. In this regard, treaties were classified as (a) Law-making treaties; (b) agreements which vests financial, political and social obligation on Nigeria or those agreement that are of scientific or technological import; (c) agreements on mutual exchange of culture and educational facilities.[897]

For operational purposes, the Act provided for the effect of the different classifications of treaty. For law-making treaties, the treaty needs to be domesticated; for treaties imposition, financial, political, social obligation, the treaty needs not be domesticated but, must be ratified.

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[895] Treaties (Making Procedure, etc) Act, Cap. T20 *Laws of the Federation of Nigeria (L.F.N) 2004.*
[896] Section 1(1) *ibid.*
[897] Section 3(1)(a)-(c) *ibid.*

One of the primary attributes of a state that points to her sovereignty is the capacity to enter into a treaty relation with other states. This requirement was laid down in the Montevideo Convention of 1933 on the Rights and Duties of States;[898] and more recently re-stated in the Vienna Convention on the Law of Treaties of 1969.[899] International law demands that treaties must be implemented in good faith by parties to them in agreement with the principle of *pacta sunt servanda*.[900] However, international law left the determination of who makes or implement treaties and the procedure for such, exclusively to domestic law especially the Constitution of the State.[901] It has however been posited that, in a federal state like Nigeria, it is adviceable to situate issues of foreign policy and foreign relations of the federation on the federal government, in order to check discordance on issues of foreign policy and foreign relations.[902] Consequently, the Constitution of several federal states specifically have provisions prohibiting the component units of the federation from concluding treaties with other states, except with the consent of the federal government. The Constitution of the United States of America states: "No state shall enter into a treaty, alliance or confederation… No state shall, without the consent of congress…enter into any agreement or compact with another state, or with a foreign power…"[903] This disposition is however, not a universal general practice. For instance, in the old federal republic of Germany and Switzerland, the federating components could enter into diplomatic relations with other states. Even in these states, it is recognized that

[898] Art. 1, Montevideo Convention on Rights and Duties of State, 1933.
[899] Art. 6, Vienna Convention on the Law of Treaties, 1969.
[900] Art. 26, Vienna Convention on the Law of Treaties, 1969.
[901] Brownlie, I. (1973) "Principles of Public International Law", 2nd edn., Oxford University Press, Oxford, pp. 62-63 cited in Oyebode, A. (2003) *International Law and Politics: An African Perspective,* Bolabay Publications, Lagos, p. 129.
[902] Wheare, K.C. (1963) *Federal Government,* Oxford, p. 169 cited in Oyebode, A., *Ibid.*
[903] Art. 1(10), Constitution of the United States of America.

foreign policy is generally regulated by the federal government.[904] The only exception to this seem to be the Constitution of the defunct U.S.S.R, 1936, which at least, theoretically purports to recognize the rights of the component states of the union to directly enter diplomatic relations, conclude treaties and even exchange diplomatic and consular representatives with foreign states.[905]

In Nigeria, our previous Constitutions[906] did not make any express stipulation about the treaty making process and implementation by the Nigerian federation. The present Constitution[907] also does not have a provision that expressly confers on the federal government or the component unit's powers of treaty making. One wonders why Nigerian Constitution from the Independent Constitution of 1960 to the operational 1999 Constitution kept a strange silence over such a serious issue that should be determined by the fundamental law of a federal union, especially that Nigeria had history of intrusion into foreign affairs by regions[908] or states.[909] This attitude by states was what led to the promulgation of a decree in 1975 which vests all executive powers on the Head of the Federal Military Government.[910]

In the 1979 as well as 1999 Constitutions there is no specific stipulation as to the devolution of treaty making powers. However, one section of the Constitutions gave an

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[904] See: Art. 32, Fundamental Law of the Federal Republic of Germany, 1949; See also: Arts. 7-10, Swiss Constitution.

[905] Art. 18 Constitution of defunct USSR cited in Oyebode, *op. cit.*, p. 130.

[906] Previous constitutions of Nigeria are: (i) Independent Constitution of 1960; (ii) Republican Constitution of 1963; and 1979 Constitution of the Federal Republic of Nigeria.

[907] Constitution of the Federal Republic of Nigeria (CFRN) 1999.

[908] One of the criticisms against the post – 1960 civilian administration is that, it allowed, by default, intrusion into foreign affairs by regions – See: Awolowo, O., *Thoughts on the Nigerian Constitution* (Ibadan, 1966) p. 125; See also: Akinyemi, A.B., *Foreign Policy and Federalism* (Ibadan, 1974) pp. 100-105, all cited in Oyebode, *op. cit.*, p. 140.

[909] Ibadan City Council was said to have negotiated loan agreements with the World Bank to execute some of its projects; Kano State Government was also said to have contracted with the government of Hungary a deal for construction of Dams and Irrigation system, one of which is the Tiga Dam which was inspected by the Hungarian President while on visit to Nigeria in 1973 – See generally, Oyebode, *op. cit.*, p. 141.

[910] Section 5, Constitution (Basic Provisions) Decree No. 32 of 1975.

inconclusive clue, which did not actually situate treaty making powers conclusively on any level of government. It provides:

> (1) No treaty between the federation and any other country shall have the force of law except to which any such treaty has been enacted into law by the National Assembly.
> (2) The National Assembly may make laws for the federation or any part thereof with respect to matters included in the executive legislative list for the purpose of implementing a treaty.
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsections of this section shall not be presented to the president for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the federation.[911]

It is most humbly submitted, that, this particular provisions of the Nigerian Constitution past and present, did not make any clear and categorical statement on the relationship between international law and domestic law in relation to powers of treaty making and its implementation by the levels of government in Nigerian federation. However, Oyebode rightfully observed that, a review of the treaty making power under various Nigerian Constitutions seem to ground the fact that, even though there is no any express stipulation on the subject, there seem to exist a conventional practice of federal prerogative regulating the making and implementation of treaty.[912] The federal government predominance in foreign relations generally, and particularly treaty making seems very clear. In the view of international law a federation is seen as a sole entity. The component

[911] Section 12 CFRN, 1979.
[912] Oyebode, *op.cit.,* p. 128.

units have roles to play internationally only to the extent to which the federal constitution allows them.[913]

5.4 The Place of Treaties in the Hierarchy of Legal Norms in Nigeria

Having examined the effect of different treaties of varying status in Nigeria and the consideration of decisions of courts in Nigeria in respect of treaties, it is disheartening to note that, the court's decisions have no definiteness on the station of a treaty in the hierarchy of legal norms in Nigeria. While the court's decision in *Oshevire vs. British Caledonian Airways Ltd*[914] held that, a treaty is above domestic legislation. A decision which completely ignores the provision of section 12 of the 1999 Constitution of Nigeria, which demands for the domestication of a treaty before its application in Nigeria. The decision in *Abacha vs Fawehinmi*[915] placed an incorporated treaty, not an unincorporated one above a domestic legislation and below the Constitution. However, this position of the Supreme Court has been vigorously criticized. One of the criticisms was based on the principle of international law that stipulates the position of municipal law in international sphere, that is, a state cannot plead its municipal law in breach of international obligation.[916] It was further contended that until a sovereign power of a state is exercised to denounce an international treaty, it retains its international flavour and hovers above all municipal laws including the Constitution.[917]

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[913] *Ibid.*
[914] *Op. cit.*
[915] *Op.cit.*
[916] Article 27, Vienna Declaration on the Law of Treaties.
[917] Abugu, J.E.A. (2009) A Treatise on the Application of ILO Conventions in Nigeria, University of Lagos Press, Lagos, p. 16

It is most respectfully submitted that the above position projected by Abugu is misguiding, this is consequent upon the fact that Nigeria has a dualist disposition, a disposition that believes in the sovereignty of the state and supremacy of national legislation over international law, hence, the need to domesticate treaties before their application and enforcement by Nigerian court. It must further be stated that, article 27 of the *Vienna Convention on the Law of Treaties* was misconstrued by Abugu and his likes. The said article 27 provides as follows: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Same article 27 further provides that, "the rule is without prejudice to article 46. The provision of article 46(1) of *Vienna Convention on Law of Treaties* have created an exception to article 27 which is often gleefully cited by proponents of superiority of treaties. The import of the provision of the said article 46(1) is that, a treaty can be violated if it concerns a rule of internal law of fundamental importance.

Upon domestication, a treaty becomes an integral part of the body of laws in Nigeria, irrespective of its international flavour, being subject to the grundnorm of the existing legal order in Nigeria[918] it must be stated that even though the decision in *Abacha vs. Fawehinmi*[919] rightly projected the supremacy of the Constitution of Nigeria. The decision has however generated controversy and fanned the embers of confusion relating to the position of treaties *vis a vis* Nigerian national laws in the hierarchy of norms. The decision's second arm was based on a seemingly unfounded proposition that legislation with international flavour takes precedent over other Nigeria domestic laws. Most

[918] See Section 1, Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[919] O*p. cit.*

respectfully, this position of the Supreme Court is not supported by any established principle relating to the position of statutes in relation to one another.

It is therefore respectfully submitted that the Constitution of the Federal Republic of Nigeria occupies the top most domain in the hierarchy of legal norms in Nigeria. However, there is no clarity on the prominence of domestic statutes with international flavour and domestic statutes *simpliciter*. It is more uncertain because Nigeria is a dualist state which projects the prominence of domestic law in domestic domain over any international instrument, however high the international flavour it possess. It is therefore safer to maintain that domesticated instruments enjoy same prominence in the hierarchy of laws in Nigeria.

5.5 Application of International Legal Instruments on Genocide in Nigeria

The extanct law of genocide had the privilege of being produced[920] in two major international instruments and some instruments creating *ad hoc* tribunals/courts.[921] However, the principal law on genocide, from which these other instruments were reproduced, is the Convention for the Prevention and Punishment of the Crime of Genocide, 1948. This instrument is often referred to as the "Genocide Convention", which as numerously stated in previous chapters of this work represents the conscience of humanity, projected to fight impunity of man and his inhumanity to his human family. The provisions of the Genocide Convention which particularly enumerated and criminalized acts that may constitute genocide[922] in international law and other acts of genocide,[923] but

[920] Convention for the Prevention and Punishment of the Crime of Genocide, 1948 (Genocide Convention) and Rome Statute of International Criminal Court (ICC).
[921] Statute of International Criminal Tribunal for former Yugoslavia (SICTY) & Statute of International Criminal Tribunal for Rwanda (SICTR).
[922] Art. 2 Genocide Conventions, 1948.

short of actual commission of genocide; were totally adopted by Rome Statute of International Criminal Court (ICC),[924] as representing its provision on genocide. The Statute of International Criminal Tribunal for former Yugoslavia (SICTY)[925] and the Statute of International Criminal Tribunal for Rwanda (SICTR)[926] also adopted the provision of the Genocide Convention of 1948.

The provisions of the Genocide Convention contained in the 1948 instrument is not applicable in Nigeria for the simple reason that, it is an instrument that is not ratified by Nigeria. This means that Nigeria as a country is not a signatory to the Genocide Convention. The consequential import of this position is that, the Genocide Convention of 1948 as an international instrument does not bind Nigeria at the international sphere neither is it applicable in her domestic courts. However, as stated earlier in *Bird's Galore Case*[927] *and A.G. Botswana vs. Unity Dow*,[928] treaties not ratified by a country may not be totally useless, it can be looked upon for direction where there is no express stipulation of the parliament against such an instrument and that, it may serve as an aid to interpretation of domestic law. Nigeria has no any international obligation to observe the provision of the Genocide Convention of 1948. The statute may however be relevant as stated in *Bird's and A.G. Botswana* above.

Even though Nigeria did not ratify the Genocide Convention, it must be stated that, the crime of genocide is recognized as a customary norm of international law, it is *erga*

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[923] Art. 3, *Ibid.*
[924] Art. 6, Rome Statute of International Criminal Court (ICC).
[925] Art. 4 Statute of ICTY.
[926] Art. 2 Statute of ICTR.
[927] *Op. cit.*
[928] *Op. cit.*

omnes, a *jus cogen*[929] recognized as binding on all civilized countries, even without treaty obligation, from which no derogation is allowed. The implication of this elevated status of the crime of genocide simply means that a civilized state like Nigeria is vested with responsibility to prevent and punish genocide as a crime against mankind even when a state has not signed any treaty vesting such obligation.

For Nigeria, even though she is not a party to the Genocide Convention of 1948, she still has treaty obligation to prevent and punish genocide as a crime under international law. This is because Nigeria has ratified the Rome Statute of International Criminal Court (ICC); an instrument which also prohibits genocide and vested state parties with enormous obligation to fight the scourge of genocide, that has over the years ravaged man and his habitation. The implication of the above position is that, Nigeria, even though not a party to Genocide Convention of 1948; is under double obligation to punish and prevent genocide. Firstly, under customary international law, and by her treaty obligation as a state party to the Rome Statute of ICC. However, the question that should suffice at this point is; to what extent is Nigeria responsive to her obligation under the Rome Statute of ICC? And, to what extent has she applied the provisions of Rome Statute of ICC in her domestic courts? These highly sensitive questions are only resolvable by the level of prominence accorded to Rome Statute of ICC – whether it is an instrument that enjoys only ratification, or whether it is ratified and domesticated by Nigeria.

The Rome Statute of ICC was ratified by Nigeria on 27th September, 2001. Nigeria has not yet domesticated the provisions of the Rome Statute of ICC in her domestic legislation. It therefore means that, the Rome Statute of ICC only has the status of an

[929] *Jus cogen* means a mandatory or preemptory norm of general international law, accepted and recognized by international community as a norm from which no derogation is permitted – See Black's Law Dictionary 9th edn. p. 937.

instrument that is ratified, but not domesticated by Nigeria. As observed earlier in this chapter the consequential effect is that, her provisions cannot apply in Nigerian courts,[930] like the provisions of the African Charter on Human and People's Rights, which currently enjoys the pleasure of domestication in Nigeria. By her status of only ratification, Nigeria is under obligation to observe her provisions at international domain; without much effect on the application of any domestic legislation, even if such domestic legislation runs counter to the provisions of Rome Statute of ICC. Therefore, conclusively, an unincorporated treaty like the Rome Statute of ICC is not binding on Nigerian national institutions, though at international level it binds Nigeria as a state party. This is also the position in Canada, where treaties must be re-enacted into domestic legislation in order to produce effect in domestic legal order.[931] Australia also has same disposition, where a treaty to which Australia is a party has no direct application in domestic law in the absence of implementing legislation.[932] As stated earlier in this chapter in Nigeria, the process of implementing the Rome Statute as part of domestic legal order is in progress. The Federal Government of Nigeria constituted a Special Working Group (SWG), which has since submitted her preliminary report on the modalities for the domestic implementation of Rome Statute.[933]

The measures taken by individual states for implementation of treaties in domestic legal order may differ. These measures are called "national measures of implementation". These measures include national measures that are specifically mentioned or required by

[930] *African Re-insurance Corporation vs. Fataye, op. cit.*
[931] Manirabona, A.M. and Crepeau, F. (2012) "Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body" *Canadian Journal of Human Rights*, Vol. 1:1, p. 28.
[932] *Dietrich vs. The Queen* (1992) 177 CLR 292; *Kruger v. Commonwealth* (1997) 190 CLR 1, all cited in Triggs, G. (2003) "Implementation of the Rome Statute of International Criminal Court: A Quiet Revolution in Australian Law" *Sydney Law Review*, Vol. 23, p. 516.
[933] See: Preliminary Report of Special Working Group (SWG) *op. cit.*, n. 8.

International Humanitarian Law (IHL).[934] The measures specifically mentioned and required by IHL are legislative[935] and non-legislative measures.[936] Other measures for implementing IHL are measures that are not specifically mentioned[937] in Geneva Convention of 1949 and the additional Protocols.[938] This measures are predominantly related to conflict situations, characterized by armed confrontations. It tends to regulate the conduct of armed conflict. It should be remembered that genocide as a crime against international law, conscience and morality, can be perpetrated in times of war and in times of peace.[939] Therefore, the foregoing national measures for implementation of the law of armed conflict as expounded by Ladan,[940] may envisage the regulation of armed conflict and prevention of atrocities in conflict situations that may result to genocide.

5.6 Constitution of the Federal Republic of Nigeria, 1999 (as Amended) and Genocide.

The Constitution of the Federal Republic of Nigeria 1999 as amended is the grundnorm of the existing legal order in the geographical entity constituting the Nigerian state. The supremacy of the constitution was clearly echoed in the constitution itself, when

[934] Ladan, M.T. (2000) *International Human Rights and Humanitarian Law*, A.B.U, Press, Zaria, pp. 398-406.

[935] In two different areas, IHL specifically requests the adoption of national legislation. These areas are: the protection of the emblem of the Red Cross and the Red Crescent and that of the repression of grave breaches of IHL. The first in this area is constituted by the protection of the emblem of the red cross and the red crescent. It is worth nothing that IHL protects the wounded and the sick, as well as the shipwrecked. By virtue of Additional Protocol I, the wounded, sick and shipwrecked, whether military or civilian, are put on an equal footing and protected in the same way: See generally, Ladan, *ibid.*

[936] International Humanitarian Law requires the adoption of national measures of implementation which may not be legislative in their nature. For example, states are expected to disseminate international humanitarian law, especially among their armed forces. However, it is up to the states to decide which form they will give to the injunctions to be addressed, to this purpose, to the competent offices of the government: See generally, Ladan, *ibid.*

[937] Other measures may not be specifically measured by the Geneva Convention or its additional Protocols, however, states may adopt such measures they deem necessary for effective implementation of IHL.

[938] Ladan,(2000), *op. cit.* p. 404.

[939] Art. 1, Genocide Convention, 1948 adopted by Resolution 260(III)A of the United Nations General Assembly on 9th December,1948.

[940] Ladan,(2000), *op. cit.* pp. 398-406.

it states: "This constitution is supreme and its provisions shall have binding force on all authorities and persons, throughout the Federal Republic of Nigeria".[941]

The foregoing provision is a clear pronouncement on the dominance and exalted position of the Nigerian Constitution and its potency in regulating and checking the activities of individuals and authorities in the Federal Republic of Nigeria. It follows therefore, that, all persons or authorities in Nigeria are subject to the supreme powers of the constitution. The Constitution[942] further extends the frontiers of her powers beyond persons and authorities to the domain of other subsidiary laws or legislation made in pursuit of the objective of good governance. She states: "If any other law is inconsistent with the provision of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void".[943] The effect of this provision is that no law that contravenes any provision of the constitution can survive. It is a definite inconsistency test with the Constitution as the standard.

In relation to the crime of genocide, it must be stated that, the Constitution of the Federal Republic of Nigeria, 1999 as amended did not make any express stipulation in contemplation of the crime of genocide, neither did any of the subsidiary legislation regulating crime and criminality in Nigeria,[944] make any express reference to the crime of genocide, its prohibition and sanction. However, some acts could technically constitute genocide, though not so stated, if the perpetration of such acts were done with the requisite intent. For instance, the constitution guarantees right to life, thereby, prohibiting unlawful

[941] Supremacy of the Constitution, section 1(1) CFRN, 1999(as amended.)
[942] CFRN, 1999 as amended.
[943] Section 1(3) CFN, 1999(as amended) .
[944] The Legislations regulating crimes and criminality in Nigeria are: *The Criminal Code,* which finds application in Southern Nigeria; the *Penal Code,* which is applicable in Northern Nigeria; and the *Sharia Penal Code,* which is an Islamic criminal justice Code, which operates side by side with the *Penal Code* in some Northern States of Nigeria.

deprivation of life. It provides: "Every person has the right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria".[945]

Aside from this constitutional provision prohibiting the deprivation of life, the Nigeria criminal law also, in recognition of the sanctity of life vehemently prohibits the killing of a person.[946] It may therefore follow that, killing of members of a targeted group because of their group identity may only ignite prosecution for unlawful killing, but technically within the purview of the crime of genocide. It may equally follow that, the violation of some other rights guaranteed by the constitution, which violation may constitute derogation of the dignity of human person,[947] if done to a targeted group, with the requisite intent, will only be a violation of constitutionally guaranteed right and not genocide even though such acts may seem clearly genocidal.

The fate of the Nigerian Constitution on the crime of genocide is like the fate of some global and regional human rights instruments which clearly guarantees numerous human rights and prohibit their violation, such violation with impunity may technically be characterized as "genocide" while such descriptive nomenclature is totally alien and not protected by the instruments. For instance, Universal Declaration of Human Rights,[948] International Covenant on Civil and Political Rights,[949] Covenant of the Right of the Child,[950] African Charter on Human and Peoples Rights,[951] all prohibit the unlawful

[945] Section 33(1) CFRN, 1999 as amended. Subsection (2) of same section provides further exceptional situation where one can suffer lawful deprivation of life, i.e. (a) self defence (b) effecting lawful arrest or escape of a felon (c) suppression of riot insurrection or muting.
[946] See: Sections 306, 308 and 316 of the *Criminal Code*; Sections 220, 221 and 223 *Penal Code* and Section 200 of the *Sharia Penal Code* of Zamfara State.
[947] S. 34, CFRN, 1999.
[948] Art. 3, UDHR.
[949] Art. 6, ICCPR.
[950] Art. 6, CRC.

deprivation of life and frown against inhuman and degrading treatment, but such violations cannot suffice as genocide under these instruments, however genocidal such violations may seem.

The summation of all these is that, Nigeria does not have a specific domestic legislation prohibiting and punishing genocide in its strict meaning. However, even though Nigeria is not a state party to the Genocide Convention, she is a signatory to the Rome Statute of ICC which criminalizes "genocide", "war crimes" and "crimes against humanity". The Rome Statute of ICC is therefore, the only life line capable of transmitting responsibility and vesting obligation concerning genocide on Nigeria. Efforts to domesticate the provision of ICC Statute on genocide, war crimes and crimes against humanity by the Nigerian National Assembly have not yet received the force of law.

It must be noted that, Nigeria having ratified the Rome Statute of ICC on 27th September, 2001, has only the status of a signatory to the treaty. The non-domestication of the treaty makes it non-justiciable in Nigerian domestic court, because it is only by domestication that a treaty can be incorporated into Nigerian law as an act of the National Assembly.[952] This position of law was echoed in *African Reinsurance Corporation Case*[953]. The implication of the foregoing is that, one may not be able to invoke the jurisdiction of municipal court to directly enforce the provision of Rome Statute of ICC in Nigeria.[954] This disposition in Nigeria flows from the provision of section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It provides: "No treaty between the Federation and any other country shall have the force of law except to the extent to which

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[951] Art. 4 ACHPR.
[952] See generally; Ladan, M.T. (2008) *Material and Cases in Public International Law*, A.B.U. Press, Zaria, pp. 240-241.
[953] (1989) 3 NWLR (Pt. 31), p. 811 at 834.
[954] Ladan, (2008) *op. cit.,* p. 240.

any such treaty has been enacted into law by the National Assembly".[955] The section further provides that: "The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the exclusive list for the purpose of implementing a treaty".[956]

The process of domestication of Rome Statute of ICC in Nigeria demands that the provision of Rome Statute of ICC be enacted into law by the operation of Rome Statute of ICC (Ratification and Enforcement) Act of a particular number and a stipulated year. This is however subject to religiously following the stipulations of subsections (2) and (3) of section 12, Constitution of the Federal Republic of Nigeria, 1999 (as amended), which was the method used by the National Assembly in 1983 to adapt African Charter on Human and Peoples' Right.[957] It is after the process of domestication is commenced and completed that the provision of Article 6 of the Rome Statute of ICC which dwells on "genocide" can be entertained in Nigerian court.[958] For now, genocide in Nigeria still remains a matter of international concern.

However, it is important to strongly note that Nigeria has already taken a very visible step in the process of domestication of Rome Statute of International Criminal Court, which as already observed, elaborately provided for the crime of genocide. The Federal Government of Nigeria has constituted a special working group of highly proficient experts. The membership of this group includes: Chief Joe-Kyari Gadzama (SAN), (Chairman), Professor Muhammad Tawfiq Ladan, Professor Adedeji Olusegun Adekunle,

[955] Section 12(1) CFRN, 1999 (as amended).
[956] Section 12(2), *ibid.*
[957] Ladan (1990), *op. cit.*, p. 241.
[958] *Ibid.*

Professor Ademola Popoola and Professor Ademola Abass, other members includes representatives of Nigeria Bar Association, National Human Rights Commission etc.[959]

The special working group was commissioned by the Honourable Attorney-General of the Federation and Minister of Justice, Mohammed Bello Adoke (SAN) on the 22nd March, 2011. The objective of the special working group is to among others assess and proffer the best strategy for promoting the domestication of Rome Statute of International Criminal Court in Nigeria. The group completed its mandate and furnished the Attorney-General with a preliminary report on 14th day off September, 2011.[960]

5.7 Conclusion

In this chapter, we were able to examine the domestic implementation of the law of genocide in Nigeria. This we did by assessing the relationship between international law and domestic law generally, and then specifically to Nigeria. It was found that, Nigeria in her international interaction maintains a dualist disposition as oppose to monism or nihilism. It was observed that, in Nigeria, international law has primacy in regulating Nigerian international affairs in international domain while domestic law has primacy in municipal courts. It was further observed in this chapter, that international law of whatever description cannot find application in Nigerian domestic court until it has undergone the process of domestication by a municipal legislative enactment, which transforms an international treaty into an operational law in domestic courts.

[959] See preliminary report of the special working group on the implementation of the Rome Statute of International Criminal Court in Nigeria; submitted to the Honourable Attorney-General of the Federation and Minister of Justice, Muhammed Bello Adoke (SAN) on September 14th 2011.

[960] *Ibid.,* Detail of the preliminary report of the special working group, will be examined in the next chapter of this work, which shall dwell on the domestic implementation of the law of genocide in Nigeria.

We have also observed that, Nigeria has not ratified the Genocide Convention of 1948, and the consequential effect is that the treaty has no any hold on Nigeria. Therefore, Nigeria does not have any obligation under the treaty. However, we have found that, Nigeria has ratified the Rome Statute of International Criminal Court; which in its Article 6 adopted the provisions of Articles 2 and 3 of the Genocide Convention hook line and sinker. By this act, Nigeria is now vested with treaty obligation to prevent and punish genocide under international law. Even without treaty obligation it was found that, the crime of genocide is a customary international law, a *jus cogen*, which binds all civilized nations even without any treaty obligation.

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Summary

In this research, we examined the clarification of concepts such as 'crime' and 'genocide'. Crime as a concept was considered from the strict legal perspective and from a sociological perspective; emphasizing that what may constitute crime at a place and time may not constitute crime at a different place and different time. The haziness and gloom surrounding the conceptualization of genocide as a crime in international law was also examined in this research. The historical evolution and criminalization of genocide were also considered, where it was noted that, the root of genocide which has caused great loss to humanity, may be lost in distant millennia, and specifically noting that the concept of cultural genocide which was very central to the perception of the founding father of the word genocide, was not captured in the extant instruments on genocide. The place of preliminary offences pursuant to genocide, contentious issues that boarder on elements of genocide and stages of genocide were also considered, emphasizing that, the appreciation of the crime of genocide from a broader perspective is necessary in order to check the global impunity of perpetration of the crime.

The research also attempted an examination of the legal regimes for combating the phenomenon of genocide. This was done by a bird's eye view assessment of the statutory laws/conventions that created and invested some institutions with legal teeth and claws to combat the ageing malignant tumor. The prohibition of genocide was said not to be predicated on signing and/or ratification of treaty, being a customary rule of international law, it is the responsibility of all civilized nations, whether such nations are parties to any

treaty on genocide or not to pursue the prevention, control and punishment of genocide as an affront against humanity.

Furthermore, we equally examined the special intent (*dolus specialis*) requirement in genocide, where it was emphasized that such requirement is breezy, gloomy and hazy, which could only breed more confusion than solution in the understanding of the jurisprudence of the law of genocide. The instruments on genocide all defined genocide in the same wordings. The conceptualization and clear meaning ascribed to the concept of genocide from the wordings of the relevant provisions of the extant law of genocide only covers the protection of some groups, and not all the groups that could be victims of genocide. The basis for such is hardly discernable. Though the existing legal regimes for combating the crime of genocide has some minimal achievement in comparison with the past, it was stated that, a more efficient and effective step at enlarging the domain of their operation is necessary, because of the relentless aggression and fierceness of their common enemy – genocide, and its notoriety as a recurring decimal threatening the existence and civilization of man.

This research also examined some crises in Nigeria with the search light of genocide. This was done for the purpose of resolving the highly debatable question of genocide, which has over the years adored the pages of literature and journalistic appreciation of the selected crises. The choice of the four Nigerian crises examined was because of practical impossibility of considering all Nigerian crises, with the hope that, the crises assessed will form a solid basis for the appreciation and understanding of genocide in relation to other crises. The study also assessed the domestic implementation of international instruments in Nigeria with the application of the instruments on genocide

used as a potent example. In this respect, the application of customary international law and the application of treaty based laws were considered. The research also attempted a resolution of the debate on the place of treaty in the hierarchy of legal norms in Nigeria, wherein, the place of treaty was considered *vis-a-vis* the Nigerian constitution and other domestic legislations.

6.2 Findings

In the course of this research, pursuant to the objective of the research and resolving the research questions, we made setting findings which cuts across chapter two to chapter five of the work.

6.2.1 The research found that, there is a very serious problem in the conceptualization of genocide, as the concept is amenable to diverse conceptualization which makes its meaning very slippery and gloomy. This was observed to have often impeded spontaneous response to the calamity of genocide. In this regard, the conceptualization of genocide proffered by Rapheal Lemkin in 1944 when he founded the concept[961] and thereafter,[962] was observed to be very broad, far away from what the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) described as genocide.[963] It was found that, the Genocide Convention did not contemplate cultural genocide as a type of genocide; a fact that was forcefully emphasized by Lemkin in his appreciation of the concept of genocide.

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[961] Lemkin, R. (1944) Axis Rule in Occupied Europe, Carnage Endowment for International Peace, Washington, p. 79. cited in Zwaan, T. (2003) On Aetiology and Genesis of Genocide and other Mass Crimes Targeting Specific Group, Centre for Holocaust and Genocide Studies, University of Amsterdam/Royal Netherlands Academy of Arts & Science, Amsterdam, p. 7.

[962] Lemkin, R. (1947) "Genocide as a Crime under International Law", 41, p. 147. cited in Zwaan, *ibid.*, p. 8.

[963] Article 2, Convention for the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260(III)A of the United Nations General Assembly on 9th December, 1948.

6.2.2 The research also found that, the extant law of genocide only emphasizes the physical destruction of a collectivity as constituting genocide, if accompanied with the requisite genocide intent (*dolus specialis*). Biological acts that may bring about genocide may just be means of achieving an end- physical destruction of the targeted collectivity. In this regard, it was further revealed that no act of mass destruction or mass atrocity can amount to genocide if such an act is not targeted at a specific group. Such act, targeted at a specific group must be spurred by the intent to destroy the specified group in whole or in part. It was observed that, even though the extant law of genocide in international law envisage other acts[964] as constituting the *actus reus* of genocide; it is strange that it is only physical atrocities of murder that are often seen as the key criteria for establishing the commission of genocide. The trend is that, cries and passionate agitations for intervention to halt genocide only ensue when there is a heap of dead bodies in crises situations.

6.2.3 The research also found that, the law of genocide[965] has limitation on the groups which it protects from being targeted for genocide. The law protects only national, ethnical, racial or religious group. Any other group outside this specifically mentioned groups could be victims of any other crime but not genocide. Political, economic or social groups, do not enjoy the protection of the extanct law of genocide in international law. This position is at variance with the position

[964] Other acts that may constitute the *actus reus* of genocide as contemplated by the law of genocide include: (i) causing grievous bodily and mental harm; (ii) deliberately inflicting on the group a condition of life calculated to bring about physical destruction in whole or in part; (iii) imposing measures intended to prevent both within the group; (iv) forcibly transferring children of the group to another group.

[965] The law of genocide means the international instruments on genocide, i.e. the Genocide Convention of 1948 and the Rome Statute of International Criminal Court (ICC).

canvassed by Lemkin which contemplated the protection of a group from a general perspective without specification or exclusion.

6.2.4 The research also found that, the act of killing as *actus reus* of genocide as stipulated in Article II(a) of the Genocide Convention as well as other paragraphs of Article II, even though grammatically suggestive of the fact that, the killing should be that of at least two members of the group; but, the interpretation of the law points to the fact that only one victim is required to satisfy the killing requirement,[966] which must be perpetrated with the requisite intent. On the intent requirement necessary for a genocide conviction it is observed that, the emphasis on special intent (*dolus specialis*) requirement is very hazy which has brought a lot of confusion in the appreciation of the jurisprudence of the law of genocide. It is consequently observed that, the intent requirement of general criminal responsibility will do no harm if applied to genocide as in any other crime.

6.2.5 It was also the finding of this research that, Nigeria is not a party to the Genocide Convention of 1948. However, Nigeria is a party to the Rome Statute of International Criminal Court, which adopted totally the provision of Genocide Convention. By this, it was observed that, the Rome Statute has vested on Nigeria treaty obligation on the crime of genocide with additional obligation conferred by customary rules of international law, which cannot be derogated; because genocide has the status of a *jus cogen*. It was therefore consequently found that the prohibition of genocide is not predicated strictly on the signing of treaty or its ratification, been a customary rule of international law all civilized countries should observe it even without any treaty obligation.

[966] *Prosecutor vs. Mpampara* (Case No. ICTR – 01-65-T), Judgment of September 11, 2006, para. 8.

6.2.6 The research specifically revealed that, the Nigerian Civil War was a fierce military engagement between two bitterly opposed sides. While one side fought for independence as a sovereign state, the other fought to maintain an existing status quo of the Nigerian entity. Consequently, this research found that, the Biafrans had an existing army that fought bravely, on the air, on the land and on the sea, causing the Nigerian troop high death rate in human lives. The Nigerian side also had a formidable army that fought to keep the country together. Hence, there was no finding of genocide.

6.2.7 It was observed that, Odi community including its inhabitants were targeted and massively destroyed by soldiers. The research also disclosed the fact that, the people of Odi were only attacked because they are the inhabitants of a geographical area called Odi. They were not attacked because they belong to Ijaw ethnic group. It was also observed that the soldiers ransacked Odi killing people and making inscriptions on the walls, the writing on the wall by soldiers only points to definite motive of the perpetrators. It was also found that, though the *actus reus* of genocide may suffice in Odi crises, but the geographical area focused as a target is not under the protected groups contemplated by the extant law of genocide. Hence, there was no finding on genocide.

6.2.8 It was also found in this research, that soldiers specifically targeted Tiv speaking people. This was made clear by the fact that many communities were attacked and molested, even communities that are far away from the scene where the nineteen soldiers were slaughtered. The molestation by soldiers of Tiv speaking people went as far as Katsina- Ala another Tiv speaking local government area of Benue State. It

was reported that, the soldiers at a particular instance, stopped a bus with passengers, and asked that, non Tiv speaking people in the crew should step aside. Thereafter they fired guns and killed all others identified as Tiv people.[967] For this genocide might be said to have been committed.

6.2.9 We have revealed in this research that *Boko Haram* insurgency and Joint Task Force (JTF) counterinsurgency activities did not pursue any ethnical, racial, religious or national group specifically. Even though it was shown that *Boko Haram* have caused a lot of destruction to churches, their target is made hazy and very gloomy because they have also killed a lot of Muslim in some Northern States. They have invaded mosque and killed numerous worshippers on several occasions. It was therefore found that Boko Haram and JTF did not set out in pursuit of specified targeted group, so genocide can not be said to have been committed.

6.2.10 It was also revealed that the Federal Government of Nigeria in the exercise of her treaty making powers has commenced the process of domestication of Rome Statute of International Criminal Court by constituting a Special Working Group (SWG) which has since submitted a preliminary report to the Federal Government of Nigeria recommending that Rome Statute of International Criminal Court be implemented in Nigerian domestic courts.

6.3 Recommendations

The potency of a research of this nature does not only lie in making observations and findings. It is only complete when the observations and findings spur the making of

[967] *Human Rights Watch* interview at Zaki-Biam, Makurdi and Abuja, December, 2001. in "NIGERIA – Military Revenge in Benue: A Population under Attack" *Human Rights Watch* (April, 2002) Vol. 14, No. 2(A), p. 12.

consequential recommendation for a better regime of the subject matter the a research. Based on the foregoing, flowing from the findings and observations of this research, we have most humbly made some recommendations for an effective regime of the law of genocide and its application in crises situation.

6.3.1 The law of genocide has often been interpreted by tribunals/courts as possessing a special genocidal intent requirement to ground conviction of an accused person(s).[968] As stated earlier in our findings, this special intent requirement for the crime of genocide is very gloomy and without clarity on what it requires. The special intent requirement rather than resolving the confusion surrounding the elements of genocide seem to compound the problem. It is therefore suggested that, the intent requirement for culpability in genocide should be that which is required in general criminal liability, as in other offences. The legal gymnastics in pursuit of special intent requirement seem to only be a pursuit of an abstraction. The general intent requirement in criminal law is clear and certain. That a person intends to cause the occurrence of a prohibited result, if he does an act with the intent that such a prohibited result ensue; or if he recklessly does an act in such a reckless disregard as to whether the prohibited result occurs or not. There is no any disadvantage if such a simple and clear standard is applied to the crime of genocide; as the hazy special intent (*dolus specialis*) requirement seem intended to make prosecution and conviction for genocide very difficult.

6.3.2 The extant law of genocide only afforded protection to specified groups. These groups are national groups, ethnic groups, racial groups and religious groups. As

[968] See: *Prosecutor vs. Jelisic* (Appeal Chambers) ICTY, July 5, 2001, para. 45; *Prosecutor vs. Brdjanin* (Trial Chambers) ICTY, September 1, 2004, para. 695; *Prosecutor vs. Static* (Trial Chambers) ICTY, July 3, 2003, para. 520.

earlier stated, the implication of expressly stipulating the groups to be protected is that, no other group outside the ones stated will enjoy the protection of the law of genocide. Economic groups, political groups, social groups or any other group unified by common trait and disposition aside from the four groups mentioned in the law of genocide, any other group is an unprotected group. It is respectfully submitted, that the reason for this segregation and discrimination against other groups is hardly discernable. Most genocides are perpetrated with political and economic undertone, which often crystallizes into a fierce aggression against perceived political enemies and economic rivals. The exclusion of political, economic and social groups from the protection of the law of genocide is very fatal. It is therefore recommended that, the law of genocide as encapsulated in the Genocide Convention and Rome Statute of International Criminal Court be reviewed to afford protection to all conceivable groups.

6.3.3 The law of genocide under international law as it is today does not contemplate cultural genocide as a form of genocide. This was not to be, because the very basis of the conceptualization of the concept of genocide by Lemkin, the founder of the term genocide has in clear contemplation the fact of destruction of groups' culture, language, cultural monuments and institutions as constituting a grave genocidal onslaught against a targeted group; if it is done with the requisite mental element. Post World War II decisions were also supportive of the existence of cultural genocide as a form of genocide. For instance, Arthur Greaser was convicted of genocide because of his attack on polish culture and learning.[969] The non inclusion of cultural genocide in the elements of genocide in the Genocide Convention and

[969] *Polan vs. Graiser* (1948) LRTWC 70 (Supreme National Tribunal of Poland) pp. 112-114.

Rome Statute of International Criminal Court is a fundamental flaw. This is because, the destruction of a groups culture, values and civilization, is actually the destruction of the groups' identity. If what gives a group her identity is destroyed then the group is simply programmed for assimilation into the dominant or perpetrator group. It is therefore recommended that, the instruments on the law of genocide be reviewed to include cultural genocide as a form of genocide.

6.3.4 The law of genocide should also be given wide interpretation that befits its couching. Even though the Genocide Convention and Rome Statute of International Criminal Court clearly itemized other acts that may amount to genocide[970] other than mass killing, if perpetrated with the requisite genocidal intent; however, the general trend of declaration of genocide is only in a situation where there are heap of dead bodies and nothing more. This is a highly erroneous conception of genocide. It is therefore recommended that the wordings and spirit of the Genocide Convention should be given effect, as such, could achieve a milestone.

6.3.5 A lot of inadequacies have been identified on the conceptualization of genocide by the extant law of genocide. Consequently, it is humbly recommended that genocide should be legally conceptualized as "any act or omission perpetrated in pursuit of the physical and socio-cultural destruction of any conceivable group of persons with common identity, in whole or in part, the perpetrator being any group of persons, organization or government with the blameworthy mind to achieve the purpose".

[970] These other act includes: (i) causing grievous bodily and mental harm; (ii) deliberately inflicting on the group a condition of life calculated to bring about physical destruction in whole or in part; (iii) imposing measures intended to prevent both within the group; (iv) forcibly transferring children of the group to another group.

6.3.6 Nigeria should take steps to domesticate the instruments on genocide, so that her domestic courts can give effect to the provisions of the international instruments. Even though it was found that Nigeria has already commenced the process of domesticating the provisions of the Rome Statute of International Criminal Court (ICC). The steps taken so far are too chameleonic in its speed. Since the year 2011 that a Special Working Group (SWG), which was constituted by the Federal Government of Nigeria, submitted her preliminary report on the domestication of Rome Statute of ICC, nothing was done again. Nigeria should therefore increase her pace to ensure that international instruments on genocide gain operation in her domestic domain, especially at this period that the country is bedeviled by countless numbers of identity crises, which have the potency of leading to genocide. Furthermore, in domesticating the international instruments on genocide, Nigeria should be mindful of the loopholes of the extanct law of genocide already identified in this research, so that she will bring out a better law of genocide and that of other international crimes.

6.3.7 Nigeria must as matters of urgency establish institutions which will give effect to her policy and laws on genocide and similar conflicts. This is most necessary because the numerous identity crises that have engulfed the country in recent times are very serious. The fact that the Genocide Watch in her risk assessment of the year 2012 has placed Nigeria on the sixth stage of genocide is most worrisome. It is therefore humbly suggested that Nigeria should establish a separate Commission for National Integration, Conflict Prevention, Resolution and Management. This should equally be replicated in the component states of the federation. The Commission if

established should be vested with the responsibility of fostering national integration and peaceful coexistence and tolerance. The Commission is to implement policies geared towards prevention of identity crises that may lead to genocide; at the same time conducting risk assessment to determine the preventive mechanism to be employed in genocide prevention. This Commission if established should also be responsible for developing human and infrastructural capacity for preventing identity conflict and genocide in Nigeria.

6.3.8 For any established institution for genocide prevention to function effectively, there most be in existence a formidable national policy tailored towards the prevention of conflict and genocide. As found in this research, some major Nigerian crises were brewed because of dissatisfaction and intolerance in the polity.[971] It is therefore recommended that formidable policies that will enhance collective coexistence, tolerance and national integration should be put in place.

6.3.9 The will to prevent and punish genocide has very enormous cost. It is therefore recommended that government should make sure there is a sustained political will and commitment towards genocide prevention by way of allocation of resources enough to combat genocide.

6.3.10 Good governance is one of the major indicators of development in a polity and a very important weapon for crises prevention, resolution and management. This is because where there is bad governance, the desirable changes in policies and attitude in the polity will not be achieved. This may fundamentally affect the priority of government to chase necessaries. We therefore call for effective provision for ensuring good governance in Nigeria, as a measure for checking and stampeding

[971] E.g. Nigerian Civil War, Jos crises, Jukun/Tiv crises later culminated into Zaki-Biam Massacre, etc.

corruption, which have been the major problem confronting successive governments in Nigeria. It should also be noted that, the existence of bad governance and corruption in government has been advanced as the major cause of Nigerian deteriorating economic and social condition. A situation which has the force of erupting identity crises that may ultimately end in genocide. This was found in this research to be the major reason for the emergence of Boko Haram terrorist group

In conclusion, it is very safe to state that, the extant law of genocide in international law is very defective with baseless limitation in respect of groups that should enjoy its protection. The law in this respect is equally defective in its effort to situate genocide within an all-embracing and acceptable conceptualization. The fact that the perpetration of the crime of genocide requires intent of a special nature to suffice, as opposed to the general intent requirement of criminal liability is gloomy and hazy, which breeds only confusion in the appreciation of the necessary elements of the crime of genocide. Still in relation to the extanct law of genocide, it is conclusive that the law does not accommodate the concept of cultural genocide. On the Nigerian crises examined, the Nigerian Civil War, the Odi massacre and the Boko Haram insurgency and counterinsurgency activities of the JTF do not legally constitute genocide in international law. However, war crimes might have been committed during the Nigerian Civil War between 1967 and 1970. In the case of Odi massacre and Boko Haram insurgency and JTF counterinsurgency measures, crimes against humanity and grave human rights violation, consequent upon the prominence of systematic and widespread atrocities are evident. For the Zaki-Biam massacre, elements of crime of genocide under international law may be said to have been established, these are

the physical elements (killing) and the mental element of (intent), deducible from the nature of massacre's specific target of an ethnic group.

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