

**AN EXAMINATION OF THE CRIME OF GENOCIDE IN
INTERNATIONAL HUMANITARIAN LAW**

BY

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DECLARATION

I hereby declare that the work in this thesis entitled “**An Examination of the Crime of Genocide under International Humanitarian Law**” is written by me; and it is a record of my research work in the Department of Public Law, Faculty of Law, Ahmadu Bello University, Zaria under the supervisions of Dr. Abubakar Isah Bappah and Dr. Kabiru Mohammed Danladi. This work has not been presented in any previous application for a higher degree or diploma in any institution. The information and materials used in this work, including quotations, have been specifically acknowledged by way of references provided in the footnotes and bibliography.

Ahmed Mukhtar DANBABA

Date

CERTIFICATION

This thesis entitled “**An Examination of the Crime of Genocide under International Humanitarian Law**” by Ahmed Mukhtar DANBABA meets the regulations governing the award of the Degree of Master of Laws, LL.M of Ahmadu Bello University, Zaria; and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to my parents.

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ABSTRACT

This thesis entitled “An Examination of the Crime of Genocide under International Humanitarian Law” dealt with crime of genocide as an act of aggression which of recent presented serious threats to international peace and security. This is because this crime when committed within a particular state lead to murder of innocent people to such alarming propositions that the international community could not ignore. Global incidences of the commission of the crime of genocide led to concerted efforts of the United Nations to make genocide an international crime so that its perpetrators could be brought to justice through punishment. On this note, this thesis aimed at examining the legal framework of the crime of genocide through the study of the various constitutive international instruments on the crime of genocide and also that of the International Criminal Court (ICC) as the judicial institution responsible for fight against genocide in International Law. However, the statement of problem of this research is that following the recent experiences in the commission of the crime of genocide the international community has found it difficult to bring perpetrators for punishment before the international criminal court due to one reason or the other. For example, the consideration of the circumstances to be designated as genocide by the Rome Statute is not clear. In addition, it is noteworthy to state here that, a fundamental issue which generated the interest of the writer in this area of research is that there is no corresponding will by states to prevent the commission of the crime or stop it from escalating. State parties and indeed even the United Nations always fail to use the term Genocide to describe hostilities that clearly fall within the meaning of the crime of Genocide. Thus, United Nations and state parties usually capitalize on the loopholes and inherent defects in the laws of Genocide to suit their political purposes. For instance the persistence of Genocide in Bangladesh, Uganda, Cambodia, Rwanda (Hutus and Tutsis) and Bosnian Muslims in the former Yugoslavia are testimonies of failure of intervention by the international community to stop high profile atrocities. Indeed, when ethnic cleansing was going on in the territory of former Yugoslavia, Darfur, Rwanda between Tutsis and Hutus, the United Nations, the US government and other countries were called upon to intervened but they failed. Against this backdrop therefore, the objective of this thesis was to identify the factors militating against the prevention and punishment of the crime of genocide and to proffer possible measures solutions to addressing them; and further to consider the possibility of adopting same measures in Nigeria so as to eradicate instance of genocide in the country in view of the present Nigerian experiences. In view of this therefore, the finding of the writer was that the general weakness of international law constitutes a major problem of lack of enforcement to the institution of the punishment and prevention of genocide. In this regard, the writer concluded by recommending (among others) that the governments of Member States of the international community particularly the Security Council should be proactive, effective, prompt and jurisprudentially sound on the improvement and enforcement of the international legal processes that hold individuals accountable to the law so that, never again should would-be violators of these laws succeed in claiming that they are entitled to hide behind a wall of sovereignty.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

International crime such as genocides, war crimes, crimes against humanity and crime of aggression have always presented serious threats to international peace and security. Such crimes which often committed within a particular state always have a spill-over effect in other states (by way of displacement of persons) and; such crimes also have the potential to engulf an entire region in crises (by way of refugees) and perpetration of more atrocities (such as rape, looting and etcetera). The prevalence of these events is not new to the world. This is because events before the advent of the United Nations Charter in 1945, showed that conflicts starting in a particular region of a particular continent can spread to engulf the neighboring region or even the world at large because at that time wars are considered to be the only solution of resolving conflicts.

Consequently, such wars paved way for the commission of other crimes such as loss of life or injury to civilians, wide spread and severe damage to the environment, attacking and bombarding by whatever means to towns and villages, torture, persecution enslavement and indirect transfer of civilian population all of which are considered to be crimes in violation of the existing international law and in particular the principles of the International Humanitarian Law (IHL) within the four 1949 Geneva Conventions and its two Additional 1977 Protocols together with the Hague Regulations. Indeed, the concern of punishing the offenders for the purposes of deterring further occurrence in the

International Legal Order prompted the researchers interest to delve into one aspect of these crimes, which is the crime of genocide.

Genocide is generally considered one of the worst moral crimes a government or a ruling authority be it a guerilla group, a guise state terrorist organization etc can commit against its citizen or those it controls it also refer to mass killing or murder with intent to destroy a designed group of people¹. This is because of the lesson learnt by the form of holocaust which was the systematic attempt of German authorities during the World War II to kill people and particularly every Jew no matter where found destroyed groups estimated between 5-6 million. This murder of the Jews became the paradigm case of genocide and underlies the origin of the word.

Alarmed by this spate of killing in both local and international conflict an attempt was made finally by the international community through the UN to make genocide an international crime and bring the perpetrators to justice. This flagrant violation of humanity led to the adoption by the UN's General Assembly, the Convention on the Prevention and Punishment of Genocide 1948 and most recently the signing into being of the International Criminal Court in 2002.

The event in former Yugoslavia and Rwanda which led to the destruction of thousands of innocent lives further strengthened the need for an international criminal court which had long been under consideration. The creation of the Permanent International Criminal Court (ICC) became a reality on July 17, 1998 with the adoption

¹ The legal application of the term genocide first occurred in the incident of Nazi war cardinal in 1945-46. See also Guobadia, D.A., (Ed) (1982) An Introduction to the Rome Statute of the International Criminal Court, p.71

of the Rome Statute after 50 years of prolonged discussion and debates. The Rome Statute was signed on 1st June 2000 and ratified on 27th September 2001 by Nigeria along with many other countries².

The objective of the establishment of the ICC are principally to safeguard higher values such as the protection of human rights, an obligation that transcends state border; and accountability for those responsible for the commission of these crimes so as to put an end to the impunity that is often associated with these violations³. At this juncture the first thing that borders the researcher into delving in this field of research is how far has the ICC achieved these objectives noting the current prevalent day to day local and international high profile impunities as a result of disorderliness. Of course the answer to this question is that the achievement of the objective of the ICC is so far poor even though there are machineries in place for the achievement of its objectives; yet, international practice (particularly politics has not pave way for the effective operation of the court (ICC).

Thus, in view of the foregoing, the finding of the writer is that the general weakness of international law constitutes a major problem of lack of enforcement to the institution of genocide. And another observation which further generates the interest of the writer in this field of study is that there is no corresponding will by states to prevent the crime or stop it from escalating. State parties and indeed even the United Nations always fail to use the term Genocide to describe hostilities that clearly fall within the

² Ladan, M.T. (2007) Materials and Cases on Public International Law, A.B.U Press, Zaria, p. 228

³ Ibid

meaning of the crime of Genocide. Thus, United Nations and state parties usually capitalize on the loopholes and inherent defects in the laws of Genocide to suit their political purposes. For instance the persistence of Genocide in Bangladesh, Uganda, Cambodia, Rwanda (Hutus and Tutsis) and Bosnian Muslims in the former Yugoslavia are testimonies of failure of intervention by the international community to stop high profile atrocities. Indeed, when ethnic cleansing was going on in the territory of former Yugoslavia, Darfur Genocide, Rwanda Genocide between Tutsis and Hutus, the United Nation, the US government and other countries were called upon to intervene but they failed. The failure of the international community to stop high profile atrocities in Bosnia and Rwanda have all highlighted the need for timely intervention in stopping or reducing the severity of mass killings.

It should be noted that after many years of Genocide, the international community hasn't taken a simple step like imposing a no fly zone just like what happened in the Libya and United States crises or what is currently happening in Syria and Mali. Equally, the Islamic world has been even much more concerned, particularly since the victims in Dafur include Muslims. In Darfur, the government supported Arab Janjaweed militia against the black population and this is Genocide. Can't the Islamic world muster one hundredth as much indignation for the Genocidal slaughter of hundred of thousands of Muslims as it can for a few Danish cartoons? Yet, the international community failed to describe what happened in Rwanda as Genocide and this prevented spontaneous and effective intervention which could have saved innocent lives.

In view of the above poor delivery system of the court and international politics, the objective of this research is to identify reasons for the poor delivery of the court, or in other words, why is it that perpetrators of such crimes are not punished, and could that be due to international politics (as a general weakness of international law) or due to local circumstances that perpetrators have been shielded by national laws or local collaborations with other offenders and supporting states that frustrates the court from apprehending the offenders and punishing them accordingly. In the light of these events therefore, a major constraint of this research is that state parties have not given full support to the implementation of the obligations set out in the Rome Statute amongst which is surrounding offers to the court without any bias or sentiments. As a result of this unfortunate common practice of states, the writer concludes this research by recommending (among others) that for the court to be able to discharge its objectives efficiently as intended at its formation, state parties must be made to fulfill their obligations under the Rome Statute.

1.2 Statement of the Problem

Attempted efforts to put an end to the crime of genocide and other impunity under International Humanitarian Law is constraint by many factors. A major constraining factor here is that the general weakness of public international law under which IHL exist as a branch is seriously affecting the achievement of the objectives of IHL vis-à-vis the response of the state parties to give full support to obligation created under the Rome Statute as a basis for full implementation of the provision of the Rome Statute.

Other related problem to the above include the practical difficulties in bringing perpetrators to trial. The problem was two-sided: “First, is the understanding of the nature of the crimes that falls under its jurisdiction. Second, proving the responsibility of individuals for acts they had not directly committed”. However, the notion that an individual can be held accountable for international criminal offences grounded the Tribunal’s concept of international criminal law. Accordingly, the Nuremberg Tribunal of 1946 emphasized “individual responsibility” for crimes against humanity. Under the Charter, individuals, not collective bodies like government or militaries, were held accountable for criminal offences. Members of the International Military Tribunal in Nuremberg proclaimed that “crimes against international law are committed by men, not by abstract entities, and it is only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Although it is difficult to conceive of heavier responsibility for the international community and the various human right bodies of the UN than to undertake all effective steps possible to prevent and punish this terrible act in order to deter reoccurrence.

It has rightly been said that those people who do not learn from this bad history are likely to continue to repeat it. This goes contrary to the human right work of the United Nation and the other NGOs in order to perceive the optimal remedies and to prevent future occurrence. It is therefore necessary to diagnose or examine past event, and case and even present happening in order to analyze the cases harness possible way of averting it.

1.3 Justification of the Study

In recent time social conflicts have become pronounced in the world (for example, the Libyan, Syrian, Sierra Leone, Rwanda crisis to mention but a few) encompassing a broad range of conflict usually manifesting in outright war or tyrannical government. And there have been also various techniques over the year by the international community to prevent, manage, and resolve conflict, many of the most severe persistent threats to the global peace and stability are arising not from conflicts between major political entities but from increase discord within states along the ethnic racial religious linguistic.⁴ The threats to global peace has greatly affected human rights and particularly the objective of the International Humanitarian Law (IHL) which is to protects lives and properties by limited the method of war fare in armed conflict situation.

It is in view of this therefore, that the necessity of making an attempt to address these global threats to international peace that this research alongside with other existing literature in this field justifies itself by identifying possible legal mechanisms of making the international legal framework proactive in order to be able to achieve its objectives of bringing an end to impunity as intended by the state parties to the Rome Statute and further examine the possibility of adopting same measures in Nigeria. These in turn will eradicate (if not completely wiped out) instances of genocide in the country in view of the present Nigerian experiences.

⁴ Ibid

1.4 Aim and Objectives of the Study

The aim of this study is to examine comprehensively the crime of genocide in International Humanitarian Law (IHL) through the study of the extant laws on genocide. Against this background therefore, the objectives of this research is to identify reasons for the current prevalent commission of the crime of genocide in IHL and possible measures for eradicating the commission of the crime together with the possibility of domestic implementation in Nigeria by reference to the following issues:

- i. The implementation of the punishment of the crime of genocide and factors militating against the implementation.
- ii. Proffering suggestions and strategies on how best the problem of implementation of Rome Statute could be addressed in International Humanitarian Law.

1.5 Scope of the Study

The scope of this research is confined to the following areas of study:

- i. Understanding of the concept of crime of genocide in International Humanitarian Law with particular reference to Rwanda, former Yugoslavia, Sudanese region of Darfur, as analytical studies of whether the acts committed in those places are enough for the international community (especially UN) to declare such as acts of genocide.
- ii. Examining the punishment for genocide and its implementation measures in IHL.

- iii. A case study of domestic implementation of international standard strategies in Nigeria.

1.6 Research Methodology

The research method adopted here is doctrinal. Doctrine method of approach includes the use of the following materials, statutes, (for example, the Four Geneva Conventions and the two Additional Protocols), textbooks, journals, law reports, conference proceedings both local and international. Also Declarations and Resolutions of international conferences and information accessed from the internet will be used.

1.7 Literature Review

Many jurists have written in this area. However, notable among such literatures considered to be relevant to this study are considered below.

Harris, D.J., in his book entitled “Cases and Materials on International Law”⁵ discussed genocide of Former Yugoslavia in relation to the application of the genocide convention of 1948. He gave a brief and concise introductory legal regime of the crime genocide as contained in the United Nations Convention on the Prevention and the Punishment of Genocide (UNCPPG).

Brownlie, in his book entitled “Principles of Public International Law”⁶ noted that the crime of genocide has been generally recognized to be part of those acts or omissions for which international law imposes criminal responsibilities on individuals and for which punishment may be imposed, either by properly empowered international tribunals

⁵ (1979) Sweet and Maxwell Publication, London, pp.581-583

⁶ (1990) 4th edition, Oxford University Press, Great Britain, pp.561-564

or by national courts and military tribunal. Thus Brownlie's analytical position is considered relevant to introductory aspect of this research for the purposes of general understanding of the crime of genocide and its development in international law.

Mc Coubrey in his book entitled "International Humanitarian Law: The Regulation of Armed Conflicts"⁷ traced the history of genocide in discussing individual and criminal responsibility, and in his opinion the atrocities perpetrated by Nazis to Jews, gypsies and homosexuals led to a post war demanded for specific treaty provision, which resulted in the 1948 United Nation (UN) convention on genocide. He further defined genocide and the essence of such definitions under the United Nation Convention on the Prevention and the Punishment of Genocide, the nature of jurisdiction in cases of genocide under the convention. Importance in the mentioned by the author that the convention does not as such purport to create new law, instead it is represented as "confirming" the existence of a crime called genocide which was taken to exist in prior customary law.

Lemkin R,⁸ a Polish born Adviser to the United States War Ministry, in his book "Axis Rule in Occupied Europe", aware of the situation at hand and of the need to find and give it a meaning first coined the term "genocide". The term genocide was constructed in contradiction to the accepted rules of etymology, from the Greek word "Genos" (race or tribe) and to the Latin suffix "Cide" (to kill). According to Lemkin, genocide signifies "the destruction of a nation or of an ethnic group and implies the

⁷ Mc Coubrey, (1990). International Humanitarian Law, Dartmouth Publishing Company Limited, U.S.A, pp145-170

⁸ Lemkin, R., "Axis Rule in Occupied Europe", cited in Harris, D.J., op. cit, p.583

existence of a coordinated plan aimed at total extermination to be put into effect against individuals chosen as victims purely, simply and exclusively because they are members of the target group”.

Ladan M. T, in his book entitled “Materials and Cases on Public International Law”⁹ in chapter 16 and 17 made an overview of the Rome Statute of the International Criminal Court in relation to the obligations of state parties and issues in domestic implementation in Nigeria. On that note, generally Ladan concluded that the approach taken in Rome Statute reflects that fact that crimes against humanity (which includes genocide) are often committed against civilians in the absence of hostilities and that the seriousness of the crime is not affected by whether it is committed in peace or war time; or that perpetrators have a discriminatory intent when committing a crime against humanity. Such crimes include, enslavement, persecution, enforced disappearance, genocide and war crimes. Further, Ladan considered the obligations of member states under the Rome Statute and general issue in domestic implementation of Rome Statute in Nigeria in relation to domestication process under the 1999 CFRN as amended. On this note therefore, Ladan’s work is considered relevant as it touches several aspects of this thesis particularly the last (concluding) chapter.

Bassiouni, M.C. in his article entitled, “Crimes Against Humanity in International Law”¹⁰ discussed, the meaning, nature and development of crime against humanity and indicated measures needed to eradicate the commission of such crimes designated as

⁹ (2008) A.B.U Press, pp.218-247

¹⁰ Bassiouni, M.C. (1999), Crimes Against Humanity International Criminal Law pp.17-18

crimes against humanity and lot which genocide is one in the international legal order by creating obligations on state parties for the enforcement of the decision of the ICC.

Mcveigh R in his article entitled “The Balance of Cruelty: Ireland, Britain and the Logic of Genocide¹¹” illustrated, accusations and assertions of genocide pervade both historical and contemporary readings of Irish history. Ireland thus provides a case study of the relationship between colonialism and genocide as a “proof” of their own righteousness and their opponent’s perfidy. Ireland therefore provides an important case study of the question of colonialism and its relationship to genocide. He asserted that the notion of the state as a necessary condition for genocide is largely implicit in the Convention but this connection is starkly illuminated by any examination of the colonial state and genocide. Mcveigh is considered relevant to this research as it adds to the understanding of the connection between different forms of colonialism and genocidal logic as a basic ground showing that the crime of genocide is a long time existing offence demanding the necessity of the adoption of the convention.

Akper, P.T. in his article entitled “The Crime of Genocide under the International Criminal Court: An Introduction to the Rome Statute and the International Criminal Court”¹² opined that the world witnessed some of the most gruesome attacks on humanity by totalitarian and authoritarian regimes leading to murder of innocent peoples to such alarming propositions that the international community could not ignore. Global incidences of the commission of crime of genocide led to concerted efforts of the United

¹¹ Mcveigh, R. (2008), The Balance of Cruelty: Ireland, Britain and the Logic of Genocide. Journal of Genocide Research, Routledge Taylor & Francis Group, pp.541-561.

¹² Akper, P.T. (2005), The Crime of Genocide under the International Criminal Court: An Introduction to the Rome Statute and the International Criminal Court” Nigerian Institute of Advanced Legal Studies Lagos, pp.66-90.

Nations to make Genocide an international crime and bring its perpetrators to justice. Akper's work is of considerable importance to this research as it expressed the importance of the establishment of International Criminal Court in the bid to prevent and punish for the crime of Genocide so as to put an end to impunity around the globe which is the central theme of this research work.

Finally, Heilprin J. in his article entitled: "United Nations Debate on Genocide: Protect or Intervene?"¹³ Posited a well reasoned argument on the responsibility of nations to protect nations that find themselves sliding towards anarchy usually borne out of a government's inadequacy or direct collusion with a particular group to cause particular distress, prejudicial harm or embark upon genocidal killings against a part of its people needs to stop. His aptly titled essay draws on the disastrous handling by the UN of the Rwandan Genocide that was allowed to degenerate into a bloodbath against a particular ethnic group (The Tutsis) and their sympathizers who expressed chagrin and disgust were also slaughtered in one of the worst post World War II human disasters ever to plague the African continent. In this research Heilprin's article is used to analyze generally the weakness or otherwise of the United Nations enforcement mechanism on the prevention and punishment of genocide.

However, notwithstanding the existence of the above literatures on the subject matter, the researcher intends to focus this study on measures which must be taken to ensure that the rules of IHL are fully respected as a different approach of the literatures

¹³ Heilprin, J. (2012) "United Nations Debate on Genocide: Protect or Intervene? Derived from <http://www.Genocidewatch.org/images/Articles> accessed 29/7/14

considered above. Measures needed here are, those which must be taken outside the areas of conflict and in time of peace as much as in time of war so as to ensure that all people, both civilian and military, are familiar with the rules of IHL.

1.8 Organizational Layout

There are five chapters in this research.

Chapter one deals with the general introduction of the research work that the study hopes to achieve, the reason for the study and the importance of the study to the international community, organizational layout of the study is also discussed in this chapter to make for easier understanding.

Chapter two critically examines the concept of the international humanitarian law, the meaning of concept of genocide, historical development of international humanitarian law and make a conclusion.

Chapter three deals with the nature and scope of the crime of genocide under international humanitarian law, introduction, nature of genocide, scope of genocide, punishment for genocide specific instances of the commission of genocide and closed with conclusion.

Chapter four which deals with the crime of genocide under international criminal court, introduction procedure of the court, the ICJ and security, function of the court and the conclusion of the chapter.

Chapter five deals with the entire summary of the research, observations arising therefrom and suggestions.

CHAPTER TWO

CONCEPT OF INTERNATIONAL HUMANITARIAN LAW AND GENOCIDE

2.1 Introduction

In this chapter, certain key words and concepts will be clarified so as to make for clear and easier understanding of this study, since these concepts and words will be frequently seen in the thesis. Therefore, international law in developing a new way of thinking, ensuring peace and providing favorable conditions for the development of each nation and each individual. International humanitarian law derives from the basic premise that the individual is entitled to certain minimum rights whether in peace or war. He is entitled to protection, security and respect; if wounded or captured, he is entitled to care and to human treatment.¹ If dead, his body is entitled to decent treatment. Humanitarian law, therefore is one side of a coin, the other side is human rights law.

2.2 Development of International Humanitarian Law

Man has sought to use violent against his fellow in order to give himself a better chance of survival. Being unable to replace war by law he as nevertheless sought to various ways to limit its horrors and humanized it. A certain chilvary based on mutual advantage led to the acceptance of 'rules of game', which were to be the starting point for a law of war. Thus, in a sense, it was warfare that gave birth to international law, following the effect of various pioneers to introduce some principles of humanity and mercy even in the midst of violence. This has also being the effort of man since antiquity,

¹ Umzurike, C. C. (1982) The Present State International Humanitarian Law in Ajomo, M. A. (ed) Proceeding of the Seventy Right and with Annual Conference of the McGowan Scorch of International Law 1975-1978 (NIIA) p. 169

that is, to control the effect of violence so as to limit the suffering, which is its inevitable consequence.

Almost two thousand years before Christ, King Hammurabi of Babylonia codified rules of conduct of war in the era of the ancient community. In ancient India the text of the Mahabharata and the Manu Code urged that mercy be shown to disarmed and wounded enemy fighters. Over 1400 years ago, the religion of Islam laid down rules of war and the rights and obligations of combatants and non-combatants in order to make war as civilized and as human as possible. In the 17th century, Grotius, a Dutch legal scholar and a diplomat in his work known as *De Jure belli, ac Pacis* made the first attempt to draw up rule of international law protecting victims of conflict. Grotius and his disciples promoted the development of international law in the name of reason, whatever is described as scientific spirit was beginning to guide human thinking. One consequent of himself began to be regarded from the stand point of human rights.² The laws of war were codified at the Hague Conference of 1899 and 1907. A series of conventions were adopted at these conferences concerning land and naval warfare, which still form the basis of the existing rules. It was emphasized belligerent remained subject to the law of the nations and forbade the use of force against under-divided villages and towns. It defined those entitled to belligerent status and dealt with the measures to be taken as regards occupied territories. There were also provisions concerning the rights and duties of neutral state and persons in case of war, and an emphatic prohibition on the

² Encarta library www.genocideencarta accessed 4/4/2012

employment of “arms, projectiles or materials calculated to cause unnecessary suffering”.³ However, there were inadequate means to implement and enforce such rules which the result that much appeared to depend on reciprocal behaviours, public opinion and the exigencies of moral, in the sense that the Marten’s Clause in the preamble to the Hague Convention concerning the laws and customs of war on land provided that; in case not included in the regulations the inhabitants and the belligerents remain under the protection and the rule of the principles of 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,⁴ apart from the 1954 Hague Convention for the Protection of Cultural Property in the time of armed conflict, the rule of war remained as they had been formulated and codified in 1907.

The conventions in the inter-war period dealt with rules concerning the prisoners of war. Such agreements were replaced by the Fourth Geneva “Red Cross” Convention of 1949, which dealt respectively with the amelioration of the condition of wounded and sick in armed forces in the field, the ship-wrecked members of the armed forces at sea, the treatment of prisoners of war and the protection of civilian population in time of war. The Fourth Convention was an innovation and a significant attempt to protect civilians who as a result of armed hostilities or occupations were in the power of a state of which they were not nationals.

³ Hague Convention 1907

⁴ Ibid Convention 1907

In 1977, two additional protocols to the 1949 Conventions were adopted. These built upon and developed the earlier Conventions. The law of Hague's dealing primarily with inter-state rules governing the use of force, and the 'law of Geneva' concerning the protection of persons from the effects of armed conflict are to some extent merged, to form what the International Court of Justice (ICJ) has recently termed one single complex system known today as International Humanitarian Law.⁵ It also noted that the provisions of the additional protocols of 1977 give expression and attest to the threat and complexity of that law.⁶

The Hague Convention seeks in the first place to lay down the military operations. They restrict the freedom of belligerent states to attack specified persons and objectives, and the use of certain methods and means of combat in the conduct of war. Part of these rules have been reaffirmed and developed by the two 1977 protocols to the Geneva Convention. While the Hague Convention has ultimately aimed to protect human beings, humanitarian concerns are more pronounced in the Geneva Convention which deals directly with problems relating to persons affected by war.

The initiator of International Humanitarian Law (IHL), the International Committee of Red Cross (ICRC), strived to develop that law so that it may keep abreast of the changing patterns of conflict. It does so in successive stages as and when revision of existing instruments appears to it to be necessary and feasible.

⁵ (1986) ICJ Reports, Legality of the threat and use of nuclear weapons, p. 75

⁶ Ibid ICJ Reports p. 75

Between 1965 and 1973, the ICRC not only undertook to the study of feasibility of filling gaps in the existing law, namely the 1949 Convention, it also came up with the draft texts of the additional protocols to the Convention.

In February 1974, the government of Switzerland, the Depository State of the 1949 Geneva Convention, convened a diplomatic conference to discuss the draft protocols prepared by the International Committee of Red Cross. At the end of the Fourth and the last session of the diplomatic conference, which took place from March 17 to June 10, 1977, the diplomats and representatives of the 102 state, present adopted the 102 Articles of Protocol II relating to the protection of victims of international armed and the 28 Articles of Protocol II conflict. By adopting of June 8, 1977 the two protocols additional, brought to successful conclusion of International Humanitarian Law (IHL).⁷

2.3 The Role of Custom in the Development of International Humanitarian Law (IHL)

The role of customs in the development of IHL cannot be disregarded especially since custom in international law is a dynamic source of law in the light of the nature of international law.

There are disagreements as to the value of customary system in international law. Some writers deny that custom can be significant today as a source of law, nothing that it is too clumsy and slow moving to accommodate the evolution of international law

⁷ Rene, K. (1997) "The 1977 Protocols- A Landmark in the Development of International Humanitarian Law (IHL). In International Review of Red Cross (IRRC), Geneva, No. 320 at pp.483-505"

anymore. While others declare that it is a dynamic process of law creation and more importantly the treaties, since it is of universal application.⁸

There are elements for truth in each of these approaches. Amidst a wide variety of conflicting behavior, it is not easy to isolate the emergency of a new customary law and there are immense problems involved in collecting all the necessary information.

It is imperative to note that, of considerable important of IHL are norms of customs international law and the pre-empty norms of international law embodied in jus cogens, which is binding upon all persons of international law irrespective of treaty commitment. Customary Law is found in the practice of state, how many is not precisely state jus cogens can arise from multilateral treaties, which are so widely ratified as to become an accept part of the law of the international community and binding even upon states and entities not party to the original treaty. The Geneva Conventions impinge upon both of these since they are in part codification of customary law and have themselves to a large extent taken on the mantle of jus cogens.

It is clear and widely accepted that the Hague and Geneva Conventions embodied a wide measure of Customary Law. The view was emphasized several times by the International Military Tribunal of Nuremberg. For instance, the tribunal cited with approval of statement of protest made by Admiral Canaris, the head of the Abirchr on 15th September, 1941, concerning the regulation for the treatment of Soviet prisoners proposed by General Reineeke:

⁸ Rehman, J. (2010) International Human Rights 2nd ed. Pearson Education Edinburgh Gate England, p. 748

The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR (the latter not being party to it). Therefore only the principle of general international law on the treatment of war apply since the 18th century, this has gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies, that is, contrary to the military treaties to kill or injure helpless people.⁹

The question raised in the Von Leeb case¹⁰ which again concerned the treaty of Soviet prisoners in Third Reich. It was certainly the case that Soviet prisoners in Germany were very much worse treated than those from the allied powers, which were with Germany, parties to the Convention. Finding the treatment meted out to them to have been unlawful, the international military tribunal at Nuremberg stated that, “*Most of the Hague and Geneva Conventions considered in substance are clearly expression of the accepted view of civilized nations...¹¹*”

It is noteworthy that common Article 3 of the 1949 Geneva Convention undoubtedly summarizes some very basic humanitarian provisions, many of which are to be found in other human rights provisions and its minimum content certainly lends it some attraction as a bracket of customary norms.

This leads towards a suggestion that, customary law makes assumption of humanitarianism in armed conflict so that the extent to which conventional provision may

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

be regarded as “customary” may be a function of the extent to which it embodies fundamental humanitarian norms.

In the light of the very large number of states party to them it may be argued that the whole of the 1949 Geneva Convention have been absorbed into the body of jus cogens, making some allowance for the possibility of valid reservations, there may be a considerable measure of truth in this.

By the variety of mechanisms the great bulk of the provisions of IHL appear to be binding upon all states in all circumstances of internal armed conflicts. This may occur through customary law, in so far as the conventions and protocol codify pre-existing norms of general effect, they will have generally binding effect irrespective of treaty law. Despite certain difficulty in determining the precise content of customary IHL, it may be said with certainty that the general requirement of human treatment for the victims of armed conflict falls within this category.

The provision of IHL may be binding under jus cogens;¹² the way wide ratification of the 1949 Geneva Convention indicates that in a wide measure, they may be accepted as having become incorporated in jus cogens and may be, to the extent, binding irrespective of treaty relation.

The International Humanitarian Law (IHL) may be binding through conventional provisions, which is mutually binding upon state party to the convention and protocols through the normal of the treaty.

¹² Jus Cogens: Principle of General International Law where a treaty would be invalidated if it departed from the body of principles or norms from which no derogation is generally permitted.

An examination of their actual significance suggests that they play the most important role in that part of IHL which is devoted to the protection of human rights, during armed conflicts. To this category belong all the Hague Convention respective the laws and customs of war and land (1899 and 1907). The Geneva Protocol on Gas and Bacteriological Warfare (1925), the Geneva Convention for the Protection of War Victims (1949), the Protocol Additional to the Geneva Convention (June 10, 1977) and the convention prohibition or restriction of use certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (1980).

2.4 The Relationship between IHL and the Crime of Genocide

The International Humanitarian Law (IHL), also referred to as they law of Armed Conflict or the Law of War, prescribes universally accepted constraints on waging war. It further aims at protecting the fundamental human rights of victims and non-combatants in the event of armed conflict. Significantly, the human right protected here is right to life which the crime of genocide tries to protect by way of punishment and prevention. Therefore, in this wise a relationship is establish between the two as they both aim at the protection of persons.

Accordingly, *“Humanitarian law is a branch of public international law which owes its inspiration to a feeling for humanity and which is centred on the protection of the individual in armed conflict situations”* and similarly, the prevention and punishment of the crime of genocide is also centred on the protection of individuals but in times of war and peace.

Although both international humanitarian law and the prevention and punishment of the crime of genocide are based on the protection of persons, there are specific differences in scope, purposes and application between them. In view of this, therefore, each of them will be considered separately below.

2.4.1 The Meaning and Nature of International Humanitarian Law

International Humanitarian Law is the branch of Public International Law, which deals with the law of armed conflict by prescribing a universally accepted rules and regulations on waging war or constraints on waging war.

The International Rules established by treaties or customs which limit the rights of parties to a conflict to use the methods or means of warfare of their choice, or which protect states nor party to the conflict or persons and objects that are or may be affected by the conflict. It described as a part of universal International Law whose purpose is to target and ensures peaceful relations between people. It makes a substantial contribution towards maintenance of peace in that it promotes humanity in time of war; it aims to prevent or at least to hinder mankind's decline to a state of complete barbarity.

From the above perspective respect for IHL lay the foundation on which a peaceful settlement can be built once the conflict is over.

IHL protect persons who are no longer participating in the hostilities and restricts the means and methods of warfare. The central theme of IHL is basically to mitigate the rigorous of war, of means and method of condition of warfare, with special regard to military operations. It primary concern is the protection of human beings who are

subjected to extreme situation of war. It seeks to safeguard human dignity and to protect their right to life. A principle of long standing, if not always honoured in practice is the requirement to protect civilians against the effect of hostilities. This lead to the essence of this study as most often victims of genocide and genocidal acts are civilians. This study will therefore link effective role the IHL can undertake in the prevention of genocide.

IHL affords protection on all victims of armed conflict it provides for the immunity of all civilians without discrimination based on sex from an attack and respect for persons who have fallen into the hand of the enemy.¹³

Another feature of the IHL is that is not restricted to situations of unstable peace of pre-conflict situation. It covers the whole spectrum of situation (peace, crises, conflict, post conflict) and look to the long term. It also aims at influencing attitude and behaviours so as to ensure that when armed conflicts break out the principles of humanitarian laws are respected.¹⁴

IHL has been conceived primarily for armed conflicts between states or group of states, that is, internationally armed conflicts. Thus, the major part of the law deals with international armed conflict for which it provides detailed rules. Only a few IHL provisions relate to non international or international armed conflict. They constitute intact summaries of the essential rules applicable to all armed conflict.¹⁵

The summary of IHL is constituted by:

a. Article 3 Common to the Geneva Convention of the 1949

¹³ Shehu, I, (2001) Russia Bombing of Chechnya: Toward an Effective Monitoring System of Violation of IHL by the UN, ABU Law Journal Vol. 19-20, p. 186

¹⁴ Fredrick, D. M. (1987) Handbook on the Law of War for Armed Forces, ICRC, pp. 91-124

¹⁵ Ladan, M. T. (1999) Introduction to Human Rights and Humanitarian Law, ABU Press, Zaria.

b. Article 4 of the Hague Convention for the Protection of Cultural Property of 1945

These articles, that is, the Geneva Convention of 1949, and the Hague Convention of 1954 apply in armed conflict occurring in territory of a state party to these conventions. There is also no express requirement with regards to intensity and level of conflict.

A larger summary is constituted by Additional Protocol II to the Geneva Convention of 1949. Thus, Protocol II develops and supplements Article 3 common to the Geneva Convention of 1949. Additional Protocol II applies to situation involving more than internal disturbances and tensions (example riots, isolated and sporadic acts of violence and acts of similar nature¹⁶). The two conventions and the Additional Protocols, particular reference should be made to Article 57 of the Additional Protocol I to the Geneva Convention, which clearly states that the means of combat shall be chosen and used so as to avoid civilian casualties and damage; minimizing in any event unavoidable casualties and damage.

To avoid civilian casualties and damage, Article 48 of Additional Protocol requires that of all times a distinction shall be made between combatant and civilian persons, military objectives and civilian objectives. In order to minimize in any event unavoidable casualties and damage, constant care under Article 57-58 of the Additional Protocol I and Article 23 of the 1907 Hague Regulation, respecting the laws and customs of war on land shall be taken to spare the civilian population persons and objects.

¹⁶ Ibid

It is important to note IHL protect the honour, convention and religious practice of person who have ceased to take part in hostilities. Therefore, the objectives of IHL is to sustain a minimum level of humanity in mid result of the “balance structure between the principles of human being to act for the good of fellow beings and principles of necessity that is, the duty of public authorities to preserve the state defend its territorial integrity and maintain order”. The International Committee of Red Cross (ICRC) founded by Henry Dunant in 1864 is the main body that plays an important role in the development of IHL both in line with local and international rules of armed conflicts.

2.4.2 The Meaning and Nature of the Crime of Genocide

The word genocide has been defined to mean different types of killing from different perspectives.

According to Frank Chalk and Kurtr Johansson,¹⁷ in genocide is a form of one sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.

Charley Israel W.¹⁸ it “genocide in the generic sense is the mass killing of substantial number of human beings, when not in the cause of military force of an avowed enemy, under conditions of the essential defencelessness and helplessness of the victims”.

According to Helen Fein,¹⁹ on the other hand, “genocide is sustained purposeful action by a perpetrator to physically destroy a collectively directly or indirectly, through

¹⁷ Chalk, F. and Jonassohn, K. (1990), *The History and Sociology of Genocide*, New Haven, p. 221

¹⁸ Charley, I. W. (Edited) (1919) *Encyclopedia of Genocide*, Vol. 12 Santa Barbara California, p. 136

¹⁹ Fein, H. (1939) *Genocide-A Sociological Perspective*, New York California, p. 98

interdiction of the biological and social reproduction of group members sustained, regardless of the surrender lack of threat offered by the victims”.

The legal perspective of the Article 6 of the UN Charter and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide has defined genocide to mean 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 a group
- b. Causing serious bodily or mental harm to members of the group
- c. Deliberately inflicting on the group condition of life calculated to bring about its physical destruction in whole or in part
- d. Imposing measures intended to prevent births within the group
- e. Forcibly transferring children of the group

But that as it may, genocide may be defined as any killing or extermination of a group in so far as that killing or extermination is, or could be said to be the result the group’s identity.

2.4.3 The Development of Genocide and its Criminalization in International Humanitarian Law

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”.²⁰ The root or the

²⁰ Kuper, L., (1981) *Genocide: Its Politico! Use in the Twentieth Century* (Harmondsworth: Penguin) p. 9. See generally- Daniel, F.A. (Unpublished) A Ph.D Seminar paper presented to the Faculty of Law Board of Studies, March 2014, pp.3-18

origin of genocide can not be easily located, as its root is said to be lost in distant millennia, and will remain so, unless archaeology of genocide can be developed.²¹ The difficulty of tracing the historic origin of genocide is predicated on the fact that historic records are generally undependable, 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.

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 survived.²² However lost the origin of genocide is; 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”²³ 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.²⁴ 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 Amalek, and utterly destroy all that they have, do not spare

²¹ Chalk, F. and Jonassohn, K., (1990) *The History and sociology of Genocide: Analyses and case studies* (New Haven: Yale University Press) p. 64.

²² Wright, K. (2004) *A Short History of Proge'avs*, (Toronto: Anansi Press) pp. 25-37.

²³ Armstrong, K. (1999) *A History of Coo'* cited in Baumeister, RE., *Evil: Inside Human violence and cruelty* (New York: W.H. Freeman) p. 171.

²⁴ Genesis 6:17-19; see also Qur'an 71:25-28.

them, but lull men and women, child and infant, ox and sheep, camel and donkey”.²⁵ It was also reported that the Lord commanded Moses to slay all male Midianites and keep their virgin women for themselves.²⁶

In ancient wars, the nature of killings may be reflective of grave genocidal onslaught, perpetrated by the “strong” army against a “weak” army. The pronouncement of King Agamemnon when he filed out his strong army against Troy, is clearly indicative of an ancient war time genocide. King Agamemnon commanded, *“We are not going to leave a 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.”*²⁷

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.²⁸ It must be observed that, prehistoric 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’

²⁵ Samuel 15:2-3.

²⁶ Numbers 31:7-18; see also *Joshua* 6, where the Israelites under the leadership of Joshua, were said to have carried out God’s 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; / Sooszw/ /0, where King David of Israel utterly destroyed the entire population of the Ammonites.

²⁷ Quoted in Chalk and Jonassohn, *op. cit.*, n. 47, p. 58.

²⁸ Charny, I., (ed.) (1999) *The Encyclopedia of Genocide* (Santa Barbara, CA: ABC-CLIO) p. 273.

dominant group. In such prehistoric 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 slated for killing are the male members of the group.²⁹

In the opinion of historian Ben Kiernan, the Roman seize and eventual razing of Carthage 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.³⁰ Other victims of Roman Empire during its imperial ascendancy were the Faithful’s of Jesus Christ. After the Romans killed him in 33 AD, his followers were subjected to grave persecution and mass killing.³¹ There are, other historic mass killings that may be styled as genocide; though not in ancient or antiquity times, even though still far away from modern times. These include the slaughter of over 150,000 Vendees in France by the Republicans in Paris, which implemented a campaign of root-and-branch genocide.³²

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.³³ To this day, people in Zimbabwe, Malawi, Zambia, Tanzania, Kenya and Uganda can trace their origin back to

²⁹ Origin of Genocide”. [Http://www.genocidetextnet/gaci_origins.pdf](http://www.genocidetextnet/gaci_origins.pdf). p.5

³⁰ Kiernan, B., (2004) “The First Genocide: Carthage, 146 BC” *niogens*, 203, pp. 27-29; cited in “Origin of Genocide”, *Id.*

³¹ Bell-Fialkoff, (1999) *Ethnic Cleansing* (New York: St. Martin’s Griffin) p. 13; cited in “Origin of Genocide” *op. cit.*, n.55, p.6

³² Origin of Genocide” *pp. cit.*, n.55

³³ Mahoney, MR., (2003) “The Zulu Kingdom as a Genocidal and Post-Genocidal Society, 810 to Present On”, *Journal of Genocide Research*, 5:2, p.265.

the refugees who flee from Shaka's expansionist warriors.³⁴ 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,³⁵ 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 technology adopted by the Zulus to denote their conquest, *lzwe/cufa*, derived from Zulu words *Izwe*, which means nation, people or polity, and *u/al/a*, which means death, dying or to die. The *term* is therefore, very identical to the concept of genocide in both meaning and etymology.³⁶

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 re-occurring phenomenon that has seemingly defied man's learning and civilization.³⁷

2.4.4 Genocide as an International Crime

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 the criminal prosecution of genocide can not

³⁴ Chalk and Ionassohn, (1990) *The History and Sociology of Genocide: Analysis and Case studies* (New Haven: Yale University Press,) p.223.

³⁵ Mahoney, MR., *op. cit.*, n. 59, p. 254.

³⁶ *Ibid.*, p. 255

³⁷ 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 activity, is indicative of the failure of existing preventive mechanism.

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 minorities was not only morally outrageous, but also highly objectionable and sanctionable.³⁸ Hence, the legal prohibition of some forms of genocide such as wars of annihilation which developed very long before their codification in the Genocide Convention of 1948. These prohibitions were embedded in treaties and customary rules of international law.³⁹

International law as applied to the rights and obligations of nations was based in part upon customs. Until the twentieth century, customary international law is the dominant source of the law of nations.⁴⁰ Customs and conventions have shaped the development of positive law of nations since the beginning of the nineteenth century. Sources of customary international law include state practice, bilateral agreements, domestic laws, non-binding 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 1878.⁴¹

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

³⁸ Schaba, W.A., *op. cit.*, n. 10, p. 17.

³⁹ Anderson, *op. cit.*, n. 8, p. 1158.

⁴⁰ *Ibid.* p.1169.

⁴¹ Bluntchli, J.C., *Das Mordern Volkerrecht Der Civilisirtin Staten (1878)* 299-300 cited in Anderson. *op. cit.*, n.8,p. 1169.

for religious minorities.⁴² Some other early treaties contemplated the protection of Christian minorities within the Ottoman Empire⁴³ and the Francophone Roman Catholics within British North America⁴⁴ 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.⁴⁵ 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.⁴⁶ The preamble of the Hague Regulations also contains the ‘marten’s clause’, which states that:

The inhabitant’s 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.⁴⁷

Nothing in The Hague Regulation expressly suggests any particular focus on 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

⁴² Treaty of Peace between Sweden and the Empire, signed at Osnabruck, 11(24) October, 1684; Oumont VI, part I, p. 469, Arts. 28-30; Treaty of Peace between France and the Empires, signed at Minister 14(24) October, 684; Oumont VI, Part I, p. 450, Art. 28. See generally; Schabas, *op. cit.*, 8. to, p. 8.

⁴³ Treaty of Peace between Russia and Turkey, signed at Adrianople, 4 September, pt.829, BFSP XVI, p.647, Arts. V and VII.

⁴⁴ Treaty of Peace and Friendship between France and Great Britain, signed at Utrecht, 11 April, 1713, Durnont VIII, Part I, p. 339, Art. 14; Definitive ‘treaty of’ Peace between France, Great Britain and Spain, signed at Paris, 10 February, 1763 BFSP. pp.422 and 645, Art. IV.

⁴⁵ Schabas, *op. cit.*, n. to, p. 18.

⁴⁶ Ibid

⁴⁷ 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 (11) with Respect to the Laws and customs of War on Land, 32 Stat 1803, I Bevans 247,91 BFST 988,

section of the Commission's report entitled: "Extermination, emigration, assimilation," documented atrocities that could rightly be described as genocide or crimes against humanity.⁴⁸

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. At this time, the world also saw serious attempts being made at the internationalization of criminal prosecution, accompanied by the suggestion that massacres of ethnic minorities within a state's own borders might give rise to both state and individual criminal responsibility.⁴⁹ 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 where the Commission was mandated to inquire into and to report on the violation of international law committed by Germany and its allies during the course of the war⁵⁰. The treaty of Sevres;⁵¹ the United Nations War Crimes Commission;⁵² Nuremberg trial

⁴⁸ Report of the International Commission of Inquiry into the causes and conduct of Balkan Wars (Washington: Carnegie Endowment for International Peace, 1914) pp. 148-58; cited in Schabas, *op. cit.*, n. 10, p.19.

⁴⁹ *Ibid*

⁵⁰ 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. See generally: Seth, PT., *Anglo-American Relations at the Paris Peace Conference of 1919* (Princeton: Princeton University Press, 1961) p.312. The Commission's report used the expression "Violations of the Laws and Customs of War and of the Laws of Humanity". Some of the breaches are clearly close to criminal behaviours now defined as genocide or crimes against humanity which involve the persecution of ethnic minorities or group. see generally: Violation of Laws and Customs of War, Report of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris (Oxford: Clarendon Press, 1919) p. 23.

⁵¹ 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., *Modern Trend in Treaty Law*, (London: Stevens & Sons, 1967) pp. 60-61. The Treaty of Sevres was replaced by the Treaty of Lausanne of 24 July, 1923.

where Art, 6(c) of the Charter of the International Military Tribunal, the indictment of the International Military Tribunal at Nuremberg charged the defendants with ‘deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious group, particularly Jews and Gypsies’,⁵³ the General Assembly Resolution 96(1)⁵⁴ and finally the Convention for the Prevention and Punishment of the Crime of Genocide;⁵⁵ which remains the grundnorm of the existing world order, as far as the crime of genocide is concerned. Other statutes which now criminalize genocide, such as the Statute of the International Criminal Tribunal for former Yugoslavia,⁵⁶ the Statute of the International Criminal Tribunal for Rwanda⁵⁷ and the Rome Statute of the International Criminal Court,⁵⁸ which were all later in time, merely adopted the provisions of the Genocide Convention of 1948.

⁵² The United Nations War Crimes Commission was established immediately prior to the Moscow Declaration of 11 November, 1943. It is composed of representatives of most of the Allied powers. Sir Cecil Hurst of the United Kingdom. See Kochavi, A.J., “The British Foreign Office Versus the United Nations War Crimes Commission during the Second World War” (1994) Vol. 8, *Holocaust and Genocide Studies*, p.28.

⁵³ See: *France et al v. Goering et al.*, (1946)22 IMT 203, pp. 45-46. See also: (1947)2 IMT, pp. 44-48.

⁵⁴ Following the failure of the Nuremberg Trial to punish certain crimes, which included genocide. Fearing they might remain unpunished owing to the principle of *non crumen sine lege*. the representative of Cuba asked that genocide be declared an international crime. Consequently, 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, 961 Sess., 55 Plenary Meeting, at 188-89, UN Doc. A/96/PV.I (Dec. 11, 1946).

⁵⁵ 78 UNTS, **cmli** December, 1948; is the historic convention that specifically sets out in an elaborate dimension, **to punish** and prevent genocide.

⁵⁶ UN Doc. S/RES/955 (1993); UN Doc. S/25795, Annex. 1993.

⁵⁷ UN Doc. S/RES/955 (1994), Annex.

⁵⁸ The International Criminal Court became a reality on 17 July, 1998, after a prolonged debate on the creation of a permanent International Criminal Court. This was made possible by the adoption of the Rome Statute of the International Criminal Court, which was signed on 17 July, 2000 and ratified by Nigeria and many other countries on 27 September, 2001. See generally, Ladan, M.T., *Materials and Cases on Public International Law*, (Zaria: ABU Press, 2008) p.228.

2.4.5 An Overview of the Constitutive International Instrument on Genocide

The Convention for the Prevention and Punishment of the Crime of Genocide⁵⁹ is the first international instrument that criminalized genocide specifically as a crime against international law.⁶⁰ 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.⁶¹ 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;
- (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;

⁵⁹ Adopted by Resolution 260(tt)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).

⁶⁰ See, preamble to the Genocide convention. It must however be noted that before the Genocide Convention, United Nations by General Assembly Resolution 96(I) 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.d&nv.un.org/doc/RESOLUTION/GEN/t{C'033/47/IMG/NR003347.odf?OenEtentent>) accessed on 12th September, 2011 at 5:59 GMT.

⁶¹ Art, I, Genocide Convention,

(e) Forcibly transferring children from the group to another group.⁶²

The foregoing provision 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 the former Yugoslavia and for Rwanda respectively. These instruments entirely reproduced the foregoing provision of Article II of the Genocide Convention, It, therefore, follows that all discussions on the above provision is applicable to these other instruments. Deducible from 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,⁶³ 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 details meanings 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 Raphael Lemkin and Nuremberg principles.⁶⁴ These previous works suggested a broader and more elaborate definition of groups protected from acts constituting genocide. For

⁶² Art. 81, Genocide convention.

⁶³ Than, and shorts, op. *cit.*, n. 19, p.66.

⁶⁴ Sungi, S., (2001) “Redefining Genocide: The international Criminal Court’s Failure to Indict on the Darfiir situation” *Journal of Theoretical Criminology* (2011) special Edition vol. I, pp. 66-67; see also: Ratner, SR. and Abrams, J.S., *Accountability for Unman Rights Atrocities in International Law*, (New York: Oxford University Press) p. 28. cited in Wright, H., “Crimes that goes unpunished”

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"⁶⁵, "condition of life",⁶⁶ "measures to prevent birth",⁶⁷ "forcibly transferring children"⁶⁸. 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 phrases 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.

⁶⁵ Art. 11(b) Genocide Convention.

⁶⁶ Art. 11(c) *Id.*

⁶⁷ Art. 11(d) *Id.*

⁶⁸ Art. 11(e), *Id.*

CHAPTER THREE

AN ANALYSIS OF THE CRIME OF GENOCIDE IN INTERNATIONAL HUMANITARIAN LAW (IHL)

3.1 Introduction

As a branch of PIL applicable in armed conflict situations, IHL is designed to ensure respect for human being by showing that life has value and torture is inhuman. Consequently, it forbids massive killing all in the name of war or conflict situation. However, IHL should not be misconceived to be an obstacle to military necessity. All it requires is that the military necessity must be balanced with humanity by concentrating on tactical principles. Tactical principles are guides for the commander to concentrate on the essentials so as not to commit other war crimes of which the crime of genocide is inclusive.

One of the great advances in International Humanitarian Law is that, it now explicitly defines ‘murder’ and ‘extermination’ as international crime, whether in time of peace and or war.

Article 7(1) of the Statute of ICC includes the intentional murder of one or more persons as “crime” against humanity when part of a widespread or systematic attacks directed against any civilian population, with knowledge of the attack. Of special importance, “extermination includes the infliction of condition of life, inter alia the

deprivation of access to food and medicine, calculate to bring the destruction of part of a population”.¹

Fundamentally, genocide is a product of the type of government a country has; there is a high correlation between the degree of democratic freedom a people enjoy and the likelihood that the government will commit genocide. Modern democratic governments have committed virtually no democratic genocide. Those governments that commit the most genocide had been totalitarian governments, while those that committed lesser genocide have been partially or wholly authoritarian and dictatorial.

In order to appreciate this study and to understand the gravity of the horrible consequence of this crime of genocide, the chapter will trace historical development of this phenomenon it will further discuss the concept in relation to some cases.

3.2 The Meaning and Nature of the Concept Genocide

Genocide is distinguishable from other crimes by the motivation behind it, but it was not until towards the end of the Second World War that it became known when the horrific act of Nazi Germans was discovered i.e. when the extermination and concentration camp became public knowledge. It was the first time that the world was confronted with such a situation and because it was a crime that was unprecedented as regards its nature or degree. The need arose to find a new terminology for such a novel concept.

It was Raphael Lemkin,² a Polish born Adviser to the United States War Ministry, in his book “Axis Rule in Occupied Europe”, aware of the situation at hand and of the

¹ See Article 7(2) (b) of the ICC Statute

need to find and give it a meaning first coined the term “genocide”. The term genocide was constructed in contradiction to the accepted rules of etymology, from the Greek word “Genos” (race or tribe) and to the Latin suffix “Cide” (to kill). According to Lemkin, genocide signifies “the destruction of a nation or of an ethnic group and implies the existence of a coordinated plan aimed at total extermination to be put into effect against individuals chosen as victims purely, simply and exclusively because they are members of the target group”.

Mahmood Mamdani observed the striking similarities of the Iraq and Darfur crises. The estimated numbers of civilians killed were roughly similar in both crises. The killers were predominantly paramilitary, closely linked to the official military who supply arms to them. The victims in both crises were identified as members 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 was christened “genocide”³. Confused with the different descriptive nomenclature attributed to visually same crises situation, Mamdani exclaimed: “why the difference? Who does the naming? Who is being named? What differences does it make?”⁴ 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

² Lemkin, R. Axis Rule in Occupied Europe

³ 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/mo5/print/mamd01.html> (accesse on 13 April, 2011).

⁴ Ibid

Rwanda was genocide. Barry Crawford in his submission to the United Nation Tribunal on Rwanda, argued that, “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”⁵, concluding that what happened in Rwanda “was not genocide but a bloody civil war between two bitterly opposed sides struggling for power”⁶.

Here it must be noted that, while some scholars were fast at describing the annihilation of the Armenians by young Turks government as genocide⁷, others disagree that the acts cannot be considered as genocide⁸. The Hereros struggle for reparation against German imperialist for the genocide against the Herero Nation has also been refuted as not constituting genocide⁹. The uncertainty and the haziness in the perception of acts that may constitute genocide makes the concept very difficulty to understand analyze or write about. Zwaan observed that the term ‘genocide’, since its first introduction in 1944 has become well-established and gained wide currency¹⁰.

However, genocide has been shown to be a very complex concept, amenable to variety of conceptualization. Thus, Zwaan further observed that:

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 core meaning of ‘genocide’ amongst specialist in the field, the discussions about the most adequate definition are still

⁵ Daniel, F.A. (2014) (Unpublished) A Ph.D Seminar paper presented to the Faculty of Law Board of Studies, p.3

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

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 defined¹¹.

It is explicit from the foregoing that, there is not yet definiteness and conclusion on the meaning attributable to the concept of genocide, as the debate is still on going, different events perceived as genocide comes along with the different perspective on the concept. The attempt by the Convention on the Prevention and Punishment of the Crime of Genocide 1948¹², to bring certainty, definiteness and conclusiveness on the naming of genocide has actually suffered immense criticism and therefore its depend on the side the person defining genocide finds himself.

Genocide is a crime on a different scale to all other crimes against humanity and implies an intention to completely exterminate the chosen group.¹³ Genocide is therefore both the gravest and the greatest of the crimes against humanity. In the same way as in case of homicide the natural right of the individual to exist is implied, so in the case of genocide as a crime, the principle that any national, racial or religious group has a natural right to exist is clearly evident. Attempts to eliminate such groups violate this right to exist to develop within the international community.

3.3 The Scope of the Concept of Genocide in International Law

According to Raphael Lemkin, the expression ‘mass murder’ that was being used at the time to describe what had happened was an inadequate description of the totally new phenomenon witnessed in Nazi-occupied territories. It was inadequate because it

¹¹ Ibid p.4

¹² Ibid

¹³ Genocide Convention throws more light as to the gravity of genocide and what it entails in its (genocide) to totality

failed to account for the motive for the crime, which arose solely from racial, national or religious consideration and has nothing to do with the conduct of the war.¹⁴

War crimes had been defined for the first time in 1907 in the Hague Convention, but the crime of genocide required a separate definition as this time, it was not only a crime against the rules of war, but a crime against humanity itself affecting not just the individual or nation in question, but humanity at large. Raphael Lemkin was the first person to put forward the theory that genocide is not a war crime and that the immorality of a crime such as genocide should not be confused with the amorality of war.

The definition of what constitutes a crime against humanity was established at the Nuremberg trials. However, despite the significance of this, the jurist at Nuremberg had invented nothing new; they were simply advancing Montesqueu's ideas of international law, which he described as "Universal Civil Law" in the sense that all people are citizens of the universe. Killing someone simply because he or she exists is a crime against humanity; it is a crime against the very essence of what it is to be human. This is not an elimination of individuals because they are political adversaries, or because they hold to what are regarded as false beliefs or territories. It was inadequate because it failed to account for the motive for the crime, which arose solely from racial, national or religious consideration and has nothing to do with the conduct of the war.¹⁵ War crimes had been defined for the first time in 1907, in the Hague Convention, but the crime of genocide required a separate definition as this time, it was "not only a crime against the rules of

¹⁴ Ibid

¹⁵ Ibid

war, but a crime against humanity itself” affecting not just the individual or nation in question, but humanity at large. Raphael Lemkin was the first person to put forward the theory that genocide is not a war crime and that the immorality of a crime such as genocide should not be confused with the amorality of war.

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- (a) Causing serious bodily or mental harm to members of the group
- (b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- (c) Imposing measures intended to prevent births within the group
- (d) Forcibly transferring children of the group to another group

This definition, although lessening the uniqueness of Lemkin’s concepts to some extent, is nonetheless of remarkable significance. Some UN member states wanted to go further to include the notion of cultural or economic genocide, others would have added political motivations. The French representative remarked at the time, even if crimes of genocide were committed for racial or religious reasons in the past, it is clear that the

motivation for such crime in future will be mainly political. Ironically, and probably not without ulterior motives, the soviet delegate gave the real reason for the exclusion of political defined groups arguing that their inclusion would be contrary to the scientific definition of genocide and would reduce the effectiveness of the convention if it could then be applied to any political crime whatsoever.¹⁶

The final definition as it stands today is based on four constituent factors:

- i. A criminal act
- ii. With the intention of destroying
- iii. An ethnic, national or religious group
- iv. Targeted as such

If it was the reality of the genocide that led to the establishment of the concept of genocide, then in most people's mind there was an utmost connection between the two.

Consequently the word "genocide" has often been used when making comparison with later massacres throughout the world in order to attract attention by evoking images of concentration camps and their victims the Second World War and the genocide because absolute references in the political context. As Finkelkraut puts it, "Satan becomes incarnate in the person of Hitler who represented nothing less than an allegory for the devil".¹⁷ Fascism became the supreme enemy and mainly political adversaries were indiscriminately accused of supporting it. But it was genocide that became the ultimate verbal stigma, a term used both to describe any horrendous thoroughly fascist act

¹⁶ Ibid

¹⁷ Ibid

perpetrated by an enemy and as a rallying call for minority groups looking to assert their identity and legitimize their existence. Thus does the word genocide fell victim to a sort of verbal inflation, in much the same as has happened with the word fascist. It has been applied freely and indiscriminately to groups as diverse as the blacks of South Africa, Palestinians and women, as well as in reference to animals, abortion, famine and widespread malnutrition and to many other situations.

The term genocide has progressively lost its initial meaning and its becoming dangerously common place. In order to shock people and gain their attention to contemporary situations of violence or injustice by making comparison with murder on the greatest scale known in this century. “Genocide” has been used as synonymous with massacre, oppression and repression overlooking that what lies behind the image it evokes is the attempted annihilation of the entire Jewish race. Further trivialization has resulted from the overuse of the term “Holocaust”, just popularized on a wide scale in the 1970s by the American television series with that title. The original context is of course religious and means literally “a ritual sacrifice wholly consumed by fire”. The use of the term has a two-fold effect both mystifying and spectacular, with distorts and denials.

Thus, when attempting to break down the definition of genocide which requires three essential elements as follows:

- (i) An identifiable national, ethnical, racial or religious group;
- (ii) The intent to destroy such a group in whole or in part (*mens rea*); and
- (iii) The commission of any of the listed acts in conjunction with the identifiable group (*actus reus*).

The first requirement implies that acts of genocide can only be committed against the listed types of groups i.e. an identifiable national, ethnical, racial or religious group. The intent to destroy, for example, a political or social group would therefore not fall under the definition of genocide political and cultural groups were excluded from the original General Assembly draft of the convention because of strong opposition to their inclusion.

The second elements of the definition of genocide certainly represents a challenge for the prosecutor who will be obliged to establish the requisite state of mind (*mens reus*) of the accused, i.e. the specific criminal intent to destroy one of the enumerated groups.

...a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a specific intent with respect to the overall consequences of the prohibited acts¹⁸

The former type was however, distinguished from the latter by the General Assembly in 1948 when it drafted the convention. Genocide is the denial of the right of existence of entire human groups, homicide is the denial of the right to life of individual human beings. The ultimate target is the group itself. Hence the *Actus Reus* (prohibited acts) may be restricted to one human being but the *mens rea* or mental element must be directed against the life of the group. In other words, genocide occurs when the intent is to eradicate the individual for no other reasons than that they are a member of the specified group.

¹⁸ *Ibid*, p. 91

Genocide requires that acts be perpetrated against a group with an aggravated criminal intent, namely that of destroying the group in whole or in part. The degree to which the group was destroyed in whole or part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices.

The third element of the definition of genocide requires that the crime be among the listed acts. The exact scope of some of them remains vague i.e. causing serious bodily or mental harm to members of the group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. For the former, it is not clear what is covered by commentators as a sort of psychological damage which would lead to the destruction of the group or bodily harm “while involves some type of impairment of mental faculties”¹⁹ nor is it clear what is considered to be “calculate” to bring about the physical destruction in whole or in part of the group.

However, one of the great advances in international and humanitarian law is that it now explicitly defines “murder” and “extermination” as international crimes whether in time of peace or war. The Article 7(1) of the Statute of International Criminal Court (ICC) includes the international ‘murder’ and ‘extermination’ of one or more persons as crime against humanity. The genocide has been defined as any act committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group. The attempts by the international community to develop humanitarian law during the 19th and early 20th century wholly focused on war crimes and crimes against humanity during war,

¹⁹ Ibid, p. 91

various Hague Treaties and the Geneva Conventions made it international crime to murder.

Conclusively, it must be understood that, regardless of under what authority genocide is committed, it is formulated and planned by individuals, and it is the individual that the International Criminal Tribunal (ICTs) will prosecute for crime of genocide. Unlike the ICT that only adjudicate disputes between states, the ICC is a criminal tribunal that indicts individuals, issue international arrest warrants for their arrests, try and punish them. This is made explicit in Article 8 of the ICC Statute. Also, considering the requirements can automatically fall under the grave breach of IHL that is applicable to both international and non-international armed conflict.

3.4 The Punishment of the Crime of Genocide in International Law

The past century witnessed the denial of justice to millions of victims of genocide and other war crimes foe atrocities suffered (and some continue to suffer) in several or conflicts or gross human rights violation throughout the world.

Evidently, the impunity of the perpetrators of international crimes is what has provided a fertile ground for the commission of such horrendous crimes as genocide, which should not be left unpunished. Not until 1948, the international community, through the UN did not make categorical the crime and punishment of genocide.

Article 3 of the UNCG provides that 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

Article 4 of the same convention further provides that “persons committing genocide or any of the other acts enumerated in article shall be punished, whether they are constitutionally responsible rulers, public official or private individuals”.

Article 5 further provides that, *“The contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provision of the present convention and, in particular, provide effective penalties for person guilty of genocide or any other Acts enumerated in Article 3”*

From the provisions of Article 3, it is clear that the UNCG does not only punish genocide, but conspiracy to commit, incitement to commit genocide, attempt to commit genocide and even complicity to commit genocide.

In analyzing the provisions of the UNCG, the crime of genocide does not imply the actual extermination of a group in its entirety but that once any of the Act mentioned in Article 2 is committed with specific intent, to destroy in whole or in part “a national ethnical, racial or religious group” becomes punishable under Article 3(a) specifically for any of the act charged under Article 2 to be a constitutive element of genocide, the Act must have been committed against one or several individuals, specifically because they belonged to the group. Thus, the victim must have been chosen not because of their individual identity, but rather, because of their national, ethnical, racial or religious group. Hence, the victim of the crime of genocide is the group itself and not the individual.

On the crime of conspiracy to commit genocide, the researcher submits that where two or more person agreed to do or cause to be done, the crime of genocide or genocidal act, or an act, which is not genocide but such act could lead to genocide, it could be said to amount to conspiracy to commit genocide. Thus, once the agreement to commit genocide has been proved, then, it is not defense to the parties to say that the crime of genocide has not actually been committed.

As to what constitutes direct and public incitement to commit genocide, this could basically mean directly provoking another person to commit genocide, either through speeches, shouting or threats uttered in public places or at public gatherings, or through the sales of dissemination, offer for sale or display of written materials or printed matters in public places or public gatherings or through the public display of placard or posters, or by any other means of audio visual communication.

Where a person(s) intending to commit genocide beings to put his intention into execution by means adopted to its fulfillment, and manifest his intention by some overt acts but does not fulfill his intention to such an extent as to commit the crime of genocide is said to attempt to commit genocide.

Regarding the crime of complicity in genocide, an accused is deemed to be an accomplice in genocide if he knowingly aided and abated or provoked person(s) to commit genocide, knowing that these persons, where committing genocide. Even if the accused lacked the specific intent of destroying in whole or in part, the national, ethnical, racial or religious groups as such.

Article 4 of the Convention has established criminal responsibility of individuals for the crimes enumerated in Article 3, irrespective of the individual status in the society. Thus, all accused person should be treated equal before the tribunal or courts, trying the case.

Article 5 provides that state parties to the Convention should enact local legislations in their respective constitutions, which will give full effect to the convention, particularly with regards to penalties for persons found guilty of genocide, or any act in Article 3.

Sequent to the enactment of UNCG, several persons have being tried while others are being tried by the CTR, ICTY and the ICC. For instance, the ICTR has been successful in finding Major Jean Paul Akayesu, former Prime Miniter Jean Kabanda; and businessman and militia leader Omar Sherushago guilty of genocide among other crimes. Kabanda was sentenced to life imprisonment; similarly, the ICTY has been successful in trying and even convicted, some persons, while some have finished serving their sentences, others are still serving. The establishment case tribunals and the recent adoption of and coming into force the CC are important step in the administration of justice, especially to victims of crimes like genocide.

Punishment of genocide has become appropriate and necessary to vindicate society morals for their own sake. Criminal punishment contributes to the rehabilitation of the international legal order in face of violations of these norms by polarizing society's normal choice punishment also serves as deterrent to potential violators. The integrity of the international legal order and the goal of deterrence has therefore mandated the

attribution of individual responsibility for crimes such as genocide to any person to commits it with the knowledge of the connection between that act and a wide spread of systematic attacks against civilians. Thus, according to Kofi Annan, the former UN Secretary-General “there can be no global justice unless the worst of crimes against humanity are subject to the law”.²⁰

3.5 Specific Instances of the Commission of Genocide in International Law

Like most multi-ethnic states, Yugoslavia relied on the double consensus, first, on the consensus of ethnic groups which complied it i.e. the Serbs, Croats, Slovenes Muslims, Montinegrins and Macedonians, and second on the consensus of the winners of the World War I and II, who supported the creation of this state within the international order as defined by versatile and Yalta-despite deep economic, cultural, religious and political divergences, the new state creatively responded to the competing claims for self determination in South-Eastern Europe and with the exception of the 1941-45 period, for 73 years relatively successfully managed a complete ethnic and political balance on the Balkans.

However, two major Yugoslavia ethnic groups Serbs and Croats held different perception of the common state. While Serbs basically opted for the Unitarian goal i.e. the creation of the new Yugoslav nation much of the Croat political elite saw Yugoslavia merely as a necessary step towards fully independent Croat nation state. The differences often encouraged from abroad, were the source of permanent political crisis in the

²⁰ Ladan, M.T., (1999) An Introduction to International Human Rights and Humanitarian Law, A.B,U Press, p.102

kingdom of Yugoslavia that led to its collapse and dismemberment under Nazi attack in 1941 and to brutal inter-ethnic war during World War II.

The genocide in Yugoslavia, like other cases of genocide, also had a nightmarish face that became manifest in bombing of market place, hospitals, schools, torture, killing, rape and rape induced pregnancy were in the thing-as tens of thousands of women were being raped, mutilated and executed in concentration camps.

Because the situation in Bosnia was certainly genocidal, mass rape used to strike at the victimized culture were correctly articulated as tools of genocide. Rapes spread fear and induce the flight of refugees; rapes humiliate, demoralize and destroy not only the victim but also her family and community; and rapes stifle any wish to return. The United Nation Commission for Experts that investigate the rapes concluded that “rape has been used as instrument of ethnic cleansing”.

The victims were not only raped and allowed to go scot-free but were kept after being raped and not allowed to go anywhere until pregnancy became manifest that is forced impregnation, thus:

The women are placed in the unique of either abandoning a child that is half-hers or raising a child that is half her rapists. All of her options entail anguish, the more one considers her situation; the more difficult it becomes. On the one hand the baby was conceived in violence and hatred, on the other hand, it has grown inside her for more months and is it itself innocent of wrong doing. A woman may have mixed feelings about the baby, and find that she is unable either wholly or despise it. Once it is born, the woman must either try to repress her bating and revulsion and raise the child love, perhaps with every feature of her assailant imprinted on the child's face as a constant reminder of her violation, or else she must give to her revulsion and part with an innocent child

that is her own flesh and blood. If her culture has now banded her unmarriageable because of the rape, she may also be giving up the only child she will ever have.²¹

The effect thus, is that pregnancy may worsen the long term impact of rape on the victim by eliminating any chance of maintaining acceptance by a husband or family through silence about her victimization-here the pregnancies themselves also serve directly in a genocidal capacity because they interfere with the reproduction of the victimized group. When reproduction is used to proliferate members of one group and simultaneously to prevent the reproduction of members of another, it is a form of destruction.

Conclusively, it is submitted that the genocide had been planned long in advance and that the only thing needed was the spark that would set it off. According to a source, the genocide had been planned and implemented with meticulous care working from prepared list, an unknown and unknowable number of people, often armed with machetes, nails, studded clubs or grenade, methodically murdered those named on the list.

Yet, in practice punishing the offenders for the crime of genocide may be difficult even when it is clear that the event is a mass destruction of people. For example, United States (US) reluctance in early 2005 to use the ICC to prosecute crimes committed in the Darfur region of Sudan further clarifies US priorities²². To their credit, President Bush, the Department of State, and both houses of Congress had all confirmed by 2004 that

²¹ Ibid

²² See generally, Human Rights Quarterly, (2006), Vol. 28, No. 2, pp.300-331

genocide was occurring in Sudan. The United States urged the international community to stop the continuing campaign of “ethnic cleansing” by the government of Sudan and the Janjaweed militia—a campaign costing the lives of as many as 300,000 persons, forcing two million to flee their communities, and burning thousand of homes and scores of villages to the ground²³. After prodding by Washington and receiving the Report of the International Commission of Inquiry on Darfur²⁴, the Security Council passed two urgent enforcement measures: The first called for 10,000 more peacekeepers on the ground in Sudan, and the second authorized economic sanctions against Sudanese individuals whom the Commission had identified as complicit in the campaign²⁵. But the United States frustrated the desire of a majority on the Security Council to take a third logical step to refer the prosecution of the Sudanese persons accused of crimes to the ICC in order to stop crimes and to deter future criminal conduct.

Most members of the Council articulated strong reasons for authorizing the Court to proceed without delay: First, to allow continuing impunity for those who had engaged in systematic rape, murder, and pillage would send the wrong signal, suggesting that the international community would tolerate continuing crimes despite its rhetoric against them. Second, to prosecute the persons responsible for the most serious crimes Darfur

²³ Warren Hoge, (2005) *France Asking U.N. to Refer Darfur to International Court*, N.Y. Times, 24, p.3

²⁴ Report of the International Commission of Inquiry on Darfur to the Secretary-General, *Submitted Pursuant to Security Council Resolution 1564 of 18 September 2004*, U.N. SCOR, U.N. Doc. S/2005/06 (31 Jan. 2005) (hereinafter Darfur Report).

²⁵ See S.C. Res. 1590, U.N. SCOR, 5151st mtg., U.N. Doc. S/RES/1590 (25 Mar. 2005); S.C. Res. 1591, U.N. SCOR, 5153d mtg., U.N. Doc. S/RES/1591 (29 Mar. 2005). See also Warren Hoge, 10,000 Peacekeepers to be sent to Sudan, UN Council Decides, N.T. Times 25 Mar. 2005, at 8; Warren Hoge, UN Council Approves Penalties in Darfur, N.Y. Times 30 Mar. 2005, at 6

“would contribute to the restoration of peace in the region”²⁶. Third, the ICC already existed, was nearby at work in three other African countries, and could not quickly exert legal pressure against continuing crimes than any other judicial arrangement. Moreover, the International Commission of Inquiry said that “action must be taken urgently” because “attacks on villages, killing of civilians rape, pillaging and forced displacement have continued” even during the Commission’s investigations²⁷. Fourth, the Commission of Inquiry “strongly” recommended that the Security Council “immediately refer the situation of Darfur to the International Criminal Court”²⁸. Finally, Security Council referral of Darfur criminal prosecutions to the ICC would not contradict or negate the main, long-standing objection voiced by the United States about the Court- namely, that it could initiate prosecutions without Security Council (and US) approval. In this particular case, the Security Council would be the authorizing agent for ICC investigations, because Sudan was not a party to the Court, and the Court had no jurisdiction there, absent an explicit Council request. Referral would not lead to an ICC out of control, so to speak, because the Council would authorize only a single Court proceedings. It would not mandate other ICC prosecutions, unless they too were authorized by the Council, which the United States could block with its veto if it chose. A referral policy was thus consistent with the Bush administration’s view of the ideal arrangement for international criminal proceedings because they would be triggered by the Security Council.

²⁶ Darfur Report, *op.cit* note 97, at paragraph 5

²⁷ *Ibid* p.3.

²⁸ *Ibid* p.5

By the time the Commission reported in January 2005, enough members of the Council favored referral to pass a resolution promptly. With the exception of China, the United States, and Algeria (who preferred an African Union proceedings), they saw the ICC as the logical place to investigate and prosecute Darfur crime. With more killings being committed each day, it was never truer that justice delayed was justice denied.

But the United States forced delays, even though Council referral to an *ad hoc* international court was the Bush administration's preferred formula for enforcement. Despite the Bush administration's support for trying the accused, it refused to vote for referral of Darfur atrocities to the ICC because, as Pierre-Richard Prosper explained, "We don't want to be party to legitimizing the ICC"²⁹. So the United States asked other countries to support its proposal to create an *ad hoc* tribunal rather than to employ the disliked ICC. Yet, even if enough diplomatic arms could have been twisted to gain Security Council support for an *ad hoc* tribunal, it would still have been a poor idea. A new tribunal would cost more than the existing ICC. It would take too long to establish. And *ad hoc* tribunal also would be time-limited, which meant that the accused, if shielded by an uncooperative Sudanese government, might escape justice altogether by avoiding trial until a temporary tribunal would shut down. In contrast, because the ICC was permanent, it would be able to prosecute any any time because there is no status of limitations for these horrific crimes.

²⁹ Jonathan F. Fanton, (2005) *U.S. Obstructs Global Justice*, L.A. TIMES, 29, Mar. 2005, at B11; Micheal Kozak, On-the-Record Briefing on the Release of "Supporting Human Right and Democracy: The U.S. Record 2004-2005" (28 Mar. 2005), available at www.state.gov/g/drl/spbr/43931.htm

When other countries refused to create another temporary tribunal, Washington faced the grim prospect of vetoing a resolution to place those accused of atrocities on trial in the Hague. This would have damaged the US reputation further and harmed President Bush's second-term efforts to mend fences with Europe, so the United States asked for provisions in the proposed referral resolution to exempt US citizens and the citizens of other non-parties, except Sudan, from ICC enforcement in Sudan. Because of the US threat to veto referral resolution, the other members of the Council had no alternative, in the end, but to accept the US-dictated language. In return for getting the exemptions it wanted, the Bush administration, after numerous delays, agreed not to veto Security Council Resolution 1593³⁰. Most states expressed grave reservations about adding US-requested provisions to the resolution. The representative from Denmark, for example, made a clarifying statement that resolution "does not affect the universal jurisdiction of member States areas such as war crimes, torture and terrorism"³¹. Moreover, in mentioning bilateral immunity agreements, "that reference is purely factual; it is merely impinges on the integrity of the Rome Statute"³².

Statements such as the preceding one were designed to limit the corrosive impact of US-proposed language aimed at eroding international law enforcement by national courts as well as by the ICC. Going beyond the exemptions sought in Resolution 1422³³ for peacekeepers drawn from non-parties to the Rome Statute, Resolution 1593 on Darfur

³⁰ S.C. Res. 1593, U.N. SCOR, 5158th mtg. 2, U.N. Doc. S/RES/1593 (31 Mar. 2005)

³¹ Meeting Record, U.N. SCOR, 5158th mtg., at 6, U.N. Doc. S/PV.5158 (2005), *available at* www.amicc.org/docs/SC%20Meeting%2Record%201593.pdf

³² *Id.*

³³ See S.C. Res. 1422 op.cit note 22

not only prevents ICC law enforcement on citizens of non-parties, but is also attempts to give non-parties *exclusive* jurisdiction over their nationals on issues arising out of these UN peacekeeping operations. If an accused person from a non-party traveled to another state, including one that might be a party to the Rome Statute, the accused person would be returned to the non-party of which he or she was a citizen rather than face prosecution in the national courts of states that might detain an indictee. The Security Council concessions to the United States on Darfur seem to interfere with the ability of both parties and non-parties to the Rome Statute to prosecute crimes in accord with traditional ideas about universal jurisdiction. The Council resolution seems aimed at limiting the ability of national courts to prosecute the nationals of other countries, even if the ICC were not involved at all.

The US abstention allowed the Council to refer the Darfur cases, including the International Commission's sealed list of fifty-one people accused of crimes and voluminous information useful for prosecution, to the International Criminal Court. Yet, the Bush administration's priority had become clear: It subordinated the protection of the innocent to the exemption of the powerful.

Despite the delays and the concessions to US insistence on exempting its nations, the Security Council action represented an historic step forward in limiting impunity. For the first time in world history, a permanent Court has taken up cases referred to it by the Security Council, to investigate and try officials accused of engaging in genocide, war crimes, and crimes against humanity, even though that government had not explicitly

ratified the Rome Statute. At long last, a sustained global legal process is at work to establish individual accountability for mass murder and other atrocities.

On a general note, the negative overall impact of US policies toward the ICC on the enforcement of international humanitarian and human rights law, this analysis also suggests some counter tendencies that can be noted but not fully discussed here. The Security Council referral of Darfur atrocities to the ICC, in particular, has confirmed four politico-legal realities that should inform future strategies to increase compliance with human rights and humanitarian law.

First, the governments of many members of the international community, including a majority of those now in the Security Council, have internalized the norm that the international community has the right-and even the duty-to stop genocide, war crimes, and crimes against humanity through international legal processes that hold individuals accountable to the law. Never again should would-be violators of these laws succeed in claiming that they are entitled to hide behind a well of sovereignty. The key question is how to make international legal processes more effective, prompt, and jurisprudentially sound.

Second, although the US government has internalized the norm that international law prohibits people in other countries throughout the world from committing these crimes, regardless of their government's explicit acceptance of particular treaties or the ICC, it clearly has not accepted the norm that the international community has the right to enforce these laws on citizens of the United States. The unambiguous price that the United States exacted for allowing the ICC to prosecute crimes in Sudan was exempting

US nationals. Significantly, the United States did not hesitate to enforce the law on the Sudanese. US officials correctly noted that the obligatory content of the law for Sudanese (and others), plus the requirement that Sudan accept ICC jurisdiction when instructed by the Security Council to do so, have nothing to do with whether Sudan has ratified the Rome Statute³⁴.

Third, the denial to others of exemptions that the United States claims for itself betrays such a glaring denial of reciprocity that other governments and human rights organizations will continue, correctly, to ask: How long will we tolerate this double standard?³⁵ Because of the tenuousness of the US position, the trade-off of achieving Council referral of Darfur atrocities in return for exempting US nationals has been sensible political bargain for the international community, particularly if the double standard is of relatively short duration, because it reveals the US position for what it is: an unacceptable double standard³⁶.

The fourth reality is that the international laws against genocide, war crimes, and crimes against humanity, when backed by human rights organizations, the European Union, other progressive governments, and UN agencies, are politically powerful. The United States presumably will continue, for a time, to resist equitable ICC enforcement of these laws; but Washington is not in control of the further internalization of these norms,

³⁴ Jack Goldsmith, (2005) *Support War Crimes Trials for Darfur*, *WAS, POST*, 24 Jan. 2005, at A15; Warren Hoge, *France Asking UN to Refer Darfur to International Court*, *N.Y. TIMES*, p.3.

³⁵ Even the frequently sympathetic voice of the Economist concluded: "The Compromise reached at the UN (on Darfur referral...is an ugly one, with the immunity offered to American citizens creating double standards. But it seems to have been the only way forward". *After 300,000 Deaths; A Modicum of Justice*, *THE ECONOMIST*, 1 Apr. 2005

³⁶ The position described here is also tenuous for two other Permanent Members of the Security Council-China and Russia – which have not ratified the Rome Statute but still may use the Security Council to prosecute others while wielding the veto to allow impunity for themselves and their non-party friends

nor of the international community's ways and means of enforcing them. European governments, other like-minded states, civil societies throughout the world, and the UN system are together stronger than US influence when its position is widely recognized, even by a strong minority domestically, be normatively deficient and hypocritical. In the end, on factor that prevented the Bush administration from vetoing resolution 1593³⁷ was simply the enormous discrediting of the United States that would have occurred if the United States had vetoed the idea that those accused of heinous crimes should face internationally authorized due legal process through the ICC. After repeatedly rejecting the idea of Security Council referral to the ICC, Washington found that the cost of a veto would be higher than the cost of abstaining. The battle between the neoconservative agenda in the United States and the ICC is far from over; and how the battle will evolve remains dependent on many actors, domestic and international, as well as unforeseen events. But the strength of many people's support for upholding norms against mass murder and systematic rape at this stage of history should not be underestimated, nor should the worldwide consequences of awareness that the United States is hypocritical in its position on these horrible crimes. If the United States does not in the future do more than abstain on authorizing legal proceedings to prosecute such crime, and do more without insisting first on obtaining immunity for US citizens, US officials will be accused of holding the victims of rape and murder hostage to a US desire to assault the Court and the law's potential for deterring such crimes. Even a repeat of the diplomatic delays of 2005 may seem unconscionable in a future crisis, given the legally-binding duty of the

³⁷ S.C. Res. 1593 op.cit, p.103

United States and others in the Genocide. Convention to stop genocide, and the likelihood of future reminders that “serious violations of international human rights law and humanitarian law...are continuing”³⁸ as the United States delays Security Council action.

3.6 The Nigerian Experience

Nigeria has experience notable circumstances some of which may be termed genocide depending on the perspective one sees it; noting the fact that the definition of genocide depends on one’s interest and on specific circumstances of the case as noted by the tribunals sitting in Yugoslavia and Rwanda. Some of these notable instances are discussed below.

3.6.1 The Odi Massacre

The Odi Massacre was an attack carried out on November 20, 1999, by the Nigerian military on the predominantly Ijaw town in Bayelsa State. The attack came in the context of an ongoing conflict in the Niger Delta over indigenous rights to oil resources and environmental protection.

On Saturday November 20, 1999, the Nigerian armed forces on direct orders from the Commander-In-Chief, President Olusegun Obasanjo, ravaged the town of Odi in Bayelsa State, killing many innocent men, women and children in what has been described as the worst human rights violation of the government. The mission of the

³⁸ Darfur Report op.cit *note 97 at p.5*

expedition team to Odi was supposedly to apprehend a group of hoodlums who had murdered twelve officers and men of the Nigeria Police.³⁹

One year on, the Ijaw National Alliance of the Americas (INAA) commemorates this sad and callous event and hopes that the families of the victims and the people of Odi will, some day, have their dreams and aspirations for a fair and equitable solution to their plight fulfilled. INAA made a mandatory donation to the Odi Reconstruction Fund during its annual Isaac Boro Day Celebrations in May, 2000, and has pledged to construct a befitting memorial to the victims of Odi as soon as arrangements can be concluded.

INAA has noted with profound sadness that since Odi, the Obasanjo government has, in fact, escalated the violence in the Niger Delta by:⁴⁰

- (a) Intensifying the military option to control the oil fields and pipelines. Through the specially created Nigerian Military Task Force for the Niger Delta with specific orders to “shoot-to-kill” protesting indigenes, Obasanjo has, once again, demonstrated his propensity to use brute force to compel silence and acquiescence.
- (b) The brazen rape of women and young girls by security operatives in Choba; the gunning down of unarmed youths who protested against unemployment in Bonny Island.
- (c) The ravaging of communities in Ke-Dere in Rivers State, for protesting Shell Petroleum’s unceremonious and forceful return to Ogoni land.

³⁹ New York, USA Release, Monday November 20th 2000

⁴⁰ Ibid

(d) The massacre on October 17, 2000 of 15 protesting youths in Tebidaba in Bayelsa State.

The foregoing actions clearly demonstrate that compelling silence and acquiescence through force, intimidation and the killing of particular ethnic group amount to genocide.

However, the Ijaw National Alliance of the Americas (INAA) reaffirms its support for the rights of the Ijaw peoples, and indeed of all Nigerians, to protest peacefully without being harassed or killed by government agents. INAA reiterates its principled stand that only dialogue and genuine negotiation between the government, oil companies and local communities can bring about a fair, equitable and lasting resolution to the problems in the Niger Delta.⁴¹

INAA calls on the Obasanjo government to seek a more honorable path which is the one of negotiation and civil discourse in solving the incessant protests by various communities in the Niger Delta due to decades of criminal neglect and marginalization.

In pursuance of this, INAA calls on the Nigerian government to immediately implement the following course of action as a sign of its declared goodwill towards the people of Odi and the communities in the Niger Delta:⁴²

- i. Withdraw all military personnel of the Niger Delta Task Force occupying and patrolling oil fields and pipelines in the Niger Delta.

⁴¹ Ibid

⁴² Ibid

- ii. Institute a judicial commission of inquiry into the ravaging of Odi, as widely demanded by human rights groups across the country and overseas, which will among other things, determine the extent of the human casualties and damage to property. The commission should also recommend punishment for overzealous soldiers in the expedition team because there is clear evidence that they executed their orders with spite, malevolence and utter vengeance.
- iii. Undertake the rehabilitation and reconstruction of Odi and other towns and villages in the Niger Delta which have been razed by the Nigerian military in the past twelve months and as a matter of urgency, send relief materials to the victims of Odi who are still squatting with relatives and friends in neighboring villages and settlement camps.
- iv. Make serious efforts to restructure Nigeria as a truly federal state where no section or ethnic group would be subjugated by another. The current structure whereby states depend on the largesse and goodwill from Abuja is inherently a source of discontent and disaffection in Nigeria.

3.6.2 The Tiv Massacre

In four ethnic-Tiv villages in Benue, soldiers rounded up and killed over 200 unarmed civilians. Zaki Biam, a town of about 20,000 people, was completely destroyed. The killings were reprisals for the deaths of 19 soldiers who had been abducted and killed

in the same district two weeks ago. They had been sent quell violence between two local tribes, the Tivs and Jukuns, and the army blames Tiv militias for their deaths.⁴³

No fewer than 1,000 houses including that of Benjamin Chacha, former Speaker, House of Representatives in the Second Republic were destroyed in an operation that led to the killing of hundreds of people and sacking of 20 Tiv villages. The soldiers who came in several trucks and armoured vehicles in commando style employed bazookas, sub-machine guns, and armoured vehicles to wreak havoc.⁴⁴

Government buildings were not spared in the destruction that followed. Ukum Local Government Secretariat was destroyed as well as official residence of the Council Chairman. Also destroyed was the Divisional Police Station in *Zaki-Biam*. *Chacha* said that many people were killed in the operation in *Zaki-Biam* alone. When Newswatch visited *Zaki-Biam* on Friday, October 26, 2001, dead bodies still littered the town while some buildings were still burning.⁴⁵

The town had been deserted by most of the inhabitants for fear further reprisal from the soldiers. A handful of people seen in the town were strange refugees, women and children who looked pale, worn out, and hungry. Transportation to the area was cut off as commercial vehicles have since stopped plying the route.⁴⁶

⁴³ Trevor, J. and Barbara, S. (2001) Nigeria Soldiers carry out Massacres 27th October, 2001

⁴⁴ Newswatch Magazine, 24th October, 2001

⁴⁵ Ibid

⁴⁶ Ibid

While a segment of the soldiers were carrying out their retaliatory act in *Zaki-Biam*, another detachment was dispatched to *Tse Adoor*, a village in Katsina-Ala Local Government Area of Benue State, 16 kilometers away from *Zaki-Biam*.⁴⁷

When Newswatch visited the village on Friday, October 26, 2001, David Pev, a nephew of Victor Malu, retired General and immediate past Chief of Army Staff narrated the story of how the detachment that visited *Tse Adoor* village came in two military trucks and two armoured vehicles. He said as soon as they arrived, they started shooting indiscriminately at the direction of Malu's house.

According to Pev, the soldiers leveled the former Chief of Army Staff's village house, and killed four persons including Pastor Pev Adoor, 85, who was the village head and uncle of Malu with his wife, after which the remains of the couple were set ablaze. Satisfied with the havoc done, the soldiers left.

Pev said that soldiers came back once more a day after. During this second coming, the soldiers leveled what remained of Malu's country home. It was during this second operation that all houses stretching from *Tse Adoor* village to *Zaki-Biam* town were completely burnt and leveled.

Similar reprisal actions by the soldiers were carried out in *Sankara* village where they killed many people that same day. A day earlier, the soldiers carried out a similar action in eight villages-*Gbeji*, *Chembe*, *Ifer*, *Jootar-Shitile*, *Abeda*, *Mchia*, *Iorja* and *Vasse*.

⁴⁷ Ibid

In Vasse, Newswatch learnt that the soldiers summoned a meeting of the villagers as soon as they arrived there in eight armoured vehicles under the pretext that they were to make peace. They allegedly separated the men from the women, and opened fire on the unsuspecting and defenceless men. After this, the soldiers moved into the village, burning down the village and leveling buildings.

3.6.3 Boko Haram

As mentioned earlier, Boko Haram is group created by Late Mohammed Yusuf and its known for its disturbance of peace throughout the nation and the world all over.⁴⁸

Since their emergence in Nigeria, Nigeria has experienced and is experiencing a lot of havoc by series of bomb blast and other related activities in some notable states such as Borno, Adamawa, Yobe, Kano, Kaduna and the Federal Capital Territory Abuja.⁴⁹

Currently, the terrorist insurgency of the radical Islamist movement, *Boko Haram*, in the North Eastern Nigeria which is far spreading to the other parts of Northern States of Nigeria poses a new threat of genocidal massacres. *Boko Haram* declares its goal as eradication of all Christian and Western influence in Nigeria, an exclusionary ideology characteristic of a genocidal group. Since the summer of 2011, *Boko Haram* had struck many targets in Nigeria ranging from government buildings, especially the security sector, to schools and churches and mosques of the moderate Islamic faithful. The attacks have killed hundred of people. *Boko Haram* proudly often claims responsibility for these

⁴⁸ Abdullahi, U. A. (2012) *Insurgency in Nigeria: The Nigerian Experience* National Institute for Policy Strategic Studies, Kuru, Nig. p.56

⁴⁹ Daily Trust Newspaper, Vol. 31 No.72, 19th March, 2013 see also Weekly Trust Newspaper, 23rd March, 2014

mass murders. The attacks are aimed at polarizing relations between the Muslim North and the Christian South of Nigeria and particularly aimed and targeted at exterminating any group whether Religious or ethnic who are adherent or believers on the acquisition and promotion of western Education⁵⁰.

On 25 December 2011, several church bombings struck Nigeria. These Christmas Day attacks including the famous Madallah bombing in Suleja Niger State a suburb of the FCT Abuja caused the death of at least 49 persons. The bombings were followed by a message from Boko Haram giving the Christians who are living in the North three days to leave the North. As a result thousands of Christians have fled the North. Moderate Muslims are also targeted by Boko Haram. On 8 and 9 April, 2012, there were more car bomb attacks aimed at churches⁵¹. In 2011 at least 550 people died. More than 253 people were killed since January 2012. The deadliest attack took place on 20 January 2012 resulting in the death of at least 185 people. Boko Haram targets people based on their ethnicity and religion, including moderate Muslims.

In an Article tagged Nigeria Abduction a Call to Action⁵² the picture was created of the images of sorrowful parents, weeping profusely and brokenly asking when their daughters would be rescued. The murmurs of discontent swelled with the government's confused and inadequate responses to basic questions about the abduction of more than 276 girls from their secondary school by suspected *Boko Haram* members. The frustration reached a crescendo when unconfirmed rumors surfaced that the girls might

⁵⁰ www.hrw.org/news/2014/04/15/nigeria escalating-communal-violence accessed 16th April, 2014

⁵¹ Ibid

⁵² www.Hrw.Org/News/2014/05/06/Nigeria-abduction-call-action accessed 14th July, 2014

have been sold into marriage to members of the militant group for a \$12 dowry. Social media groups organized around the Twitter hashtag #BringBackOurGirls have demanded government action. Women's groups and other concerned people have joined in solidarity with the grieving parents⁵³. The abductions late in the evening of 14 April, 2014 the same day an early morning bomb blast killed more than 70 people in Nyaya a suburb of Abuja, was too much tragedy for most Nigerian. The dreaded insurgent group Boko Haram, which claimed responsibility for the deadly explosion, has also since claim responsibility of the girl's abductions. The Girl's Secondary School in the town of Chibok had been closed since February 2014 along with most schools in Borno State after threats from Boko Haram. The school had reopened just so that the girls could take their final exams. Disguised as security forces, Boko Haram apparently lured the girls into their vehicles. When the insurgents set fire to the school buildings and shot and killed soldier and a policeman guarding the school, the authorities determined that they were most likely Boko Haram in disguise. Some of the girls managed to jump out of the moving trucks by holding onto low-hanging tree branches, while a few later escaped from the insurgents' camp in the Sambisa Forest Reserve, 40 kilometers north. The abducted girls are children within the meaning of the definition of a "child" as defined by the relevant International Instruments⁵⁴. In November 2013, Human Rights Watch documented Boko Haram's abduction of several girls and women, snatching them off the streets or public transport vehicles, or from their parents, throwing money at them,

⁵³ Ibid

⁵⁴ The United Nations Convention on the Right of Child, defines a child as a human being below the age of 18 years

presumably as a form of dowry. Some of the girls later returned home, either pregnant or with babies⁵⁵. Abubakar Shekau, the Boko Haram leader, threatened a year ago to embark on a series of kidnappings of women and children which threat has clearly been put to action with little or no resistance by government. What is clear is that despite the genocidal intents and action of the Boko Haram sect clearly manifested in its declared war against western education and the abduction, rape and forced impregnation of women and children, the Nigerian criminal justice system has done little or nothing at arresting and prosecuting the suspects or acclaimed leaders and members of the sect. the only single known conviction obtained by the Nigeria Government was the conviction of Kabiru Sokoto⁵⁶ the few cases pending in Court are unnecessarily delayed to the extent that the criminal justice system in Nigeria is left much to be desired.

However, as far as the Nigerian experience is concerned a fundamental theme that is responsible for the state of the event is lack of awareness in the polity base on self interest and not because Nigeria those not have value for life in the observance of humanitarian rules. This is because at the end of every hostility, the bitterness caused by inhumanity lingers on in the polity.

⁵⁵ www.hrw.org/news/2013/13/29/Nigeria-boko-haram-abducts-women-recruits-children accessed 14th July, 2014

⁵⁶ See the Unreported Judgment of the Federal High Court Abuja in the case of FRN v. Kabiru Umar (Alias Kabiru Sokoto) delivered on the 20th December, 2013.

3.6.4 Ombatse Militia in Nasarawa State

Between the 30 May, 2012 and the 1st June, 2012 the quite and hitherto peaceful of Assakio⁵⁷ became the alago⁵⁸ people of Assakio their Eggon⁵⁹ neighbours. The conflict from its onset was viewed as the usual communal conflicts between two major neighbors' resultants of the clamour for agrarian lands. Sooner had the crisis broke up, that it became manifest far beyond the ordinary thoughts of the common citizens, partly because of the number of people killed in the crisis and partly because of the approach adopted in the killings. Within the span of the few days of the Assakio conflict hundred of lives were lost, houses burnt and property worth hundreds of million were destroyed and set ablaze. The state was overwhelmed by the extent of damages done to lives and properties within the short period of the crisis. The "*Ombatse*"⁶⁰ militia was alleged to be the most readily available group that caused the horrible destruction through gorilla styled approach.

In what was reported to be a proactive measure aimed at ending the activities of all illegal groups, the Nasarawa State Government proscribed the Ombatse group and all other militia groups in the state⁶¹. Furthermore, overwhelmed by the extent of lost of lives and damages which resulted from the conflict, and in exercise of the powers vested under

⁵⁷ Assakio is a town and the headquarters of Lafia East Development Area in Lafia Local Government Area of Nasarawa State one of the 774 Local Government Areas recognized under the 1999 Constitution, the town is predominantly occupied by *alago* one of the Majority ethnic groups in the State, but has other ethnic groups such as the *Eggons*; *Tivs*; *Hausas* and etc also inhabiting the town.

⁵⁸ Is one of the more than 25 ethnic groups in Nasarawa State and is acclaimed to be the single most populated in the State

⁵⁹ Is one of the more than 25 ethnic groups in Nasarawa State and is acclaimed to be the single most populated in the State

⁶⁰ Ombatse literarily interpreted from the Eggon dialect means "our time has come". Or "it is time" the Ombatse is a militia group of the Eggon ethnic group but the group claimed it was only a religious or prayer group with membership only of male, adults, of Eggon descent, women are exempted from the old cherished culture of purity and chastity reminiscence of the Eggon forefathers.

⁶¹ The Proscription was done vide; The Nasarawa State Legal Notice No.4 of 2012, Vol.15

the law⁶², the State Government on the 6th day of June, 2012 constituted a High Powered Commission of Inquiry on the disturbance in Assakio, chaired by Hon. Justice Isa Ahmed Ramalan (Rtd). After the Commission's sitting and submission of its Reports to the State Government, the State Government issued a White Paper⁶³ in November 2012 and made certain recommendations. Despite the proscription of the Ombatse and the Reports and recommendations of the Justice Ramalan's Commission of Inquiry, after the June, 2012 Assakio conflicts, between the 27th September 201 and 14th September 2013 there were series of Attacks on some towns and villages in the State which includes Kwandere and Barkin Abdullahi (BAD) in Lafia LGA; Brum Brum in Doma LGA; Bassa and Yelwa in Kokona LGA; Iggah in Nasarawa Eggon LGA all attacks were linked to the outlawed Ombatse Militia. As if that was not enough on the 7th May, 2013 same Ombatse waylaid, killed and burnt beyond recognition 74 Nigerian Security Personnel comprising of members of the Nigeria Police Force and the Department of State Service in Alaky Village⁶⁴. Characteristically, another Judicial Commissions of Inquiry was set up by the State Government chaired by Hon. Justice Joseph F. Gbadeyan (Rtd) former Chief Judge of Kwara State which sat, indicted some personalities and even recommended the Prosecution of some indetified individuals which recommendation was accepted and a

⁶² Section 2 of the Commission of Enquiry Law (Cap 25), Laws of Northern Nigeria 1963 as Applicable to Nasarawa State

⁶³ Government of Nasarawa State views and Decisions on the Report of the High Powered Commission of Inquiry on Ethnic Disturbance in Assakio (November 2012) Printed by Government Printer Lafia

⁶⁴ Alakyo is a village in Lafia Local Government Areas of Nasarawa State; the village is populated majorly by people of Eggon extraction. The Chief Priest of the Ombatse (Baba Ala Agu alias Baba Alakyo) is also resident in Alakyo.

White Paper issued⁶⁵. It is imperative to note that the style of the Ombatse Militia is to identify and destroy with genocidal propensities any group(s), whether ethnic, religious or even security agency that they perceived as a threat to their cultural renaissance. But more fundamentally is the point that despite the proscription and several indictments of the group by different Commissions, none of the identified culprits to the moment of this presentation has been prosecuted.

3.6.5 The Plateau State Religious Crisis

Plateau State has been Nigeria's *home of peace and tourism*, until the conflicts which erupted on the Plateau ironically turned the State into a ghost of itself. While Nigeria was getting ready to ratify the ICC Statute which it eventually did on the 27th September, 2001⁶⁶ the hitherto peaceful serene of Jos became eluded with the outbreak of violent religious conflicts in September 2001. Before the outbreak of the September, 2001 conflict, there were clear signals that trouble was brewing in Jos⁶⁷. Obviously; Government has a responsibility to maintain peace. The Nigerian Government could and should have prevented the mass killings in Jos in September 2001⁶⁸. As many as more than one thousand people are believed to have been killed in just six days in Jos, the capital of Plateau State was rocked by unprecedented violence between Christians and Muslims. The conflict in Plateau has ethnic, political, economic and religious

⁶⁵ Government of Nasarawa State: Government Views and Decisions on the Report of the Judicial Commission of Inquiry into the Recent Killings of the Nigerian Security Forces (Nigeria Police and the Department of State Security Services), Destruction and Confiscation of Security Personnel's Operational Vehicle and Weapons in Alakyo Village of Lafia Local Government Area and Matters connected Therewith (March 2014) printed by Government Printer Lafia.

⁶⁶ Ladan M.T. (2006). An overview of the Rome Statute of the International Criminal Court. In *An Introduction to the Rome Statutes and International Criminal Court*. Nigerian Institute of Advance Legal Studies, Lagos, p.27

⁶⁷ www.hrw.org/en/report/2001/04 Nigerian-govt-inactions-cost-lives-in-jos accessed 15th July, 2014

⁶⁸ Ibid

components which over the time become inextricably linked. The population in Plateau State is ethnically and religiously diverse like that of most central states of Nigeria. Generally speaking, while Christians in Plateau State could be said to be in the majority, however, Muslims make up a large minority⁶⁹ in the recent years, influential positions in the Plateau State Government have tended to be dominated by Christians leading to feelings of resentment and marginalization by the Muslims. Conversely, the Christians in Plateau State have complained of economic dominance and monopolization by the Muslims. Christians and Muslims were both perpetrators and victims in the conflicts in Plateau State which have led to recruitments and counter recruitments of allies by parties to the conflicts which make the conflict increasingly more complex. This is in spite of the fact that even among the parties to the conflict, there are families who have members that profess the Islamic faith while others profess the Christians faith. Whatever the propelling factors to the conflict, what is hardly disputable, is that the conflict in the Plateau, has assumed more religious than ethnical dimension. At the root of the conflict is the competition between “indigenes”⁷⁰ and “non indigenes”. The September, 2001 conflicts in Jos, later spilled over to Yelwa Shendam in the same dimension and character like the one in Jos, and with similar propelling factors, to the extent that by the years 2002 and 2004⁷¹. Yelwan Shendam was equally affected. The root of the crisis has its bane from the “*indigenes*” and “*non indigenes*” dichotomy which ordinarily should have

⁶⁹ Human Right Watch Report: Revenge in the Name of Religion a Cycle of violence in Plateau and Kano State (May, 2005) Vol.17 No.8(A), p7

⁷⁰ The concept of indigeneship was formalized in the 1979 Nigerian Constitution and further identified in Section 147(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁷¹ Op.cit 55 p.12

been ethnically based, but became more polarized on religious lines than ethnical. The crisis continued on and off, from Jos to Yelwa and to Jos unabated. Ethnic groups including the *Fulanis*, the *Tarok* and a number of smaller groups from other local government areas have taken sides largely on religious sides. For example a Christian from *Angas* ethnic group in Yelwa told Human Rights Watch that *“As indigenes of Platea State we can’t leave this place for them (the Muslim) including the Gamai are indigenes of Shendam Local government. The Angas perceive ourselves as indigenes of Plateau State. The Muslims who are in Yelwa are non indigenes. They come from the northern states (...) it is a religious war. They said they are indigenes of this place and want to chase us out. They want to occupy the place”*⁷².

According to another Christian witness who was interviewed also by the Human Right Watch stated that⁷³

‘Some of those in military uniform arrived at the church in a pickup truck, others in a vehicle similar to fuel a tanker. As the pickup truck reached the Langtang South road, the attackers shouted “that they should start” witnesses heard the attackers shouting “Allahu akbar” (God is great) and “let’ fight those arna as they (the Muslims) were the ones who founded Yelwa and they didn’t want the Christians there. Another witnesses was able to identify some of the individual attackers as Muslim residents of Yelwa; she recognized some of their faces, including that of a man who appeared to be one of the Commanders, but did not know their names’.

In the same Jos communal conflict, it was reported in 2004 that 67 Christians were killed by Moslems in Yelwa village in February of that year⁷⁴. This killing was followed

⁷² Human Rights Watch interview Yelwa (July, 10, 2004).

⁷³ Op.cit, 54 p.17

⁷⁴ See Tribune 12th May 2004 front page

by a revenge massacre of about 650-700 Moslems in May 2004⁷⁵. This no doubt qualified as crime of genocide on which the ICC Statute can apply.

Furthermore, questionnaire administered by the researcher of this paper on victims and witnesses of the Jos crises elicited responses that support the assertion made above. The questionnaire covered the period between 2009 and 2011. The questionnaire of 43 questions was randomly administered on 52 people residing in Jos. The answers it elicited are revealing and disturbing. The 52 people on whom the questionnaire was administered were most either Berom or Hausa/Fulani. Answers to questions by the Berom shows that Hausa/Fulani had committed acts of genocide in the Plateau State conflict. Similar questionnaires administered on a Hausa-Fulani man elicited answers largely opposed to those given by the Berom. Similar questionnaires administered on persons who are not partisan of the conflict, elicited answers that are different from both those of the Berom and Hausa/Fulani. The answers obtained from the latter appear more objective and reliable. They showed there have been high casualties on both sides to the conflict and some level of government complicity⁷⁶. The high level casualties make a case of genocide and government complicity fingers who can be arraigned for the genocide. As opposed to each other as the answers given by the Berom on one hand and Hausa/Fulan on the other hand are, they almost unanimously agreed that there has been no prosecution, conviction and punishment of anyone involved in the Jos communal conflict. This makes a clear case of impunity that requires the intervention of the ICC.

⁷⁵ See Daily Trust 14th May, 2004 Front page

⁷⁶ For Berom casualties ranged from 100-250; while for Hausa/Fulani from 500-1000

The Claim and counter claims of genocidal attacks by the parties to the conflicts were seemingly endless.

Of significance is the dominance of the crisis with acts constituents of genocidal status. The Muslims alleged constructive and systematic plans by the Plateau State Christians supported by the Plateau State Government to eliminate them through systematic killings and annihilation that is characteristics of genocidal intents⁷⁷. Also in a Report by the Ulamas/Elders Council Plateau State in May 2014 titled “*The Yelwan Shendam Massacr of 2nd and 3rd May, 2014*”. The Ulama/Elders Plateau State made genocidal allegations against the *Tarok*⁷⁸. The Human Rights Watch⁷⁹ also reported incidence of abduction in Yelwa Shendam of Muslims women and children and sexual abuse in the 2004 crisis. In the ensuing conflicts Buildings were smashed or burnt; homes and businesses were looted; and some villages, such as Dilimi on the outskirts of Jos, were virtually razed to the ground. Government authorities and security forces failed to take action that could have saved hundreds of lives, Human Rights Watch said⁸⁰.

⁷⁷ In a Memorandum submitted to the senate ad hoc committee on the 28th – 30th November 2008 Jos North Crisis by the Jos North Muslim Ummah where the Jos Muslim alleged attempted genocide on the Muslims in Plateau State.

⁷⁸ In the Introductory aspect of the Report it was stated thus: Following the recent attack on Yelw-Shendam by Christian Tarok militia and other from Shendam town from 2/04/04 through to 03/04/04 in which innocent Muslims citizen of Plateau State were brutally killed maim, properties worth several millions of Naira destroyed and children, daughters and wives abducted and mercilessly raped by the Tarok militia, the Muslims Community in Plateau State under the umbrella of the Ulama/Elders Council; of Plateau State inaugurated a committee and its finding are summarized as follows:

⁷⁹ Op.cit, 54 p.40

⁸⁰ The Executive Director of the Human Right Watch Africa Division, Takirambudde commenting on the signal about the ongoing crisis queried that the Nigerian government can't just sit back and watch this happen, it has a responsibility to maintain peace. There were clear signals that trouble was brewing in Jos but these signals were ignored.

“Explicit threats by both Muslim and Christian groups were not taken seriously by the government”, said Takirambudde⁸¹. “Their warnings were effectively ignored”.

It is imperative to mention further that in the wake and aftermath of the crises particularly the September, 2001 Jos and its environs crises, the Plateau State Government constituted a High Powered Judicial Commission of Inquiry Headed by the renowned Justice Niki Tobi CON. The Commission of Inquiry sat and submitted its Reports to the Plateau State Government which culminated into issuance of a White Paper by the Plateau State Government on the 9th April, 2009⁸². From the Government White Paper⁸³, the Judicial Commission of Inquiry found that the total numbers of 904 persons were killed from the few days of September, 2001 Jos crisis. Out of these Numbers an estimated 700 were Muslims, while an estimated 204 were Christians. From the facts contained on the White Paper, the Commission of Inquiry indicted certain individuals for complicity and participation in the killings that occurred during the crisis and recommended for their investigation and prosecution⁸⁴.

The White Paper even though recommended to the Police to complete investigations of those indicted in the crisis, up to this moment the presenter is not aware of any Prosecution of the persons indicted by the White Paper. Despite, the fact that there were evidently acts which were clearly constituents of genocide, such as making a

⁸¹ Ibid

⁸² Plateau State of Nigeria Government White Paper Report of the Judicial Commission of Inquiry into the Civil Disturbances in Jos and its Environs, September, 2001 dated 9/04/2009 Produced by Plateau State Government and Printed by the Government Printing Press Jos Ministry of Information & Communications, Jos Plateau State, Nigeria.

⁸³ Ibid

⁸⁴ The details of the persons indicted for complicity or participation in the killings in the crisis were listed and recommended to be prosecuted, the White Paper, pp.101-104.

particular Religious Group target of the crisis aimed at annihilating the members of the religious group, through systematic killings, abduction of women and children, and rape of the women which acts could be appropriately squared up within the constituents element of the crime of genocide.

CHAPTER FOUR

THE CRIME OF GENOCIDE IN INTERNATIONAL CRIMINAL COURT (ICC)

4.1 Introduction

When the nations of the world gathered in Rome, and adopted the Statute of the International Criminal Court (ICC) on 17th July, 1998, the event was hailed as a landmark achievement in international law and a potential turning point in international relations. The former United Nations Secretary-General Kofi Annan described the establishment of the International Criminal Court as, *“A gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law”*¹

The chairman responsible for the conduct of negotiations, Canadian Philippe Kirsch said that; *“The diplomatic conference had established the solid foundations of an international institution that will have a major impact for the future generations”*²

Governments, politicians, media communications, non-governmental organizations, academics from all around the world welcomed the accomplishment. None saw the statute as the most perfect that could ever be imagined; rather they welcomed it as the best advance compatible with respect for the principle of state equality, fairness of process and international relations as they exist today.

The International Criminal Court (ICC) is governed by an enabling statute or law known as the Rome Statute, which came into force on the 17th July 1998. The Rome Statute provides for the composition of the court, its function and structure. It also defines

¹ UN Press Release L 12890 (20 July 1998) p. 4

² Ibid P. 2

as well as codifies the crimes and sentences, rules or procedure and other law principles that would govern the International Criminal Court (ICC).

4.2 Procedure of the Court

The ICC has very limited subject matter jurisdiction to try individuals accused of the most serious crimes condemned by all nations such as crimes against humanity, genocide and war crimes. Its jurisdiction is limited to “the most serious crimes of concern to the international community as a whole”.³ The court also has safeguards against politically motivated prosecutions. They safeguards the interest of the defence, are sensitive to state concerns, and protect the courts’ ability to perform its functions. It is through these provisions and through the clarity of its definitions of crimes and its general principles as well that the statute will ensure the integrity and authority of the court over the long term.

The ICC, by building a development in international procedural standards and on the progress made by Ad-hoc Tribunals for the former Yugoslavia and Rwanda, aims to ensure that, the legitimacy of international criminal procedure is never again open to doubt. However, the proceedings are triggered, the prosecutor evaluates the information received and will initiate an investigation unless he or she determines that there is no reasonable basis to proceed.⁴

Though, the advisory procedure of the court is open solely to international organizations. The only bodies at present authorized to request advisory opinions of the

³ Article 5, Rome Statutes 17 July 1998

⁴ Ladan, M. T. (2006) An Overview of the Rome Statute of the International Criminal Court p. 43

court are five organs of the United Nations and 16 specialized agencies of the United Nations family.⁵

Among the pending cases that are present are; the application of the convention on the prevention and punishment of the genocide, armed activities on the territory of Congo, application for revision of the judgment of 11 July 1996 in the case concerning application of the convention on the prevention and punishment of the crime of genocide as enunciated in the case of Bosnia and Herzegovina Vs Yugoslavia⁶.

4.3 The International Court of Justice and the Maintenance of International Peace and Security

The International Court of Justice came into existence with the ratification of the Charter of the United Nations. Article 92 of the Charter describes the new court as the principal judicial organ of the United Nations, and states that the court is to function in accordance with the annexed statute of the permanent court of international justice and forms an integral part of the Charter. It consists of 15 Judges elected by both the General Assembly and the Security Council for nine years term each acting independent of the other. The Judges as in the case of the permanent court serve for nine years term, but instead of a full court being elected every nine years, one third of the Judges are elected every three years. The court has jurisdiction over all cases which parties refer to it and that matter specifically provided for in the Charter.

⁵ Article 53

⁶ Preliminary objections and named activities on the territory of the Congo (New Application 2002).

The Security Council has 15 members the United Nations Charter designates five states as permanent members and the General Assembly elect 10 other members for two years terms, and in their election due regard is to be given to the contribution of member states to the maintenance of peace and security, to other purposes of the United Nations, and to equitable geographical distribution (Article 23). The five permanent members are China, France, Russia Federation, United Kingdom and United States. The Security Council is not like a world cabinet having the power of a world government. Therefore, despite special regulations, there are no guarantees in the Charter for implementation of its decision.

The International Court of Justice is the principal judicial organs of the United Nations, as stated before, its seat is at the Peace Palace in the Hague, Netherlands it began work in 1946, when it replaced the permanent Court of International Justice which had function in the Peace Palace since 1922. It operates under a statute largely similar to that of its predecessor which is an integral part of the Charter of the United Nations.⁷

The court has a dual role i.e. to settle disputes in accordance with the international law the legal disputes submitted to it by states, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.⁸

4.4 The Functions of the Court

The tribunal, which has a relatively wide jurisdiction, is supposed to prosecute persons responsible for genocide and other serious violations of international

⁷ Ladan M.T. Op.cit, p.44

⁸ Ibid

humanitarian law. The statute of the tribunal more or less follows the Genocide Convention of 1948 in defining genocide as any act committed with intent to destroy, in whole or in part, a national, ethnic or religious group. Such acts include; killing members of a group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group condition of life calculated to bring about its physical destruction in whole or in part; imposing measures to prevent birth within the group; and forcibly transferring children of the group to another group. According to the statute, genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide attempts to commit genocide and complicity in genocide are all punishable.⁹

The tribunal has powers to prosecute person charged with crimes against humanity, which include; murder, extermination, torture, rape persecution on political, racial, religious grounds, and other inhuman act.¹⁰ Since such crimes can be committed in various circumstances, the statutes specified that they only fall within the purview of the tribunal when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

Article 4 of the Statute empowers the tribunal to prosecute persons who committed or order to committed serious violations of Article 3 common to the 1949 Geneva Convention for the protection of war victims and of 1977, additional protocols relating to the protection of victims of non international armed conflict. In particular humiliating and degrading treatment, rape, enforce prostitution and any form of indecent assault, pillage;

⁹ Burundi: to protect the people Human Rights Watch

¹⁰ Ibid, Notes on the international Court of Justice

the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees are recognize as indispensable by realizing people and threats to commit any of the foregoing acts.¹¹

Also, the international tribunal has power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Convention of 12th August 1949,¹² the persons who have engaged themselves in violation of the laws or customs of war of which such violations includes but riot to limited to employment of poisonous weapons or other weapons calculated to cause unnecessary suffering. Article 4 of the Statute empowers the tribunal to prosecute persons who committed or order to be committed serious violations of Article 3 common to the 1949 Geneva Convention for the Protection of Wart Victims of 1977, Additional Protocols relating to the protection victims of non-international armed conflict. In particular humiliating and degrading treatment, rape, enforce prostitution and any form of indecent assault, pillage, the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees are recognize as indispensable by realizing people and threats to commit any of the foregoing acts.

Also, the international tribunal has power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Convention of 12th August 1949, the persons who have engaged themselves in violation of the laws or customs of war of

¹¹ Peter, Idris Maina: (1998) "The International Tribunal for Rwanda: Bringing the Killers to Book " International Review of the Red Cross 31 Dec. 1998, No. 321 pp.695-704

¹² Op.cit Article 2 Genocide Convention

which such violations includes but not limited to employment of poisonous weapons or, other weapons calculated to cause unnecessary suffering.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

About sixty-four years ago, on the 9th December 1948, the UN General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide. It has become necessary after these years to reflect on the sufferings of the millions of people who are victims of genocide so as to take the necessary step to end this crime, the topic of this research has been chosen deliberately to draw the attention of the international community to the most immediate threats to human survival, which is genocide.

It is an established fact that, unless a nation can come to terms and recognize the aspect of ties past, that nation cannot create a foundation for understanding and reconciliation, which will allow it take a place as a responsible partner in the community of nations. It is the light of this treat this research has studied the past genocidal events that take place in Rwanda and former Yugoslavia, as a step towards reconciliation.

Thus in relation to the foregoing this thesis is generally examined the legal framework of the crime of genocide in relation to its administration in international humanitarian law (which is a branch of public international law). For clarity purposes, a good summary of this thesis is made on chapter by chapter basis.

Chapter one which is noted as the general format of any standard academic research discussed the general for which the research is intended to serve considering the increase in the commission of genocide due to the modern trends of conflicts in

international community; the need for the choice of selection of the research topic as a justification of the research and the anticipated contribution of this research to the already existing literatures noting the fact that there are many literatures on the subject matter. Thus, in chapter one, the researcher tried to juxtapose the background upon which this research is based by noting the expediency of the international community to put an end to impunity and the adoption of this research as one of the contributions to knowledge on the subject matter.

Chapter two made an overview of the understanding of the concept of Genocide and its administration in International Humanitarian Law (IHL). This chapter analyzed the epochal stages of the recognition of genocide as a crime in international law which is today admitted to be a notable crime in IHL to be punished under the administration of International Criminal Court (ICC). Thus, the genocide convention was among the first conventions of the United Nations to address humanitarian issues, it was adopted in 1948 in response to the Nazi atrocities committed during World War II and following General Assembly Resolution 180(II) of 21 December 1947, in which the UN recognized that “genocide” is an international crimes responsibility of individual persons and states.¹ The contracting parties confirm that genocide, whether committed in time of war, is a crime under international crimes which they undertake to prevent and punished.

The origin of the convention shows 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

¹ Ibid, Article 1

mankind and results in great losses to humanity, and which is contrary to moral law and to the purposes and aims of the United Nations².

Chapter three identified the basic concept of the crime of genocide by noting its key elements as basis for comprehending the theoretical framework which is needed to balance the practical understanding of the concept. On this note, international and local experiences were brought into play. Both the international and local experiences considered showed that the theoretical framework of genocide is only to be taken to mean that the crime can only be committed against an identified national, ethnical; racial or religious group. Therefore, the intent to destroy social or political group will not amount to genocide. However, this events rendered some of the practical instances incorrect to be termed as genocide.

Chapter four examined the crime of genocide in International Criminal Court (ICC) noting the fact that the ICC is specifically bestowed with the jurisdiction to try and punish for the crime of genocide and other related offences such as in the category of crimes against humanity under the Rome Statute.

Chapter five which is this chapter dealt with summary of the whole analysis of the research topic and thereafter proceeded to identifying findings and recommendations of the research one after the other as indicated below.

² Resolution 96(1) of the General Assembly, December 11th, 1946.

5.2 Findings

In the light of the above analysis in chapters 1 to 4 that the following findings are made:

1. The main problem associated with genocide is difficulty in prosecution. This is because issues as basic as the conceptualization of genocide within a definite description could still not be clear. This is because the attempt made by the Convention in its Article I to describe genocide was found to have only succeeded in erupting a new dimension of endless debate. This also is the fate of the Rome Statute of International Criminal Court, which merely adopted the description of genocide as proffered by the Genocide Convention of 1948 in its Article 6. The effect of all this is that, it frustrate the preventive measures of checking the commission of crime of genocide because in most cases after trials criminals are discharge based on the fact that the prosecution could not establish the commission of the offence. For example the definition of genocide is centered on identifying national, ethnical, racial, religious groups and therefore the intent to destroy any political or social group would not amount to genocide by strict adherence to the definition given by the convention.

2. Another finding of this research is lack of enforcement mechanism to monitor the immediate surrender of those responsible for genocide for trials which has recently rendered the implementation of the provision of the International Criminal Court ineffective. This event arises from the general weakness of international law (of which the international humanitarian law is a branch) and unless something is done to salvage this situation punishing offenders for the crime of genocide will be very difficult. For

example, United States (US) reluctance in early 2005 to use the ICC to prosecute crimes committed in the Darfur region of Sudan further clarifies US priorities³. To their credit, President Bush, the Department of State, and both houses of Congress had all confirmed by 2004 that genocide was occurring in Sudan. The United States urged the international community to stop the continuing campaign of “ethnic cleansing” by the government of Sudan and the Janjaweed militia—a campaign costing the lives of as many as 300,000 persons, forcing two million to flee their communities, and burning thousand of homes and scores of villages to the ground⁴. After prodding by Washington and receiving the Report of the International Commission of Inquiry on Darfur⁵, the Security Council passed two urgent enforcement measures: The first called for 10,000 more peacekeepers on the ground in Sudan, and the second authorized economic sanctions against Sudanese individuals whom the Commission had identified as complicit in the campaign⁶. But the United States frustrated the desire of a majority on the Security Council to take a third logical step to refer the prosecution of the Sudanese persons accused of crimes to the ICC in order to stop crimes and to deter future criminal conduct.

3. There is also weak enforcement mechanism to the effect that some countries are not party of the Rome Statute of the International Criminal Court (ICC) and as such are not bound by the obligations of the Rome Statute unless customary international law is

³ See generally, Human Rights Quarterly, (2006), Vol. 28, No. 2, pp.300-331

⁴ Warren Hoge, *France Asking U.N. to Refer Darfur to International Court*, N.Y. Times, 24, Mar. 2005, at A3

⁵ Report of the International Commission of Inquiry on Darfur to the Secretary-General, *Submitted Pursuant to Security Council Resolution 1564 of 18 September 2004*, U.N. SCOR, U.N. Doc. S/2005/06 (31 Jan. 2005) (hereinafter Darfur Report).

⁶ See S.C. Res. 1590, U.N. SCOR, 5151st mg., U.N. Doc. S/RES/1590 (25 Mar. 2005); S.C. Res. 1591, U.N. SCOR, 5153d mtg., U.N. Doc. S/RES/1591 (29 Mar. 2005). See also Warren Hoge, 10,000 Peacekeepers to be sent to Sudan, UN Council Decides, N.T. Times 25 Mar. 2005, at 8; Warren Hoge, UN Council Approves Penalties in Darfur, N.Y. Times 30 Mar. 2005, at 6

applied which is consequently weak to enforce. Where this happens even United Nations Security Council which is the last hope of the International Communities may not be ready to intervene because of the superpower's veto. On this note, generally it may be correct to say that the implementation of the provision of the International Criminal Court (ICC) for the punishment and prevention of crime of genocide is meant to be enforced on smaller nations rather than the super powers (i.e. in particular members of the Security Council) who do not submit offenders to the court.

4. Based on the Nigerian experience it is observed that there is lack of awareness of the observance of International Humanitarian Law Rules in Armed Conflict situations. This is because Nigeria experience had showed that women, children and the aged are not left out in the unjust killing and torture in armed conflict situations in Nigeria.

5.3 Recommendations

In view of the above observations, the following recommendations are proffered.

1. It is also recommended that the limitation of groups protected by the statutory definition of genocide (illustrated under findings above) should be removed in order to afford protection to all human groups, whether political, economic or social groups. By so doing the concept of cultural genocide articulated by Raphael Lemkin will be introduced to the legal conceptualization of genocide because cultural genocide is the very basis and representation of the actual destruction of human group.

Still on the note of clarity of definition, it is also suggested that genocide should be envisaged as “any act or legal omission, perpetrated with the intent to destroy a

group or a collectivity, unified by common traits, common heritage and common disposition”. The use of the phrase ‘common trait’ is projective of physical features, while ‘common heritage’ and ‘common disposition’ is broad enough to cover any type of targeted group, which may include religious, economic, social and even groups unified by common heritage of domiciliation at a particular targeted geographical area. The said phrases may also encompass the fact of cultural genocide, which Raphael Lemkin (supra) forcefully emphasized in his appreciation of genocide. On this note importantly, other acts other than mass killing may constitute genocide, if perpetrated with the requisite intent.

2. For the world to eradicate the commission of genocide, the problem of ethnocentrism must be done away with the international methods recommended will not be enough to end genocide, without political will to do so on the part of the international community. It was not for want of UN peace-keepers in Rwanda that about 800,000 people died over the course of 13 weeks. They died because of the complete lack of political will by the world leaders to save them. One of the most shocking episodes of that time was the failure of the United States and other world powers to save them. In fact, it was their political will to actually withdraw their troops and leave them to their murderers. Neither the United States nor any member of the Security Council had the political will to risk one of their citizen to rescue about 800,000 Tutsis from genocide.⁷

⁷ Ladan, M. T. (2004) An Overview of International Criminal Law: The Work of the Rwanda Tribunal, Internal Law Focus, Journal of International Law, ABU (2004) Zaria

3. The international community, especially the UN and the world super powers should deviate from politicizing the punishment and prevention of the crime of genocide through the application of sentiment by making only smaller states to be answerable to the ICC. This is expedient in order to save humanity from this horrific crime of genocide. Innocent lives have been lost in Darfur and other parts of the world, they are duly bound to serve humanity, for history will never forgive them if they do not do what they are duly bound to do.
4. On the basis of the Nigerian experience it is recommended that there must be adequate mechanism for familiarity with the rules of IHL to be put in place by the government for both civilian and military. This can be done through media information system, seminar, conferences and even the introduction of teaching IHL in secondary and tertiary institution as general courses. By so doing the structures administrative arrangement and personnel required for implementation of IHL will be put in place.

Still on Nigerian experience there should be an adequate and instant punishment for offenders domestically (and if possible the crime of genocide could be place in the category of strict liability offence) so that the violations of humanitarian rules will be prevented and deterred.

In conclusion, an effective implementation of the intent and purposes of the Rome Statute establishing the International Criminal Court for the prevention of the crime of genocide will require adequately a prompt and severe punishment for the wrong doers so as to discourage future injustice. In this wise, deterrence, they

say is achieved both through the threat of punishment and through educative effect of criminal justice. Education involves producing a record of event and clear movies of truth telling. Indeed, recovering from situations of widespread or systematic inhumanity requires accessing the truth, punishments and reconciliation, all of which make violations and recurrence less likely.

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