# CHAPTER ONE

# GENERAL INTRODUCTION

## 1.1 Background to the study

Crimes against humanity are among the most serious crimes of concern to the international community.[1] Like all other grave crimes, they are evidence of the disintegration of peace in human society. The world historiography is matted with episodes of violence,[2] despite the fact that men since the beginning of time have sought peace.[3] In contemporary times, themes of armed conflict, violence, rapaciousness, destruction, and mass killings have resonated in the media, leading to the testy conclusion that peace is perhaps, elusive. Thus, the more civilized we have become; the violent and bloody realities of armed conflict become even more abhorrent.[4]

Nigeria is not insulated from the spiraling trend of global violence. Since 2002, the country has been plagued by mind-boggling atrocities perpetrated by Boko Haram insurgents.[5] Ayegba is of the view that Boko Haram is a radical Islamist movement shaped by its domestic context and reflecting the country's history of poor governance and extreme poverty in the north.[6] The movement combines a sectarian, radical Islamic agenda with violence. The discourse on the Boko Haram sect is often journalistic, without a conscious attempt to legally interrogate the terms: 'insurgency' and 'terrorism'. In consequence, the study strives to distill their

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1 Paragraph 4, Preamble to the Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9

2 A Metcalf, 'Regents Prep Global History, Conflict: Introduction' <http://www.regentsprep.org/Regents/global/themes/conflict/index> accessed on 26 August 2014.

3 D MacArthur, 'Farewell to Congress' 19 April 1951, 6. <http://www.americanrhetoric.com /…/PDFFiles/ …> Accessed on 15 November 2014.

4 B Bowden, 'What Price Peace? On the Dialectical Relationship between Civilization and War' (2011) Vol 16. No. 1 *International Journal of Peace Studies*, 9.

5 O O Ajibola ,'Terrorism and Insurgency in Northern Nigeria: A Study of the Origins and Nature of Boko Haram' (2015) Vol. 5. No. 12 *Research on Humanities and Social Sciences,* 8.

6 U S Ayegba, 'Uemployment and Poverty as Sources and Consequences of Insecurity in Nigeria: The Boko Haram Insurgency Revisited' (2015) Vol. 9. No. *3 African Journal of Political Science and International Relations,* 94.

differences and discusses the relevant legal regimes. Furthermore, a study of the characterization and anatomy of crimes against humanity is undertaken.

The desire for global peace is manifested strongly in the United Nations Charter and other regional treaties.[7] In the same way, domestic legal systems extol peace, and provide opportunities for the orderly resolution of disputes. However, where these institutions fail, are bypassed or undermined, anarchy sets in, leading to gross violations of human rights.

The resulting macabre state notwithstanding, deliberate attacks on civilians is still prohibited. In periods of armed conflict, customary international law prohibits deliberate attacks on civilians; attacks aimed at terrorizing civilians; and attacks against civilian objects.[8] Oji has observed that the principle of distinction requires that during armed conflict, parties should distinguish and make distinguishable all non-military targets.[9] In a blatant disregard of these norms, Boko Haram insurgents have, in the pursuit of their political objective of carving out an Islamic Caliphate from Nigeria, adopted terrorists and guerilla tactics of warfare, which do not discriminate between protected persons, objects, and legitimate objects of attack. The U.S Department of State has observed that Boko Haram killed about 8, 239 people in 2013 and 2014.[10]

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7 Charter of the United Nations 1945 Article 1.

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 48: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations'. See also Additional Protocol I Article 52 (2): "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers a definite military advantage'.

9 E A Oji, 'The Problem with International Humanitarian Law: Distinguishing Targets in Armed Conflict' (2013) Vol. 4. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* 3.

10 J Alagbe, 'Boko Haram Kills 8, 239 in two years – Report', *Punch Mobile*. 27 June 2015. http://www.punchng.com/news/boko-haram-kills-8239-in-two-years-report/ accessed on 16 August 2015.

The methods of warfare used by such groups are susceptible to superfluous injury. In every situation, whether peace time or war time, international law provides ample guarantees for the protection of human rights. However, the perennial problem of the indiscriminate slaughter or persecution of civilians in times of peace or protracted armed violence has remained one of the greatest challenges to global security.[11]

Regardless of the link between armed conflict and the occurrence of atrocity crimes, a significant statistic of mass killings or crimes against humanity has been perpetrated in a situation in which a state of belligerency was not declared. It has been asserted that 'the strong empirical correlation between the two phenomena: armed conflict and atrocity crimes, implies a direct linkage'.[12] Another scholar; Adigbou, highlighted that 'civil wars and terrorism have left millions dead in Africa'.[13]

The nature of warfare has changed fundamentally since 1945, as contemporary wars are mostly fought with small arms and light weapons between weak governments and ill-trained rebels, insurgents, or terrorists. Ironically, such violent conflicts exacerbate the very conditions that gave rise to them in the first place, creating a 'conflict trap' from which escape is difficult.[14] In the past 100 years, more people have been killed in various types of conflicts and regime victimization than at any other time in history, and most of the victims are likely to fall within the descriptive contextualization of crimes against humanity.[15]

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11 K A Petty, 'Humanity and National Security: The Law of Mass Atrocity Response Operations' (2013) Vol. 34 No. 4 *Michigan Journal of International Law*, 746.

12 A J Bellamy, 'Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Protect' (2011) *Policy Analysis Brief*, The Stanley Foundation, February 2011, p.1.

13 E R Adigbou, 'The New ECOWAS Counter-Terrorism and Arms Trade Treaty' (2013) Vol. 6. No. 2 *CJJIL* 40.

14 R Thakur, 'The United Nations and the Elusive Quest for Peace'. <http:// www.un.org/en/ga/63/.../ pdf/qatar_en.pd…> accessed on 16 November 2014.

15 M C Bassiouni, 'Crimes Against Humanity: The Case for a Specialized Convention' (2010) Vol. 2, No. 4 *Washington University Global Studies Law Review*, 575.

The delinquencies collectivity: crimes against peace, crimes against humanity, genocide and war crimes, are known as ‘atrocity crimes’ because they are characterized by the widespread massacre of civilians. States and non-State actors, such as organized terrorist groups, insurgents, rebels and militia, have been implicated in these crimes. However, unlike war crimes and genocide, crimes against humanity have not yet been codified in a dedicated international convention, despite their occurrence over the centuries, and their prosecution in modern times, beginning from the post-war Nuremberg Trials. Mass atrocity crimes violate the basic rights and freedoms of their victims.

According to Scheffer, atrocity crimes fit the following profile of cumulative definitional characteristics, all of which must exist for the term to be used accurately:

(i) The crime must be of significant magnitude, meaning that its commission is widespread or systematic or occurs as part of a large-scale commission of such crimes. The crime must involve a relatively large number of victims (e.g., a fairly significant number of deaths or casualties), or impose other very severe injury upon non-combatant populations (e.g., massive destruction of private property), or subject a large number of combatants or prisoners of war to violations of the laws and customs of war.

(ii) The crime may occur in time of war, or in time of peace, or in time of violent societal upheaval of some organized character, and may be either international or non-international in character.

(iii) The crime must be identifiable in conventional international criminal law as the crime of genocide, a violation of the laws and customs of war, the crime of aggression (if and when it is defined so as to give rise to clear individual

criminal culpability), the crime of international terrorism, a crime against humanity (the precise definition of which evolved in the development of the criminal tribunals), or the emerging crime of ethnic cleansing.

(iv) The crime must have been led, in its execution, by a ruling or otherwise powerful elite in society (including rebel or terrorist leaders) who planned the commission of the crime and were the leading perpetrators of the crime.

(v) The law applicable to such crime, while it may impose state responsibility and even remedies against states, is also regarded under customary international law as holding individuals criminally liable for the commission of such crime, thus enabling the prosecution of such individuals before a court duly constituted for the purpose.[16]

Like every other atrocity crime, crimes against humanity infringe upon the basic liberties of civilian populations. Even though credit for the earliest conceptualization of human rights is attributed to natural law philosophy,[17] many of the ideas which sparked the notion of human rights as presently understood originated after 1945.[18]

Prior to the emergence of the United Nations Organization, the laws of war provided a modicum of protection for civilians during armed conflict. The Lieber Code which served as the foundation for much of international humanitarian law prohibited 'all robbery, all pillage or sacking, even taking a place by main force, all rape, wounding, maiming, or killing of the inhabitants of an invaded country'.[19] Human rights, including rights to life, religion, dignity,

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16 D Scheffer, 'Genocide and Atrocity Crimes' (2006) Vol. 1. No. 3. *Genocide Studies and Prevention: An International Journal*, 238-239.

17 'Human Rights'. https://www.en.m.wikipedia.org/wiki/Human_rights accessed on 27 August 2014.

18 M Mazower, 'The Strange Triumph of Human Rights, 1033-1950' (2004) 47 (2), *The Historical Journal*, 396-397.

19 Government Orders No. 100: The Lieber Code. Instructions for the Government of Armies of

speech, and the protection of minorities, developed with celerity under the auspices of the United Nations Organization.

The United Nations' was established in 1945 with the determination to 'save succeeding generations from the scourge of war, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations, large and small'.[20]

However, critics have been quick to point out that the founders of the United Nations system were not as much concerned about human rights, as they were with the deterrence of crimes against peace.[21] One notable shortcoming of the UN, and perhaps, of any other institution concerned with the promotion of global peace, has been its inability to eradicate armed conflicts, leaving humankind with no better alternative than to regulate them. The reality confronting mankind is that, as the barrage of legal prohibition intensifies, we witness more frequent and gruesome outbreaks of violence. Perhaps, it is now necessary to pause and ponder whether legal responses alone are sufficient solutions to this reign of anarchy. Moreover, as the incidence of inter-State armed conflicts declined, wars of asymmetry, such as those waged by insurgents, terrorists, or guerillas have peaked.

Pundits have also stated that the UN system, created essentially to deal with inter-State relationships, simply institutionalized indifference to atrocities like crimes against humanity, as sovereign states did not interfere in one another's internal affairs, or chose to intervene only after

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the United States in the Field. Prepared by Francis Lieber, Promulgated as General Orders No. 100 by President Lincoln, 24 April 1863 Article 44.

[20] Preamble to the Charter of the United Nations 26 June 1945. Entered into force on 24 October 1945.

[21] G Evans, 'The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All'. (2009) Vol. 20, 7–13 *Irish Studies in International Affairs*, 8.

gross violations have occurred.[22] Yet, to some extent, the UN has succeeded in creating a schema for international order and peace. The establishment of a body of international human rights law is regarded as one of the greatest achievements of the United Nations Organization.[23]

The United Nations Organization has facilitated the negotiation of human rights treaties and declarations, and has also helped to create a global culture of justice, affirmation of human rights, and judicial fora for combating impunity.[24] The U.N paradigm has been replicated by regional institutions, like the African Union, and the European Union, amongst others. Furthermore, several universal instruments against international terrorism, relating to specific terrorist activities, have been elaborated within the framework of the United Nations system.[25]

Treaties negotiated in the aftermath of World War II have strengthened international institutional capacities, and have given greater clarity and force to international criminal law. Significantly, jurisprudence from the tribunals for Nuremberg and the Far East established the novel concept of individual criminal responsibility, and that crimes against humanity were also recognized by customary international law. Much later, similar tribunals were created for atrocities committed in the former Yugoslavia and Rwanda. From such fragmented systems of criminal justice enforcement, the international community has progressed to the establishment of a perpetual criminal judicature: the International Criminal Court.

However, as the global community looks back over the course of history, it is still distressed by its inability to prevent the resurgence of crimes against humanity, consisting of murder, extermination, enslavement, deportation, imprisonment, torture, rape and sexual

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22 UN Charter 1945 Article 2 (7). See also Evans, *loc cit*.

23 'Major Achievements of the United Nations'. < https://www.un.org/Overview/achieve.html> accessed on 3 August 2015.

24 'UN Role in Human Rights Respect/Convention on the Rights of the Child/UNICEF'. <https:// www.unicef.org/crc/index_30198.html> accessed on 28 August 2014.

25 'United Nations Action to Counter Terrorism'. <http://www.un.org/en/terrorism/> accessed on 3 August 2015.

violence, persecution, enforced disappearance, apartheid, and other inhumane acts of a similar gravity.[26]

## 1.2 Statement of problem

Rather than being unspeakable aberrations, crimes against humanity have remained a constant characteristic of everyday life. Thus, there are established, though horrifying cases of crimes against humanity in recent history involving the dehumanization of the human race, or loss of thousands of human lives: the trans-Atlantic slave trade;[27] the Armenian genocide of 1915;[28] The Holocaust between 1941 and 1945[29]; apartheid in South Africa;[30] the international armed conflict in the Former Yugoslavia;[31] the Rwandan genocide;[32] Darfur; and East Timor. The systematic killing of thousands of civilians, the widespread displacement of many more civilians, sexual violence against women, and the abduction and enslavement of children are endemic in areas plagued by violent conflict.

Despite their prevalence for centuries, the first universally acknowledged trials for crimes against humanity took place in Nuremberg in the aftermath of the Second World War. Yet, the crimes have resurged notwithstanding their condemnation under customary international law, treaties, UN resolutions; and punishment by international judicial bodies, invariably leading many to question the capacity and will of governments, and organizations to combat these crimes.

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26 G Evans, 'Responding to Mass Atrocity Crimes: The Responsibility to Protect After Libya', A Paper delivered at the University of York El Hassan bin Talal Annual Lecture on 15th November, 2011, pp.3-4.

27 P M Muhammad, 'The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law' (2003) Vol. 19 No. 4, *American University International Law Review*, 883-947.

28 S Cohan, 'A Brief History of the Armenian Genocide' (2005) Vol 69 No. 6 *Social Education* 333-337.

29 'The Jewish Holocaust'. < http://www.genocidetext.net/gaci_holocaust.pdf> accessed on 16 August 2015.

30 O Obasanjo, 'Opening Remarks at the African Leadership Forum Conference at Windhoek, Namibia, on the Challenges of Post-Apartheid South Africa', 8th-10th September, 1991.

31 V Pesic, 'Serbian Nationalism and the Origins of the Yugoslav Crisis' (1996) *Peaceworks* No. 8. United States Institute of Peace.

32 P Magnarella, 'Explaining Rwanda's 1994 Genocide' (2002) Vol. 2. No. 1. *Human Rights and Human Welfare,* 25-34.

One reason for this is that the obligation to prevent and punish crimes against humanity is intricately enmeshed in politics or even realpolitik, including the identification of an atrocity situation as crimes against humanity, assumption of jurisdiction by domestic or international courts, and allegations of bias against the International Criminal Court.

Perpetrators of crimes against humanity are either States, State-sponsored, or ragtag armed groups seeking political territory. The result of these problems is often a trade-off between accountability and impunity. Another major problem besetting the identification of crimes against humanity is the threshold requirement of widespreadness or systematicity. There are no hard and fast rules, or numerical indices for determining this. Furthermore, it tasks logic that we should have to wait for a crime to advance to a high threshold to label it a crime against humanity, given the imperative of nipping incipient atrocity crimes in the bud.

Crimes against humanity are usually not random acts of violence, and in some way, governments are complicit in their perpetration, either actively or by sanctioning atrocities. In other cases, national authorities may fail to stop non-state actors committing such crimes, and the involvement of the international community clashes with the concept of sovereignty. Thus:

> It has taken the world an insanely long time, centuries in fact, to come to terms conceptually with the idea that state sovereignty is not a license to kill - that there is something fundamentally and intolerably wrong about states murdering or forcibly displacing large numbers of their own citizens, or standing by when others do so.[33]

No State can tolerate an insurgency, more so, one involving the use of terror as an instrument of its organizational policy. Such an endangered country will take steps to eradicate

[33] 'Confronting Crimes Against Humanity: A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors' (Washington, DC: United States Institute of Peace, 2008) p.5.

the threat. Insurgency hinders peace, stability, social cohesion and economic growth. It threatens the very life and existence of a State. In the northeast states of Nigeria, thousands of people have been displaced from their homes, creating a humanitarian crisis, and the disruption of economic activities.

The Terrorism (Prevention) Act 2011 is the major legislation under which Boko Haram insurgents have been prosecuted; but can legal regimes alone combat this odious scourge? Another question arising is: does the Terrorism (Prevention) Act of 2011 reflect the gravity, seriousness, 'widespreadness' or 'systematicity' of the atrocities perpetrated by the Boko Haram sect? Concisely stated then, the statement of the problem is: can Boko Haram insurgents be prosecuted for crimes against humanity? Can counter-insurgents too be prosecuted for crimes against humanity? The conceptualization of terrorism in international law is still controversial. In contrast, the contours of crimes against humanity are comparatively better defined. Therefore, to a significant extent, prosecuting for crimes against humanity threads a certain path, and may possibly lead to the harmonization of laws since the constituents of the crimes are already well known.

### 1.3 Purpose of the study

The Boko Haram insurgency has beleaguered Nigeria since 2002, resulting in the loss of thousands of lives and the destruction of property worth billions of naira. Attacks by the insurgents have soared despite the existence of a counterinsurgency force, and a penal regime: the Terrorism (Prevention) Act 2011. The view has been articulated that the present Boko Haram insurgency is fueled by years of maladministration. Despite being blessed with abundant natural

resources, Nigeria has experienced decades of economic stagnation during which the ruling class commandeered the wealth of the nation.[34]

The Boko Haram insurgency is also regarded as a culmination of the protracted religious conflicts in northern Nigeria. These provided sufficiently combustible circumstances leading to the eruption of radical Islamic violence in the country. This analysis investigates the possibility of conflating insurgency, counterinsurgency, terrorism and crimes against humanity. Therefore, the purpose of the study is to:

(a) Appraise the legal framework for crimes against humanity so as to ascertain whether the atrocities perpetrated by Boko Haram insurgents can be characterized as such.

(b) Investigate whether sub-state or non-state actors, who have no affiliation whatsoever with governmental authority, can be prosecuted for crimes against humanity.

(c) Investigate whether counterinsurgency by military and paramilitary organizations in Nigeria amount to crimes against humanity.

(d) Appraise the Terrorism (Prevention) Act 2011.

(e) Analyze the two legal categories: insurgency and terrorism, and explore their relationship.

(f) Emphasize the need for human rights protection in the war on terror.

[34] T Adetiloye, 'The Root Cause of Boko Haram and other Insurgent, Groups in Nigeria', *Sahara Reporters,* April 21, 2014. < http://www.saharareporters.com/2014/04/21/root-cause-boko-haram-and-other-insurgent-groups-nigeria> accessed on 5 August 2015.

## 1.4 Scope of the study

In physical terms, this research is conducted in Nigeria, and its study, findings and analysis of domestic law are confined to the Nigerian legal system, despite the cross-border activities of the Boko Haram sect. The subject-matter of the study, which is crimes against humanity, spans both international law and national law. The research will not undertake a discussion of war crimes or genocide; hence, any mention of these two core international crimes is only incidental to this research. It is worthy to note that Boko Haram insurgents pursue a political agenda by terrorism.

While crimes against humanity are examined under the 1998 Statute of the ICC and the jurisprudence of international criminal courts or tribunals, terrorism is analyzed under international conventions such as the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[35] the 1979 International Convention against the Taking of Hostages;[36] the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;[37] the 1997 International Convention for the Suppression of Terrorist Bombings;[38] the 1999 International Convention for the Suppression of Financing of Terrorism,[39] and the O. A. U Convention on the Prevention and Combating of Terrorism.[40]

Particular attention is paid to the Terrorism Prevention Act of 2011, which was amended in 2013. The contours of crimes against humanity began to assume a definite shape after the

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35 (Protection of Diplomats Convention) Adopted by the UN General Assembly by Resolution 3166 \ (XXVIII), 14 December 1973, 1035 UNTS 15410. Entered into force on 20 February 1977.

36 (The Hostages Convention) Adopted by the UN General Assembly by Resolution 34/145 (XXXIV) of 17 December 1979, 1316 UNTS 205. Entered into force on 3 June 1983.

37 Adopted by the International Civil Aviation Organization on 1 March 1991. Entered into force on 21 June 1998.

38 Adopted by the UN General Assembly, 15 December 1997 by Resolution A/52/164. Entered into force on 23 May 2001.

39 Adopted by the UN General Assembly on 9 December 1999 by Resolution A/54/109. Entered into force on 19 April 2002.

40 O. A. U Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14 July 1999, entered into force 6 December 2002.

post-war Nuremberg and Tokyo trials. Nevertheless, the study situates the historical context of crimes against humanity beginning from the Martens Clause of the Hague Convention on the Laws and Customs of War on Land, 1899. The case laws of international criminal courts are also discussed.

### 1.5 Significance of the study

There is a large amount of legal scholarship on insurgency or terrorism in Nigeria; but a paucity of academic research on crimes against humanity, or the conflation of insurgency or terrorism with crimes against humanity, in the context of domestic crises. Moreover, there appears to be an uncertainty as to whether terrorists specifically can be prosecuted for crimes against humanity.

This study seeks to contribute to knowledge by addressing this issue. Therefore, the study will be relevant not only to national institutions concerned with, or involved in the administration of justice, but to the International Criminal Court or juridical institutions with jurisdiction over international crimes.

The research is also significant in the sense that it will be of benefit to legal practitioners, researchers and actors in international law, particularly, those with interest in international criminal law, international humanitarian law, and international human rights law.

The research is significant in showing the legal framework within which the prosecution of crimes against humanity has taken place; pointing out the international and national instruments for combating terrorism; recommending best practices that can help to end terrorism in Nigeria; and provoking further research on alternative perspectives on terrorism or insurgency in Nigeria.

In addition, the research projects the view that the Terrorism (Prevention) Act 2011 is inadequate to deal with the scale and horror of terrorist atrocities committed in Nigeria. The

study therefore calls for the domestication of the Statute of Rome. From the criminal law perspective, studies on terrorism seem to accentuate the urgency of a comprehensive convention on terrorism. Thus, this work is part of ongoing research efforts towards a unity convention for the crime. The same submission can be said for the adoption of a treaty on crimes against humanity, just as there is one on genocide or war crimes. Furthermore, the work highlights counterinsurgency in Nigeria and emphasizes the need to respect human rights norms. This conclusion provides a policy direction for government forces involved in the war on terror.

### 1.6 Methodology

Crimes against humanity, insurgencies and terrorism are misty areas of research. The phenomenal rise of terrorism in the past decade has attracted worldwide publicity and a flurry of activities to contain the threat. The interrogation of these issues involves analyses of international criminal law, international humanitarian law and international human rights law, besides the domestic laws of the state concerned.

To enable the researcher to do this, the study adopts the doctrinal method of research. Duncan and Hutchinson have stated that the doctrinal method is normally a two-part process because it involves first locating the sources of the law, and then interpreting and analyzing the text.[41] Doctrinal research methodology involves the location and analyses of the primary documents of the law in order to establish the nature and parameters of the law. Thus, the primary and secondary sources of materials in this field of law have been used. The primary sources of materials for this research are the relevant international treaties and national legislations, for example, the 1998 Statute of the International Criminal Court, and the Terrorism

[41] N J Duncan and T Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) Vol. 17. No. 1 *Deakin Law Review*, 113.

Prevention Act 2011; the case law of international criminal tribunals or courts, resolutions of the UN or other soft law instruments, etc.

On the other hand, secondary sources of materials offer analyses, commentary, or a restatement of primary law, and are helpful in locating and explaining primary sources of law. Therefore, relevant textbooks, journal articles, research reports, unpublished papers, newspapers, internet materials, etc, are utilized. Data is also collected from the foregoing sources. Materials accessed from the World Wide Web are particularly handy in order to keep abreast with the most recent developments in the field. These articles have provided sufficient information for the analyses made, and conclusions drawn. The research is also analytical in the sense that it involves critical thinking skills and evaluation of facts and information relative to the research topic.[42] This enabled the researcher to find out critical details to hopefully add new ideas to the subject area.

### 1.7 Organizational Layout

The research is organized in seven chapters. Chapter one is the general introduction of the work. It sets out the statement of the problem; purpose of the study; scope of the study; research methodology, and organizational layout.

Chapter two undertakes a review of relevant literature, and examines the concepts of *jus cogens* and *obligatio erga omnes* in relation to crimes against humanity. It also discusses the sources of law of crimes against humanity.

Chapter three analyzes the substantive law of crimes against humanity, using the ICC statute, the charters or statutes of previous international criminal courts, and their case laws.

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[42] 'What is Analytical Research?' <http://www.ask.com/business-finance/analytical-research-94534a536bf46028 accessed 4 August 2015.

Chapter four examines the prosecution and punishment of crimes against humanity by international criminal courts. The analysis covers the Nuremberg and Tokyo Tribunals, the ad-hoc criminal courts, hybrid courts, and the international criminal court.

Chapter five conducts an assessment of Boko Haram insurgency in the context of crimes against humanity. It explores the origin and evolution of the group; and discusses the related concepts of insurgency, terrorism, and guerilla warfare. It proceeds to discuss several counter-terrorism treaties and then investigates whether Boko Haram insurgents can indeed, be prosecuted for crimes against humanity.

Chapter six critically examines the counterinsurgency and investigates if the human rights abuses committed by government forces also amount to crimes against humanity.

Chapter seven concludes the work with some recommendations.

# CHAPTER TWO

# LITERATURE REVIEW, STATUS AND SOURCES OF LAW OF CRIMES AGAINST HUMANITY

## 2. 1 Introduction

The previous chapter introduced the subject-matter of the research. The present chapter has two major objectives: firstly, to review relevant literature, and secondly, to discuss the status and sources of law of crimes against humanity. The idea of crime has a long history, and its incidence is a very sad reality of human existence.[43] Crimes are prohibited by criminal laws which reflect the moral and ethical beliefs of society.

Most penal systems have one code or the other conceptualizing crime for certain purposes.[44] The word 'crime' is used interchangeably with 'offence'. A crime is defined as an 'act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding.'[45] Legislatures may pass laws called *mala prohibita*, defining crimes against social norms, or offences that are wrong only because the law prohibited them.[46] These laws have neither time or place constants. For example, the prohibition of gambling, dueling and dealing in narcotics has varied throughout history. Other crimes, called *mala inse*, are outlawed in most jurisdictions. This category of crimes, for example, murder, theft or rape, is inherently bad, independent of, and prior of the law. Crimes are generally reduced into two elements: '*actus reus,'* or the guilty conduct, and '*mens rea,'* the evil mind. To be convicted of crime, both elements must be proved.[47]

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43 'Crime'. < https://en.m.wikipedia.org/wiki/Crime> Accessed on 22 November 2014.

44 By the Nigerian Criminal Code Act s. 1, an offence is 'an act or omission which renders the person doing the act or making the omission liable to punishment under the code, or under any Act or law'.

45 B A Garner, *Black's Law Dictionary* (9th edn, St Paul MN: Thomson Reuters, 2009) p.427.

46 A Ristroph, 'Criminal Law in the Shadow of Violence' (2011) Vol. 62. No. 3. *Alabama Law Review*, 582-584.

47 D Milovanovic, 'Legalistic Definition of Crime and an Alternative View' (2006) *Annals Fac L. Belgrade*

## 2.2 Literature review

This section of the dissertation conveys the ideas and knowledge that have been published on the dissertation topic and examines their strengths and weaknesses. Furthermore, it declares what the researcher intends to do with regard to the presumed gaps in the literature. The first work we shall review in this section is that of Antonio Cassese.

Cassese is the author of the 21-chapter book titled: 'International Criminal Law'.[48] In chapter five of the textbook, the author extensively discussed crimes against humanity, including the evolution, objective and subjective elements of the crimes.[49] On the possible authors of crimes against humanity, Cassese was of the view that the case law seems to indicate that crimes against humanity may be committed by individuals acting in their private capacity, provided they behave in unison, with a general State policy and find support for their misdeeds.[50] This gloss over the ability of sub-state actors to perpetrate the crimes appeared to have been remedied in chapter 8 of his work treating terrorism as an international crime.[51]

The writer conceded that terrorist crimes can amount to crimes against humanity provided they meet a number of conditions, including the underlying sub-offences like murder, rape, or torture. In addition, the terrorist acts must be part of a widespread or systematic attack against a civilian population with the support or tolerance or acquiescence of a State or non-State entity.[52]

Despite its signal contribution to the discipline, Cassese's work appeared to have only implicitly addressed the controversy on the 'State or organizational policy' requirement for

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*Int'l Ed*., 79-80.

48 A Cassese, International Criminal Law (2nd edn, Oxford: Oxford University Press, 2008).

49 *Ibid* pp. 98-125.

50 *Ibid* p. 166.

51 *Ibid* pp. 162-183.

52 *Ibid* p. 176.

crimes against humanity. This crucial determination will allow or disallow terrorists with no association with the State to be prosecuted for crimes against humanity. Perhaps, Cassese' omission of this point is because his textbook was published two years before the ICC's authoritative decision on the issue. However, this dissertation will address this area of jurisprudence.

In their book: 'An Introduction to International Criminal Law and Procedure', Cryer, Friman, Robinson and Wilmshurst, extensively treated the policy element for crimes against humanity.[53] The authors observed that more recent authorities indicated that the policy to commit the attack need not be that of a government, but could also be that of an organization.[54]

The authors pointed out that although terrorist acts are not listed as crimes against humanity in the Statutes of the *ad hoc* Tribunals and the ICC, it is clear that if the underlying acts fall within the list of crimes and if their commission is widespread or systematic, they will fall within the definition of crimes against humanity.[55] Although this analysis is insightful, it is devoid of case law jurisprudence. This research intends to fill that vacuum by extensively discussing the structure of crimes against humanity undergirded with the decisions of the ICC.

In chapter 2 of his textbook: 'An Introduction to the International Criminal Court', Schabas, undertook a discussion of crimes prosecuted by the ICC.[56] The author correctly observed that although occasional references to the expression 'crimes against humanity' can be found dating back several centuries, the term was first used in its contemporary context in 1915.[57] Expectedly, he stated that the massacres of Turkey's Armenian population were

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53 R Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) pp. 187 – 220.

54 *Ibid* p. 196.

55 *Ibid* p. 294.

56 W A Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2004) pp. 26-66.

57 *Ibid* p. 41.

denounced as a crime against humanity in a declaration of three Allied powers pledging that those responsible would be held personally accountable.

Although the treatment of crimes against humanity in the book is condensed into only ten pages, the author emphasized that the requirement that the attack must be carried out 'pursuant to or in furtherance of a State or organizational policy to commit such attack' indicates that crimes against humanity may in some circumstances be committed by non-State actors. Historically, it was generally considered that crimes against humanity required implementation of a State policy. This requirement was gradually attenuated, a legal development that paralleled the expansion of war crimes in the area of non-international armed conflict.[58]

However, the author failed to state the identity and character of these non-State actors. This omission is even more glaring considering the decline of inter-State wars, and the rise of wars of asymmetry waged by insurgents, rebels, and terrorists, involving wanton attacks on civilian populations. This research intends to explore these contemporary types of conflicts and their affinity with crimes against humanity.

In his textbook: 'International Criminal Law,' Shaw offered only a cursory examination of the concept of crimes against humanity in chapter five dealing with 'the subjects of international law'.[59] Written before the adoption of the ICC Statute in 1998, the author expressed the view that in 1994, the International Law Commission adopted a Draft Statute for an ICC. This Statute provides for the court to have jurisdiction over persons with respect to the crime of genocide, the crime of aggression, serious violations of the laws and customs of war applicable in armed conflicts, crimes against humanity and crimes established under or pursuant to the

[58] *Ibid* p. 44.

[59] M Shaw, *International Law* (4th edn, Cambridge: Cambridge University Press, 1997) pp. 135-195.

treaty provisions listed in the Annex, which having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.[60]

However, the author merely mentioned that the International Criminal Tribunal for the Former Yugoslavia (ICTY) had jurisdiction over crimes against humanity, comprising murder, extermination, deportation or torture, relating to the civilian population.[61] It is necessary to point out that the list of the underlying crimes constituting crimes against humanity is much broader in the ICC Statute than it is under the ICTY Statute.

The learned author further remarked that the International Criminal Tribunal for Rwanda (ICTR) had jurisdiction over crimes against humanity, without discussing the constituents of the crimes or their possible perpetrators.[62] The author also merely enumerated the individual crimes without analyzing them. However, he opined that the use of terror as a means to achieve political results is not a new phenomenon; but it has recently acquired a new intensity.[63] Aside from briefly discussing some counter-terrorism conventions, the author did not explore the use of terror on a massive scale leading to huge civilian casualties, or more explicitly, its transposition into crimes against humanity. This dissertation will address these issues.

Like Shaw, Umozurike blithely treated international criminal jurisdiction in his book: 'Introduction to International Law'.[64] The author expressed the view that Europe witnessed massacres and ethnic cleansing in the former Yugoslavia, which provided the opportunity for the international community to punish the criminals. In consequence, the UN Security Council set up the ICTY to prosecute persons responsible for: (a) murder; (b) extermination; (c) enslavement;

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60 *Ibid* pp. 187-188.
61 *Ibid* pp. 188-189.
62 *Ibid* p. 190.
63 *Ibid* p. 803.
64 U O Umozurike, *Introduction to International Law* (3rd edn, Ibadan: Spectrum Books Limited, 2005) pp. 86-89.

(d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial or religious grounds; and (i) other inhumane acts, when committed in armed conflict, whether international or national in character.[65]

These crimes were merely mentioned, and not elaborated upon in the textbook. Furthermore, treaty and case law jurisprudence today shows that the armed conflict requirement has been discarded for crimes against humanity. Furthermore, the list of specific conducts constituting crimes against humanity is much broader in the Statute of the ICC than that which is contained in the author's exegesis. This research will explore the evolution of the crimes, from the Martens Clause of the Hague Conventions to the ICC Statute.

Kapoor in his book: 'International Law and Human Rights' examined the evolution and establishment of the ICC.[66] The author noted that the jurisdiction of the ICC is limited to the most serious crimes of concern to the international community as a whole, such as genocide, crimes against humanity, war crimes and aggression.[67] However, the learned author only mentioned crimes against humanity without discussing them. Although the author examined the crime of genocide in Chapter 56 of his textbook, its origin and status as a species of crimes against humanity was not elaborated upon.[68]

Genocide is distinguished from crimes against humanity, chiefly by the special intent to destroy in whole or in part, a homogenous population. The author failed to explore crimes against humanity through tribunal jurisprudence and neither did he advert to other kinds of atrocities, like terrorism, which may advance to the threshold of crimes against humanity. Written in an age when insurgency, rebellion, insurrections and terrorism are rife, it is rather

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65 *Ibid* p. 88.

66 S K Kapoor, *International Law and Human Rights* (18th edition, Allahabad: Central Law Agency 2011) pp. 375-391.

67 *Ibid* p. 382.

68 *Ibid* pp. 772-774.

curious that these concepts where not discussed in a 68-chapter textbook, made up of 1053 pages. This research will endeavour to painstakingly discuss crimes against humanity, insurgency, terrorism and their interlinkages.

'Responsibility for Crimes under International Law', is a textbook comprising 17 chapters, written by Oji.[69] The author extensively discussed the concept of international crime, sources of crimes under international law, international human rights law, international humanitarian law, the historical overview of international criminal courts and tribunals, amongst other topics.[70] In the preface, the learned scholar remarked that over the past 65 years, international criminal law has slowly emerged as an alternative means of resolving conflicts so heinous that domestic law is either ineffective or unable to address. Its emergence ensures liability in order to end impunity by prosecuting the perpetrators of the most horrendous crimes and to bring some form of justice and solace to their victims.[71] Perhaps, the notion of combating impunity for international crimes triggered the elaborate treatment of international criminal tribunals in the textbook. The author accurately stated that the phrase, crimes against humanity was used in the 1915 Declaration by the governments of France, Great Britain and Russia, denouncing the Turkish massacre of Armenians.[72]

Despite outlining the development of crimes against humanity through the Nuremberg Charter; the Tokyo Charter, Control Council Law No. 10 of 1945, the Statutes of the ICTY and ICTR, and the Special Court for Sierra Leone, analyses of the substantive content of the specific crimes were not far-reaching.[73] The author concluded that there is undoubtedly a consensus that

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69 E A Oji, *Responsibility for Crimes under International Law* (Lagos: Odade Publishers, 2013).
70 *Ibid* Chapters 2, 3, 4, and 8-12.
71 *Ibid* p. xv.
72 *Ibid* p. 32.
73 *Ibid* pp. 31-35; 157-252.

crimes against humanity are international crimes.[74] The author also declared that States were unhappy about the exclusion of terrorism from the jurisdiction of the ICC.[75]

Although the author observed that recourse to unchecked and indiscriminate violence has always been deemed contrary to fundamental rules of law; and terrorists have always been prosecuted for their crimes, she did not proceed to address the widespread or systematic use of terror, which may result to crimes against humanity.[76] The oversight is curious in view of the fact that the book was published at a time when Boko Haram insurgents have gripped the Nigerian State by its jugular; neither did the author examine the causes or solutions of terrorism. However, the author cited some counter-terrorism conventions which will prove invaluable to this research. This research will address the issues highlighted here.

In his book: 'Terrorism in International Law,' Okoronye argued that crimes against humanity were first created by the Charter establishing the Nuremberg and Tokyo Military Tribunals, 1945 and 1946 respectively.[77] With due respect however, it must be pointed out that crimes against humanity are rooted in the Hague Conventions of 1899 and 1907, which have crystallized into customary international law.[78] However, the author correctly stated that Boko Haram which means western education is forbidden, is a terrorist group based in Nigeria.[79] He also observed that Boko Haram has emerged as a clear and organized terrorist group, with established links with Al-Qaeda in the Islamic Maghreb, which has provided training to some Boko Haram members.[80]

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74 *Ibid* p.35.
75 *Ibid* p. 250.
76 *Ibid* pp. 46-47.
77 I Okoronye, *Terrorism in International Law* (Okigwe: Whytem Publishers, 2013) p. 39.
78 Laws and Customs of War on Land (Hague II) July 29, 1899 preamble.
79 Okoronye, *op cit*, p.37.
80 Okoronye, *op cit*, p.212.

Although the author did not treat in detail the individual crimes constituting crimes against humanity, he pointed out that crimes against humanity are extant crimes punishable under the ICC Statute.[81] Significantly, the author posited that terrorists can be prosecuted under the ICC Statute for crimes against humanity as they commit murder, torture and other inhumane acts, causing great suffering or serious injury to mental and physical health.[82] The author demonstrated his assertion using the Islamic Resistance Movement (HAMAS), which concentrates its attacks on Israeli civilians and military targets, and concluded that they can be tried for crimes against humanity.[83] It is amazing that the author went as far as the Middle East to exhume a suitable example when his own country is beleaguered by Islamist terrorists; Boko Haram. Is he uncertain that their activities constitute crimes against humanity? Investigation this question shall form the fulcrum of this research.

Ladan declared that 'unlike the Nuremberg Charter, no nexus to armed conflict is required for crimes against humanity under the Rome Statute'.[84] The learned author, also stated that another positive development of the ICC is that 'unlike the definition in the Nuremberg Charter and the Statute of the ICTR, the ICC Statute does not require discriminatory intent for crimes against humanity', implying that the attack against civilians need not be committed against a particular group sharing certain characteristics such as nationality or religion.[85]

Nevertheless, a caveat has to be given here as this assertion is too broad a reflection of the ICC position. The ICC Statute unequivocally indicates that only the crime against humanity of persecution requires a discriminatory intent or *animus,* which is, that it is perpetrated on racial,

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81 Okoronye, *op cit,* p.40.
82 Okoronye, *op cit,* p.160.
83 Okoronye, *op cit,* pp.160 – 161.
84 M T Ladan, *Materials and Cases on Public International Law* (Zaria: Ahmadu Bello University Press Ltd, 2007) p. 220.
85 *Ibid* p.221.

national, ethnic, cultural, religious or gender grounds.[86] Of course, this discriminatory intent establishes its comparison with the crime of genocide. Furthermore, only torture, enslavement, persecution and enforced disappearance, were discussed under crimes against humanity.[87] This research will conduct a systemic discussion of the expanded list of crimes against humanity as it is rendered in the Statute of the ICC.

In 'Terrorism as a Strategy of Insurgency', Merari declared that insurgents' mode of struggle is dictated by circumstances, and wherever possible, they adopt a variety of strategies.[88] According to the author, terrorism which is the easiest form of insurgency is almost always one of these.[89] The author emphasized that in its organized form, citizens' violence against the State falls under the category of insurgency aimed at overthrowing the government.[90] Insurgent violence may take several forms including revolution, coup d'etat, guerilla warfare, terrorism and riots.[91] In the author's expatiation, guerilla warfare is a diffuse type of war fought in relatively small formations against a stronger enemy, and in many insurrections, guerilla warfare has been the main form of struggle, at least for a while.[92] Guerillas try to compensate for their inferiority in manpower, arms and equipment by adopting a very flexible style of warfare, based on hit-and-run operations, utilizing the terrain to their advantage, blending into the population, or some times, launching their attacks from neighbouring countries. The wisdom is always to prevent government forces from employing their full might in the context of the conflict.

The author remarked that the critical distinction between terrorism and guerilla warfare is that, guerilla warfare tries to establish physical control over territory. The territory controlled

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86 Article 7 of the ICC Statute.

87 Ladan, *op cit*, pp. 220-222; 230-232.

88 A Merari, 'Terrorism as a Strategy of Insurgency' in G Chaliand and A Blin (eds), *The History of Terrorism from Antiquity to Al Qaeda* (Berkeley: University of California Press, 2007) pp. 12-51.

89 *Ibid* p.12.

90 *Ibid* p.18.

91 *Ibid* p.19.

92 *Ibid* p.21.

provides the human reservoir for recruitment, a logistical base, and the ground and infrastructure for establishing a regular army.[93] The author acknowledged that the causes of groups that have adopted terrorism as a mode of struggle are diverse, but they include social changes in the spirit of right-wing and left-wing ideologies, ethnic grievances, and aspirations associated with religious beliefs.[94] Furthermore, the author noted that the operational inventories of terrorists include placing explosives in public places, assassinating political opponents, carrying out assault by small arms in the public at large, and taking hostages by kidnapping, hijacking, or barricading themselves in buildings.[95]

Admittedly, the ideas propounded by this author will profoundly influence this research; nevertheless, it should be borne in mind that this author's analysis is not jurisprudential. Thus, the author did not delve into the legal examination of insurgency or terrorism. Furthermore, no solutions were suggested for terrorist crises. The repertoire of terrorist criminality goes beyond what the author has highlighted, for example, sexual slavery, trafficking in persons, money laundering, illegal trading were not mentioned at all. This research seeks to address some of these issues, while shifting the author's ideas towards the Nigerian landscape.

In her article: 'Forced Marriage: A New Crime against Humanity?' Gong-Gershowitz reflected upon the prevalent practice of 'forced marriages' or 'bush wives' in the context of the Sierra Leonean civil war.[96] The author stated that thousands of women and girls were abducted on a massive scale, and forcefully married off to rebels, providing them sexual and domestic services.[97] Abducted women and girls were subjected to a variety of abuses and violence

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93 Ariel Merari (2007), p. 24.
94 Ariel Merari (2007), p. 27.
95 Ariel Merari (2007), p. 31.
96 J Gong-Gershowitz, 'Forced Marriage: A New Crime against Humanity?' (2009) Vol. 8. No. 1. *Northwestern Journal of International Human Rights*, 53-76.
97 *Ibid* p.54.

throughout their captivity, which lasted several years, including sexual slavery, forced labour and forced pregnancy. These crimes led to the phenomenon known as 'bush wives.'[98] Although the analysis is thorough, it is limited to only sexual offences as a crime against humanity in the Statute of the SCSL. Thus, the author did not consider in detail the international legal framework for the prosecution of the universe of crimes against humanity. This research will delve into these issues.

In his article: 'Defining Crimes Against Humanity at the Rome Conference', Robinson observed that one of the many significant provisions of the ICC Statute is Article 7 which defines crimes against humanity for the purposes of the ICC.[99] According to him, the essential difference between the ICC definition and that of other international criminal tribunals is that the ICC was not imposed by victors or the UN Security Council, but evolved through multilateral treaty negotiation.[100]

The author contended that the essential characteristics of the chapeau of Article 7 of the ICC Statute are (1) the absence of a requirement of a nexus with armed conflict; (2) the absence of a requirement of a discriminatory motive; (3) the widespread or systematic attack criterion; and (4) the element of *mens rea*.[101] The author correctly pointed out that at the negotiation stage of the ICC Statute, all participants agreed that the specific crime of persecution required a discriminatory motive, as discrimination is the essence of the crime of persecution, but the majority maintained the view that not all crimes against humanity required a discriminatory intent.[102]

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98 *Ibid* p.56.

99 D Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (1999) Vol 93. No. 1. *American Journal of International Law*, 43-57.

100 *Ibid* p.43.

101 *Ibid* p.45.

102 *Ibid* p.46.

Yet, another thorny issue addressed by the author is that, the traditional conceptualization of crimes against humanity was in fact, not only that a policy must be present, but that the policy must be that of a State. He remarked further that the contemporary trend of scholarship is that customary international law has evolved in such a way that reference only to a State policy would be too restrictive.[103] Thus, he noted that the Tadic opinion and judgment acknowledges that the entity behind the policy could be an organization with de facto control over territory, and leaves open the possibility that other organizations might as well meet this criterion. In consequence, Article 7 of the ICC Statute makes reference to the State or organizational policy. However, the author did not elaborate on the nature of the organizations that could be behind the policy of attack on civilian populations. Are they terrorists, rebels, guerrillas or insurgents? Secondly, the ICC has issued an authoritative decision on this matter. These gray areas will be exhaustively discussed in this research.

In her article: 'Crimes Against Humanity in the Modern Age', Sadat lamented that despite the promises made after World War II to eliminate atrocity crimes, crimes against humanity persist with horrifying ubiquity.[104] The author examined crimes against humanity in the work of the ad hoc international criminal tribunals; the Special Court for Sierra Leone; and their codification in the Rome Statue.[105]

Sadat remarked that considering the centrality of charges of crimes against humanity to the successful prosecution of atrocity crimes, the ICC treatment of crimes against humanity will therefore be critically significant.[106] She stated further that in the Kenya, Libya and Cote d'Ivoire

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103 *Ibid* p.50.

104 L N Sadat, 'Crimes against Humanity in the Modern Age' (2013) Vol. 107. *The American Journal of International Law,* 334 – 377.

105 *Ibid* pp. 340, 349, 350 & 355.

106 *Ibid* p.334.

situations, crimes against humanity provide the only probable basis for the court's jurisdiction *ratione materiae*.[107]

With reference to the position of the ICC on the post-election violence in Kenya, the writer opined that Judge Kaul's dissenting conclusion that 'amorphous tribal groups' cannot as a matter of law, formulate the, kind of policies that may engender the perpetration of crimes against humanity would arguably result in an under-inclusive conception of crimes against humanity that fails to encompass the diverse forms that such crimes can take, especially outside the political landscape of Europe.[108]

The author also articulated the view that Judge Kaul's position would severely limit the scope of prosecution of crimes against humanity at the ICC, which could affect its utility as a tool for punishing and preventing atrocity crimes.

Despite the fact that the dissent raises credible concerns about the Court's capacity to absorb the cases being sent to it, and about the wisdom of the prosecutor's overall strategy, reshaping the technical requirements of the Court's substantive law in order to protect its workload or to correct a perception of prosecutorial overreaching is the wrong solution. However, the author noted that as the global community dawdles on the framing of a comprehensive convention on crimes against humanity, recent studies of victimization suggests that widespread or systematic violations of human rights remain a mainstay of despotic regimes, and that attacks on civilians by government forces and rebels remain a constant weapon of war.[109]

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107 *Ibid* p.335.

108 *Ibid* p.336. See also Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion. Kaul, J., para. 18 (Mar. 31, 2010).

109 *Ibid* p.338.

The central and practical idea passed by this author is that sub-state organizations can be prosecuted for crimes against humanity, despite the academic polemics surrounding the 'State or organizational policy' phrase. The critical merit of her approach is the visible demonstration of the view that crimes against humanity are designed to provide broad-based protections for civilians against the depredations of States or organizations whose policy is to attack them.[110] This research builds upon her study by examining the possibility of prosecuting insurgents or terrorist organizations, whose policy is to attack civilians, for crimes against humanity.

Bassiouni is the author of the article: 'Crimes against Humanity: The Case for a Specialized Convention'.[111] The learned author noted that from the end of WWII until 2008, some 313 conflicts of various types occurred globally, with civilian casualties estimated at ninety-two million, mostly non-combatants.[112] However, Bassiouni declared that less than 1% of the perpetrators of international crimes have been brought to justice, thereby creating an impunity gap.[113] He noted that the characteristics of crimes against humanity reveal that those most liable to prosecution are State actors, which explains the reluctance of governments to support a specialized convention for crimes against humanity.

However, Bassiouni seems to have overlooked the fact that crimes against humanity have crystallized into international customary law, which is also a veritable source of law, or that the ICC Statute is a treaty in its own right, or that the existence of comparable conventions for war crimes and genocide have neither prevented wars in Europe, nor the genocide in Rwanda. The author pointed out that historically, perpetrators have been state actors whose conduct was part of a state policy, but since the WWII, non-state actors are increasingly committing crimes against

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110 *Ibid* p.337.

111 M C Bassiouni, 'Crimes against Humanity: The Case for a Specialized Convention' (2010) Vol. 9. No. 4. *Washington University Global Studies Law Review*, 575-593.

112 *Ibid* p.580.

113 *Ibid*.

humanity, often not acting pursuant to State policy, but as part of a group policy. He argued that as presently defined in international instruments, crimes against humanity does not specifically include non-state actors within its scope.[114]

One is left wondering how the author wants the global community to combat impunity for atrocity crimes in an era when State-sponsored atrocities have been surpassed by sub-state actor mass crimes. However, it must be remarked that the controversy on this singular issue has long been laid to rest by the ICC. The author also emphasized that the obligation to prosecute crimes against humanity even with respect to state parties that have not adopted national implementing legislation is non-existent. Consequently, the future of international criminal justice does not depend on the ICC, but on states to carry out domestically the task of investigating and prosecuting crimes against humanity. Just as the title of the article suggests, it is indeed a case for the adoption of a specialized convention on crimes against humanity. Hence, the anatomy of substantive crimes against humanity was not even discussed at all. This research will undertake this task.

In the article: 'International Criminalization of Terrorism', Kovac examined the concept of terrorism in international law, highlighting its contemporary development, paying particular attention to its criminalization under international criminal law.[115] The author expressed the view that the treatment of terrorism as an international crime seems relevant not only in the light of the progressive development of international criminal law, but also given the attention the concept has received in the aftermath of the events of September 2001, and following nascent attempts at its international regulation since 1937.[116] The author argued that for international terrorism to

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114 *Ibid* pp.584 -586.

115 M Kovac, 'International Criminalization of Terrorism' (2007) Vol. 14. Broj 1, *Hrvatski Ijetopis za kazneno pravo I praksu* (Zagreb), 267-290.

116 *Ibid* pp.267-268.

materialize, two subjective elements are required: intent as in the case of any underlying criminal offence, and the 'specific intent' of compelling a public or a prominent private authority to take, or refrain from taking, an action.[117] Thus, spreading terror among the population or destabilizing or destroying the institutional structure of the country is not the primary aim of the act itself. The central focus is on the effect of a terrorist act; the spreading of fear or anxiety is only a means, it is never an end in itself. [118]

The author contended that terrorist acts can, subject to a number of limitations, amount to crimes against humanity, whether perpetrated in time of war or peace. They must however, meet the basic requirements of the category. These include taking part in a widespread or systematic attack against a civilian population, and the perpetrator must have knowledge of his involvement in the said widespread or systematic attack.[119] Specifically, the author mentioned conduct such as murder, great suffering, serious injury to body, physical or mental health, or torture, rape or enforced disappearance. Furthermore, the victims of such crimes may comprise of both civilians and officials, including members of armed forces, although the statutes of international criminal tribunals seem to limit the victims of such crimes to civilians.

The author contended that the reasoning that supports the more comprehensive inclusion is that customary law does not provide such limitations as it would generally speaking, be contrary to the whole spirit and logic of modern international human rights law and humanitarian law to limit to civilians, especially in times of peace, the international protection of individuals against horrendous and large-scale atrocities.[120] Although the author noted that crimes against

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117 *Ibid* p.271.
118 *Ibid* p.272.
119 *Ibid* p.280.
120 *Ibid* p.281.

humanity are, as war crimes, also deemed to amount to *jus cogens* crimes,[121] the author did not elaborate on the substantive content of crimes against humanity as espoused under treaties or tribunal jurisprudence, or treat the various counter-terrorism treaties. Furthermore, terrorist crimes extend beyond those highlighted in the article. This researcher will endeavour to address the issues raised here.

In his article: 'International Criminal Court, The United States and the Fight Against Impunity', Taiwo asserted that crimes against humanity in international law consists of acts of persecution or any large scale atrocities perpetrated against a body of people, as being criminal offences above all others.[122] It is the view of the learned author that the jurisprudence of crimes against humanity is a result of considerable developments in international humanitarian law over the second half of the 20th century with the major goal of protecting civilian populations from mass violence.[123] The author noted that the categories of crimes against humanity have expanded beyond their orthodox meaning which was restricted to war crimes.

The author reiterated the position of law that crimes such as murder, extermination, torture, rape, political, racial or religious persecution would reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice.[124] He also stated that limitation laws do not apply to crimes against humanity. Despite the contributions of this scholar to the discourse, he did not treat crimes against humanity in detail, but merely listed some of the underlying crimes. Furthermore, he did not elaborate on the nature and scope of expansion of crimes against humanity, especially with regard to the identity of the individual crimes and their possible perpetrators. In order to effectively combat impunity, it is necessary to clearly delineate

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121 *Ibid*.

122 L O Taiwo, 'International Criminal Court: The United States and the Fight Against Impunity' (2007 – 2009) Vols. 2 & 3, *Journal of Private and Comparative Law*, 33-56.

123 *Ibid* p.37.

124 *Ibid* p.39.

the contours of crimes against humanity. Therefore, this research will explore the contextualization of the Boko Haram insurgency in the context of crimes against humanity and counter insurgency, and advances the argument that severe and horrendous cases of terrorism can amount to crimes against humanity.

Mazzochi, in her work: 'The Age of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and for All', opined that terrorist activities satisfy all the required elements of the ICC Statute to be a crime against humanity.[125] She duly noted that some terrorist activities are part of a widespread attack against a civilian population, and may also be long-term and systematic in nature. According to her, some terrorist acts involve murder, which is one of the crimes identified by the ICC Statute as a crime against humanity.[126] In addition, terrorist incidents which do not amount to murder may still be regarded as crimes against humanity if they fall within the class of 'other inhumane acts' of a similar character, intentionally causing great suffering or serious injury.

However, the particular prohibited conducts amounting to crimes against humanity were merely enumerated by the author, and not discussed. The scope of terrorist atrocities go beyond those enumerated by the author; they include hostage-taking, torture, persecution, imprisonment, sexual violence, slavery and enslavement. Furthermore, the analysis of this author was made only in the contest of the September 11 terrorist attacks on the United States. However, this research will develop upon the author's thesis in the context of the Boko Haram insurgency. The specific offences underlying crimes against humanity will be explored in detail.

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125 S Mazzochi, 'The Age of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and for All' (2011) Vol. 32. *Northern Illinois University Law Review*, 75-102.

126 *Ibid* p.93.

## 2.3 Jus cogens

Crimes against humanity are committed in breach of *jus cogens* norms. Generally, crimes in breach of *jus cogens* affect the collective interest of the world community; threaten the peace and security of humankind and shock the conscience of humanity. The jurisprudential assertion of the prohibition of *jus cogens* has taken place in pursuance of the superior and fundamental values to be protected, shared by the international community as a whole, from which no derogation or diversion is allowed.[127]

Usually, a *jus cogens* crime is implicated explicitly or implicitly by state-favouring policy or conduct, irrespective of whether it is manifested by commission or omission, which differentiates such crimes from other international crimes.[128] In international law, the notion of '*jus cogens*' refers to certain peremptory norms, from which no derogation is ever permitted.[129] Bassiouni has defined the term *jus cogens* as the 'compelling law'. To him, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles.[130] It has been argued that some principles of international law exist which constitute 'a body of *jus cogens*'.[131]

The notion of *jus cogens* has a rather ancient origin traceable to the natural law theory of the Stoics. The Stoics developed the thesis that law should be applied on an international scale through the process of 'universal reasoning' which is common to all men, irrespective of differences in race, place and nationality.[132] This theory was developed further by writers like

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127 A A C Trindade, 'Jus Cogens: The Determination and Gradual Expansion of Its Material Content in Contemporary International Case Law' (2012) 12. http://www/oas.org/.../3%20-%20cancado.LRC... Accessed on 2 September 2015.

128 ISIS/ISIL in Syria is said to have received support in funds, etc from some Middle-East States.

129 The Blacks' Law Dictionary, 9th edn, p.1251, defines 'peremptory' as 'final; absolute; conclusive; incontrovertible. Not requiring any cause shown; arbitrary.'

130 M C Bassiouni, 'A Functional Approach to "General Principles of International Law' (1989) 11 *Michigan Journal of International Law*, 768.

131 I Brownlie, *Principles of Public International Law* (Fifth edn, Oxford: Clarendon Press, 1998) p.515.

132 R Nieto-Navia, 'International Peremptory Norms (*Jus cogens*) and International Humanitarian Law'. Man's

Grotius,[133] Wolff[134] and Vattel,[135] who posited the existence of a 'necessary law' which was natural to all states; and from which all treaties and customs derive their validity. The formal recognition of *jus cogens* in international law began only in the second half of the 20th century, firstly in legal scholarship,[136] and secondly, in the Covenant of the League of Nations[137] and the judgment of the Permanent International Court of Justice in the *Wimbledon Case* stating that state sovereignty is not alienable.[138]

*Jus cogens* norms has been formally codified by the Vienna Convention on the Law of Treaties (VCLT) 1969 and affirmed in judiciary jurisprudence.[139] Article 53 of the VCLT, provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. In the context of the Convention, a peremptory norm of

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Inhumanity to Man: Essays on International Law in honour of Antonio Cassese. (The Hague: Kluwer Law International, 2003) pp.595-640.

133 H Grotius held that there existed certain 'principles' amounting to *jus naturale necessarium* (necessary natural law).

134 C Wollf, '*Jus Gentium'* (1764), para. 5.

135 E de Vattel, '*Le Droit des Gens ou Principes de la Loi Naturale'* (1758), para. 9.

136 In 1905, Oppenheim opined that 'a number of universally recognized principles' of international law existed which rendered any conflicting treaty void and that the peremptory effect of such principles was itself a 'unanimously recognized customary rule of international law'. See M Byers, 'Conceptualizing the Relationship between Jus cogens and Erga Omnes Rules' (1977) 66 *Nordic Journal of International law* 213, referring to L Oppenheim, *International law* Vol. 1 (London: Longmans, 1905) p. 528.

137 Covenant of the League of Nations, 1919 Article 20.1. Interpreting Article 20.1 of the Covenant in The Oscar Chinn Case (1934) PCIJ Rep. Ser. A/B, No. 63, p. 149, Judge Schucking held that 'the covenant of the League of Nations, as a whole , and more particularly its Article 20…would posses little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void,..And I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even today, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void'.

138 M C Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011) p. 266. See also Case of The SS. Wimbledon, PCIJ 17th August 1923, p. 25.

139 Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), 1986 ICJ. 14, 95 (27th June) (concerning the applicability of the Vienna Convention on the Law of Treaties). The VCLT with annex, 23rd May 1969, U.N. A/Conf. 39/27. However, Article 71, paragraph 1 (a) makes it clear that the entire treaty is not null and void if the parties do not give effect to the provision in question. The ICJ has also considered the question. In U.S. Diplomatic and Consular Staff in Tehran (U.S V Iran), 1980 I.C.J. 3 (May 24), the court holds that some treaty obligations can also be 'obligations under general international law', and in its advisory opinion on the Reservations to the Convention on Genocide 1951 I.C.J. 15 (May 28), it holds that the Genocide Convention is part of customary law.

general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Furthermore, by Article 64 VCLT, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Some crimes are considered to be contrary to *jus cogens*: crimes against peace, war crimes, genocide, crimes against humanity, maritime piracy, slavery and trade-related practices, and torture. Tribunal jurisprudence justifies this conclusion.

The decisions of the ICTY Trial Chambers maintain the understanding that genocide, torture and attacks against civilians in armed conflicts are in breach of jus cogens.[140] In the same way, the Restatement on Foreign Relations of the United States (Restatement) describes *jus cogens* to include, at a minimum, the prohibition against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and the principles of the United Nations Charter prohibiting the use of force.[141] 'At the minimum' appearing in the restatement shows that the list is not exhaustive. The description by the ICJ of the basic rules of international humanitarian law applicable in armed conflict as 'intransgressible' in character, in the *Nuclear Weapons Advisory Case*, would seem to justify treating them as peremptory.[142]

*Jus cogens* norms present two major problems to international criminal law, especially in the context of mass atrocity crimes: normative conformity to the *lex certa* principle (that is, the need for a precise definition in law, of criminal offences) and the principle of legality, which

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140 The Prosecutor v Anto Furundzij (ICTY Trial Chamber), 10th December 1998, paras. 137, 144-157,. See also Trindade, *op cit*.

141 Restatement (Third) of Foreign Relations of the United States 702 cmts. d –I, 102 cmt. k (1987).

142 H Fujita, 'The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons' (1997) No. 316 *International Review of the Red Cross*.

requires all law to be clear, ascertainable and non-retrospective. These issues were evident in the proceedings leading to the adoption of the Statute of the IMT in the London Charter of 8th August 1945.[143] The crimes defined in Article 6 (c) of the London Charter were not founded upon treaty law, but had to be prosecuted based on other philosophical foundations. While natural law protagonists accorded *jus cogens* norms a higher value to be observed by prosecutions, positivist scholars contend that the principle of legality should prevail.

### 2.3.1 Obligatio erga omnes

The *obligatio erga omnes* and *jus cogens* concepts are often entwined in a normative tryst. '*Erga omnes*' is a Latin derivative which means 'in relation to everyone'. The concept, *obligatio erga omnes* refers to 'specifically determined obligations that states have towards the international community as a whole.'[144] Posner has observed that careful scholarship has identified only a handful of norms: the laws against aggression, genocide, slavery, and racial discrimination, although there are many other likely candidates.[145] To him, 'it seems plausible that other human rights are erga omnes norms; these could include laws against torture, sex discrimination, arbitrary detention and certain norms against pollution'.[146] Although the concepts of *erga omnes* and *jus cogens* are related, they are not interchangeable or necessarily interdependent.[147]

Explaining their relationship, Bassiouni has said: '*jus cogens* norms refers to the status that certain international crimes reach, and obligatio erga omnes pertains to the legal implications

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143 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8th August 1945, London Charter, 59 Stat. 1544, 82 U.N.T.S. 279.

144 A Memeti and B Nuhija, 'The Concept of Erga Omnes Obligations in International Law' (2013) No. 14 *New Balkan Politics: Journal of Politics.*

145 Eric A. Posner *'Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law'* (2008) John M. Olin Law and Economics Working Paper 2nd Series, Public Law and Legal Theory Working Paper No. 224, The Law School of the University of Chicago, p. 2.

146 *Ibid*.

147 M Knorr, 'The International Crime of Genocide: Obligations jus Cogens and Erga Omnes, and Their Impact on Universal Jurisdiction', 36. <http://www.projects.essex.ac.uk/ehrr/V7N2/Knorr.pdf> accessed on 3 September 2015.

arising out of a certain crime's characterization as *jus cogens'*.[148] Thus, *erga omnes* is a result of an international crime having risen to the level of a *jus cogens* norm.

A *jus cogens* norm rises to the level of *obligatio erga omnes* when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris*, by most states.[149] For example, the territorial sovereignty of states has risen to the level of a 'peremptory norm' because all states have consented to the right of states to exercise exclusive territorial jurisdiction.[150] Bassiouni has persuasively argued that international crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. One of the consequences of the criminalization of genocide, crimes against humanity, and war crimes in the statute of the ICC is that every State is obliged to investigate, prosecute, punish or extradite individuals accused of such crimes.[151]

## 2.4 Sources of Law of Crimes against Humanity

It is necessary to remark from the outset that penalties are imposed by international law only for crimes identified by its formal sources. A formal source of law is law-creating.[152] Formal sources are those supported by the rule of recognition within the legal system, that is, the criteria for ascertaining what the law is.[153] Formal sources of law are often contrasted with material sources

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148 Bassiouni has argued that it may be true that all jus cogens norms of international law give rise to *erga omnes* obligations, but the converse that all norms from which erga omnes obligations flow are jus cogens is questionable. For example, arguably all customary human rights norms carry with them erga omnes obligations, yet all have certainly not reached the status of jus cogens. M C Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes (1996) Vol. 58 No. 4 *Law and Contemporary Problems*, 63

149 In Right of Passage over Indian Territory (Portugal v India) (Merits), 1960 ICJ 123, 135 (12th April) (Fernandes, J. dissenting), Judge Fernandes stated that it is true that in principle, special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general is to beg the question. Moreover, there are exceptions to this principle... And the general principles to which I shall refer later constitute true rule of *jus cogens* over which no special practice can prevail.

150 S.S 'Lotus' (France V. Turkey), 1927 P.C.I.J (ser. A) No. 10 (Sept. 7).

151 Bassiouni (1996), *op cit*, p.74.

152 M Dixon, *Textbook on International Law*, (6th edn, Oxford: Oxford University Press, 2005) p.25.

153 R K Gardiner, *International Law*, (London: Pearson Longman, 2003) p.25.

which only identify where the law is to be found.[154] It is essential to analyze the sources of international law so that attention would not be directed to the wrong sources of law of crimes against humanity.

Or as Parry eloquently counseled some decades ago: 'if attention be directed to the wrong sources, it is impossible to discover what international law is or, what is perhaps more important, what is not international law'.[155] During the 20th century, new branches of international law, like International Human Rights Law, and International Criminal Law, emerged which do not sit easily on the orthodox state-centric view of international law. Unlike international law's traditional narrative, these emerging departments deal with the rights and duties of individuals or non-State actors.[156] Oji is of the view that 'international law lays down principles, rules and standards that govern nations and other participants in international affairs in their relations with one another'.[157] It is wrong to assume that the Statute of the ICC is the only source of ICL, because the rules of the Statute are applicable to only the ICC.[158] Every criminal tribunal must apply the rules defined by its Charter. Article 38 of the Statute of the International Court of Justice is taken as articulating the general sources of international law:

1. The court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    (a) International Conventions whether general or particular, establishing rules expressly recognized by the contesting states;

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154 R M M Wallace, *International Law* (5th edn, London: Sweet and Maxwell, 2005) p.8.

155 C Parry, *The Sources and Evidences of International Law*, (Manchester: Manchester University Press, 1965) p.7.

156 C Schreuer, 'Sources of International Law: Scope and Application', Emirates Lecture Series 28, published by the Emirates Centre for Strategic Studies and Research, p. 2. http://www.univie.ac.at/int law / .../59_ sources.pd... accessed on 3 September 2015.

157 E A Oji, 'Application of Customary International Law in Nigerian Courts' (2010) *NIALS Journal of Law and Development*, 151.

158 A Cassese, International Criminal Law (2nd edn, Oxford: Oxford University Press, 2008) p.14.

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) Subject to the provision of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

2. This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto.

A stylized application of Article 38 is necessary for criminal matters since the ICJ does not exercise criminal jurisdiction. As a result, some of the issues addressed here will be discussed in greater detail in the chapters of this research treating the substantive crimes against humanity, and the international prosecution of crimes against humanity. Thormundsson has pointed out that there is a good deal of reason to assume that the sources purporting to constitute international law according to the introductory provision of Article 38 also do apply, though not directly, to criminal cases as minimum standards required for international criminal liability.[159] The exhaustiveness of Article 38 of the ICJ Statute as a formal source of international law has not gone unchallenged. On one side of the divide are those who assert that Article 38 does not allow the consideration of other potential law-creating processes such as natural law, moral postulates or the doctrines of international law.[160]

The opposite view, also of a distinguished ancestry, states that they are not all-inclusive.[161] Sir Jennings for instance, questioned the exhaustiveness of Article 38 as a sufficient

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159 J Thormundsson, 'The Sources of International Criminal Law with Reference to the Human Rights Principles of Domestic Criminal Law' Stockholm Institute for Scandinavian Law' (1957) 1957-2009. <http://www.scandinavian law.se/pdf/39-17.pdf> accessed on 28 December 2014.

160 M T Ladan, *Materials and Cases on Public International Law* (Zaria: Ahmadu Bello University Press Ltd, 2007) p.11.

**161** U O Umozurike, Introduction to International Law (3rd edn, Ibadan: Spectrum Books Limited, 2005) p.15.

guide to the content of modern international law, and proposed other sources like the results of treaty negotiating conferences, and the decisions and recommendations of international organizations.[162] Furthermore, the normative characterization of *jus cogens, obligatio erga omnes,* and soft-law principles, describe a minimum standard of acceptable behavior from which no State may derogate.[163] The sources of law in Article 38 are not listed in a hierarchy but represent the order which the court may observe. A treaty opposed to customary law or *jus cogens* would be void, and a treaty may be interpreted with reference to general principles of law.[164] Paragraphs (a)-(c) are regarded as the more authoritative sources of international law, while paragraph (d) identifies some of the law determining agencies.

### 2.4.1 Treaties

A treaty is an all-purpose term for all agreements binding at international law, concluded between international entities, notwithstanding their formal appellation. Of course, Article 38 (1) (a) does not mention the term 'treaty', but refers to 'international conventions'. Article 2 (1) (a) of the 1969 Vienna Convention on the Law of Treaties defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

A treaty may supplement, modify or override obligations derived from customary law. As such, where a treaty and a custom converge upon the same subject matter, the later is tributary to

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162 R Y Jennings, 'What is International Law and How Do We Tell It When We See It?*'* 37, 60 (1981) *Schweitzerisches Jahebuch fur Internationales Recht* (1981), 59, 61, 70-73, 80-83.

163 D B Hollis, 'Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) Vol. 23. No. 1. *Berkeley Journal of International Law*, 142.

164 I Brownlie, *Principles of Public International Law* (6th edn, Oxford: Oxford University Press, 2003) p. 5.

the former.[165] Only States that ratify treaties are bound by them.[166] The principles of treaty law are now largely codified in the Vienna Convention on the Law of Treaties 1969.

The Statutes of international criminal tribunals set out the substantive crimes within their jurisdiction, and their procedural rules as well. In this regard, the London Agreement of 8th August 1945, establishing the IMT Nuremberg and the crimes within its jurisdiction; and the 1998 Statute of the ICC laying down the set of crimes which it may try and some general principles of ICL are particularly significant.[167] The London Agreement was adopted by the governments of the USA, France, UK, and the Union of Soviet Socialist Republics, for the prosecution and punishment of the major war criminals from Axis Europe. The Charter of the IMT Nuremberg was annexed to the London Agreement.[168] Both the London Agreement and the IMT Charter were later ratified by other Allied states. Article 6 of the Charter defined three categories of crimes: crimes against peace, war crimes and crimes against humanity. Furthermore, the Charter established general principles of ICL, like individual criminal responsibility.[169]

Only four 'core' international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression fall within the jurisdiction of the ICC.[170] The Statute of Rome was adopted by 120 states at a diplomatic conference on 17th July 1998 and entered into force on 1st

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165 M Swart, 'Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and Adventurous Interpretation' (2010) 70 *ZaoRV*, 462.

166 J Elsea, 'U.S Policy Regarding the International Criminal Court' (2002) Report for Congress, Order Code RL31495.

167 Cassese, *op cit*, pp. 15-16.

168 Article 2 of the London Agreement provides that 'the constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this agreement, which Charter shall form an integral part of this Agreement.

169 Article 7 of the Charter.

170 Article 5 of the Rome Statute of the ICC. Genocide is the systematic destruction of all or a significant part of a national, ethnical, racial, religious group. Article 6: Aggression is a grave breach of international law by a state. Aggression has no unitary definition, but extends to the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in a manner inconsistent with the Charter of the United Nations: Garner, *op cit*, p.76.

July 2002 after ratification by 60 countries.[171] The Statute of the ICC being an agreement between the state parties is a 'treaty of a particular type' as well as the 'grundnorm' of the court. Also of significance are the constitutive instruments of the ICTY and the ICTR. The United Nations Security Council established the ICTR for Rwanda in November 1994 by Resolution 955 to try serious violations of International Humanitarian Law in the country. The Statute of the ICTR confers jurisdiction over genocide,[172] crimes against humanity,[173] and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II.[174]

The constitutive instrument of the ICC has expressed which law the court should apply. By Article 21 titled 'applicable law,' the ICC is required to apply (1): (a) in the first place, the Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) failing that, general principles of law derived by the court from national laws of legal systems of the world including, where appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards; (2) the court may apply principles and rules of law as interpreted in its previous decisions; and the caveat, that (3) the application and interpretation of law must be consistent with internationally recognized human rights norms. This provision authorizes the ICC to apply its own proper law or primary system of law, and other laws external to it.

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171 'ICC-About the Court'. <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.> accessed on 29 December 2014.

172 Article 2 Statute of the ICTR.

173 Article 3 Statute of the ICTR.

174 Article 4 Statute of the ICTR.

The proposition that the Statute of the ICC is also a criminal code of a kind is convincing as it defines the crimes within the jurisdiction of the court.[175] A criminal code is a compilation of criminal laws, usually defining and categorizing offences and setting out their respective punishments.[176] The statute is also a code of procedure containing systems of investigation, prosecution, penalties, enforcement and appeal.[177] Furthermore, Article 51 of the Statute of the ICC provides for the Rules of Procedure and Evidence for the court. These rules adopted by a two-thirds majority of the Assembly of State Parties indicate a supplementary source of law. However, in the event of a conflict between the Statute of the ICC and the Rules of Procedure, the former prevails.[178]

Under its Statute, the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra through Security Council Resolution 1315 (2000) of 14th August 2000 can try the following crimes: crimes against humanity,[179] violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II;[180] other serious violations of International Humanitarian Law;[181] and crimes under Sierra Leonean law.[182] It bears mentioning that the ICTY, ICTR, SCSL and a host of other hybrid tribunals were established by the UN Security Council exercising its powers concerning 'actions with respect to threats to the peace, breaches of the peace and acts of aggression' under Chapter VII of the Charter of the United Nations. The decisions of the Security Council are binding on all members of the UN.[183] At the regional setting, the African Union in 2014 adopted a protocol extending the

175 Articles 6, 7 and 8 of the Statute of the ICC.
176 Garner, *op cit*, p. 1247.
177 See for instance, Articles. 15, 16, 54, 55, 57, 58, 60, 62, 63, 77, 81 and 83 of the Statute of the ICC.
178 Article 51 (5), Statute of the ICC.
179 Article 2, Statute of the SCSL.
180 Article 3, Statute of the SCSL.
181 Article 4, Statute of the SCSL.
182 Article 5, Statute of the SCSL.
183 Article 25, Charter of the United Nations.

jurisdiction of the African Court of Justice and Human and Peoples' Rights to crimes against humanity among several others. The definition, characterization and descriptive contextualization of the crime are contained in the protocol.[184]

Several treaties create international crimes and confer jurisdiction on domestic courts to try and punish offenders. The key difference between these treaties – creating crimes, and the constitutive instruments of the international criminal tribunals is that whereas, the later established crimes, and no system of law courts, the former constituted both crimes and corresponding judicatures. The Genocide Convention of 1948 defines the crime of genocide,[185] and penalizes it.[186] Besides the laws of war,[187] three other treaties criminalize mercenarism: the 1977 O. A. U Convention for the Elimination of Mercenaries in Africa;[188] the 1989 UN Convention against the Recruitment, Use, Financing, and Training of Mercenaries,[189] and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights.[190] Two Palermo Protocols have established offences of relevance to this research: the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their

184 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights, adopted on 27th June 2014, Article 28 C.

185 Genocide Convention 1948 Article II: Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such : *(a)* Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group; *(e)* Forcibly transferring children of the group to another group.

186 Genocide Convention 1948, Article III.

187 Article 47, Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8th June 1977.

188 The O.A.U Mercenaries Convention, Article 4 states that a mercenary is responsible both for the crime of mercenarism and all related offences, without prejudice to any other offences for which he may be prosecuted.

189 Article 3 provides that a mercenary who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.

190 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights, adopted on 27th June 2014, Article 28A.

Parts and Components and Ammunition,[191] and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[192]

Other crime-creating treaties include: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;[193] the International Convention against the Taking of Hostages of 1979;[194] the International Convention for the Suppression of Terrorist Bombings;[195] the International Convention for the Suppression of the Financing of Terrorism;[196] the O. A. U Convention on the Prevention and Combating of Terrorism;[197] the International Convention for the Protection of All Persons from Enforced Disappearance;[198] the Draft Comprehensive Convention against International Terrorism;[199] and the Draft International Convention on the Prevention and Punishment of Crimes against Humanity.[200] The Draft Convention on Crimes against Humanity confers jurisdiction on national courts or the ICC to try alleged perpetrators of its crimes.[201] The draft conventions if adopted would facilitate measures on the prosecution of their subject crimes.

**2.4.1.1 International Humanitarian Law (IHL)**

Expressly or impliedly, humanitarian and human rights regimens have been incorporated into the ICC's formal source of law. It is a widely acknowledged fact that International Criminal Law draws upon IHL, domestic criminal law, and transitional justice; a triad in which transitional

191 Article 5.
192 Articles 3 and 5.
193 Articles II and III.
194 Article 1.
195 Article 2.
196 Article 2.
197 Articles 1 and 3.
198 Articles 4, 5, 6 and 7.
199 Articles 2, 3,4,5,6, and 7.
200 Articles 1 and 3.
201 Article 10: (1) Persons alleged to be responsible for crimes against humanity shall be tried by a criminal court of the State Party, or by the International Criminal Court, or by an international tribunal having jurisdiction over crimes against humanity.

justice focuses on the human rights violations committed by the *ancien régime*.[202] Umozurike has aptly stated that humanitarian law derives from the basic principle that the individual is entitled to certain minimum rights in peace or in war.[203] Article 8 of the Rome Statute directly refers to 'grave breaches of the Geneva Conventions of 12th August 1949'; 'other serious violations of the laws and customs of war applicable in international armed conflict'; and 'serious violations of Article 3 common to the four Geneva Conventions'. Indeed, IHL is the *fons et origo* of many of the crimes in ICL.[204]

International humanitarian law[205] is the part of public international law which seeks, for humanitarian reasons, to limit the effects of armed conflict. IHL protects persons who are not, or are no longer participating in hostilities and restricts the means and methods of warfare available to belligerents.[206] IHL applies only in the context of an armed conflict.[207] IHL is composed of the Law of The Hague and the Law of the Geneva. The Hague Conventions of 1899 and 1907 were the first multilateral treaties on warfare, and were substantially derived from the Lieber Code of 1863, which is recognized as the first modern codification of the laws and customs of war.[208] The Law of The Hague consists of the Hague Conventions of 1899; revised in 1907; and in the 1977 Protocols Additional to the Geneva Conventions as well as the treaties regulating the use of

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202 A M Danner and J S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) *California Law Review*, 75.

203 U O Umozurike, 'Introduction to International Law,' (3rd Edition: Ibadan, Spectrum Books Limited, 2005) p. 212.

204 Danner and Martinez, *loc cit*.

205 Also known as laws of war, laws and customs of war; and law of armed conflict

206 ICRC, "*What is International Humanitarian Law?*" (2004) International Committee of the Red Cross Advisory Service on International Humanitarian Law.

207 Common Articles. 2 and 3 of the Geneva Conventions of 1949.

208 General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 24th April 1863.

weaponry[209] Three main treaties adopted in the First Hague Peace conference in 1899 make up the Hague Law.[210]

The second Hague Peace Conference of 1907 adopted 13 conventions and one declaration.[211] The Hague law determines the rights and duties of belligerents in the conduct of hostilities and limits the means of inflicting damage upon the enemy.[212] The Hague law and regulations primarily regulate the conduct of hostilities. Most of the substantive provisions of the Law of The Hague are considered to embody rules of customary international law.[213] The Hague Conventions of 1907 are still part of international law and are often referred to. For illustration, the United Nations Security Council resolution 1483 called upon States to observe their obligations under the four Geneva Conventions of 1949 and the Hague Regulations of 1907.[214] As an additive, resort to the use of force as an instrument of national policy was prohibited by the Kellog-Briand Pact of 1928;[215] and presently, the United Nations Charter 1945.[216]

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209 E A Oji, *Responsibility for Crimes under International Law*' (Lagos: Odade Publishers, 2013) pp. 78-79. See also (I) the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare of 1925; (II) the 1972 Biological Weapons Convention; and (III) the 1993 Chemical Weapons Convention.

210 (I) The Convention for the Pacific Settlement of International Disputes, which established the Permanent Court of Arbitration; (II) the Convention with Respect to the Laws and Customs of War on Land, dealing the treatment of Prisoners of War, wounded combatants, prohibition of poison and killing of combatants who had surrendered, collective punishments, looting of a town, attack on undefended places, etc; and (III) the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22nd August 1864. The third treaty dealt with the protection of marked hospital ships, and wounded and shipwrecked sailors of all belligerent parties.

211 These include: (I) the Convention Respecting the Limitation of Force for Recovery of Contract Debts; (II) the Convention Relative to the Opening of Hostilities, which sets out the procedure for the declaration of war; (III) Convention Respecting the Laws and Customs of War on Land; (IV) Convention Relative to the Legal Position of Enemy Merchant Ships at the Start of Hostilities; and (V) the Convention Relative to the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

212 M T Ladan, *Materials and Cases on Public International Law* (Zaria: Ahmadu Bello University Press Ltd, 2007) p. 201.

213 ICRC, '*Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, The Hague', 18th October 1907.* <https://www.icrc.org/ihl/INTRO/195> accessed on 31 December 2014.

214 Paragraph 5, Resolution 1483 (2003), adopted by the Security Council at its 4761st meeting, on 22nd May 2003. S/RES/1483 (2003).

215 Articles I and II.

216 Article 2 (4).

On the other hand, the Law of Geneva, which developed from 1864 to 1949 provides for humanitarian treatment in the event of armed conflict. The Geneva Conventions of 1949 updated the terms of the first three Geneva Conventions of 1864, 1906, and 1929 and added a fourth treaty.[217] The Geneva Conventions provide for the protection of civilians, prisoners of war, the wounded, and sick and those rendered *hors de combat*.[218] Grave breaches of the Geneva Conventions involving the following acts committed against persons or protected property: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, may amount to war crimes.[219]

**2.4.1.2 International Human Rights Law**

Like IHL, human rights are inspired by considerations of humanity.[220] Notwithstanding the fact that they have different historical launch pads, IHL is increasingly perceived as part of human rights law applicable in armed conflict situations.[221] Article 21 (3) of the ICC Statute provides that the interpretation and application of law by the ICC must be consistent with internationally recognized human rights. International Human Rights Law (IHRL) is the aspect of public

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217 (I) The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1949 (updated the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the 1906 and 1929 versions); (II) the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949 (revised and updated the 1906 version); (III) the Third Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (revised and replaced the 1929 version); and (IV) the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949. The Geneva Conventions have been modified by three protocols: (I) Protocol I (1977) Relating to the Protection of Victims of International Armed Conflicts; (II) Protocol II (1977) Relating to the Protection of Victims of Non-International Armed Conflicts; and (III) Protocol III (2005) Relating to the Adoption of an Additional Distinctive Emblem.

218 C C Wigwe, *International Humanitarian Law* (Ghana: Readwide Publishers, 2010) p. 2.

219 Article 50, First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1949.

220 Oji, *op cit*, p. 55.

221 L Doswald-Beck and S Vite (1993), 'International Humanitarian Law and Human Rights Law' (1993) No. 293 *International Review of the Red Cross*.

international law designed to promote and protect human rights at the international, regional and domestic levels.[222] Human rights refers to the concept of human beings as having natural, universal rights, or status, regardless of legal jurisdiction or other localizing factors, such as ethnicity and nationality.[223]

Human rights describe certain minimum standards and rules of procedure to which those in power should adhere in their treatment of people. This basically concerns state authorities such as governments, police or armed forces, but increasingly also those wielding non-governmental power, who exert control over people. Human rights norms set limits to the power exercised by government and non-governmental entities, and oblige them to lay the foundation to enable people to affirm these rights. The idea of an international Bill of Rights had been conceived at the framing of the UN Charter, but a compromise-declaration: the Universal Declaration of Human Rights of 1948 was adopted in its stead.[224] The UDHR is regarded as part of international customary law or general international law.[225]

After the UDHR, the United Nations General Assembly adopted two other human rights treaties in 1966, that is, the International Covenant on Civil and Political Rights (ICCPR),[226] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[227] These instruments, particularly, the UDHR, provided the basis for later human rights treaty systems,

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222 'International Human Rights'. <https//www.en.m.wikipedia.org/wiki/International_human_rights_law> accessed on 1 January, 2015.

223 Human Rights Manual: Guidelines for Implementing a Human Rights Based Approach in ADC (2010), prepared by Austrian Development Agency, and Ludwig Boltzmann Institute of Human Rights, Vienna, pp. 6-8.

224 K C Joshi, *International Law and Human Rights* (2nd edition, Lucknow: Eastern Book Company, 2012) p.439.

225 *Ibid* p. 444.

226 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.

227 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.

including the 1981 African Charter on Human and Peoples' Rights (The Banjul Charter).[228] The Banjul Charter combined all three generations of human rights into one legally binding instrument. The collectivity: UDHR, ICCPR and ICESCR, is known as the International Bill of Rights.[229] Broadly speaking, these treaties guarantee the basic rights to life, equality, dignity, privacy, liberty; freedom from slavery, torture, discrimination, arbitrary arrest or detention, and retroactive criminal punishments.[230]

An international crime would be committed where the consequences of the breach of human rights satisfy the elements of the crime.[231] In certain circumstances, the breach of human rights norms of liberty, life, discrimination, and dignity of the person, would constitute crimes against humanity.[232] Such obnoxious practices might have also violated provisions of the Genocide Convention of 1948;[233] the Convention on the Elimination of All Forms of Racial Discrimination of 1965;[234] and the 1926 Slavery Convention amongst others.[235] Some of the guarantees in the Statute of Rome derive their validity from human rights law, like the *nullum crimne, nulla poena sine praevai lege poenali* (no crime and no punishment without a pre-existing penal legislation) principle.[236] Articles 7 (2) of the Banjul Charter, and 15 (1) of the ICCPR prohibit *ex post facto* criminal legislations, treaties, and penalties. Individuals prosecuted and tried for international crimes are assured a fair degree of fundamental human rights guarantees. The Statute of Rome provides for an accused person, the rights of fair hearing;[237]

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228 Adopted on 27 June 1981, entered into force on 21 October 1986.
229 O V C Ikpeze, *Gender Dynamics of Inheritance Rights in Nigeria: Need for Women Empowerment* (Onitsha: Folmech Printing and Pub. Co. Ltd, 2009) p. 21.
230 UDHR 1948, Articles 1, 2, 3, 4, 5, 7, 9 and 11.
231 Oji, *op cit*, p. 59.
232 Article 7, Statute of the ICC.
233 Articles I, II, III, IV, IV, V and VI.
234 Articles 1, 2, 3, 4 and 5.
235 Articles 1 and 2.
236 Articles 22 and 23, Statute of the ICC.
237 Article 41, Statute of the ICC.

freedom from self-incrimination, duress, torture, cruel or degrading treatment or punishment;[238] the presumption of innocence;[239] and choice of counsel.[240]

### 2.4.2 Customary International Law

Article 38 (1) (b) directs the ICJ to apply 'international custom, as evidence of a general practice accepted as law'. Ironically, it is 'general practice accepted as law' that is evidence of international custom. In the *Asylum case*, the ICJ described custom as a 'constant and uniform usage accepted as law'.[241] However, Kirsch and Oehmichen have cautioned that there is an academic debate on which of the two elements - *opinio juris* or state practice, is the dominant one for establishing customary international law.[242] Ohlin has asserted that 'any analysis of customary international law must begin with state practice'.[243] State practice and the *opinio juris* must co-exist to establish an international custom. Therefore, 'not only must the acts concerned amount to a settled practice, but they must also be accompanied by the *opinio juris sive necessitatis,* a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[244]

In the *Advisory Opinion on the Legality of Nuclear Weapons,* the ICJ found that a large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The laws and customs of war as they were traditionally called were the subject of efforts at codification undertaken in The Hague (including

238 Article 55, Statute of the ICC.
239 Article 66, Statute of the ICC.
240 Article 67, Statute of the ICC.
241 Asylum Case (Colombia V. Peru), ICJ Reports 1950, p. 266.
242 S Kirsch and A Oehmichen, 'Judges Gone Astray- The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon' (2011) Vol. 1. *Durham Law Review Online*, 8.
243 J D Ohlin, 'Applying the Death Penalty to Crimes of Genocide' (2005) Vol. 99. *The American Journal of International Law*, 751.
244 Nicaragua v The United States of America (Merits) *Supra*, pp. 108 – 109.

the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874.[245]

Brownlie has drawn up a non-comprehensive catalogue of material sources of international custom: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the ILC, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practices of international organs, and resolutions relating to legal questions in the United Nations General Assembly.[246]

Particularly, Security Council and General Assembly resolutions, establishing international criminal tribunals, may evidence state practice and aid the development of the customary law of international crimes. When customary law is applied today, the methods used to determine its content are increasingly relaxed, especially in relation to the proof of state practice. The contemporary approach to customary law relies largely on loosely defined *opinio juris* and, or inference from the widespread ratification of treaties or support for resolutions and other soft law instruments, therefore, rendering it more flexible and open to the relatively rapid acceptance of new norms.[247] Once a rule of customary international law has emerged, the current understanding is that it binds all states except those that clearly and persistently objected to the rule prior to the time of its crystallization or ripening into a rule of law.[248]

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245 Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 8th July 1996. ICJ Reports, para. 75.

246 Brownlie, *op cit*, p. 5.

247 T Meron, 'Revival of Customary Humanitarian Law' (2005) Vol. 99. No. 4. *American Journal of International Law,* 817.

248 C A Bradley and M Gulati, 'Withdrawing from International Custom' (2010) Vol. 120. No. 2. *The Yale Law Journal*, 211.

In the *Tadic Interlocutory Appeal Decision*, opinions expressed in the writings and findings of the International Committee of the Red Cross (ICRC) were regarded as evidence of international practice in the establishment of custom.[249] International custom is perhaps, the oldest and the original source, of international as well as of law in general. Umozurike wrote that customs were the most important source of international law until their recent displacement by the extensive framework of law-giving multilateral treaties.[250] Nevertheless, customs remain a dynamic source of law in the light of the nature of the international system and its lack of centralized government organs.[251]

In international criminal law, resort is often had to customary law or general principles of law in order to clarify treaty or fill in lacunae in law.[252] However, as already observed in respect of conventional law, a criminal tribunal can enforce only customary rules defining crimes within its jurisdiction. Customs as a source of international criminal law present some vexed issues. Firstly, they suffer from a lack of specificity. The doctrine of specificity requires criminal rules to be as detailed as possible so as to clearly indicate to their addresses the prohibited conduct.[253] Secondly, the jurist's legal pedigree may affect his attitude towards judicial law. There are two major legal systems in the Western world: the common law and the civil law. Judges trained in common law may task themselves to apply criminal law evolved from case law, crystallizing overtime into custom. Whereas, in legal analysis; their civil law counterparts will place more emphasis upon a code of crimes, possibly leading to different decisions.[254]

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249 Prosecutor v Dusko Tadic. Decision on Defence Motion for Interlocutory Appeal on Jurisdiction. 2 October 1995, paras. 73, 109.

250 Umozurike, *op cit*, p.17.

251 M Shaw, *International Law* (4th edn, Cambridge: Cambridge University Press, 1997) p.69.

252 A Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford University Press, 2008) p. 17.

253 Ibid, p. 41.

254 Ibid, p. 18.

References to case law as evidence of customary rules abound. In the *Furundzija case*, an ICTY Trial Chamber held that the prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law; it has gradually crystallized out of the express prohibition of rape in Article 44 of the 1863 Lieber Code and the general provisions contained in Article 46 of the Regulations annexed to Hague Convention IV, read in conjunction with the 'Marten's Clause' laid down in the preamble to the Convention.[255] In the *Tadic* case, the ICTY Appeals Chamber held that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.[256]

Human rights instruments recognize that customary international law can safely found criminal convictions without violating the legality principle. So much of the spirit and letter of this proposition is affirmed by Article 15 (1) of the ICCPR 1966 which provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. It is worthy to mention that many of the international conventions in force today, like the Geneva Conventions, are rooted in customary law. Bassiouni has stated that international law experts point to historic legal precedents from 1923 to date, including prosecutions before international and national tribunals, as evidence of customary international law.[257]

### 2.4.3 General Principles of Law

By Article 38 (1) (c) of the Statute of the ICJ, general principles of law recognized by civilized nations make up the third source of international law. General principles describe the

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255 Prosecutor v Anto Furundzija (ICTY Trial Chamber), 10th December 1998, para. 137.

256 Prosecutor v Dusko Tadic (ICTY Appeals Chamber), 15th July 1999, para. 283, 292, 305.

257 M C Bassiouni, 'Crimes Against Humanity: The Case for a Specialized Convention' (2010) Vol. 9, Issue 4, *Washington University Global Studies Law Review*, 582.

inexhaustible reservoir of legal principles from which international tribunals can enrich and develop international law.[258] Resort to general principles will prevent international tribunals from declaring judgments *non liquet*. Conversely, if there is in existence, an applicable treaty or custom, general principles will not apply. There are two views about the content of paragraph 1 (c) of article 38. While one view regards them as analogies drawn from domestic jurisprudence adapted to international judicial reasoning, the opposite view is that they are the product of natural law as developed from Judeo-Christian beliefs.[259] Ideas derived from local law and international law are considered to fall within the catchment area of Article 38 (1) (c).[260] Carter, Trimble and Bradley posited that the most fertile field for the implementation of municipal law analogies have been those of procedure, evidence and the machinery of the judicial process.[261]

Some general principles of international law are applicable to criminal cases. These are principles developed from treaty law or customs. General principles of ICL emerged in the same way. It is in the face of a normative gap in these sources, that the criminal tribunal may apply the general principles of the criminal jurisprudence of states. This class of principles inheres in national legal systems, and is of relevance to international criminal law, for instance, non-retroactivity of penal law and the territoriality of crimes. Others were transposed from national legal systems, and have overtime, firmly infused themselves in ICL.

In the *Furundzija* case, the ICTY Trial Chamber outlined the criteria for the application of national laws by international criminal courts. Thus, whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is

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258 L McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) Vol. 33 *British Yearbook of International* Law, 1.

259 S K Kapoor, *International Law and Human Rights* (18th edn, Allahabad: Central Law Agency, 2011), p. 70.

260 M N Shaw, *International Law* (5th Edition, Cambridge: Cambridge University Press, 2002) p. 94.

261 B E Carter *et al*, *International Law* (4th edn, New York: Aspen Publishers, 2003) p.151.

justified, subject to the following: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common law or that of civil law states. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since international trials exhibit a number of features that differentiate them from criminal proceedings, account must be taken of the specificity of international criminal proceedings when utilizing national law notions. In this way, a mechanical importation or transposition from national law into international criminal is avoided, as well as the attendant distortions of the unique traits of such proceedings.[262]

The view has also been expressed that the relationship between public international law and domestic criminal law has greatly contributed to the development of international criminal law.[263] A tribunal's analysis of general principles must be broad; including the study of the key legal systems; common law, civil law, Islamic law, and the legal systems of Asia and Africa. In *Erdemovic*, the trial chamber of the ICTY found that there is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present.[264] Antonio Cassese identified the general principles of ICL to include: legality, specificity, presumption of innocence, and equality of arms.[265]

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262 Prosecutor V. Anto Furundzija (ICTY Trial Chamber), 10th December 1998, para. 178.

263 Thormundsson, *loc cit*.

264 The Prosecutor v Drazen Erdemovic, (ICTY Trial Chamber), 29th November 1996, para. 31.

265 Cassese, *op cit*, pp. 20-21.

### 2.4.4 Judgments of Tribunals and Scholarly Opinions

Judicial decisions are only persuasive authorities. The doctrine of precedent as it is known in the common law tradition does not hold sway in the international legal system.[266] The decisions of international tribunals and the opinions of learned scholars are law-determining agents, and not formal sources of law. Judicial decisions are subsidiary means of determination of rules of law.[267] International tribunals are not even bound by their own precedents. Article 21 (2) of the Statute of the ICC provides that the court may apply principles and rules of law as interpreted in its previous decisions. Nevertheless, Cassese has advised that judicial decisions in ICL cannot be cursorily dismissed as they may prove to be of crucial importance not only for ascertaining whether a customary rule has evolved, but also as a means to establish the most appropriate interpretation to be placed on a treaty rule.[268] For instance, the decisions of the IMT Nuremberg set down significant principles on the crime of aggression and crimes against humanity. Although the views of legal writers may help in espousing the law; they lack normative force.

## 2.5 Conclusion

This chapter has reviewed literature relevant to the topic; and examined the status and sources of crimes against humanity. The chapter observed that the perpetration of crimes against humanity, are in breach of *jus cogens* norms, with *erga omnes* obligations. As a result, all states have a compelling duty to arrest, investigate, prosecute, punish or extradite perpetrators of crimes against humanity. The analysis of sources of crimes against humanity showed that they are derived mainly from the statutes and decisions of international criminal courts, as opposed to Article 38 of the Statute of the ICJ.

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266 Shaw, *op cit*, p. 103.

267 Article 38 (1) (d), Statute of the ICJ.

268 Cassese, *op cit*, pp. 26-27.

## CHAPTER THREE

## THE SUBSTANTIVE LAW OF CRIMES AGAINST HUMANITY

### 3.1 Introduction

Following our discussion of the status and sources of law of crimes against humanity, this part of the research will now focus on the substantive content of the crimes. The incidence of crimes against humanity is as old as the human race, although analyses of the crimes in the legal literature began only in the post-World War Years. [269] The brutalities of World War II influenced the development of crimes against humanity. There is an early record of a trial for crimes against humanity. In Breisach in the year 1474, Sir Peter of Hagenbach was tried and convicted for rudimentary forms of crimes against humanity, involving murder and rape.[270] As a species of mass atrocity crimes, crimes against humanity defy the human rights of a civilian population. Driven extensively by the human rights crusade, the essence of the crime is the protection of the civilian population from violence. Cassese reflected this idea when he stated that to a large extent many concepts underlying this category of crimes derive from, or overlap with, those of human rights law, the rights to life, not to be tortured, to liberty and security of the person.[271]

For a very long time, crimes against humanity have been recognized as international crimes on account of the threats they pose to humanity and the fundamental values of mankind by the actions of sovereign states, against civilian populations, particularly, their own subjects.[272] These egregious crimes are not isolated incidents, but involve large scale and systematic actions,

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269 J Graven, 'Les Crimes Contre I'Humanite' (1950) 76 *Hague Recueil*, 433.

270 E Greppi (1999), 'The Evolution of Individual Criminal Responsibility under International Law' (1999) No. 835. *International Review of the Red Cross*.

271 A Cassese, International Criminal Law (2nd edn, Oxford: Oxford University Press, 2008) p. 99.

272 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of An Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, para. 59.

often cloaked with official authority, that shock the conscience of humankind.[273] Their widespread or systematic character implicates or awakens the conscience of the international community as a whole. Crimes against humanity are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons.[274] By Article 7 of the Statute of the ICC, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder, extermination, enslavement, deportation, imprisonment, torture, rape or sexual slavery, persecution, enforced disappearance, apartheid, and other inhumane acts.[275]

A high threshold is required for proof of crimes against humanity. The 'widespread or systematic' requirement differentiates crimes against humanity from random acts of violence or the more familiar penal groupings like homicide, sexual offences, assault or grievous bodily harm, and abduction, found in most internal criminal codes.[276] Lone inhumane acts may amount to gross human rights violations or war crimes during armed conflicts. Crimes against humanity spin a weird trajectory to which an extreme degree of depravity attaches than to any ordinary crime. Unlike other 'core international crimes' such as war crimes and genocide codified in the Geneva Conventions of 1949; and the Genocide Convention of 1948, crimes against humanity have not been codified in a convention, resulting in inconsistent formulations and reformulations

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273 B A Garner, *Black's Law Dictionary* (9th edn, St Paul MN: Thomson Reuters, 2009) p.429.

274 Cassese, *op cit*, p. 98.

275 For the philosophical foundations of crimes against humanity, see C Macleod, 'Towards a Philosophical Account of Crimes Against Humanity' (2010) Vol. 21. No. 2. *The European Journal of International Law*, 282. 'Different readings of 'crimes against humanity' are routinely employed, without acknowledgement that there is very little agreement as to the substance, and indeed whether there can be said to a substance as distinct from the case law, of this crime. Disagreements of this sort should certainly be of interest to legal theorists and, while their relevance to legal practice may be contested, even to determine whether they are of practical import requires far more analytic attention to the concept than has been thus far given'.

276 Prosecutor v Akayesu, (ICTR Trial Chamber), 2nd September 1998, para. 579.

in the crime's historiography. It has remained a mutant crime defying legal precision.[277] For example, enforced disappearance was included as a crime against humanity, by some international instruments, while others did not.[278]

A major distinction between crimes against humanity and genocide is that the former need not target a specific group, but a civilian population in general. They are also different from war crimes insofar as the criminal conduct may be directed not only towards the opposing belligerent's civilian population, but also against the perpetrator's own population. Furthermore, in contrast to war crimes against individuals, they must be widespread or demonstrate a systematic character.[279] The law of crimes against humanity was initially created to fill certain gaps in the law of war crimes, but many parameters were left undefined, until the contours became more clearly shaped by the Statute of the ICC.

### 3.2 The Evolution of Crimes against Humanity

There are differing accounts of the etymology of crimes against humanity. A corresponding term; the 'laws of humanity and the dictates of public conscience' first appeared in the Martens Clause of the Hague Convention on the Laws and Customs of War on Land, 1899.[280] It remained in obscurity until animated by the desire for post-War justice. However, a more direct reference

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277 M C Bassiouni, 'Crimes Against Humanity: The Case for a Specialized Convention' (1994) 31 *Colum. J. Transnat'L L*, 457. See also P Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) Vol. 22, Issue 2, Article 5 *Fordham International Law Journal*, 468.

278 The preambular part of the Inter-American Convention on Enforced Disappearance of 9th June 1994 reaffirms that 'the systematic practice of the forced disappearance of persons constitutes a crime against humanity'. See also the preamble of the International Convention for the Protection of All Persons from Enforced Disappearance.

279 Prosecutor v Mile Mrksic, Miroslav Radic, and Veselin Sljivancanin (ICTY Trial Chamber) 27th September 2007, para 458.

280 Laws and Customs of War on Land (Hague II) preamble., July 29, 1899, 32 Stat. 1803, 1805, T.S. No. 403. As formulated in 1899, the Martens Clause read as follows: 'until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations from the laws of humanity, and the requirements of the public conscience'. See also T Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) Vol. 94. No. 1. *The American Journal of International Law*, 79.

is enclosed in the France, Great Britain and Russia Joint Declaration of 1915, which warned the Ottoman authorities of responsibility for 'crimes against humanity and civilization' for the massacre of Armenians and of personal responsibility.[281] In the Declaration on German Atrocities (Moscow Declaration) 1943, the Allies had proclaimed that those 'whose offences have no particular geographical localization…will be punished by the joint decision of the Allies'.[282]

The allied governments in World War I signed the Treaty of Sevres,[283] which would have required the Ottoman Empire to assist in the apprehension and prosecution of the perpetrators of the Armenian genocide. International prosecutions of the crimes did not take place because the treaty was not ratified.[284] After the Second World War, the Allied powers convened the London Conference of 28th June to 8th August 1945 to draft the Charter of the IMT Nuremberg. To give effect to the Moscow Declaration and the London Agreement of 8th August 1945, the tribunal was established for the trial and punishment of the major war criminals of the European Axis countries. The tribunal had powers to try not only war crimes, but also crimes against humanity. It is because they were first clearly articulated in the aftermath of the WWII that Muftai asserted that the concept of crimes against humanity was introduced by the Charter of the Nuremberg Tribunal in 1945.[285]

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281 See the United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1948).

282 The Moscow Declaration of 30th October 1943 'Concerning Responsibility of Hitlerites for Committed Atrocities'.

283 Articles 228 and 230, Treaty of Peace Between The Allied and Associated Powers and Turkey, Signed at Sevres, 10th August 1920.

284 C C Jalloh, 'What Makes A Crime Against Humanity a Crime Against Humanity' (2013) Vol. 28. No. 2. *AM. U. Int'L L. Rev*, 392.

285 R Muftau, 'Crimes against Humanity in International Law', Ph D Dissertation submitted to the Post-Graduate School, Ahmadu Bello University, Zaria, in partial fulfillment of the requirements for the award of the Degree of Doctor of Philosophy (PhD) of Ahmadu Bello University, Zaria 2006, p. 76.

The context of war crimes did not include crimes committed by a government against its own citizens, but against those of other belligerents. The Germans had perpetrated acts of barbarity not prohibited by orthodox international law. The laws of warfare only proscribed violations involving the adversary or the enemy populations, whereas the Germans had also carried out inhuman acts for political or racial reasons against their own citizens; Jews, trade union members, social democrats, communists, gypsies, gays, members of the church, as well as others not covered by the laws of warfare.[286] Article 6 of the Nuremberg Charter defined crimes against humanity as: murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.

The definition points to the following issues: firstly, the reference to 'any civilian population' included the aggressor's own population; secondly, crimes against humanity could be committed only in the context of an armed conflict;[287]and thirdly, the allusion to 'population' created a requirement of scale, but the exact threshold was neither defined by the Charter nor in the Nuremberg judgment.[288] An analogous rendition is contained in the Charter of the IMT Tokyo.[289] Yet, the differences between these two definitions call for some remarks. In defining

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286 Cassese, *op cit*, p. 103.

287 By Article 6 of the Nuremberg Charter, the Tribunal had jurisdiction over (a) crimes against peace; (b) war crimes; and (c) crimes against humanity.

288 R Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) p. 188.

289 IMT FE Tokyo Charter, Article 5 (c): Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all

crimes against humanity, the Tokyo Charter listed the class of person to be held responsible, and it did not include 'persecution' subject to religious grounds. Secondly, the Nazi crimes against the Jews lacked an Asian equivalent.[290] Significantly, Article II (2) (a) of the Allied Control Council Law No. 10 of 20th December 1945 included rape, torture, imprisonment as inhumane acts, but expurgated the war nexus,[291] and thereby, reinstated the customary international law descriptive characterization of the crime.

Comparably, the Genocide Convention of 1948 which criminalizes a type of crime against humanity does not require the armed conflict connective.[292] The 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity exempted crimes against humanity whether committed in time of war or in time of peace from statutory limitations.[293] Article 5 of the ICTY Statute defined the contextual threshold of crimes against humanity as when committed in armed conflict, whether international or internal in character, and directed against any civilian population.[294]

It is worthy to bear in mind however, that the jurisdictional limitation of the ICTY does not reflect the current state of international customary law which does not require a nexus

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acts performed by any person in execution of such plan" By Article 5, the crimes within the jurisdiction of the court are: (a) crimes against peace; (b) conventional war crimes; and (c) crimes against humanity.

290 'Tokyo Charter'. < https://www.en.m.wikipedia.org/wiki/Tokyo_Charter > accessed on 10 January 2015.

291 That is atrocities or offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated. See Control Council Law No. 10, 20 Dec. 1945, 3 Official Gazette Control Council for Germany 50 (1946), Reprinted in 1 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 at xvi (1949).

292 Hwang, *art cit*, p. 487.

293 Article I (b) of the 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

294 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25th May 1993, U.N Doc. S/RES/827 (1993).

between crimes against humanity and an armed conflict.[295] In contrast to the ICTY Statute, the ICTR Statute eliminates the armed conflict requirement; replaces it with the need for a widespread or systematic attack; and establishes the discriminatory grounds. Thus, Article 3 of the Statute of the ICTR describes the context of crimes against humanity as 'when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds,' and thereby demands the discriminatory *animus*.[296] Article 2 of the Statute of the Special Court for Sierra Leone dispenses with the armed conflict and discriminatory nexuses, but requires discrimination for only persecution as a crime against humanity.[297] The trend has been followed by the national prosecution of the crime. The armed conflict and discriminatory nexuses were dispensed with by Article 12 of the Law of the Supreme Iraqi Criminal Tribunal.[298]

The war nexus limited the scope of the prohibition against crimes against humanity by excluding comparable inhumane acts committed in peacetime.[299] The ICTY and the ICTR were established by the United Nations Security Council to punish mass atrocity crimes committed in the former Yugoslavia and in Rwanda.[300] The armed conflict nexus has been discarded by Article 7 of the Statute of the ICC. Like the ICC provision, the definition of crimes against

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295 V J Proulx, 'Rethinking the Jurisdiction of the International Criminal Court in Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' (2004) Vol. 19. *AM. U. Int'L L. Rev*, 1056.

296 However, it is important to note the ruling of the Appeals Chamber of the ICTR in Prosecutor v Akayesu, Case No. ICTR-96-4-A, 1st June 2001, paras. 447-469: that the Trial Chamber had committed an error of law in finding that intent to discriminate on national, political, ethnic, racial or religious grounds was an essential element of crimes against humanity. 'Article 3…does not require that all crimes against humanity…be committed with a discriminatory intent'. The Appeals Chamber ruled that Article 3 restricts the jurisdiction of the Tribunal to crimes against humanity committed in a specific situation, that is, 'as part of a widespread or systematic attack against any civilian population' on discriminatory grounds.

297 Article 2, Statute of the Special Court for Sierra Leone: 'The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population…'

298 Article 12, Law of the Supreme Iraqi Criminal Tribunal, No. 10 of 2005.

299 B V Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (1999) 37 *Colum. J. Transnat'L L*, p 793.

300 SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

humanity in the amended Statute of the African Court of Justice and Human Rights has dispensed with the armed conflict requirement.[301] Today, it is certain that the legal definition of crimes against humanity no longer requires a nexus to armed conflict.[302]

The researcher states here that he is not unwary of the lingering debate over the question whether the Nuremberg Charter had created a new crime or merely exhumed one from the bowels of customary international law. The opinions of some law writers on this issue appear nebulous. The view of Cassese is that:

> In all probability the IMT applied new law, or substantially new law, when it found some defendants guilty of crimes against humanity alone or of these crimes in conjunction with others. However, this was not in breach of a general norm strictly prohibiting retroactive criminal law…Immediately after the Second World War, the nullum *crimen sine lege* principle could be regarded as a moral maxim destined to yield to superior exigencies whenever it would have been contrary to justice not to hold persons accountable for appalling atrocities. The strict legal prohibition of ex post facto law had not yet found expression in international law;

301 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 27th June 2014, Article 28 C: 1. For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise….'

302 R C Slye, 'Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission' (1999) Vol. 20. *Michigan Journal of International Law*, p. 275.

> nor did it constitute a general principle of law universally accepted by all states.[303]

Nevertheless, the researcher would align himself with the stance of Jallor that customary international law 'arguably recognized some crimes against humanity, though not explicitly called as such, while also leaving the substantive content of the crimes unclear',[304] or to that of Lippman who asserted that crimes against humanity are 'rooted in transcendent humanitarian principles' suggested in the Hague Convention.[305]

In *United States v Wilhelm List & Ors,* the U.S Military Tribunal Nuremberg concluded that preexisting international law has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey.[306] It should be noted that murder becomes no less murder because it is directed against a whole race rather than a single person.[307] A crime of this magnitude must not be condoned; and its perpetrators should not be allowed to assert ignorance of the turpitude of their misdeeds. The probable consequence of the uncertainty on the status of the crime at that time was that the Nuremberg Judgment tended to blur discussion of crimes against humanity and war crimes and provided very little guidance on the particular elements of the crime.

Lesser war criminals were tried by military tribunals or national courts set up by the Allies under Control Council Law No. 10 in their various zones of occupation. Crimes against humanity had also appeared in some other international law instruments. Post-WW II

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303 Cassese, *op cit*, pp. 106-107.

*304* Jallor, *art cit*, p. 392.

305 M Lippman, 'Crimes Against Humanity' (1997) Vol. 17. No. 2 *B. C. Third World L. J.* 172.

306 'The Hostages Trial'. Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, 8th July 1947 – 19th February 1948, pp. 53-54.

307 United States v von Leeb (1949), 11 Trials of War Criminals Before the Nuremberg Military Tribunals at 497, cited in T Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law*, 567.

jurisprudence and case law from the mixed international tribunals have also illuminated the crimes. Crimes against humanity were included by the ILC in the Draft Code of Crimes Against the Peace and Security of Mankind,[308] as well as affirmed in several United Nations General Assembly Resolutions.[309] The Draft Code too abandoned the armed conflict link. Like the Control Council No. 10 Law, the ICC Statute includes sexual offences: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, enforced disappearance, deportation or forcible transfer of population, and the crime of apartheid.[310]

The Statute of the ICC has discarded the armed conflict nexus, and the discriminatory *animus* except for the crime of persecution. The framework of the large scale or systematic pattern in the context of which a given criminal conduct is committed is the constitutive element of crimes against humanity.[311] Taiwo has articulated the view that the jurisprudence of crimes against humanity is a result of developments in international humanitarian law over the last half of the 20th century with the central aim of protecting civilian populations from grievous harm.[312]

### 3.3 The Contextual Elements of Crimes against Humanity

The contextual element of crimes against humanity exactly corresponds to the circumstances in which they are committed.[313] By Article 7 of the Statute of the ICC, crimes against humanity are constituted by: (a) the enumerated acts (b) committed as part of a widespread or systematic (c) attack directed against a civilian population, (d) with knowledge of the attack and (e) pursuant to or in furtherance of a State or organizational policy to commit such attack. The *actus reus* of a

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308 Draft Code of Crimes against the Peace and Security of Mankind 1996. The chapeau to Article 18 provided that a crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group.

309 For example, United Nations Security Council Resolution 1820, S/RES/1820 19th June 2008.

310 Article 7 ICC Statute.

311 M Frulli, 'Are Crimes against Humanity More Serious than War Crimes?' (2001) Vol. 2. No. 2. *European Journal of International Law*, 334.

312 L O Taiwo, 'International Criminal Court: The United States and the Fight Against Impunity,' (2007 – 2009) Vols. 2 and 3. *Journal of Private and Comparative Law*, 37.

313 Frulli, *art cit*, p. 334.

crime against humanity consists of an attack that is inhumane in nature and character, causing great suffering, or serious injury to body or mental or physical health, committed on a widespread basis against a civilian population.[314]

To actuate the jurisdiction of the ICC, there must be (i) an attack; (ii) a nexus between the specific crimes and the attack; (iii) the attack must be committed against any civilian population; and (iv) the attack must be committed on a widespread or systematic basis. From the wording of Article 7 (1) of the ICC Statute, a differentiation is made between a required macro-criminal context *eo ipso*- the chapeau; and a micro-criminal participation in the crime by the perpetrator. The larger context is codified as 'widespread or systematic attack directed against any civilian population'. The micro-criminal participation is codified through the phrase 'any of the following acts' followed by a catalogue of offences. The notion 'committed as part of…with knowledge of the attack' was incorporated to serve as a nexus between the macro - and micro-criminal sections of crimes against humanity.[315] It is necessary for the prosecution of crimes against humanity that the attack should be 'widespread or systematic'.

An attack is an unlawful act of the kind enumerated in Article 7 (1) of the ICC Statute.[316] Under Article 7 (3) of Introduction to the Elements of Crimes against Humanity adopted by the Preparatory Commission for the International Criminal Court, the acts comprising the attack need not constitute a military attack.[317] Therefore, it includes any mistreatment of the civilian

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314 V Proulx, 'Rethinking the Jurisdiction of the International Criminal Court in Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' (2004) Vol. 19. No. 5. *AM. U. Int'L L. Rev*, 1059-1060.

315 B Kuschnik, 'Humaneness, Humankind, and Crimes Against Humanity' (2010) Vol. 2. *Goettingen Journal of International Law*, 519.

316 Under Article 2 (a) of the ICC Statute, 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

317 International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

population.[318] The attack must be either widespread or systematic, and not necessarily both.[319] Nevertheless, some writers are of the view that the attack should entail a modest degree of scale and organization.[320] 'Widespread' indicates a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.[321] This requirement is satisfied if the attack has been executed on a large scale affecting many people or a multiplicity of victims.[322] In *Prosecutor v Dusco Tadic,* the Appeals Chamber of the ICTY acknowledged that crimes which are unrelated to widespread or systematic attacks on civilians should not be prosecuted as crimes against humanity.[323] Nevertheless, a singular massive act of extraordinary magnitude; would be regarded as being widespread.[324]

In the lexicon, systematic suggests notions of method, routine, organization and regularity.[325] Tribunal jurisprudence on the term is consistent with its lexical usage. In *Prosecutor v Jean-Paul Akayesu*, 'systematic' was defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.[326] There is no requirement that the state must have formally adopted the policy. Nevertheless, there must have been in existence a preconceived plan or policy.[327] Parameters like patterns, continuous commission; use of resources, planning, and political

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318 Prosecutor v Vasiljevic, (ICTY Trial Chamber), 29th November 2002, paras. 29, 30.

319 Prosecutor v Akayesu (ICTR, Trial Chamber) 2nd September 1998, para. 579.

320 Cryer *et al*, *op cit*, p. 194

321 Prosecutor v Seromba, (ICTR Trial Chamber), 13th December, 2006, para. 356.

322 Prosecutor v Kayishema and Ruzindana, (ICTR Trial Chamber), 21st May 1999, para. 123.

323 Prosecutor v Dusko Tadic, (ICTY Appeals Chamber) IT-94-1-A, Judgment of 15th July 1999.

324 Prosecutor v Kordic (ICTY Trial Chamber) 26th February 2001, para. 176.

325 Holt School Dictionary of American English defines 'systematic' as 'arranged or carried on' according to a system; methodical. It defines 'system' as 'orderly method of doing things.' (New York: Holt, Rinehart and Winston Publishers, 1981) p. 824.

326 Akayesu, *supra*, para. 580.

327 Prosecutor v Musema, (ICTR Trial Chamber), 27th January 2000, para. 204. The ILC Draft Code of Crimes defines systematic as meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude random acts that were not committed as part of a broader plan or policy. Article 18, para. 3 of Commentary.

objectives could reveal a pattern or method.[328] An attack; the execution of which the accused participates, directed against any civilian population means a course of conduct involving the multiple commission of the prohibited acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[329]

It is the desire to exclude isolated or random criminal acts from the purview of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian 'population;' and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement.[330] The question whether the lone act of a perpetrator can constitute a crime against humanity, is of interest. In the *Vukovar Hospital Decision*, the Trial Chamber of the ICTY stated that as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity; the acts of the perpetrator must be objectively part of the attack, as opposed to being isolated acts.[331] Where the acts are multiple, they need not be of the same type, and could be a combination of any of the acts in Article 7 (1) of the ICC Statute.

Article 7 (2) of the ICC Statute states that for the purpose of paragraph 1(a), 'attack directed against a population' means a course of conduct involving the multiple commissions of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such an attack. International case law: *The Tadic case*,

328 Cryer *et al*, *op cit*, p. 195.
329 Article 7 (2) (a).
330 Prosecutor V. Dusko Tadic (ICTY Trial Chamber II), IT-94-1-T, Judgment of 7th May 1997.
331 Prosecutor V. Mile Mrksic, Miroslav Radic, and Veselin Sljivancanin (ICTY Trial Chamber II), (Vukovar Hospital Decision), 27th September 2007. para. 438.

asserts that a non-state actor which has de facto control over, or is able to move freely within a defined territory can be the author of the policy.[332]

Although the policy element does not negate the disjunctive test, 'systematic' is a high threshold while 'policy' is a low threshold to be deduced from the manner in which the acts occurred.[333] It is necessary in this regard to reproduce the decision of the ICC on this matter:

> With regard to the term 'organizational', the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as 'organization' for the purposes of Article 7(2) (a) of the Statute. Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values: the associative element, and its inherently aggravating effect, could eventually be satisfied by purely private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by 'territorial' entities or by private groups, given the latter's acquired capacity to infringe basic human values. The Chamber deems it useful to turn to the work of the ILC which determined in the Commentary to the Draft Code adopted during its 43rd session that one shall not confine possible perpetrators of the crimes to public

332 Prosecutor V. Tadic, (ICTY Trial Chamber) Opinion and Judgment, para. 654, 7th May 1997.
333 Cryer *et al*, *op cit*, p. 196.

officials or representatives alone. Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the crimes covered by the draft article; yet the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code. The Chamber finds that had the drafters of the Statute intended to exclude non-State actors from the term 'organization', they would not have included this term in Article 7 (2) (a) of the Statute. The Chamber thus determines that organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population. In the view of the Chamber, the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an

> intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.[334]

The ICC Statute does not provide definitions for the terms 'policy' or 'State' or 'organizational'. However, the Pre-Trial Chambers have established criteria as regards the 'policy' requirement. The following elements have been identified by the Pre-Trial Chambers: (a) it must be thoroughly organized and follow a regular pattern; (b) it must be conducted in furtherance of a common policy involving public or private resources; (c) it can be implemented either by groups who govern a specific territory or by an organization that has the capability to commit a widespread or systematic attack against a civilian population; and (d) it need not be explicitly defined or formalized. Indeed, an attack which is planned, directed or organized, as opposed to spontaneous or isolated acts of violence, will satisfy this particular criterion.[335]

Bassiouni strongly differs on this point. He has asserted that as currently defined in international instruments, crimes against humanity does not specifically include non-state actors within its scope.[336] He contends that the terms 'organizational policy' in Article 7 (2) (a) of the ICC statute, refers to the policies of organizations within a state. Therefore, the phrase 'organizational policy' would include the policy guidance of a sovereign State, but would exclude a non-State actor, or even a transnational terrorist network like Al-Qaeda. Accordingly,

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334 Situation in the Republic of Kenya (Decision Pursuant to Article15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), ICC Pre-Trial Chamber II, No.: ICC-01/09, 31st March 2010, paras. 90-93, pp. 38-40.

335 'Situation in the Republic of Cote d'Ivoire' Decision Pursuant to Article15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire. Pre-Trial Chamber II, No.: ICC-02/11, 3rd October, 2011, ICC-02/11-14 03-10-2011 20/86 NM PT, p. 19.

336 M C Bassiouni, 'Crimes against Humanity: The Case for a Specialized Convention' (2010) Vol. 9. No. 4. *Washington University Global Studies Law Review*, 585.

the only entities legally capable of committing crimes against humanity are the sub-organizational elements of sovereign states such as the Gestapo, the KGB, or the Ministry of Interior.[337] On the other hand, Newton and Scharf have contended that such a conflation of the policy requirement would render the phrase 'state or organizational policy' internally redundant, and there is no evidence in the drafting history of the Rome Statute to support the combination of the two terms into one functional concept.[338]

The existence of a policy can be regarded as a form of premeditation, and could be inferred from the widespread or systematic nature of the proscribed act. To some scholars, it is uncertain whether the state policy requirement in Article 7 means the same thing for both the condition of 'widespreadness' as well as 'systematicity.'[339] An attack may be widespread for example, a crime wave or anarchy following a natural disaster, without being made as a result of a state or organizational policy, whereas, it is difficult to conceive an attack being systematic that was not based on a state or organizational policy.[340] Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. A systematic attack is one that was carried out pursuant to a preconceived plan or policy.[341] Article 7 of the Statute of the ICC demands the attack to have been made in pursuance of a State or

337 W A Schabas, 'State Policy As An Element of International Crimes' (2008) Vol. 98 *Journal of Criminal Law and Criminology*, 973.

338 M A Newton and M P Scharf, 'Terrorism and Crimes Against Humanity', Vanderbilt University Law School Public Law and Legal Theory Working Paper No. 11-49, p. 275.

339 Larry May (2010), 'A Note on State Policy and Crimes Against Humanity', (2010) Oxford Transitional Justice Research Working Paper Series, 10th March, p. 1.

340 *Ibid*.

341 Prosecutor v Kayishema and Ruzindana, (ICTR Trial Chamber), 21st May 1999, para. 123; Prosecutor v Bagilishema, (ICTR Trial Chamber), 7th June 2001, para. 77. However, see Prosecutor v Semanza, (ICTR Trial Chamber), 15th May 2003, para. 329, where it was held as follows: 'systematic' describes 'the organized nature of the attack. The…ICTY recently clarified that the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, but that the existence of such a plan is not a separate legal element of the crime'.

organizational policy.[342] The requirement that the attack must be committed against a 'civilian population' inevitably demands some kind of plan and, the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy.[343] Although there is no requirement that the policy must be adopted formally by the state, there must be some conceived plan or policy.[344] Furthermore, the policy need not be formally adopted, nor expressly declared, nor even stated clearly and precisely.[345]

The protection offered by Article 7 of the ICC Statute extends to 'any' civilian population, including the population of a state partaking in the attack.[346] The term 'population' envisages an attack directed against a large number of civilians, so as to exclude single or isolated acts against individuals. The use of the word 'population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way to show that the attack was in fact directed against a civilian 'population,' rather than against a limited and randomly selected number of individuals.[347] The extension of protection to any civilian collectivity is indeed the defining feature of crimes against humanity.[348]

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342 Cf. Prosecutor v Kunarac (ICTY Appeals Chamber) 12th June 2002, para. 98: 'nothing in this statute or in customary international law…required proof of the existence of a plan or policy to commit these crimes'. It should be noted that the ICTY jurisprudence is reflective of customary international law. Note also, the circumstances surrounding the adoption of the ICC Statute by a significant number of states purporting to codify extant international customary law. Article 10 of the ICC Statute provides that 'nothing in this Part (that is, jurisdiction, admissibility and applicable law) shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than for this Statute'.

343 Prosecutor v Clement Kayishema and Obed Ruzindana, (ICTR Trial Chamber II) ICTR-95-1-T, Judgment of 21st May 1999.

344 Prosecutor v Rutaganda, (ICTR Trial Chamber), 6th December, 1999, para. 69; Prosecutor v Musema, (ICTR Trial Chamber), 27th January 2000, para. 204.

345 Prosecutor v Dusko Tadic (ICTY Trial Chamber II) 7th May 1997 para. 653.

346 Prosecutor v Vasiljevic, (ICTY Trial Chamber), 29th November 2002, para. 33.

347 Prosecutor v Kunarac, Kovac and Vokovic, (ICTY Appeals Chamber), 12th June 2002, para. 90.

348 Cryer *et a*l, *op cit*, pp. 192-193.

### 3.3.1 Mental Elements

The *dolus malus* for crimes against humanity can be broken into two segments. Firstly, the underlying mens rea for the specific crime against humanity, for example, murder, extermination or enslavement; and secondly, the awareness of the context of a widespread or systematic attack directed against a civilian population.[349] The widespreadness or systematicity context differentiates a crime against humanity from commonplace criminality or war crimes.[350] Furthermore, crimes against humanity do not require special intent, that is; they differ from genocide in the sense that no *dolus specialis* to destroy members of a particular group is required in case of crimes against humanity.[351] Generally, criminal responsibility arises only when the material elements of a crime are committed with intent and knowledge.[352]

Article 30 (2) of the ICC Statute defines 'intent' as a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Werle and Bung have succinctly stated that 'the perpetrator must act with intent. He must act with knowledge of the attack on the civilian population and that his action is part of this attack. Discriminatory element is required only for persecution'.[353] Knowledge need not be proved directly, as constructive knowledge satisfies the knowledge requirement.[354] Furthermore,

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349 Prosecutor v Tadic, *supra*, para. 248.

350 Prosecutor v Tadic, *supra*, para. 656; Prosecutor v Semanza (ICTR Trial Chamber) I5th May 2003 para. 332. See also R v Finta (1994) 1 SCR 701: 'The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity'.

351 VJ Proulx, 'Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes against Humanity?' (2004) Vol. 19. No. 5. *American University International Law Review*, 1043.

352 Article 30 (1), Statute of the ICC.

353 G Werle and J Bung, *op cit*, p. 3.

354 R G Mason Jr, 'Issue: Elements of Crimes Against Humanity,' Memorandum for the Office of the Prosecutor Extraordinary Chambers in the Courts of Cambodia' (2010) Case Western Reserve University School of Law, Spring Semester.

knowledge may be inferred from relevant facts and circumstances.[355] The perpetrator need not share in the purpose or goals of the overall attack, but he should be aware that there is an attack on the civilian population and that his acts comprise part of that attack; or he must at least take the risk that his acts are part of the attack. It is enough for him to willingly accept, or knowingly take the risk of participating in the implementation of the attack.[356] The mental requirement relates to knowledge of the context, not motive.

### 3.4 The Underlying Offences

Under Article 7, the definition of crimes against humanity consists of two layers. The first layer requires the crime against humanity to have been committed as part of a widespread or systematic attack directed against any civilian population. The second layer lists 10 specific or underlying crimes, and a residual category of 'other inhumane acts' which qualify as crimes against humanity when committed in the context of a widespread or systematic attack on any civilian population.[357] There is no indication that the crimes are listed in their present order for any particular reason. The definition of crimes against humanity includes certain prohibited acts when committed in the necessary context. The list of prohibited acts has gradually evolved over the decades. The first list, appearing in the Nuremberg Charter, comprised murder, extermination, enslavement, deportation, persecution and other inhumane acts. Shortly thereafter,

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355 Prosecutor v Blaskic, (ICTR Trial Chamber), 3rd March 2000, para. 258-259.

356 G Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) Vol. 43 *Harv. Int'l L.J*, 261. At p. 262 Mettraux stated that 'knowledge of the attack and the perpetrator's awareness of his participation may be inferred from circumstantial evidence, examples of which include the accused's position in the military or civilian hierarchy, his voluntary assumption of an important role in the broader criminal campaign; his participation in the violent take over of enemy villages; his acts of capture, detention, rape, brutalization, or murder, his presence at the scene of the crime; his membership in a group involved in the commission of such crimes; his utterances and references to the superiority of his group over the enemy group; and the consistency and predictability of is criminal acts. The perpetrator's knowledge may also be inferred from public knowledge based on the extent of media coverage, the scale of the acts of violence, and the general historical and political environment in which the acts occurred. The indicia of knowledge should be assessed as a whole'.

357 Prosecutor v Muvunyi, (ICTR Trial Chamber), 12th September 2006, para. 511.

Control Council Law No. 10 added rape, imprisonment and torture. The ICTY and ICTR Statutes followed the same expanded list.

### 3.4.1 Murder

The underlying crimes of murder and extermination are two different but closely prohibited conducts involving taking the lives of innocent human beings. Most legal systems prohibit the crime of murder, which is considered to be the embodiment of crimes against humanity. Perhaps, the most important right available to man is the right to life; the right of one to exist without the unlawful deprivation of the sacred gift of existence.[358] Murder is often thought of as the 'unlawful killing of another human being with malice afterthought.[359] The 'unlawful' act of killing distinguishes murder from killings that are done within the boundaries of law, such as capital punishment, justified self-defence, or the killing of enemy combatants by lawful combatants as well as causing collateral damage to non-combatants during a war.[360]

Cryer *et al* have expressed the view that there is a 'general conformity between Tribunal jurisprudence and the ICC elements that murder refers to unlawfully and intentionally causing the death of a human being'.[361] In *Prosecutor* v *Akayesu*, the Trial Chamber of the ICTR defined murder as the unlawful, intentional killing of a human being. The requisite elements of murder are: (1) the victim is dead; (2) the death resulted from an unlawful act or omission of the accused or a subordinate; (3) at the time of the killing, the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely

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358 D F Atidoga, 'Genocide and Human Rights Violations: An Examination of the Armenian Genocide' (2011) Vol. 2. No. 2. *Human Rights Review: An International Human of Rights Journal (An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, Nigeria and the National Human Rights Commission of Nigeria*), 53.

359 'Murder'. <https://www. en.m.wikipedia.org/wiki/Murder > accessed on 20 February 2015.

360 *Ibid*.

361 Robert Cryer *et al*, *op cit*, p. 201.

to cause the victim's death, and is reckless whether death ensues or not.[362] Furthermore, for an act to qualify as murder, it is required that (1) the perpetrator killed one or more persons; (2) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[363]

In the case of Pius Nwaoga v The State, the Supreme Court of Nigeria per Sir A Ademola, CJN, decided that the deliberate and intentional killing of an unarmed person living peacefully inside the Federal Territory…is a crime against humanity, and even if committed during civil war, is in violation of the domestic law of the country and must be punished.[364] With due respect to the apex court, it does however appear that the term 'crime against humanity' had been used in a loose linguistic sense, and not in its technical sense. The victim was not a civilian; he did not belong to the adversary, but was a rebel soldier in the Biafran army; who had been

362 Prosecutor v Akayesu, supra, para. 589. See also Prosecutor v Rutaganda, (ICTR Trial Chamber), 6th December 1999, para. 136-140.

363 Article 7 (1) (a) of the ICC Elements of Crimes.

364 Pius Nwaoga v The State (1972) LPELR-SC.345/70. In this case, the appellant was charged with another, for the murder of Robert Ngwu at Ibagwa Nike, on 20th day of July, 1969. He was convicted and sentenced to death while the 2nd accused was discharged. He then appealed to the Supreme Court. The incident which led up to the killing of the deceased happened during the civil war in the country. The appellant joined the rebel forces known as the Biafran Army. He joined as a private and rose to become a lieutenant. He was attached to the BOFF (Biafran Organization of Freedom Fighters). He was deployed to Nike and at that time, Nike was in the hands of the Federal troops. The deceased was also a soldier in the rebel forces; he and the appellant were both natives of Ibagwa Nike and well-known to each other. Before July 1969, the appellant was posted in command of a rebel company to a town called Olo, near Ibagwa Nike, with the operational headquarters of his brigade at Atta. In July 1969, the appellant was summoned to Atta. There he was instructed to lead Lieutenant Ngwu and Lieutenant Ndu to Ibagwa Nike and to point out the deceased to them. He was told that as he knew the area well and also knew the deceased, his duty was to identify the deceased to the two lieutenants who would eliminate him. His offence was that the deceased was given £800 to re-open and operate the Day Spring Hotel in Enugu for the benefit of the members of the BOFF, but he had diverted the money to the operation of his contract business and had indeed undertaken a contract with the Federal Government to carry out repairs to the Enugu Airfield which had been damaged by rebel aircraft. Major Nwoye who gave him the instructions told him the instructions had come down from the 'State House'. The appellant in obedience to the instructions given him took the two men to Nike. They went to Robert Ngwu's (deceased's) house and there, in the presence of the appellant, one of the lieutenants killed Robert Ngwu and another. They all ran away. The appellant was later apprehended, tried and convicted.

killed by other rebel soldiers from the Biafran army. The researcher is of the opinion that it was simply a case of murder under national law.[365]

Except for differences in contextual elements, the *actus reus* of the crime against humanity of murder and that of the war crime of willful killing are the same; i.e., that 'the perpetrator killed one or more persons'.[366] A single murder may constitute a crime against humanity if it is perpetrated within the context of a widespread or systematic attack.[367] An accused can be convicted on the basis of his responsibility as a commander or superior.[368] It is not necessary for the prosecution to establish that the accused personally committed the killing.[369] The death may result from the act or omission of the accused 'or a subordinate," and the intent may be that of the accused or subordinate'.[370]

### 3.4.2 Extermination

The crime against humanity of extermination bears a close semblance to the crime against humanity of murder and the crime of genocide. The most discernible difference between extermination and murder is one of scale.[371] Extermination is a crime which by its very nature is directed against a group of individuals. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, extermination covers situations in which a group of individuals who do not share any common

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365 However, note the view of the ICTY that war crimes can be committed against a country's own nationals. Thusly, the ICTY has stated that the nationality of the victims is irrelevant for the purposes of Article 5 of the Statute (dealing with crimes against humanity). Historically, this was one of the main distinguishing factors between war crimes and crimes against humanity: whereas war crimes could only be committed against enemy nationals (combatants and civilians), crimes against humanity could also be committed against the state's own population. This factor is now obsolete for war crimes, as the jurisprudence has accepted that war crimes can also be committed against a state's own nationals. It stays, however, relevant to an understanding of the difference between the two categories of crimes. See Prosecutor v Mile Mrksic, Miroslav Radic, and Veselin Sljivancanin (ICTY Trial Chamber) 27th September 2007, para 441.

366 Elements of Crimes, Article 8 (2) (a) (i).

367 Prosecutor v Athanase Seromba, (ICTR Trial Chamber), 13th December 2006, para. 357.

368 Article 28, Statute of the ICC.

369 Prosecutor v Ntakirutimana and Ntakirutimana, (ICTR Appeals Chamber), 13th December 2004, para. 546.

370 Prosecutor v Akayesu, *supra*, para. 589.

371 Prosecutor v Bisengimana, (ICTR Trial Chamber), 13th April 2006, para. 87.

characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared.[372]

Tribunal jurisprudence indicates that the necessary *actus reus* underlying the crime of extermination consists of any act, omission, or combination thereof, which contributes directly or indirectly to the killing of a large number of individuals.[373] There must in fact, be a large number of killings, and the attack must be directed against a group, such as a neighbourhood, in contrast to any specific individuals within it.[374] However, the expressions: 'large number' or 'on a large scale' do no suggest a numerical minimum. The crime should be determined on a case-by-case basis using a common sense approach as there is no conclusive authority on how many murders constitute extermination.[375] Furthermore, the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death.[376] In *Prosecutor v Nahimana, Barayagwiza and Ngeze*, the Appeals Chamber of the ICTR held that 'except for extermination, a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity'.[377]

The crime of extermination clearly includes indirect means of causing death because the ICC Statute expressly incorporates the phrase 'inflicting conditions of life calculated to bring about the destruction of part of a population'.[378] By Article 7 (1) (b) of the ICC Elements of Crimes, the elements of the crime against humanity of extermination are that: (1) the perpetrator

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372 Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, 1996. Report of the International Law Commission on the Work of its Forty-Eight Session, United Nations, 2005, p. 48.

373 Prosecutor v Seromba, (ICTR Appeals Chamber), 12th March 2008, para. 189.

374 Prosecutor v Kamuhanda, (ICTR Trial Chamber), 22nd January 2004, para. 694.

375 Prosecutor v Kamuhanda, supra, para. 692. See also Prosecutor v Gacumbitsi, (ICTR Trial Chamber), 17th June 2004, para. 309.

376 Prosecutor v Ntakirutimana and Ntakirutimana, (ICTR Appeals Chamber), 13th December 2004, para. 522.

377 Prosecutor v Nahimana, Barayagwiza and Ngeze, (ICTR Appeals Chamber), November 28, 2007, para. 924.

378 Articles 7 (2) (b) ICC Statute and 7 (1) (b) of the ICC Elements of Crimes.

killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population;[379] (2) the conduct constituted, or took place as part of, a mass killing of members of a civilian population; (3) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (4), the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (b) (1) of the ICC Elements of Crimes as well as Article 7 (2) (b) of the ICC Statute were adopted from the Genocide Convention of 1948.[380] There are conflicting judicial decisions on whether responsibility for a single killing is sufficient for a finding of extermination. Some cases indicate that a single killing is not sufficient,[381] while others indicate that a single killing is sufficient for a finding of extermination provided that the perpetrator is aware that that his acts or omissions form part of a mass killing event, namely, mass killings that are proximate in time and place and thereby are best understood as a single or sustained attack.[382] The ICC Statute adopts the latter view.[383] Whatever be the case, killing a particularly large number of victims can be an aggravating circumstance in relation to the sentence for the crime.[384]

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379 Article 7 (2) (b) of the ICC Statute provides that 'extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

380 Article 2 (c) of the Genocide Convention of 1948 provides that '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 such as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.

381 Prosecutor v Gacumbitsi, (ICTR Trial Chamber), 17th June 2004, para. 309. See also Prosecutor v Ntagerura, Bagambiki and Imanishimwe, (ICTR Trial Chamber), 25th February 2004, para. 701.

382 Prosecutor v Kamuhanda, (ICTR Trial Chamber), 22nd January 2004, paras. 692-94. See also Prosecutor v Kajelijeli, (ICTR Trial Chamber), 1st December 2003, paras, 890-93.

383 See ICC Elements, Article7 (1) (b), Element 1.

384 Prosecutor v Ndindabahizi, (ICTR Appeals Chamber), 16th January 2007, para. 135.

### 3.4.3 Enslavement

The lexical meaning of enslavement is to claim ownership of somebody: to take somebody prisoner and claim legal ownership of that person and his or her labour.[385] Slavery was widely accepted in historical societies, but has now been prohibited in all countries. Nevertheless, slavery continues through the practices of debt bondage, serfdom, domestic servants kept in captivity, certain adoptions in which children are forced to work as slaves, child soldiers, and forced marriage.[386] The first basic definition of slavery is given by Article 1 (1) of the Slavery Convention of 1926 which provides that slavery is 'the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised'.[387] There is consistency between this definition and that offered by Article 7 (2) (c) of the ICC Statute[388] and the ICTY Trial Chamber in *Prosecutor v Kunarac, Kovac and Vukovic.*[389]

Slavery may be viewed in the traditional context of chattel slavery in which people are treated as property or through other practices involving the exercise of the powers of ownership over persons. The 'commoditization' of persons, which is the least prevalent form of slavery today, is reminiscent of the Trans-Atlantic slave trade. The slave trade 'includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of

385 Encarta Dictionaries, Microsoft Encarta 2009, Microsoft Corporation.

386 BBC. 'Modern Day Slavery' < http://www.bbc.co.uk/ethics/slavery/modern/modern_1.shtml#section_2> accessed on 2nd March 2015.

387 See also Article 7 (a) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, entry into force, 30th April 1957.

388 Enslavement means 'means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.

389 Prosecutor v Kunarac, Kovac and Vukovic, (ICTY Trial Chamber), February 22, 2001, para. 539: 'The Trial Chamber finds that enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the rights of ownership over a person'.

disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.[390]

Article 7 (1) (c) of the ICC Elements also mentions 'purchasing, selling, lending or bartering' for the crime of enslavement. In addition, human trafficking, particularly in women and children, is mentioned by Article 7 (2) (c) of the ICC Statute; and 7 (1) (c) of the Elements of Crimes as a form of enslavement. However, the exact definition of trafficking beyond the attachment of ownership over a person or similar deprivations of liberty is not articulated in the ICC Statute.[391] A number of conventions forbid human trafficking. The 1979 Convention on the Elimination of All Forms of Discrimination against Women imposes an obligation on states 'to suppress all forms of traffic in women and exploitation of prostitution of women'.[392] Similarly, the 1989 Convention on the Rights of the Child prohibits trafficking in children.[393] The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others further outlaws traffic in persons for the purpose of gratifying passion.[394] Unlike the 1949 Convention, the earlier two do not require a connective between trafficking and prostitution.

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390 Article1 (2), Slavery Convention, 1926.

391 J Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity under the Rome Statute' (2011) Columbia Law School Gender and Sexuality Online (GSL online), 6. <http:wwww. blogs.law.columbia.edu/…/Jane-Kim_GS…> accessed on 3rd March 2015.

392 Article 6, United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979. Entry into force 3rd September 1981.

393 Article 35: States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form. United Nations Convention on the Rights of the Child, 20th November 1989. Entered into force on 2nd September 1990.

394 The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2nd December 1949. Entry into force: 25th July 1952. Article 1: The Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person. Article 2: The Parties to the present Convention further agree to punish any person who: (1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel; (2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

It is worth considering that footnote 11 of Article 7 (1) (c) of the ICC Elements on enslavement incorporates 'reducing a person to a servile status' as defined in the 1956 Supplementary Slavery Convention. A servile status includes the practices of serfdom, forced marriage and child exploitation.[395] Forced labour is another form of slavery. The ICTY in Prosecutor v Milorad Krnojelac stated that 'there is a principle which states that the work required of a person in the ordinary course of lawful detention is not regarded as forced or compulsory labour.'[396] In order to further ascertain whether labour is forced, reference may be had to the following treaties: the Third Geneva Convention 1949;[397] the ICCPR[398] and the Forced or Compulsory Labour Convention which generally prohibit compulsory labour but provide exceptions.[399]

Furthermore, in the *Krnojelac case*, the ICTY Appeals Chamber held that the overcrowding of the solitary confinement cells in which the detainees were so packed that they were unable to move around or lie down, the starvation and its principal effects in terms of weight loss, the widespread nature of the beatings and mistreatment and the psychological abuse linked to the detention conditions and mistreatment constitute circumstances particularly

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395 Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

396 Prosecutor v Milorad Krnojelac, (ICTY Appeals Chamber), 17th September 2003, para. 200, p. 90.

397 Articles 49-57 of the Geneva Convention III, provides the general regulations for the labour of prisoners of war.

398 The International Covenant on Civil and Political Rights, 1966. Article 8 (3) (a): No one shall be required to perform forced or compulsory labour, (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court. *(c)* For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) Any work or service, not referred to in sub-paragraph *(b),* normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.

399 Article 2 (1): For the purposes of this Convention, the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. Article 2 (1) Forced or Compulsory Labour Convention.

indicative of the discriminatory character of the acts of forced labour imposed upon the non-Serb detainees.[400] A miscellany of factors may indicate the crime of enslavement. Tribunal jurisprudence is also very handy here. In Prosecutor v Kunarac, the ICTY Trial Chamber was of the view that enslavement includes elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[401]

### 3.4.4 Deportation or Forcible Transfer of Population

Deportation and population transfer are closely associated with political problems arising from the relation between territory and demographics. A primary objective of population transfer is to render a state homogenous in ethnic, religious or linguistic composition. Often, the affected population is transferred by force to a distant locality, perhaps, not suited to their way of life, causing them substantial harm.[402] This large-scale movement of people from one region to another is a type of forced migration.

Such transfers may occur on account of: (i) international armed conflicts; (ii) internal armed conflicts, including war, insurrection or civil disobedience, whether or not, involving a

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400 Prosecutor v Milorad Krnojelac, *supra*, para. 201, p. 91.

401 Prosecutor v Kunarac, Kovac and Vukovic, *supra*, para. 542, p. 193.

402 'Population Transfer'. < https:///www.en.m.wikipedia.org/wiki/Population_transfer > accessed on 30th March 2015.

State actor; (iii) deportations, expulsions or evictions under the guise of national security or other military imperative; (iv) territorial changes, with or without population exchange treaties; (v) demographic manipulation preceding or consequent upon the formation of a new state as part of the consolidation or integration of statehood, accompanied by measures aimed at either balancing population density or at ethnic homogenization, or separatist apartheid tendencies; (vi) punitive transfers within and across a state border; (vii) transfers purportedly for development or other public purpose; (viii) induced degradation of the environment calculated to cause migration away from specific areas; (ix) slavery or conditions of slavery, including forced or compulsory labour; and (x) the implantation of settlers.[403]

Although there is no treaty at present dedicated to the subject of population transfer, the United Nations Sub-Committee on the Prevention of Discrimination and the Protection of Minorities has recommended the adoption of an instrument criminalizing forced population transfer, and has to this end, prepared a draft Declaration on Population Transfer and Implantation of Settlers.[404] Prior to the coming into force of the Statute of the ICC, international criminal laws did not make a strict distinction between the crime of deportation, involving the forced removal of people from one country to another, and the crime of forced population transfer, which refers to the compulsory movement of people from one area of a country to another area within the same country.[405]

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403 United Nations Economic and Social Council. Freedom of Movement, Human Rights and Population Transfer, Final Report of the Special Rapporteur, Mr. Al-Khasawneh, E/CN.4/Sub.2/1997/23, 27th June 1997.

404 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Session, Distr. GENERAL E/CN.4/Sub.2/1997/23 27th June 1997. See for instance, Article 9.

405 M C Bassiouni, *Crimes Against Humanity in International Law*, (The Hague: Kluwer Law International, 1999) p. 312.

For deportation or forcible transfer of population to be considered a crime, they have to be arbitrary, that is, committed without grounds permitted under international law.[406] Deportation has been recognized as a crime against humanity in the major international criminal treaties, including the Charters of the IMT Nuremberg,[407] the IMT Tokyo,[408] the Allied Control Council Law No. 10,[409] the ICTY[410] and the ICTR.[411] Similarly, the Fourth Geneva Convention, now considered a part of customary international law, prohibits the mass movement of people out of, or into territory under belligerent military occupation.[412] Traditionally, deportation was a war crime, but was subsequently extended to crimes against humanity in order to protect civilians of the same nationality as the perpetrator. However, debate lingers on the notion of deportation or forcible transfer, that is, whether the two should be treated together or distinctly, as the two concepts have been conflated by most instruments.[413]

In Article 7 (2) (d) of the ICC Statute, 'deportation or forcible transfer of population' is defined as the 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'. The Commentaries on Article 18 (g) of the Draft Code of Crimes against the Peace and Security of Mankind criminalizing the crime against humanity of arbitrary deportation or forcible transfer of population assert that 'deportation implies expulsion from the national territory' while

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406 F Andreu-Guzman, 'Criminal Justice and Forced Displacement: International and National Perspectives' (2013) Research Brief, Brookings-LSE Project on Internal Displacement, p. 2.

407 Article 6 (c), Charter of the IMT Nuremberg, 1945.

408 Article 5 (c), Charter of the IMT Tokyo, 1946.

409 Article II (1) (c), Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20th December 1945.

410 Article 5 (d), Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993.

411 Article 3 (d), Statute of the International Criminal Tribunal for Rwanda, 1994.

412 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12th August 1949. Article 49: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. …The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'.

413 G Acquaviva, 'Forced Displacement and International Crimes' (2011) Legal and Protection Policy Research Series, United Nations High Commissioner for Refugees.

'forcible transfer of population could occur wholly within the frontiers of one and the same state'.[414]

The ICTY Appeals Chamber held in the *Stakic case* that deportation requires 'the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* State border or, in certain circumstances, *de facto* border'.[415] On the other hand, forcible transfer exists where there is a forced displacement of persons within the territory of one State. Most tribunal jurisprudence is consistent with this view.[416] As used in the ICC statute, force is not restricted to physical force, but includes threat of force, psychological and other means of rendering displacement involuntary.[417] Therefore, forced displacement does not occur if a group flees of its own volition to escape a conflict zone. On the other hand, if the group flees to escape deliberate violence and persecution, they would not be exercising a genuine choice.[418] Notwithstanding the fact that international law prohibits any form of forced displacement, there are exceptions to this rule. Forced displacement may be justified to protect national security, public order, or public health.[419]

### 3.4.5 Imprisonment

The prohibition of arbitrary detention and imprisonment has been recognized in both times of peace and armed conflict. Yet, the crime against humanity of imprisonment appeared in only the Control Council Law No. 10,[420] the Statutes of the ICTY[421] and the ICTR,[422] but not in the

414 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, 1996' Report of the International Law Commission on the Work of its Forty-Eight Session, United Nations, 2005, p. 49.
415 Prosecutor v Stakic (ICTY Appeals Chamber), 22nd March 2006, para. 278.
416 Prosecutor v Krstic (ICTY Trial Chamber) 2nd August 2001 para. 521.
417 ICC Elements of Crimes, Article7 (1) (d).
418 Prosecutor v Krstic, *supra*, para. 530.
419 Article 5, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12th August 1949.
420 Article 2 (1) (c), Control Council Law No. 10.
421 Article 5 (e), Statute of the ICTY.
422 Article 3 (e), Statute of the ICTR.

Nuremberg or Tokyo Charters. As a crime against humanity, imprisonment refers to arbitrary or otherwise unlawful detention or deprivation of liberty.[423]

It is not every minor infringement of liberty that constitutes the material element of imprisonment as a crime against humanity. The deprivation of liberty must be severe or of similar gravity as the other crimes enumerated in Article 7 of the ICC Statute. The deprivation must be arbitrary or without regard to the due process of law.[424] This excludes lawful instances of detention such as imprisonment after lawful arrest, post-trial conviction, lawful deportation or extradition processes, quarantine, and in armed conflict situations, assigned residence, internment on security grounds and internment of prisoners of war.[425] However, justified imprisonment may later become arbitrary if the legal basis for it ceases to exist, and the detention continues. It is uncertain for how long the victim should have been confined to amount to imprisonment or severe deprivation of liberty.

In assessing whether the imprisonment constitutes a crime against humanity, the court may take into account whether the initial arrest was lawful, by considering, for example, whether it was based on a valid warrant of arrest, whether the detainees were informed of the reasons for their detention, whether the detainees were ever formally charged, and whether they were informed of any procedural rights. The court may also consider whether the continued detention was lawful. Reliance cannot be placed upon national law to justify a deprivation of liberty, if such national law violates international norms.[426] Article7 (1) (e) of the ICC Statute refers to 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of

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423 Prosecutor v Ntagerura, Bagambiki, and Imanishimwe, (ICTR Trial Chamber), 25th February 2004, para. 702.

424 Prosecutor v Kordic (ICTY Trial Chamber) 26th February 2001 para. 302.

425 Articles 5, 42 and 43 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12th August 1949.

426 Prosecutor v Ntagerura, Bagambiki, and Imanishimwe, *supra*.

international law'. Furthermore, the ICC Elements of Crimes alludes to the 'gravity of the conduct' being such as to violate fundamental rules of international law. This would have the effect of excluding minor procedural irregularities from the ambit of imprisonment. The material elements of arbitrary imprisonment are comparable to the material elements for the war crime of unlawful confinement.[427] The key difference between the two is the contextual element of armed conflict for war crimes or widepsreadness or systematicity for crimes against humanity.

### 3.4.6 Torture

Torture appeared as a crime against humanity in the Allied Control Council Law No. 10 and the charters or statutes of other international criminal courts.[428] Torture or inhuman treatment has been denounced by a plethora of treaties and national systems of law, for instance, the Universal Declaration of Human Rights,[429] the African Charter of Human and Peoples Rights,[430] the Geneva Conventions and the Additional Protocols,[431] the Convention Against Torture,[432] and the Nigerian Constitution.[433] The prohibition of torture has evolved to become a norm of customary international law, attaining the status of *jus cogens*.[434] Torture as a crime against humanity refers to the intentional infliction of severe physical or mental pain or suffering for prohibited purposes

427 ICC Elements of Crimes, Article 8 (2) (a) (vii)-2, War Crime of Unlawful Confinement.

428 Article II (1) (c), Allied Control Council Law No. 10; Article 5 (f), Statute of the ICTY 1993.

429 Article 5, Universal Declaration of Human Rights 1948.

430 Article 5, African Charter on Human and Peoples' Rights, 1981. Entered into force 21st October 1986.

431 Article 3 Common to the four Geneva Conventions of 1949; Article 32 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949; Article 75 (2) (a) and (e) of Protocol Additional to the Geneva Convention of 12th August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8th June 1977; and Article 4 (2) (a) and (h) Protocol Additional to the Geneva Conventions of 12th August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8th June 1977.

432 Article 2, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. Entered into force on 26th June 1987.

433 Section 34 (1) of the 1999 Constitution of the Federal Republic of Nigeria.

434 Rika de Wet (2004), 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law' (2004) Vol. 15. No. 1 *European Journal of International Law*, 97-98.

including: obtaining information or a confession; punishing, intimidating, or coercing the victim or a third person; or discriminating against the victim or a third person.[435]

Article 7 (1) (f) of the ICC Elements of Crimes requires the victim of torture to have been 'in the custody or under the control of the perpetrator'. Article 7 of the ICC Statute excludes from the crime of torture, pain or suffering arising only from, inherent in or incidental to, lawful sanctions. As the prohibition against torture is a peremptory legal norm deemed fundamental enough to preclude State contravention, 'lawful' under national law must not be in violation of international law.[436] The definition of torture in Article 7 of the ICC Statute[437] is substantially consistent with the definition of torture in Article 1 of the Convention Against Torture.[438]

Nevertheless, there are several significant differences between the definitions of torture in the ICC Statute and the Convention Against Torture (CAT). The CAT requires the suffering to have been 'inflicted by or at the instigation of or with the consent or acquiescence of a 'public official or other person acting in an official capacity'. Early tribunal jurisprudence adopted this approach.[439] However, subsequent decisions of international criminal courts discarded this view.

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435 Prosecutor v Ntagerura, Bagambiki, and Imanishimwe, *supra*, para. 703.

436 L F Rouillard, 'Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum' (2005) Vol. 21. No. 1 *American University International Law* Review, 17.

437 Article 7 (2) (e) ICC Statute: 'Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'.

438 Article 1 of the Convention Against Torture: 'Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

439 Prosecutor v Akayesu, *supra*, paras. 593-95: The Tribunal interpreting the word 'torture' in accordance with the definition in CAT stated that an essential element of torture was that 'the perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity'.

In *Semanza,* the Trial Chamber of the ICTR held that in *Akayesu*, the Trial Chamber relied on the definition of torture found in the Convention Against Torture.

The ICTY Appeals Chamber has since explained that while the definition contained in the Convention Against Torture is reflective of customary international law, it is not identical to the definition of torture as a crime against humanity. The ICTY Appeals Chamber has confirmed that, outside the framework of the Convention Against Torture, the 'public official' requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity.[440] In consequence, the Chamber rejected the 'public official' requirement. As opposed to the ICC Statute, the CAT is a human rights treaty which seeks to hold the State accountable for torture. Furthermore, the ICC Statute and the Elements of Crimes do not require the public official nexus.

Secondly, the 'purpose' of torture is a specific requirement under the CAT. That is, 'for such purposes as obtaining from him or a third person, information or a confession…' Many authorities and tribunal jurisprudence regard the purpose element as distinguishing torture from inhuman treatment, which is regarded as being less severe. However, Article 7 of the ICC Statute did not include a purpose element. In *Akayesu,* the ICTR held that the perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes :(a) to obtain information or a confession from the victim or a third person; (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them; (c) for the purpose of intimidating or coercing the victim or the third person; and (d) for any reason based on discrimination of any kind.[441] The attitude of the ICC Statute with respect to the crime against humanity of torture may be contrasted with the

[440] Prosecutor v Semanza, *supra,* paras. 342-343.

[441] Prosecutor v Akayesu, *supra,* paras. 593-595. See also Prosecutor v Kunarac, *supra,* para. 155.

war crime of torture where Article 8 (2) (a) (ii)-1 of the Elements of Crimes imposes the requirement that 'the perpetrator inflicted pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.'

Another equally persuasive view is that the distinction between torture and inhuman or degrading treatment derives principally from the difference in the intensity of the suffering inflicted. The European Court of Human Rights has held that the term torture attaches 'a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'.[442] In human rights instruments, only deliberate inhuman treatment causing very serious and cruel suffering ranks as torture. This appears to be the route taken by Article 7 of the ICC Statute, by not including a purpose element. Indeed, footnote 14 to Article 7 (1) (f) of the ICC Elements of Crimes explicitly states that 'it is understood that no specific purpose need be proved for this crime'. Rape can also constitute the crime against humanity of torture if the elements of torture are satisfied. In *Akayesu,* the ICTR observed that like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity'.[443] As earlier stated, the link with public official or official capacity in the ICTR jurisprudence is not a requirement of the ICC Statute.

### 3.4.7 Rape and Sexual Violence

Rape which is endemic during peace is aggravated in times of conflict. Besides exerting power and control over the victim, rape serves as a means of humiliating and destroying groups,

[442] The Republic of Ireland v The United Kingdom. Series A, No. 25. ECHR 1 para. 167, 18th January 1978.
[443] Prosecutor v Akayesu, *supra,* paras. 597, 687.

including families and tribes.[444] Article 7 (1) (g) of the ICC Statute constitutes the crime against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. The ICC list is an improvement on the renditions of sexual crimes in the statutes of past criminal tribunals. For example, the Allied Control Council Law No. 10 mentioned only the crime against humanity of rape.[445] Thusly, the crimes envisaged by Article 7 of the ICC Statute embody a wider categorization of sexual related crimes than any other similar convention in international law.[446] On account of the fact that rape was not an issue in the Nuremberg Trials, which in many ways set the precedent for international criminal law, it took much longer for rape to become a part of international criminal law.[447] However, there is a general prohibition of rape and forms of sexual assault in the Geneva Conventions of 1949.[448] However, rape was never considered or prosecuted as a crime against humanity under international humanitarian law before the establishment of the ICTY and the ICTR in 1993 and 1994 respectively.[449] The Charter of the International Military Tribunal (IMT) of 1945, and the Charter of the International Military Tribunal of the Far East (IMTFE) of 1946, had excluded rape from crimes against humanity.

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444 L A Nessel, 'Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women that Flee' (2007) Vol. 15. No 1. *Michigan State Journal of International Law,* 104.

445 Article II (1) (c), Allied Control Council Law No. 10.

446 T F Acuna (2004) 'The Rome Statute's Sexual Related Crimes: An Appraisal under the Light of International Humanitarian Law' (2004) Vol. 39. *Revista IIDH*, 196.

447 L Cinder, 'Rape as a War Crime and Crime Against Humanity: The Effect of Rape in Bosnia-Herzegovina and Rwanda on International Law' A Paper presented at the Alabama Political Science Association Conference held at Auburn University, 30th -31 March, 2012, p. 2.

448 Article 27 Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Article76 (1) Additional Protocol I, 1977; and Article 4 (2) (e) Additional Protocol II 1977.

449 Article 5 of the ICTY Statute states that the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhuman acts. This provision is repeated in Article 3 of the ICTR Statute.

Rape is considered to be the most serious manifestation of sexual assault. Rape is traditionally defined in the penal systems of States in terms of physical invasion of a sexual nature, and the absence of consent or the presence of coercion.[450] The crime of rape has two components: the physical invasion of a sexual nature, and the absence of consent or the presence of coercion. The first of these elements was described in the *Akayesu case* where the ICTR held 'that rape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts'.[451] The tribunal proceeded to define rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.

The ICTR Trial Chamber had therefore created an expansive catchment for the sexual acts regarded as rape. The ICTR's definition includes forced oral or anal sex, as well as the insertion of a finger or tongue into the vagina. In contrast, under the traditional common law approach, those acts are classified as various sexual offenses, including sodomy or some other form of sexual violence.[452] Notably however, the *Akayesu* case did not analyze the elements of lack of consent. Although *mens rea* is not included within the elements of the crime, Article 30 of the ICC Statute requires that the 'material elements are committed with intent and knowledge'.

A slightly different description was offered by the Trial Chamber of the ICTY in the *Furundzija* case where it declared the constituents of rape as: (i) the sexual penetration, however

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450 Section 357 of the Nigerian Criminal Code Act, Cap 28, LFN 2004 defines rape as any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman by impersonating her husband, is guilty of an offence which is called rape.

451 Prosecutor v Akayesu, supra, paras. 597, 598 & 688.

452 P Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) Vol. 54. Issue 3, *Boston College Law Review*, 1210.

slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person'.[453] While the Trial Chamber I of the ICTR explicitly rejected a mechanical definition of rape as proposed by the prosecution and found in many national laws, the Furundžija's conceptual formulation stated the body parts in minute detail.[454] The definition of rape in the ICC Statute is gender-neutral, as it also is in the *Akayesu case*.[455] Sexual violence is a gendered issue affecting both men and women.[456]

Under Article 7 (1) (g)-1 of the Elements of Crimes, it is required that the perpetrator invaded the body of a person by conduct resulting in penetration, however, slight, of any part of the victim or of the perpetrator with a sexual organ, or the anal opening of the victim with any object or any other part of the body. Furthermore, the ICC Elements of Crimes requires the presence of coercion. ICC Elements, Article 7 (1) (g)-1, Element 2 states that the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. The force requirement is the second element of rape.

The ICTY and ICTR Statutes did not list sexual slavery as a particular crime against humanity, distinct from the crime of enslavement.[457] Sexual slavery is characterized by

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453 Prosecutor v Anto Furundzija, (ICTY Trial Chamber) 10th December 1998, para. 185.

454 H M Zawati, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity' (2007) Vol. 17. No. 1. *Torture*, 32.

455 Footnote 15 of Article 7 (1) (g)-1 of the ICC Elements of crimes.

456 D Couturier, 'The Rape of Men: Eschewing Myths of Sexual Violence in War' (2012) Vol .6, No. 2 *On Politics*, 1.

457 A Spazk, 'Sexual Slavery before Ad Hoc International Criminal Tribunals and the International Criminal

continuity in the sense that the victim is required to provide sexual services during the period of slavery. The Sudanese case of a woman who managed to escape from the hands of her Janjaweed abductors is illustrative:

> They used us like wives in the night and during the day time we worked all the time – preparing food, collecting firewood and fetching water from nearby. The men they abducted with us were used to look after their livestock. We worked all day, during the week, with no rest. I believe those who we left behind are still doing the same work.[458]

In 1932, the Japanese military began to institute 'comfort stations', places where women were kept to serve as sex slaves to men in the Japanese military. Such women were either abducted from their homes or lured into sexual servitude under false pretences.[459] Estimates suggest that the Japanese Imperial Army enslaved between 80, 000 and 200, 000 women and girls from 1932 to 1945. Most came from Korea, with many also from Japan and the Dutch East Indies.[460] The crime against humanity of sexual slavery is identical to the crime of enslavement. Except that the second element of crime for sexual slavery requires that 'the perpetrator caused such person or persons to engage in one or more acts of a sexual nature'.[461] The ICC Statute does not define sexual enslavement, but enslavement.[462] According to Acuna, the term sexual slavery

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Court' (2013) Vol 9, No. 6, *European Scientific Journal*, 320.

458 Darfur Consortium: An African and International Civil Society for Darfur, 'Darfur: Abductions, Sexual Slavery and Force Labour' (2009) p. 8. < http://www.crin.org/en/library/publications/darfur-abductions-sexual-slavery-and-forced-labour > accessed on 7th September 2015.

459 L Niksch, 'Japanese Military's Comfort Women System' (2007) Congressional Research Service Memorandum, 3rd April, p. 2.

460 D Horn, 'Comfort Women' (1997) Endeavours. < http://www. web.archive.org/web/20080625101655/http??research.unc.edu/endeavors/win97/comfort.html > accessed on 8th April 2015.

461 Article 7 (1) (g)-2 of the ICC Elements of Crimes.

462 ICC Statue Article7 (2) (c): 'Enslavement means the exercise of any or all of the powers attaching to the

is preferable to enslavement because it includes the sexual aspect of the crime of slavery, while also highlighting the coercive element involved where women are force to provide sexual services.[463]

The crime of enforced prostitution in the Rome Statute involves those situations where prostitution takes place as a result of coercion by a third party. Enforced prostitution is prohibited by the Geneva Conventions of 1949, but as an attack on the honour of women.[464] The term 'prostitution' suggests on one hand, that the sexual services are provided as part of an exchange, under of course, coerced circumstances and on the other, that the sexual activity is initiated by the victims instead of, by the offender.[465] The prohibition of enforced prostitution is already contained in Additional Protocol II.[466] However, in contrast with the language of the Geneva Conventions, the ICC Statute discarded the nexus with the woman's honour.

The learned author, Acuna has expressed the view that the specific prohibition against enforced prostitution plays an important role in cases where the objective legal requirements of the crime of rape are not present but neither the facts constitute a case of slavery or enslavement.[467] Enforced prostitution may be characterized as a continuing offence or a separate criminal act. By the ICC Elements, the crime of enforced prostitution is constituted when (a) the perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force; and (b) the perpetrator or another person obtained or expected to obtain pecuniary or other

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right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.

463 Acuna, *art cit*, p. 197.

464 Article 27 of the Fourth Geneva Convention provides *inter alia* that women shall be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. See also Article 75 (2) (b) of Additional Protocol II of 1977.

465 Acuna, *art cit*, p. 198.

466 Article 4 (2) (e) of Additional Protocol II prohibits *inter alia*, the act of enforced prostitution, against persons all persons who do not take a direct or who have ceased to take part in hostilities.

467 Acuna, *art cit*, p. 199.

advantage for or in connection with the acts of a sexual nature.[468] This latter element was added at the suggestion of the United States of America. Robert Cryer *et al* have observed that there were considerable misgivings among some delegations concerning the paucity of precedent for this element. In the end however, it was adopted, in order to create some distinction from sexual slavery and in light of the ordinary meaning of the term 'prostitution'. In the absence of such anticipated advantage, the relevant conduct could still be prosecuted as sexual slavery or sexual violence.[469]

Prior to its codification in the ICC Statute, forced pregnancy had been explicitly recognized and condemned as a war strategy in two soft law instruments: the Vienna Declaration and Program of Action,[470] and Beijing Declaration and Platform for Action.[471] The Beijing Declaration advised that attention should be paid to the impact of armed conflict on women. Rape and forced pregnancy have been used as conscious and deliberate tools of war. Severe harm is inflicted through occupation of women's bodies and then forcing them to bear their rapist's children.[472] Evidence from the Bosnia-Herzegovina conflict between April 1992 and November 1995 is presented as follows:

> When the Serbian forces came to Miljevena, they turned the local gymnasium into a rape camp…Thousands of women are pregnant as a result of rape. Over and over again, everywhere I went in Bosnia-Herzegovina and in Croatian refugee camps,

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468 ICC Elements of Crimes, Article 7 (1) (g)-3

469 Cryer *et al, op cit,* p. 211.

470 Part II, para. 38: '…All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response'. Vienna Declaration and Program of Action, World Conference on Human Rights, Vienna, 25th June 1993.

471 Chap II, para. 114: 'Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular, murder, systematic rape, sexual slavery and force pregnancy'. Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15th September 1995.

472 S S E Jessie, 'Forced Pregnancy: Codification in the Rome Statute and Its Prospect as Implicit Genocide' (2006) 4 *NZJPIL,* 312.

> women told me stories of abomination, of being kept in a room, raped repeatedly and told they would be held until they gave birth to Serbian children.[473]

The crime of forced pregnancy is constituted by two elements, namely, the rape or sexual abuse with intent or effect of making the woman pregnant; and the unlawful confinement of the woman to force her to give birth. Article 7 (2) (f) of the ICC Statute defines forced pregnancy as the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. Forced pregnancy proved to be a very controversial crime during the negotiation process of the Rome Statute because some delegations feared that its inclusion would criminalize national penal systems that prohibited abortion. By way of compromise, it was resolved that the definition 'shall not in any way be interpreted as affecting national laws relating to pregnancy'.[474]

The ICC statute is the first instrument to explicitly criminalize widespread or systematic enforced sterilization as a crime against humanity, despite the fact that the crime had previously been prosecuted in the context of unlawful medical experiments. The Doctor's Trial was prosecuted in 1946 – against twenty-three doctors and administrators accused of organizing and participating in war crimes and crimes against humanity in the form of medical experiments, including sterilization, inflicted on prisoners and civilians.[475] Enforced sterilization appears as a crime against humanity and a war crime.[476] Where genocidal intent is present, enforced

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473 L Paltrow, 'Rape, Forced Pregnancy, Personhood, and Crimes Against Humanity' (2012) August 23. <http://www.rhealitycheck.org/article/2012/08/23/rape-forced-pregnancy-rep-akin-colorado's-personhood-measure-and-crimes-against-h/> accessed on 8th April 2015.

474 Article7 (2) (f) of the ICC Statute.

475 USA v Karl Brandt, et al. < https://www/en.m.wikipedia.org/wiki/ Doctors > accessed on 9th April 2015.

476 Article 8 (2) (b) (xxii)-5 of the ICC Statute.

sterilization can also satisfy the *actus reus* of genocide, and amount to the crime of genocide.[477] By Article 7 (1) (g)-5 of the ICC Elements, the elements 1 and 2 of the crime are that: (a) the perpetrator deprived one or more persons of biological reproductive capacity; and (b) the conduct was neither justified by the medical or hospital treatment of the person concerned nor carried out with their genuine consent. The deprivation excludes birth-control measures which have a non-permanent effect in practice.[478] Furthermore, for the purpose of the Article, consent obtained through deception does not amount to genuine consent.[479]

Article 7 (1) (g) of the ICC Statute concludes with the crime: 'or any other form of sexual violence of comparable gravity'. The crime of 'sexual violence' operates as a residual clause allowing courts to exercise jurisdiction over any other un-enumerated serious sexual assaults of comparable gravity to the named sex-based crimes.[480] When committing this crime, the perpetrator could inflict sexual violence on the victim or force the victim to perform sexual acts. Sexual violence could include sexual mutilation and sexual humiliation.[481] This category of crime is made up of the following elements: (a) the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature; (b) by force or threat of force or coercion; and (c) such conduct was of a gravity comparable to the other offences in Article 7 (1) (g) of the ICC Statute.

### 3.4.8 Persecution

Persecution is closely related to the crime of genocide on account of the fact that the two offences require a discriminatory intent, although in the case of genocide, the more specific

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477 Article 6 (d), ICC Statute dealing with "genocide by imposing measures intended to prevent births."

478 Footnote 19 to the ICC Elements of Crimes.

479 Footnote 20 to the ICC Elements of Crimes.

480 P V Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation', (2007) Women's Human Rights and Gender Unit (WRGU), p 13.

481 Women2000, 'Sexual Violence and Armed Conflict: United Nations Response' (1998) United Nations Division for the Advancement of Women Department of Economic and Social Affairs, April.

intent is to destroy, in whole or in part, a national, ethnical, racial or religious group.[482] The crime of persecution is often described in terms of the violation of the fundamental rights of a group of persons, based on discriminatory grounds. Persecution is distinguished by the perpetration of the prohibited acts on discriminatory grounds. In *Prosecutor v Nahimana, Barayagwiza and Ngeze*, the ICTR defined the crime against humanity of persecutions as consisting of an act or omission which discriminates in fact and which, denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[483] This definition is largely consistent with the one provided in the ICC Statute.

While Article 7 (2) (g) of the ICC Statute defines persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity,' Article 7 (1) (h) of the ICC Statute prohibits persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any crime within the jurisdiction of the court. However, the problem with the prohibition is that the acts that may constitute persecution are indeterminate.

In *Prosecutor v Kupreskic*, the ICTY held that neither international treaty nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice systems. Thus, the crime of persecution needs careful and sensitive development in light of the principle of *nullum crimen*

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482 Article 6 of the ICC Statute.

483 Prosecutor v Nahimana, Barayagwiza and Ngeze, (ICTR Appeals Chamber), 28th November 2007, para. 985. See also Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (ICTR Trial Chamber), 18th December 2008, para. 2208; and Prosecutor v Bikindi, (ICTR Trial Chamber), 2nd December 2008, para. 435.

*sine lege*.[484] The acts of persecution or deprivation of fundamental right must be of a gravity or severity comparable to other crimes against humanity.[485] Tribunal jurisprudence shows that the underlying acts of persecution need not be considered crimes in international law. For example, harassment, humiliation, psychological abuse, as well as denial of the rights of employment, freedom of movement, proper judicial process, and proper medical care have been recognized as underlying acts of persecution.[486]

Although the list of persecutory acts is open-ended, a high threshold of 'universal' recognition is required in order to satisfy the principle of legality. Cassese has observed that Article 7 of the ICC Statute is less liberal than customary international law with regard to the element of persecution: 'in connection with any act referred to in this paragraph or any crime, within the jurisdiction of the court', as no such link is required under customary international law.[487] Furthermore, Cassese expressed the view that: 'since no mention is made of the possible victims of persecutions, or rather, as it is not specified that such persecutions should target 'any civilian population,' the inference is warranted that not only any civilian group but also members of the armed forces may be the victims of this class of crime'.[488]

However, with due respect to Cassese, the researcher is of the view that his proposition extends the scope of the crime beyond its statutory objective. The essence of crimes against humanity is to protect a civilian population from violence. Persecution requires a specific intent to target a person, group or collectivity, based on the prohibited grounds of discrimination.[489] Yet, with respect to the requirement in the ICC Statute that the conduct was committed in

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484 Prosecutor v Kupreskic (ICTY Trial Chamber II) 14th January 2000 para. 618. See also Prosecutor v Semanza, (ICTR Trial Chamber), 15th May 2003, paras. 348-49.

485 Prosecutor v Kupreskic, *supra*, paras. 619 and 621.

486 Prosecutor v Bikindi, (ICTR Trial Chamber), 2nd December 2008, paras. 390-395, 397.

487 Cassese, *op cit*, p. 125.

488 Cassese, *op cit*, p. 118.

489 ICC Elements, Article 7 (1) (h), Element 3.

connection with any act referred to in Article 7 (1), no additional mental element is required except the objective test of 'widespreadness' or 'systematicity.[490]

### 3.4.9 Enforced Disappearance

The crime against humanity of enforced disappearance is prohibited in several international instruments including, the United Nations Declaration on the Protection of All Persons from Enforced Disappearance 1992;[491] the Inter-American Convention on Forced Disappearance of Persons 1994;[492] the International Convention on the Protection of All Persons from Enforced Disappearance 2005;[493] and the Statute of the African Court of Justice and Human Rights.[494] The ICC definition was inspired by the UN Declaration on the Protection of Protection of All Persons from Enforced Disappearance, and the Inter-American Convention on Forced Disappearance of Persons. Article 7 (2) (i) of the ICC Statute defines enforced disappearance as the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons with the intention of removing them from the protection of the law for a prolonged period of time.

Often, enforced disappearance implies murder. In this case, the victim is abducted, illegally detained and then tortured during interrogation; killed, and the body hidden. Typically, a

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490 See footnote 22 of the ICC Elements of Crimes.

491 Article 4: All acts of enforced disappearance shall be offences under criminal law punishable by Appropriate penalties which shall take into account their extreme seriousness.

492 See the Preamble to the Convention. Article II of the Convention provides as follows: For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

493 Article 5: The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

494 Article 28 C (1) (i), Statute of the African Court of Justice and Human Rights. See Protocol on the Statute of the African Court of Justice and Human Rights, 1st July 2008.

murder will be surreptitious, with the corpse disposed of to escape discovery; so that the person apparently vanishes. The perpetrator has deniability, as nobody provides evidence of the victim's death.[495] Two major kinds of conduct are implicated: deprivation of liberty and withholding of information. The criminal prohibition of enforced disappearance protects the interests of family members in knowing the fate of the missing person and provides retribution for the harm inflicted upon these secondary victims.[496]

The crime of enforced disappearance of persons gained global prominence when Adolf Hitler on 7th December 1941 issued 'Nacht und Nebel Erlass' (the Night and Fog Decree). Its purpose was to seize persons in Nazi occupied territories that were 'endangering German security' and make them vanish without a trace. No information was given to victim's families as to their fate, even when, as often occurred, it was merely a question of the place of burial in the "Reich'.[497] Enforced disappearances were later used as 'a systematic policy of State repression' starting in Guatemala and Brazil in the 1960s and 1970s. They came to be practiced extensively throughout Latin America in the 1970s and 1980s, affecting tens of thousands of people. Governments would routinely abduct people, hold them in clandestine prisons, subject them to torture and often execute them without trial. The bodies were frequently hidden or destroyed to eliminate any material evidence of the crime and to ensure the impunity of those responsible.[498]

The ICC Elements acknowledge that given the complex nature of this crime, its commission will normally involve more than one perpetrator as part of a common criminal

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495 'Forced Disappearance'. < https://www.en.m.wikipedia.org/wiki/Forced_disappearance > accessed on 10th April 2015.

496 B Finucane, 'Enforced Disappearance as a Crime under International Law; A Neglected Origin in the Laws of War' (2010) Vol. 35. *The Yale Journal of International Law*, 173.

497 D Vitkauskaitė-Meurice, and J Žilinskas (2010), 'The Concept of Enforced Disappearances in International Law' (2010) 2 (120) *Jurisprudence*,197-198.

498 K Anderson, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' Vol. 17. (2006) *Melbourne Journal of International Law*, 245.

purpose.[499] The Elements recognize that the crime may be committed by the perpetrator (a) arresting, detaining, or abducting one or more persons; or (b) by refusing to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.[500] Enforced disappearance may be committed with State complicity or simply by political organizations. This is consistent with the fundamental proposition that crimes against humanity may be committed by non-State actors.[501] It is an innovation peculiar to the ICC Statute as it has no precedent in the UN Declaration or the Inter-American Convention. The crime of enforced disappearance under Article 7 of the Rome Statute is a complex offence. It has been called an 'octopus crime' as well as a 'permanent crime'. Several persons could be prosecuted at different stages of the disappearance even though some of them may or may not be aware of the acts committed by others in the chain of events.[502]

### 3.4.10 Apartheid

Two treaties: the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968,[503] and the Convention on the Suppression and Punishment of the Crime of Apartheid 1973,[504] had recognized apartheid as a crime, long before the adoption of the ICC Statute. Professor Shaw has argued that the Convention on the Suppression and Punishment of the Crime of Apartheid 1973, declares apartheid to be an international crime involving direct individual responsibility.[505] Apartheid was a system of racial segregation in South Africa enforced by the ruling National Party governments from 1948 to 1994, through legislation. Under apartheid, the rights, associations, and movements of the majority black

499 See footnote 23, ICC Elements of Crimes.
500 ICC Elements, Article 7 (1) (i) (1) (a) and (b).
501 Cryer et al, *op cit*, p. 217.
502 D Vitkauskaitė-Meurice and J Žilinskas, *art cit*, p. 205.
503 Article 1 (b).
504 Preamble, para. 5.
505 M Shaw, *International Law* (4th edn, Cambridge: Cambridge University Press, 1997) p.69.

inhabitants and other ethnic groups were curtailed and Afrikaner minority rule was maintained.[506] Most of the acts prohibited by the Apartheid Convention are contained in Article 7 of the ICC Statute.[507]

Apartheid is criminalized by Article 7 (1) (j) of the ICC Statute. Article 7 (2) (h) defines apartheid as inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. The definition in the ICC Statute was extended to cover not only the situation which had prevailed in South Africa, but similar situations which may arise in future. The requirement of 'similar character' invariably covers acts of identical character. In this

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506 'Apartheid'. < https://www.en.m.wikipedia.org/wiki/Apartheid > accessed on 11th April 2015.

507 Article II of the Apartheid Convention provides as follows: For the purpose of the present Convention, the term 'the crime of Apartheid,' which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) by murder of members of a racial group or groups;

(ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

context, 'character' refers to the nature and gravity of the act,[508] and that the 'inhumane act' had been committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.[509] Furthermore, the perpetrator must have intended to maintain such regime by his conduct.[510]

### 3.4.11 Other Inhumane Acts

The residual clause, 'other inhumane acts' embodying the *ejusdem generis* principle, forms the concluding part of all definitions of crimes against humanity. The crime of 'other inhumane acts' encompasses acts not specifically enumerated as crimes against humanity, but which are nonetheless of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (j) of Article 7. Expressed in another way, any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met.[511] The inclusion of a residual category of crimes in Article 7 recognizes the difficulty in creating an exhaustive list of criminal conduct and the need for flexibility in the law's response.[512]

Article 7 (1) (k) of the ICC Statute prohibits 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. Fears have been expressed on the possibility of the residual clause violating the criminal law principle of legality. As a safeguard against transgressing this rule, the Statute requires the acts to be (1) be of a similar character to other prohibited acts, and (2) that they cause great suffering, or serious injury to body or to mental or physical health. The conduct of the accused must have been committed as part of a widespread or systematic attack.[513] Tribunal Statutes, for example,

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508 Footnote 29 to the ICC Elements of Crimes.
509 Article 7 (1) (j) (4), ICC Elements of Crimes.
510 Article 7(1) (j) (5) ICC Elements of Crimes.
511 Prosecutor v Akayesu, *supra,* para. 585.
512 The Prosecutor v Muvunyi, *supra,* para. 527.
513 Article 7 (1) (k) (4), ICC Elements of Crimes.

the ICTR does not contain the offences of forcible transfer or population, sexual slavery, enforced prostitution, forced, pregnancy, enforced sterilization, sexual violence, enforced disappearance of persons, and apartheid.[514] Nevertheless, tribunal jurisprudence has found that these acts fall within the scope of inhumane acts.[515]

Gong-Gershowitz has stated that in February 2008, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) became the first international criminal tribunal to recognize 'forced marriage' as a separate or distinct crime against humanity.[516] Although the Trial Chamber of the SCSL held in the *Prosecutor v Brima, Kamara and Kanu*, also known as the AFRC trial, that the evidence of 'bush wives' or forced marriage in the Sierra Leone conflict was completely subsumed by the crime of sexual slavery, and found the defendants; three Armed Forces Revolutionary Council (AFRC) leaders, guilty of war crimes and crimes against humanity, including murder, rape, sexual slavery, and conscription of child soldiers, the Appeals Chamber reversed the Trial Chamber's dismissal of the forced marriage charge, ruling that, contrary to the majority view of the trial chamber, forced marriage was distinct from the crime of sexual slavery under the category of 'other inhumane acts', which are recognized as crimes against humanity under customary international law.[517] During the conflict, thousands of women were abducted by the rebels and subjected to constant sexual violence. The victims were assigned husbands and forced to become the husband's sex slaves, besides performing forced labour such as cooking, washing, carrying loads and farming.

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514 Article 3, Statute of the International Criminal Tribunal for Rwanda, 1994.

515 Prosecutor v Muvunyi, *supra*, para. 528. See also Prosecutor v Akayesu, para. 688.

516 J Gong-Gershowitz, 'Forced Marriage: A New Crime Against Humanity?' (2009) Vol. 8. No. 1. *Northwestern Journal of International Human Rights*, 53-76.

517 Prosecutor v Brima, Kamara & Kanu, 22nd February 2008. Case No. SCSL- 2004-16-A, para. 202. See also Prosecutor v Sesay, Kallon and Gbao, 2nd March 2009, Case No. SCSL-04-15-T, (Trial Chamber Judgment).

## 3.5 Conclusion

This chapter has demonstrated the historical origin and development of crimes against humanity from the Hague Conventions to the ICC Statute. It noted that the contours of crimes against humanity began to assume a definite shape following the Nuremberg and Tokyo trials. The changes in the substantive content of the crimes in the statutes of criminal tribunals were also highlighted. As already stated, the essence of the crime is the protection of any civilian population from widespread or systematic atrocities perpetrated by State or sub-state actors.

# CHAPTER FOUR

# THE INTERNATIONAL PROSECUTION OF CRIMES AGAINST HUMANITY

## 4.1 Introduction

It has become the tradition to situate the international prosecution of crimes in the historical context of the 21st century. Yet, the idea of prosecuting international crimes predates modern times. Thusly, legal historians have drawn attention to the incidence of such trials in antiquity. Bassiouni has articulated the view that there is evidence of a tribunal holding individuals responsible for war crimes in Greece in 405 BC.[518] As remarked in the third chapter of this dissertation, Landvogt Peter von Hagenbach was tried in the fortified city of Breisach in 1474 for crimes of murder, rape, perjury, wanton confiscation of private property, and other crimes, in violation of the 'laws of God, and humanity'.[519]

Nevertheless, the more popular trend of scholarship is to regard the post-war trials as setting the pace for the international prosecution of crimes against humanity. At the termination of the First World War, the global conviction was that the horrors of war must be spared to men; that war is a crime against humankind, which must be prevented and punished.[520] Reference was also made to Germany's infraction of the Kellogg-Briand Pact, 1928. The Kellogg-Briand Pact said:

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518 M C Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague: Kluwer Law International, 1999) p. 517.

519 D Arnaut, 'When in Rome? The International Criminal Court and Avenues for U.S. Participation' (2003) Vol. 43. No. 2. *Virginia Journal of International Law*, 532.

520 R J Alfaro, 'Report on the Question of International Criminal Jurisdiction' (1950) Document: A/CN.4/15 and Corr.1, p. 2.

> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.[521]

In consequence, the five victorious powers: France, England, Italy, the United States and Japan, convened a Peace Conference in Versailles in 1919 and appointed a 15-member Commission to Consider the Responsibility of the Authors of the War.[522] The 1919 Commission was instructed to investigate the responsibility of those who violated the laws and customs of war particularly as embodied in the 1907 Hague Convention as well as what the Commission regarded as crimes against the laws of humanity.[523] The Commission was required to present evidence of criminality to an international tribunal to be set up to try Nazi military officers and their allies for war crimes and crimes against humanity.

At the end of its investigation and deliberation, the Commission, under the chairmanship of the U.S. Secretary of State, Robert Lansing, reasoned that all persons belonging to enemy countries, however high their position who have been guilty of offenses against the laws and customs of war or the laws of humanity are liable to criminal prosecution.[524] The Commission therefore, recommended the prosecution of the former Emperor of Germany, Kaiser Wilhelm II, for 'a supreme offence against international morality and the sanctity of treaties' and eight hundred and ninety six of his officers 'for having committed acts in violation of the laws and

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521 Article1, (Kellogg-Briand Pact), General Treaty for the Renunciation of War, 27th August, 1928.

522 B B Ferencz, 'International Criminal Courts: The Legacy of Nuremberg' (1998) Vol. 10. No. 1. *Pace International Law Review*, 207.

523 Convention Respecting the Laws and Customs of War on Land, 18th October 1907.

524 Ferencz, *art cit*, p. 207.

customs of war'.[525] It also recommended the establishment of an international tribunal for the prosecution of suspected war criminals, with no immunity from prosecution even for defeated heads of state.[526]

It is necessary to reproduce the relevant provisions of the Peace Treaty with Germany. Article 227 of the Peace Treaty of Versailles provided that:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following powers: namely, the United States of America, Great Britain, France, Italy and Japan…The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.[527]

Article 229 of the Peace Treaty authorized each of the Allied powers to try German nationals for criminal acts against its own nationals. The German Government had the duty to furnish the tribunal with all documents and information relevant to the prosecution.[528] However,

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525 E Stover, 'In the Shadow of Nuremberg: Pursuing War Criminals in the Former Yugoslavia and Rwanda' (1995) Vol. 2. No. 3. *Medicine and Global Survival*, 140-141.

526 International Law Commission, 'Historical Survey of the Question of International Criminal Jurisdiction' (UN Document: A/CN.4/7/Rev. 1), p. 7.

527 Peace Treaty of Versailles, 28th June, 1919.

528 Article 230 Peace Treaty of Versailles 1919: 'The German Government undertakes to furnish all

because the Dutch authorities refused to extradite the German Emperor because it believed that the offence was political, the matter of his trial was not pursued any further. Nevertheless, the recommendations of the Commission created the positive perception of the possibility of trying the Kaiser before an international tribunal, setting the stage for the Nuremberg trials.[529]

Most of the remaining suspected war criminals on the list similarly managed to avoid prosecution, because Germany was reluctant to turn them over to the Allies. Instead, a compromise was reached whereby the Allies allowed a small number of suspects to be tried in Germany before the Supreme Court of Leipzig.[530] Seventeen trials were held in Leipzig; almost half ended in acquittals and the maximum sentence handed down was ten years.[531] Professor Bassiouni is of the view that although the Leipzig Trials were a failure, they nonetheless serve as an important historical precedent for war crimes trials. Moreover, the Leipzig Trials helped establish a principle to put on record before history that might is not right, and that men whose sole conception of the duty they owe to their country is to inflict torture upon others, may be put on their trial.[532]

### 4.2 The Nuremberg Tribunal

Brownlie has rightly articulated the view that the International Military Tribunals at Nuremberg and Tokyo functioned on the basis of Charters which required the punishment of individuals for

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documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility'.

529 B Baytemir, 'The International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law' (2010) Vol. 3. *USAK Yearbook of International Politics and Law*, 80.

530 M M Penrose, 'War Crime' (2014) < http://www.global.britannica.com/EBchecked/topic/635621/war-crime#ref750572. > accessed on 17th April 2015.

531 S Chesterman, 'International Criminal Law with Asian Characteristics?' (2014) NUS Law Working Paper Series, p. 9. < http://law.nus.edu.sg/.../002_2014_Simon_ ... > accessed on 13th April 2015.

532 M C Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)' (1994) Vo. 88, No. 4. *The American Journal of International Law*, 786-787.

war crimes, crimes against humanity and crimes against peace.[533] The accused criminals were divided into two large categories: 'major' war criminals were those political and military leaders whose crimes knew no geographical boundaries, and 'minor' war criminals were those civilians or former soldiers whose crimes were committed in specific locations. The overwhelming majority of accused war criminals, however, were those in the 'minor category'. Their trials were conducted by military courts in the various occupied zones of Germany, and by special courts established for this purpose in Allied countries.[534]

In the Moscow Declaration of 30th October 1943, the principal Allied Powers laid down their policy with respect to the German war criminals.[535] The Declaration issued by the governments of the UK, USA, USSR and China, stated that those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be 'judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein'. The final section of the Moscow Declaration entitled 'Statement of Atrocities' influenced the establishment of the European Advisory Commission, which drafted the London Charter.[536] The Charter, issued on 8th August 1945, was drawn up in London following the surrender of Germany. Earlier on, representatives from the nine countries occupied by Germany had met in London on 14th January 1942, to draft the 'Inter-Allied Resolution on German War Crimes'.[537]

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533 I Brownlie, *Principles of Public International Law* (Fifth edn, Oxford: Clarendon Press, 1998) p.559-560.

534 'Trials of War Criminals' SHOAH Resource Centre, The International School for Holocaust Studies. < http://www.yadvashem.org. > accessed on 21st April 2015.

535 International Law Commission, Historical Survey of the Question of International Criminal Jurisdiction (UN Document: A/CN.4/7/Rev. 1), p. 21.

536 Moscow Declaration, 30th October 1943.

537 Resolution on German War Crimes signed by Representatives of Nine Occupied Countries, London. 12th January 1942.

In Article 4 of the Resolution, the parties determined in the spirit of international solidarity to see to it that: (a) those guilty and responsible, whatever their nationality, are sought for, handed over to justice and judged; and (b) that sentences pronounced are carried out. The London Charter restricted the trial to the 'punishment of the major war criminals of the European Axis countries'. As a result, some 200 German war crimes defendants were tried at Nuremberg, and 1,600 others were tried under the traditional channels of military justice.

The German Instrument of Surrender which ended World War II in Europe transferred the political authority for Germany to the Allied Control Council.[538] Possessing sovereign power over Germany, the Allied Control Council could choose to punish violations of international law and the laws of war. However, the jurisdiction of the court was limited to only the violations of the laws of war; thus, it had no jurisdiction over crimes that took place before the outbreak of war on 1st September 1939. Article 1 of the London Agreement provides that: there shall be established after consultation with Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.[539]

As already stated, on 8th August 1945, the Allies signed the London Agreement which established the International Military Tribunal, Nuremberg. The Charter of the IMT Nuremberg was annexed to the London Agreement of 1945. The tribunal had eight judges, consisting of four principal judges and four alternates.[540] Under Article 6 of its Charter, the IMT had jurisdiction

538 German Instrument of Surrender, 7th May 1945.

539 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8th August 1945.

540 Article 2, Charter of the IMT, Nuremberg.

over (a) crimes against peace; (b) war crimes; and (c), crimes against humanity.[541] The drafters of the Charter of the IMT Nuremberg were confronted with the problem of responding to the Holocaust and other grave crimes committed by the Nazi regime against its own populations, as the traditional characterization of war crimes excluded crimes committed by a State against its own citizens.

Article 6 of the IMT Nuremberg Charter was framed to include crimes against humanity. In its judgment, the IMT declared that with regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution with, any crime within the jurisdiction of the Tribunal.

Therefore, the tribunal could not make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939, war crimes were committed on a vast scale, which were also crimes against humanity. Insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or

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[541] Article 6 (c) of the IMT Charter defines crimes against humanity as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

in connection with, the aggressive war, and therefore constituted crimes against humanity.[542] Twenty four German major war criminals were prosecuted.[543] The indictment received by the Tribunal contained four main charges, which were all based on Article 6 of the IMT Nuremberg Charter.

The first count was the overall conspiracy to wage an aggressive war, which was handled by the U.S legal team. The second count of treaty violations and waging aggressive war was prosecuted by Britain. The French and Russian prosecutors argued charges of war crimes and crimes against humanity.[544] Karl Donitz who briefly became president of Germany after Hitler's death was sentenced to ten years imprisonment. Field Marshall Hermann Goering, the highest ranking Nazi official to be tried at Nuremberg was sentenced to death, but committed suicide the night before his execution.[545] Some organizations were also indicted. The indictment of Nazi organizations was designed to deal with thousands of people who had been members of such organizations, the criminal character of the organizations and the extent of guilt of the individual members. Three of the indicted organizations were found guilty. They were the SS, the Gestapo and the Corps of the Political Leaders of the Nazi Party. Three of the organizations were not indicted and these were the SA, the Reichsregierung (Reich Cabinet) and General Staff and High Command.[546]

In March 1938, German troops invaded Austria and in 1939 began their march of conquest over Europe. Nazi extermination squads killed without pity or remorse every Jew,

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542 Judgment: The Law Relating to War Crimes and Crimes Against Humanity. < http://www.avalon.law.yale.edu/imt/judlawre.asp > accessed on 23rd April 2015.

543 M Futamura (2005), 'Revisiting the `Nuremberg Legacy': Societal Transformation and the Strategic Success of International War Crimes Tribunals - Lessons from the Tokyo Trial and Japanese Experience' Thesis submitted for the degree of PhD (War Studies), King's College London, autumn, 2005, p.73.

544 Cryer *et al*, *op cit*, p. 93.

545 Hermann Goering. < http://www.charlesbackstrom.com/pdf/WW2_Goerin... > accessed on 12th August 2015.

546 A O Olamide, 'Appraisal of International Crimes and the Operations of the International Criminal Court' LL.B Long Essay Submitted to the Faculty of Law, University of Ilorin, Nigeria, 2011, p. 42.

Gypsy, disabled, social undesirables, or perceived adversary on whom they could lay their hands. In defiance of the accepted rules of the Hague Conventions, millions of civilians were forced into slave labour, millions of prisoners-of-war were murdered or starved to death, while many millions more, were simply annihilated in gas chambers and concentration camps.

However, some authorities have striven to disprove claims of mass killings of Jews in gas chambers. For instance, Weber stated as follows:

> Over the past several decades, however, nearly all claims of gassings and mass extermination at these and other camps in Germany proper have been quietly abandoned. No reputable historian of this subject now supports the once supposedly proven story of 'extermination camps' in the territory of the old German Reich.[547]

Nuremberg was chosen as the venue of the trial for two main reasons: (1) the Palace of Justice was spacious and largely undamaged; one of the few buildings that had remained largely intact through extensive Allied bombing of Germany, and a large prison was also part of the complex, and (2) Nuremberg was considered the ceremonial birthplace of the Nazi Party. It had hosted the Party's annual propaganda rallies' and the Reichstag session that passed the Nuremberg Laws. Thus, it was considered a fitting place to mark the Party's symbolic demise.

Sequel to the trial of the major war criminals by the IMT, the United States, empowered by the Allied Control Council Law No. 10 to try war criminals in its own occupation zone, held

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547 M Weber, 'Extermination' Camp Propaganda Myth' in G Ernst (ed), *Dissecting the Holocaust: The Growing Critique of Truth and Memory*, (Alabama: Theses and Dissertation Press, 2000) p. 286.

twelve more trials at Nuremberg between 1946 and 1949, including the Doctors' Trial[548] and the Judges' Trial.[549] Genocide which was then an emerging legal concept was tacitly regarded as a crime against humanity. Thus, in *The Nuremberg SS-Einsatzgruppen Trial*, involving the defendants' participation in the 'Final Solution to the Jewish Question', the defendants were charged with crimes against humanity which included 'a systematic program of genocide', aimed at the destruction of foreign nations and ethnic groups by murderous extermination.[550]

Furthermore, the universality principle of jurisdiction enabled Allied States to try war criminals in their domestic courts. The first of such trials was the *Eichmann* case.[551] Eichmann was charged under Israel's Nazis and Nazi Collaborators (Punishment) Law of 1st August 1950, for crimes against the Jewish people, crimes against humanity, war crimes and membership of hostile organizations. He was sentenced to death and executed.[552]

Several groundbreaking achievements have been credited to the Nuremberg Trials. The Doctors' Trial led to the creation of the Nuremberg Code, which is a set of research ethics principles for human experimentation.[553] The Nuremberg Principles also emerged from the Nuremberg Trials. The UN General Assembly had directed the International Law Commission to 'formulate the principles of international law recognized in the Charter of the Nuremberg

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548 G J Annas, 'The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights' (2009) Vol. 10. No. 1. *Minn. J. L. Sci & Tech*, 20-23.

549 Trial 3, Judges Case. < http://www.digitalcommons.law.uga.edu/nmt3/ > accessed on 12th August 2015.

550 R Lemkin (2005), 'Axis Rule in occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress' (Washington: Carnegie Endowment for International Peace, Division of International Law, 194), pp. 94-95.

551 H W Baade, 'The Eichmann Trial: Some Legal Aspects' (1961) Vol. 10. No. 3. *Duke Law Journal*, 400-401.

552 E A Oji, *Responsibility for Crimes under International Law* (Lagos: Odade Publishers, 2013) pp. 168-169. See also S Liskofsky, 'The Eichmann Case' (1961) *The American Jewish Year Book*, 199-208.

553 E Shuster, 'Fifty Years Later: The Significance of the Nuremberg Code' (1997) Vol. 337 *N. Engl J Med* 1436-1440. See also Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. 2. pp. 181-182. Washington, D.C. U.S. Government Printing Office, 1949.

Tribunal and in the judgment of the Tribunal'.[554] The Nuremberg trials are also commended for highlighting the individualization of criminal responsibility for certain serious violations of the rules of international law applicable in armed conflict; and according formal recognition to the terms, crimes against peace, war crimes, and crimes against humanity.[555]

The Nuremberg Trials also served as a model for subsequent international criminal trials in Tokyo, Yugoslavia, Rwanda, and the ICC. The conclusions of the Nuremberg trials served as models for: the Genocide Convention, 1948, the Universal Declaration of Human Rights, 1948, the Convention on the Abolition of the Statute of Limitations on War Crimes and Crimes against Humanity, 1968, and the Geneva Conventions of 1949 and their supplementary protocols, 1977. The IMT was the first successful international criminal court, and played a pioneering role in the development of international criminal law and international institutions. The Nuremberg trials established a basic framework and precedent for the prosecution of war crimes and crimes against humanity and condemned a war of aggression in the strongest terms.[556]

Despite its achievements, the IMT has been the object of censure. There is the belief that it represents an instance of victor's justice. Thusly, Tomuschat remarked that it was felt that the trial had been imposed upon Germany and that the fact alone of justice being dispensed by prosecutors and judges from the four main victorious Powers discredited the proceedings as a

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554 For instance, Principle III declares that the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law. Principle IV provides that the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, 1950. See Yearbook of the International Law Commission, 1950, Vol. II, pp. 374-378.

555 T Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts' (1998) No. 322. *International Review of the Red Cross*.

556 M L Dougherty, 'A Comparative Analysis of International Tribunals: The Formation of an Iraqi Judiciary to Try Saddam Hussein' (2005) 588 *Bepress Legal Series*, 4.

diktat.[557] Secondly, the list of offences under the jurisdiction of the IMT lacked a strong basis in international law. The prosecution of crimes against peace in Article 6 (a) of the Nuremberg Charter had no generally recognized precedent in international law. In consequence, the defence at Nuremberg argued that until that time, no leading statesman had ever been held accountable for waging war.[558] In this respect, the normative *opinio juris* and state practice required to constitute customary international law were lacking. The criticism was also charged that the Tribunal had applied *ex post facto* criminal legislation. However, the IMT was of the view that the Charter is the expression of international law existing at the time of its creation and that '*nullum crime*' was a principle of justice that was satisfied merely on the count that the defendants knew that what they were doing was wrong.[559]

### 4.3 The Tokyo Tribunal

As was the case with the Nuremberg trials, the Tokyo trials refer to two sets of trials. The first was the trial and punishment of the major war criminals in the Far East before the International Military Tribunal for the Far East (IMTFE) in Tokyo between 1946 and 1984, commonly known as the Tokyo Tribunal. The second set was the 1945-1951 proceedings by *ad hoc*, unilateral Allied military commissions throughout the Far East.[560] The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo War Crimes Tribunal, or simply the Tribunal, was modeled after the Nuremberg Tribunal. The Tokyo Tribunal was established on 19th January 1946, to try the leaders of the Empire of Japan for three categories of war crimes. Class A crimes were reserved for those who participated in a joint conspiracy to start and wage war, and were

557 C Tomuschat, 'The Legacy of Nuremberg,' (2006) Vol. 4. No. 4. *Journal of International Criminal Justice*, 830.

558 *Ibid*.

559 M Milanovic, 'Was Nuremberg a Violation of the Principle of Legality?' (2010) *EJIL: Talk. Blog of the European Journal of International Law*.

560 Z D Kaufman, 'Transitional Justice for Tojo's Japan: The United State's Role in the Establishment of the International Military Tribunal for the Far East and Other Transitional Justice Mechanisms for Japan After World War II' (2013) Vol. 27. *Emory International Law Review*, 756.

brought against those in the highest decision-making bodies. The majority of these defendants had occupied the highest governmental and military positions in Japan during World War II.[561]

Class B crimes were reserved for those who committed conventional atrocities or crimes against humanity. Class C crimes were leveled against those who participated in planning, ordering, authorizing, or failing to prevent such transgressions at higher levels in the command structure.[562] Twenty-eight Japanese military and political leaders were charged with Class A crimes, and more than 5,700 Japanese nationals were charged with Classes B and C crimes, mostly entailing prisoner abuse. China held 13 tribunals of its own, resulting in 504 convictions and 149 executions.[563] Although the Tokyo Tribunal was not established by an international agreement as was the case with the IMT Nuremberg, it had nevertheless emerged from a previous understanding by nations to try Japanese war criminals. On 26th July 1945, China, the UK, and USA signed the Potsdam Declaration or the Proclamation Defining Terms for Japanese Surrender, in which they demanded Japan's 'unconditional surrender' and stated that 'stern justice shall be meted out to all war criminals'.[564]

Later on at the Moscow Conference held in December 1945, the UK, the Soviet Union, and USA with the support of China, agreed to a basic plan for the occupation of Japan. The plan empowered General Douglas MacArthur, as Supreme Commander of the Allied Forces, to issue

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561 Z Wanhong, 'From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (On the Sixtieth Anniversary of the Nuremberg Trials)' (2006) Vol. 27. No. 4. *Cardozo Law Review*, 1674

562 Oji, *op cit*, p. 170.

563 International Military Tribunal for the Far East. < https//:www.en.m.wikipedia.org/wiki/International_Military_Tribunal_for_the_Far_East > accessed on 2 46th April 2015.

564 Milestones: 1945-1952. 'The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)' < https://www.history.state.gov/milestones/1945-1952/nuremberg > accessed on 25th April 2015. See also the Potsdam Declaration, 26th July 1945, Articles 10 and 13.

all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and all directives supplementary thereto. In pursuance of this authority, in January 1946, General MacArthur issued a special proclamation establishing the IMTFE.[565]

Under Article 5 of the Charter of the IMTFE, the Tribunal had jurisdiction over (a) crimes against peace, (b) conventional war crimes; namely violations of the laws and customs of war; and (c), crimes against humanity.[566] Two other significant differences distinguish the two tribunals. The IMTFE required a nexus between the crimes committed by the defendants and 'crimes against peace', whereas; the IMT required no such connection. Furthermore, while the IMT could try criminal organizations, the IMTFE could not.[567]

Twenty-eight Class A war criminals were arraigned before the Tokyo Tribunal. The defendants included nine civilians and nineteen military men. The indictment accused the defendants of promoting a scheme of conquest that contemplated and carried out murdering, maiming and ill-treating prisoners of war and civilian internees, forcing them to labour under inhumane conditions, plundering public and private property, wantonly destroying cities, towns and villages beyond any justification of military necessity; perpetrating mass murder, rape,

565 International Military Tribunal for the Far East. Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19th January, 1946; Charter dated 19th January 1946; amended Charter dated 26th April 1946, Tribunal established 19th January 1946. Treaties and Other International Acts Series 1589.

566 Article 5 (c) of the IMTFE Charter 19th January 1946, defines crimes against humanity as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

567 Z D Kaufman, 'The Nuremberg Tribunal V. The Tokyo Tribunal: Designs, Staffs and Operations' (2010) Vol. 43. No. 3. *The John Marshall Law Review*, 758.

pillage, brigandage, torture and other barbaric cruelties upon the helpless civilian population of the over-run countries.[568]

Numerous eye-witness accounts of the Nanking Massacre were provided by Chinese civilian survivors and western nationals living in Nanking at the time. In the Nanking Massacre, thousands of innocent civilians were buried alive, used as targets for bayonet practice, shot in large groups and thrown into the Yangtze River. Rampant rapes of women, ranging from seven to seventy years old were also reported.[569] As was the case with the Nuremberg trials, other nations were authorized to try war criminals. As a result, the Soviet Union and Chinese Communist forces organized trials for Japanese war criminals. The Khabarovsk War Crime Trials held by the Soviets tried and found guilty twelve members of Japan's bacteriological and chemical warfare unit, also known as Unit 731.[570] Between 1945 and 1951, over 2, 200 trials were held outside of Japan against 5, 600 Japanese nationals and Japanese collaborators accused of various crimes. More than 4, 400 were convicted, and about 1000 were sentenced to death.[571]

Like the Nuremberg Tribunal, the Tokyo Tribunal has been adjudged unfair in some quarters. There was the charge of victor's justice. As it was with the Nuremberg trial, the Tokyo tribunal judged only the Axis power involved. The defendants were not allowed to question the actions of the Allied Powers, which included the atomic bombing of Hiroshima by the U.S and the violation of the Soviet-Japanese Neutrality Pact of 13th April 1941 by the Soviet Union. Furthermore, the political character of the trial was evident in the treatment of the emperor, who

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568 The Tokyo War Crimes Trials. < http://www.humanum.arts.cuhk.edu.hk/NanjingMassacre/NMTT.html > accessed on 26th April 2015.

569 J Gordon, 'The Nanking Massacre: Analysis of Japanese and Chinese Interpretation and Remembrance of Nanking 1940s-The Present' (2014) The University of Wisconsin-Eau Claire, p. 5.

570 P Fong, '*Inter Arma Enim Silent Leges*: The Impunity of Japan's Secret Biological Unit' (2000) 6 New Eng. Int'l & Comp. L. Ann, 3.

571 C P Cohen, 'Tokyo Trial and other Trials Against Japan: 3rd May 1946-12th November 1948' < http://www.ww2db.com/battle_spec.php?battle_id=221 > accessed on 26th April 2015.

under the Meiji Constitution bore ultimate responsibility for the war. The Japanese Emperor Hirohito and other members of the imperial family were not indicted. Emperor Hirohito escaped prosecution because the American government felt the imperative of using the imperial throne as an instrument for the control of the Japanese people.[572]

Again, there was the assertion that crimes against peace and crimes against humanity applied at the tribunal were unknown to international law, and were therefore, a violation of the *nullum crimen sine lege, nulla poena sine lege* principle.[573] Despite the fact that crimes against humanity were listed in the Tokyo Charter along with crimes against peace and war crimes, they were mentioned just once in the indictment, and only in passing in the majority judgment, probably because the Japanese crimes were less heinous compared to the German atrocities.

Despite the fact that the war crimes charges and murder charges partly covered the same ground as crimes against humanity, many victims, such as the 'comfort women' from Japan's colonies of Korea and Formosa were left to seek justice by different means.[574] However, Yuma Totani is of the view that the failure of the prosecution to make a conceptual distinction between war crimes and crimes against humanity reflects less the lack of expertise than the general understanding among the prosecutors that in the Asia Pacific region, they did not have instances of mass atrocity that required the use of law pertaining to crimes against humanity.[575] Nevertheless, Oji and Ozioko have pointed out that the Nuremberg and Tokyo Trials were the

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572 E Okada, The Australian Trials of Class B and C Japanese War Crime Suspects, 1945-51' (2009) Vol. 16 *Australian International Law Journal*, 49.

573 United States *et al* v Araki Sadao *et al* in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, with an Authoritative Commentary and Comprehensive Guide (2002), Vol. 105, Dissenting Opinion of Justice Pal, 36-37 (Tokyo Major War Crimes Trial).

574 R Sakamoto, 'The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: A Legal and Feminist Approach to the 'Comfort Women's Issue' (2001) Vol. 3 *New Zealand Journal of Asian Studies*, 51.

575 Y Totani, 'The Case against the Accused' in Y Tanaka *et al* (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff Publishers, 2010) p. 154.

first comprehensive attempts to unravel the factual complexity of the horrible crimes committed by the German Nazi regime, as well as the most comprehensive attempts to punish the perpetrators of the crimes.[576]

### 4.4 Ad Hoc Tribunals Established by the United Nations Security Council

As a result of the atrocities committed during the breakup of the Yugoslav Republic and also of the Rwandan genocide, the UN Security Council created *ad hoc* courts to try those responsible for genocide, war crimes and crimes against humanity. Ethnic cleansing in the former Yugoslavia and genocide in Rwanda led to an unprecedented experiment in institution building by the United Nations.[577]

To Schabas, given the existence of the ICTY, a failure to have created the ICTR 'would have indelibly stained international justice as good enough for conflicts in the North, but relatively indifferent to those in the South'.[578] The view has been articulated that International Criminal Tribunals are UN subsidiary organs established by the Security Council to exercise judicial powers which the Council does not possess the competence to exercise.[579] The two statutes were strongly influenced by the Nuremberg Charter. However, unlike the others, the Statute of the ICTR conferred jurisdiction over crimes committed in an internal conflict. The *ad hoc* tribunals introduced a novelty into international criminal law. Defendants convicted by the IMT Nuremberg and the IMT Tokyo could only plead for clemency before a political body.

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576 E A Oji and M V C Ozioko, 'Duty of State to Enforce International Humanitarian Law Vis-A-Vis Duty to Protect Interest of Its Nationals' (2015) Vol. 6. No.6 *Journal of Emerging Trends in Educational Research and Policy*, 454.

577 P Akharan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) Vol. 90. No. 3. *The American Journal of International Law*, 501.

578 W A Schabas, 'Genocide Trials and Gacaca Courts' (2005) Vol. 3. Journal of International Criminal Justice, 2.

579 D Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1997) Vol. 67 No. 1. *British Yearbook of International Law*, 428.

There was no provision at all for the judicial re-examination of their convictions.[580] On the other hand, the ICTY was created with an Appeals Chamber, constituted to hear appeals from the decisions of the trial chamber. A year later, the responsibility of the Appeals Chamber was expanded to hear appeals from the trial chamber of the ICTR.[581]

### 4.4.1The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The period from the late 1980s to the early 1990s witnessed great political and social upheavals in Eastern Europe and the Soviet Union with the collapse of most socialist systems and the resurgence of nationalism.[582] In Yugoslavia, or more formally, the Socialist Federal Republic of Yugoslavia up to October 1992, a series of economic and political crises led ultimately to the violent disintegration of the country.[583] The conflict between Serbia, Croatia, and Bosnia was an international armed conflict between former republics of Yugoslavia. However, it also described the qualities of an internal armed conflict in Bosnia, as Bosnian Croats, Bosnian Serbs and Bosnian Muslims fought one another.[584] Shocked by news of human rights abuses in the former Yugoslavia, reported with increasing urgency by the world press and non-governmental organizations in the summer of 1992, the United Nations Security Council in October 1992 requested the Secretary-General to establish a Commission of Experts to report on those abuses and grave breaches of international humanitarian law.[585]

From the inception of conflict, great brutality characterized the conduct of the parties. There were mass executions, mass sexual assaults and rapes, the existence of concentration

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580 Charter of the IMT Nuremberg, Article 29; and Charter of the IMTFE, Article17.

581 M C Fleming, 'Appellate Review in the International Criminal Trials' (2002) Vol. 37. *Texas International Law Journal*, 112.

582 UN ICTY. < http://www.icty.org/sid/319 > accessed on 28th April 2015.

583 *Ibid*.

584 L A Barria and S D Roper, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) Vol. 9. No. 3. *The International Journal of Human Rights*, 350.

585 S.C. Res. 780, U.N.SCOR, 47th Sess., 3119th Mtg., U.N. Doc. S/RES/780 (1992).

camps and the implementation of a policy of ethnic cleansing.[586] The widely held belief was that the Commission would presage the establishment of an international tribunal to prosecute individuals if the parties did not conform to Security Council resolutions.[587] In consequence, the Council on 22nd February 1993 adopted a resolution and decided to establish a Tribunal.[588] On 25th May 1993, the Security Council established the ICTY by a unanimously resolution.[589] This was in consequence of Chapter VII of the Charter of the UN, which authorizes the Security Council to take measures necessary to maintain or restore international peace and security.[590] Furthermore, Article 25 obligates members of the United Nations to accept and carry out decisions of the Security Council.

Adopting the Statute, member states of the Security Council recognized that the creation of the *ad hoc* criminal tribunal represented a historic and unprecedented use of Chapter VII powers.[591] It was no surprise therefore that the government of Yugoslavia (Serbia and Montenegro) contended that the UN Security Council acted *ultra vires* as it lacked the power to establish a court under the Charter of the UN.[592] The Tadic Jurisdictional Decision highlighted the challenge to the legality of the creation of the ICTY. Tadic had argued that the Security Council had no power to establish a criminal court.[593] The Trial Chamber decided that it lacked the jurisdiction to review the action taken by the Security Council. Furthermore, it asserted that it

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586 D Shraga and R Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) Vol. 5. *European Journal of International Law*, 360.

587 *Ibid* p. 361.

588 Security Council Resolution 808 (1993), 22nd February 1993.

589 Security Council Resolution 827, 25th May 1993.

590 UN Charter 1945, Chapter VII, Articles 39-51: Action with respect to threats to the peace, breaches of the peace and acts of aggression.

591 C Lister, 'What's in a Name? Labels and the Statute of the International Criminal Tribunal for the Former Yugoslavia' (2005) Vol. 18. No. 1. *Leiden Journal of International Law*, 81.

592 A Birdsall, 'The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order?' (2006) Issue 8. *Peace Conflict & Development*, 11.

593 Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2nd October 1995 (Tadic Jurisdictional Decision).

was a Tribunal with 'a limited criminal jurisdiction' derived solely from the Statute and that it did not have the jurisdiction to determine the legality of its own creation.[594]

On the other hand, the Appeals Chamber held that in terms of the principle of *competence de la competence*, it had the inherent jurisdiction to determine its own jurisdiction.[595] However, in a dissenting decision to the decision of the Appeals Chamber, Judge Li expressed the view that the Tribunal did not have the competence to determine its own jurisdiction. He asserted further that the Tribunal could not review the legality of the resolutions of the Security Council.[596] The decision of the Appeals Chamber in *Tadic* is significant because it addresses the validity of the creation of an international criminal tribunal by the Security Council, the first such tribunal ever constituted by the global community through the United Nations. It is also noteworthy for its characterization of the Yugoslav conflict and for the various principles of international humanitarian law applicable to offenses committed in that conflict.[597]

The ICTY was established while conflict was still raging in the former Yugoslavia. In creating the ICTY, the UN had hoped to deter civilian and military officials in the former Yugoslavia from committing more mass atrocity crimes, while at the same time sending a powerful signal that those responsible for atrocities already committed would be brought to justice. Unfortunately, the establishment of the ICTY alone produced little if any deterrent effect, as the July 1995 genocide at Srebrenica; the single largest crime of the entire Bosnian war, occurred after the tribunal had come into existence.[598] In *Prosecutor v Radislav Krstic,* one of the

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594 Prosecutor v Tadic, Decision on the Defence Motion on Jurisdiction, IT-94-T, 10th August 1995.

595 Tadic Jurisdictional Decision, para. 15. The '*competence de la competence' (*competence-competence) principle empowers a tribunal to rule on its jurisdiction. See also A Kawharu, 'Arbitral Jurisdiction' (2008) Vol. 23. *New Zealand Universities Law Review*, 239.

596 M Swart (2011), 'Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY' (2011) Vol. 3. *Goettingen Journal of International Law,* 997.

597 A K Baltes 'The Prosecutor v Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia' (1997) Vol. 49. *Maine Law Review*, 559.

598 K G Southwick, 'Srebrenica as Genocide? The Krstic Decision and the Language of the Unspeakable'

Trial Chambers of the ICTY found that following the takeover of the town, Bosnian Serb forces executed between seven thousand and eight thousand military-aged Bosnian Muslim men.[599]

Furthermore, the invading forces transferred away from the region almost all the Bosnian women, children, and the elderly, leading to the physical disappearance of the Bosnian Muslim population of Srebrenica.[600] Likewise, in the *Brdjanin* case, the ICTY expressed its satisfaction beyond reasonable doubt that there was a widespread or systematic attack against the Bosnian Muslim and Bosnian Croat civilian population in the Bosnian Krajina during the period relevant to the Indictment from 1st April 1992 to 31st December 1992. Nearly all Bosnian Muslims and Bosnian Croats had been dismissed from their jobs in, amongst others, the media, the army, the police, the judiciary and public companies. Numerous crimes were committed against Bosnian Muslims and Bosnian Croats, including murder, torture, beatings, rape, plunder and the destruction of property.[601]

The ICTY, sitting at The Hague, Netherlands, had jurisdiction over four categories of crimes committed on the territory of the former Yugoslavia since 1991:[602] grave breaches of the Geneva Conventions,[603] violations of the laws or customs of war,[604] genocide,[605] and crimes against humanity.[606] Article 5 of the ICTY Statute prohibiting crimes against humanity provides that the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c)

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(2005) Vol. 8. *Yale Human Rights and Development Law Journal*, 189.

599 Prosecutor v Radislav Krstic (ICTY Trial Chamber), Case No. IT-98-33-T, para. 84, 2nd August 2001.

600 Prosecutor v Radislav Krstic, supra, paras. 52 and 595.

601 Prosecutor v Brdjanin, (ICTY Trial Chamber), 1st September 2004, paras. 157-158.

602 Article 1 Statute of the ICTY 1993.

603 Article 2, ICTY Statute.

604 Article 3, ICTY Statute.

605 Article 4, ICTY Statute.

606 Article 5, ICTY Statute.

enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and

religious grounds; (i) other inhumane acts. The ICTY Statute extends the scope of crimes against humanity found in Article 6 of the Nuremberg Charter, by including torture and rape.

The ICTY has held that Article 5 of the Statute confers jurisdiction on the Tribunal to prosecute persons for crimes against humanity. While the Appeals Chamber has held that 'customary international law may not require a connection between crimes against humanity and any conflict at all', Article 5 imposes a jurisdictional requirement limiting the Tribunal's jurisdiction to crimes against humanity 'when committed in armed conflict, whether international or internal in character'.[607] The notorious practice of ethnic cleansing, although not referred to, as such, by the ICTY Statute, is incorporated by the grave breach of 'unlawful deportation or transfer...of a civilian,' or the crime of 'deportation' of civilian population under Article 5 of the Statute. To the extent that 'ethnic cleansing' also comprises murder, extermination, rape etc., it is covered under the respective crimes, characterized as either war crimes or crimes against humanity.[608]

In relation to national courts, the ICTY had primacy over offences created by its statute.[609] The Statute of the ICTY incorporates the principle of individual criminal responsibility.[610] Joyner has stated that the Tribunal thus confirms the principle that individuals may be held criminally liable under international law, even though their conduct might have been considered valid or even mandated by domestic law.[611]

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607 Prosecutor v Stakic, (ICTY Trial Chamber), 31st July 2003, para. 567.

608 D Shraga and R Zacklin, *art cit*, p. 367.

609 Article 9 (1), ICTY Statute.

610 Article 7, ICTY Statute.

611 C C Joyner, 'Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal

In 1994, the first indictment was issued against the Bosnian-Serb concentration camp commander Dragan Nikolic. This was followed on 13th February 1995 by two indictments comprising 21 individuals which were issued against a group of 21 Bosnian-Serbs charged with committing atrocities against Muslim and Croat civilian prisoners.[612] The Tribunal indicted the Bosnian Serb leader and the Army Commander for genocide and crimes against humanity. The leader of rebel Serbs in Croatia was also indicted for the dropping of cluster bombs on Zagnab, the Capital of Croatia. Twenty one other persons were indicted for crimes committed in prison camps in Bosnia and the northern Bosnian region of Bosanki Sanac. On 26th February 2009, the ICTY convicted five former high-ranking Yugoslav and Serbian officials for crimes against humanity.[613]

Dusko Tadic became the subject of the Tribunal's first trial. The Bosnian-Serb, Dusko Tadic was arrested by German police in Munich in 1994 for his alleged actions in the Prijedor region in Bosnia-Herzegovina, (especially his actions in the Omarska, Trnopolje and Keraterm detention camps). Tadic made his initial appearance before the ICTY Trial Chamber on 26th April 1995 and pleaded not guilty to all of the charges in the indictment.[614] The indictment of Dusko Tadic, for example, alleges in part that he had participated in the murder of Emir Karabasic, a crime against humanity recognized by Articles 5(a) and 7(1) of the Statute of the Tribunal.[615] He was convicted of crimes against humanity, grave breaches of the Geneva

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Tribunal for the Former Yugoslavia' (1995) Vol. 6. *Duke Journal of Comparative and International Law*, 87.

612 The International Criminal Tribunal for the Former Yugoslavia. < https://www.en.m.wikipedia.org/wiki/International_Criminal_Tribunal_for _the_former_Yugoslavia > accessed on 29th April 2015.

613 H O Agarwal (2013), *International Law and Human Rights* (19th edn, Allahabad: Central Law Publications, 2013) p. 623.

614 The International Criminal Tribunal for the Former Yugoslavia. < https://www.en.m.wikipedia.org/wiki/International_Criminal_Tribunal_for _the_former_Yugoslavia > accessed on 29th April 2015.

615 W J Fenrick, 'Some International Law Problems Related to Prosecutions of Persons before the International

Conventions, and violations of the laws and customs of war, and sentenced to a twenty year term of imprisonment.[616]

Askin highlighted some of the challenges faced by the ICTY in the execution of its work. These included scarce legal or procedural precedent, handicaps in acquiring evidence and securing arrests, acute language and translation difficulties, and its location far from the conflict region.[617] Another allegation was that the ICTY was established in place of a more effective action to prevent crimes in the former Yugoslavia.

Unlike the national legal systems of States, the ICTY was not part of a framework that ensures that its arrest warrants and others orders will be executed. In addition, in contrast with the Nuremberg and Tokyo Tribunals, the ICTY operated in a scenario quite different from that in which the Allied Powers wielded full control over Germany and Tokyo.[618] Despite these enormous obstacles, the ICTY was still able to record some remarkable achievements. These are that the ICTY promoted accountability rather than impunity, established the facts of the crimes in the former Yugoslavia, brought justice to victims and gave them a voice, developed international law and strengthened respect for the rule of law.[619]

### 4.4.2 The International Criminal Tribunal for Rwanda (ICTR)

In establishing the ICTR, the UN followed its earlier footsteps for creating the ICTY following the genocide in Europe. It was considered imperative to create a similar institution when genocide occurred in Africa. On 6th April 1994, Hutu President Juvenal Habyarimana's plane

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Criminal Tribunal for the Former Yugoslavia' (1995) Vol. 6. *Duke Journal of Comparative and International Law,* 105.

616 Prosecutor v Dusko Tadic a/k/a 'Dule' (ICTY Trial Chamber), para. 74, pp. 38-39, 14th July 1997, Case No. IT-94-1-T.

617 K D Askin, 'Reflections on Some of the Most Significant Achievements of the ICTY' (2003) Vol. 37. No. 4. *New England Law Review*, 903.

618 G K McDonald, 'Problems, Obstacles and Achievements of the ICTY' (2004) Vol. 2. *Journal of International Criminal Justice*, 559.

619 Cryer *et al*, *op cit*, p. 110.

was shot down from the sky by a surface-to-air missile, signaling the onset of the genocide.[620] The next day, a systematic and widespread slaughter spread throughout the country:

> Rape, torture, mutilation, unspeakable cruel murder; mothers forced to watch their children die before being killed themselves; and children forced to kill their families. Mutilations were common, and macabre ritual was evident; brutality...did not end with murder. At massacre sites, corpses, many of them those of children, were methodically dismembered and the body parts stacked neatly in separate piles.[621]

The genocide was perpetrated in the course of a hundred days in which approximately 800 000 Tutsis and moderate Hutus were hacked to death by their machete-wielding Hutu neighbours.[622] The UN first began with a condemnation of the genocide in Rwanda, followed by the establishment of a Commission of Experts and the constitution of an international criminal tribunal.[623]

The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed

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620 V Percival and T Homer-Dixon (1996), 'Environmental Scarcity and Violent Conflict: The Case of Rwanda' Vol. 5. No. 3. *Journal of Environment and Development*, 275.

621 D Koosed, 'The Paradox of Impartiality: A Critical Defence of the International Criminal Tribunal for Rwanda' (2012) Vol. 19. *U. Miami Int'L & Comp. L. Rev*, 258.

622 W K Timmermann, 'The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law towards Criminalization of Hate Propaganda?' (2005) Vol. 18. No. 2. *Leiden Journal of International Law*, 258.

623 Security Council Resolutions 935 (1994) (Commission) and 955, Article1, U.N. Doc. S/RES/955 (8th Nov. 1994) (Court).

in the Territory of Neighbouring States, between 1st January 1994 and 31st December 1994, more commonly referred to as the International Criminal Tribunal for Rwanda or ICTR, was created by the UN Security Council exercising its powers under Chapter VII of the UN Charter, to prosecute those most responsible for genocide, crimes against humanity and other serious violations of international humanitarian law. In addition to that role, the United Nations as well as the international community held the underlying hope that the work of the ICTR would contribute to the process of national reconciliation and restoration and the maintenance of peace.[624] Indeed, the ICTR was the first tribunal established for the purpose of national reconciliation.[625] The Statute of the ICTR was annexed to the UN Security Council Resolution 955.

The ICTR made full use of the ICTY's experience and was based largely on it. The ICTR Statute was similar to that of the ICTY with some variations to account for the mostly internal and temporal aspects of the Rwandan conflict.[626] Yet, in order to harmonize jurisprudence and save resources, the ICTR and the ICTY shared the same appellate body[627] and Prosecutor.[628] However, unlike the ICTY which was created by the Security Council on its own initiative, the ICTR was established by the Security Council at the request of the Rwandan government.[629]

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624 A Dieng, 'Capacity-Building Efforts of the ICTR: A Different Kind of Legacy' (2011) Vol. 9. No. 3. *Northwestern Journal of International Human Rights*, 404.

625 H Shinoda, 'Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals' (2002) Vol. 7. *International Journal of Peace Studies*, 41-58.

626 K O Einarsdottir, 'Comparing the Rules of Evidence Applicable Before the ICTY, ICTR and the ICC' (2010) Sigillum Universitatis Islandiae, Haskoli Islands, p. 11.

627 Article 12 (2), Statute of the ICTR: 'The members of the Appeals Chamber of the ICTY shall also serve as the members of the Appeals Chamber of the ICTR'.
Article 15 (3) Statute of the ICTR: The Prosecutor of the ICTY shall also serve as the Prosecutor of the ICTR. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

629 Letter of 28th September 1994, addressed by the Rwanda's permanent representative to the United Nations to the President of the Security Council, Doc. 5/1994/1115.

Nevertheless, Rwanda later voted against the creation of the Tribunal on the grounds that the most severe punishment to be meted out by the Tribunal would be imprisonment and not death; and that it was unrealistic to limit the tribunal's temporal jurisdiction to 1st January 1994 since serious crimes related to the genocide had been committed before then.[630]

In 1995, the seat of the ICTR became located in Arusha, Tanzania.[631] The choice of Arusha was symbolic because it hosted the negotiations on the political stabilization of Rwanda, which culminated in the conclusion of the Arusha Accords or the Arusha Peace Agreement.[632] The Arusha Peace Accords of 1993 attempted to forge a power-sharing arrangement between the rebel Rwandan Patriotic Front (RPF) and Habyarimana's government.[633] Like the ICTY, the ICTR had primacy over national courts.[634] The ICTR had jurisdiction over war crimes,[635] genocide,[636] and crimes against humanity.[637] Under Article 3 of the ICTR Statute, the tribunal is authorized to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.

However, the definition of crimes against humanity in the ICTR Statute has the supplementary requirement of discrimination. As a result, the ICTR has held that for an

630 P Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) Vol. 90, No. 3. *The American Journal of International Law*, 505. See also C M Peter, 'The International Criminal Tribunal for Rwanda: Bringing Killers to Book' (1997) No. 321. *International Review of the Red Cross*.

631 UN Security Council Resolution 977 (1995).

632 C Aptel, 'The International Criminal Tribunal for Rwanda' (1997) No. 321. *International Review of the Red Cross*.

633 M Hana, 'Challenging Impunity-The Failure of the International Criminal Tribunal for Rwanda to Prosecute Paul Kagame' (2011) Vol. 37. No. 2. *Brook. J. Int'l L*, 688.

634 Article 8 (1), ICTR Statute.

635 Article 4, ICTR Statute.

636 Article 2, ICTR Statute.

637 Article 3, ICTR Statute.

enumerated crime under Article 3 to qualify as a crime against humanity, the Prosecution must prove that there was a widespread or systematic attack against the civilian population on national, political, ethnic, racial or religious grounds.[638] Furthermore, in Prosecutor v Muvunyi, the ICTR was of the view that crimes against humanity consisted of two layers. The first layer, comprising the general elements posits that a crime against humanity must be committed as part of a 'widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds'. The second layer enumerates six specific or underlying crimes, in addition to a residual class of 'other inhumane acts' committed in the context of a widespread or systematic attack on a civilian population on any of the enumerated discriminatory grounds.[639]

The ICTR is the first international tribunal to convict defendants for the crime of genocide.[640] Jean-Paul Akayesu's trial ended in September 1998, with his conviction in a judgment that was not only the first express application of the Genocide Convention by an international tribunal, but also determined that sexual offences could form the *actus reus* of genocide.[641] On 18th December 2008, the ICTR delivered its judgment in the Theoneste Bagosora case, also known as the Military I trial or the 'mastermind' of genocide in Rwanda. Bagosora and three other senior military officers were charged with conspiracy to commit genocide, genocide, crimes against humanity, and war crimes, based on direct or superior responsibility for crimes committed in Rwanda in 1994. At the end of the trial, the ICTR delivered a judgment in which it found Bagosora and two of the other accused guilty of

638 Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (ICTR Trial Chamber), 18th December 2008, para. 2165. See also Prosecutor v Zigiranyirazo, (ICTR Trial Chamber), 18th December 2008, para. 430; and Prosecutor v Bikindi, (ICTR Trial Chamber), 2nd December 2008, paras. 428.

639 Prosecutor v Muvunyi, (ICTR Trial Chamber), 12th September 2006, para. 511.

640 Oji, *op cit*, p. 193.

641 Cryer *et a*l, *op cit*, p. 114.

genocide, war crimes, and crimes against humanity, but acquitted all four accused persons of the charge of conspiracy to commit genocide.[642]

In 2010, the Security Council, acting pursuant to its Chapter VII powers issued Resolution 1966, which established the Residual Mechanism as the legal successor to both the ICTY and the ICTR. Although the UN Security Council did not set a time for the ICTR to conclude its work, or fix a deadline for its existence, it had always been understood that as an *ad hoc* international tribunal with a mandate restricted to the gravest crimes committed in Rwanda for the sole year of 1994, the tribunal's lifespan would be short.[643] The ICTR is primed to close down in 2015, and had for that purpose, significantly downsized its staff strength and presented completion dates to the United Nations General Assembly and the Security Council.[644]

The Mechanism for International Criminal Tribunals (MICT) was conceived as a means of closing down the ICTY and the ICTR before the conclusion of their mandates, while simultaneously ensuring the full completion of their respective mandates by the Mechanism itself.[645] The MICT is made up of two branches. One branch handles the duties inherited from the ICTR, and is located in Arusha, Tanzania. It started its operations on 1st July 2012. The other branch is located in The Hague, and inherited functions from the ICTY. It commenced its work on 1st July 2013.[646] Some of the cases which could not be completed in the ICTY and the ICTR will be completed by the Residual Mechanism. Others will be transferred to the national courts

642 The Prosecutor V. Theoneste Bagosora et al., (ICTR Trial Chamber) ICTR–98–41–T.

643 C Aptel, 'Closing the U.N International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' (2008) Vol. 14. No. 2. *New England Journal of International & Comparative Law*, 170.

644 ICTR Expected to Close Down in 2015. Press Release dated 2nd February 2015, United Nations International Criminal Tribunal for Rwanda. < http://www.unictr.org/en/news/ictr-expected-close-down-2015 > accessed on 6th May 2015.

645 G McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2011) Vol. 3. *Goettingen Journal of International Law*, 926.

646 The Mechanism for International Criminal Tribunals. < http://www.icty.org/sid/10874 > accessed on 6th May 2015.

of Rwanda. For instance, the appellate court left the *Bernard Munyagishari case* to the Rwanda national court on 24th July 2013, anticipating that it could not be completed.[647]

Although the ICTR Statute does not explicitly provide a legal basis for the transfer to domestic courts of the cases of persons it has indicted, the judges amended the Rules of Procedure and Evidence to include provisions enabling such transfers. Rule 11 *bis*, entitled 'Referral of the Indictment to another Court' provides that a case can be referred for trial to the State in whose territory the crime was committed, or the State in which the accused was arrested, or to any other State having jurisdiction, which is willing and adequately prepared.[648]

Like its Nuremberg counterpart, the ICTR has also come under severe criticisms. The accusation of victor's justice has been leveled against the tribunal. Lars Waldorf pointed out that in 1994, the RPF killed at least 25,000 to 30,000 Hutu civilians, yet the prosecutor of the ICTR announced that he would not indict a single RPF soldier for those crimes.[649] Erlinder has also stated that unlike the ICTY, which has brought at least some charges against each of the

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647 E Coban-Ozturk, 'Completing the Tribunal: ICTR's Contributions and Deficiencies' (2014) Vol. 10. No. 4. European Scientific Journal, 43.

648 In the hierarchy of norms pertinent to the ICTR, the Statute, annexed to UN Security Council Resolution 955, is higher than the Rules of Procedure and Evidence, adopted and regularly amended by the judges. The full Rule provides as follows: (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard. (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out. (D) Where an order is issued pursuant to this Rule: (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned; (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force; (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment; (iv) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf. (E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial. ICTR Rules of Procedure and Evidence, 11 *bis.*

649 L Waldorf, 'A Mere Pretence: Complementarity, Sham Trials and Victor's Justice at the Rwanda Tribunal' Vol. 33. *Fordham International Law Journal*, 1221-1222.

protagonists, with the notable exception of NATO forces, only members of the former Rwandan government and military have been among the accused at the ICTR.[650] On the positive side however, to some extent, testimony presented during the trial process may also assist with post-conflict reconciliation in Rwanda because it has the effect of giving voice to victims and survivors, allowing them to tell their stories and to validate their experience of suffering.[651]

The ICTR has been successful in its mandate to hold accountable the highest level of perpetrators who organized and carried out the genocide in Rwanda. The trials completed by the Tribunal have challenged the historical impunity that existed in Rwanda for government and military officials who conducted previous massacres of Tutsi civilians under a societal ideology of hatred and extermination as a final solution to a scapegoat minority.[652] Although the ICTR was set up in a post-conflict environment, the global community was worried that revenge killings on the part of the Tutsis would undermine peace in the region. Unsurprisingly, tens of thousands perished in clashes between Hutu insurgents and Tutsi revenge killings in the period following the creation of the ICTR.[653] Nevertheless, the *ad hoc* Tribunals for the former Yugoslavia and Rwanda paved the way for the establishment of the International Criminal Court, a permanent court that has succeeded them.[654]

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650 P Erlinder, 'The International Criminal Tribunal for Rwanda: A Model for Justice or Juridically Created 'Victor's Impunity?' (2008) *La Justice International Aujourd'hui* 30-31 Mai 2008 Adif/Aijd, 3. See also T Hauschildt, "ICTR: Contribution to Reconciliation or Victor's Justice?" (2014) Issue 2. No. 3. *Global Governance*, 7.

651 T Gallimore, 'The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda' (2008) Vol. 14. No. 2. *New Eng. J. of Int'l & Comp. L*, 240.

652 *Ibid* p. 242.

653 L A Barria and S D Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) Vol. 9. No. 3. *The International Journal of Human Rights*, 358.

654 L N Sadat, 'The Legacy of the International Criminal Tribunal for Rwanda' (2012) Occasional Papers, Whitney R. Harris World Law Institute, Washington University in St. Louis, p. 10.

## 4.5 Hybrid Internationalized Criminal Courts

Hall succinctly stated that the history of post-conflict justice can be separated into three generations.[655] The hybrid criminal courts may be regarded as third generation courts; the Nuremberg and Tokyo tribunals being of the first generation, while the ICTY and the ICTR are of the second generation.[656] The United Nations defines hybrid courts as courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crime occurred.[657]

Notwithstanding the terminological melee over what to call the new types of courts,[658] most authors on the subject mention as examples of this class of courts, the Serious Crimes Panels in the District Court of Dili in East Timor,[659] the Regulation 64 Panels in the courts of Kosovo,[660] the Special Court for Sierra Leone, and the Extraordinary Chambers in the

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655 B Hall, 'Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal' (2005) Vol. 13. Issue 1/2. *Michigan State Journal of International Law*, 44.

656 E R Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) Vol. 23. *Ariz J Int'l & Comp L*, 352.

657 Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts' (2008) United Nations, New York and Geneva, p. 1.

658 Whether they are referred to as hybrid (criminal) courts/tribunals, mixed courts/tribunals, internationalized (criminal) courts/tribunals, mixed domestic-international tribunals, hybrid domestic-international courts, semi-internationalized criminal courts/tribunals, internationalized domestic courts/internationalized domestic tribunals or mixed international/national institutions.

659 The UN Transitional Authority in East Timor (UNTAET) established the Special Panels under its mandate to establish law and order at the end of hostilities. The UNTAET Regulation 2000/15, approved in July 2000, described the operation of the Special Panels. Under Section 9 of UNTAET Regulation 2000/15, the Panels had jurisdiction over serious international crimes committed between January and October 1999. The crimes included genocide, war crimes and crimes against humanity. See also Special Panel for Serious Crimes (East Timor). < http://www.ibanet.org/Committee/WCC_EastTimor.aspx > accessed on 14th May 2015.

660 Intending to deal with those cases that the ICTY could not prosecute because of the absence of resources or mandate, the UN Interim Administration Mission in Kosovo (UNMIK) Regulation 2000/64 provided for Panels consisting of at least two international judges and one judge from Kosovo to try alleged perpetrators responsible for atrocities committed during the armed conflict in Kosovo in 1999. The panels were to adjudicate cases where it is 'necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice'. See 'Hybrid'. < http://www.internationalcrimesdatabase.org/Courts/Hybrid > accessed on 14th May 2015.

Courts of Cambodia.[661] Others include the Supreme Iraqi Criminal Tribunal (formerly, the Iraqi Special Tribunal),[662] the War Crimes Chamber in Bosnia and Herzegovina,[663] the War Crimes Chamber in Serbia,[664] the Ethiopian Special Prosecutor's Office,[665] and the Extraordinary African Chambers within the Courts of Senegal. However, only the SCSL and the Extraordinary African Chambers within the Courts of Senegal are discussed in this section. These two tribunals are chosen as representative of the others since they share similar attributes.

Hybrid courts have become increasingly popular in the fight against impunity for international crimes.[666] As stated by Holvoet and Paul de Hert, the establishment of hybrids was imperative to fill the impunity gap created by the interregnum between the adoption of the Rome

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661 S M H Houven, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts' (2006) Vol. 2. Issue 2. *Utrecht Law Review*, 192.

662 The Iraqi Governing Council approved the statute establishing the Iraqi Special Tribunal for Crimes against Humanity on 10th December 2003. The Iraqi Special Tribunal was designed to prosecute those accused of crimes against humanity, war crimes and genocide committed in Iraq between 17th July 1968 when Saddam Hussein's Ba'ath Party seized power, and 1st May 2003, when President Bush declared that major combat operations in Iraq were over. The Tribunal's remit also include the trial of several lesser crimes, including squandering national resources, attempts to manipulate the judiciary, and the use of armed force against an Arab country: Articles 1, 11, 12, 13, and 14, Law of the Supreme Iraqi Criminal Tribunal, No. 10 of 2005, 18th October. See also 'Iraqi Special Tribunal to Try Crimes against Humanity'. < http://www.hrcr.org/hottopics/iraqitribunal.html > accessed on 14th May 2015.

663 The War Crimes Chamber of Bosnia and Herzegovina is a domestic court of the State of Bosnia and Herzegovina which includes international judges and prosecutors. It was officially inaugurated on 9th March 2005. Its remit is to investigate and prosecute persons allegedly involved in serious violations of international law during the 1992-1995 conflict. The WCC will also try lower -to-mid-level cases referred to it by the ICTY pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence.

664 In order to try war crimes committed in its national courts, Serbia established a War Crimes Chamber of the Belgrade District Court in July 2003 with the support of the USA and the ICTY. In July 2003, the Serbian Assembly passed the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes (Official Gazette of the Republic of Serbia, No. 67/2007, 1st July 2003, War Crimes Law). The subject-matter jurisdiction of the WCC covers war crimes, genocide, and crimes against humanity (Law Amending the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Official Gazette of the Republic of Serbia*, No. 135/2004, 21st December, 2004, Article 3 (amending Article 2 in the original law)).

665 In 1992, the transitional government in Ethiopia established the Office of the Special Prosecutor vide the Proclamation to Provide for the Establishment of the Office of the Special Prosecutor 22/1992, 8th August 1992. Its mandate was to 'conduct investigations and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Dergue-WPE regime'. See Article 6, Proclamation Establishing the Office of the Special Prosecutor. The Dergue was the military government that ruled Ethiopia between 1974 and the end of the 1980s while the WPE stands for Worker's Party of Ethiopia.

666 H Jain, 'Conceptualizing Internationalization in Hybrid Criminal Courts' (2008) 12 *Singapore Yearbook of International Law*, 81.

Statute in 1998 and its entry into force in 2002.[667] Nevertheless, in the decade after 2000, the popularity of hybrid criminal tribunals as an avenue for transitional criminal justice has declined drastically. The courts have been subjected to scathing criticism by scholars who had earlier hoped that the symmetry of international and domestic law and expertise would cause the tribunals to appear more legitimate to the survivor populations concerned, and to leave a lasting legacy by strengthening national legal systems.[668] Additionally, the ICC offers an alternative means of international accountability for crimes. Although there is no single model of a hybrid court, all mixed international courts, like other criminal courts, aim to sanction serious violations of international law, committed by individuals.[669]

There are varieties of mixed or internationalized courts, but the common denominator among all of them is that they are of an *ad hoc* nature, and feature international elements, especially, their composition of judges and personnel. They rely on national and international administrators, as well as a fusion of domestic and internationally recognized criminal justice procedures to investigate and prosecute crimes.[670] The most recent example of a hybrid court is the Extraordinary African Chambers for the trial of Hissene Habre in Senegal following an agreement between the African Union and the government of Senegal.

Mixed international courts were created to overcome the problems associated with wholly domestic courts and purely international tribunals. It is thought that they will be more independent and impartial than local courts and can transcend the burden of harnessing resources

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667 M H Holvoet and Paul de Hert, 'International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals' (2012) Vol. 17. *Tilburg Law Review*, 235.

668 P McAuliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child became an Orphan' (2011) *Journal of International Law and International Relations*, 1-2.

669 Hybrid Courts. Published by Project on International Court and Tribunals. < http://www.pict-pcti.org/courts/hybrid.html > accessed on 9th May 2015.

670 B A Kritz and J Wilson, 'No Transitional Justice without Transition: Darfur - A Case Study' (2011) Vol. 19. Issue 3. *Michigan State Journal of International Law*, 488.

and expertise in post-conflict societies. They are also considered to be cheaper and easier to set up than international courts and usually being located in the countries they serve, suffer less from a legitimacy shortfall and can build local capacity[671] Hybrid courts are thus assumed to combine the better of two worlds.[672] Despite the existence of the ICC, Holvoet and Paul de Hert have declared that hybrid tribunals could try cases where the ICC has no *jurisdiction ratione temporis*,[673] or where the ICC has no jurisdiction *ratione loci*,[674] or where the ICC has no jurisdiction *ratione materiae*.[675]

### 4. 5.1 The Special Court for Sierra Leone (SCSL)

War broke out in Sierra Leone in 1991, when a rebel group, the Revolutionary United Front ('RUF'), entered the country from Liberia in order to overthrow the regime in Sierra Leone.[676] The Revolutionary United Front (RUF) under the leadership of Foday Sankoh used amputations and mass rape to terrorize the population and gain control of the country's lucrative diamond mines. Charles Taylor, then president of neighbouring Liberia, backed the insurgency providing arms and training to the RUF in exchange for diamonds. The pro-government Civil Defence Force (CDF), led by Sam Hinga Norman, committed serious crimes as well.[677] Among the conflict's most notorious features were widespread amputations, mutilations, acts of sexual

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671 L A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law*, 295.

672 S M H Nouwen, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts' (2006) Vol. 2. No. 2. *Utrecht Law Review*, 190.

673 For example, crimes committed before the entry into force of the ICC Statute.

674 For instance, where for geopolitical reasons, the UN Security Council is unable to refer a situation to the ICC under Article 13 (b) of the Rome Statute, or for political reasons, a non-State party refrains from lodging an *ad hoc* declaration under Article 12 (3) accepting the jurisdiction of the ICC for the particular crime, regional organizations such as the African Union or the Arab League could establish a hybrid tribunal.

675 For example, crimes which fall outside the jurisdiction of the ICC, such as transnational crimes like terrorism and drug trafficking. See M H Holvoet and Paul de Hert, *art cit*, pp. 235-240.

676 RUF Trial. (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2nd March 2009) [12].

677 Global Policy Forum, 'Special Court for Sierra Leone'. < https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-court-for-sierra-leone.htm > accessed on 12th May 2015.

violence, mass killing, abduction and forced recruitment into armed groups, the use of child combatants, and the exploitation of Sierra Leone's diamond reserves to finance the war.[678]

The SCSL was established in 2002 by the government of Sierra Leone and the United Nations to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone after 30th November 1996 and during the Sierra Leone civil war.[679] On 12th June 2000, Sierra Leone wrote a letter to the UN Secretary-General, requesting the trial of those responsible for crimes against the people of Sierra Leone and for taking UN Peace Keepers as hostages.[680] Sierra Leone's demand was either for the creation of a special court for Sierra Leone, or the extension of the mandate of the ICTR to the country.

On 14th August 2000, the United Nations Security Council unanimously passed Resolution 1315 (2000), initiating a process intended to lead to the creation of a Special Court for Sierra Leone.[681] An agreement between the Government of Sierra Leone and the UN Secretary-General was concluded on 16th January 2002. The Statute of the SCSL was attached to the agreement. Sierra Leone had to ratify the agreement and adopt implementing legislation before the Court became functional and started to work in July 2002. The SCSL is not part of the judicature of Sierra Leone. Frulli emphasized that whereas the ICTY and the ICTR were UN

678 S Kendall and M Staggs, 'From Mandate to Legacy: The Special Court for Sierra Leone as a Model for Hybrid Justice' (2005) Interim Report on the Special Court for Sierra Leone, War Crimes Studies Centre, University of California, Berkeley, p. 2.

679 Article 1, Statute of the Special Court for Sierra Leone.

680 Special Court for Sierra Leone. < https:www.en.m.wikipedia.org/wiki/special_Court_for_Sierra_Leone > accessed on 12th May 2015. Also see the letter from the President of Sierra Leone to the UN Secretary-General, UN Doc S/2000/786.Annex

681 A McDonald (2002), 'Sierra Leone's Special Shoestring Court' (2002) Vol. 84. No. 845. *International Review of the Red Cross*, 122.

subsidiary organs, the SCSL was the first treaty-based *ad hoc* criminal court.[682] The judges of the SCSL are partly appointed by the government of Sierra Leone and partly by the United Nations.

The SCSL has jurisdiction over crimes against humanity,[683] violations of Article 3 Common to the Geneva Conventions and Additional Protocol II;[684] other serious violations of international humanitarian law;[685] and crimes under Sierra Leone law.[686] Thus, the jurisdiction of the court embraces both international crimes and national crimes. This situation led Frulli to describe the SCSL as 'a mixed tribunal exercising mixed jurisdiction'.[687] The inclusion of domestic crimes in the Statute has been attributed to various factors, including the attempt to legitimize and revitalize the existing domestic legal system, which many considered to be complex and inaccessible. In addition, it was intended to fill gaps in international criminal law regarding arson and crimes against girls and an attempt to ground the SCSL in the specific circumstances of the Sierra Leone conflict.[688]

The definition of crimes against humanity at the SCSL differs from the ICTY, ICTR, and ICC definitions. Adopted nearly a decade after the ICTY and ICTR statutes, the SCSL statute includes an expanded list of crimes involving sexual violence (rape, sexual slavery, forced prostitution, forced pregnancy, (and any other form of sexual violence), and omits both the armed conflict requirement and the 'discriminatory intent' provisions found in the ICTY statute.

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682 M Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) Vol. 11. *European Journal of International Law*, 858.

683 Article 2, Statute of the SCSL. That is, the Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) persecution on political, racial, ethnic or religious grounds; (i) other inhumane acts.

684 Article 3, Statute of the SCSL.

685 Article 4, Statute of the SCSL.

686 Article 5, Statute of the SCSL.

687 Frulli, *art cit*, p. 859.

688 T Perriello and M Wierda 'The Special Court for Sierra Leone Under Scrutiny' Prosecutions Case Studies, (2006) International Centre for Transitional Justice, p. 15.

Moreover, the SCSL statute includes no 'State or organizational policy' requirement even though it was adopted four years after the negotiation of the Rome Statute.[689] The State or organizational policy requirement is also absent in definition of crimes against humanity in the constitutive instrument of the Serious Crimes Panels in the District Court of Dili in East Timor.[690]

Despite the fact that the SCSL and the Sierra Leonean courts have concurrent jurisdiction, the SCSL has primacy over the latter.[691] However, it is worth noting that this primacy is limited only to Sierra Leonean courts. On 22nd February 2008, the Appeals Chamber of the SCSL recognized the crime of forced marriage as an 'other inhumane act' for the purpose of determining a crime against humanity.[692] Women's experiences of being kidnapped by rebels or soldiers, raped, confined, forced to provide domestic services, impregnated, and controlled during the war in Sierra Leone have been variously called the 'bush wife' phenomenon, sexual slavery, extreme cruelty, forced marriage or enslavement.[693]

On 7th March 2005, the Trial Chamber of the SCSL initiated proceedings against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu. Among various other charges, the defendants were arraigned for the crime of forced marriage as an 'other inhumane act' under Article 2 of the Statute of the SCSL. The Trial Chamber's decision was handed down on 20th June 2007.[694] The charge relating to forced marriage, indicted as a crime of sexual slavery or any

689 Article 2, Statute of the SCSL dealing with crimes against humanity. See also L N Sadat (2013), 'Crimes against Humanity in the Modern Age' (2013) Vol. 107. *The American Journal of International Law*, 349.

690 S. 5, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

691 Article 8, Statute of the SCSL.

692 Prosecutor v Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (2008) SCSL-2004-16-A (Special Court for Sierra Leone, Appeals Chamber) 22nd February 2008, 105, 181-203.

693 A Bunting, 'Forced Marriage' in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes' (2012) Vol. 1. No. 1. *Canadian Journal of Human Rights*, 166.

694 Prosecutor v Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (SCSL-2004-16-T (SCSL, Trial Chamber) 20th June 2007) (93)-(95).

other form of sexual violence under Article 2 (g) of the Statute, was dismissed as duplicitous.[695] The charge relating to forced marriage, indicted as an 'other inhumane act' was dismissed as redundant.[696] However, dissatisfied with the decision, the prosecution appealed. On 22nd February 2008, the Appeals Chamber of the SCSL held that forced marriage in the context of the Sierra Leone conflict properly fell within Article 2 (i) of the Statute, which is 'other inhumane acts' but declined to enter a conviction.[697]

This decision is very important because it is the first time that forced marriage was independently recognized by an international court as an 'other inhumane act'. Past tribunal jurisprudence had recognized forced marriage as a sexual crime. The recognition of forced marriage as an 'other inhumane act' has a number of implications. It establishes a precedent that the existing 'sexual crimes' provision in the context of crimes against humanity does not adequately capture the 'multi-layered and distinctive nature' of crimes such as forced marriage; furthermore, it indicates the willingness of an international criminal court to acknowledge the complex nature of gender-based crimes.

In the view of Jaques *et al*, this may allow for other gendered crimes which international law has failed to explicitly recognize to be pursued under international criminal law, and for the development of international jurisprudence in relation to such crimes.[698] The decision of the Appeals Chamber was widely acclaimed by non-governmental organizations and scholars alike as a breakthrough in the recognition of gender-based crimes.[699] Furthermore, the decision is to be welcomed because the practice of forced marriage is not adequately described by existing

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695 *Ibid*.

696 Ibid.

697 Prosecutor v Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (2008) SCSL-2004-16-A (SCSL, Appeals Chamber) 22nd February 2008, (202).

698 M S Jaques *et al*, 'Special Court for Sierra Leone-Forced Marriage as an Other Inhumane Act' (2010) Humanitarian Law Perspectives, Australian Red Cross, p. 5.

699 J Gong-Gershowitz, 'Forced Marriage: A New Crime against Humanity' (2009) Vol. 8. Issue 1. *Northwestern Journal of International Human Rights*, 53.

categories of sexual crimes, as forced conjugality results in particular psychological and moral suffering for the victims.[700]

In March 2003, the prosecutor of the SCSL issued thirteen indictments against the leaders of the RUF, the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF). Ten persons were brought to trial. Two others died, and the third fled Sierra Leone before his indictment. Nine defendants were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years.[701] Charles Taylor, the former president of Liberia, was arrested in March 2006, and transferred to Freetown in April of the same year. Security Council resolution 1688 (2006) facilitated his transfer to The Hague with the help of the International Criminal Court, the Netherlands, and the United Kingdom. Taylor was tried and convicted in April 2012 on 11 charges arising from war crimes, crimes against humanity, and other serious violations of international humanitarian law. Accordingly, he was sentenced to 50 years in jail.[702]

The conviction of Taylor recognizes that civilian or military leaders who are far from the battlefield but who support and encourage sexual violence, or make no attempt to prevent or punish it, can be held responsible for sex crimes.[703] Other landmark rulings of the court include holdings that the SCSL is not a part of Sierra Leone's legal system; and that the amnesty granted

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700 M Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a New Crime against Humanity' (2008) Vol. 16. *Journal of International Criminal Justice*, 1033.

701 Special Court for Sierra Leone. < http://www.rscsl.org/ > accessed on 12th May 2015.

702 Open Society Justice Initiative, (2013) 'The Trial of Charles Taylor before the Special Court for Sierra Leone: The Appeal Judgment' < http://www.opensocietyfoundations.org/briefing-papers/trial-charles-taylor-special-court > accessed on 12th May 2015.

703 I Tommy, 'Lessons from the Special Court for Sierra Leone in the Fight against Impunity' A Paper Presented at the Regional Forum on International and Transitional Justice, organized by Avocats Sans Frontieres-Uganda Mission and the Uganda Coalition of the International Criminal Court, on 31st July 2012, Imperial Botanical Beach Hotel, Entebbe.

in the Lome Peace Accord of 1999 applied only to national criminal jurisdiction and not international crimes.[704]

### 4.5.2 The Extraordinary African Chambers within the Courts of Senegal

The Extraordinary African Chambers is a special *ad hoc* procedure of an international character within the Senegalese judicature. The Chambers was established within the Senegalese court system in 2012 to prosecute international crimes committed in Chad between 7th June 1982 and 1st December 1990. The applicable law as embodied in the Statute of the Chambers includes international criminal law, the Senegalese criminal code and Senegal's Code of Criminal Procedure.[705]

The Chambers were inaugurated by Senegal and the African Union in February 2013 to prosecute the person or persons most responsible for international crimes committed in Chad between 1982 and 1990 when Hissene Habre ruled Chad.[706] Habre's regime was marked by serious human rights violations and campaigns of indiscriminate violence against the Chadian population, particularly against ethnic minorities such as the Sara people, Hadjerai, Zaghawa, and Chadian Arabs.[707]

Upon his overthrow from power in December 1990, his successor, President Idriss Derby, immediately set up a Commission of Inquiry to investigate the crimes committed during the previous regime. In 1992, the Commission recommended the initiation of legal proceedings against the alleged perpetrators of those atrocities, including Hissene Habre, who had fled to

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704 *Ibid*. See also Prosecutor v Kallon and Kamara, SCSL-2004-15 & 16-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty, (13th March 2004) (Sierra Leone Special Court, Appeals Chamber).

705 A Bodley and S K Tefera (2013), 'The Extraordinary Role of The Extraordinary African Chambers Convened to Try Former Chadian Leader Hissene Habre' (2013), Issue 3. *Africa Law Today*, p.3.

706 Q&A: The Case of Hissene Habre before the Extraordinary African Chambers in Senegal. 27th April 2015. < http://www.m.hrw.org/news/2012/09/11qa-case-hiss-ne-habr-extraordinary-african-chamber > accessed on 13th May 2015.

707 'Extraordinary African Chambers: Historical Landmarks' < http://www.trial-ch-org/en/resources/tribunals/hybrid-tribunals/extraordinary-african-chambers.htm > accessed on 13th May 2015.

Senegal. Despite many attempts to initiate criminal proceedings in Senegal and later in Belgium, it took several years and a decision of the International Court of Justice on 20th July 2012 ordering the Republic of Senegal to prosecute or extradite Hissene Habre to finally get a real chance to prosecute him.[708] When Habre was ousted from power, he was granted asylum by the Senegalese authorities. But overtime, mainly on account of pressures from victims, their families and the global community, it was agreed by the African Union, human rights bodies and other international institutions that he should be put on trial.[709]

The Extraordinary Chambers have four levels; an Investigative Chamber within the *Tribunal Regional Hors Classe de Dakar* with four Senegalese investigative judges; an Indicting Chamber with three Senegalese judges; a Trial Chamber; and an Appeals Chamber.[710] The Trial Chamber and the Appeals Chamber each have two Senegalese judges and a president from an African Union member state. The prosecutors and Investigative Judges were nominated by Senegal's Minister of Justice and appointed by the Chairperson of the AU Commission.[711] The Chambers have jurisdiction over the crime of genocide, crimes against humanity, war crimes, and torture.[712]

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708 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), No. 2012/24, 20th July 2012, pp. 1-2, where the ICJ found *inter alia* that 'the Republic of Senegal, by failing to submit the case of Mr. Hissene Habre to its competent authorities for the purpose of prosecution, has breached its obligations under Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10th December 1984 ' and that 'the Republic of Senegal must, without further delay, submit the case of Mr. Hissene Habre to its competent authorities for the purpose of prosecution , if it does not extradite him'.

709 The Extraordinary African Chambers and the Trial of Hissene Habre: Why in Senegal and What Likely Benefits for Senegal and Africa? The News from WARC, 29th April 2014. < http://www.bu.edu/wara/2014/04/29/the-extraordinary-african-exchange/ > accessed on 13th May 2015.

710 Article 2 (a)-(d), Statute of the Extraordinary African Chambers.

711 Article 11, Statute of the Extraordinary African Chambers.

712 Article 4, Statute of the Extraordinary African Chambers, September 2013.

Crimes against humanity as defined in Article 6 of the Statute of the Chambers do not require the state or organizational policy, or a link with armed conflict.[713] The crimes within the jurisdiction of the Chambers are not time-barred.[714] So far, the only trial scheduled is that of Hissene Habre. The official position of an accused person shall not relieve him of criminal responsibility nor serve to mitigate punishment.[715] In addition, an amnesty granted for genocide, crimes against humanity, war crimes, and torture does not bar the prosecution of the beneficiary by the Chambers.[716]

Habre was indicted for crimes against humanity, torture and war crimes by the Chambers' investigating judges on 2nd July 2013. On 13th February 2015, after a 19-month investigation, the judges found sufficient evidence for Habre to face charges of crimes against humanity and torture as a member of a joint criminal enterprise and of war crimes on the basis of superior responsibility. In particular, he was charged with (a) the massive practice of murder, summary executions, kidnapping followed by enforced disappearance and torture, amounting to crimes against humanity, against the Hadjerai and Zaghawa ethnic groups, the people of Southern Chad, and political opponents; (b) torture; and (c); the war crimes of murder, torture, unlawful transfer and unlawful confinement, and violence to life and physical wellbeing.[717]

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713 Article 6 of the Statute of the Extraordinary African Chambers: 'for the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population: (a) rape, sexual slavery, enforced prostitution, enforced sterilization, or any other form of sexual violence of comparable gravity; (b) murder; (c) extermination; (d) deportation; (e) the crime of apartheid; (f) the enslavement or massive and systematic practice of summary executions, kidnapping of persons followed by their enforced disappearance; (g) torture or inhumane acts intentionally causing great suffering or serious injury to body or to physical or mental health, on political, racial, national, ethnic, cultural, religious or gender grounds'.

714 Article 9, Statute of the Extraordinary African Chambers.

715 Article 10 (3) Statute of the Extraordinary African Chambers.

716 Article 20, Statute of the Extraordinary African Chambers.

717 See Q&A: The Case of Hissene Habre before the Extraordinary African Chambers in Senegal. 27th April 2015. < http://www.m.hrw.org/news/2012/09/11qa-case-hiss-ne-habr-extraordinary-african-chamber > accessed on 13th May 2015. In July 2013, the Chief Prosecutor requested the indictment of five additional officials: Saleh Younous, Guihini Korei, Abakar Torbo, Mahamat Djibrine, and Zakaria Berdei, from Habre's regime suspected of responsibility for international crimes. None of them have been brought to the

Upon conviction, the Chambers may impose a sentence of imprisonment for a maximum of 30 years or a term of life imprisonment, when justified by the extreme gravity of the crime.[718] It may also order the forfeiture of proceeds, property and assets derived from the crime.[719]

### 4.6 The International Criminal Court (ICC)

On 17th July 1998, the Rome Statute of the International Criminal Court was adopted by a vote of 120 to 7, with 21 countries abstaining. Thus, the States, Intergovernmental organizations and non-governmental organizations that met in Rome in 1988 managed against the odds, to draw up a Statute that distills a clear international criminal code from the disparate decisions of past international criminal tribunals at Nuremberg, Tokyo, Yugoslavia, Rwanda, as well as from the Hague Conventions, Geneva Conventions and the Additional Protocols.[720] Greenwalt sees the ICC as the latest chapter in the evolution of an international legal order once concerned primarily with the mutual relations of states but now increasingly focused on the rights and obligations of individuals.[721]

Following 60 ratifications, the Rome Statute entered into force on 1st July 2002 and the International Criminal Court was formally established. As of May 2015, 123 states are parties to the Statute of the Court, including all the countries of South America, nearly all of Europe, most of Oceania and roughly half of Africa.[722] The Vienna Convention on the Law of Treaties

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court. Younous and Djibrine were convicted in Chad on charges filed by victims in Chadian courts and Chad declined their extradition to Senegal. Bardei is believed to be in Chad, but not in custody. The location of Torbo and Korei remains unknown.

718 Article 24, Statute of the Extraordinary African Chambers.

719 Article 24 (b), Statute of the Extraordinary African Chambers.

720 K Ainley, 'The International Criminal Court on Trial' (2009), paper presented at the BISA Annual Conference, Leicester, 14th -16th December, p.2.

721 A K A Greenwalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) Vol. 39. *International Law and Politics*, 584.

722 'International Criminal Court'. < http://www.en.m.wikipedia.org/wiki/International_Criminal_Court > accessed on 21st May 2015.

obligates these states to refrain from 'acts which would defeat the object and purpose' of the treaty until they declare they do not intend to become a party to the treaty.[723] Nigeria signed the ICC Statute on 1st June 2000, ratified or acceded to it on 27th September 2001, and it entered into force for it on 1st July 2002.[724]

Nevertheless, Nigeria has not yet domesticated the Statute, despite efforts to do so over the years.[725] Although the ICC is not legally dependent on the UN like the ICJ, ICTY and the ICTR, some powers granted to the UN Security Council impinge on the independence of the Court. For example, under Article 13 of the ICC Statute, the UN Security Council may refer to the Court situations that would ordinarily have fallen outside the remit of the Court.[726] In addition, Article 16 of the ICC Statute allows the Security Council to require the Court to defer from investigating a case for a period of twelve months, subject to renewal by the Security Council. The ICC Statute provides for jurisdiction over war crimes, crimes against humanity and genocide, with crimes against peace, awaiting a definition.[727]

### 4.6.1 Crimes within the Jurisdiction of the ICC

Although the Draft Statute of the ICC made provisions for 'treaty' crimes like hijacking and 'core' crimes such genocide to come under the jurisdiction of the ICC, only core crimes were

723 Article 18, Vienna Convention on the Law of Treaties, 22nd May 1969.

724 'States Parties to the Rome Statute of the International Criminal Court'. < http://www.en.m.wikipedia.org/wiki/States_parties_to_the_Rome_Statute_of_the_International_Criminal_Court > accessed on 21st May 2015.

725 C Odenyi, 'The Domestic Implementation of International Treaties in Nigeria: Understanding the Role of the National Assembly in the Implementation of the International Criminal Court Bill' NCICC News, 23rd July 2014. < http://www.ncicc.org.ng/index.php/latest/83-the-domestic-implementation-of-international-treaties-in-nigeria > accessed on 21st May 2015.

726 This happened in the case of Darfur and Libya, considering the fact that neither Sudan nor Libya are State Parties to the ICC Statute.

727 Article 5, ICC Statute. See also I Bantekas, 'Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self Contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction against the Background of the 2003 Iraq War' (2005) Vol. 10. No. 2. *Journal of Conflict and Security Law*, 34.

adopted in the final draft.[728] The subject-matter jurisdiction of the ICC is similar to that of previous tribunals. Under Article 5 of the ICC Statute, the jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole, that is, (a) genocide;[729] (b), crimes against humanity; (c), war crimes;[730] and (d) the crime of aggression.[731] Furthermore, Article 70 of the ICC Statute defines offences against the administration of justice, for which individuals may also be prosecuted.[732]

The Court has no retroactive criminal jurisdiction. Therefore, the Jurisdiction *ratione temporis* of the ICC extends only to crimes committed on, or after the entry into force of the ICC Statute, that is, 1st July 2002.[733] The crimes within the jurisdiction of the Court are not subject to Statutes of limitation.[734] The Security Council may refer a situation to the Court even when the State in whose territory it occurred is not a party to the ICC Statute, or has not lodged a declaration with the Registrar to accept jurisdiction in respect of the crime in question.[735]

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728 K C Joshi, *International Law and Human Rights* (2nd edition, Lucknow: Eastern Book Company, 2012) pp. 395-396.

729 Article 6 of the ICC Statute defines genocide as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e), forcibly transferring children of the group to another group'.

730 That is, breaches of the Geneva Conventions of 12th August 1949 or other serious violations of the laws and customs of war giving rise to individual criminal responsibility. For example, willful killing; torture or inhuman treatment, including biological experiments; intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives. See Article 8, ICC Statute.

731 According to Article 8 *bis*, ICC Statute, the 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

732 For example, giving false testimony when under an obligation to tell the truth, presenting evidence that the party knows is false or forged, corruptly influencing a witness, impeding, intimidating or corruptly influencing officials of the ICC for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties.

733 Article 12 (1), ICC Statute.

734 Article 29, ICC Statute.

735 Article 13 (b), ICC Statute.

However, Paulus has remarked that in allowing the Security Council to refer situations to the ICC and to defer others, at least temporarily, the Statute intersects with the UN Charter, but the relationship of the Charter to the Statute is not entirely clear.[736] Furthermore, the ICC Statute consolidates past tribunal jurisprudence on denial of immunity. In consequence, the official capacity of the defendant is irrelevant to criminal responsibility and the mitigation of sentence.[737]

Again, Paulus pointed out that the apparent contradiction between the 'irrelevance of official capacity' pursuant to Article 27 of the ICC Statute and immunity agreements recognized by Article 98 of the ICC Statute is in need of elucidation.[738] In the *Arrest Warrant* case,[739] the ICJ affirmed that under customary international law, holders of high ranking office, such as Ministers of Foreign Affairs, Heads of State and Heads of Government enjoy immunities from jurisdiction in other States, both civil and criminal**.** However, the ICC had issued arrest warrants against President Omar Al-Bashir of Sudan, in 2009 and 2010.[740] It is the view of Max du Plessis, Maluwa and O'Reilly, that the other probable interpretation of Article 27 of the ICC Statute, which provides that state immunity does not apply under the statute, is that it creates an exception to customary international law and allows Heads of State and other senior state officials to be tried in a criminal jurisdiction.

In support of this view, there appears to be an acceptance that States parties, by virtue of becoming signatories to ICC Statute, have waived the immunity of their own officials or have

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736 A L Paulus, 'Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court' (2003) Vol. 14. No. 4. *European Journal of International Law*, 851.

737 Article 27, ICC Statute.

738 Paulus, *art cit*, p. 851.

739 Case Concerning the Arrest Warrant of 11th April 2000 (Democratic Republic of The Congo v Belgium), International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, Judgment of 14th February 2002, pp.31-32.

740 'ICC Issues arrest Warrant for Sudanese President for War Crimes in Dafur' 4th March 2009. < http://www.un.org/apps/news/story.asp?NewsID=30081#.VWFS9DNw0Yg > accessed on 24th May 2015.

otherwise accepted that they do not have immunity.[741] It is also worthy to note that under Article 33 of the ICC Statute, superior orders to commit genocide and crimes against humanity are patently unlawful in every case except possibly for war crimes.

### 4.6.2 Complementarity

In the ICC language, 'complementarity' indicates that a case is inadmissible before the ICC if there are national investigations, and or, prosecutions, unless the State demonstrates an unwillingness or inability to investigate or prosecute the case.[742] As an alternative to states completely surrendering their sovereignty to the ICC, a compromise was reached whereby the primary competence and authority to initiate investigations of international crimes rests with States. In consequence, the ICC will prosecute an individual only if states are unwilling or unable to do so. If legitimate national investigations or proceedings into crimes have taken place or are in progress, the Court will not initiate proceedings.

Both Paragraph 10 of the Preamble to the ICC Statute, as well as Article 1 of the Statute declare that the ICC 'shall be complementary to national jurisdictions'. The principle articulated in Article 17 of the ICC Statute applies regardless of the outcome of national proceedings.[743] The principle still applies where the case has been investigated by a State with jurisdiction over the crime, but the State has declined to prosecute it, unless the decision resulted from the unwillingness or inability of the State to genuinely prosecute. Complementarity provides a policy framework for catalyzing and coordinating national prosecution efforts so that the overarching

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741 M du Plessis et al, (2013), 'Africa and the International Criminal Court' (2013) International Law 2013/01, Chatham House, London, p. 5.

742 J Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of Overzealous" National Court Prosecutions' (2012) Vol. 435 *Cornell International Law Journal*, 571.

743 Article 17 (1), ICC Statute: '…the court shall determine that a case is inadmissible where (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.

goal of the ICC System of justice can be achieved as effectively and efficiently as possible.[744] In a similar tone of voice, Burke-White has also argued that the complementarity regime of the ICC catalyzes changes in the domestic judiciary as the assertion of primacy by States with failed institutions will involve significant reform.[745]

A kindred principle to complementarity is that of '*ne bis idem*.' *Ne bis idem* is a concept based on fairness to the accused and a desire for finality in criminal cases.[746] It is a common principle in national legal systems, including Nigeria.[747] The legality of amnesties and pardons, or whether the ICC will respect the decision of a State to forego criminal prosecutions, remains unresolved under the Rome Statute. Dakas stated that 'amnesty' in its original Greek rendition means 'amnestia' (from which the English word 'amnesia' derives) or 'oblivion'.[748] Oji has noted that amnesties, which often take the form of legislative or constitutional acts of States, or are contained in treaties or political agreements, are designed to preclude the prosecution of persons suspected or accused of crimes.[749] In addition to the use of force, governments have employed legislative measures to end armed conflict. For example, in Uganda, the Amnesty Act of 2000 was promulgated to provide amnesty for Ugandans involved in acts of a war-like nature in various parts of the country. Its preamble expressed the desire of the people of Uganda to end

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744 W W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) Vol. 49. No. 1. *Harvard Journal of International Law,* 107.

745 W W Burke-White, 'International Criminal Court Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) Vol. 18. No. 3. *Leiden Journal of International Law,* 568.

746 L E Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis in Idem'* (2010) Vol. 8. Issue 1. *Santa Clara Journal of International Law,* 169.

747 Section 36 (9): 'No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence upon the order of a superior court' **.**

748 D C J Dakas, 'Impunity, Necessary Evil or Strategic Imperative? The Question of Amnesty for Perpetrators of Kidnapping (and other Crimes) in Nigeria's Niger Delta Region' (2011) Vol. 7. No. 1. *Nigerian Bar Journal,* 185.

749 E A Oji, 'Accountability for International Crimes Through Alternatives To Prosecution' (2015) Vol. 6. *Nnamdi Azikiwe Journal of International Law and Jurisprudence,* 53.

armed hostilities, reconcile with those who have caused suffering and rebuild their communities, and the desire of the Government to genuinely implement its policy of reconciliation.[750]

In a similar initiative, in May 2009, the Nigerian Government declared an amnesty program for Niger-Delta militants, with the objective of disarmament, demobilization and reintegration of the militants as well as the comprehensive development of the region.[751] An offer of amnesty by the Nigerian government to Boko Haram insurgents was rejected on account of distrust on both sides and the factionalized leadership of the group's different cells.[752] Nonetheless, it would seem that blanket amnesties and pardons granted prior to investigation and prosecution do not pose a problem for the ICC, as they would constitute a clear case of a State's unwillingness to carry out investigation or prosecution for the purpose of Article 17 (1) (a).[753] Elsewhere, the view was advanced that although the ICC has the interpretative autonomy to decide whether an amnesty or a pardon is permissible under its Statute, exemptions from criminal responsibility for the core crimes within the jurisdiction of the Court by amnesties or pardons should generally be considered to be incompatible with the Statute.[754]

A reinforcing opinion is that the UN initiative in Sierra Leone which precluded the possibility of amnesties for crimes such as crimes against humanity, war crimes, and torture, provides evidence of an emerging principle of international law prohibiting amnesty for

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750 M Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court' (2005) Vol. 10. No. 3. *Journal of Conflict and Security Law*, 419.

751 M U Ikoh and E A Ukpong (2013), 'The Niger Delta Crisis: Taming Violence beyond the Amnesty' (2013) Vol. 3. No. 17. *International Journal of Humanities and Social Science*, 147

752 D Agbiboa, 'The Ongoing Campaign of Terror in Nigeria: Boko Haram versus the State' (2013) Vol. 2, No. 3. *Stability: International Journal of Security and Development*, 1-2.

753 R D Evans, 'Amnesties, Pardons and Complementarity: Does the International Criminal Court Have the Tools to End Impunity?' (2007) p. 5. < https://www.nottingham.ac.uk/.../ …. > accessed on 25th May 2015.

754 C Stahn (2005), 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005). Vol. 3. No. 3. *Journal of International Criminal Justice*, 695.

international crimes.[755] The human rights NGO; Amnesty International, has stated that national amnesties, pardons or similar measures of impunity for crimes under international law, are contrary to international law.[756]

In the African region, the question of the complementarity of the ICC has been muddled by the extension of the jurisdiction of the African Court of Justice and Human Rights to include the core international crimes and some treaty crimes as well.[757] Like the ICC, the African Court was also created by a multilateral treaty, but in this case, by the African Union: a regional body possessing a legal personality distinct from that of its member-States. Furthermore, the obligations of African States under the Statute of the African Court, a latter treaty, do not conflict with their obligations under the Statute of Rome, an earlier treaty, which does not contain a supremacy clause over subsequent similar treaties. The African Court is *sui generis* among regional human rights courts, which traditionally, do not exercise criminal jurisdiction over individuals.

This researcher is of the view that 'complementarity' in the Rome Statute envisages a synergistic relationship between the ICC and national courts, and not between the ICC and a parallel regional or sub-regional court with criminal jurisdiction. Article 46H (1) of the Protocol to the Statute of the African Court of Justice and Human Rights has said that its jurisdiction 'shall be complementary to that of National Courts and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'. The conundrum is, can the ICC exercise jurisdiction where an African State declines to prosecute a glaring case of crime

755 D Majzub, 'Peace or Justice? Amnesties and the International Criminal Court' (2002) Vol. 3. *Melbourne Journal of International Law*, 247.

756 Amnesty International, 'International Criminal Court. Timor-Leste: Justice in the Shadow' Amnesty International Publications, International Secretariat, United Kingdom, (2010) p. 27.

757 Arts. 28A to 28M of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

against humanity, but refers it the African Court? Perhaps, the view of Abass will provide an insight. To him:

> An inquiry into the legality of the international criminal jurisdiction in Africa with reference to the Rome Statute is fallacious, fundamentally mistaken and unscrupulous in international law. No provision of the Statute forbids its States Parties from concluding other treaties, even if those were to establish courts of a similar nature to the ICC. The Rome Statute is not a *primus inter pares* among treaties and cannot fetter the competence of its States Parties to deploy their consent in international law. It is but a manifestation of uncritical appraisal now to regard the Rome Statute as the *fons et origo* of all international crimes and their international prosecution.[758]

This researcher is also of the view that the cardinal objective of the treaty of Rome is to preclude impunity for core international crimes. This purpose is satisfied once a credible forum exists for the trial of offenders, no matter where. Thus, there will be no rivalry between the ICC and the African Court of Justice and Human Rights so long as the latter genuinely undertakes investigations and prosecutions.

[758] A Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) Vol. 24. No. 3. *The European Journal of International Law*, 942.

### 4.6.3 Cases and Situations before the ICC

Twenty-two cases in nine situations have been brought before the ICC.[759] Four States Parties to the ICC Statute, that is, Uganda, the Democratic Republic of Congo, the Central African Republic and Mali, have referred situations occurring in their territories to the court. On 31st March 2010, the Pre-Trial Chamber I granted the Prosecution the authority to conduct investigations *proprio motu* in the Situation in Kenya. Furthermore, on 3rd October 2011, Pre-Trial Chamber II granted the Prosecutor's request for authorization to open investigations *proprio motu* into the situation in Cote d'Ivoire. The Office of the Prosecutor is currently conducting preliminary examinations in a number of situations including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and the Boko Haram insurgency in Nigeria.[760] However, the analysis here will be limited to some of the cases alleging crimes against humanity.

#### 4.6.3.1 Situation in the Democratic Republic of Congo

From the Democratic Republic of Congo, several cases have been instituted before the relevant Chambers of the ICC. These included the Prosecutor v Bosco Ntaganda; the Prosecutor v Germain Katanga; and the Prosecutor v Mathieu Ngudjolo Chui. Of these three defendants, only Germain Katanga and Bosco Ntaganda are still in the custody of the ICC. Bosco Ntaganda, who was the former Deputy Chief of the Staff and commander of operations of the Patriotic Forces for the Liberation of Congo, voluntarily surrendered himself to the ICC on 22nd March 2013.

On 9th June 2014, Pre-Trial Chamber II confirmed the charges against him, comprising war crimes and 5 counts of crimes against humanity: murder and attempted murder; rape; sexual slavery; persecution; and forcible transfer of population, committed between 2002 and 2003 in

759 'Situations and Cases'. < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx > accessed on 21st May 2015.

760 *Ibid.*

the Ituri Province of the DRC.[761] Bosco Ntaganda is alleged to bear individual criminal responsibility under the following modes of liability, direct participation, indirect co-perpetration;[762] ordering, inducing;[763] any other contribution to the commission or attempted commission of crimes;[764] or as military commander for crimes committed by his subordinates.[765] His trial opened on 2nd September 2015 before Trial Chamber VI.

The trial in the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui began on 24th November 2009. Closing statements in the case were heard from 15th to 23rd May 2012. However, on 21st November 2012, Trial Chamber II decided to sever the charges against Mathieu Ngudjolo Chui and Germain Katanga. On 18th December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity and ordered his immediate release. In consequence, he was released from the custody of the ICC on 21st December 2012.[766] The Prosecutor appealed the verdict, but on 27th February 2015, the Appeals Chamber confirmed the decision acquitting him of crimes against humanity. The charges were that Mathieu Ngudjolo Chui had committed through other persons within the meaning of Article 25 (3) (a) of the ICC Statute, three crimes against humanity, comprising murder;[767] sexual slavery and rape;[768] and seven counts of war crimes.

However, on 7th March 2014, the Trial Chamber II found Germain Katanga guilty, as an accessory within the meaning of Article 25 (3) (d) of the ICC Statute, of one count of crime

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761 The Prosecutor v Bosco Ntaganda, ICC-01/04-02/06. < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx > accessed on 13th August 2015.

762 Article 25 (3) (a), of the ICC Statute.

763 Article 25 (3) (b), of the ICC Statute.

764 Article 25 (3) (d), of the ICC Statute.

765 Article 28 (a), of the ICC Statute.

766 The Prosecutor v Mathieu Ngudjolo Chui, ICC-01/04-02/12. < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx > accessed on 28th May 2015.

767 Article 7 (1) (a), Statute of the ICC.

768 Article 7 (1) (g), Statute of the ICC.

against humanity; murder, and four counts of war crimes: murder, attacking a civilian population, destruction of property and pillaging, committed on 24th February 2003, during the attack on the village of Bogoro, in the Ituri district of the DRC. During the attack primarily on civilians of the Hema ethnicity, rebels under his command went on an indiscriminate killing spree, killing at least 200 civilians, imprisoning survivors in a room filled with corpses, and sexually enslaving women and girls.[769] It was also widely believed that Katanga led other crimes, including the massacre of over 1,200 civilians during an attack at the Nyakunde Hospital in September 2002.[770] On 23rd May 2014, Trial Chamber II sentenced Germain Katanga to a jail term of 12 years.[771] The Chamber ordered that the time he had spent in detention at the ICC facility, from 18th September 2007 to 23rd May 2014, be deducted from his sentence.

#### 4.6.3.2 Situation in the Central African Republic

The situation was referred to the Court by the Government of the Central African Republic itself in December 2004. The Prosecutor opened an investigation on 22nd May 2007. The trial in the case, The Prosecutor v Jean-Pierre Bemba Gombo started before Trial Chamber III on 22nd November 2010, for two counts of crimes against humanity: murder under Article 7 (1) (a) and rape under Article 7 (1) (g) of the ICC Statute; and three counts of war crime; murder (Article 8 (2) (c) (i); rape (Article 8 (2) (e) (vi); and pillaging; (Article 8 (2) (e) (v) of the ICC Statute.[772]

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769 Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga (Urgent Warrant of Arrest for Germain Katanga), Pre-Trial Chamber I, No.: ICC-01/04-01/07, 2nd July 2007.

770 Human Rights Watch, 'D.R Congo: Army Should Not Appoint War Criminals, Congolese Government Must Investigate and Prosecute Warlords, Not Reward Them' (2005) 14th January. < http://www.m.hrw.org/en/news/2005/01/13/dr-cong0-army-should-not-appoint-war-criminals > accessed on 28th May 2015.

771 The Prosecutor v Germain Katanga, ICC-01/04-01/07. < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx > accessed on 28th May 2015.

772 The Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05 -01/08. Case Information Sheet. <

He remains detained at the ICC detention centre in The Hague. Jean-Pierre Bemba Gombo; the former DRC Vice-President is facing trial for crimes against humanity and war crimes committed by troops under his control in the CAR.

The crimes were allegedly committed in 2002 and 2003 after his militia group, the Movement for the Liberation of Congo, was invited by the CAR President, Ange-Felix Patasse, to help to put down a coup attempt.[773] Patasse invited Jean-Pierre Bemba Gombo and Chadian mercenaries to help put down a coup attempt led by his former army chief of staff, Francois Bozize. Bemba Gombo's forces were alleged to have committed appalling crimes, including mass rapes, killings, and looting against civilians in the CAR. Upon the success of the coup, and Bozize ascending the Presidency, in December 2004, he requested the ICC to investigate the crimes committed during the rebellion.[774] The closing oral statements in the case were made on 12th and 13th November 2014. The judges have commenced deliberations but the judgment has not yet been pronounced.

On 11th November 2014, Pre-Trial Chamber II partially confirmed the charges for Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu, and Narcisse Arido, and committed the five suspects to trial for offences against the administration of justice allegedly committed in connection with the case of the Prosecutor v Jean-Pierre Bemba Gombo. The offences all committed between the end of 2011 and 14th November 2013 in various locations, include corruptly influencing witnesses by giving them money and instructions to provide false testimony, presenting false evidence and giving false

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http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200q105%200108/Pages/case%20the%prosecutor%20v%20jean-pierre%20bemba%gombo.aspx > accessed on 27th May 2015.

773 'Bemba Case' Central African Republic. < http://www.iccnow.org/?mod=car > accessed on 27th May 2015.

774 Human Rights Watch, 'ICC: Q&A on the Trial of Jean-Pierre Bemba' (2010)' 22nd November. < http://www.m.hrw.org/news/2010/11/18/bemba-qa > accessed on 28th May 2015.

testimony in the courtroom, all perpetrated in various ways including by committing, soliciting, inducing, aiding, abetting or otherwise assisting in their commission. On 30th January 2015, the Presidency of the ICC constituted Trial Chamber IV, which will be in charge of the trial of this case. On 21st October 2014, Pre-Trial Chamber II ordered the interim release of Aime Kilolo Musamba, Fidele Babala Wandu and Narcisse Arido.

**4.6.3.3 Situation in Cote d'Ivoire**

On 18th April 2003, Cote d'Ivoire, which was not a party to the ICC Statute at the time, lodged a declaration under Article 12 (3) of the Statute accepting the jurisdiction of the Court for crimes committed in its territory since the events of 19th September 2002, and also 'for an unspecified period of time'.[775] On 3rd October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorization to open investigations *proprio motu* into the situation in Cote d'Ivoire with respect to alleged crimes within the jurisdiction of the Court, committed since 28th November 2010, as well as with regard to crimes that may be committed in the future in the context of the situation. It was the Prosecutor's argument that a reasonable basis existed to believe that pro-Gbagbo forces committed crimes against humanity in the period following 28th November 2010.[776]

According to the application of the Prosecutor, at least 3000 persons were killed, and over 100 raped. The application also included instances of enforced disappearance and over 500 cases of arbitrary arrest and detention.[777] On 22nd February 2012, Pre-Trial Chamber III decided to expand its authorization for the investigation in Cote d'Ivoire to include crimes within the

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775 Situation in the Republic of Cote d'Ivoire. Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire. Pre-Trial Chamber II, No.: ICC-02/11, 3rd October, 2011, ICC-02/11-14 03-10-2011 20/86 NM PT, p. 5.

776 Situation in the Republic of Cote d'Ivoire, *supra*, p. 13.

777 International Criminal Court Investigations Cote d'Ivoire. < http//:www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/cote-divoire.html > accessed on 27th May 2015.

jurisdiction of the Court allegedly committed between 2002 and 2012 as a single situation. Laurent Gbagbo was charged with being an indirect co-perpetrator in the post-election violence. He is allegedly responsible for crimes against humanity, including murder, rape and sexual violence, persecution, and other inhumane acts or in the alternative attempted murder.[778]

Charles Ble Goude faces a similar charge. Charges were confirmed against them on 12th June 2014 and 11th December 2014, respectively and their trial assigned to Trial Chamber I. On 11th March 2015, Trial Chamber I joined the two cases in order to ensure the efficacy and expeditiousness of the proceedings. The opening of the trial in this case is scheduled for 10th November 2015. Laurent Gbagbo and Charles Ble Goude are in the custody of the Court.

On 22nd November 2012, Pre-Trial Chamber I decided to unseal a warrant of arrest issued initially on 29th February 2012 against Simone Gbagbo for four counts of crimes against humanity, including murder, rape and other sexual violence, persecution and other inhumane acts, allegedly committed in the context of post-electoral violence in the territory of Cote d'Ivoire between 16th December 2010 and 12th April 2011.[779] Mrs. Gbagbo is currently not in the custody of the ICC, because the Ivorian government declined the arrest warrant issued by the ICC. Based on the complementarity principle, the Ivorian authorities will either have to try Simone Gbagbo for the ICC charges, or cooperate with the ICC and transfer her to The Hague.[780] However, on 10th March 2015, the Criminal Court of Abidjan sentenced her to 20 years in jail for

778 A Zheng, 'Questions and Answers: The Case of the Prosecutor v. Laurent Gbagbo' (2012) 5th April 2012. < http://www.amicc.org/icc/cdi > accessed on 27th May 2015.

779 < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211related%20cases/icc02110112/Pages/index.aspx > accessed on 27th May 2015.

780 FIDH, 'Simone Gbagbo Trial: First of Many' 23rd October 2014. < http://www.fidh.org/international-Federation-for-Human-Rights/Africa/cote-d-ivoire/1631-simone-gbagbo-trial-first-of-many > accessed on 27th May 2015.

her role in Ivory Coast's post-electoral crisis of 2010-2011. She had been charged with undermining State security.[781]

**4.6.3.4 Situation in Libya**

Libya is not a State Party to the Rome State. However, on 26th February 2011, the United Nations Security Council unanimously referred the situation in Libya since 15th February 2011, to the ICC in Resolution 1979 (2011). The United Nations Security Council referred the situation condemning the violence and use of force against civilians, deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern over the death of civilians at the behest of the highest level of the Libyan government, then under Muammar Gaddafi.

The referral noted that the widespread and systematic attacks against the civilian population may amount to crimes against humanity. The investigation, which opened in March 2011, produced only one case, originally against three suspects, and involved charges of crimes against humanity: murder and persecution. The arrest warrant against Muammar Gaddafi was withdrawn on 22nd November 2011 on account of his death. Proceedings against Abdullah Al-Senussi before the ICC came to an end on 24th July 2014 when the Appeals Chamber confirmed a decision of Pre-Trial Chamber I declaring the case inadmissible before the ICC.[782]

**4.6.4.5 Situation in Kenya**

Kenya ratified the ICC Statute on 15th March 2005. On 31st March 2010, Pre-Trial Chamber II granted the Prosecutor's request to open an investigation *proprio motu* in the situation in Kenya, in relation to crimes against humanity within the jurisdiction of the ICC between 1st June 2005 and 26th November 2009. ICC investigations have focused on alleged crimes against humanity

781 Ivory Coast's former first lady Simone Gbagbo jailed. BBC News, 10th March 2015. < http://www.bbc.com/news/world-africa-31809073 > accessed on 27th May 2015.

782 < http://www.icc-cpi.int/libya> accessed on 2nd September 2016.

committed in the context of post-election violence in Kenya in 2007-2008. In granting the Prosecutor's request to open an investigation, the ICC Pre-Trial Chamber noted the gravity and scale of the violence.

The Prosecutor contended that over 1000 people were killed, there were over 900 instances of documented rape and sexual violence, approximately 350 000 people were displaced and over 3, 500 people were seriously injured. The investigation has produced two main cases with six suspects, involving charges with the following crimes: crimes against humanity of murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts. However, charges were not confirmed or where withdrawn concerning these six suspects.[783]

### 4.7 Criticisms, Problems and Challenges of the ICC

It has been suggested that the ICC has made a positive impact on the global community. First is the claim that the Rome Statute is a major instrument in the 'constitutionalization' of international relations and that the process of establishing the Court hastened the departure from power politics to the realization of common ethical goals.[784] It is also argued that given the growing consensus that atrocities should be punished; the ICC has significant advantages over *ad hoc* criminal courts in doing so. On the other hand, opponents of the ICC regime have advanced the argument that the Court is expected to be the missing link in the chain of human rights enforcement, aiming to deter atrocity and bring about peace and justice, by rising above international politics; and by prosecuting any, and all individuals guilty of the worst atrocities. The argument centres upon the extent to which the ICC is undertaking the political task of disciplining some States while insulating others using the language of law.

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783 < http://www.icc-cpi.int/kenya> accessed on 2nd September 2016

784 K Ainley, 'The International Criminal Court on Trial' (2011) Vol. 24 No. 3. *Cambridge Review of International Affairs*, 309.

Murphy has stated that politics and law will always be entwined and that the atrocities committed during the conflict in Sri Lanka led to neither a commission of inquiry or tribunal, let alone, a referral to the ICC. However, the UN Security Council had referred the situation in Darfur and Libya to the Court. But the situation in Syria has not yet been referred to it, owing to the disagreement among the permanent members of the UN Security Council.[785] This view has been articulated especially by African leaders due to an alleged disproportionate focus of the Court on Africa. While it claims to have a global mandate; to date, all eight situations which the ICC has investigated are in African countries. Furthermore, despite the fact that over two-thirds of the members of the African Union (AU) are parties to the Statute of Rome, nevertheless, over the years, the Assembly of the AU has adopted various resolutions critical of the ICC and its practice.[786]

The tension between the two bodies led the AU to amend the Protocol on the Statute of the African Court of Justice and Human Rights to incorporate the core international crimes within the jurisdiction of the ICC,[787] and to immunize Heads of State and senior officials from criminal prosecution.[788] It would appear that this conflict came to a head in June 2015 when the Sudanese President, Omar al-Bashir, visited South Africa. On 4th March 2009, the ICC issued an arrest warrant against Omar al-Bashir for crimes against humanity and war crimes. On 12th June 2010, the ICC issued an additional warrant for genocide for the ethnic cleansing of the Fur, Masalit, and Zaghawa tribes.[789] Omar al-Bashir had to leave South Africa hurriedly and

785 R Murphy, 'Many Criticisms of International Criminal Court have Validity' The Irish Times, June 6, 2013.

786 M du Plessis *et al*, *op cit*, p. 2.

787 Article 28A to 28M of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

788 Article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights provides that: 'No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.

789 'Stop Bashir. End Genocide'. < http://www.bashirwatch.org > accessed on 13th August 2015.

surreptitiously while a court decided whether to enforce the ICC warrant. His case was a clear example of the paradox of the politics of international criminal justice as the South African executive arm of government ignored South African law, which the judiciary had sought to enforce.[790] A South African high court had ordered him to remain in the country pending its final decision on whether to execute the ICC warrant.[791]

The ICC is not a court of general jurisdiction. Its subject matter jurisdiction is restricted to only four crimes: genocide, crimes against humanity, war crimes and the crime of aggression. In reality, however, the Court can exercise jurisdiction over only three crimes since a consensus has not yet been reached over the definition of the crime of aggression.[792] Crimes like terrorism, corruption, unconstitutional change of governments, and drug trafficking are excluded from the remit of the Court. Alubo and Lar observed that the ICC has been criticized because its jurisdiction does not extend to internal disturbances such as riots, religious and communal crises, and some military expeditions within the territory of States Parties.[793] Expectedly, the authors cited the Odi massacre of 20th November 1999 as well as the Zaki Biam massacre of 2001, both perpetrated by the Nigerian army.[794] Yet, as we bear in mind the resource constraints of the ICC, it is necessary to point out that its Statute is not cast in stone.[795] The ICC itself was originally

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790 'Five of the World's Most Wanted for Crimes against Humanity'. < http://www.euronews.com/2015/07/17five-of-the-worlds-most-wanted-for-crimes-against-humanity/ > accessed on 13th August 2015.

791 Q Hunter et al, 'How Zuma and Ministers Plotted Omar al-Bashir's Escape'. Mail & Guardian, June 19, 2015. < http://mg.co.za/article/2015-06-18-how-zuma-and-ministers-plotted-omar-al-bashirs-escape > accessed on 13th August 2015.

792 Paragraph 2 of Article 5, ICC Statute: 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime…'

793 A A Alubo and O Lar, 'The International Criminal Court: Towards the Proposed 2010 Review of the Statute' (2009) Vol. 8. No. 1. *University of Jos Law Journal*, 266.

794 'Nigeria massacres blamed on soldiers'. BBC News. October 24, 2001. < http://www.news.bbc.co.uk/2/hi/africa/1616598.stm > accessed on 28th May 2015.

795 Article 121, Statute of the ICC: 'After the expiration of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties'.

conceived as a means to combat the crime of drug trafficking. Although the motivation for the campaign to establish the ICC was the desire to create an international tribunal to try drug traffickers, the result of the campaign deprived the Court of jurisdiction over drug trafficking offences.[796]

Another criticism is the insufficiency of checks and balances on the authority of the ICC prosecutor and judges. Marc Grossman; US Under Secretary for Political Affairs, opined that the UN Security Council has the primary responsibility of maintaining international peace and security, but the ICC Statute removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC Prosecutor and judges. The treaty has created a self-initiating prosecutor, answerable to no State, or institution, other than the Court itself.[797]

Furthermore, funding remains a major problem plaguing the ICC.[798] The Court's finance is derived from voluntary contributions from Governments, international organizations, individuals, and corporations.[799] The Court is also funded by contributions made by States Parties and the United Nations, especially for Security Council referrals.[800] However, a former Second Vice President of the ICC, Hans-Peter Kaul had remarked that some States Parties are trying to restrict funding for the Court through demands for zero-nominal growth, alongside sweeping demands for more outreach, more situations, and more referrals to the Court.[801]

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796 H L Kiefer, 'Just Say No: The Case against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking' (2009) Vol. 13. *Loyola of Los Angeles International and Comparative Law Review*, 165.

797 M Grossman, 'American Foreign Policy and the International Criminal Court' Remarks to the Centre for Strategic and International Studies, Washington, DC. May 6, 2002.

798 E A Oji, *Responsibility for Crimes under International Law* (Lagos: Odade Publishers, 2013) p. 250.

799 Article 116, Statute of the ICC.

800 Article 115, Statute of the ICC.

801 H. E. Judge Hans-Peter Kaul, 'The International Criminal Court-Current Challenges and Perspectives' Lecture delivered at the Salzburg Law School on International Criminal Law, Salzburg, Austria, 8th August 2011, p. 9.

As earlier stated, the ICC Statute is silent on amnesties. Indeed, the issue of how to deal with national amnesties and national truth and reconciliation efforts was raised in the ICC negotiations, but was not explicitly dealt with in the Rome Statute.[802] Amnesties provide opportunities for dealing with the varied and complex situations facing democracies in transition. Amnesty is defined as a pardon extended by the government to a group or class of persons, usually for a political offence; or the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted.[803] According to Professor Azinge, amnesty allows the government of a nation or state to forget criminal acts, usually before prosecution has occurred.[804] If all amnesties were to be considered as invalid and never accorded international recognition, this might seriously blunt a useful tool for ending or preventing civil wars, facilitating the transition to democratic civilian regimes, or aiding the process of reconciliation.[805]

Challenging the view that international law prohibits amnesty, Dugard stated that State practice is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them.[806] The ICC could defer to non-prosecutorial reconciliation measures by not exercising its jurisdiction to proceed with an investigation or prosecution under Article 53. According to Article 53 of the ICC Statute, the Prosecutor shall…initiate an investigation unless he or she determines that there is 'no reasonable basis' to proceed. On an even stronger note,

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802 D Robinson, 'Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) Vol. 14. No. 3. *European Journal of International Law*, 483.

803 B A Garner, *Black's Law Dictionary* (9th edn, St Paul MN: Thomson Reuters, 2009) p. 99.

804 Epiphany Azinge, 'The Concept of Amnesty and Its Place in Human Rights Discourse, Paper presented at the Nigerian Bar Association, 53rd Annual Conference. Tinapa, Calabar, Nigeria. 27th August 2013, p. 2.

805 Y Naqvi (2003), 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) Vol. 85. *International Review of the Red Cross*, 587.

806 J Dugard (1999) 'Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law*, 1003.

Article 53 (1) (c) requires the Prosecutor to take into account the 'gravity of the crime committed and the interest of victims,' where 'there are substantial reasons to believe that an investigation would not serve the interest of justice'. Moreover, Article 16 of the ICC Statute allows the UN Security Council to request the Court to defer the investigation or prosecution of a situation. To a significant degree, the ICC Prosecutor is subject to oversight by the Pre-trial Chamber, which can review his decision whether or not to proceed with a case.[807]

Critics of the ICC, especially writers from the US, argue that it has refused to ratify the Statute of Rome because it lacks prudent safeguards against political manipulation; possesses sweeping authority without accountability to the U. N Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party States.[808] It must be stated however, that the US was one of the states which laboured very hard towards the establishment of the ICC, exemplified by her roles in the creation of the Nuremberg and Tokyo tribunals, the ICTY and ICTR, and the negotiations leading to the ICC.[809]

The hostility of the US towards the ICC is manifested in several ways: Security Council resolutions that block anticipated prosecutions by the ICC, adopted in response to threats to sabotage humanitarian mission by a perverse use of the veto;[810] bilateral treaties concluded to shield U.S nationals and even some nationals of other States from the threat of transfer to the Court, and domestic legislation authorizing the U.S President to use military force to obstruct the operations of the Court.[811] The America Service Members Protection Act 2002 deepens US

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807 Article 53 (3) (a) and (b), Statute of the ICC.

808 B D Schaefer and S Groves, 'The U.S. Should Not Join the International Criminal Court' The Heritage Foundation, Washington, DC. 18th August 2009. < http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court > accessed on 27th May 2015.

809 L O Taiwo, 'International Criminal Court: The United States and the Fight against Impunity' (2007-2009) Vols. 2 & 3. *Journal of Private and Public Law*, 47.

810 UN Doc. S/RES/1422 (2002); UN Doc. S/RES/1487 (2003).

811 W A Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) Vol. 15. No. 4. *European Journal of International Law*, 702.

refusal to cooperate with the ICC and authorizes the executive branch of government to 'use all necessary means' to free members of the US armed forces detained by the ICC.[812] By doing these, Ojukwu-Ogba believes that the USA has attempted to break the rank of States that are parties to the ICC Treaty, as a way of frustrating the laudable objectives of the Court.[813]

## 4.8 Conclusion

This chapter examined the framework for the prosecution and punishment of crimes against humanity by international courts. The study discussed the prosecutions before the Nuremberg and Tokyo tribunals, the ICTY and ICTR, hybrid courts and the ICC. It is significant in showing the concern and efforts that have been made by the international community to prosecute and punish widespread or systematic human rights violations in places where they have occurred.

812 American Service Members Protection Act of 2002, Section 2008 (a): 'The President is authorized to use all means necessary and appropriate to bring about the release of any person in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court. (b) The authority of subsection (a) shall extend to the following persons: (1) Covered United States persons. (2) Covered allied persons'.

813 N Ojukwu-Ogba, 'The Implication of the Jurisdiction of the International Criminal Court for African States' (2011) *NIALS journal of Law and Development*, 113.

## CHAPTER FIVE

## AN ASSESSMENT OF THE BOKO HARAM INSURGENCY IN THE CONTEXT OF CRIMES AGAINST HUMANITY

### 5.1 Introduction

In recap, we have in the preceding chapters, discussed the sources of law of crimes against humanity, and their substantive content; as well as the prosecution of these crimes before international courts. The overriding objective of this chapter is to ascertain if the violence or atrocities perpetrated by Boko Haram insurgents amount to crimes against humanity. It is widely known that Boko Haram is an Islamist movement capping decades of religious conflict in Nigeria.[814] This situation led Peterside to assert that the Boko Haram militant group has been in existence right from the 1960s but only drew attention in 2002.[815] At the epicentre of its ideology, is the notion that many aspects of western civilization are antithetical to Islam.

The avowed desire of the sect is to establish 'a pure Islamic state ruled by sharia law'.[816] In 2012, Abu Qaqa, the sect's spokesman said:

> We will consider negotiation only when we have brought the government to their knees…Once we see things are being done according to the dictates of Allah, and our members are released from prison, we will only put aside our arms, but we will not lay them

814 'Boko Haram Renames Group Islamic State in West Africa'. < http://www.nigerianmonitor.com/2015/04/23/photos-boko-haram-renames-group-islamic-state-in-west-africa/ > accessed on 30th May 2015.

815 B Z Peterside, 'A Threat to National Security: The Case of Boko Haram in Nigeria' (2014) Vol. 3. No. 4. *Academic Journal of Interdisciplinary Studies*, 286.

816 A Walker, 'W hat is Boko Haram?' Special Report 308, United States Institute of Peace, Washington DC, (2012) p. 1.

> down. You don't put down your arms in Islam, you only put them aside.[817]

Accordingly, the sect is opposed to any form of negotiation and has waged a relentless attack on Nigeria and neighbouring countries.[818] The Boko Haram uprising is not the first violent attempt to impose a religious ideology on a secular Nigerian society, but like other previous efforts, it widened the scope of Islamic revivalism in the country.[819] In the sect's ideology, violence is not a perversion of Islam, but a justifiable means to a pure end.[820] Violence in northern Nigeria has flared up periodically over the last three decades. Principally in the form of urban riots, it has pitted Muslims against Christians and has seen confrontations between different Islamic sects.[821]

Poignantly however, Fatima has articulated the view that 'extremists in Islam are destroying the beauty of Islamic religion'.[822] A similar opinion is held by Awoniyi who postulated that 'the issue of fundamentalism illustrates the fact that religion appears to be associated with conflict in many parts of the world'.[823] A religious fundamentalist is one who holds a conservative religious belief or values and wishes to incorporate them into the secular

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817 M Mark, 'Boko Haram Vows to Fight until Nigeria Establishes Sharia Law' *The Guardian*, January 27, 2012, < http://www.theguardian.com/world/2012/jan/27/boko-haram-nigeria-sharia-law > accessed on 6th June 2015.

818 In 2014, Abubakr Shekau made a speech saying: '…If we meet infidels, if we meet those that become infidels according to Allah, there is no talk except hitting of the neck; I hope you chosen of Allah are hearing. This is an instruction from Allah. It is not a distorted interpretation, it is from Allah himself'. See M Rubin, 'It's About Christianity, Not the Girls' May 13, 2014. < https://www.commentarymagazine.com/2014/05/13its-about-christianity-not-the-girls/ > accessed on 6th June 2015.

819 A Adesoji, 'The Boko Haram Uprising and Islamic Revivalism in Nigeria' (2010) Vol. 5. No. 2. Africa Spectrum, 96.

820 J Campbell, 'Boko Haram: Origins, Challenges and Responses' Policy Brief, NOREF, Norwegian Peace building Resource Centre, 2014, p. 2.

821 International Crisis Group, 'Northern Nigeria: Background to Conflict' Africa Report No. 168, December 20, 2010, p. ii.

822 N Fatima, 'Religious Conflicts in Nigeria and their Impacts on Social Life' (2014) Vol. 2. No. 4. Global *Journal of Arts, Humanities and Social Sciences*, 15.

823 S Awoniyi, 'A Discourse on Religious Conflict and Tolerance in Multi-Faith Nigeria' (2013) Vol. 19. No. 20. *European Scientific Journal*, 124.

political realm by making laws that would apply not only to their followers but to everyone else in the society.[824] Nigeria has three major religions: the African Religions, Christianity and Islam.[825] The coexisting religions highlight the prevailing regional and ethnic divides. Islam dominates the north; Protestantism and local syncretic Christianity are most evident in Yoruba areas, while Catholicism predominates in the Igbo and closely related areas.[826]

In advance of its colonization and annexation into the British Empire in 1900 as part of Colonial Nigeria, the Bornu Empire ruled the territory, constituting north-east Nigeria, where Boko Haram is currently active.[827] It has been posited that at its zenith, the Bornu Empire covered southern Libya, eastern Niger and northern Cameroon.[828] The empire was a sovereign sultanate governed in accordance with the principle of the Constitution of Medina, with a majority Kanuri population. Mai Idris Alooma, who lived from 1580 to 1617, introduced sharia into the Bornu Empire and made Islam the religion of the realm.[829] In 1903, both the Bornu Sultanate and the Sokoto Caliphate fell under the control of the British, who used educational institutions to spread Christianity in the region.

Nigeria gained its independence in 1960. Religious crises in the country began after independence, although they were prosecuted mainly on tribal and religious basis, motivated by the desire to acquire political power. The quest for political power is the main source of conflict

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824 A F Akwara and B O Ojoma, 'Religion, Politics and Democracy in Nigeria' (2013) Vol. 9. No. 2. *Canadian Social Science*, 45.

825 S M Nwaomah, 'Religious Crises in Nigeria: Manifestation, Effect and the Way Forward' (2011) Vol. 3. No. 2. *Journal of Sociology, Psychology and Anthropology in Practice*, 96.

826 'Nigeria-Religion'. < http://www.globalsecurity.org/military/world/nigeria/religion.htm > accessed on 1st June 2015.

827 'Boko Haram.' < http://www.en.m.wikipedia.org/wiki/Boko_Haram > accessed on 30th May 2015.

828 I Egor, 'The Basis of Security Challenges in Nigeria: Implications for Foreign Investors' (2014) Vol. 2. No. 3. *British Journal of Marketing Studies*, 62.

829 I R Adebayo, 'The Role of Traditional Rulers in the Islamization of Osun State (Nigeria)' (2010) Vol. 30. *Journal of Islamic Studies*, 61.

in societies.[830] The regional and tribal differences resulted to an internecine war from 1967 to1970.[831] Religious violence in Nigeria reached a new height in 1980 in Kano, when the Muslim fundamentalist sect, Yan Tatsine, instigated riots that resulted in four or five thousand deaths within only ten days.[832] In the ensuing military crackdown, Maitatsine was killed, fuelling a backlash of increased violence that spread across northern cities over the next twenty years. Social inequality, poverty and the increasingly radical nature of Islam in modern times, contributed both to the Maitatsine and Boko Haram uprisings.[833]

Other incidents of religious violence closely followed, including the Jimeta Yola crisis of 1984; the Zango Kataf crisis of 1992; and the Bulumkutu Christian-Muslim riots of 1982,[834] and the recurring religious conflicts in Jos, Plateau state.[835] The implementations of sharia in some northern states, beginning with Zamfara state,[836] led to more riots. The reactions of Christians were immediate and devastating. Riots which started in Kaduna between Muslims and Christians on 21st February 2000, left many dead and property worth billions of naira destroyed. By 28th February 2000, the riots had spread to Aba, Owerri, Port Harcourt, and other places in the south east.[837]

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830 E O Ekpenyong, 'The Social and Political Roots of Conflict in Nigeria: The Role of the Church' (2011) Vol. 1. No. 2. *American Journal of Social Issues and Humanities*, 120.

831 A Ejike, 'Nigerian-Biafran Civil War: Social and Economic Effects on the Nigerian Igbos' (2010) Vol. 1. No. 1. *Oasis Journal*, 88-89.

832 E Akpomera and K Omoyibo, 'Boko Haram Terrorism in Nigeria: The Paradox and Challenges of Big Brother Foreign Policy' (2013) Vol. 2 (1) *AFRREV IJAH: An International Journal of Humanities*, 96.

833 T Adamolekun, 'Religious Fanaticism and Fundamentalism in Nigeria since 1980: A Historical Perspective' (2012) Vol. 9. No. II. *British Journal of Arts and Social Sciences*, 149-151.

834 O A Fawole and M L Bello, 'The Impact of Ethno-Religious Conflict on Nigerian Federalism' (2011) Vol 6. (10) *International NGO Journal*, 212.

835 I Osaretin and E Akov, 'Ethno-Religious Conflict and Peace Building in Nigeria: The Case of Jos, Plateau State' (2013) Vol. 2. No. 1. *Academic Journal of Interdisciplinary Studies*, 2, 352-355.

R Peters, 'The Reintroduction of Islamic Criminal Law in Northern Nigeria' A Study Conducted on Behalf of the European Commission, Lagos, 2001, pp. 3-4.

837 S E Mijah, 'Ethics of Violence in Nigeria' Thesis in the Department of Religious Studies, Faculty of Arts, submitted to the School of Postgraduate Studies, University of Jos, for the award of the Doctor of Philosophy, 2005, pp. 80-81.

Ushe has remarked that the religious scenario in Nigeria has assumed a violent dimension, leading to suicide bombing, and the loss of innocent lives and property mostly in the northern part of the country.[838] Religious hypersensitivity and violence in Nigeria has provided fertile ground for the embedment of the Boko Haram insurgency.[839]

## 5.2 The Boko Haram

Boko Haram was founded in 2002 by an Islamist cleric known as Mohammed Yusuf.[840] The sect originated in Borno and Yobe States, which are home to the Kanuri tribe. The Arabic name of the Boko Haram sect is Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad, meaning 'People Committed to the Propagation of the Prophet's Teachings and Jihad'.[841] However, the sect is more popularly known as 'Boko Haram': a combination of the Hausa word 'boko' meaning 'Western education' and the Arabic word 'Haram' which means 'sin' or 'forbidden'. Since pledging allegiance to ISIS in March 2015, Boko Haram has renamed itself 'Islamic State, West Africa Province'.[842]

Members of the Boko Haram sect are known to reference the Islamic verse which states that, 'Anyone who is not governed by what Allah has revealed is among the transgressors'.[843] Radical Muslims interpret this statement to mean that leaders who do not govern by strict Sharia law must be overthrown.[844] This informed the sect's attack against government personnel and

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838 U M Ushe, 'Religious Conflicts and Education in Nigeria: Implications for National Security' (2012) Vol. 1 (2) *International Journal of Educational Research and Development*, 011.

839 Adesoji, *art cit*, p. 95.

840 A Okpaga *et al*, 'Activities of Boko Haram and Insecurity Question in Nigeria' (2012) Vol. 1. No. 9. *Arabian Journal of Business and Management Review (OMAN Chapter)*, 82.

841 V Thomson, 'Boko Haram and Islamic Fundamentalism in Nigeria' (2012) Vol. 3. Issue 3. *Global Security Studies*, 46.

842 Boko Haram Now Calls Itself 'Islamic State, West Africa Province'. 12th July 2015. < http://www.thenewsnigeria.com.ng/2015/07/12/boko-haram-now-calls-itself-islamic-state-west-africa-province/ > accessed on 1st August 2015.

843 Surah Al-Maida 5: 44-50.

844 Jim Denison, 'Why Boko Haram Matters to You' Denison Forum on Truth and Culture, 19th January 19, 2015. < http://www.denisonforum.org/global/1317-why-boko-haram-matters-to-you > accessed on 5th June 2015.

facilities, because in its view, they maintain an un-Islamic social and political order. Yusuf was killed in 2009 and replaced by its current leader, Abubakar Shekau.[845] Boko Haram evolved in the immediate framework of the September 11 U.S terrorist attacks, in which age-long conflicts, among Muslims, and between Muslims and Christians, were recast within the narrative architecture of global jihad**.**

Between 2000 and 2009, Boko Haram engaged in low-level conflict with local police officers and non compliant villagers, until its leader, Mohammed Yusuf who was captured on 30th July 2009 in a battle with Nigerian security forces in Maiduguri, was extra judicially murdered in detention.[846] Boko Haram has been in control of swathes of territory, including the Sambisa forest, in and around Borno State, estimated at 50, 000 square kilometers, but has been unable to capture Maiduguri, the state capital.[847]

It is necessary to ponder over the factors that have given rise to the Boko Haram menace. According to Chinwokwu, the causal factors include the following: lack of rule of law, failed or weak states that provide havens for terrorists, corrupt governments, depression, discrimination, social injustice, unemployment, absolute poverty, underemployment, rise of indigenous neo-elites, executive lawlessness, marginalization, relative deprivation, oppression, neo-imperialist class, Machiavellian politics, and government insincerity and insensitivity.[848] Another often cited rationale for terrorism is the existence of social pluralism. Racial, tribal and linguistic differences within countries can be linked to the use of terror.

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845 However, at a press conference in N'jamena, Idriss Deby, the President of Chad declared that Abubakar Shekau had been removed as ruler of the Boko Haram insurgents, and replaced by another militant known as Mahamat Daoud. See 'Shekau Ousted as leader of Boko Haram – Deby, Chadian President'. 13th August 2015. < http://www.vanguardngr.com/2015/08/shekau-ousted-as-leader-of-boko-haram-deby-chadian-president/ > accessed on 13th August 2015.

846 K E Uchehara, 'Peace Talks Initiatives between the Boko Haram and Nigerian Government' (2014) Vol. 5. No. 6 (1) *International Journal of Business and Social Science*, 130.

847 'Boko Haram'. < http://www.en.m..wikipedia.org/wiki/Boko_Haram > accessed on 6th June 2015.

848 E C Chinwokwu, 'Terrorism and the Dilemmas of Combating the Menace in Nigeria' (2013) Vol. 3. No. 4. *International Journal of Humanities and Social Science*, 269.

In November 2013, the U.S State Department designated Boko Haram as well as its splinter, Ansaru, a Foreign Terrorist Organization.[849] A terrorist organization is an illegal clandestine organization consisting of planners, trainers, and actual bombers or killers. Such an organization can have various structures such as an identifiable hierarchy of command, a horizontal structure where leaders are non-identifiable or have no major role, or a cell structure, where the terrorists can be lone wolves. It is a political movement that uses terror as a weapon to achieve its goals.[850] In 2014, the United Nations designated Boko Haram an Al-Qaeda affiliate.[851] Evidence suggests that Boko Haram has links with terror groups such as Al-Qaeda, ISIS and Al-Shabaab.[852] On 7th March 2015, Boko Haram pledged its allegiance to Abu Bakr al-Baghdadi, the leader of ISIS.[853]

In its delocalization campaign, Boko Haram has extended its base of activities to Northern Cameroon, Southeastern Niger, and Southwestern Chad. The Kanuri regions of Chad provide the group with a corridor to Sudan and from there to Al-Shabaab in Somalia. Similarly, the Kanuri regions of Niger provide Boko Haram with a northern corridor to the Touareg region of Niger and the adjacent Touareg regions of Mali, southern Libya, and Algeria.[854] Campbell has stated that funding for Boko Haram and other radical groups comes from bank robberies, kidnapping ransoms, the theft of weapons from government armouries, and, especially in the

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849 'Terrorist Designations of Boko Haram and Ansaru'. U.S. Department of State, Washington, DC, 13th November 2013. < http://www.m.state.gov/md217509.htm > accessed on 4th June 2015.

850 'Terrorist Organization', < http://www.thefreedictionary.com/terrorist+organization > accessed on 21st June 2015.

851 'Security Council Al-Qaida Sanctions Committee adds Boko Haram to its Sanctions List' SC/11410, 22nd May 2014. < http://www.un.org/press/en/2014/sc11410.doc.htm > accessed on 3rd June 2015.

852 E Wosu and D E. Agwanwo, 'Boko Haram Insurgency and National Security Challenges in Nigeria: An Analysis of a Failed State' (2014) Vol. 17. No. 7. *Global Journal of Human-Social Science*, 12.

853 M Ewi, 'What Does the Boko Haram-ISIS Alliance mean for Terrorism in Africa' Institute for Security \ Studies, March 17, 2015. < htpp://www.issafrica.org/iss-today/what-does-the-boko-haram-isis-alliance-mean-for-terrorism-in-africa > accessed on 4th June 2015.

854 M Tanchum, 'Al-Qai'da's West African, Advance: Nigeria's Boko Haram, Mali's Touareg, and the Spread of Salafi Jihadism' (2012) VI: 2. *Israel Journal of Foreign Affairs*, 76.

case of criminal groups; smuggling, while remittances from overseas appear to play no role.[855] Bodansky gave an insight into the organizational structure of the sect as follows:

> Boko Haram is led by an Amir ul-Aam (Commander in Chief) - Abubakar Shekau. He is answerable to a Shura (Council) of trusted Kwamandoji (Commanders in the Hausa language). Significantly, the Shura includes not only Boko Haram's senior regional commanders but also representatives of Ansaru, AQIM, MUJAO[856] and others. The Shura is Boko Haram's highest decision-making body, and the Amir ul-Aam cannot launch major operations, formulate strategy or issue communiqués without the approval of the Shura. The Shura is functioning efficiently though, given the realities on the ground, not frequently. Very little is known about the members of the Shura or even its size - estimated at 6-8 members. The only two known members are Mamman Nur, who is Shekau's second-in-command, and Ansaru's Khalid al-Barnawi. Other reported Shura members include Ibrahim Tada Ngalyike from Gwoza, member of the original 'Nigerian Taliban' Aminu Tashen-Ilmi, and a factional leader known only as Abu Sumayya. There are conflicting reports whether Abu Kaka or Abu Qaqa - the media face of Boko Haram - is a Shura member. The identity of past members should be indicative. The three known members are Habibu Yusuf (killed in early 2013),Momodu Bama (aka

855 Campbell, *op cit,* p. 3.

856 Movement for Unity and Jihad in West Africa, an active militant organization, is a splinter group of the Al-Qaida in the Islamic Maghreb. The group's agenda is primarily the spread of Islamic Jihad across West Africa. See 'MUJAO is an AQIM offshoot that has Risen to Prominence in Northern Mali' Think Security Africa, Fact sheet on the Movement for Unity and Jihad in West Africa, August 2012.

Abu Saad, heavy-weapons expert and the son of Mallam Abatcha Flatari who provided charms for the soldiers until both were killed in late 2013), and Mohammed Zangina (who was involved in coordinating suicide bombings before his arrest in early 2013). The main problem of the Boko Haram command and control system seems to be at the localized level. As a populist movement immersed in fratricidal violence all over the land, Boko Haram must be represented in every region and city. To achieve this, the Boko Haram has a system of local Amirs who are in charge of specific areas. Large cities and densely populated areas are subdivided into Lajna (Sectors in the Hausa language) each of which is being run fairly autonomously by a sub-Amir. The Amirs and sub-Amirs are supported by Kwaman-doji who run operations on a localized level. Each Commander is in turn assisted by a Nabin (Deputy in the Hausa language). Each Nabin controls at least one Mu'askar (Lieutenant) who is the real leader and commander of the violent armed gangs that carry out Boko Haram's murderous raids. Known commanders include Abdulmalik Bama, Umar Fulata, Alhaji Mustapha (aka Massa Ibrahim), Abubakar Suleiman Habu, Hassan Jazair, Ali Jalingo, Alhaji Musa Modu, Bashir Aketa, Abba Coroma, Ibrahim Bashir, Abubakar Zakariya and Tukur Ahmed Mohammed. There are also new zonal commanders for Borno, Yobe and Adamawa States who are unknown. Significantly, only a

few of the more senior Amirs and Kwamandoji are members of the Boko Haram Shura.[857]

Boko Haram engages in a brutal asymmetric warfare, in which there is seemingly no place for the rule of law. An asymmetric warfare is one characterized by significant disparities between the military capacities of the belligerent parties.[858] In the sect's ideology, all is fair in love and war. As a result, it makes no distinction between civilians and combatants; males and females, children and adults, or even Muslims and non-Muslims. It was in this context that on 14th April 2014, Boko Haram kidnapped over 250 girls from a secondary school in Chibok, Bornu State.[859]

In the laws of war, the principle of distinction is intended to protect civilian persons and objects. The implementation of the principle requires parties to always clearly distinguish between civilians and civilian objects on the one hand, and combatants, fighters, and military targets on the other.[860] Beginning with crude attacks on Christians using clubs, machetes and small arms, Boko Haram advanced to the use of Molotov cocktails, simple improvised explosive devices (IEDs) produced using soft drink cans, general purpose machine guns, rocket propelled grenades and launchers, armoured tanks, anti-aircraft guns, Vehicle-borne improvised explosive device (VBIED), etc.[861]

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857 Y Bodansky, 'The Boko Haram and Nigerian Jihadism' ISPSW Strategy Series: Focus on Defence and International Security, Issue No. 276, 2014, p. 11.

858 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' Vol. 89, No. 867, Reports and Documents prepared for the 30th International Conference, Geneva, Switzerland, November 26-30, 2007, p. 732.

859 J Zenn, 'Boko Haram and the Kidnapping of the Chibok School Girls' Combating Terrorism Centre, West Point, USA, May 29, 2014.

860 J T G Kelsey, 'Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare' (2008) Vol. 106. *Michigan Law Review*, 1436. See also Protocol Additional to the Geneva Conventions of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8th June 1977, Article 51 (1) and (2).

861 'Army found Boko Haram's Weapons Hidden Underground in Balmo Forest' < http://www.naij.com/69571.html > accessed on 7th June 2015.

In 2014, escalating violence led to about 10, 849 deaths and over 1. 6 million refugees and internally displaced persons.[862] Boko Haram has identified the U.S and other Western states as potential targets, in particular, citing U.S support for Israel and what the sect describes as American 'oppression and aggression against Muslim nations'.[863] It has also struck a wide range of targets. Boko Haram is responsible for a series of major terrorist attacks, including a wave of bombings in Kano, Nigeria in January 2012 that killed more than 162 people in a single day.[864] On the 26th August, 2011, the United Nations Headquarters' building in Abuja, fell victim to a suicide VBIED carried out by the sect that killed at least 21 people and wounded scores more.[865] On 25th December 2011, multiple bomb attacks by the sect on Saint Theresa Catholic Church in Madalla, Niger state, killed at least 37 people, and wounded an estimate of 50 persons.[866]

Boko Haram has also conducted suicide bombings in Nigeria. This situation involves an attack upon a target using explosives, in which the attacker intends to kill others, and or, cause damage, knowing that he or she will either certainly or most likely die in the process.[867] In June 2011, the first suicide bombing in Nigeria killed five people just outside the Nigeria Police Headquarters in Abuja.[868] In addition, Boko Haram has increasingly feminized terror in Nigeria by involving women both as victims and vanguards of attacks. Since 2009, the sect has abducted

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862 Monica Mark, 'Thousands Flee as Boko Haram Seizes Military Base on Nigeria Border' The Guardian, January 6, 2015. < http://www.the guardian.com/world/2015/jan/05/boko-haram-key-military-base-nigeria-chad-border > accessed on 6th June 2015.

863 'Boko Haram: The Emerging Jihadist Threat in West Africa'. Anti-Defamation League, New York, May 9, 2014, p. 1. Available at http://www.adl.org/.../ boko-haram-jihadist-thre… Retrieved on 12th June 2015.

864 'Terror Attacks in Kano, Nigeria, Kill at Least 162'. The Telegraph, UK. January 21, 2012. < http://www.telegraph.co.uk/news/worldnews/africaandindiaocean/nigeria/9030066/Terror-attacks-in-Kano-Nigeria-kill-at-least-162.html > accessed on 12th June 2015.

865 S Connell, 'To Be Or Not To Be: Is Boko Haram a Foreign Terrorist Organization?' (2012) Vol. 3. Issue 3. *Global Security Studies*, 87.

866 A Olowoselu *et al*, 'Historical Analysis of Boko Haram Insurgency on Educational Management in Northern Nigeria' (2014) Vol 2. No. 10. *Global Journal of Arts Humanities and Social Sciences*, 79.

867 O A Obaro, 'Making Sense of Boko Haram and Suicide Missions in Nigeria' (2013) Vol. 9. No. 26. *European Scientific Journal*, 36.

868 O I Eme and J Ibietan, 'The Cost of Boko Haram Activities in Nigeria' (2012) Vol. 2. No.2. *Arabian Journal of Business and Management Review* (OMAN Chapter), 11.

at least 500 women and girls in north-eastern Nigeria.[869] On 8th June 2014, the first female suicide bomber, wearing a body-borne improvised explosive device (BBIED) attacked the 301 Battalion barracks of the Nigerian Army in Gombe, Gombe State, killing a soldier and herself.[870]

### 5.2.1 Insurgency

In the literature, Boko Haram has been described as a violent insurgency,[871] a terrorist organization and a guerilla group.[872] Aiyesimoju has expressed the view that the concept of insurgency has undergone kaleidoscopic trends over the years on account of differing perspectives but has been frequently used interchangeably with terrorism.[873] However, while insurgency captures the goal of the Boko Haram sect, terrorism and guerilla warfare typify its tactics, strategies, and methods of operation. An insurgency is a movement; a political effort with a specific aim. It is different from terrorism and guerilla warfare, which are methods available for the realization of the goals of the political movement.[874]

Insurgency has been known since historical times, although it has ebbed and flowed in strategic significance. Since Sparta defeated Athens, it has been a constant and effective form of warfare.[875] The common feature of most insurgent groups is their desire to control a particular area or territory, which differentiates them from purely terrorist organizations, whose objectives

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869 F C Onuoha and T A George, 'Boko Haram's Use of Female Suicide Bombing in Nigeria' Al Jazeera Centre for Studies, March 17, 2015, p. 2.

870 N Odebode *et al*, 'Female Suicide Bomber attacks Gombe Barracks'. *Punch Mobile*, June 9, 2014. < http://www.punchng.com/news/female-suicide-bomber-attacks-gombe-barracks/ > accessed on 12th June 2015.

871 Marc-Antoine Perouse de Montclos, 'Nigeria's Interminable Insurgency? Addressing the Boko Haram Crisis' Africa Program, Chatham House, The Royal Institute of International Affairs, 2014, p. 7.

872 C Stein (2015), 'Boko Haram Resorts to Guerilla Tactics as Pressure Mounts' VOA News, February 23, 2015.

873 A B Aiyesimoju, 'Curbing Insurgencies in Nigeria: Roles for the Media' (2015) Vol. 5. No. 2. *Developing Country Studies*, 18.

874 Terrorism Research, 'Differences between Terrorism and Insurgency', < http://www.terrorism-research.com/insurgency/ > accessed on 13th June 2015.

875 K N Jackson, 'Essential Elements Required by an Insurgent Force', A Thesis presented in partial fulfillment of the requirements for the degree of Master of Arts in Defence and Strategic Studies, Massey University, Manawatu, New Zealand, (2011) p. 5.

do not include the creation of an alternative government capable of controlling a given area or country.[876] The assertion has been made that most insurgent groups use terrorism as a tactic in pursuit of their goal.[877] Krishna pointed out that the use of violence in insurgencies sets them apart from movements of political protest like Gandhi's campaign in India and the civil rights movement in the United States of America.[878]

Most conflicts at the international level in contemporary times are of an insurgent nature. Insurgency is a tool for dramatic regime change, pervading human history. In recent times, Africa has seen the rise of insurgent groups rebelling against constituted governments in Egypt, Tunisia, Somalia, etc.[879] Insurgents are better able to survive and prosper if the government and military they oppose is relatively weak, badly financed, organizationally inept, corrupt, and poorly informed about events at the local level.[880] Insurgents seek to subvert or displace the government and completely or partially control the resources and population of a state through the use of force, including guerrilla warfare, terrorism, coercion, propaganda, subversion and political mobilization.[881] By conducting sporadic, harassing attacks in population centers, on security forces or other government interests, insurgent groups can create a widespread atmosphere of chaos and fear, thereby minimizing their disadvantage in terms of available

876 J Ruvalcaba, 'Understanding Iraq's Insurgency' (2004) *The Fletcher School Online Journal for Issues related to Southwest Asia and Islamic Civilization*, 1.

877 U. S. Government, 'Guide to the Analysis of Insurgency' 2012, p. 2.

878 A Krishna, 'Insurgency in the Contemporary World: Some Theoretical Aspects – Part II' < http://www.idsa-india.org/an-dec-6.html > accessed on 15th June 2015.

879 The Economist, 'Africa's Deadly Insurgencies: Ranking High on the Wrong Measures' July 28, 2014. < https://www.economist.com/blogs/baobab/2014/07/africas-deadly-insurgencies > accessed on 15th June 2015.

880 J D Fearon and D D Laitin, (2001) 'Ethnicity, Insurgency and Civil War' A Paper presented at the Annual Meetings of the American Political Science Association, San Francisco, CA, 30th August to 2nd September 2001, p. 9.

881 U.S. Government Counterinsurgency Guide, January 2009. United States Government Interagency Counterinsurgency Initiative, p. 6.

resources.[882] Or as more clearly stated by Kiras, insurgency is perhaps best understood by first considering what it is not:

> Insurgency is not conventional war or terrorism, for example, but it shares with them the use of force to achieve a political end. The crucial difference is the scope and scale of the violence. Terrorism rarely results in political change on its own while insurgency attempts to bring about change through force of arms. The principal difference between irregular and conventional war is relatively simple: the latter involves adversaries more or less symmetric in equipment, training, and doctrine. In an insurgency, the adversaries are asymmetric and the weaker, and almost always a sub-state group attempts to bring about political change by administering and fighting more effectively than its state-based foe through the use of guerilla tactics. These tactics are characterized by hit-and-run raids and ambushes against local security forces…External physical and moral support for an insurgent cause is a prerequisite for success.[883]

Insurgents engage in confrontations with state forces only to the degree required to achieve their political objectives which is to establish a competitive system of control over the population, making it impossible for the government to administer its territory and people. Like most insurgencies needing a physical safe haven, Boko Haram has hideouts in Sambisa forest cutting across Borno, Yobe, Gombe, Bauchi, and Kano states as well as neighbouring African

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882 I Lye and M Roszkowska, 'Insurgency, Instability, Intervention: A Snapshot of Mali and the Sahel Region Threat Landscape' Thomson Reuters, ACCELUS, 2013, p. 5.

883 J D Kiras 'Irregular Warfare: Terrorism and Insurgency' Understanding Modern Warfare, 2007, pp. 188-189, accessed at < http://www.indianstrategicknowledgeonline.co... >

States.[884] Again, like other modern-day insurgencies, Boko Haram is affiliated to transnational networks with access to satellite communications, internet facilities, global media, international markets, transnational criminal gangs and transnational banking systems.[885]

Insurgency is a general overarching concept that involves conflict between a government and an opponent in which the latter uses both political resources and violence to change, reformulate, or uphold the legitimacy of one or more of four cardinal aspects of politics.[886] These aspects of politics are, (1) the integrity of the borders and composition of the nation state, (2) the political system, (3), the authorities in power, and (4) the policies that determine who gets what in societies. O'Neil postulates that the political aim of insurgencies thrives in situations where societal divisions are cumulative and are combined with economic and political disparities.[887] In a similar way, the British Army Field Manual defines insurgency as 'an organized, violent subversion used to effect or prevent political control, as a challenge to established authority'.[888] The Manual declares that insurgencies have many aims, the most common of which are: to gain control of territory, seek resolution of a grievance or seek the overthrow of the existing authority.

An insurgency's origins may be ideological, religious, ethnic, sectarian, class-based, or, most probably, a combination of these factors. While the majority of insurgencies will have a strategy, some may not. Within a group or affiliation, some elements may not agree on any one goal except where they seek the removal of a government, or preventing a government to form.

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884 'Nigerian Armed Forces Locate 12 Boko Haram Hideout in Cameroon' < http://www.naij.com/60700.html > accessed on 15th June 2015.

885 U. S. Department of State, 'U.S Government Counterinsurgency Guide' Washington, DC. U. S. Department of State, Bureau of Political-Military Affairs, January 2009. See also D D Lilly, 'Strategic Framing of Stability Operations' A Strategic Research Project submitted to the U.S. Army War College in partial fulfillment of the requirements of the Master of Strategic Studies Degree, March 20, 2009, p. 9.

886 A M Young Sr. and D H Gray, 'Insurgency, Guerilla Warfare and Terrorism: Conflict and its Application for the Future' (2011) Vol. 2. Issue 4. *Global Security Studies*, 66.

887 B E O'Neil, *Insurgency and Terrorism: From Revelation to Apocalypse*," (2nd ed, Washington D.C: Potomac Books Inc, 2005) p. 4.

888 British Army Field Manual, Vol. 1, Part 10, Countering Insurgency, Army Code 71876, October 2009, p. 5.

Some insurgent groups may fight for criminal or personal reasons, with no goal beyond financial gain, personal satisfaction, or revenge. Insurgents frequently look to states, diaspora, and a variety of illicit economic activities for the material underpinnings of their rebellion. These economic endowments are the resources that can be mobilized to finance the start-up and maintenance of a rebel organization.[889] Metz and Millen have opined that:

> At some point every insurgency must open direct operations against the regime in order to succeed. This can take the form of guerrilla warfare, terrorism, assassination of officials, sabotage, and other types of irregular or asymmetric violence. At the same time, the insurgents must continue to improve their skills, learn their craft, accumulate resources, and mobilize support. They may do this by cultivating external alliances, smuggling, robbery, narcotrafficking, kidnapping, black marketing, money laundering, counterfeiting, merchandise pirating, illegal use of charities, racketeering, and extortion. They may buy arms, obtaining them from ideological allies, or capture them from government forces. Most, but not all, insurgents also seek to augment their legitimacy, mobilize greater public support and, in some cases, expand their international acceptance.[890]

889 P Staniland (2012), 'Organizing Insurgency: Networks, Resources and Rebellion in South Asia' (2012) Vol. 37. No. 1. *International Security*, 145.

890 S Metz and R A Millen, *Insurgency and Counterinsurgency in the 21st Century: Reconceptualizing Threat and Response* (Darby: Diane Publishing, 2004) p. 4.

If there is a rebellion against the state authority, and those taking part in the rebellion are not recognized as belligerents, then the rebellion is an insurgency.[891] However, not all rebellions are insurgencies as a state of belligerency may exist between a sovereign state and the rebel forces. For example, Nigeria was rocked by a civil war between government forces and the secessionist Biafra, from 1967 to 1970.[892] The war was characterized by the recognition of a state of belligerency between the two forces. Insurrection, insurgency and belligerency are the dynamics of non-international armed conflicts. In international law, the concept of belligerency deals with the occurrence of an armed conflict which is not of an international character. Therefore, if internally generated crisis is prolonged, and the insurgents are in effective control of considerable areas of the state, third parties may treat them as belligerents and intervene under the emerging concept of the Responsibility to Protect.[893]

The distinction between rebellion, insurgency and belligerency has not been clearly defined under international law which has until recent times, refrained from interfering in the domestic affairs of sovereign states. Although International law has defined an 'armed conflict' as existing 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and armed groups or between such armed groups within a State' it has not explicitly delineated the boundaries between rebellion, insurgency and belligerency.[894] The Third Geneva Convention is oriented towards international armed conflicts

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891 'Insurgency', < https://www.en.m.wikipedia.org/wiki/Insurgency > accessed on 14th June 2015.

892 F A James, 'The Nigerian Civil War, 1967-1970: A Revolution?' (2011) Vol. 5 (3) *African Journal of Political Science and International Relations*, 120.

893 M Dickson, 'Nigeria's Recognition of the Transitional National Council of Libya: Exploration and Critical Assessment' (2013) Vol. 14. No. 1. *British Journal of Arts and Social Sciences*, 69.

894 Prosecutor v Dusko Tadic a.k.a 'DULE' (ICTY), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, para. 70.

and has only vaguely addressed the question of irregular forces.[895] Irregular military, which is any non-standard military, includes insurgents, guerillas and terrorists.[896]

Traditionally, international law provides three relevant statuses of internal strife: rebellion, insurgency and belligerency.[897] Customarily, international law viewed rebellion or upheaval as a situation of domestic violence in which only a sporadic challenge to the legitimate government was visible.[898] The expectation is that the police force of the state will be able to reduce the seditious party to respect the municipal legal order. This kind of rebellion taking place within the borders of a sovereign state is regarded as the exclusive concern of the state, and not the business of international law.[899]

However, when a rebellion is able to survive suppression and cause longer-lasting and more substantial intra-state violence, it transforms into an insurgency.[900] If the legitimate government acknowledges the rebels as insurgents, it is in fact regarding them as contestants-in-law, and not as mere law-breakers.[901] But in recognizing a state of insurgency, third parties do not assume any obligation under international law, and they are still free to help the legitimate

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895 Third Geneva Convention Relative to the Treatment of Prisoners of War, 12th August 1949, Article 4 (A) (2): Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions; (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

896 'Irregular Military' < https://www.en.m.wikipedia.org/wiki/Irregular_military > accessed on 16th June 2015.

897 Y M. Lootsteen, 'The Concept of Belligerency in International Law' (2000) Vol. 166. *Military Law Review*, 113.

898 H A Wilson, 'International Law and the Use of Force by Liberation Movements' (Oxford: Oxford University Press, 1988) p. 23.

899 R A Falk, 'Janus Tormented; The International Law of Internal War' in J N Rosenau (ed), *International Aspects of Civil Strife* (Princeton: Princeton University Press, 1964) pp. 197-199.

900 R Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' (2009) Vol. 91. No. 873. *International Review of the Red Cross*, 49.

901 'Joint Opinion in the PMOI Case – US Committee for Camp...' < http://www.usccar.org/ Legal Opinions/Slynn_.... > accessed on 21st June 2015. .

government, but should desist from helping the rebels. Such recognition is only an acknowledgment by a foreign state of the existence of a political revolt.

Furthermore, recognition of an insurgency does not provide the rebels with any of the protections under international humanitarian law. Belligerency exists when a sub-state actor meets the following conditions: (1) the existence of civil war within a state, beyond the scope of mere local unrest; (2) occupation by insurgents of a substantial part of the territory of the state; (3) a measure of orderly administration by that group in the area that it controls; and (4) observance of the laws of war by the rebel forces acting under responsible authority.[902] When these conditions are met, recognition of belligerency gives rise to defined rights and obligations under international law. While not conferring statehood, proper recognition of belligerency grants the rebels substantive protections under the laws of war.

### 5.2.2 Guerilla Warfare

Guerrilla warfare is a form of warfare by which the strategically weaker side assumes the tactical offensive in selected forms, times, and places. Guerrilla warfare is the weapon of the weak. It is never chosen in preference to regular warfare; it is employed only when and where the possibilities of regular warfare have been foreclosed.[903] It is generally employed by small bands of irregulars fighting a superior invading army or to weaken the latter's hold over conquered territory; by a weaker side, or as a supplementary means in a conventional war; and in the preliminary stages of a revolutionary war that aims at overthrowing the existing political authority. Guerrilla strategy is determined by the rebels' weakness in relation to the superior

902 A R Amana and S A Ienlanye, 'Non-International Armed Conflicts in International Humanitarian Law' (2015) Vol. 2. No. 1. *Joseph Ayo Babalola University Law Journal*, 147.

903 S P Huntington (1962), 'Introduction' i*n* F M Osanka (ed), *Modern Guerrilla Warfare: Fighting Communist Guerrilla Movements, 1941-1961*(New York: The Free Press, 1962) p. xvi.

military forces that they confront. Since weakness precludes a direct trial of strength in open battle, guerrillas necessarily aim at denying military victory to their opponents.[904]

In this type of irregular warfare, a small group of combatants such as armed civilians or irregulars use military tactics including ambushes, sabotage, raids, petty warfare, hit-and-run tactics, and mobility to fight a larger and less-mobile traditional military.[905] The strategy and tactics of guerilla warfare tend to focus around the use of a small, mobile force competing against a larger, more unwieldy one. The guerilla focuses on organizing in small units, depending on the support of the local population, as well as taking advantage of terrain more accommodating of small units. Rarely do forces using guerrilla tactics attempt to hold terrain, for to do so invites its destruction by superior enemy forces.[906] Not limiting their targets to personnel, enemy resources are also preferred targets. All of that is to weaken the enemy's strength, to cause the enemy eventually to be unable to prosecute the war any longer, and to force the enemy to withdraw.

As a strategy, guerrilla warfare avoids direct, decisive battles, opting instead for a protracted struggle consisting of many small clashes.[907] Guerillas are more or less, a nuisance to regular armies. Much of this ideal was captured by the Communist leader, Mao Zedong when he summarized basic guerilla tactics at the beginning of the Chinese Second Revolutionary Civil War as: 'the enemy advances, we retreat; the enemy camps, we harass; the enemy tires, we attack; the enemy retreats, we pursue'.[908] Operating in small units, guerrillas avoid presenting

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904 S Kalyanaraman, 'Conceptualizations of Guerilla Warfare' (2003) Vol. 27. No. 2. *Strategic Analysis*, 172-173.

905 'Guerilla Warfare'. < https://en.wikipedia.org/?title=Guerilla_warfare > accessed on 16th June 2015.

906 D M Drew, 'Insurgency and Counterinsurgency: American Military Dilemmas and Doctrinal Proposals' Report No. AU-ARI-CP-88-1, Air University Press, Maxwell Air Force Base, Alabama, 1998, p. 10.

907 A Merari, 'Terrorism as a Strategy of Insurgency' in G Chaliand and A Blin (eds), *The History of Terrorism from Antiquity to Al Qaeda* (Berkeley: University of California Press, 2007) pp. 21.

908 M Tse-Tung, *A Single Spark Can Start a Prairie Fire, Selected Works* (English ed, Peking: Foreign Languages Press, 1965) Vol. I.

themselves as tempting targets for government forces, which usually have vastly superior firepower at their disposal. A guerrilla insurgency is the strategic employment of guerrilla tactics; most commonly hit and run tactics, combined with terrorist-type acts, for example, car bombs, to achieve a particular political and, or ideological end.[909]

### 5.2.3 Terrorism

Although terrorism has always been an item on the international agenda, it was the attacks on 11th September, 2001 that brought the issue of terrorism into a new, urgent, and sustained debate.[910] Terrorism was interrogated by the international community in the mid-1930s sequel to the assassination of the Yugoslav monarch, Alexander and the French Foreign Minister, Louis Barthou in Marseilles in 1934.[911] Following this incident, the French government proposed that the League of Nations adopt a Convention for the Prevention and Punishment of Terrorism.[912] The convention did not garner enough ratification to enter into force. International humanitarian law also contains several provisions that expressly prohibit acts of terrorism. Article 33 of the Fourth Geneva Convention provides in part that 'Collective penalties and likewise all measures of intimidation or of terrorism are prohibited'.

A similar provision is found in the two Additional Protocols to the four 1949 Geneva Conventions: Article 51 (2) of Protocol I on international armed conflict and 13 (2) of Protocol II on non-international armed conflict provide in part that: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. Article 4 (2) of Additional Protocol II provides that 'acts of terrorism' against civilians and non-combatants

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909 B Reed, 'A Social Network Approach to Understanding Insurgency' (2007) *Parameters*, 30.

910 J N Maogoto, 'Walking an International Law Tightrope: Use of Military Force to Counter Terrorism – Wiling the Ends' (2006) Vol. 31 (2) *Brook. J. Int'l L*, 409.

911 K Brown, 'The King is Dead, Long Live the Balkans! Watching the Marseilles Murders of 1934' Delivered at the Sixth Annual World Convention of the Association for the Study of Nationalities, Columbia University, New York, April 5th -7th April, 2001.

912 < http://www.wdl.org/en/item/11579/ > accessed on 21st June 2015.

'are and shall remain prohibited at any time and in any place whatsoever'. International humanitarian law also contains provisions which, without using the term 'terrorism', prohibit acts that depending on the intent, the nationality of the perpetrator and victim(s) and other such considerations, may be prohibited by one of the treaties against terrorism. The prohibition in Article 3 common to the four Geneva Conventions of acts of violence against 'persons taking no active part in hostilities', for example, would apply to some acts of terrorism.[913]

Despite the global condemnation of terrorist activities being unanimous and unequivocal, efforts to regulate them have been marred by differences of approach and competing concerns. As a result, after more than seventy years of academic attention, scholars from many fields have spilled almost as much ink as the actors of terrorism have spilled blood.[914] In some instances, a group which is described as 'freedom fighters' by its supporters may be branded as 'terrorists' by its opponents. Cynics have therefore, often retorted that: 'one man's freedom fighter is another man's terrorist'.[915] Merari has therefore cautioned that achieving a consensus on the meaning of the term 'terrorism' is not an important end in itself, except, perhaps, for linguists.[916] In order not to over-swell the ocean of available scholarly and statutory definitions of terrorism, this researcher will refrain from defining the term, but points out that 'terrorism' is better described than defined; and the first step towards doing so is to identify what is not terrorism.

Those labeled terrorists prefer to be known as separatists, freedom fighters, liberators, revolutionaries, vigilante, militants, paramilitary, guerillas, rebels, patriots, or even Jihadi, mujaheddin, and fedayeen. The last three terms are Arabic words associated with religious

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913 D O'Donnell, 'International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces' (2006) Vol. 88. No. 864. *International Review of the Red Cross*, 863.

914 A Clere, 'An Examination of the Special Tribunal for Lebanon's Explosive Declaration of 'Terrorism' at Customary International Law' A Dissertation Completed in Partial Fulfillment of the Requirements of the Degree of Bachelor of Laws, University of Otago, October 2012, p. 1.

915 A Spencer, 'Questioning the Concept of 'New Terrorism' (2006) Issue 8. *Peace Conflict and Development*, 2.

916 Merari, *op cit*, p. 13.

terrorism. Religious terrorism is terrorism performed by groups or individuals, the motivation of which is typically rooted in faith-based tenets. Or as defined by the online encyclopedia; wikipedia, 'religious terrorism' is 'terrorism carried out based on motivations and goals that have a predominantly religious character or influence'.[917] Terrorist acts throughout history have been performed on religious grounds with the hope to either spread or enforce a system of belief, viewpoint or opinion.[918] Boko Haram is a terrorist group motivated by religious agenda. Religious terrorism does not in itself necessarily define a specific religious standpoint or view, but instead usually defines an individual or a group view or interpretation of that belief system's teachings.

Prominent individuals like the Nobel Peace Prize Laureates Menachem Begin and Nelson Mandela have previously been tagged terrorists.[919] Adding to this uncertainty, some writers have articulated the view that terrorism is a term without legal significance and merely a convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.[920]

Therefore, one must exercise caution in order not to mix up terrorism and 'the recourse to rebellion against tyranny and oppression', as stated in the third paragraph of the Preamble of the Universal Declaration of Human Rights.[921] In this sense, paragraph 12 of the 1987 General Assembly Resolution 42/159 is of relevance. The paragraph makes a clear distinction between

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917 'Religious Terrorism'. < https://en.m.wikipedia.org/wiki/Religious_terrorism > accessed on 28th August 2015.

918 P I Rose, 'Disciples of Religious Terrorism Share One Faith' *Christian Science Monitor*, August 28, 2003.

919 Louise Richardson, 'What Terrorists Want' *The New York Times*, 10th September 10, 2006. < http://www.nytimes.com/2006/09/10/books/chapters/0910-1st-rich.html?pagewanted=print&_r=0 > accessed on 21st June 2015.

920 R Higgins, 'The General International Law and Terrorism' in R Higgins and M Flory (eds), *Terrorism and International Law* (London: Routledge, 1997) pp. 27-28.

921 Proclaimed by the United Nations General Assembly in Paris on 10th December 1948, General Assembly resolution 217 A (III): 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.

terrorism and the struggle for national liberation, freedom and independence of peoples subjugated to racist regimes, to alien occupation or to other forms of colonial domination and the right of such peoples to seek and receive support.[922] The differences in the conceptualization of terrorism have made it impossible for the United Nations to conclude a Comprehensive Convention on International Terrorism that incorporates a single, all-encompassing, legally binding, criminal law definition of terrorism.[923]

Rather, the global community has adopted a series of sectoral conventions that identify and criminalize activities characterizing terrorists. In criminal jurisprudence, the proper delineation of terrorism is necessary so as not to violate the principle of legality; that is, it is not possible to talk about the suppression of a criminal act by the exercise of criminal jurisdiction if the act in question is not properly defined.[924] According to Kiras, the first problem associated with the study of terrorism relates to the relative and subjective lenses that one applies to the subject.[925] The inability to formulate a workable legal definition for 'terrorism' stems from its inherent indeterminate and subjective nature.[926] To date, terrorism has proven difficult and elusive to define.

Merari argued that the major obstacle towards achieving a widely accepted definition of terrorism is the negative emotional connotation of the term. Terrorism has become merely another derogatory word, rather than a descriptor of a specific type of activity, and usually,

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922 United Nations General Assembly, A/RES/42/159 of 7th December 1987.

923 CF Diaz-Paniagua, 'Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005' City University of New York, 2008, p. 47.

924 R Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists' in A Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004), 227.

925 Kiras, *op cit*, p. 224.

926 B M Jenkins, The Study of Terrorism: Definitional Problems (Santa Monica: The Rand Corp, 1980) p. 3.

people use the term as a pejorative label for a whole variety of phenomena which they dislike, without bothering to define precisely what constitutes terrorist behavior.[927]

Hoffman has said that terrorism is ineluctably political in aims and motives, violent, or, equally important, threatens violence, designed to have far-reaching psychological repercussions beyond the immediate victim or target, conducted by an organization with an identifiable chain of command or conspiratorial cell structure, whose members wear no uniform or identifying insignia, and perpetrated by a sub-national group or non-state entity.[928] Another definition of the concept is that it 'involves the use of violence against random civilian targets in order to intimidate or to create generalized pervasive fear for the purpose of achieving political goals'.[929] The U.S. Department of Defense defines terrorism as the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.[930]

A similar definition is offered by Chalk who viewed terrorism as: 'the systematic use of illegitimate violence that is employed by sub-state actors as means of achieving specific political objectives, these goals differing according to the group concerned'.[931] The UN Security Council Resolution 1566 (2004) provides yet another definition:

> criminal acts, including against civilians, committed with intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a

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927 A Merari, 'Terrorism as a Strategy of Insurgency' (1993) Vol. 5. No. 4. *Terrorism and Political Violence*, 213-251.

928 B Hoffman. *Inside Terrorism* (2nd ed, New York: Columbia University Press, 2006) p. 43.

929 Y Alexander, *International Terrorism: National, Regional and Global Perspectives* (New York: Praeger, 1976) p. xiv.

930 Joint Chiefs of Staff DoD, Department of Defense Dictionary of Military and Associated Terms. Washington, D.C, 2008.

931 P Chalk (1999), 'The Evolving Dynamic of Terrorism in the 1990s' (1999) Vol. 53. No. 2. *Australian Journal of International Affairs*, 151.

> group of persons or particular persons, intimidate a population or compel a government or international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.[932]

Article 1 of the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism defined acts terrorism as criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public. The Convention specified the types of anti-state actions considered to be acts of terror: attacking public officials, heads of state and their families, or the destruction of public facilities.

The UN Convention for the Suppression of the Financing of Terrorism defines terrorism as: any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context is to intimidate a population, or to compel a government or an international organization from doing any act.[933] A United Nations General Assembly resolution adopted in 1994 contains a provision describing terrorism as, criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a

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932 UN Security Council Resolution 1566, Terrorism, 8th October 2004.

933 Article 2 (1) (b), International Convention for the Suppression of the Financing of Terrorism, 10th January 2000.

political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[934]

Lizardo has stated that most of the definitions of terrorism emphasize some ineffable 'extranormal', brutal and extraordinary aspect of terrorist violence, which is designed to mostly intimidate civilian audiences.[935] Terrorists globally have adopted the following means, amongst others, to execute their aims: arson, mass killing by, gunfire, suicide bombing and use of improvised explosives, high-jacking of aircraft, ship, hostage-taking or kidnapping, media propaganda and advocacy, piracy, jail break, and forced enlistment or recruitment of combatants or fighters.[936]

Apart from scholarly and statutory analyses, terrorism has also been the subject of international tribunal jurisprudence. The Special Tribunal for Lebanon (STL) is the first hybrid international tribunal that has been vested with jurisdiction *ratione materiae* over terrorism,[937] and also the first to try persons who are accused solely of violating domestic, and not international criminal law.[938] Article 2 of the Statute of the STL establishes that the Tribunal shall apply the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material

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934 1994 United Nations Declaration on Measures to Eliminate International Terrorism, annex to UN General Assembly Resolution 49/60, 'Measures to Eliminate International Terrorism' of 9th December 1994, UN Doc. A/Res/49/60.

935 O Lizardo, 'Defining and Theorizing Terrorism: A Global Actor-Centered Approach' (2008) Vol. XIV. No. 2. *Journal of World-Systems Research*, 94.

936 A I Chukwuma Okoli and P Iortyer, 'Terrorism and Humanitarian Crises in Nigeria: Insights from Boko Haram Insurgency' (2014) Vol. XIV. Issue I. *Global Journal of Human Social Science*, 40.

937 Statute of the Special Tribunal for Lebanon, established 29th March 2006 (entered into force 30th May 2007). Article 1 of the Statute provides that: if the Tribunal finds that attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a gravity and nature similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks.

938 M Milanovic, 'An Odd-Couple – Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon' (2007) Vol. 5. No. 5. *Journal of International Criminal Justice*, 1139-1152.

elements of a crime, criminal participation and conspiracy as well as Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'.

The STL was established sequel to an Agreement between the UN and the Lebanese Republic (Security Council Resolution 1664 (2005)) to investigate the 2005 assassination of the former Prime Minister Hariri Rafiq and 22 others in a bomb attack.[939] The mandate of the STL is to prosecute those persons responsible for the attack of 14th February 2005 in Beirut, which resulted in the death of former Prime Minister and in the death or injury of other persons, as well as additional attacks connected with that killing.[940] In an interlocutory decision rendered on 16th February 2011, the Appeals Chamber of the Special Tribunal for Lebanon held that terrorism has evolved into a crime under international customary law:

> On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace, requiring the following elements: (i) the intent (dolus) of the underlying crime and (ii) the special intent (dolus specialis) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational. The very few States still insisting on an exception to the definition of terrorism can, at most, be considered persistent objectors. A comparison between the crime of terrorism as

939 P Puchooa, 'Defining Terrorism at the Special Tribunal for Lebanon' (2011) Vol. 2. Issue 3. *Journal of Terrorism Research,* 34.

940 'The Special Tribunal for Lebanon and the Quest for Truth, Justice and Stability' International Law Middle East and North Africa Programs: Meeting Report, Chatham House, London, 2010, p. 4.

> defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is broader with regard to the means of carrying out the terrorist act, which are not limited under international law, and narrower in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act and (iii) it involves a transnational element.[941]

However, this decision has evoked textual criticisms. Kirsch and Oehmichen have said that not only does the current discord on the definition of terrorism apply to international treaty law and international customary law, but that the Appeals Chamber's claim that terrorism constituted an international crime is indeed revolutionary and highly inventive to an extent which makes it particularly difficult to follow the tribunal's reasoning in the matter.[942] Similarly, Stier asserted that on its path to declaring a definition that has eluded the international community for nearly a century, the STL Appeals Chamber exceeded the bounds of the tribunal's fundamental mandate to apply Lebanese law, and the court's decision to resort to customary law on terrorism was unnecessary, its justification grounded in contentious methodology, and its pronouncement on applicable law expansive.[943]

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941 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (United Nations Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/I, 16 February 2011).

942 S Kirsch and A Oehmichen, 'Judges Gone Astray- The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon' (2011) Vol. 1. *Durham Law Review Online*, 7.

943 E Stier, 'The Expense of Expansion: Judicial Innovation at the Special Tribunal for Lebanon' (2014) Vol. 36. Issue 3. *Boston College International and Comparative Law Review*, 116.

## 5.3 Examination of Some International Instruments on Terrorism

In view of the controversies attending the definition of terrorism, international law has adopted a sectoral approach towards the criminalization of terrorist activities. As a result, there is in existence, a series of treaties targeting specific methods of violence employed by terrorists such as hijacking, kidnapping, bombings, etc. The conventions are regarded as sectoral because they cover only a narrow field of application. The adoption of these conventions occurred after terrorist incidents of aircraft hijacking, aircraft sabotage, attacks on shipping and other catastrophes. These treaties are complemented by a plethora of soft law instruments condemning terrorism.

The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Tokyo, is regarded as the first multilateral treaty on terrorism.[944] In the 1970s, several other treaties were concluded: the 1970 Convention for the Unlawful Seizure of Aircraft;[945] the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[946] the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[947] the 1979 International Convention against the Taking of Hostages;[948] and the 1979 International Convention on the Physical Protection of Nuclear Material.[949]

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944 (Aircraft Convention) 704 UNTS 10106, entered into force on 4th December 1969.

945 (Unlawful Seizure Convention) 16th December 1970, 860 UNTS 12325. Entered into force 16th October 1971.

946 (Civil Aviation Convention) 23rd September 1971, 974 UNTS 14118. Entered into force 26th January 1973.

947 (Protection of Diplomats Convention) Adopted by the UN General Assembly by Resolution 3166 (XXVIII), 14th December 1973, 1035 UNTS 15410. Entered into force on 20th February 1977.

948 (The Hostages Convention) Adopted by the UN General Assembly by Resolution 34/145 (XXXIV) of 17th December 1979, 1316 UNTS 205. Entered into force on 3rd June 1983.

949 Adopted by the UN General Assembly by Resolution A/35/146 of 17th December 1979, 1456 UNTS 24631. Entered into force on 8th February 1987.

These treaties were followed in the 1980s by the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;[950] a Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;[951] and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[952]

In the 1990s, the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;[953] the 1997 International Convention for the Suppression of Terrorist Bombings;[954] and the 1999 International Convention for the Suppression of Financing of Terrorism,[955] were negotiated. On 13th April 2005, the UN General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism.[956] O'Donnell has stated that these treaties which define nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of bombs or nuclear materials, and two crimes concerning the financing of terrorism, reflect an evolving code of terrorist offences.[957]

Outside the framework of the United Nations, the African region has adopted the O. A. U Convention on the Prevention and Combating of Terrorism.[958] Article 1 (3) of the Convention

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950 (Maritime Convention) 10th March 1988, IMO Document SUA/CONF/15/Rev. 1. Entered into force on 1st March 1992.

951 (SUA PROT) Adopted by the IMO on 10th March 1988. Entered into force on 1st March 1992.

952 (Airport Protocol) 24th February 1988. ICAO Document 9518. Entered into force on 6th August 1989.

953 Adopted by the ICAO on 1st March 1991. Entered into force on 21st June 1998.

954 Adopted by the UN General Assembly, 15th December 1997 by Resolution A/52/164. Entered into force on 23rd May 2001.

955 Adopted by the UN General Assembly on 9th December 1999 by Resolution A/54/109. Entered into force on 19th April 2002.

956 Adopted by the UN General Assembly on 13th April 2005, by Resolution A/59/290.

957 O'Donnell, *art cit*, p. 855.

958 O. A. U Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14th July 1999, entered into force 6 December 2002.

stipulates the definition of a terrorist act.[959] However, it categorically excludes the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces from designation as terrorist acts.[960] The offences established by the Convention are extraditable.[961] Parties to the Convention undertake to offer one another mutual police and judicial assistance in investigation, criminal prosecution or extradition proceedings, and bank secrecy or confidentiality is not a justifiable reason to decline such assistance.[962]

Africa's conceptualization of terrorism evolved from its political permutations in the years before independence. During the struggle for decolonization, many of the activities of the freedom fighters were labeled terrorism.[963] Parties to the Convention undertake to review their national laws and establish criminal offences for terrorist acts, and render them punishable by appropriate penalties that take into account the grave nature of such offences.[964] States Parties commit not to engage in acts aimed at supporting, financing, providing havens for terrorists,

959 Article 1 (3): 'Terrorist act' means: (a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State. (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to(iii).

960 Article 3 (1), O. A. U Convention on the Prevention and Combating of Terrorism.

961 Articles 9-13, O. A. U Convention on the Prevention and Combating of Terrorism.

962 Articles 16 and 17, O. A. U Convention on the Prevention and Combating of Terrorism.

963 M Ewi and K Aning, 'Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa' (2006) Vol. 15. No. 3. *African Security Studies*, 35.

964 Article 2 (a), O. A. U Convention on the Prevention and Combating of Terrorism.

including the provision of weapons and their stockpiling in their countries and the issuing of visas and travel documents.[965]

The offences prohibited by the Convention are extraditable.[966] Furthermore, the Constitutive Act of the AU provides a basis for preventing and combating terrorism. Article 4 (o) requires 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities' which is underscored in the preamble as the need to promote peace, security and stability as a prerequisite for the implementation of Africa's development and integration agenda.[967]

A related treaty which should be mentioned because of its significance is the Arms Trade Treaty.[968] The landmark Arms Trade Treaty (ATT), regulating the international trade in conventional arms,[969] from small arms to battle tanks, combat aircraft and warships,[970] entered into force on 24th December 2014. The Convention calls for potential arms deals to be evaluated in order to determine whether they might enable buyers to commit genocide, crimes against humanity, or war crimes. The ATT also seeks to prevent conventional military weapons from falling into the hands of terrorists or organized criminal groups.[971]

In general, the major obligation imposed by international treaties prohibiting terrorism is the incorporation of the crimes established by the treaties into the legal system of the States Parties, and to render them punishable by sentences that reflect their gravity.[972] This section of

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965 Article 4, O. A. U Convention on the Prevention and Combating of Terrorism.

966 Article 8, O. A. U Convention on the Prevention and Combating of Terrorism.

967 Preamble 8, Constitutive Act of the African Union, adopted on 11th July 2000 at the Lome, Togo, entered into force in 2001.

968 3rd June 2013.

969 Article 1.

970 Articles 2 and 3.

971 Preamble, paragraph 2.

972 Article 2 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 3 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 2 (1) and (2) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected

the thesis will address only those treaties of relevance to the methods of terror employed by the Boko Haram sect, that is, for example, the attack on the UN building in Abuja, use of explosives, robberies, hostage-taking, etc.

### 5.3.1 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

It is well known that diplomatic personnel are favourite targets of terrorists. Up till the early 1980s, more than 25 per cent of all international terrorist incidents were directed against diplomats, embassies, and consulates.[973] Local terrorists attack diplomats to win international attention, increase their leverage in hostage situations, or punish foreign governments for their perceived involvement in the local conflict. Terrorists seize hostages in order to win attention and to increase their coercive power by putting human life at risk.[974]

On 4th November 1979, as many as 3, 000 Iranian revolutionaries stormed and captured the U.S Embassy in Tehran taking 66 American hostages in the process. Fifty-three hostages were kept for 444 days, until their negotiated release was concluded on 20th January 1981.[975] The kidnapping of diplomatic agents is popularly known as 'diplonapping'.[976] After the adoption of the Vienna Convention on Diplomatic Relations 1961, kidnappings, murders and violent assaults

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Persons; Article 2 of the 1979 International Convention against the Taking of Hostages; Article 7 (1) and 7 (2) of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 5 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 5 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Articles 4 and 5 of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 4 of the 1999 International Convention for the Suppression of Financing of Terrorism.

973 B M Jenkins, 'Diplomats on the Front Line' The Rand Paper Series, Paper presented at the Conference on International Terrorism: The Protection of Diplomatic Premises and Personnel, Bellagio, Italy, 8th -12th March 1982.

974 G Bass *et al*, 'Options for U.S. Policy on Terrorism' Rand Corporation, Santa Monica, California, 1981.

975 J K Elsea (2013), 'The Iran Hostages: Efforts to Obtain Compensation' Congressional Research Service Report, November 1, 2013. < https://www.fas.org/sgp/crs/.../R43210. pd... > accessed on 26th June 2015.

976 < http://www.rcimun.org.org/ …/spc_2_-_eran_esken… > accessed on 25th June 2015.

against diplomatic agents and embassies increased dramatically.[977] Articles 22 and 29 of the Vienna Convention on Diplomatic Relations 1961 oblige the state receiving the diplomat to protect mission premises and members.[978]

The Protection of Diplomats Convention was adopted by the United Nations General Assembly on 14th December 1973.[979] The Convention has 178 parties and entered into force on 20th February 1977. Nigeria acceded to the convention on 25th September 2012.[980] The ILC began working on the convention in 1971, and it was adopted about two years later. It is one of the sectoral anti-terrorism conventions negotiated within the United Nations and its specialized agencies.[981] The Convention was negotiated in response to a spate of kidnappings and killings of diplomatic agents in the late 1960s, such as the killing of Count Karl Maria von Spreti, Ambassador of Germany to Guatemala by members of the Rebel Armed Forces (FAR).[982]

Article 1 of the convention defines the category of persons it protects.[983] The crimes set out in Article 2 of the convention are: 1 (a) murder, kidnapping or other attack upon the person

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977 T Maria, 'Fight Against Terrorism in the Light of Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents' (2005) Vol. 2. No. 3. *Miskolc Journal of International Law*, 54.

978 Vienna Convention on Diplomatic Relations 1961. Under Article 22 (2), the receiving State is under a special duty to tale all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. By Article 29, the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

979 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Annexed to General Assembly resolution 3166 (XVIII) of 14th December 1973.

980 < https://www.treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-7&chapter=18&lang=en > accessed on 25th June 2015.

981 M Wood, 'Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents: Introductory Note' < http:// www.legal.un.org/avl/ha/cppcipp/cppcipp.html > accessed on 23rd June 2015.

982 '1970: West German Envoy Killed by Rebels' 5th April, 1970. < http://www.news.bbc.co.uk/onthisday/hi/dates/stories/april/5/newsid_2522000/2522703.stm > accessed on 25th June 2015.

983 Article 1. 'Internationally protected person' means: (a) A Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, A Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as

or liberty of an internationally protected person; (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; (c) a threat to commit any such attack; (d) an attempt to commit any such attack; and (e) an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law. Article 7 of the convention contains the principle of *aut dedere aut judicare*, that a party to the treaty must either (1) prosecute a person who commits an offence against an internationally protected person or, (2) send the person to another state that requests his extradition for prosecution of the same crime. Each State Party is required by the convention to take necessary measures to establish its jurisdiction over the crimes in Article 2.[984]

### 5.3.2 International Convention against the Taking of Hostages

Although an accepted wartime practice in ancient times, it was only in the 19th century that the capture and murder of civilian hostages emerged as a common military strategy. The Nazis gained infamy for their policy of reprisal against civilians. However, the killing of civilian hostages was criminalized by the Charter of the IMT Nuremberg[985] and prohibited by the Fourth Geneva Convention of 1949.[986] Hostage-taking allows weak and obscure groups to extort concessions from State authorities. Notable examples of hostage-taking include the seizure and murder of Israeli athletes at the 1972 Munich Olympics by the Fedayeen, of the Black September

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well as members of his family who accompany him; (b) Any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

984 Article 3, Protection of Diplomats Convention.

985 Article 6 (b), Charter of the IMT (82 UNTS 279; UKTS (1945) 4).

986 Article 34,Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12th August 1949, (75 UNTS 287).

Organization, a militant arm of the Palestinian Liberation Organization;[987] the seizure of 60 OPEC officials in Vienna by a group of terrorists led by Ilich Ramirez Sanchez, also known as Carlos the Jackal,[988] and the 1976 hijacking of an Air France flight to Entebbe.[989]

In order to eliminate this threat, the Hostages Convention, or formally, the International Convention against the Taking of Hostages was adopted by the United Nations General Assembly on 17th December 1979 by Resolution 34/1461. It entered into force on 3rd June 1983, after its ratification by 22 states. In 2013, the Nigerian government ratified the convention.[990] The convention does not apply to hostage-taking committed during armed conflict for which the parties have an obligation to prosecute or extradite.[991] The first paragraph of Article 3 imposes an obligation on the Party in whose territory a hostage is being held to take 'all measures it considers appropriate' to ease the situation of the hostage and, in particular, to secure release and aid with departure.

Under Article 1 (1) of the convention, the offence of hostage-taking is committed by 'any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental

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987 E Briggs, 'The Munich Massacre' A Thesis submitted in partial fulfillment of the requirements of the degree, BA (Hons) in History, University of Sydney, October, 2011, p. 5. See also 'Israeli 1972 Olympic Team Murdered in Munich' < http://www.palestinefacts.org/pf_1967to1991_munich.php > accessed on 26th June 2015.

988 B M Jenkins, Embassies under Siege: A Review of 48 Embassy Takeovers, 1971-1980 (Santa Monica: The Rand Corporation, 1981) p. 4.

989 R Singh, 'Raid on Entebbe' (2011) *Scholar Warrior*, 144.

990 'FG Ratifies UN Conventions on Arms, Hostages, Terrorism' < http://www.freedomonline.com.ng/fg-ratifies-un-conventions-on-arms-hostages-terrorism/ > accessed on 26th June 2015.

991 Article 12: 'In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in Article 1, paragraph 4, of Additional Protocol of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations'.

organization, a natural or juridical person, or a group of persons, to do or abstain from doing any acts as an explicit or implicit condition for the release of the hostage'. The offence is constituted first by the following elements: (1) the seizure or detention of the hostage; (2) the threat to kill or injure the hostage unless a third party does or abstains from doing a thing; and (3) an implicit or explicit condition for the release of the hostage. It appears from the wording of Article 13 of the convention that a subtle attempt has been made to distinguish hostage-taking from kidnapping by importing the inter-state element. Article 13 provides as follows: 'this Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State'.

Usually, kidnapping involves compelling a third party to do something; perhaps, to pay a ransom. It is often the case that the victim is detained in a secret location. Kidnapping is often for a non-political purpose. On the other hand, hostage-taking transcends kidnapping since the demands of the hostage-takers are chiefly political. In some cases, the victims are held in a known location such as a plane, ship or building.[992]

Each party to the convention must make the offences punishable by appropriate penalties taking into account their grave nature.[993] Article 8 (1) of the convention contains the principle of *aut dedere aut judicare*: thus, the State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State. Parties to the convention have an obligation to take all

[992] N S Apkan, 'Kidnapping in Nigeria's Niger Delta: An Exploratory Study' (2010) 24 (1) *J Soc Sci*, 33.

[993] Article 2.

practicable measures to prevent preparations for hostage-taking, in particular measures to prohibit the illegal activities of those who encourage, instigate, organize or engage in hostage-taking.[994]

### 5.3.3 Convention on the Marking of Plastic Explosives for the Purpose of Detection

The Lockerbie disaster of 1988 drew urgent global attention to the use of plastic explosives aboard aircraft. On 21st December 1988, Pan American flight 103 exploded over Lockerbie, Scotland, killing all 259 passengers and crew on board and 11 people on the ground.[995] On 5th April 1999, more than a decade after the bombing, the two Libyans: Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhima, charged with planting the plastic explosive, semtex, arrived Netherlands for their trial.[996] Ali Mohmed Al Megrahi was convicted of 270 counts of murder and sentenced to life imprisonment while Al Amin Khalifa Fhima was discharged and acquitted.[997]

Semtex is a general-purpose plastic explosive containing RDX and PETN. Until recently, it was notoriously popular with terrorists because it was extremely difficult to detect.[998] In the early 1990s, experts actively participated in international negotiations on the marking and detection of plastic explosives, contributing greatly to the conclusion of the Convention on Plastic Explosives. Expressing its concerns over the issue, the UN Security Council met on 14th June 1989 and unanimously adopted Resolution 635 condemning 'all acts of unlawful interference against the security of civil aviation', and urged the International Civil Aviation

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994 Article 4.

995 S Lloyd, 'The Pam Am 103 Case – Terror Over Lockerbie, Scotland' Our History, Stories from the Historical Committee, 12th December 2013, p. 10. < https://www.socxfbi.org/.../p amam103_... > accessed on 29th June 2015.

996 M Plachta, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle of Aut Dedere Aut Judicare' (2001) Vol. 12. No. 1. *European Journal of International Law*, 135.

997 Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhima. The High Court of Justiciary at Camp Zeist, Case No: 1475/99, paras 85 and 89, pp. 77 and 82.

998 'Semtex' < https://en.m.wikipedia.org/wiki/Semtex > accessed on 29th June 2015.

Organization (ICAO) to intensify its work aimed at preventing all acts of terrorism against civil aviation, and in particular, its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection.[999]

In order to forestall future explosions onboard aircraft, the ICAO Council passed a resolution urging its Member States to expedite current research and development on detection of explosives and on security equipment, during its regular session meeting in February 1989. On 30th January 1989, the ICAO Council established an *Ad Hoc* Group of Experts on the Detection of Explosives. At the 27th Session of the ICAO Assembly held in 1989, a proposal was made to draft an international convention on the marking of plastic explosives. A special Sub-Committee of the Legal Committee prepared a preliminary draft in 1990; and the Diplomatic Conference met at Montreal from 11th February to 1st March 1991 to adopt the Convention for the Marking of Plastic Explosives for the Purpose of Detection.[1000] The Convention entered into force on 26th June 1998 and is administered by the ICAO. Nigeria acceded to the Convention on 10th May 2002, and lodged a declaration in accordance with Article XIII (2), that it is not a producer State.[1001]

In drafting the convention, the global community was of the opinion that the marking of plastic explosives makes them more easily identifiable and detectable, thereby inhibiting their improper and unlawful use. States Parties agree to mark plastic explosives with a chemical agent that can be detected by commercially available vapor or particle trace detectors and, or canines. There are four such chemical agents identified in the Convention. While Article 1 (3) of the

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999 UN Security Council Resolution 635 (1989) adopted by the Security Council at its 2869th meeting, on 14th June 1989, 14th June 1989, S/RES/635.

1000 Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1st March 1991. Also see 'The Postal History of ICAO: Legal Instruments Related to Aviation Security'. < http://www.icao.int/secretariat/PostalHistory/legal_instruments_related_to_aviation_security.htm > accessed on 29th June 2015.

1001 Under Article I (6) of the Convention, a 'Producer State' means any State in whose territory explosives are manufactured.

convention defines ‘marking’ as introducing into an explosive, a detection agent in accordance with the Technical Annex to the Convention, a ‘detection agent’ means a substance as described in the Technical Annex which is introduced into an explosive to render it detectable. The Convention creates no offence, but contains a number of prohibitions.

As a rule, the Convention provides for the monitoring, regulation, manufacture, possession, import and export of plastic explosives internationally. Each State Party undertakes to prohibit and prevent the manufacture in its territory, and the movement into and out of its territory of unmarked plastic explosives.[1002] It is also obligated to take necessary measures to destroy, as soon as possible, all stocks of unmarked plastic explosives manufactured upon the Convention’s entry into force, other than stocks of unmarked explosives held by its authorities performing military or police functions.[1003] The Convention obliges States to exercise strict and effective control of the possession and transfer of existing stocks of unmarked plastic explosives manufactured or brought into its territory prior to the entry of the convention into force.[1004]

Existing stocks of unmarked plastic explosives must either be consumed, destroyed, marked or rendered permanently ineffective, consistent with obligations under the Convention within a period of 3 years of the entry into force of the convention for that state for those stocks of unmarked plastic explosives not held by authorities performing military functions,[1005] and 15 years for those stocks of unmarked plastic explosives held by authorities performing military functions that are not incorporated as an integral part of duly authorized military devices.[1006] The Convention establishes the International Explosives Technical Commission consisting of 15 to 19 experts appointed by the Council of the ICAO to implement the Convention. The

1002 Articles II and III (1).
1003 Article IV.
1004 Article IV (1).
1005 Article IV (2) and (3).
1006 Article IV (3).

Commission provides technical assistance and facilitates the exchange of information relating to technical developments in the marking and detection of plastic explosives between States Parties.[1007]

### 5.3.4 International Convention for the Suppression of Terrorist Bombings

With the increasing spate of terrorist attacks by means of explosives or other lethal devices, it became necessary to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of, and for the prosecution and punishment of their perpetrators. For example, the Tokyo subway sarin attack of 20th March 1995, perpetrated by members of the religious movement Aum Shinrikyo, killed 12 persons, severely injured 50, and caused temporary vision damage to about 6000 other people.[1008]

The Terrorist Bombings Convention is a United Nations treaty adopted on 15th December 1997, which entered into force on 23rd May 2001. The Convention was adopted by Resolution A/RES/52/164 of the General Assembly.[1009] Nigeria acceded to the convention on 24th September 2013.[1010] The Convention enhances international cooperation between States by requesting them to adopt appropriate measures and domestic legislation to ensure that criminal acts within the Convention's scope, in particular, where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological,

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1007 Articles V and VI.

1008 N Yanagisawa *et al*, 'Sarin Experiences in Japan: Acute Toxicity and Long-term Effects' (2006) 249 *Journal of the Neurological Sciences*, 76.

1009 UN Doc. A/RES/52/164; 37 ILM 249 (1998); 2149 UNTS 284.

1010 'United Nations-Treaty Collection on the Internet'. < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapteR=18&lang=en > accessed on 1st July 2015.

racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.[1011]

Article 15 obliges State Parties to cooperate to prevent the commission of Convention offences, including through preventing and countering preparations in, or outside their respective territories by exchanging accurate and verified information and through research and development of methods of detection of explosives, marking of explosives, technology transfer, and so on. In general, the Convention applies to the offence of the intentional and unlawful delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss.[1012] The offence is extraditable.[1013]

In the context of the Convention, an 'explosive or other lethal device is (a) an explosive or incendiary weapon or device that is designed or has the capability, to cause death, serious bodily injury or substantial material damage; or (b) a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.[1014] As is usually the case with counter-terrorism treaties, the Convention urges States Parties to transpose its offences into their national criminal law, and render them punishable taking into account their grave nature.[1015]

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1011 Article 5.
1012 Article 2.
1013 Article 9.
1014 Article 3 (a) and (b).
1015 Article 4 (a) and (b).

A state may exercise jurisdiction over an alleged offender if (a) the offence is committed in the territory of that State; (b) the offence is committed on board a vessel flying the flag of that State or an aircraft registered under its laws when the offence was committed; (c) the offence is committed by a national of that State;[1016] (d) the offence is committed against a national of that State; (e) the offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises; (f) the offence is committed by a stateless person who has his habitual residence in the territory of that State; (g) the offence is committed in an attempt to compel that State to do or abstain from doing any act; or (h) the offence is committed on board an aircraft which is operated by the Government of that State.[1017] The Convention also provides for mutual assistance by States Parties and the transfer of detainees to assist with investigation or prosecution of offences.[1018]

### 5.3.5 International Convention for the Suppression of the Financing of Terrorism

In order to sustain their members and acquire the logistics vital for their activities, terrorists organizations require financial resources. The UN has passed several resolutions restricting the access of terrorists to funds. UN Security Council Resolution 1373 of 2001 calls for all Member States to take drastic measures to prevent and suppress the financing of terrorist acts, and freeze funds or economic resources meant for them.[1019] Furthermore, in Resolution 2199 of 2015 adopted under Chapter VII of the United Nations Charter, the Security Council condemned any trade with ISIL, the Al-Nusrah Front (ANF), and other entities designated as Al-Qaeda affiliates. States are to ensure that their nationals and persons within their territory do not make economic

1016 Article 1 (a), (b) and (c).
1017 Article 6, 2 (a)-(e).
1018 Article 10-13.
1019 S/RES/1373 (2001), adopted by the Security Council at its 4385th meeting on 28th September 2001.

resources, including oil and related material, and other natural resources, available to ISIL and ANF.[1020]

On 23rd September 1998, at the UN General Assembly, France proposed a convention for the suppression of terrorist financing in order to fill in the gaps in treaty law on terrorism.[1021] On 8th December 1998, the UNGA, in Resolution 53/108, authorized the *Ad Hoc* Committee to elaborate a draft International Convention for the Suppression of Terrorist Financing. By Resolution 54/109 of 9th December 1999, the UN General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism and requested the Secretary-General to open it for signature at the United Nations Headquarters in New York.[1022] The treaty entered into force on 10th April 2002. Unlike other anti-terrorism treaties, the financing convention seeks not to address a specific aspect of terrorist activity, but to cripple the entire system by cutting off its lifeblood, which is, access to material resources, mainly finance.[1023]

Terrorist financing is the provision of financial support, in any form, to terrorism, or to those who encourage, plan, or engage in it. It is the process by which an organized terrorist group raises money to fund its activities.[1024] The forms of financing can be classified into: (a) financial support, in the form of donations, community solicitation, and other fundraising activities, or support from individuals, states and large organizations; and (b) revenue generating activities, where income is derived from criminal activities such as the drug trade, smuggling of weapons,

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1020 S/RES/2199 (2015), 12th February 2015.

1021 M T Ladan, 'International Legal and Administrative Regimes for Combating Money Laundering and Terrorist Financing' A Paper presented at a 2-day Workshop on Money Laundering Laws and Regulations, organized by Lintol Resources Base Ltd, Lagos. 1st -2nd March, 2010, p. 14.

1022 'International Convention for the Suppression of the Financing of Terrorism'. United Nations Audiovisual Library of International Law. < http://www.legal.un.org/pdf/ha/.../icsft_ph_e.pdf > accessed on 4th July 2015.

1023 R Lavalle, 'International Convention for the Suppression of the Financing of Terrorism' (2000) 60 *ZaoRV*, 492.

1024 J Roth *et al*, (2004) 'Monograph on Terrorist Financing: Staff Report to the Commission on Terrorist Attacks upon the United States' 2004, p. 52.

fraud, kidnapping, hostage taking and extortion. It may also come from legitimate undertakings such as diamond trading or real estate investment.[1025]

Money laundering has been defined as the process whereby criminals attempt to conceal the illegal origin, and or, ownership of property and assets that are the fruits or proceeds of their criminal activities. It is invariably, a derivative of crime.[1026] Terrorists use techniques like those of money launderers to evade authorities' vigilance and to conceal the identity of their sponsors and of the ultimate beneficiaries of the funds. However, financial transactions associated with terrorist financing tend to be in smaller amounts than is the case with money laundering, and when terrorists raise funds from legitimate sources, the detection and tracking of these funds becomes more difficult.[1027] The crucial distinction between financing of terrorism and money laundering, is that in contrast, organized crime syndicates launder proceeds of crime as a covert technique to legalize the proceeds and create a false impression of the legitimacy of its sources, while terrorist organizations are more interested in the disbursement of the money and at the most, some if not all of the sources of these funds are legitimate.

In addition to the criminalization of the funding of terrorist operations, the Convention aspires to promote police and judicial cooperation to prevent, investigate and punish the financing of terrorist activities. Therefore, States Parties are to offer one another assistance in criminal investigations, criminal proceedings and extradition requests.[1028] Bank secrecy does not constitute a justification for declining a request for such assistance or cooperation for the

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1025 'Terrorist Financing: Definition and Methods', < https://www.fidis.net/resources/fidis-deliverables/identity-of-identity/int-d2200/doc/27/ > accessed on 5th July 2015.

1026 Central Bank of Nigeria, 'Anti-Money Laundering/Combating Financing of Terrorism (AML/CFT) Compliance Manual for Banks and other Financial Institutions in Nigeria' BSD/DIR/GEN/CIR/03/027 October, 2009, p. 2.

1027 'What is Terrorist Financing?' < http://www.fintrac-canafe.gc.ca/fintrac-canafe/definitions/terrorist-terroriste-eng.asp > accessed on 5th July 2015.

1028 Article 12 (1).

suppression of terrorist financing.[1029] In adapting local legislation to prevent and counter the financing of terrorism, States must prohibit in their respective territories, the illegal activities of persons and organizations knowingly involved in terrorist financing, and also adopt measures requiring financial institutions and the professions concerned to ensure the identification of their usual or occasional customers, paying special regard to suspicious transactions.[1030]

Article 2 of the Convention criminalizes the financing of terrorism. In Article 2 (1), it provides that any person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;[1031] or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. The offence is still committed even when the funds were not actually used to

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1029 Article 12 (2).

1030 Article 18.

1031 (1) Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16th December 1970; (2) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on 23rd September 1971; (3) Convention on the Prevention and Punishment of Crimes against internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14th December 1973; (4) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17th December 1979; (5) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3rd March 1980; (6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24th February 1988; (7) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10th March 1988; (8) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10th March 1988; and (9) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15th December 1997.

perpetrate terrorist activities.[1032] State Parties commit themselves to domesticate the convention offences, and impose appropriate penalties taking into account their grave nature.[1033] They also have an obligation to ensure that legal entities involved in terrorist financing are appropriately punished through the imposition of criminal, civil or administrative sanctions.[1034]

In order to prevent and suppress terrorist financing, the Financial Action Task Force (FATF) has recommended the following measures: (a) each State should criminalize the financing of terrorism, terrorist acts and terrorist organizations, and ensure that such offences are designated as money laundering predicate offences; (b) freezing and confiscation of terrorist assets; (c) reporting suspicious transactions related to terrorism to the appropriate authorities; (d) provision of international cooperation, mutual legal assistance or information exchange among States; (e) licensing and registration of all entities providing a service for the transmission of money and the imposition of administrative, civil or criminal penalties on persons implicated in illegal transfers; (f) States should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain; and (g) States should review the adequacy of laws and regulations that relate to entities, non-profit organizations, that can be abused for the financing of terrorism.[1035]

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1032 Article 2 (3).

1033 Article 4.

1034 Article 5.

1035 United Nations Office on Drugs and Crime, Anti-Money Laundering Unit/Global Program Against Money Laundering, 'An Overview of the United Nations Conventions and other International Standards Concerning Anti-Money Laundering and Countering the Financing of Terrorism' Vienna, January, 2007, pp. 100-101.

Article 7 of the Convention enumerates the grounds upon which a State may exercise jurisdiction over the offence of terrorist financing.[1036] States Parties are obliged to take appropriate measures, under their national laws to freeze or seize funds intended to finance terrorism.[1037] The obligation extends to the establishment of mechanisms whereby such forfeited funds are used to compensate the victims of the offences under the Convention.[1038] Unless a State decides to extradite an alleged offender, it must submit him to for trial under its municipal law.[1039] The offences under the Convention are extraditable.[1040] The Convention provides that all disputes between parties that cannot be settled through negotiation within a reasonable time should be submitted to arbitration, and if need be, to the International Court of Justice.[1041]

### 5.4 Prosecuting Boko Haram Insurgents for Crimes against Humanity

As previously discussed, a crime against humanity consists of certain prohibited acts: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid, and other inhumane acts, 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[1042] Although the Preparatory Committee on the Establishment of an ICC deliberated on the crime of

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1036 Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: (a) The offence is committed in the territory of that State; (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed; (c) The offence is committed by a national of that State. 2. A State Party may also establish its jurisdiction over any such offence when: (a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State; (b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State; (c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act; (d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; (e) The offence is committed on board an aircraft which is operated by the Government of that State.

1037 Article 8 (1) and (2).

1038 Article 8 (4).

1039 Article 10.

1040 Article 11.

1041 Article 24.

1042 Article 7, Rome Statute of the International Criminal Court.

terrorism, it was eventually excluded from Article 7 of the ICC Statute.[1043] That notwithstanding, certain manifestations of terrorism once they satisfy the chapeau of Article 7 can be prosecuted before the ICC either as one or more of the catalogued crimes against humanity, or as an 'inhumane act'.

In this sense, terrorists are prosecuted not for the crime of terrorism, but for crimes against humanity. Arnold has emphasized that doing so raises several implications for international criminal justice: (i) all the offences can be committed by everyone, including non-state actors; (ii) a wide range of victims is covered, including everyone not perfuming *de facto* combat operations; (iii) it is not important at all to question the legitimacy of the policy to attack; (iv) the principle of universal jurisdiction is embedded in crimes against humanity, so that terrorists cannot find safe havens anywhere; (v) where a State is unwilling or unable to prosecute the crime, the ICC or the United Nations Security Council may intervene to combat impunity; and (vi) trials for crimes against humanity face less law enforcement hurdles, for example, lack of international cooperation in penal matters and extradition law.[1044]

The Office of the ICC Prosecutor has determined that there is a reasonable basis to believe that crimes against humanity have been committed in Nigeria, namely acts of murder and persecution attributable to Boko Haram.[1045] Judicial support for this proposition can be found in Spain. Using the concept of universal jurisdiction, Spain's state prosecutor charged Abubakar

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1043 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court Rome, Italy, 15th June – 17th July 1998, Document:-A/CONF.183/2, p. 21.

1044 R Arnold, 'The Prosecution of Terrorism as a Crime Against Humanity' (2004) 64 ZaoRv, 998-1000.

1045 Office of the Prosecutor, 'Preliminary Examinations: Ongoing-Nigeria' < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx > accessed on 18th July 2015.

Shekau with terrorism and crimes against humanity over a 22nd March 2013 attack on Ganye, Adamawa State, in which a Spanish nun was assaulted.[1046]

Although expressing caution towards the prosecution of terrorists for crimes against humanity, Cassese observed that:

> The terrorist attack of 11th September has been defined a crime against humanity by a prominent French jurist and former Minister of Justice, Robert Badinter, by the UN Secretary-General Kofi Annan, as well as by the UN High Commissioner for Human Rights, Mary Robinson. Distinguished international lawyers have taken the same view. Indeed, that atrocious action exhibits all the hallmarks of crimes against humanity: the magnitude and extreme gravity of the attack as well as the fact that it has targeted civilians, is an affront to all humanity, and part of a widespread or systematic practice.[1047]

According to Okoronye, terrorists can conveniently be prosecuted under the ICC Statute. He explained that apart from war crimes which are applicable during armed conflicts, terrorists can also be prosecuted for crimes against humanity and even for genocide.[1048] Similarly, Mazzochi is of the view that terrorist activities satisfy all the required elements to be a crime against humanity.[1049] Likewise, Kovac has contended that terrorist acts can amount to crimes against humanity, whether perpetrated in time of war or peace. They must, however, meet the basic requirements of the category. These include taking part in a widespread or systematic

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1046 'Spain Charges Boko Haram Militant Chief with Crimes Against Humanity'. Reuters, May 28, 2015. < http://www.mobile.reuters.com/article/idUSKBN00D2CD20150528 > accessed on 1st August 2015.

1047 A Cassese (2001), 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) Vol. 12. No. 5. *European Journal of International Law*, 994.

1048 I Okoronye, 'Terrorism in International Law' (Okigwe: Whytem Publishers, Nigeria, 2013) p. 160.

1049 S Mazzochi, 'The Age of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and For All' (2011) Vol. 32. *Northern Illinois University Law Review*, 92.

attack against a civilian population, and the perpetrator must have knowledge of his involvement in the widespread or systematic attack. In addition, the victims of such crimes may be comprised of both civilians and officials, including members of armed forces, although the statutes of international criminal tribunals seem to limit the victims of such crimes to civilians.[1050]

Such widespread or systematic attacks go beyond mere terrorists offences. Besides, the ICC Statute requires a specific *mens rea* for crimes against humanity, which is that the perpetrator of the attack had knowledge that it was being carried on a widespread or systematic basis.[1051] The attack contemplated by the ICC Statute must have been part of a state or organizational policy involving the multiple commissions of the prohibited acts. As earlier pointed out, the ICC has held that sub-state actors can be held responsible for crimes against humanity. The decision is made on a case-by-case basis taking into account a number of considerations including:

> (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria. It is important to clarify that, while these considerations may assist the

1050 M Kovac, 'International Criminalization of Terrorism' Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 14, broj 1/2007, str. 267 at 280-281.

1051 Article 7 (1), ICC Statute.

> Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.[1052]

Amnesty International is of the view that Boko Haram is a well organized and efficient force, training recruits and using sophisticated weaponry, such as armoured tanks. The sect has a fleet of vehicles, including motorcycles, flat-bed trucks and armoured personnel carriers, which it is able to supply; service and deploy. It also holds and administers territory and has a command structure that imposes discipline on its forces and directs hostilities, and the existence of an organizational policy to attack a civilian population can be determined both by public statements made by Boko Haram leaders and inferred from the widespread or systematic nature of the attacks.[1053]

Thus, the sect possesses a sufficient degree of organization to come within the ambit of Article 7 (2) (a) of the ICC Statute. It is well documented that Boko Haram operates under the leadership of Abubakar Shekau. Shekau took over the headship of the sect after the death of Mohammed Yusuf in 2009.[1054] Although accounts vary on the structure of the group, commonalities in reports on the organizational hierarchy of the sect show the existence of an emir and a Shura council of decision-makers. Boko Haram is reportedly led by a Shura Council of thirty members which overseas and directs other cells. Members of the Shura Council do not meet face to face frequently, but speak through mobile phones. Each member of the council is responsible for a cell, and each cell is focused on a different task or geographical area. Most of

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1052 Situation in the Republic of Kenya (Decision Pursuant to Article15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), ICC Pre-Trial Chamber II, No.: ICC-01/09, 31st March 2010, paras. 90-93, pp. 38-40.

1053 Amnesty International, 'Our Job is to Shoot, Slaughter and Kill: Boko Haram's Reign of Terror in North-East Nigeria' London, April 2015, p. 25.

1054 'Abubakar Shekau' < http://www.counterextremism.com/extremists/abubakar-shekau > accessed on 12th July 2015. See also C Ajike and O B Longe, 'The Boko Haram Insurgency in Nigeria: A Security Officer's Perspective on the American Angle' (2014) Vol. 5. No. 2. *Computing, Information Systems, Development Informatics & Allied Research Journal*, 85.

the group's actions are agreed at the council level, but Abubakar Shekau also takes decisions without referring them to the council.[1055]

In 2013, for the first time, Boko Haram acquired control over more than ten local government areas in northeastern Nigeria.[1056] Reports indicate that ISIS, Al-Qaeda and Boko Haram are working together to train recruits for jihad. Isis has officially embraced Boko Haram as a franchise of its caliphate.[1057] It therefore follows that Boko Haram is also part of a global terror organization. Since Nigeria deposited its instrument of ratification to the ICC Statute on 27th September 2001, the ICC has jurisdiction over Rome Statute crimes committed on Nigerian territory or by Nigerians as from 1st July 2002.[1058] It is necessary to remark that the ICC can exercise its jurisdiction over crimes committed in Nigeria, whether or not its treaty has been transformed into local law because the general rule in international law is that a State cannot rely on its internal law to justify the contravention of its treaty obligations.[1059] Furthermore, the absence of an enabling domestic legislation may be an indication of the unwillingness of a national judicial system to prosecute an entity for crimes against humanity, thereby, triggering the jurisdiction of the ICC.

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1055 U. S. House of Representatives Committee on Homeland Security, 'Boko Haram: Growing Threat to the U.S Homeland' 13th September, 2013, p. 10.

1056 J Zenn, 'Nigerian al-Qaedaism' Vol. 16, *Current Trends in Islamist Ideology*, 99. < http://www.hudson.org/content/…/zenn. pdf > accessed on 12th September 2015.

1057 J Hayward, 'Report: ISIS, Al-Qaeda, and Boko Haram Training Together,' 24th March 2015. < http://www.breitbart.com/national-security/2015/03/24/triple-threat-isis-al-qaeda-and-boko-haram-training-together/ > accessed on 12th July 2015.

1058 Office of the Prosecutor, Preliminary Examinations: Ongoing-Nigeria, *op cit*.

1059 Article 27, Vienna Convention on the Law of Treaties (VCLT), 1969, Vol. 1155, 1-18232, United Nations Treaty Series; See also P Ranjan and D Raju, 'Bilateral Investment Treaties and the Indian Judiciary' (2014) .Vol. 46. *The Geo. Wash. Int'L L. Rev*, 819.

### 5.4.1 Prosecuting for Any of the Itemized Acts in Article 7 (1) (a)-(j) of the Statute of Rome

Writing on the prosecution of terrorists for crimes against humanity, Arnold asserted that 'one of the most relevant provisions is murder' under Article 7 (1) (a) of the ICC Statute.[1060] Article 7 which deals with crimes against humanity, contains a general element that is applicable to all the acts listed therein: perpetration of any of those acts by an accused will constitute a crime against humanity only if it was committed as part of a widespread or systematic attack against any civilian population.[1061] With regard to the *mens rea*, the advantage is that only the intentional commission of the sub-offences needs to be proven.

However, this does not pose any problem in relation to acts of terrorism. The essence of terrorist action is the instrumental killing of innocent civilians for a political purpose.[1062] Boko Haram has killed or caused the death of thousands of civilians in Nigeria, and neighbouring States. In January 2015, after seizing control of Baga in Kukuwa Local Government Area, Borno State, Boko Haram gunmen went through the streets shooting civilians in the streets and in their homes. The gunmen were reported to have hidden among trees surrounding the towns and killed hundreds of civilians as they tried to flee. Specific individuals such as politicians, civil servants, teachers, health workers and traditional leaders were deliberately targeted because of their relationship with secular authority. They were regarded as unbelievers, but so were Islamic religious figures, from the leaders of sects to local imams, if they publicly opposed Boko Haram or failed to follow the group's teachings.[1063]

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1060 R Arnold, 'The Prosecution of Terrorism as a Crime against Humanity' (2004) 64 ZaöRV, 994.

1061 The Prosecutor v Seromba, (ICTR Trial Chamber) 13th December 2006, para. 354.

1062 C Paulussen, 'Impunity for International Terrorists? Key Legal Questions and Practical Considerations' International Centre for Counter-Terrorism, Hague, Research Paper, April 2012, p. 9.

1063 Amnesty International, *op cit*, p. 5.

Boko Haram has also attacked schools in the north-east of Nigeria. For example, between 8th and 20th March 2013, Boko Haram attacked six different schools in diverse locations in Maiduguri, Borno State.[1064] The attack demonstrated a methodical plan whose objective was to prevent children from receiving secular education. The attacks made by Boko Haram were multiple and coordinated. On 27th May 2011, about 70 Boko Haram members killed eight people including four policemen in simultaneous gun and bomb attacks on a police station, a police barrack and a bank in Damboa, Borno State. Again, on 25th December 2011, Boko Haram bombed the St. Theresa Catholic Church, in Madalla, killing 42 worshippers.[1065] The deaths were caused in furtherance Boko Haram's terrorist policy against Nigerians.

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[1064] Maiduguri Metropolitan Primary School, Gwange III Primary School, Mafa Central Primary School, Umarari Primary School, Mai Malari Day Secondary School, and Ali Aliskiri Primary School.

[1065] (1) From 11th -12th June 2009, Boko Haram leader Mohammed Yusuf threatened reprisals in a video recording to the president following the killing of 17 Boko Haram members in a joint military and police operation in Borno State. This was after a disagreement over Boko Haram members' alleged refusal to wear crash helmets while in a funeral procession to bury members who had lost their lives in a motor accident; (2) on 26th July 2009, Boko Haram launched a short-lived uprising in parts of northern Nigeria, which is quelled by the military, the crackdown leaves more than 800 dead, mostly sect members, including Boko Haram's leader, Mohammed Yusuf. A mosque in Maiduguri, serving as the Headquarters of the sect is burnt down; (3) on 7th September 2010, some Boko Haram gunmen freed over 700 inmates including about 100 sect members from a prison in Bauchi State, four people including a soldier, one policeman and two residents were killed in the raid; (4) from 24th -27th December 2010, a series of attacks in Jos and Maiduguri, claimed by Boko Haram, killed at least, 86 persons; (5) on 29th December 2010, suspected Boko Haram members shot dead eight people, including the ANPP governorship candidate; (6) on 27th May 2011, a group of 70 suspected Boko Haram members killed eight people including four policemen in simultaneous gun and bomb attacks on a police station, a police barrack, and a bank in Damboa, Borno State, near the Nigeria/Chad border; (7) on 29th May 2011, Boko Haram detonated three bombs in a beer palour in a military barrack in Bauchi State killing 13 and wounding 33 others; (7) on 6th June 2011, a Muslim cleric, Ibrahim Birkuti, who was critical of the activities of the sect was shot dead outside his house in Biu, Borno State, by two Boko Haram members riding a motor-cycle; (8) on 7th June 2011, Boko Haram attacks on a church and two police stations in Maiduguri, left at least, 14 people dead; (9) on 16th June 2011, Boko Haram attacks the Nigeria Police Headquarters Abuja, killing two persons; (10) on 20th June 2011, Boko Haram launched a gun and bomb attack on a police station and a bank in Kankara, Katsina State, killing five policemen; (11) on 27th June 2011, Boko Haram's gun and bomb attack on a beer parlour in Maiduguri left at least 25 persons dead, and a dozen others wounded; (12) on 25th August 2011, gun and bomb attacks by Boko Haram on two police stations and two banks in Gombi, Adamawa State, killed at least 16 people, including seven policemen; (13) on 26th August 2011, Boko Haram claimed responsibility for a suicide bomb attack on the UN premises in Abuja, killing 23 people; (14) a shootout between Boko Haram and soldiers in Song, Adamawa state, killed a sect member, while another is wounded and captured; (15) on 4th September 2011, two Boko Haram members shot dead a Muslim cleric, Malam Dala, outside his home in the Zinnari area of Maiduguri; (16) on 12th September 2011, seven men, including four policemen were killed in a Boko Haram bomb and gun attack on a police station and a bank in Misau, Bauchi State, they proceeded to rob the bank; (17) on 13th September 2011, four soldiers were shot and wounded in an

Boko Haram is an extremist group fuelled by a religious fundamentalist ideology which it seeks to impose upon all Nigerians through violence.[1066] Boko Haram has advocated a policy of Jihad which can be defined as conquering and dominating non-Muslims, and later extended to non-sect members. This policy is expressed in the Holy Quran as follows: '

> Fight those among the People of the Book, Jews and Christians, who do not believe in God and the last day, do not forbid what God and His Apostle have forbidden, and do not profess the true religion, Islam, until they pay the poll tax out of hand and submissively.[1067]

The attacks launched by the sect were methodical, well organized and involved the use of suicide bombers, disguised attackers, and sophisticated weapons, for instance a 'quad barreled ZSU-23-4 Shika' anti-aircraft gun, a T-55 tank, a Panhard ERC-90 'Sagaie,' explosive devices, guns, etc.[1068] Since the attacks were aimed at several targets, they were also systematic. The attacks were aimed at both hard and soft targets resulting in a large number of deaths or civilian casualties. A 'hard target' is one which is guided or has considerable security, implying that a terrorist attack runs the risk of being intercepted often with potentially lethal force, for example, military bases, police stations and prisons. A 'soft target' is one which has little or no military

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ambush by Boko Haram in Maiduguri, shortly after the arrest of 15 sect members in military raids on the sect's hideout in Maiduguri; (18) on 17th September 2011, Babakura Fugu, brother-in-law of the Boko Haram leader, Mohammed Yusuf, is shot dead outside his house in Maiduguri, two days after attending a peace meeting with former president, Olusegun Obasanjo; Boko Haram denied any involvement in the killing; (19) on 3rd October 2011, a butcher and his assistant were killed at Baga market by Boko Haram gunmen in a targeted killing. In a separate incident, three civilians were killed in a shoot out following Boko Haram's bomb and gun attacks on a military patrol vehicle delivering food to soldiers at a checkpoint in Maiduguri, etc. See 'Timeline of Boko Haram Attacks'. The Nation, July 24, 2014. < http://www.thenationonlineng.net/new/timeline-of-boko-haram-attacks/ > accessed on 13th July 2015.

1066 O N Neji, 'Domestic Terrorism: Rethinking the Role of Islam in the Emerging Boko Haram Phenomenon in Nigeria' (2015) Vol. 4 (3) *Scholarly Journal of Scientific Research and Essay*, 51.

1067 Quran-Surah, 9:29, p.248.

1068 J Campbell, 'The Boko Haram War Machine' 8th October 2014. < http://www. blogs.cfr.org/Campbell/2014/10/08/the-boko-haram-war-machine/ > accessed on 14th July 2014.

protection or security and hence is an easy option for a terrorist attack. Soft targets include churches, mosques, markets, commercial shopping centres, power or transmission stations, schools, banks, bridges, termini, etc.[1069]

Boko Haram's targets have included churches, mosques, schools, markets, bus termini, etc.[1070] The attacks were also widespread; they were massive, frequent, large scale action, and carried out collectively with considerable seriousness and directed against a multiplicity of victims. The sect has attacked civilians in Abuja, Kogi State,[1071] Borno State, Yobe State, Adamawa State, Plateau State, Kaduna State, Kano State, Gombe State, Jigawa State, Bauchi State, and Taraba State. The victims were civilians. The term 'civilian' is used to indicate persons who are not involved in counter-insurgency. Even military, paramilitary and other law enforcement agents would still be regarded as civilians under Article 7 (2) of the ICC Statute, since they are not involved in any armed hostilities. Thus, they constitute non-military targets. Civilians are defined as people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.[1072]

Article 7 (1) (c) and (g) will be treated together. With regard to the crime against humanity of enslavement, Boko Haram's abduction of the Chibok schoolgirls has gained worldwide notoriety. In May 2013, Boko Haram carried out a mass assault on a police barrack in

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1069 Dugdale-Pointon, 'Terrorist Targets' 26th May 2005. < http://www.historyofwar.org/articles/concepts_terrortargets.html > accessed on 15th July 2015.

1070 S Iroegbu and M Olugbode, 'Dozens Killed in Latest Boko Haram's Hit at Soft Targets' ThisDayLive, March 8, 2015. < http://www.thisdaylive.com/articles/dozens-kiiled-in-latest-boko-harams-hit-at-soft-targets/203572/ > accessed on 15th July 2015.

1071 On 7th August 2012, 19 people were killed at the Deeper Life Church, when Boko Haram insurgents raided a church in Kogi State., < https://en.m.wikipedia.org/wiki/Timeline_of_Boko_Haram_insurgency > accessed on 15th July 2015.

1072 Prosecutor v Bisengimana, (ICTR Trial Chamber), 13th April 2006, para. 48.

Bama, Borno State, in which militants captured 12 Christian women and children.[1073] On the night of 14th April 2014, Boko Haram members attacked the Government Secondary School in Chibok, Borno State, and abducted about 276 girls.[1074] Some of the girls were sold off for N2000, 00k to marry the militants.[1075] Human trafficking serves three main purposes for terrorists; generating revenue, providing fighting power, and vanquishing the enemy.[1076] Amnesty International has asserted that since the beginning of 2014, the sect has abducted at least 2000 women and girls.[1077]

Hill stated that the goal of the sect is to use girls and young women as sexual objects and as a means of intimidating the civilian population into non-resistance.[1078] The insurgents deliberately raped the women they abducted to get them pregnant, and give birth to future jihadist insurgents.[1079] Abducted women and girls have been subjected to forced imprisonment, rape, early marriage and used as sex slaves.[1080] They have been subjected to forced labour and reduced to a servile status by the sect. A servile status includes the practices of serfdom, forced

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1073 J Zenn and E Pearson, 'Women, Gender and the Evolving Tactics of Boko Haram' (2014) Vol. 5, No. 1. *Journal of Terrorism Research*.

1074 A P Ireju *et al*, 'The Mass Media Coverage of the Kidnap of the Chibok School Girls' (2014) Vol. 31. *New Media and Mass Communication*, 73.

1075 H Gittens, 'Boko Haram: Nigerian Terror Group Sells Girls into Slavery' 1st May 2014. < http://www.nbcnews.com/storyline/missing-nigeria-schoolgirls/boko-haram-nigeria-terror-group-sells-girls-slavery-n93951 > accessed on 17th July 2015.

1076 L I Shelley, 'ISIS, Boko Haram, and the Growing Role of Human Trafficking in the 21st Century Terrorism' *The Daily Beast*, December 26, 2014. < http://www.thedaily beast.com/articles/2014/12/26/isis-boko-haram-and-the-growing-role-of-human-trafficking-in-21st-century-terrorism.html > accessed on 17th July 2015.

1077 B McAllister, 'Amnesty: Boko Haram has Abducted at Least 2000 Women Since 2014' 15th April 2015. < http://www.jurist.org/paperchase/2015/04/amnesty-boko-haram-has-arrested-at-least-2000-women-since-2014.php > accessed on 17th July 2015.

1078 J N C Hill, 'Boko Haram, the Chibok Abductions and Nigeria's Counterterrorism Strategy' 30th July 2014. < https://www.ctc.usma.edu/post/boko-haram-the-chibok-abductions-and-nigerias-counterterrorism-strategy > accessed on 16th July 2015.

1079 W Odunsi, 'Boko Haram Rape, Impregnate Women to Implant Future Jihadists – Shettima' *Daily Post* May 4, 2015. < http://www.dailypost.ng/2015/05/04/boko-haram-rape-impregnate-women-to-implant-future-jihadists-shettima/ > accessed on 18th July 2015.

1080 A Osita-Njoku and P Chikere 'Consequences of Boko Haram Terrorism on Women in Northern Nigeria' (2015) Vol. 1. Issue 3. *Applied Research Journal*, 102.

marriage and child exploitation.[1081] It is not the underlying crime of enslavement *per se* that must be shown to be widespread or systematic, but rather the attack itself of which the enslavement forms part.[1082]

Amnesty International has pointed out that Boko Haram imprisoned thousands of civilians in its camps and in towns under its control in Borno State and other areas in the north-east. These civilians were often detained in large houses, prisons or other buildings, under armed guard. At other times, civilians were allowed to remain in their houses, but those caught leaving their homes or the town without permission were flogged or executed.[1083]

Article 7 (1) (e) of the ICC Statute may cover hostage-taking, which implies the unlawful deprivation of a person's physical liberty. However, this should occur along with other acts forming part of a widespread or systematic attack. On 24th July 2014, Boko Haram kidnapped Akaoua Babiana, the wife of the Cameroon Deputy Prime Minister, during an attack against the town of Kolofata in northern Cameroon. Along with 27 others, including 10 Chinese workers, she was freed in October 2014.[1084] No details were given on the circumstances of their release, or whether a ransom was paid.[1085]

Furthermore, on 18th January 2015, the sect kidnapped 80 hostages from northern Cameroon, many of whom were children. The Cameroonian army was able to free 24 of the kidnapped hostages while pursuing the sect back to Nigeria.[1086] On 21st January 2015, Cameroonian troops and their allies freed a German citizen, Robert Nitsch Eberhard, who was

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1081 Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

1082 Prosecutor v Gacumbitsi, (ICTR Appeals Chamber), 7th July 2006, para. 102.

1083 Amnesty International, *op cit*, p. 26.

1084 'Mapping Militant Organizations: Boko Haram'. 20th February 2015. < http://web.standford.edu/group/mappingmilitants/cgi-bin/groups/view/553?highlight=boko+haram > accessed on 18th July 2015.

1085 'Cameroon Flies Freed Boko Haram Hostages to Capital.' 11th October 2014, < http://www.bbc.com/news/world-africa-29581495 > accessed on 18th July 2015.

1086 Mapping Militant Organizations: Boko Haram, *op cit*.

kidnapped by Boko Haram and held by the sect for six months.[1087] Similarly, in January 2015, Boko Haram released nearly 200 hostages, mostly women, who were kidnapped from a village in Yobe State.[1088] It is argued that the hostage-taking perpetrated in furtherance of Boko Haram's fundamentalist ideology was policy-based and systematic. Moreover, considering the large number of victims involved, it was also widespread and, therefore it constituted a crime against humanity.

Boko Haram insurgents may also be prosecuted for torture under Article 7 (1) (f) of the ICC Statute. Although based on the 1984 Convention against Torture, the ICC Statute omits the requirement of a connection to a public official.[1089] Arnold has pointed out that since no purpose is required, the difference between terrorism constituting torture under Article 7 (1) (f) or an inhumane act under Article 7 (1) (k) lies in the gravity of the harm inflicted.[1090] Terrorists can be prosecuted for torture as long as their onslaughts have an effect on the mental state of those under their custody or control. In addition, the ICTR has held that rape constitutes torture, and is used for purposes like intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.[1091]

Another relevant provision is Article 7 (1) (h) of the ICC Statute which prohibits persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as

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1087 N K Chimtom *et al*, 'Freed German Hostage calls Boko Haram Captivity, Total Darkness' *CNN*, January 21, 2015, < http://www.edition.cnn.com/2015/01/21/world/cameroon-boko-haram-german-hostage/ > accessed on 18th July 2015.

1088 'Boko Haram Frees 200 Hostages in Northeastern Nigeria' *AFP*, January 24, 2015. < http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/11368059/Bo > accessed on 18th July 2015.

1089 Prosecutor v Semanza, (ICTR Appeals Chamber), 20th May 2005, para. 248: 'In the Kunarac et al. Appeal judgment, the ICTY Appeals Chamber explained that the public official requirement is not a requirement outside the framework of the Torture Convention'.

1090 Arnold, *art cit*, p. 997.

1091 Prosecutor v Akayesu, (ICTR Trial Chamber), 2nd September 1998, paras. 597, 687.

impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court. The ICTR Appeals Chamber has reiterated that the crime of persecution consists of an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law, (the *actus reus)*; and was carried out deliberately with the intention to discriminate on one of the listed grounds, (the *mens rea*).[1092]

Persecution may include acts enumerated under other sub-headings of crimes against humanity, such as murder, when they are committed on discriminatory grounds. Persecution may also involve a variety of other discriminatory acts, not enumerated elsewhere in the Statute, involving serious deprivations of human rights.[1093] However, the persecutory act must have a link with another crime within the jurisdiction of the ICC, for example, war crimes, or an act referred to in Article 7 (1). The proposition advanced here is that the victims of Boko Haram have a specific identity: they have a common political or religious identity. The term 'political' is defined as 'of, relating to, or dealing with the structure or affairs of government, politics, or the state: a political system'.[1094] The Black's Law Dictionary sees 'political' as 'pertaining to politics; of or relating to the conduct of government'.[1095] Most victims are civilians who identify with the state or secular authority.

In consequence, Boko Haram has primarily targeted police and other government security agents, Christians worshiping in church, and Muslims whom the group accuses of cooperating with the government. In addition to the attacks, the sect has forced Christians to convert to Islam on pain of death, and has assassinated Muslim clerics and traditional leaders in the north for

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1092 Prosecutor v Nahimana, Barayagwiza and Ngeze, (ICTR Appeals Chamber), 28th November 2007, para. 985.

1093 Prosecutor v Semanza, (ICTR Trial Chamber), 15th May 2003, paras. 348-49.

1094 < http://www.thefreedictionary.com/political > accessed on 18th July 2015.

1095 B A Garner, *Black's Law Dictionary* (9th edn, St Paul MN: Thomson Reuters, 2009) p. 1276.

opposing its tactics or cooperating with the state to identify group members.[1096] The sect has also attacked Muslims who do not support its Islamic ideology. For example, on 17th July 2015, two female suicide bombers, one of whom was a 10-year-old girl, attacked the Damaturu Eid praying ground killing at least nine persons.[1097] It is therefore argued that there was a discriminatory intent based on political and religious or sectarian views.

### 5.4.2 Prosecuting for 'other inhumane acts' in Article 7 (1) (k) of the Statute of Rome

Article 7 (1) (k) of the ICC Statute requires the perpetrator to have inflicted other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The list of acts enumerated in this category is not exhaustive, but includes those crimes against humanity that are not otherwise specified in Article 7, but are of comparable seriousness and gravity to the enumerated acts.[1098] As clarified by the 1996 ILC Draft Code, these must be acts 'which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm'.[1099] As a result, this provision may be used for the prosecution of all cases of terrorism not falling under any other sub-head of crimes against humanity, as long as they were intended to inflict the kind of harm envisaged by this residual category.

This provision, for illustration, covers third party mental harm. Thus, a 'third party could suffer serious mental harm by witnessing acts committed against others, particularly against

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1096 Human Rights Watch, 'Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria' 11th October 2012. < http://www.hrw.org/report/2012/10/11/spiraling-violence/boko-haram-attacks-and-security-force-abuses-nigeria > accessed on 18th July 2015.

1097 'Why Are Muslims Clueless on Boko Haram Queries Jama'atu Nasril Islam' 17th July 2015. < http://www.vanguardngr.com/2015/07/why-are-muslims-clueless-on-boko-haram-queries-jamaatu-nasril-islam/ > accessed on 18th July 2015. See also 'Nigeria's Boko Haram Crisis: Eid Prayer Blasts Hit Damaturu' *BBC News*, July 17, 2015. < http://www.bbc.com/news/world-africa-33565992 > accessed on 20th July 2015.

1098 Prosecutor v Akayesu, *supra*, para. 585.

1099 1996 International Law Commission Report, Chapter II, Draft Code of Crimes Against the Peace and Security of Mankind, Article 18.

family or friends'.[1100] A situation that quickly comes to mind is that of the families of the abducted Chibok schoolgirls. Aside from their mental agony and the accompanying illnesses, 14 parents of the abducted Chibok girls have died following heart-related diseases.[1101] Furthermore, many of the women and girls abducted by the insurgents were forcibly married, compelled to provide wifely services to their captors, and made to participate in armed attacks, sometimes on their own towns and villages.[1102]

## 5.5 Conclusion

This chapter has discussed the Boko Haram insurgency and the related concepts of terrorism and guerilla warfare. It has also analyzed some counter-terrorism treaties which are relevant to the methods of violence adopted by Boko Haram insurgents. The chapter examined the insurgency using the jurisprudence of crimes against humanity, and found that the atrocities perpetrated by the insurgents constitute crimes against humanity.

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1100 Prosecutor v Kayishema and Ruzindana, (ICTR Trial Chamber), 21st May 1999, para. 153.

1101 'Parents of Chibok Girls Describe Pain of Abduction, Slam Federal Government' *Sahara Reporters New York*, April 15, 2015, < http://www.saharareporters.com/2015/04/15/parents-chibok-girls-describe-pain-abductions-slam-federal-government > accessed on 18th July 2015. See also 'Chibok Girls' Parents Alert Public to Fraudsters' *The Nation Nigeria*, July 6, 2015. < t http://www.ww90.trafficads01.com/ > accessed on 18th July 2015.

1102 'Nigeria: Abducted Women and Girls Forced to Join Boko Haram Attacks' 14th April 2015. < https://www.amnesty.org/en/latest/news/2015/04/nigeria-abducted-women-and-girls-forced-to-join-boko-haram-attacks/ > accessed on 29th August 2015.

# CHAPTER SIX

# AN ASSESSMENT OF THE COUNTER- INSURGENCY IN THE CONTEXT OF CRIMES AGAINST HUMANITY

## 6.1 Introduction

As a follow up to the previous chapter, this part of the research investigates the nature of counterinsurgency in Nigeria, and whether the human rights abuses committed by security agents also amount to crimes against humanity. The scale of mobilization of personnel and resources in the fight against Boko Haram has demonstrated that military operations against irregular insurgents can be as intense as combat in conventional warfare. Nevertheless, Biden has cautioned that military options must be combined with strong socio-economic support programs.[1103] Insurgency and counterinsurgency are two sides of a very complex form of warfare, where a group resorts to violence and takes up arms to achieve political objectives. A realistic approach towards counterinsurgency requires a multilayered strategy that addresses the political, economic, social, cultural and security dimensions of the conflict.

The British Army Field Manual defines counterinsurgency as: 'those military, law enforcement, political, economic, psychological and civic actions taken to defeat insurgency, while addressing the root causes'.[1104] Counterinsurgency comprises five main functional components: political, economic, security, information and control: (1) the political function is the cardinal function, providing a framework of political reconciliation, and reform of governance around which all other counterinsurgency activities are organized; (2) the economic function seeks to provide essential services and stimulate long term economic growth, thereby

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1103 H Shobiye, 'Biden Counsels Buhari on Terror War' *The Nation Nigeria*, July 20, 2015. < http://www.thenationonlineng.net/biden-counsels-buhari-on-terror-war/ > accessed on 21st July 2015.

1104 'Countering Insurgency,' British Army Field Manual, Vol. 1, Part 10, Army Code 71876, October 2009, p. 6.

generating confidence in the government while at the same time reducing the pool of frustrated, unemployed young men and women from which insurgents can readily recruit; (3) the security function is a catalyst for the other functions and involves development not just of the affected nation's military force, but its whole security sector, including the related legal framework, civilian oversight mechanisms and judicial system; (4) the information function comprises intelligence required to gain understanding, and influence to promote the affected government's cause; and fifthly, these four functions contribute to the overall objective of enabling the affected government to establish control, consolidating and then transitioning it from intervening forces to national forces and from military to civil institutions.[1105]

In 2014, the National Security Adviser articulated the view that the soft approach to countering terrorism will help to address its root causes. The approach would be complemented with dialogue, and would engage public institutions in the northeast in the formulation of a development plan to revitalize the region.[1106] A similar view was expressed by a former U.S President, Bill Clinton, who asserted that Nigeria could effectively deal with the Boko Haram insurgency through poverty eradication, equitable distribution of wealth and job creation for the unemployed.[1107] Seul has opined that religion is not the cause of religious conflict; rather for many, it frequently supplies the fault line along which inter-group identity and resource competition occurs.[1108]

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1105 U.S Government Counterinsurgency Guide, January 2009, pp. 2-4.

1106 Colonel S Dasuki (Rtd), 'Nigeria Unveils New Approach to Tackle Terrorism' Channels Television, March 18, 2014. < http://www.channelstv.com/2014/03/18/nigeri-unveils-new-approach-to-tackle-terrorism/ > accessed on 20th July 2015.

1107 S Olatunji, 'Poverty Fuelling Boko Haram Insurgency – Clinton' *Punch Mobile*, 27th February 27, 2013. Punch Mobile. < http://www.punchng.com/news/poverty-fuelling-boko-haram-insurgency-clinton/ > accessed on 20th July 2015.

1108 J R Seul, 'Ours Is the Way of God: Religion, Identity, and Inter-group Conflict' (1999) Vol. 36. No. 5. *Journal of Peace Research*, 553.

Following these views, the argument has been advanced that the stark polarization in Nigeria: 75 per cent of northerners live in poverty, compared to 27 per cent of those in the Christian south, is a factor behind local insurrections such as that of Boko Haram. The situation is worsened by unemployment, lack of economic opportunities, and inequities in the distribution of wealth, which are a source of deep frustration in the Muslim north.[1109] Yet, Agbiboa has pointed out that despite the above socio-economic explanations; the link between terrorism and poverty remains unclear and the debate unsettled.[1110]

Thusly, the question which would agitate us at this juncture is: could we have prevented the emergence of the Boko Haram insurgency? It would appear that addressing the prevailing social fractures when they began to appear would have prevented the occurrence of crimes against humanity in Nigeria. The prevention of crimes against humanity always requires the constant attention and best efforts of the government, without subordinating that noble humanitarian objective to any religious, ethnic, or geopolitical calculations. Every measure should be taken before hand to prevent incipient criminality from maturing into irreversible acts of violence.

Ndulo has contended that each individual state has the responsibility to protect its populations from crimes against humanity; and at the minimum, the responsibility entails the following: (a) the state should ensure that people under its jurisdiction are not subjected to genocide, war crimes, ethnic cleansing and crimes against humanity; (b) a state should take effective and credible measures to ensure that such things do not happen; and (c) that when they occur, the state should punish those that perpetrate the atrocities and provide reparations to

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[1109] D E Agbiboa, 'Is Might Right? Boko Haram, the Joint Military Task Force and the Global Jihad' (2013) Vol. 5. No. 3. *Military and Strategic Studies*, 64.

[1110] D Agbiboa, 'The Ongoing Campaign of Terror in Nigeria: Boko Haram versus the State' (2013) Vol. 2, No. 3. *Stability: International Journal of Security and Development*, 10.

victims.[1111] This implies that governmental powers should be organized in such a way that they are capable of ensuring that atrocity crimes do not occur and that any tensions that might lead to the commission of these crimes are resolved peacefully. To this end, the state is expected to have an independent judiciary, impartial and effective security services, ensure accountability of governments to the people, and effective participation of citizens in the governance of the country.

The Boko Haram crisis is not the first attempt to strip a segment of the population of their rights to life and religious identity. It bears a striking similarity to previous religious crises in northern Nigeria, involving practices such as the treatment of victims, expropriation of their properties, mass killings of Christians, oppression, intolerance towards, and demonization of the representatives of ethnic groups, which require immediate, unconditional and united preventive efforts. Robust systems of legal and moral values form an important defence line against these mass atrocity crimes. These crimes will be much more difficult to conceive of in a society founded on the protection of human rights, on the values of mutual respect, tolerance and non-violence.

Every state has a responsibility in the recognition, condemnation and punishment of crimes against humanity particularly in the light of the 1968 Convention on the Non-Applicability of Statutory Limitations, in their efforts towards their prevention in future. The preamble to the convention reaffirms the conviction that the effective punishment of crimes

[1111] M Ndulo, 'Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity', Presentation at the Informal Interactive Dialogue of the UN General Assembly 'Early Warning, Assessment, and the Responsibility to Protect' UN Headquarters, New York, 2010, p. 1.

against humanity is an important element in their prevention, and the protection of human rights.[1112] Fighting impunity for such crimes is an important factor in their prevention.[1113]

### 6.2 Human Rights during Counterinsurgency

Since the emergence of the Boko Haram insurgency, human rights have fared badly in the conflict-ridden areas. The most violated of these rights are the rights to life,[1114] torture,[1115] personal liberty,[1116] and private property.[1117] In their efforts to rid the country of the terrorist threat, security forces have killed hundreds of Boko Haram suspects and random members of communities where attacks have taken place.[1118] Private properties have also been destroyed through aerial bombardment.[1119] Yet, government security forces have not been held accountable for the use of excessive force and the deaths of persons in custody.[1120]

Rather, Nigerian soldiers whom the government could find and capture have been court-martialed for inappropriate actions such as mutiny, during the fight with Boko Haram. For this reason, the U.S has relied on the Leahy Law to decline Nigeria's request for security assistance to fight insurgents.[1121] The Leahy Law states that: 'no assistance shall be furnished...to any unit

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1112 Preamble, paragraph 5, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968. Entered into force on 11th November 1970.

1113 'Armenia FM: Prevention of Crime against Humanity is Still Imperative'. 20th April 2015. < http://www.news.am/eng/news/262940.html > accessed on 26th July 2015.

1114 In the form of extrajudicial killings, section 33, Constitution of the Federal Republic of Nigeria, 1999.

1115 Section 34, Constitution of the Federal Republic of Nigeria, 1999.

1116 In arbitrary arrest and detention, section 35, Constitution of the Federal Republic of Nigeria, 1999.

1117 Section 43, Constitution of the Federal Republic of Nigeria, 1999.

1118 Human Rights Watch, 'Spiraling Violence: Boko Haram Attacks and Security Forces Abuses in Nigeria' October 2012, p. 20.

1119 '207 Boko Haram Militants Killed in Maiduguri Attack, Says Civilian-JTF'. 15th March 2014. < http://www.sunnewsonline.com/new/207-boko-haram-militants-killed-maiduguri-attack-says-civilian-jtf/ > accessed on 24th July 2015.

1120 S Malik, 'U. S Report Confirms Abuse by Nigerian Security Forces' 29th June 2015. < http://www.icirnigeria.org/u-s-report-confrims-abuse-by-nigerian-security-forces/ > accessed on 24th July 2025.

1121 U. S. Senator Patrick Leahy: 'It is well documented by the State Department and by respected human rights organizations that Nigerian army personnel have, for many years, engaged in a pattern and practice of gross violations of human rights against the Nigeria people and others, including summary executions of prisoners, indiscriminate attacks against civilians, torture, forced disappearances and rape. Rarely have the perpetrators been prosecuted or punished'. See 'Murderers, Rapists in Nigerian Military, Says U.S.

of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights'.[1122]

On 14th May 2013, the federal government declared a state of emergency in Borno, Yobe and Adamawa states owing to the deteriorating security situation in the northeast.[1123] The state of emergency was extended in November 2013 for another six months.[1124] The state of emergency provided the security agencies with authorities to prosecute a military campaign against Boko Haram, including sweeping powers to search and arrest without warrants. However, the emergency failed to curb atrocities and to sufficiently protect civilians.[1125] A vexing issue with emergency is the adequacy of guarantees for human rights. International human rights laws as well as the Nigerian constitution acknowledge that human rights are not absolute, and provide for temporary derogations from the obligations of the state in exceptional circumstances, that is, in times of public emergency threatening the life of the nation; armed conflicts, civil and violent unrest, environmental and natural disasters, etc.[1126]

Notwithstanding their permissibility under international law, the validity of a state of emergency is subject to a number of requirements imposed by treaty such as qualifications of severity, temporariness, proclamation and notification, consistency with other obligations under

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Senator'. 24th July 2015. < http://thenewsnigeria.com.ng/2015/07/24/murderes-rapists-in-nigerian-military-says-us-senator/ > accessed on 25th July 2015.

1122 'Leahy Vetting: Law, Policy, Process'. 15th April 2013. < http://www.humanrights.gov/.../ leahy-vetting-I… > accessed on 25th July 2015.

1123 O Deji-Folutile, 'Jonathan Declares State of Emergency in Adamawa, Borno, Yobe' *Punch*, May 14, 2013. < http://www.punchng.com/news/jonathan-declares-state-of-emergency-in-adamawa-borno-yobe/ > accessed on 25th July 2015.

1124 C Okafor, 'Senate Approves Request to Extend Emergency Rule' 8th November 2013. < http://www.dailyindependentnig.com/2013/11/senate-approves-request-to-extend-emergency-rule/ > accessed on 25th July 2015.

1125 'World Report 2014: Nigeria, Events of 2013'. < http://www.hrw.org/world-report/2014/country-chapters/nigeria > accessed on 25th July 2015.

1126 Section 45, 1999 Constitution of the Federal Republic of Nigeria. See also Article 4, International Covenant on Civil and Political Rights, 1966, entered into force on 23rd March 1976. .

international law, non-discrimination, and the non-derogability of certain rights.[1127] The Nigerian constitution prohibits derogations from the right to life except in respect of death resulting from acts of war or derogations from retroactive criminal legislations or the imposition of a heavier penalty than that which was in force at the time the offence was committed.[1128]

The composition of the law enforcement agencies involved in counterinsurgency is specified by the Terrorism (Prevention) Act, No. 10, 2011.[1129] These agencies are empowered by the Act to: (a) enforce all laws and regulations on counter-terrorism in Nigeria; (b) adopt measures to prevent and combat acts of terrorism in Nigeria; (c) facilitate the detection and investigation of acts of terrorism in Nigeria; (d) establish, maintain and secure communications, both domestic and international, to facilitate the rapid exchange of information concerning acts that constitute terrorism; (e) conduct research with the aim of improving preventive measures to efficiently and effectively combat terrorism in Nigeria; and (f) partner with Civil Society Organizations and the Nigerian public to provide necessary education, support, information, awareness and sensitization towards the prevention and elimination of acts of terrorism.[1130]

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1127 Proviso to section 45 (2), CFRN 1999. See also section 305 of the 1999 CFRN which provides as follows: (1) Subject to the provisions of this Constitution, the President may by instrument published in the Official Gazette of the Government of the Federation issue a Proclamation of a state of emergency in the Federation or any part thereof. (2) The President shall immediately after the publication, transmit copies of the Official Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the House of which he is the President or Speaker, as the case may be, to consider the situation and decide whether ot not to pass a resolution approving the Proclamation. See also Articles 4 (2) & (3), 6, 7, 8, 11, 15, 16 and 18, International Covenant on Civil and Political Rights, 1966.

1128 Section 33, 36 (8), and 45 (2) CFRN 1999.

1129 'Law enforcement agency' means the: (a) Nigeria Police Force; (b) Department of State Security Services; (c) Economic and Financial Crimes Commission; (d) National Agency for the Prohibition of Traffic in Persons; (e) National Drug Law Enforcement Agency; (f)National Intelligence Agency; (g) Nigeria Customs Service; (h) Nigeria Immigration Service; (i) Defence Intelligence Agency; (j)Nigeria Security and Civil Defence Corps (NSCDC); and (k) Nigerian armed forces and Nigeria Prisons Service. See section 40 (m) (a)-(k), Terrorism (Prevention) Act, 2011, and section 19 (c) Terrorism (Prevention) Amendment Act, 2013.

1130 Section 1A (4) (a)-(f), Terrorism (Prevention) Amendment Act, 2013.

It is also noteworthy that in 2015, the African Union has approved an 8, 700-strong Multi-National Joint Task Force, consisting of military personnel from Chad, Niger, Cameroon, and Nigeria, to fight Boko Haram insurgents in the Lake Chad region.[1131] Throughout its existence, allegations of human rights abuses were leveled against the Joint Task Force Restore Order (JTF-RO) created to combat terrorism. The Joint Task Force was originally composed of personnel from numerous security institutions, including the military, the Department of State Security Service, the Nigerian Police, and other intelligence units.[1132] On August 2013, the 7th Infantry Division of the Nigerian Army was established to replace the JTF-RO as the umbrella command for the northeastern security operations.

Reports indicate that the JTF-RO carried out summary executions, assaults, torture, and other abuses throughout Borno, Kano, and Yobe States.[1133] This heavy-handed approach violates human rights with its lack of access to a fair trial and use of discriminatory techniques to determine perpetrators of violence.[1134] The JTF-RO or 7th Infantry Division is complemented by the Civilian JTF, a loose locally trained group of militants constituted in Maiduguri to fight Boko Haram insurgents.[1135] Even the Civilian JTF has been accused of human rights abuses. It is worthwhile nonetheless to consider the opposite view of Col. Musa Sagir, a former spokesman of the 7th Division:

> The internationalization of human rights and dignity is of equal measure. Security agents are massacred in defense of

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1131 T Fessy, 'Boko Haram: Can Regional Force Beat Nigeria's Militant Islamists?' *BBC News*, March 3, 2015. < http://www.bbc.com/news/world-africa-31695508 > accessed on 25th July 2015.

1132 '7th Infantry Division'. < http://www.globalsecurity.org/military/world/nigeria/7div.htm > accessed on 24th July 2015.

1133 *Ibid*.

1134 'Human Rights in Nigeria'. < https://en.m.wikipedia.org/wiki/Human_rights_in_Nigeria > accessed on 22nd July 2015.

1135 'Civilian Joint Task Force'. < https://en.m.wikipedia.org/wiki/Civilian_Joint_Task_Force > accessed on 22nd July 2015. See also 'Civilian JTF Commander Speaks on War Against Boko Haram in Maiduguri'. < http://www.naij.com/63467.html > accessed on 22nd July 2015.

> their respective countries, non-combatants are beheaded, traumatized and infected with the most deadly of all diseases, and terrorists and their atrocities are somehow shielded in the shade of human rights triumphalist reports...[1136]

### 6.3 Problems Militating against Counterinsurgency

In addition to the challenges of enforcement of human rights, counterinsurgency has been mired by other controversies. There are allegations of infiltration of security forces by Boko Haram sympathizers.[1137] Adeniyi has observed that the sudden imperative for inter-agency synergy exposed the years of rivalry among Nigerian security agencies; for example, the Department of State Security Service believes that it should host the Counter-Terrorism Directorate which is presently domiciled in the Office of the National Security Adviser, who is not an operational commander.[1138]

Falana has also stated that soldiers who joined the army with little or no training were deployed to fight insurgents with inadequate weapons; withheld salaries, and general neglect by the military authorities.[1139] In the view of Kwaja, Nigerian security forces are over-stretched, under-motivated, under-trained and overwhelmed by the Boko Haram insurgency, as evidenced by the frequency, intensity, coordination and sophistication associated with insurgent activities in the country.[1140]

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1136 M Sagir, 'Amnesty International Asymmetric Security Report on Nigeria by Col. Sagir Musa' 2015, < https://www.saharareporters.com/2015/06/18/amnesty-international-asymmetric-security-report-nigeria-col-sagir-musa > accessed on 23rd July 2015.

1137 B B Kaze, 'How Boko Haram Infiltrated Nigeria Armed Forces' 13th May 2014. < http://www.elombah.com/index.php/articles-mainmenu/22691-how-boko-haram-infiltrated-nigeria-armed-forces > accessed on 28th July 2015.

1138 O Adeniyi (2012), 'Army, Police, SSS and Gunmen' *ThisDay Live*, November 29, 2012. < http://www.thisdaylive.com/articles/army-police-sss-and-gunmen-/132017/ > accessed on 28th July 2015.

1139 'Boko Haram Crisis: Is the Nigerian Army Failing?' *BBC News*, February 4, 2015. < http://www.bbc.com/news/world-africa-31046809 > accessed on 28th July 2015.

1140 C Kwaja, 'Caught on the Brink: Critical Reflections on Nigeria's Counter-Insurgency/Terror Strategy'

Research conducted by the U.S Department of State found that among the problems that deterred or hindered more effective law enforcement and border security by the Nigerian government were a lack of coordination and cooperation between Nigerian security agencies; a lack of biometrics collection systems and the requisite data bases; corruption; misallocation of resources; the slow pace of the judicial system, including a lack of timely arraignment of suspected terrorist detainees; and lack of sufficient training for prosecutors and judges to understand and implement the Terrorism (Prevention) Act of 2011.[1141] Lastly, many Nigerians have developed a cynical distrust of security agencies. This situation has led Shettima to state that the restoration of public confidence on security agents is the best counterinsurgency strategy.[1142]

### 6.4 The Terrorism Prevention Act 2011

Nigeria's former National Security Adviser, Mohammed Sambo Dasuki rightly noted that terrorism compels a State to reform its laws and processes.[1143] Accordingly, in 2011, the National Assembly promulgated the Terrorism Prevention Act,[1144] which was later modified by the Terrorism Prevention (Amendment) Act of 2013. The enactment of the Terrorism Prevention Act (TPA) was Nigeria's immediate response to the rise of terrorism in the country.[1145] Prior to its enactment, the Criminal Code and the Penal Code were the two main penal statutes in the

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1141 Security Sector Reform Centre, 6th May 2014. < http://www.ssrresourcecentre.org/2014/05/06/caught-on-the-brink-critical-reflections-on-nigerias-counter-insurgencyterror-strategy/ > accessed on 28th July 2015. 'Country Reports on Terrorism 2014' United States Department of State Publication, Bureau of Counterterrorism, June 2015, p. 43.

1142 K Shettima, 'Nigeria: Bread Not Bullets – Broadening Counter-Insurgency Strategy' 22nd May 2013, The Centre for Democracy Development Blog, < http://www.blog.cddwestafrica.org/2013/05/nigeria-bread-not-bullets---broadening-counter-insurgency-strategy/ > accessed on 28th July 2015.

1143 M S Dasuki, 'Nigeria's Soft Approach to Countering Terrorism' Being a Presentation by the National Security Adviser on the Roll Out of Nigeria's Soft Approach to Countering Terrorism held in Abuja, Nigeria, 18th March, 2014. < http://www.iheanyiigboko.wordpress.com/tag/terrorism-prevention-act/ > accessed on 26th July 2015.

1144 Terrorism (Prevention) Act, 2011 Act No. 10, 3rd June 2011.

1145 'The Terrorism (Prevention) Act 2011: Economic Implications' Austen-Peters & Co., Business Law Digest, February 2012.

Nigerian criminal justice system. Although both codes do not contain specific provisions for counter-terrorism, they criminalize specific acts of violence like murder, rape, kidnapping, etc.

However, it is necessary to state that the pre-existing criminal code addresses the cardinal political ambition of the Boko Haram sect, which is to establish an alternative Islamic Caliphate. In August 2014, Abubakar Shekau declared Gwoza town in Bornu State, a new Caliphate.[1146] It is argued that the armed attack or levying of war against the Nigerian state carried out by the sect members also renders them vulnerable to charges of treason.[1147]

From 2001 to 2004, no step was taken by Nigeria to effectuate UN Security Council resolution 1373 which called upon all states to condemn terrorism, terrorist funding and related activities, as serious criminal offences in their domestic laws,[1148] despite the fact that no counterterrorism legislation existed in the country.[1149] Instead, terrorism was criminalized by only two sections of the Economic and Financial Crimes Commission (Establishment) Act 2002.[1150] Previous attempts to pass an anti-terrorism law were stymied on the one hand, by opposition from northern senators who argued that the motive for the law was a presumed anti-Islamic sentiment, and on the other hand, by peoples from the Niger-Delta, who interpreted the proposed legislation as an attempt to criminalize their legitimate agitations for equity in the distribution of petroleum resources from the region.[1151]

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1146 'Boko Haram Declares Caliphate. Shows Scenes of Fleeing Soldiers, Captured Arms and Civilian Massacres' *Sahara Reporters New York*, August 24, 2014.

1147 Sections 37, 38, and 41 of the Criminal Code Act, Cap C. 28, LFN 2004.

1148 United Nations Security Council Resolution 1373 (2001), adopted by the Security Council at its 4385th meeting, on 28th September 2001.

1149 'Legal Framework for the Prevention of Terrorism in Nigeria' *The Nation*, May 26, 2015. < http://www.thenationonlineng.net/legal-framework-for-the-prevention-of-terrorism-in-nigeria/ > accessed on 29th July 2015.

1150 EFCC (Establishment) Act 2002, section 14 (Offences relating to terrorism), and S. 40 (Definition of terrorism).

1151 Legal Framework for the Prevention of Terrorism in Nigeria, *op ct***.**

The objective of the TPA is to prevent, prohibit, combat and punish acts of terrorism and the financing of terrorism in Nigeria.[1152] The TPA is divided into eight parts, with 41 sections.[1153] S. 1 (A) of the Terrorism Prevention Act (TPA) designates the Office of the National Security Adviser as the coordinating body for all security and enforcement agencies in matters relating to terrorism.[1154] The TPA does not define 'terrorism,' but rather offered a definition of 'act of terrorism.' S. 1 (2) of the TPA proscribes 'act of terrorism' which is defined as:

> An act which is deliberately done with malice, aforethought and which: (a) may seriously harm or damage a country or an international organization; (b) is intended or can reasonably be regarded as having been intended to: (i) unduly compel a government or international organization to perform or abstain from performing any act; (ii) seriously intimidate a population; (iii) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization; or (iv) otherwise influence such

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1152 V Ekundayo, 'Nigerian Terrorism Act: A Right Step Forward' *Punch Mobil*e, January 24, 2012. . < http//:www.punchng.com/opinion/Nigerian-terrorism-act-a-right-step-forward/ > accessed on 28th July 2015.

1153 Part I (Acts of terrorism and related offences, sections 1-11); Part II (Terrorists funds and property, sections 12-17); Part III (Mutual assistance and extradition, sections 18-22); Part IV (Information sharing, extradition and mutual assistance on criminal matters, section 23); Part V (Investigation, sections 24-29); Part VI (Prosecution, sections 30-34); Part VII (Charities, section 35); and Part VIII (Miscellaneous powers, sections 36-41).

1154 The Office is required by the Act to: (a) provide support to all relevant security, intelligence, law enforcement agencies and military services to prevent and combat acts of terrorism in Nigeria; (b) ensure the effective formulation and implementation of a comprehensive counterterrorism strategy for Nigeria; (c) build capacity for the effective discharge of the functions of all relevant security, intelligence, law enforcement and military services under this Act or any other law on terrorism in Nigeria; and (d) do such other acts or things that are necessary for the effective performance of the functions of the relevant security and enforcement agencies under this Act.

government or international organization by intimidation or coercion.

The TPA requires such an attack to cause or involve: (i) an attack upon a person's life which may result in serious bodily harm or death; (ii) kidnapping of a person; (iii) destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; (iv) the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for terrorist purposes; (v) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons without lawful authority; (vi) the release of dangerous substance or causing of fire, explosions or floods, the effect of which is to endanger human life; (vii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (d) an act or omission in or outside Nigeria which constitutes an offence within the scope of counter terrorism protocols and conventions duly ratified by Nigeria.[1155] However, the disruption of a service during a protest does not amount to a terrorist act, if it was not done in furtherance of a terrorist objective.[1156]

Oyebode has stated that a principal motivation for the passage of the TPA is the necessity of implementing Nigeria's treaty obligations on terrorism.[1157] Much of this assertion is justified given the fact that the TPA penalizes any act or omission which constitutes an offence

[1155] Article 1 (2), TPA 2011.
[1156] Section 1 (3), TPA 2011.
[1157] A Oyebode, 'Legal Responses to the Boko Haram Challenge: An Assessment of Nigeria's Terrorism (Prevention) Act, 2011' (2012) *Forum on Public Policy: A Journal of the Oxford Roundtable Forum*.

under terrorism treaties ratified by Nigeria.[1158] Under Section 1 (1) of the TPA, a person who knowingly: (a) does, attempts or threatens to do an act preparatory to or in furtherance of an act of terrorism; (b) commits to do anything that is reasonably necessary to promote an act of terrorism; or (c) assists or facilitates the activities of persons engaged in an act of terrorism, commits an offence under the Act.

Furthermore, the TPA creates the following offences: (1) membership of a proscribed organization punishable with imprisonment of a term of up to 20 years;[1159] arranging or managing terrorist meetings punishable with imprisonment for a maximum term of 10 years;[1160] knowingly soliciting or rendering support for terrorism punishable for a maximum term of 20 years;[1161] harbouring of terrorists punishable, with imprisonment for a maximum term of 10 years;[1162] provision of training or instruction to terrorists, punishable with imprisonment for a term of 10 years;[1163] and withholding information about acts of terrorism, punishable with imprisonment for a maximum term of 10 years.[1164] However, the TPA admits the defence of a

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1158 Under section 1 (2) (d) and section 40 of the TPA, the treaties are: (i) Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; (ii) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; (iii) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; including Diplomatic Agents, 1973; (iv) International Convention against the Taking of Hostages, 1979; (v) Convention on the Physical Protection of Nuclear Material, 1980; (vi) Protocol for the Suppression of Unlawful Acts of violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; (vii) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; (ix) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988; (ix) The International Convention for the Suppression of Terrorist Bombing, 1997; (x) The Convention against Terrorist Financing; (xi) Convention on Offences and certain other Acts committed on Board Aircraft; and (xii) Convention on the Making of Plastic Explosives for the purpose of Detection.

1159 Section 2 (3) (i), TPA 2011. However, it is a defence to prove that the organization had not been proscribed as at the time of its membership by the person charged.

1160 Section 3, TPA 2011.

1161 Section 4, TPA 2011.

1162 Section 5, TPA 2011.

1163 Section 6, TPA 2011.

1164 Section 7, TPA 2011.

reasonable excuse for not making the disclosure.[1165] Furthermore, disclosures made to a legal practitioner in contemplation of legal advice or proceedings are exempted by the TPA.[1166]

Under section 8 of the TPA, the offence of obstructing or prejudicing the investigation of terrorist activity is liable upon conviction to a maximum term of ten years. Several other offences are penalized by the TPA: funding of terrorism, punishable with a 10-year maximum term of imprisonment;[1167] dealing in terrorist property, punishable with imprisonment for a maximum term of 10 years; [1168] and the obligation of financial institutions or designated non-financial institutions to report suspicious transactions related to terrorism, which is punishable with a term of imprisonment not exceeding five years or a minimum fine of N5, 000, 000, 00k (five million naira).[1169] It does appear however, that the TPA clumsily operates two different penalty regimes: firstly, the penalties in the specific sections creating offences, and secondly, the purport of section 33 of the TPA, which may be regarded as a general provision. Following this situation, the penalty is no longer predictable in the case of a conviction and may be susceptible to abuse.[1170]

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1165 Section 7 (2), TPA 2011.

1166 Section 7 (3) and (4), TPA 2011.

1167 Sections 10 and 13, TPA 2011.

1168 Section 15 (1) A person who enters into, or is involved in, an arrangement which facilitates the retention of or control by, or on behalf of, another person, of a terrorist property in any manner including- (a) concealment; (b) removal from the jurisdiction; or (c) transfers to any other person, commits an offence under this Act and is liable on conviction to imprisonment for a maximum term of 10 years. TPA 2011:

1169 Section 14, TPA 2011.

1170 TPA 2011, section 33 (1) Subject to subsection (3) of this section, a person who commits an offence under this Act is liable on conviction— *(a)* in the case of an offence under sections 1 and 10 of this Act, to life imprisonment or to a fine of not less than 150 million Naira or both; *(b)* in the case of an offence under sections 2, 3, 4, 5, 8, 9, 12 and 14, to an imprisonment for a term of not less than 3 years and not exceeding 20 years; *(c)* in the case of an offence under sections 6 and 7, to an imprisonment for a term of not less than 2 years and not exceeding 15 years; *(d)* in the case of an offence under sections 25 and 29, to a fine not exceeding N1,000,000.00 or an imprisonment for a term not exceeding 5 years or both; and *(e)* where death results from any terrorist act, the penalty shall be life imprisonment. (2) The court before which a person is convicted of an offence under this Act may, in addition to any penalty imposed by the court, order the forfeiture of.

A lot of money donations to charities end up financing terrorism. Kroessin has remarked that in the public mind, Islamic charity organizations have become little more than funding fronts for terrorism and jihad.[1171] Regulatory oversight is essential to protecting charities and the financial institutions that deal with them from abuse by terrorist organizations.[1172] Charities have been regarded as the fourth line of financing for terrorists groups after individual contributions**,** legitimate businesses, and criminal activities, be it narcotics, arms or human trafficking.[1173] Therefore, the Registrar-General of the Corporate Affairs Commission, may refuse or revoke the registration of charity based on security intelligence provided to him, if there are sufficient grounds to believe that the charity has a link with terrorism.[1174] The TPA provides a procedure for the judicial review of the decision of the Registrar-General of the Corporate Affairs Commission.[1175]

The TPA also regulates acts of 'international terrorism'.[1176] This situation may involve a non-citizen; a person possessing dual citizenship; or groups or individuals whose terrorist activities are foreign based, directed by countries or groups outside Nigeria, or whose activities transcend national boundaries.[1177] On the recommendation of the National Security Adviser or the Inspector-General of Police, the President may declare a person to be a 'suspected international terrorist' if he has been involved in acts of international terrorism; belongs to an international terrorist group, is affiliated to such a group, poses a security risk to the country; is listed as a terrorist in a UN Security Council resolution, instruments of the AU or ECOWAS, or

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1171 M R Kroessin (2007), 'Islamic Charities and the War on Terror: Dispelling the Myths' *Humanitarian Exchange Magazine*, Issue 38, June 2007.

1172 'Charity Commission's Counter-Terrorism Strategy' p. 4. < https://www.phap.org/.../Charity%20Commissi… > accessed on 29th July 2015.

1173 P Cochrane, 'Charities and Terrorism Financing Compliance – Approaches and Challenges in 2014,' *Thomson Reuters*, August, 2014, p. 5.

1174 Section 35, TPA 2011.

1175 Section 35 (3)-(8), TPA 2011.

1176 Section 9, TPA 2011.

1177 Section 9 (7), TPA 2011.

is listed as one by any State or organization approved by the President.[1178] The same criteria are used to declare a group as 'an international terrorist group.'[1179] The TPA requires the declaration to be gazetted.[1180]

A person suspected of international terrorism may be deprived of his citizenship, if it was obtained other than by birth.[1181] In addition, the Attorney-General of the Federation is authorized to make regulations for freezing the funds or financial assets of the person or group, or prohibiting the sale of weaponry, associated material, or provision of technical assistance to such person or group.[1182] The regulation may prevent the entry of the person or group into Nigeria, or their transit within the country.[1183] On 29th September 2011, the Attorney-General of the Federation passed the Terrorism Prevention (Freezing of International Terrorists Funds) Regulations. Contravening the regulations attract a penalty of imprisonment for a maximum term of five years.[1184]

The Federal High Court has exclusive jurisdiction over the offences in the TPA.[1185] The Attorney-General of the Federal may either undertake the prosecution of terrorist offences by himself, or delegate this power to any agency charged with the investigation of terrorists.[1186] The Act provides for mutual assistance and cooperation with other States. Thus, a foreign state may make a request for assistance in investigation, prosecution or extradition, provided it is signatory to a mutual treaty with Nigeria.[1187] Conversely, the Attorney-General of the Federation may also

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1178 Section 9 (1), TPA 2011.
1179 Section 9 (4), TPA 2011.
1180 Section 9 (7), TPA 2011.
1181 Section 9 (3), TPA 2011.
1182 Section 9 (6), TPA 2011.
1183 Section 9 (6) (b), TPA 2011.
1184 Section 9 (6) (d), TPA 2011; and Regulation 26, Terrorism Prevention (Freezing of International Terrorists Funds and Other Related Measures) Regulations, 2011.
1185 Section 32 (1), TPA 2011.
1186 Section 30 (1), TPA 2011.
1187 Section 18, TPA 2011.

make the same request to another State if such a treaty exists between that State and Nigeria.[1188] The Minister of Internal Affairs is authorized to issue an exclusion order preventing the entry of a suspected terrorist into Nigeria or order the removal of such persons from the country.[1189] In the interest of national security and public safety, the Minister of Internal Affairs may also refuse an application for the grant of refugee status if he reasonably believes that the applicant has been involved in terrorism.[1190]

### 6.4.1 Criticisms of the Terrorism Prevention Act 2011

The TPA is also not free of criticisms. There are inadequate safeguards for the rights of suspects. For example, under section 28, an arrestee may be detained for a period not exceeding 24 hours from the time of his arrest, without access to any person other than his medical doctor and the legal counsel of the detaining agency. This provision is in direct conflict with section 36 (6) (c) of the constitution which guarantees the right to a counsel of one's choice. Furthermore, it is axiomatic in criminal jurisprudence that a person is presumed innocent until proven guilty. In view of the fact that the Nigerian judiciary is overburdened with cases,[1191] the provision of the TPA on court jurisdiction should have been expanded to allow courts of coordinate jurisdiction, special courts, or even commissions, to try terrorism cases.

The TPA appears to be reactive, rather than proactive. There are no provisions strengthening the commitment of government to tackle the causal factors of terrorism such as economic deprivation, religious extremism, radicalization and de-radicalization.[1192] In

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1188 Section 19, TPA 2011.

1189 Section 37, TPA 2011.

1190 Section 38, TPA 2011.

1191 T Alabi and S Olubusola Alabi, 'The Pains of Imprisonment: A Sociological Analysis of the Experiences of Inmates in Ilorin and Kirikiri Prisons' (2011) Vol. 1. No. 8. *Journal of Research in Peace, Gender and Development*, 237. See also I Nnochiri (2015), 'Nigerian Judiciary Overburdened, CJN Cries Out,' 5th February 2015. < http://www.vanguardngr.com/2015/02/nigerian-judiciary-overburdened-cjn-cries/ > accessed on 30th July 2015.

1192 'Methods of Law: Nigerian Legal System and Registration of Foreign Judgments vis-à-vis Terrorism

comparison, the U.K Prevention of Terrorism Act 2005 provides detailed guidelines for the use of control orders to minimize the risk of terrorist attacks.[1193] Similarly, other factors conducing terrorism, such as border control are not addressed at all. Terrorists and smugglers freely traverse Nigeria's porous borders to carry out illicit activities.[1194] Furthermore, the TPA is silent on the management and minimization of the consequences of terrorist attacks, by improving capabilities to deal with it, including the needs of victims. In a clearer term, there is no scheme for compensation to, or assuaging the humanitarian concerns of, victims of terrorism.

### 6.5 Do Human Rights Abuses During Counterinsurgency Amount to Crimes Against Humanity?

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Prevention', 19th February 2014. < http://www.legalisplatform.blogspot.com/2014/02/nigerian-legal-system-and-registration_19.html?m=1 > accessed on 30th July 2015.

1193 Section 1 (1), UK Prevention of Terrorism Act 2005 defines a 'control order' to mean an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism. The obligations contained in a control order issued by the Secretary of State may include (a) a prohibition or restriction on his possession or use of specified articles or substances; (b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities; (c) a restriction in respect of his work or other occupation, or in respect of his business; (d) a restriction on his association or communications with specified persons or with other persons generally; (e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence; (f) a prohibition on his being at specified places or within a specified area at specified times or on specified days; (g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom; (h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order; (i) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force; (j) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access; (k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened; (l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force; (m) a requirement on him to allow himself to be photographed; (n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means; (o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand; (p) a requirement on him to report to a specified person at specified times and places.

1194 Punch Editorial Board, 'Policing Nigeria's Porous Borders', *Punch Mobile*, October 3, 2012. < http://www.punchng.com/editorials/policing-nigerias-porous-borders/ > accessed on 30th July 2015.

There are appalling reports of gross, systematic or widespread human rights abuses by Nigerian security personnel involved in counterinsurgency. The situation is so terrible that Amnesty International has called upon the Nigerian government to immediately close military detention facilities and either release or transfer detainees to civilian authorities; children below the internationally accepted minimum standard age for criminal liability must be released to their relatives or child protection authorities.[1195] However, apart from criminal prosecutions, victims of human rights abuses committed by counter-insurgents can also enforce their rights through fundamental rights actions. The ECOWAS Community Court of Justice has held that the responsibility of the State to protect the rights of its subjects is not diminished in the context of counter-insurgency.[1196]

Military action against insurgents has led to significant civilian casualties. It is important to point out again that crimes against humanity evolved to fill up the gap in the law of war crimes regarding actions of sovereign states against civilian populations, especially their own

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1195 Amnesty International, "Nigeria: Human Rights Violations by the Military continue in the absence of Accountability for Crimes under International Law," Written Statement to the 32nd Session of the UN Human Rights Council (13th June – 1st July 2016).

1196 The Community Court of Justice, ECOWAS has awarded 200 000 dollars as compensation to each of the families of eight persons who were killed on 20th September 2013 by Nigerian security agents during a raid on an uncompleted building in Abuja in a search for Boko Haram insurgents. The Court also ordered the government to pay another 150 000 dollars each to the 11 persons who sustained injuries during the raid. In suit no. ECW/CCJ/APP/02/14 filed on their behalf by the Socio-Economic Rights and Accountability Project (SERAP), the applicants had asked the Court for a declaration that they are entitled to their right to life and that the shooting resulting in death and injury constitutes a flagrant abuse of their fundamental human rights to life and dignity of the person as enshrined under international law. The Court held that the State has a responsibility to protect everyone's right to life which is not diminished in the context of counter-terrorism and obliged under international instruments to investigate deaths 'irrespective of how the authorities found about the death whether State authorities were involved or the circumstances.' Relying on the provisions of the African Charter on Human and Peoples' Rights, the Nigerian Constitution and declarations of the UN Human Rights Committee regarding the circumstances under which persons can be deprived of life, the Court concluded that the 'legality of killing outside the context of armed conflict as in this case is governed by human rights standards especially the ones concerning the use of force. They apply to all government officials who exercise police powers including military and security forces operating in contexts where violence exists but falls short of the threshold of armed conflict,' the court said that the plea of seld-defence and necessity claimed by the Defendants must be circumscribed within the limits of force required by human rights law. See "Court Awards 3.25 Million Dollar Compensation for Victims of 2014 Raid by Nigerian Security Forces." Community Court of Justice-ECOWAS. < http://www.courtecowas.org/site2012/index.php?option=com_ > accessed on 14th December 2016.

subjects. In the view of Bassiouni, the State or its organs, is the archetypal perpetrator of crimes against humanity.[1197] The human rights NGO, Amnesty International has stated that:

> In the course of security operations against Boko Haram in north-east Nigeria, Nigerian military forces have extra-judicially executed more than 1,000 people; they have arbitrarily arrested at least 20,000 people, mostly young men and boys; and have committed countless acts of torture. Hundreds, if not thousands, of Nigerians have become victims of enforced disappearance; and at least 7,000 people have died in military detention as a result of starvation, extreme overcrowding and denial of medical assistance…these acts, committed in the context of a non-international armed conflict, constitute war crimes[1198] for which military commanders bear both individual and command responsibility, and may amount to crimes against humanity. Security forces have been implicated in the disproportional use of force against civilians.[1199]

It is also necessary to reproduce a similar report published by Human Rights Watch:

> Nigerian authorities have yet to open credible investigations into allegations of heavy-handed and abusive response to the

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1197 M C Bassiouni, 'Crimes against Humanity: The Case for a Specialized Convention' (2010) Vol. 9. No. 4. *Washington University Global Studies Law Review*, 585.

1198 A war crime is a serious violation of the laws and customs of war giving rise to individual criminal responsibility.

1199 G Iyatse, 'Prosecute Soldiers Involved in Human Rights Abuses', *Punch*, July 15, 2015. < http://www.punchng.com/news/prosecute-soldiers-involved-in-human-rights-abuses/ > accessed on 1st August 2015.

> insurgency by security forces. Since 2009, hundreds of men and boys in the northeast have been rounded up and detained in inhumane conditions for suspected membership or provision of support for Boko Haram. There are also allegations of use of excessive force, and inadequate civilian protection measures, including for Boko Haram hostages, by the military in the ongoing operations in the northeast. When the Nigerian army drove at high speed into the Sambisa Forest Reserve, some Boko Haram hostages mostly women and children, were crushed by moving trucks. Survivors said soldiers did not issue instructions on how hostages could avoid danger….Authorities have rarely prosecuted members of the police and military implicated in abuses. While some soldiers have been prosecuted in military tribunals for offences such as cowardice and mutiny, the pervasive culture of impunity means almost no one has been held to account for human rights crimes….In July and September, the military released 310 people, including women and children, from detention in Borno and Yobe states who had been detained without charges for at least two years.[1200]

In yet another report, Amnesty International declared as follows:

> In June 2015, Amnesty International published evidence of war crimes committed by the Nigerian military. President Buhari

[1200] Human Rights Watch, "Nigeria: Events of 2015", < http://www.hrw.org/world-report/2016/country-chapters/nigeria > accessed on 14th December 2016.

promised that this evidence would be investigated. One year later, no steps have been taken to begin independent investigations into these crimes. Some steps have been taken by the Nigerian military to introduce internal accountability structures. The army informed Amnesty International that the Military Police has investigated cases of indiscipline by soldiers, including human rights abuses, since at least October 2015. In February 2016, the army announced the creation of a human rights desk, which will handle complaints from members of the public. Amnesty International was not able to establish whether any soldiers have been held accountable for recent cases of human rights violations or violations of IHL, or how the human rights desk will function. Since January 2016, at least 168 people have died in military detention facility at Giwa barracks, Maiduguri; a significant increase in the rate of deaths in the barracks compared with the second half of 2015. Their bodies were deposited at a mortuary in Maiduguri and then buried in the city's cemetery. Among the dead were at least 12 babies and children under six years old, and one boy of approximately 15 years. Children under five years old were detained in extremely crowded and unsanitary women's cells. Many of the young children were detained when their mothers were arrested, while others were born in detention. Two

> witnesses told Amnesty International that three of the babies and children died as a result of measles. Amnesty International believes it is likely that detainees died of starvation, dehydration and disease, linked to overcrowding at the detention cells in Giwa Barracks. No autopsies or investigations into the deaths have been conducted. Witnesses described cells as too crowded for detainees to lie down properly. They also report that detainees, especially men were provided with insufficient amounts of food and water. Instead of toilets, they were two communal buckets in each cell for faeces and urine, which were emptied once a day. Cells were infrequently cleaned and detainees were rarely allowed to wash. Many detainees fell ill, yet access to medical assistance was scant. Detainees in Giwa barracks lack any access to their families or lawyers. They are not brought before a judge and no charges are filed against them. [1201]

In consequence, Amnesty International is of the view that the military committed war crimes and possible crimes against humanity in its response to Boko Haram between 2011 and 2015.[1202] However, the Nigerian army has dismissed these reports on the ground that they are not consistent with the practical realties on ground.[1203] As earlier stated, in order to show crimes

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1201 Amnesty International, "Nigeria: Human Rights Violations by the Military continue in the absence of Accountability for Crimes under International Law," Written Statement to the 32nd Session of the UN Human Rights Council (13th June – 1st July 2016).

1202 "Our Job is to Shoot, Slaughter and Kill": Boko Haram's Reign of Terror in Northh East Nigeria, (AFR 44/1360/2015).

1203 'Investigate Alleged War Crimes by Soldiers', *The Nigerian Observer*, June 8, 2015. <

against humanity, there must have been an attack against any civilian population.[1204] The attack need not constitute a military attack, as any mistreatment of the civilian population would satisfy this requirement.[1205] Counter-insurgency can satisfy the sub-elements of crimes against humanity, especially: murder, imprisonment, torture, and other inhumane acts. The attack was executed on a large scale affecting many people or a multiplicity of victims.[1206] This requirement is satisfied by the large scale number of victims.

Tribunal jurisprudence has indicated that a crime may be widespread or committed on a large scale by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.[1207] The element 'systematic' requires an organized nature of the acts and the improbability of their random occurrence.[1208] It is further argued that the attack against the civilian population was systematic; it was thoroughly organized and followed a regular pattern on the basis of a common policy, involving substantial public or private resources.[1209] The gross or severe violations of rights were continuous and involved the use of public resources or facilities. There is no requirement that the State must have formally adopted the policy. Nevertheless, there must have been in existence, a preconceived plan or policy.[1210] As already stated in the third chapter of this dissertation, the existence of a policy can be regarded as a form of premeditation, and could be inferred from the widespread or systematic nature of the proscribed act. The policy need not be formally adopted, nor expressly declared,

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http://www.nigerianobservernews.com/2015/06/08/investigate-alleged-war-crimes-by-soldiers/ > accessed on 1st August 2015.

1204 Prosecutor v Kunarac, Kovac and Vukovic (ICTY Appeals Chamber), 12th June 2002, para. 410.

1205 Art. 7 (3), Introduction to the Elements of Crimes against Humanity. See also Prosecutor v Vasiljevic, (ICTY Trial Chamber), 29th November 2002, paras. 29, 30.

1206 Prosecutor v Kayishema and Ruzindana (ICTR Trial Chamber), 21st May 1999, para. 123.

1207 Prosecutor v Kordic and Cerkez, (ICTY Trial Chamber), 26th February 2001, para. 179.

1208 Prosecutor v Naletilic and Martinovic (ICTY Trial Chamber), 31st March 2003, para. 236.

1209 Prosecutor v Jean-Paul Akayesu (ICTR Trial Chamber), 2nd September 1998, para. 579.

1210 Prosecutor v Musema (ICTR Trial Chamber), 27th January 2000, para. 204.

nor even stated clearly and precisely.[1211] It would appear that the unwillingness of the government to discipline or prosecute counter-insurgents for serious human rights violations constitutes a silent articulation or tacit approval of the policy of attack on civilians. Amnesty International has also called upon the government to urgently initiate thorough, independent, impartial and effective investigations into crimes under international law by all parties to the conflict in north-east Nigeria, and bring those responsible for these crimes to justice before civilian courts in fair trials.[1212]

## 6.6 Conclusion

This chapter has examined the counter insurgency to see if the human rights violations committed by government forces also amount to crimes against humanity. The study found appalling evidence of widespread human rights violations and concluded that they amount to crimes against humanity. It also noted that the government has made little or no effort to dissociate itself from the systematic atrocities committed by state forces, by for example, investigating and punishing those responsible for them. It was further observed and suggested that victims have the alternative course of suing the state for breach of their fundamental rights.

1211 Prosecutor v Dusko Tadic (ICTY Trial Chamber II) 7th May 1997 para. 653.

1212 Amnesty International, "Nigeria: Human Rights Violations by the Military continue in the absence of Accountability for Crimes under International Law," Written Statement to the 32nd Session of the UN Human Rights Council (13th June – 1st July 2016).

# CHAPTER SEVEN

# CONCLUSION AND RECOMMENDATIONS

## 7.1 Conclusion

This research has investigated the topic: 'Crimes Against Humanity: A Case Study of Boko Haram Insurgency and the Counterinsurgency Measures in Nigeria'. The topic was discussed in six chapters. This work observed that crimes against humanity are rooted in principles of international customary law. Crimes against humanity were derived from the Martens Clause of the Hague Conventions, which codified new rules of international humanitarian law.

The study stated that crimes against humanity are a type of mass atrocity crimes. Atrocity crimes refer to the core crimes under public international law, namely war crimes, genocide, crimes against humanity, and crimes against peace, which involve the widespread massacre of civilians. Crimes against humanity spin a historical trajectory dating back to ancient times. The research noted the case of Sir Peter of Hagenbach in Breisach, who was tried in 1474, for rudimentary forms of crimes against humanity.

The research also noted that crimes against humanity refer to some prohibited acts; murder, extermination, rape, slavery, torture, hostage taking, etc., committed as part of a widespread or systematic attack directed against any civilian population. As man's criminal ingenuity cannot be forecast, all definitions of crimes against humanity end with the residual clause: 'other inhumane acts', provided they meet the threshold required by statute. The crime evolved to fill the gap in international law in the protection of people from atrocities perpetrated against them by their own government, as war crimes traditionally did not cover crimes committed by a State against its own citizens.

Thus, in response to the Armenian genocide perpetrated by the Ottoman Empire, on 24th May 1915, the Allied Powers, Britain, France and Russia, jointly issued a declaration charging Turkey with crimes against humanity:

> In view of these new crimes of Turkey against humanity and civilization, the Allied Governments announce publicly to the Sublime Porte that they will hold personally responsible for these crimes all members of the Ottoman Government, as well as those of their agents who are implicated in such massacres.[1213]

The primary lesson cocooned in this statement, which is the denial of impunity for atrocity criminals, has remained relevant ever since. In response to similar atrocities perpetrated during the Second World War, including the Holocaust, the International War Crimes Commission recommended the establishment of a tribunal to try violations of the laws of humanity. The post-war Nuremberg Trials were conducted in response to the grave crimes committed by the Nazi regime. The Tokyo Trials were also conducted to try the leaders of the Empire of Japan for crimes against peace, war crimes and crimes against humanity. International criminal tribunals were also established in for the Former Yugoslavia and Rwanda following the conflicts in these countries.

Hybrid courts were established for other countries afflicted by armed violence. The legal principles establishing these institutions and the jurisprudence they have spewed forth will be immensely beneficial if they are invoked any time the global community confronts a conflict situation involving widespread or systematic attacks against civilian populations. The writer has

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[1213] W A Schabas, *Genocide in International Law, The Crimes of Crimes* (New York: Cambridge University Press, 2002) pp. 16-17

shown that crimes against humanity are not random, isolated or sporadic events, but are part either of a government policy, or of a wide practice of inhumanity carried out by sub-state organizations.

In recent times, there has been armed violence in places like Sudan and Syria, where grave human rights abuses are being committed. However, international reaction has largely been inadequate and hortatory. Weak institutional responses remind us of Hitler's retort: 'who, after all, speaks today of the annihilation of the Armenians'.[1214] Travis has stated that there is evidence that the massacre of the Ottoman Armenians helped persuade the Nazis that national minorities posed a threat to empires dominated by an ethnic group such as the Germans or the Turks. Furthermore, these minorities could be exterminated to the benefit of the perpetrator with little risk.[1215]

This is indeed, a very dangerous analogy, but its echoes are playing themselves out. Recall for instance, the failure of African governments to execute the ICC arrest warrant on Al-Bashir Omar of Sudan. In this regard, the international community must exhibit the political will to ensure that violators of international criminal law are held accountable. In order to infuse such measure with transparency and credibility, criminal sanctions should be imposed wherever these atrocities are committed, without regard to regional geography or politics. To this end, the US animosity towards the ICC is condemnable. It is wrong for the US, which is a permanent member of the UN Security Council, which also has a role to play in the effectiveness of the ICC, to consistently oppose the court, which could hold anybody, including U.S military and civilian leaders accountable to a universal standard of justice. In the same way, the ICC dragnet should extend beyond Africa.

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[1214] H Travis, 'Did the Armenian Genocide Inspire Hitler? Turkey, Past and Future' (2013) *Middle East Quarterly Review*, 27-35.

[1215] Travis, *art cit*, 27.

Throughout its evolution, crimes against humanity have experienced contextual modifications which would facilitate the subjection of non-state entities to trial. In its early history, the crimes were confined to situations of armed conflict, but paradigmatic shifts opened their commission to peace time as well. Atrocities perpetrated before the war, as odious as they were, were declared to be outside the jurisdiction of the IMT. In the judgment of the IMT for the trial of the Major War Criminals, the Tribunal stated thus:

> The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939, war crimes were committed on a vast scale, which were also crimes against humanity; insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, and therefore constituted crimes against humanity.[1216]

The position today is rather markedly different. Article 7 of the ICC Statute discards the armed conflict nexus. Nevertheless, the prosecution of sub-state actors with no affiliation whatsoever with governmental authorities, for crimes against humanity, is still contentious among scholars. Bassiouni, perhaps, echoing the historical context of the crimes, has contended that as currently defined in international law, crimes against humanity do not specifically include non-state actors within their scope.[1217] The resolution of this singular point constitutes the linchpin for the prosecution of insurgents for crimes against humanity. An insurgency upends the State-support

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[1216] The Trial of Adolf Eichmann – The District Court Sessions, Defence Submission 1 (Part 6 of 8), The Nizkor Project: Remembering the Holocaust (Shoah). < http://www.nizkor.org.hweb/people/e/eichmann-adolf/transcripts/Sessions/Defence-Submission-01-06.html > accessed on 19th August 2015.

[1217] M C Bassiouni, 'Crimes Against Humanity: The Case for a Specialized Convention' (2010) Vol. 9. No. 4. *Washington University Global Studies Law Review*, 585.

policy since it is a rebellion against a constituted authority when those taking part in the rebellion are not recognized as belligerents.

The study has shown that what is now crucial is the ability of a group to infringe upon basic human values. Thus, the ICC has held as follows:

> Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values: the associative element, and its inherently aggravating effect, could eventually be satisfied by 'purely private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by 'territorial' entities or by private groups, given the latter's acquired capacity to infringe basic human values.[1218]

The functionality of the ICJ perspective cannot be over-praised. Insisting on a State nexus would amount to a high threshold demand which most sub-state actors would fall short of, despite appalling statistics of human rights abuses, which would allow such groups to slip through the grips of international accountability regimes. In contemporary times, most conflicts are fought not between States but between States and armed rebel groups or between rebels, in situations where the laws of war cannot be properly invoked. The Boko Haram insurgency has resulted to

[1218] Situation in the Republic of Kenya (Decision Pursuant to Article15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), ICC Pre-Trial Chamber II, No.: ICC-01/09, 31st March 2010, paras. 90-93, pp. 38-40.

the loss of thousands of human lives and a huge humanitarian crisis, yet it is not recognized as a State of civil war.[1219]

The study has striven to analyze the concepts of insurgency, terrorism, guerilla welfare and their symbiosis. Of these three terminologies, terrorism is the most controversial. Insurgency takes cognizance of the political motivation of those participating in the insurgency. During the period since July 2014, Boko Haram has clearly set the establishment of a physical Islamic state in Nigeria as its goal and has intensely fought the Nigerian military and civilian populace.[1220] Boko Haram insurgents have used terror as a way to achieve the political goals of the group. The Boko Haram insurgency has been defined along regional, ideological and religious lines, beginning from the protracted religious conflicts bedeviling northern Nigeria. It follows therefore that the sect has to be re-examined retrospectively to ascertain its causes and other variables conducing its phenomenal rise in global violence. Only then, can durable solutions be found to the crises.

## 7.2 Recommendations

Sequel to the observations made in this research concerning crimes against humanity and the Boko Haram insurgency and counter-insurgency in Nigeria, it is now essential to make the following recommendations to ensure that the objective of preventing and penalizing the massacre of civilian populations is realized.

**1.** It is recommended that the government should address the religious, cultural and socio-economic stressors in Nigeria, as they fuel insurgencies. This is the first step towards confronting crimes against humanity and protecting civilians from mass killings. This should be

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1219 A C Okoli and P Iortyer, 'Terrorism and Humanitarian Crisis in Nigeria: Insights from Boko Haram Insurgency (2014) Vol. 14, Issue 1. *Global Journal of Human-Social Science (F),* 39-50.

1220 D Cook, 'Boko Haram: A New Islamic State in Nigeria', James Baker III Institute for Public Policy, Rice University, 11th December, 2014, p. 3.

complemented by a timely identification of emerging conflicts through an effective early warning system. The U. S Institute for Peace and Conflict has pointed out that the earlier one knows about abuses or potential atrocities, the easier it is to stop them.[1221]

Imposing a religious ideology on any people under any guise, especially in a religion-sensitive State like Nigeria, is a quick recipe for armed violence. Religion as a source of conflict is the result of religious intolerance, fanaticism and politics.[1222] The objective of the Boko Haram insurgency is to establish an Islamic caliphate in a pluralistic society. This present crisis is a fallout of the history of religious intolerance endemic in northern Nigeria. Effective measures were never taken to checkmate the menace. The constitutional right to religion or irreligion should be upheld at all times. The State should also make concrete efforts to improve the lot of Nigerians, to render it difficult for Islamic radicals to win the sympathy of the people or offer them unorthodox sources of relief.

**2.** Further to the earlier recommendation, the wisdom in recognizing and affirming the rights of Nigerians during counterinsurgency cannot be overemphasized. The obverse would alienate the people from the State; and render it practically difficult to distinguish insurgents from counterinsurgents, as both activities result in civilian deaths. By its very nature, an insurgency is a violent struggle between the State and a non-state actor for legitimacy and influence over a population.[1223]

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1221 'Confronting Crimes against Humanity. A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors. United States Institute of Peace, Washington. DC, 2008, p. 14.

1222 M T Ladan , 'Ethno-Religious Difference, Recurrent Violence and Peace Building in Nigeria: Focus on Bauchi, Plateau and Kaduna States' Keynote Paper presented at a public lecture on 'Difference, Conflict and Peace Building Through Law', Organized by the Edinburgh Centre for Constitutional Law, University of Edinburgh School of Law, in association with Centre for Population and Development, Kaduna, Arewa House, Kaduna, 22nd November, 2012.

1223 F Sperotto, 'Counter-Insurgency, Human Rights, and the Law of Armed Conflict' (2009) Vol. 17. Issue 1. *Human Rights Brief*, 19.

The broader human rights rules, rather than IHL, are more relevant to counterinsurgency. Therefore, human rights treaties and the jurisprudence developed there under should serve as a persuasive authority for military and paramilitary forces involved in the war on terror. The State should endeavour to improve its human rights records in the fight against Boko Haram insurgents and also penalize violations of these rights.

**3.** The government should deepen efforts to domesticate the Statute of Rome. The creation of the ICC system of international criminal jurisdiction is predicated on the presupposition that the primary competence to initiate investigations of international crimes resides within national court systems. This is the essence of the principle of complementarity. On account of the limited resources of the court, it is essential that States fulfill this primary obligation. The first and minimal condition enabling States to meet this obligation of imposing punitive measures for crimes against humanity is the existence of legislation that incorporates in their national laws, the crimes and principles of law calcified by the Statute of Rome.

Transposing the ICC Statute into national law has several benefits for States including: (a) activating the principle of complementarity; (b) fulfilling the obligation to cooperate fully with the ICC; (c) an opportunity to strengthen their own criminal justice systems so that they can prosecute the ICC crimes themselves; (d) it has a deterrent effect as detailed domestic legislation indicates forbidden conduct, allowing potential criminals to think twice before committing them because of the risk they face of being arrested and prosecuted; (e) effective legislation can also facilitate the direct communication and cooperation of national prosecutors with the Office of the ICC Prosecutor, hence providing additional safeguards to protect the independence of the judiciary from the risk of interference and manipulation by the executive or legislative arms of government; (f) it allows for explicit definitions of crimes and penalties, rather than the simple

reference to international conventions, which will ensure juridical certainty and protection to individuals on the applicable law, and avoid the necessity of adopting laws *ex post facto* that distort the principle of legality.[1224] More specifically for Boko Haram insurgents and counter-inurgents, it is more appropriate to try them for crimes against humanity than for terrorism given the widespread or systematic character of their atrocities and the phenomenal war-like humanitarian crises it has created in Nigeria.

**4.** There should be a focus on humanitarian assistance directed towards meeting the necessities of the millions of people who have been internally displaced by the struggle between Boko Haram insurgents and government forces. Humanitarian assistance should also be provided to Nigeria's neighbours, experiencing such internal displacement, and hosting thousands of refugees too.

**5.** Nigeria, Cameroon, Niger and Chad should conclude a multilateral cooperation treaty for counterinsurgency. The treaty should call upon the affected States to implement measures that would enhance their legal and institutional capacity for counter-insurgency or counter-terrorism. The treaty should encourage member states to criminalize the financing of terrorism; freeze terrorist funds; suppress the provision of safe havens for terrorists within the treaty area; exchange information on terrorist activities, cooperate in the detection, investigation, extradition and prosecution of terrorists, etc. A counter-terrorism force should operate under the auspices of the treaty.

**6.** There should be a permanent international counter-terrorism or counter-insurgency commission established under the cooperation treaty. The commission should coordinate technical assistance, country reports, and develop close ties with relevant international, regional

[1224] Parliamentarians for Global Action, 'Implementing Legislation on the Rome Statute'. < http://www.pgaction.org/programmes/ilhr/icc-legislation.html > accessed on 22nd August 2015.

and sub-regional bodies in the fight against insurgency. In undertaking its tasks, the commission may appeal to the international community for logistical and technical support.

**7.** There should be an improvement in law enforcement technologies. For instance, biometrics may be used for identity verification particularly in the areas of visa and immigration documentation and government-issued identification cards. Technology offers potential solutions to many counter-terrorism concerns. Non-lethal weapons may also be used along with lethal weapons. Non-lethal weapons include acoustic systems; communications systems; entanglement and other mechanical systems; information technologies, optical devices; electronic, psychological and information warfare. These weapons make counter-insurgency more effective and discriminate.

**8.** The researcher recommends the establishment of a Special Court for Nigeria, Cameroon, Niger and Chad, with jurisdiction over the core international crimes and terrorism. The proposed court is to be created under the auspices of the African Union, Nigeria, Cameroon, Niger and Chad.

## BIBLIOGRAPHY

**Books**


Agarwal, H, O, *International Law and Human Rights:* (19th edn, Allahabad: Central Law Publications, 2013).

Alexander, Y, *International Terrorism: National, Regional and Global Perspectives* (New York: Praeger, 1976) p. xiv.

Bassiouni, M, C, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011).

……, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague: Kluwer Law International, 1999) .

Bei, S, Siqi, Z & Qi Z'Chinese Confucianism and other Prevailing Chinese Practices in the Rise of International Criminal Law' in M Bergsmo, C W Ling & YI Ping (eds), *Historical Origins of International Criminal Law: Volume I*. (Brussels, Torkel Opsahl Academic EPublisher, 2014) pp.141-167.

Brownlie, I, *Principles of Public International Law:* (Fifth edn, Oxford: Clarendon Press, 1998).

Cassese, A, *International Criminal Law:* (2nd ed, Oxford: Oxford University Press, 2008).
Carter B. E, *et al*, *International Law:* (4th edn, New York: Aspen Publishers, 2003).
Cheah, W. L and Chong X. N, 'Historical Origins of International Criminal Law' in M Bergsmo, C W Ling & YI Ping (eds), *Historical Origins of International Criminal Law: Volume I*. (Brussels, Torkel Opsahl Academic EPublisher, 2014) pp.1-22.

Cryer, R, *et al*, *An Introduction to International Criminal Law and Procedure:* (Cambridge: Cambridge University Press, 2007).

Curzon, L, B, *Criminal Law:* (3rd edn, Plymouth: MacDonald & Evans Ltd, 1980).

Dixon, M, *Textbook on International Law:* (6th edn, Oxford: Oxford University Press, 2005).

Einarsen, T, *The Concept of Universal Crimes in International Law:* (Oslo: Torkel Opsahl Academic EPublisher, 2012).

Falk, R,A, 'Janus Tormented; The International Law of Internal War' in J N Rosenau (ed), *International Aspects of Civil Strife* (Princeton: Princeton University Press, 1964) pp. 196-197.

Gardiner, R, K, *International Law:* (London: Pearson Longman, 2003).
Garner, B, A, *Black's Law Dictionary:* (9th edn, St Paul MN: Thomson Reuters, 2009).

Higgins, R, 'The General International Law and Terrorism' in R Higgins and M Flory (eds), *Terrorism and International Law* (London: Routledge, 1997) pp. 13-29.

Hoffman, B,. *Inside Terrorism:* (2nd ed, New York: Columbia University Press, 2006).

Huntington, S,P, 'Introduction' i*n* F M Osanka (ed), *Modern Guerrilla Warfare: Fighting Communist Guerrilla Movements, 1941-1961*(New York: The Free Press, 1962) p. xvi.

Ibu, O. E, 'The International Criminal Court and the Crime of Genocide under International Law: Burning Contemporary Issues' in A O Alubo *et al* (eds), *A Colossus in the Legal Firmament: Essays in Honour of Olisa Agbakoba* (Ibadan: Constellation (Nig) Publishers, 2008) p. 502.

Ikpeze, O.V.C, *Gender Dynamics of Inheritance Rights in Nigeria: Need for Women Empowerment* (Onitsha: Folmech Printing and Pub. Co. Ltd, 2009).

Jenkins, B, M, *The Study of Terrorism: Definitional Problems* (Santa Monica: The Rand Corp, 1980).

Joshi, K,C, *International Law and Human Rights:* (2nd edition, Lucknow: Eastern Book Company, 2012).

Kapoor, S, K, *International Law and Human Rights:* (18th edn, Allahabad: Central Law Agency, 2011).

Kolb, R, 'The Exercise of Criminal Jurisdiction over International Terrorists' in A Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004), 227.

Ladan, M, T, *Materials and Cases on Public International Law:* (Zaria: Ahmadu Bello University Press Ltd, 2007).

Merari, A, 'Terrorism as a Strategy of Insurgency' in G Chaliand and A Blin (eds), *The History of Terrorism from Antiquity to Al Qaeda* (Berkeley: University of California Press, 2007) pp. 12-51.

Metz, S, and R A Millen, R, A, *Insurgency and Counterinsurgency in the 21st Century: Reconceptualizing Threat and Response* (Darby: Diane Publishing, 2004).

Nieto-Navia, R, 'International Peremptory Norms (*Jus cogens*) and International Humanitarian Law', Man's Inhumanity to Man: Essays on International Law in honour of Antonio Cassese. (The Hague: Kluwer Law International, 2003).

O'Neil, B, E, *Insurgency and Terrorism: From Revelation to Apocalypse*," (2nd ed, Washington D.C: Potomac Books Inc, 2005).

Oji, E, A, *Responsibility for Crimes under International Law:* (Lagos: Odade Publishers, 2013)

Okoronye, O, *'Terrorism in International Law':* (Okigwe: Whytem Publishers, Nigeria, 2013).

Oppenheim, L, *International law:* Vol. 1 (London: Longmans, 1905).

Parry, C, *The Sources and Evidences of International Law:* (Manchester: Manchester University Press, 1965).

Sandoz, Y, 'Penal Aspects of International Humanitarian Law' in M C Bassiouni (ed), *International Criminal Law* Vol. 1 (Leiden: Nijhoff, 2008) pp.293-321.

Schabas, W, A, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2004).

…….*Genocide in International Law, The Crimes of Crimes* (New York: Cambridge University Press, 2002).

Shaw, M, *International Law* (4th edn, Cambridge: Cambridge University Press, 1997).

Tse-Tung, M, *A Single Spark Can Start a Prairie Fire, Selected Works* (English ed, Peking: Foreign Languages Press, 1965) Vol. I.

Umozurike, U, O. *Introduction to International Law* (3rd edn, Ibadan: Spectrum Books Limited, 2005).

Victor, B and Cassese, A, *The Tokyo Trial and Beyond: Reflections of a Peace Monger:* (Cambridge: Polity Press, 1994) p. 97.

Wallace, R, M, M, *International Law* (5th edn, London: Sweet and Maxwell, 2005).
Wilson, H, A, 'International Law and the Use of Force by Liberation Movements' (Oxford: Oxford University Press, 1988) p. 23.

Wigwe, C, *International Humanitarian Law* (Ghana: Readwide Publishers, 2010).

Y Totani, 'The Case against the Accused' in Y Tanaka *et al* (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff Publishers, 2010) pp.147-161.

**Journals**

Abass, A, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) Vol. 24. No. 3. *The European Journal of International Law*, 933-946.
``````

Acuna, T, F, 'The Rome Statute's Sexual Related Crimes: An Appraisal under the Light of International Humanitarian Law' (2004) Vol. 39. *Revista IIDH*, 196-202.
``````

Adamolekun, T, 'Religious Fanaticism and Fundamentalism in Nigeria since 1980: A Historical Perspective' (2012) Vol. 9. No. II. *British Journal of Arts and Social Sciences*, 149-151.

Adebayo, I, R, 'The Role of Traditional Rulers in the Islamization of Osun State (Nigeria)' (2010) Vol. 30. *Journal of Islamic Studies*, 60-77.

Adigbou, E, R, 'The New ECOWAS Counter-Terrorism and Arms Trade Treaty' (2013) Vol. 6. No. 2 *CJJIL* 46-54.

Agbiboa, D, E, 'Is Might Right? Boko Haram, the Joint Military Task Force and the Global Jihad' (2013) Vol. 5. No. 3. *Military and Strategic Studies*, 53-72.

……'The Ongoing Campaign of Terror in Nigeria: Boko Haram versus the State' (2013) Vol. 2, No. 3. *Stability: International Journal of Security and Development*, 1-18.

Ainley, K, 'The International Criminal Court on Trial' (2011) Vol. 24 No. 3. *Cambridge Review of International Affairs*, 309-333.

Aiyesimoju, A, B, 'Curbing Insurgencies in Nigeria: Roles for the Media' (2015) Vol. 5. No. 2. *Developing Country Studies*, 18-29.

Ajibola, O, O, 'Terrorism and Insurgency in Northern Nigeria: A Study of the Origins and Nature of Boko Haram' (2015) Vol. 5. No. 12. *Research on Humanities and Social Sciences*, 6-15.

Ajike, C, and Longe, O, B, 'The Boko Haram Insurgency in Nigeria: A Security Officer's Perspective on the American Angle' (2014) Vol. 5. No. 2. *Computing, Information Systems, Development Informatics & Allied Research Journal*, 85-88.

Akharan, P, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) Vol. 90. No. 3. *The American Journal of International Law*, 501-510.

Akinfala, F, F, *et al* 'Boko Haram and Terrorism in Northern Nigeria: A Psychological Analysis' (2014) Vol. 17. No. 1. *British Journal of Arts and Social Sciences*, 116.

Akpomera, E and Omoyibo, K, 'Boko Haram Terrorism in Nigeria: The Paradox and Challenges of Big Brother Foreign Policy' (2013) Vol. 2 (1) *AFRREV IJAH: An International Journal of Humanities*, 94-113.

Akwara, A, F, and Ojoma, B, O, 'Religion, Politics and Democracy in Nigeria' (2013) Vol. 9. No. 2. *Canadian Social Science*, 48-61.

Alabi, T, and Alabi, S, O, 'The Pains of Imprisonment: A Sociological Analysis of the Experiences of Inmates in Ilorin and Kirikiri Prisons' (2011) Vol. 1. No. 8. *Journal of Research in Peace, Gender and Development*, 235-241.

Alubo, A, A, and O Lar, 'The International Criminal Court: Towards the Proposed 2010 Review of the Statute' (2009) Vol. 8. No. 1. *University of Jos Law Journal*, 266.

Amana, R, A, and Ienlanye, S, A, 'Non-International Armed Conflicts in International Humanitarian Law' (2015) Vol. 2. No. 1. *Joseph Ayo Babalola University Law Journal*, 147.

Anderson, K, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' Vol. 7. (2006) *Melbourne Journal of International Law*, 245-277.

Annas, G, J, 'The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights' (2009) Vol. 10. No. 1. *Minn. J. L. Sci & Tech*, 20-23.

Aptel, C, 'The International Criminal Tribunal for Rwanda' (1997) No. 321. *International Review of the Red Cross*.

……'Closing the U.N International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' (2008) Vol. 14. No. 2. *New England Journal of International & Comparative Law*, 169-189.

Apkan, N, S, 'Kidnapping in Nigeria's Niger Delta: An Exploratory Study' (2010) 24 (1) *J Soc Sci*, 33-42.

Arnaut, D, 'When in Rome? The International Criminal Court and Avenues for U.S. Participation' (2003) Vol. 43. No. 2. *Virginia Journal of International Law*, 525-539.

Arnold, R, The Prosecution of Terrorism as a Crime against Humanity' (2004) 64 ZaöRV, 994

Askin, K, D, 'Reflections on Some of the Most Significant Achievements of the ICTY' (2003) Vol. 37. No. 4. *New England Law Review*, 903.

Atidoga, D, F, 'Genocide and Human Rights Violations: An Examination of the Armenian Genocide' (2011) Vol. 2. No. 2. *Human Rights Review: An International Human of Rights Journal (An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, Nigeria and the National Human Rights Commission of Nigeria*), 53.

Awoniyi, S, 'A Discourse on Religious Conflict and Tolerance in Multi-Faith Nigeria' (2013) Vol. 19. No. 20. *European Scientific Journal*, 124.

Ayegba, U, S, 'Unemployment and Poverty as Sources and Consequences of Insecurity in Nigeria: The Boko Haram Insurgency Revisited' (2015) Vol. 9. No. 3. *African Journal of Political Science and International Relations*, 90-99.

Baade, H, W, 'The Eichmann Trial: Some Legal Aspects' (1961) Vol. 10. No. 3. *Duke Law*

*Journal,* 400

Baltes, A, K, 'The Prosecutor v Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia' (1997) Vol. 49. *Maine Law Review,* 559.

Bantekas, I, 'Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self Contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction against the Background of the 2003 Iraq War' (2005) Vol. 10. No. 2. *Journal of Conflict and Security Law,* 21-42.

Barria, L, A, and Roper, S,D, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) Vol. 9. No. 3. *The International Journal of Human Rights,* 349-368.

Bartels, R, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' (2009) Vol. 91. No. 873. *International Review of the Red Cross,* 49.

Bassiouni, M, C, 'International Crimes: Jus Cogens and Obligatio Erga Omnes (1996) Vol. 58 No. 4 *Law and Contemporary Problems,* 63-74.

……..'A Functional Approach to "General Principles of International Law' (1989) 11 *Michigan Journal of International Law,* 768.

**……..**'Crimes Against Humanity: The Case for a Specialized Convention' (2010) Vol. 9, Issue 4, *Washington University Global Studies Law Review,* 582.

……'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1996) 10 *Harvard Human Rights Journal,* 11.

……'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)' (1994) Vo. 88, No. 4. *The American Journal of International Law,* 786-787.

Baytemir, B, 'The International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law' (2010) Vol. 3. *USAK Yearbook of International Politics and Law,* 80.

Birdsall, A, 'The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order?' (2006) Issue 8. *Peace Conflict & Development,* 11.

Boister, N, 'Transnational Criminal Law?' (2003) Vol. 14. No. 5. *European Journal of International Law,* 967-77.

Bradley, C, A, and Gulati, M, 'Withdrawing from International Custom' (2010) Vol. 120. No. 2. *The Yale Law Journal,* 211.

Bowden, B, 'What Price Peace? On the Dialectical Relationship between Civilization and War' (2011) Vol 16. No. 1 *International Journal of Peace Studies*, 9.

Bunting, A, 'Forced Marriage' in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes' (2012) Vol. 1. No. 1. *Canadian Journal of Human Rights*, 166.

Burke-White, W, W, 'International Criminal Court Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) Vol. 18. No. 3. *Leiden Journal of International Law*, 568.

……'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) Vol. 49. No. 1. *Harvard Journal of International Law*, 107.

Byers, M, 'Conceptualizing the Relationship between Jus cogens and Erga Omnes Rules' (1977) 66 *Nordic Journal of International law* 213.

Carter, L, E, 'The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis in Idem'* (2010) Vol. 8. Issue 1. *Santa Clara Journal of International Law*, 169.

Cassese (2001), 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) Vol. 12. No. 5. *European Journal of International Law*, 994.

Chalk, P, (1999), 'The Evolving Dynamic of Terrorism in the 1990s' (1999) Vol. 53. No. 2. *Australian Journal of International Affairs*, 151.

Chinwokwu, E, C, 'Terrorism and the Dilemmas of Combating the Menace in Nigeria' (2013) Vol. 3. No. 4. *International Journal of Humanities and Social Science*, 269.

Coban-Ozturk, E, 'Completing the Tribunal: ICTR's Contributions and Deficiencies' (2014) Vol. 10. No. 4. *European Scientific Journal*, 43.

Cohan, S, 'A Brief History of the Armenian Genocide' (2005) Vol 69 No. 6 *Social Education* 333-337.

Connell, S, 'To Be Or Not To Be: Is Boko Haram a Foreign Terrorist Organization?' (2012) Vol. 3. Issue 3. *Global Security Studies*, 87.

Couturier, D, 'The Rape of Men: Eschewing Myths of Sexual Violence in War' (2012) Vol .6, No. 2 *On Politics*, 1.

Criddle, E, J, and Fox-Decent, E, 'A Fiduciary Theory of *Jus cogens*' (2009) Vol. 34 *The Yale Journal of International Law*, 346.

Dakas, D, C, J, 'Impunity, Necessary Evil or Strategic Imperative? The Question of Amnesty for

Perpetrators of Kidnapping (and other Crimes) in Nigeria's Niger Delta Region' (2011) Vol. 7. No. 1. *Nigerian Bar Journal*, 185.

Danner, A, M, and Martinez, J,S, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) *California Law Review*, 75.

Dickinson, L, A, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law*, 295.

Dickson, M, 'Nigeria's Recognition of the Transitional National Council of Libya: Exploration and Critical Assessment' (2013) Vol. 14. No. 1. *British Journal of Arts and Social Sciences,* 69.

Dieng, A, 'Capacity-Building Efforts of the ICTR: A Different Kind of Legacy' (2011) Vol. 9. No. 3. *Northwestern Journal of International Human Rights*, 404.

Doswald-Beck, L, and Vite, S, 'International Humanitarian Law and Human Rights Law' (1993) No. 293 *International Review of the Red Cross*.

Dougherty, M, L, 'A Comparative Analysis of International Tribunals: The Formation of an Iraqi Judiciary to Try Saddam Hussein' (2005) 588 *Bepress Legal Series*, 4.

Dugard, J, 'Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law*, 1003.

Duncan, N, J, and T Hutchinson, T, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) Vol. 17. No. 1 *Deakin Law Review*, 113.

Egor, I, 'The Basis of Security Challenges in Nigeria: Implications for Foreign Investors' (2014) Vol. 2. No. 3. *British Journal of Marketing Studies*, 62.

Ejike, A,'Nigerian-Biafran Civil War: Social and Economic Effects on the Nigerian Igbos' (2010) Vol. 1. No. 1. *Oasis Journal*, 88-89.

Ekpenyong, E, O, 'The Social and Political Roots of Conflict in Nigeria: The Role of the Church' (2011) Vol. 1. No. 2. *American Journal of Social Issues and Humanities*, 120.

Erlinder, P, 'The International Criminal Tribunal for Rwanda: A Model for Justice or Juridically Created 'Victor's Impunity?' (2008) *La Justice International Aujourd'hui* 30-31 Mai 2008 Adif/Aijd, 3.

Evans, G, 'The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All'. (2009) Vol. 20, 7–13 *Irish Studies in International Affairs*, 8.

Ewi, M, and Aning, K, 'Assessing the Role of the African Union in Preventing and Combating

Terrorism in Africa' (2006) Vol. 15. No. 3. *African Security Studies*, 35.

Fatima, N, 'Religious Conflicts in Nigeria and their Impacts on Social Life' (2014) Vol. 2. No. 4. Global *Journal of Arts, Humanities and Social Sciences*, 15.

Fawole, O, A, and M L Bello, M, L, 'The Impact of Ethno-Religious Conflict on Nigerian Federalism' (2011) Vol 6. (10) *International NGO Journal*, 212.

Fenrick, W, J, 'Some International Law Problems Related to Prosecutions of Persons before the International Criminal Tribunal for the Former Yugoslavia' (1995) Vol. 6. *Duke Journal of Comparative and International Law*, 105.

Ferencz, B, B, 'International Criminal Courts: The Legacy of Nuremberg' (1998) Vol. 10. No. 1. *Pace International Law Review*, 207.

……..'The Draft Code of Offences against the Peace and Security of Mankind' (1981) Vo. 75. No. 3 *The American Journal of International Law*, 674.

Finckernauer, J, O, 'Meeting the Challenge of Transnational Crime' (2000) *National Institute of Justice Journal*, 3.

Finucane, B, 'Enforced Disappearance as a Crime under International Law; A Neglected Origin in the Laws of War' (2010) Vol. 35. *The Yale Journal of International Law*, 173.

Fleming, M, C, 'Appellate Review in the International Criminal Trials' (2002) Vol. 37. *Texas International Law Journal*, 112.

Frulli, M, 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) Vol. 11. *European Journal of International Law*, 858.

…….'Are Crimes against Humanity More Serious than War Crimes?' (2001) Vol. 2. No. 2. *European Journal of International Law*, 334.

…….. 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a New Crime against Humanity' (2008) Vol. 16. *Journal of International Criminal Justice*, 1033.

Fujita, F, 'The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons' (1997) No. 316 *International Review of the Red Cross*.

Fong, P, '*Inter Arma Enim Silent Leges*: The Impunity of Japan's Secret Biological Unit' (2000) 6 New Eng. Int'l & Comp. L. Ann, 3.

Gallimore, T, 'The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda' (2008) Vol. 14. No. 2. *New Eng. J. of Int'l & Comp. L*, 240.

Greenwalt, A, K, A, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) Vol. 39. *International Law and Politics*, 584.

Grepp, E, 'The Evolution of Individual Criminal Responsibility under International Law' (1999) No. 835. *International Review of the Red Cross*.

Gong-Gershowitz, J, 'Forced Marriage: A New Crime Against Humanity?' (2009) Vol. 8. No. 1. *Northwestern Journal of International Human Rights*, 53-76.

Graditzky, T, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts' (1998) No. 322 *International Review of the Red Cross.*

…….'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts' (1998) No. 322. *International Review of the Red Cross*.

Graven, J, 'Les Crimes Contre I'Humanite' (1950) 76 *Hague Recueil*, 433.

Hall, B, 'Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal' (2005) Vol. 13. Issue 1/2. *Michigan State Journal of International Law*, 44.

Hana, M, 'Challenging Impunity-The Failure of the International Criminal Tribunal for Rwanda to Prosecute Paul Kagame' (2011) Vol. 37. No. 2. *Brook. J. Int'l L*, 688.

Harrison, J, 'The International Law Commission and the Development of International Investment Law' (2013) Vol. 45 *The George Washington International Law Review*, 417.

Hauschildt, T, 'ICTR: Contribution to Reconciliation or Victor's Justice?' (2014) Issue 2. No. 3. *Global Governance*, 7.

Helen, H, 'The Cambodia Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) Vol. 5. No. 2. *Melbourne Journal of International Law*, 462.

Higonnet, E, R, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) Vol. 23. *Ariz J Int'l & Comp L*, 352.

Hollis, D, B, 'Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) Vol. 23. No. 1. *Berkeley Journal of International Law*, 142.

Holvoet, M, H, and Paul de Hert, 'International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals' (2012) Vol. 17. *Tilburg Law Review*, 235.

Houven, S, M, H, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes

Courts' (2006) Vol. 2. Issue 2. *Utrecht Law Review,* 192.

Howard, J, 'Invoking State Responsibility for Aiding the Commission of International Crimes- Australia, The United States of America and the Question of East Timor' (2001) Vol. 2 No. 1. *Melbourne Journal of International Law,* 1.

Hwang, P, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) Vol. 22, Issue 2, Article 5 *Fordham International Law Journal*, 468.

Ibietan, J, 'The Cost of Boko Haram Activities in Nigeria' (2012) Vol. 2. No.2. *Arabian Journal of Business and Management Review* (OMAN Chapter), 11.

Ikoh, M, U, and E A Ukpong, E, A, 'The Niger Delta Crisis: Taming Violence beyond the Amnesty' (2013) Vol. 3. No. 17. *International Journal of Humanities and Social Science,*
147

Ireju, A, P, *et al*, 'The Mass Media Coverage of the Kidnap of the Chibok School Girls' (2014) Vol. 31. *New Media and Mass Communication,* 73.

Jain, H, 'Conceptualizing Internationalization in Hybrid Criminal Courts' (2008) 12 *Singapore Yearbook of International Law,* 81.

Jalloh, C,C, 'What Makes A Crime Against Humanity a Crime Against Humanity' (2013) Vol. 28. No. 2. *AM. U. Int'L L. Rev*, 392.

Jennings, R, Y, 'What is International Law and How Do We Tell It When We See It?*'* 37, 60 (1981) *Schweitzerisches Jahebuch Fur Internationales Recht* (1981), 59, 61, 70-73, 80-83.

Jessie, S, S, E, 'Forced Pregnancy: Codification in the Rome Statute and Its Prospect as Implicit Genocide' (2006) 4 *NZJPIL,* 312.

Joyner, C, C, 'Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia' (1995) Vol. 6. *Duke Journal of Comparative and International Law,* 87.

Kaufman, Z,D, 'The Nuremberg Tribunal V. The Tokyo Tribunal: Designs, Staffs and Operations' (2010) Vol. 43. No. 3. *The John Marshall Law Review,* 758.

Kawharu, A, 'Arbitral Jurisdiction' (2008) Vol. 23. *New Zealand Universities Law Review,* 239

Kelsey, J, T, G, 'Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare' (2008) Vol. 106. *Michigan Law Review,* 1436.

Kiefer, H, L, 'Just Say No: The Case against Expanding the International Criminal Court's

Jurisdiction to Include Drug Trafficking' (2009) Vol. 13. *Loyola of Los Angeles International and Comparative Law Review*, 165.

Koosed, D, 'The Paradox of Impartiality: A Critical Defence of the International Criminal Tribunal for Rwanda' (2012) Vol. 19. *U. Miami Int'L & Comp. L. Rev*, 258.

……'Transitional Justice for Tojo's Japan: The United State's Role in the Establishment of the International Military Tribunal for the Far East and Other Transitional Justice Mechanisms for Japan After World War II' (2013) Vol. 27. *Emory International Law Review*, 756.

Kritz, B,A and Wilson, J, 'No Transitional Justice without Transition: Darfur - A Case Study' (2011) Vol. 19. Issue 3. *Michigan State Journal of International Law*, 488.

Kuschnik, B, 'Humaneness, Humankind, and Crimes Against Humanity' (2010) Vol. 2. *Goettingen Journal of International Law*, 519.

Lavalle, R, 'International Convention for the Suppression of the Financing of Terrorism' (2000) 60 *ZaoRV*, 492.

Lemkin, R, (2005), 'Axis Rule in occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress' (Washington: Carnegie Endowment for International Peace, Division of International Law, 194), pp. 94-95.

Lippman, M, 'Crimes Against Humanity' (1997) Vol. 17. No. 2 *B. C. Third World L. J.* 172.

Lister, C, 'What's in a Name? Labels and the Statute of the International Criminal Tribunal for the Former Yugoslavia' (2005) Vol. 18. No. 1. *Leiden Journal of International Law*, 81.

Liskofsky, S, 'The Eichmann Case' (1961) *The American Jewish Year Book*, 199-208

Lizardo, O, 'Defining and Theorizing Terrorism: A Global Actor-Centered Approach' (2008) Vol. XIV. No. 2. *Journal of World-Systems Research*, 94.

Lootsteen, Y, M, 'The Concept of Belligerency in International Law' (2000) Vol. 166. *Military Law Review*, 113.

Nessel, L, A, 'Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women that Flee' (2007) Vol. 15. No 1. *Michigan State Journal of International Law*, 104.

Macleod, C, 'Towards a Philosophical Account of Crimes Against Humanity' (2010) Vol. 21. No. 2. *The European Journal of International Law*, 282.

Majzub, D, 'Peace or Justice? Amnesties and the International Criminal Court' (2002) Vol. 3. *Melbourne Journal of International Law*, 247.

Maogoto, J, N, 'Walking an International Law Tightrope: Use of Military Force to Counter Terrorism – Wiling the Ends' (2006) Vol. 31 (2) *Brook. J. Int'l L*, 409.

Magnarella, P, 'Explaining Rwanda's 1994 Genocide' (2002) Vol. 2. No. 1. *Human Rights and Human Welfare*, 25-34.

Maria, T, 'Fight Against Terrorism in the Light of Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents' (2005) Vol. 2. No. 3. *Miskolc Journal of International Law*, 54.

Mazower, M, 'The Strange Triumph of Human Rights, 1033-1950' (2004) 47 (2), *The Historical Journal*, 396-397.

Mazzochi, S, 'The Age of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and for All' (2011) Vol. 32. *Northern Illinois University Law Review*, 75-102.

McAuliffe, P, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child became an Orphan' (2011) *Journal of International Law and International Relations*, 1-2.

McDonald, G, K, 'Problems, Obstacles and Achievements of the ICTY' (2004) Vol. 2. *Journal of International Criminal Justice*, 559.

McDonald, A, 'Sierra Leone's Special Shoestring Court' (2002) Vol. 84. No. 845. *International Review of the Red Cross*, 122.

McIntyre, G, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2011) Vol. 3. *Goettingen Journal of International Law*, 926.

McNair, L, 'The General Principles of Law Recognized by Civilized Nations' (1957) Vol. 33 *British Yearbook of International* Law, 1.

Memeti, A, and Nuhija, B, 'The Concept of Erga Omnes Obligations in International Law' (2013) No. 14 *New Balkan Politics: Journal of Politics.*

Merari, A, 'Terrorism as a Strategy of Insurgency' (1993) Vol. 5. No. 4. *Terrorism and Political Violence*, 213-251.

Meron, T, 'International Criminalization of Atrocities' (1995) 89 American Journal of International Law, 554.

…….'Revival of Customary Humanitarian Law' (2005) Vol. 99. No. 4. *American Journal of International Law*, 817.

……..'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience'

(2000) Vol. 94. No. 1. *The American Journal of International Law*, 79.

……'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law*, 567.

Mettraux, G, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) Vol. 43 *Harv. Int'l L.J*, 261.

Milovanovic, D, 'Legalistic Definition of Crime and an Alternative View' (2006) *Annals Fac L. Belgrade Int'l Ed*., 79-80.

Milanovic, M, 'Was Nuremberg a Violation of the Principle of Legality?' (2010) *EJIL: Talk. Blog of the European Journal of International Law*.

**……** 'An Odd-Couple – Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon' (2007) Vol. 5. No. 5. *Journal of International Criminal Justice*, 1139-1152.

Muhammad, P, M, 'The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law' (2003) Vol. 19 No. 4, *American University International Law Review*, 883-947.

Nagan, W, P, 'International Criminal Law and the Ad-hoc Tribunal for Former Yugoslavia' (1995) Vol. 6. No. 1. *Duke Journal of Comparative and International Law*, 128.

Naqvi, Y, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) Vol. 85. *International Review of the Red Cross*, 587.

Neji, O, N, 'Domestic Terrorism: Rethinking the Role of Islam in the Emerging Boko Haram Phenomenon in Nigeria' (2015) Vol. 4 (3) *Scholarly Journal of Scientific Research and Essay*, 51.

Nouwen, S, M, H, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts' (2006) Vol. 2. No. 2. *Utrecht Law Review*, 190.

Nwaomah, S, M, 'Religious Crises in Nigeria: Manifestation, Effect and the Way Forward' (2011) Vol. 3. No. 2. *Journal of Sociology, Psychology and Anthropology in Practice*, 96.

Obaro, O, A, 'Making Sense of Boko Haram and Suicide Missions in Nigeria' (2013) Vol. 9. No. 26. *European Scientific Journal*, 36.

O'Donnell, D, 'International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces' (2006) Vol. 88. No. 864. *International Review of the Red Cross*, 863.

Ohlin, D, 'Applying the Death Penalty to Crimes of Genocide' (2005) Vol. 99. *The American Journal of International Law*, 751.

Oji, E, A, 'Application of Customary International Law in Nigerian Courts' (2010) *NIALS Journal of Law and Development*, 151

…….. 'The Problem with International Humanitarian Law: Distinguishing Targets in Armed Conflict' (2013) Vol. 4. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* 1-11.

…….. 'Accountability For International Crimes Through Alternatives To Prosecution' (2015) Vol. 6. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* 50-56.

…… 'Duty of State to Enforce International Humanitarian Law Vis-à-vis Duty to Protect Interest of Its Nationals' (2015) Vol. 6. No. 6. *Journal of Emerging Trends in Educational Research and Policy Studies*, 452-459.

……. 'Defences in International Criminal Law: Acceptable and Non-Acceptable Defences' (2016) Vol. 2. No. 1. *Ideal Journal of Arts and Humanities*, 8-15.

Ojukwu-Ogba, N, 'The Implication of the Jurisdiction of the International Criminal Court for African States' (2011) *NIALS journal of Law and Development*, 113.

Okada, E, The Australian Trials of Class B and C Japanese War Crime Suspects, 1945-51' (2009) Vol. 16 *Australian International Law Journal,* 49.

Okpaga A, *et al*, 'Activities of Boko Haram and Insecurity Question in Nigeria' (2012) Vol. 1. No. 9. *Arabian Journal of Business and Management Review (OMAN Chapter),* 82.

Okoli, A, C, and Iortyer, P, 'Terrorism and Humanitarian Crises in Nigeria: Insights from Boko Haram Insurgency' (2014) Vol. XIV. Issue I. *Global Journal of Human Social Science,* 40.

Olowoselu *et al*, A, 'Historical Analysis of Boko Haram Insurgency on Educational Management in Northern Nigeria' (2014) Vol 2. No. 10. *Global Journal of Arts Humanities and Social Sciences*, 79.

Osaretin, I and Akov, E, 'Ethno-Religious Conflict and Peace Building in Nigeria: The Case of Jos, Plateau State' (2013) Vol. 2. No. 1. *Academic Journal of Interdisciplinary Studies*, 2, 352-355.

Osita-Njoku, A, and Chikere, P, 'Consequences of Boko Haram Terrorism on Women in Northern Nigeria' (2015) Vol. 1. Issue 3. *Applied Research Journal*, 102.

Oyebode, A, 'Legal Responses to the Boko Haram Challenge: An Assessment of Nigeria's Terrorism (Prevention) Act, 2011' (2012) *Forum on Public Policy: A Journal of the Oxford Roundtable Forum.*

Paulus, A, L, 'Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court' (2003) Vol. 14. No. 4. *European Journal of International Law,* 851.

Penna, L, R, 'The International Criminal Court' (1997) Vol. 1. *Singapore Journal of International & Comparative Law*, 233.

Peter, , M, 'The International Criminal Tribunal for Rwanda: Bringing Killers to Book' (1997) No. 321. *International Review of the Red Cross*.

Plachta, M, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle of *Aut Dedere Aut Judicare'* (2001) Vol. 12. No. 1. *European Journal of International Law*, 135.

Peterside, B, Z, 'A Threat to National Security: The Case of Boko Haram in Nigeria' (2014) Vol. 3. No. 4. *Academic Journal of Interdisciplinary Studies,* 286.

Percival, V, and Homer-Dixon, T, 'Environmental Scarcity and Violent Conflict: The Case of Rwanda' 1996, Vol. 5. No. 3. *Journal of Environment and Development,* 275.

Petty, K, A, 'Humanity and National Security: The Law of Mass Atrocity Response Operations' (2013) Vol. 34 No. 4 *Michigan Journal of International Law,* 746.

Proulx, V, J, 'Rethinking the Jurisdiction of the International Criminal Court in Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' (2004) Vol. 19. *AM. U. Int'L L. Rev*, 1056.

Puchooa, P, 'Defining Terrorism at the Special Tribunal for Lebanon' (2011) Vol. 2. Issue 3. *Journal of Terrorism Research,* 34.

Kalyanaraman, S, 'Conceptualizations of Guerilla Warfare' (2003) Vol. 27. No. 2. *Strategic Analysis,* 172.
173.

Kirsch, S, and Oehmichen, A, 'Judges Gone Astray- The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon' (2011) Vol. 1. *Durham Law Review Online,* 7.

Kovac, M, 'International Criminalization of Terrorism' Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 14, broj 1/2007, str. 267 at 280-281.

Ranjan, P, and Raju, D, 'Bilateral Investment Treaties and the Indian Judiciary' (2014) .Vol. 46. *The Geo. Wash. Int'L L. Rev*, 819.

Reed, B, 'A Social Network Approach to Understanding Insurgency' (2007) *Parameters,* 30.

Rika de Wet (2004), 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law' (2004) Vol. 15. No. 1 *European Journal of International Law*, 97-98.

Ristroph, A, 'Criminal Law in the Shadow of Violence' (2011) Vol. 62. No. 3. *Alabama Law Review*, 582-584.

Robinson, D, 'Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) Vol. 14. No. 3. *European Journal of International Law*, 483.

……'Defining Crimes Against Humanity at the Rome Conference' (1999) Vol 93. No. 1. *American Journal of International Law*, 43-57.

Rouillard, L, F, 'Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum' (2005) Vol. 21. No. 1 *American University International Law* Review, 17.

Rutledge, K, 'Stumbling Toward Justice: Crime and Punishment within International Criminal Law' (2004) 34 *ELR*, 10615.

Ruvalcaba, J, 'Understanding Iraq's Insurgency' (2004) *The Fletcher School Online Journal for Issues related to Southwest Asia and Islamic Civilization*, 1

Sadat, L, N, 'Crimes against Humanity in the Modern Age' (2013) Vol. 107. *The American Journal of International Law*, 334 – 377.

Sakamoto, R, 'The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: A Legal and Feminist Approach to the 'Comfort Women's Issue' (2001) Vol. 3 *New Zealand Journal of Asian Studies*, 51.

Sarooshi, D, 'The Legal Framework Governing United Nations Subsidiary Organs' (1997) Vol. 67 No. 1. *British Yearbook of International Law*, 428.

Sassoli, M, 'State Responsibility for Violations of International Humanitarian Law' (2002) Vol. 84. No. 846 *International Review of the Red Cross*, 420.

Schaack, B, V, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (1999) 37 *Colum. J. Transnat'L L*, p 793.

Schabas, W,A, 'Genocide Trials and Gacaca Courts' (2005) Vol. 3. Journal of International Criminal Justice, 2.

…… 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) Vol. 15. No. 4. *European Journal of International Law*, 702.

…….'State Policy As An Element of International Crimes' (2008) Vol. 98 *Journal of Criminal Law and Criminology,* 973.

Scheffer, D, 'Genocide and Atrocity Crimes' (2006) Vol. 1. No. 3. *Genocide Studies and Prevention: An International Journal*, 238-239.

Scott, R, S, 'The Basics of Counterinsurgency' (2007) Vol. 14. *Small Wars Journal,* 3.

Seul, J, R, 'Ours Is the Way of God: Religion, Identity, and Inter-group Conflict' (1999) Vol. 36. No. 5. *Journal of Peace Research,* 553.

Shattuck, J, 'The Legacy of Nuremberg: Confronting Genocide and Terrorism Through the Rule of Law' (2006) Vol. 10. No. 1. *Gonzaga Journal of International Law,* 7.

Shinoda, H, 'Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals' (2002) Vol. 7. *International Journal of Peace Studies,* 41-58.

Shraga, D, and Zacklin, R, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) Vol. 5. *European Journal of International Law,* 360.

Shuster, E, 'Fifty Years Later: The Significance of the Nuremberg Code' (1997) Vol. 337 *N. Engl J Med.*

Slye, R, C, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights' (2004), Vol. 22. No. 1. *Wisconsin International Law Journal,* 102.

……..'Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission' (1999) Vol. 20. *Michigan Journal of International Law,* p. 275.

Spazk, A, 'Sexual Slavery before Ad Hoc International Criminal Tribunals and the International Criminal Court' (2013) Vol 9, No. 6, *European Scientific Journal,* 320.

Sperotto, F, 'Counter-Insurgency, Human Rights, and the Law of Armed Conflict' (2009) Vol. 17. Issue 1. *Human Rights Brief,* 19.

Spencer, A, 'Questioning the Concept of 'New Terrorism' (2006) Issue 8. *Peace Conflict and Development,* 2.

Ssenyonjo, M, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court' (2005) Vol. 10. No. 3. *Journal of Conflict and Security Law,* 419.

Stahn, C, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative

Guidelines for the International Criminal Court' (2005). Vol. 3. No. 3. *Journal of International Criminal Justice*, 695.

Staniland, P, 'Organizing Insurgency: Networks, Resources and Rebellion in South Asia' (2012) Vol. 37. No. 1. *International Security*, 145.

Stier, E, 'The Expense of Expansion: Judicial Innovation at the Special Tribunal for Lebanon' (2014) Vol. 36. Issue 3. *Boston College International and Comparative Law Review*, 116.

Stover, E, 'In the Shadow of Nuremberg: Pursuing War Criminals in the Former Yugoslavia and Rwanda' (1995) Vol. 2. No. 3. *Medicine and Global Survival*, 140-141

Swart, M, 'Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and Adventurous Interpretation' (2010) 70 *ZaoRV*, 462.

…… 'Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY' (2011) Vol. 3. *Goettingen Journal of International Law*, 997

Sokol, D, S, 'Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia' (2011) Vol. 10. Issue 1. *Washington University Global Studies Law Review*, 170.

Southwick, K, G, 'Srebrenica as Genocide? The Krstic Decision and the Language of the Unspeakable' (2005) Vol. 8. *Yale Human Rights and Development Law Journal*, 189.

Taiwo, L, O, 'International Criminal Court: The United States and the Fight Against Impunity' (2007 – 2009) Vols. 2 & 3, *Journal of Private and Comparative Law*, 33-56.

Tanchum, M, 'Al-Qai'da's West African, Advance: Nigeria's Boko Haram, Mali's Touareg, and the Spread of Salafi Jihadism' (2012) VI: 2. *Israel Journal of Foreign Affairs*, 76.

Thomson, V, 'Boko Haram and Islamic Fundamentalism in Nigeria' (2012) Vol. 3. Issue 3. *Global Security Studies*, 46.

Timmermann, W, K, 'The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law towards Criminalization of Hate Propaganda?' (2005) Vol. 18. No. 2. *Leiden Journal of International Law*, 258.

Trahan, J, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of Overzealous" National Court Prosecutions' (2012) Vol. 435 *Cornell International Law Journal*, 571.

Travis, H, 'Did the Armenian Genocide Inspire Hitler? Turkey, Past and Future' (2013) *Middle East Quarterly Review*, 27-35.

Tomuschat, 'The Legacy of Nuremberg,' (2006) Vol. 4. No. 4. *Journal of International Criminal Justice*.

Uchehara, K, E, 'Peace Talks Initiatives between the Boko Haram and Nigerian Government' (2014) Vol. 5. No. 6 (1) *International Journal of Business and Social Science*, 130.

Ushe, U, M, 'Religious Conflicts and Education in Nigeria: Implications for National Security' (2012) Vol. 1 (2) *International Journal of Educational Research and Development*, 011.

Vitkauskaitė-Meurice, D, and J Žilinskas, J, 'The Concept of Enforced Disappearances in International Law' (2010) 2 (120) *Jurisprudence*,197-198.

Waldorf, L, 'A Mere Pretence: Complementarity, Sham Trials and Victor's Justice at the Rwanda Tribunal' Vol. 33. *Fordham International Law Journal*, 1221-1222.

Wanhong, Z, 'From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (On the Sixtieth Anniversary of the Nuremberg Trials)' (2006) Vol. 27. No. 4. *Cardozo Law Review*, 1674

Weiner, P, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) Vol. 54. Issue 3, *Boston College Law Review*, 1210.

Williams, K, 'The Other Side of COIN: Counterinsurgency and Community Policing' (2011) Vol. 3. No. 1. *Interface: A Journal For and About Social Movements,* 8.

Wosu, E, and Agwanwo, D, E, 'Boko Haram Insurgency and National Security Challenges in Nigeria: An Analysis of a Failed State' (2014) Vol. 17. No. 7. *Global Journal of Human-Social Science*, 12.

Yanagisawa, N, *et al*, 'Sarin Experiences in Japan: Acute Toxicity and Long-term Effects' (2006) 249 *Journal of the Neurological Sciences*, 76.

Young Sr. A, M, and Gray, D, H, 'Insurgency, Guerilla Warfare and Terrorism: Conflict and its Application for the Future' (2011) Vol. 2. Issue 4. *Global Security Studies*, 66.

Zawati, H, M, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity' (2007) Vol. 17. No. 1. *Torture*, 32.

Zenn, J, and Pearson, E, 'Women, Gender and the Evolving Tactics of Boko Haram' (2014) Vol. 5, No. 1. *Journal of Terrorism Research.*

**Research reports, Dissertations, Policy briefs, etc,**

Adesoji, A., 'The Boko Haram Uprising and Islamic Revivalism in Nigeria' (2010) Vol. 5. No. 2. Africa Spectrum, 96.

Ainley, K., 'The International Criminal Court on Trial' (2009), paper presented at the BISA Annual Conference, Leicester, 14th -16th December, p.2.

Alfaro, R.J., 'Report on the Question of International Criminal Jurisdiction' (1950) Document: A/CN.4/15 and Corr.1, p. 2.

Amnesty International, 'Our Job is to Shoot, Slaughter and Kill: Boko Haram's Reign of Terror in North-East Nigeria' London, April 2015, p. 25.

Amnesty International, 'International Criminal Court. Timor-Leste: Justice in the Shadow' Amnesty International Publications, International Secretariat, United Kingdom, (2010) p. 27.

Andreu-Guzman, F., 'Criminal Justice and Forced Displacement: International and National Perspectives' (2013) Research Brief, Brookings-LSE Project on Internal Displacement, p. 2.

Aydin, Y., 'The Distinction between Crimes against Humanity and Genocide Focusing Most Particularly On the Crime of Persecution.' Ministry of Justice, Turkey.

Bass G *et al*, 'Options for U.S. Policy on Terrorism' Rand Corporation, Santa Monica, California, 1981.

Bellamy, A.J., 'Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Protect' (2011) *Policy Analysis Brief*, The Stanley Foundation, February 2011, p.1.

Bodansky, Y., 'The Boko Haram and Nigerian Jihadism' ISPSW Strategy Series: Focus on Defence and International Security, Issue No. 276, 2014, p. 11.

Bodley, A., and S K Tefera (2013), 'The Extraordinary Role of The Extraordinary African Chambers Convened to Try Former Chadian Leader Hissene Habre' (2013), Issue 3. *Africa Law Today*, p.3.

Briggs, E., 'The Munich Massacre' A Thesis submitted in partial fulfillment of the requirements of the degree, BA (Hons) in History, University of Sydney, October, 2011, p. 5.

British Army Field Manual, Vol. 1, Part 10, Countering Insurgency, Army Code 71876, October 2009, p. 5.

Brown, K., 'The King is Dead, Long Live the Balkans! Watching the Marseilles Murders of 1934' Delivered at the Sixth Annual World Convention of the Association for the Study of Nationalities, Columbia University, New York, April 5th -7th April, 2001.

Cakmak, C., 'Historical Background: Evolution of the International Criminal Law, Individual Criminal Accountability and the Idea of a Permanent International Court' (2006) Working Paper No. 39, Human Rights and Human Welfare.

Campbell, J., 'Boko Haram: Origins, Challenges and Responses' Policy Brief, NOREF, Norwegian Peace building Resource Centre, 2014, p. 2.

Central Bank of Nigeria, 'Anti-Money Laundering/Combating Financing of Terrorism (AML/CFT) Compliance Manual for Banks and other Financial Institutions in Nigeria' BSD/DIR/GEN/CIR/03/027 October, 2009, p. 2.

Cinder, L., 'Rape as a War Crime and Crime Against Humanity: The Effect of Rape in Bosnia-Herzegovina and Rwanda on International Law' A Paper presented at the Alabama Political Science Association Conference held at Auburn University, 30th -31 March, 2012, p. 2.

Clere, A., 'An Examination of the Special Tribunal for Lebanon's Explosive Declaration of 'Terrorism' at Customary International Law' A Dissertation Completed in Partial Fulfillment of the Requirements of the Degree of Bachelor of Laws, University of Otago, October 2012, p. 1.

Cluskey, P., 'International Criminal Court elects First Woman President', *Irish Times*, April 6, 2015.

Cochrane, P., 'Charities and Terrorism Financing Compliance – Approaches and Challenges in 2014,' *Thomson Reuters*, August, 2014, p. 5.

Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Session, Distr. GENERAL E/CN.4/Sub.2/1997/23 27th June 1997.

'Confronting Crimes Against Humanity: A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors' (Washington, DC: United States Institute of Peace, 2008) p.5.

Cook, D, 'Boko Haram: A New Islamic State in Nigeria', James Baker III Institute for Public Policy, Rice University, 11th December, 2014, p. 3.

Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court Rome, Italy, 15th June – 17th July 1998, Document:- A/CONF.183/2, p. 21

Diaz-Paniagua, C.F., 'Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005' City University of New York, 2008, p. 47

Drew, D.M., 'Insurgency and Counterinsurgency: American Military Dilemmas and

Doctrinal Proposals' Report No. AU-ARI-CP-88-1, Air University Press, Maxwell Air Force Base, Alabama, 1998, p. 10

Du Plessis M et al, (2013), 'Africa and the International Criminal Court' (2013) International Law 2013/01, Chatham House, London, p. 5.

Einarsdottir, K.O., 'Comparing the Rules of Evidence Applicable Before the ICTY, ICTR and the ICC' (2010) Sigillum Universitatis Islandiae, Haskoli Islands, p. 11.

Elsea, J., 'U.S Policy Regarding the International Criminal Court' (2002) Report for Congress, Order Code RL31495.

Eric A. Posner, *'Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law'* (2008) John M. Olin Law and Economics Working Paper 2nd Series, Public Law and Legal Theory Working Paper No. 224, The Law School of the University of Chicago, p. 2.

Epiphany, A, 'The Concept of Amnesty and Its Place in Human Rights Discourse, Paper presented at the Nigerian Bar Association, 53rd Annual Conference. Tinapa, Calabar, Nigeria. 27th August 2013, p. 2.

Evans, G., 'Responding to Mass Atrocity Crimes: The Responsibility to Protect After Libya', A Paper delivered at the University of York El Hassan bin Talal Annual Lecture on 15th November, 2011, pp.3-4.

Fearon, J.D. and D D Laitin, (2001) 'Ethnicity, Insurgency and Civil War' A Paper presented at the Annual Meetings of the American Political Science Association, San Francisco, CA, 30th August to 2nd September 2001, p. 9.

Futamura, M., (2005), 'Revisiting the `Nuremberg Legacy': Societal Transformation and the Strategic Success of International War Crimes Tribunals - Lessons from the Tokyo Trial and Japanese Experience' Thesis submitted for the degree of PhD (War Studies), King's College London, autumn, 2005, p.73.

Gidley, R., 'The Extraordinary Chambers in the Courts of Cambodia and the Responsibility to Protect' ," Working Paper No. 1, Responsibility to Protect in Southeast Asia Program, Asia-Pacific Centre for Responsibility to Protect, Australia, 25th August 2010, p. 5.

Gordon, J., 'The Nanking Massacre: Analysis of Japanese and Chinese Interpretation and Remembrance of Nanking 1940s-The Present' (2014) The University of Wisconsin-Eau Claire, p. 5.

Grossman, M., 'American Foreign Policy and the International Criminal Court' Remarks to the Centre for Strategic and International Studies, Washington, DC. May 6, 2002.

Human Rights Manual: Guidelines for Implementing a Human Rights Based Approach in ADC (2010), prepared by Austrian Development Agency, and Ludwig Boltzmann Institute of Human Rights, Vienna, pp. 6-8.

ICRC, "*What is International Humanitarian Law?*" (2004) International Committee of the Red Cross Advisory Service on International Humanitarian Law.

ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' Vol. 89, No. 867, Reports and Documents prepared for the 30th International Conference, Geneva, Switzerland, November 26-30, 2007, p. 732.

International Crisis Group, 'Northern Nigeria: Background to Conflict' Africa Report No. 168, December 20, 2010, p. ii.

Jackson, K.N., 'Essential Elements Required by an Insurgent Force', A Thesis presented in partial fulfillment of the requirements for the degree of Master of Arts in Defence and Strategic Studies, Massey University, Manawatu, New Zealand, (2011) p. 5

Jaques M.S. *et al*, 'Special Court for Sierra Leone-Forced Marriage as an Other Inhumane Act' (2010) Humanitarian Law Perspectives, Australian Red Cross, p. 5

Jenkins, B.M., 'Diplomats on the Front Line' The Rand Paper Series, Paper presented at the Conference on International Terrorism: The Protection of Diplomatic Premises and Personnel, Bellagio, Italy, 8th -12th March 1982.

……, Embassies under Siege: A Review of 48 Embassy Takeovers, 1971-1980 (Santa Monica: The Rand Corporation, 1981) p. 4.

Judge H.E., Hans-Peter Kaul, 'The International Criminal Court-Current Challenges and Perspectives' Lecture delivered at the Salzburg Law School on International Criminal Law, Salzburg, Austria, 8th August 2011, p. 9.

Kendall, S. and M Staggs, 'From Mandate to Legacy: The Special Court for Sierra Leone as a Model for Hybrid Justice' (2005) Interim Report on the Special Court for Sierra Leone, War Crimes Studies Centre, University of California, Berkeley, p. 2.

Knorr, M., 'The International Crime of Genocide: Obligations jus Cogens and Erga Omnes, and Their Impact on Universal Jurisdiction', 36. <http://www.projects.essex.ac.uk/ehrr/V7N2/Knorr.pdf> accessed on 3 September 2015.

Kroessin, M.R., (2007), 'Islamic Charities and the War on Terror: Dispelling the Myths' *Humanitarian Exchange Magazine*, Issue 38, June 2007.

Ladan, M.T., 'Ethno-Religious Difference, Recurrent Violence and Peace Building in Nigeria: Focus on Bauchi, Plateau and Kaduna States' Keynote Paper presented at a public lecture on 'Difference, Conflict and Peace Building Through Law', Organized by the Edinburgh Centre for Constitutional Law, University of Edinburgh School of Law, in

association with Centre for Population and Development, Kaduna, Arewa House, Kaduna, 22nd November, 2012.

……., 'International Legal and Administrative Regimes for Combating Money Laundering and Terrorist Financing' A Paper presented at a 2-day Workshop on Money Laundering Laws and Regulations, organized by Lintol Resources Base Ltd, Lagos. 1st - 2nd March, 2010, p. 14.

Larry, M (2010), 'A Note on State Policy and Crimes Against Humanity', (2010) Oxford Transitional Justice Research Working Paper Series, 10th March, p. 1.

Lilly, D.D., 'Strategic Framing of Stability Operations' A Strategic Research Project submitted to the U.S. Army War College in partial fulfillment of the requirements of the Master of Strategic Studies Degree, March 20, 2009, p. 9.

Lye, I. and Roszkowska, M, 'Insurgency, Instability, Intervention: A Snapshot of Mali and the Sahel Region Threat Landscape' Thomson Reuters, ACCELUS, 2013, p. 5.

Marc-Antoine Perouse de Montclos, 'Nigeria's Interminable Insurgency? Addressing the Boko Haram Crisis' Africa Program, Chatham House, The Royal Institute of International Affairs, 2014, p. 7.

Mason, R.G. Jr, 'Issue: Elements of Crimes Against Humanity,' Memorandum for the Office of the Prosecutor Extraordinary Chambers in the Courts of Cambodia' (2010) Case Western Reserve University School of Law, Spring Semester.

Mijah, S.E., 'Ethics of Violence in Nigeria' Thesis in the Department of Religious Studies, Faculty of Arts, submitted to the School of Postgraduate Studies, University of Jos, for the award of the Doctor of Philosophy, 2005, pp. 80-81.

Muftau, R., 'Crimes against Humanity in International Law', Ph D Dissertation submitted to the Post-Graduate School, Ahmadu Bello University, Zaria, in partial fulfillment of the requirements for the award of the Degree of Doctor of Philosophy (PhD) of Ahmadu Bello University, Zaria 2006.

Murphy, R., 'Many Criticisms of International Criminal Court have Validity' The Irish Times, June 6, 2013.

Ndulo, M., 'Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity', Presentation at the Informal Interactive Dialogue of the UN General Assembly 'Early Warning, Assessment, and the Responsibility to Protect' UN Headquarters, New York, 2010, p. 1.

Newton, M.A. and M P Scharf, 'Terrorism and Crimes Against Humanity', Vanderbilt University Law School Public Law and Legal Theory Working Paper No. 11-49, p. 275.

Niksch, L., 'Japanese Military's Comfort Women System' (2007) Congressional Research Service Memorandum, 3rd April, p. 2.

Obasanjo, O., 'Opening Remarks at the African Leadership Forum Conference at Windhoek, Namibia, on the Challenges of Post-Apartheid South Africa', 8th-10th September, 1991.

Olamide, A.O., 'Appraisal of International Crimes and the Operations of the International Criminal Court' LL.B Long Essay Submitted to the Faculty of Law, University of Ilorin, Nigeria, 2011, p. 42.

Onuoha, F.C. and T A George, 'Boko Haram's Use of Female Suicide Bombing in Nigeria' Al Jazeera Centre for Studies, March 17, 2015, p. 2.

Paulussen, 'Impunity for International Terrorists? Key Legal Questions and Practical Considerations' International Centre for Counter-Terrorism, Hague, Research Paper, April 2012, p. 9.

Perriello, T. and M Wierda 'The Special Court for Sierra Leone Under Scrutiny' Prosecutions Case Studies, (2006) International Centre for Transitional Justice, p. 15.

Peters, R., 'The Reintroduction of Islamic Criminal Law in Northern Nigeria' A Study Conducted on Behalf of the European Commission, Lagos, 2001, pp. 3-4.

Pesic, V., 'Serbian Nationalism and the Origins of the Yugoslav Crisis' (1996) *Peaceworks* No. 8. United States Institute of Peace.

'Results of the supplement to the Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, on Transnational Crime (Interim report by the Secretariat)', United Nations, 4 April 1995.

Rose, P.I., 'Disciples of Religious Terrorism Share One Faith' *Christian Science Monitor*, August 28, 2003.

Roth J *et al*, (2004) 'Monograph on Terrorist Financing: Staff Report to the Commission on Terrorist Attacks upon the United States' 2004, p. 52.

Rutledge, K.D., 'Crime and Punishment within International Criminal Law' (2004) Environmental Law Reporter, p. 10620.

Sadat, L.N., 'The Legacy of the International Criminal Tribunal for Rwanda' (2012) Occasional Papers, Whitney R. Harris World Law Institute, Washington University in St. Louis, p. 10.

Schreuer, C., 'Sources of International Law: Scope and Application', Emirates Lecture

Series 28, published by the Emirates Centre for Strategic Studies and Research, p. 2. http://www.univie.ac.at/int law / .../59_ sources.pd... accessed on 3 September 2015.

Schulz, P., 'Outreach and the International Criminal Tribunal for Rwanda: Assessing the Impact of Outreach Activities by the International Criminal Tribunal for Rwanda (ICTR)' (2014) Holocaust and Genocide Studies, Working Papers Series 2, The Hugo Valentin Centre, Uppsala, p. 9.

Sellers, P.V.,'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation', (2007) Women's Human Rights and Gender Unit (WRGU), p 13.

Singh, R., 'Raid on Entebbe' (2011) Scholar Warrior, 144.

'The Special Tribunal for Lebanon and the Quest for Truth, Justice and Stability' International Law Middle East and North Africa Programs: Meeting Report, Chatham House, London, 2010, p. 4.

Tommy, 'Lessons from the Special Court for Sierra Leone in the Fight against Impunity' A Paper Presented at the Regional Forum on International and Transitional Justice, organized by Avocats Sans Frontieres-Uganda Mission and the Uganda Coalition of the International Criminal Court, on 31st July 2012, Imperial Botanical Beach Hotel, Entebbe.

United Nations Economic and Social Council. Freedom of Movement, Human Rights and Population Transfer, Final Report of the Special Rapporteur, Mr. Al-Khasawneh, E/CN.4/Sub.2/1997/23, 27th June 1997.

U. S. Department of State, 'U.S Government Counterinsurgency Guide' Washington, DC. U. S. Department of State, Bureau of Political-Military Affairs, January 2009.

U.S. Government Counterinsurgency Guide, January 2009. United States Government Interagency Counterinsurgency Initiative, p. 6.

U. S. House of Representatives Committee on Homeland Security, 'Boko Haram: Growing Threat to the U.S Homeland' 13th September, 2013, p. 10.

Vareikis, E., 'Enforced Population Transfer as a Human Rights Violation' (2011) Committee on Legal Affairs and Human Rights, Parliamentary Assembly, AS/Jur (2011) 49, p. 5.

Vianney-Liaud, M., 'Controversy on the Characterization of the Cambodian Genocide at the Extraordinary Chambers in the Courts of Cambodia' (2014) International Crimes Database, Brief 8, October, p. 2

Walker, A., 'W hat is Boko Haram?' Special Report 308, United States Institute of Peace, Washington DC, (2012) p. 1.

Weber, M., 'Extermination' Camp Propaganda Myth' in G Ernst (ed), *Dissecting the Holocaust: The Growing Critique of Truth and Memory*, (Alabama: Theses and Dissertation Press, 2000) p. 286.

Werle, G. and J Bung, 'Summary (Crimes Against Humanity) International Criminal Justice' (2010) Sommersemester, Humboldt Universitat zu Berlin, p. 2.

Women2000, 'Sexual Violence and Armed Conflict: United Nations Response' (1998) United Nations Division for the Advancement of Women Department of Economic and Social Affairs, April.

Year book of the International Law Commission, 1996, Vol. II (Part Two), para. 46.

Zenn, J., 'Boko Haram and the Kidnapping of the Chibok School Girls' Combating Terrorism Centre, West Point, USA, May 29, 2014.

Zenovic, P., 'Human Rights Enforcement Via Peremptory Norms- A Challenge to State Sovereignty', Riga Graduate School of Law (RGSL) Research Papers, No. 6, (2012) p. 15.

**Internet (Electronic materials)**

Adetiloye, T, 'The Root Cause of Boko Haram and other Insurgent, Groups in Nigeria', *Sahara Reporters*, April 21, 2014. < http://www.saharareporters.com/2014/04/21/root-cause-boko-haram-and-other-insurgent-groups-nigeria> accessed on 5 August 2015.

'International Criminal Law'. < http://www.law.cornell.edu/wex/international_criminal_law> accessed on 3 August 2015.

Alagbe, J, 'Boko Haram Kills 8, 239 in two years – Report', *Punch Mobile*. 27 June 2015. http://www.punchng.com/news/boko-haram-kills-8239-in-two-years-report/ accessed on 16 August 2015.

'Apartheid'. < https://www.en.m.wikipedia.org/wiki/Apartheid > accessed on 11th April 2015.

'Army found Boko Haram's Weapons Hidden Underground in Balmo Forest' < http://www.naij.com/69571.html > accessed on 7th June 2015.

'ARtCRIME'. p. 6. <https://www.jojje13files.wordpress.com/.../ … > accessed on 6 August 2015.

BBC. 'Modern Day Slavery' < http://www.bbc.co.uk/ethics/slavery/modern/modern_1.shtml#section_2> accessed on 2nd March 2015.

'Bemba Case' Central African Republic. < http://www.iccnow.org/?mod=car > accessed on 27th May 2015.

'Boko Haram Frees 200 Hostages in Northeastern Nigeria' *AFP*, January 24, 2015. < http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/11368059/Bo > accessed on 18th July 2015.

'Boko Haram has Infiltrated my Government, Says Jonathan'. Premium Times, 8th January 2012. <https://www.premiumtimesng.com/news/3360-boko-haram-has-infiltrated-my - government-says-jonathan.html> accessed on 26th January 2015.

'Boko Haram'. < http://www.en.m..wikipedia.org/wiki/Boko_Haram > accessed on 6th June 2015.

Boko Haram Now Calls Itself 'Islamic State, West Africa Province'. 12th July 2015. < http://www.thenewsnigeria.com.ng/2015/07/12/boko-haram-now-calls-itself-islamic-state-west-africa-province/ > accessed on 1st August 2015.

'Boko Haram Renames Group Islamic State in West Africa'. < http://www.nigerianmonitor.com/2015/04/23/photos-boko-haram-renames-group-islamic-state-in-west-africa/ > accessed on 30th May 2015.

'Boko Haram: The Emerging Jihadist Threat in West Africa'. Anti-Defamation League, New York, May 9, 2014, p. 1. Available at http://www.adl.org/.../ boko-haram-jihadist-thre… Retrieved on 12th June 2015.

'Cameroon Flies Freed Boko Haram Hostages to Capital.' 11th October 2014, < http://www.bbc.com/news/world-africa-29581495 > accessed on 18th July 2015.

Campbell, J, 'The Boko Haram War Machine' 8th October 2014. < http://www. blogs.cfr.org/Campbell/2014/10/08/the-boko-haram-war-machine/ > accessed on 14th July 2014.

CAN Asks FG to Relocate Boko Haram Suspects from Ekwulobia Prison as Group Sues FG', *ThisDay Live*, July 7, 2015. < http://www.thisdaylive.com/articles/can-asks-fg-to-relocate-boko-haram-suspects-from-ekwulobia-prison-as-group-sues-fg/214076/ > accessed on 1st August 2015.

'Case 001'. < http://www.eccc.gov.kh/en/case/topic/1 > accessed on 14th May 2015

'Charity Commission's Counter-Terrorism Strategy' p. 4. < https://www.phap.org/.../ Charity%20Commissi… > accessed on 29th July 2015.

'Chibok Girls' Parents Alert Public to Fraudsters' *The Nation Nigeria*, July 6, 2015. < t http://www.ww90.trafficads01.com/ > accessed on 18th July 2015.

Chimtom, N, K, *et al*, 'Freed German Hostage calls Boko Haram Captivity, Total Darkness' *CNN*, January 21, 2015, < http://www.edition.cnn.com/2015/01/21/world/cameroon-boko-haram-german-hostage/ > accessed on 18th July 2015.

Chesterman, S,'International Criminal Law with Asian Characteristics?' (2014) NUS Law Working Paper Series, p. 9. < http://law.nus.edu.sg/.../002_2014_Simon_ ... > accessed on 13th April 2015.

'Countering Insurgency,' British Army Field Manual, Vol. 1, Part 10, Army Code 71876, October 2009, p. 6.

'Crime'. < https://en.m.wikipedia.org/wiki/Crime> Accessed on 22 November 2014.

CTR Expected to Close Down in 2015. Press Release dated 2nd February 2015, United Nations International Criminal Tribunal for Rwanda. < http://www.unictr.org/en/news/ictr-expected-close-down-2015 > accessed on 6th May 2015.

Cohen, C, P, 'Tokyo Trial and other Trials Against Japan: 3rd May 1946-12th November 1948' < http://www.ww2db.com/battle_spec.php?battle_id=221 > accessed on 26th April 2015.

Darfur Consortium: An African and International Civil Society for Darfur, 'Darfur: Abductions, Sexual Slavery and Force Labour' (2009) p. 8. < http://www.crin.org/en/library/publications/darfur-abductions-sexual-slavery-and-forced-labour > accessed on 7th September 2015

Dasuki, S, (Rtd Colonel), 'Nigeria Unveils New Approach to Tackle Terrorism' Channels Television, March 18, 2014. < http://www.channelstv.com/2014/03/18/nigeri-unveils-new-approach-to-tackle-terrorism/ > accessed on 20th July 2015.

Denison, J, 'Why Boko Haram Matters to You' Denison Forum on Truth and Culture, 19th January 19, 2015. < http://www.denisonforum.org/global/1317-why-boko-haram-matters-to-you > accessed on 5th June 2015.

Dugdale-Pointon, 'Terrorist Targets' 26th May 2005. < http://www.historyofwar.org/articles/concepts_terrortargets.html > accessed on 15th July 2015.

Elsea, J, K, (2013), 'The Iran Hostages: Efforts to Obtain Compensation' Congressional Research Service Report, November 1, 2013. < https://www.fas.org/sgp/crs/.../R43210.pd... > accessed on 26th June 2015.

Evans, R, D, 'Amnesties, Pardons and Complementarity: Does the International Criminal Court Have the Tools to End Impunity?' (2007) p. 5. < https://www.nottingham.ac.uk/.../.... > accessed on 25th May 2015.

Ewi, M, 'What Does the Boko Haram-ISIS Alliance mean for Terrorism in Africa' Institute for Security Studies, March 17, 2015. < htpp://www.issafrica.org/iss-today/what-does-the-boko-haram-isis-alliance-mean-for-terrorisssssm-in-africa > accessed on 4th June 2015.

'Extraordinary African Chambers: Historical Landmarks' < http://www.trial-ch-org/en/resources/tribunals/hybrid-tribunals/extraordinary-african-chambers.htm > accessed on 13th May 2015.

'FG Ratifies UN Conventions on Arms, Hostages, Terrorism' < http://www.freedomonline.com.ng/fg-ratifies-un-conventions-on-arms-hostages-terrorism/ > accessed on 26th June 2015.

FIDH, 'Simone Gbagbo Trial: First of Many' 23rd October 2014. < http://www.fidh.org/international-Federation-for-Human-Rights/Africa/cote-d-ivoire/1631-simone-gbagbo-trial-first-of-many > accessed on 27th May 2015.

'Five of the World's Most Wanted for Crimes against Humanity'. < http://www.euronews.com/2015/07/17five-of-the-worlds-most-wanted-for-crimes- against-humanity/ > accessed on 13th August 2015.

'Forced Disappearance'. < https://www.en.m.wikipedia.org/wiki/Forced_disappearance > accessed on 10th April 2015.

Gittens, H, 'Boko Haram: Nigerian Terror Group Sells Girls into Slavery' 1st May 2014. < http://www.nbcnews.com/storyline/missing-nigeria-schoolgirls/boko-haram-nigeria-terror-group-sells-girls-slavery-n93951 > accessed on 17th July 2015.

Global Policy Forum, 'Special Court for Sierra Leone'. < https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-court-for-sierra-leone.htm > accessed on 12th May 2015.

Hayward, J, 'Report: ISIS, Al-Qaeda, and Boko Haram Training Together,' 24th March 2015. < http://www.breitbart.com/national-security/2015/03/24/triple-threat-isis-al-qaeda- and-boko-haram-training-together/ > accessed on 12th July 2015.

Hermann Goering. < http://www.charlesbackstrom.com/pdf/WW2_Goerin... > accessed on 12th August 2015.

Hill, J, N, C, 'Boko Haram, the Chibok Abductions and Nigeria's Counterterrorism Strategy' 30th July 2014. < https://www.ctc.usma.edu/post/boko-haram-the-chibok-abductions-and-nigerias-counterterrorism-strategy > accessed on 16th July 2015.

Horn, D,'Comfort Women' (1997) Endeavours. < http://www.

web.archive.org/web/20080625101655/http??research.unc.edu/endeavors/win97/comfort.html > accessed on 8th April 2015.

'Human Rights'. https://www.en.m.wikipedia.org/wiki/Human_rights accessed on 27 August 2014.

Human Rights Principles of Domestic Criminal Law' Stockholm Institute for Scandinavian Law' (1957) 1957-2009. <http://www.scandinavian law.se/pdf/39-17.pdf> accessed on 28 December 2014.

Human Rights Watch, 'D.R Congo: Army Should Not Appoint War Criminals, Congolese Government Must Investigate and Prosecute Warlords, Not Reward Them' (2005) 14th January. < http://www.m.hrw.org/en/news/2005/01/13/dr-cong0-army-should-not-appoint-war-criminals > accessed on 28th May 2015.

Human Rights Watch, 'ICC: Q&A on the Trial of Jean-Pierre Bemba' (2010)' 22nd November. < http://www.m.hrw.org/news/2010/11/18/bemba-qa > accessed on 28th May 2015.

Human Rights Watch, 'Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria' 11th October 2012. < http://www.hrw.org/report/2012/10/11/spiraling-violence/boko-haram-attacks-and-security-force-abuses-nigeria > accessed on 18th July 2015.

Hunter, Q, *et al*, 'How Zuma and Ministers Plotted Omar al-Bashir's Escape'. Mail & Guardian, June 19, 2015. < http://mg.co.za/article/2015-06-18-how-zuma-and- ministers-plotted-omar-al-bashirs-escape > accessed on 13th August 2015.

'Hybrid'. < http://www.internationalcrimesdatabase.org/Courts/Hybrid > accessed on 14th May 2015.

Hybrid Courts. Published by Project on International Court and Tribunals. < http://www.pict-pcti.org/courts/hybrid.html > accessed on 9th May 2015.

'ICC-About the Court'. <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.> accessed on 29 December 2014.

'ICC Issues arrest Warrant for Sudanese President for War Crimes in Dafur' 4th March 2009. < http://www.un.org/apps/news/story.asp?NewsID=30081#.VWFS9DNw0Yg > accessed on 24th May 2015.

ICC Press Release dated 11th March 2015. 'Judge Fernandez de Gurmendi elected ICC President for 2015-2018; Judges Aluoch and Ozaki elected First and Second Vice-President respectively'. ICC-CPI-20150311-PR1096. < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1096.aspx > accessed on 18th May 2015.

ICRC, '*Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, The Hague', 18th October 1907*. <https://www.icrc.org/ihl/INTRO/195> accessed on 31 December 2014.

Iroegbu, S, and Olugbode, M, 'Dozens Killed in Latest Boko Haram's Hit at Soft Targets' ThisDayLive, March 8, 2015. < http://www.thisdaylive.com/articles/dozens-kiiled-in-latest-boko-harams-hit-at-soft-targets/203572/ > accessed on 15th July 2015.

Iyatse, G, 'Prosecute Soldiers Involved in Human Rights Abuses', *Punch*, July 15, 2015. < http://www.punchng.com/news/prosecute-soldiers-involved-in-human-rights-abuses/ > accessed on 1st August 2015.

Kim, J, 'Prosecuting Human Trafficking as a Crime Against Humanity under the Rome Statute' (2011) Columbia Law School Gender and Sexuality Online (GSL online), 6. <http:wwww. blogs.law.columbia.edu/…/Jane-Kim_GS…> accessed on 3rd March 2015.

Lloyd, S, 'The Pam Am 103 Case – Terror Over Lockerbie, Scotland' Our History, Stories from the Historical Committee, 12th December 2013, p. 10. < https://www.socxfbi.org/.../pamam103_... > accessed on 29th June 2015.

MacArthur, D, 'Farewell to Congress' 19 April 1951, 6. <http://www.americanrhetoric.com /…/PDFFiles/ …> Accessed on 15 November 2014.

Mark, M, 'Boko Haram Vows to Fight until Nigeria Establishes Sharia Law' *The Guardian*, January 27, 2012, < http://www.theguardian.com/world/2012/jan/27/boko-haram- nigeria-sharia-law > accessed on 6th June 2015.

McAllister, B, 'Amnesty: Boko Haram has Abducted at Least 2000 Women Since 2014' 15th April 2015. < http://www.jurist.org/paperchase/2015/04/amnesty-boko-haram-has-arrested-at-least-2000-women-since-2014.php > accessed on 17th July 2015.

Metcalf, A, 'Regents Prep Global History, Conflict: Introduction' <http://www.regentsprep.org/Regents/global/themes/conflict/index> accessed on 26 August 2014.

Odebode, N, *et al*, 'Female Suicide Bomber attacks Gombe Barracks'. *Punch Mobile*, June 9, 2014. <http://www.punchng.com/news/female-suicide-bomber-attacks-gombe-barracks/ > accessed on 12th June 2015.

Odunsi, W, 'Boko Haram Rape, Impregnate Women to Implant Future Jihadists – Shettima' *Daily Post* May 4, 2015. < http://www.dailypost.ng/2015/05/04/boko-haram-rape-impregnate-women-to-implant-future-jihadists-shettima/ > accessed on 18th July 2015.

Olatunji, S, 'Poverty Fuelling Boko Haram Insurgency – Clinton' *Punch Mobile*, 27th February 27, 2013. Punch Mobile. < http://www.punchng.com/news/poverty-fuelling-boko-haram-insurgency-clinton/ > accessed on 20th July 2015.

Paltrow, L, 'Rape, Forced Pregnancy, Personhood, and Crimes Against Humanity' (2012) August 23. <http://www.rhealitycheck.org/article/2012/08/23/rape-forced-pregnancy- rep-akin-colorado's-personhood-measure-and-crimes-against-h/> accessed on 8th April 2015.

Penrose, M, M, 'War Crime' (2014) <http://www.global.britannica.com/EBchecked/topic/635621/war-crime#ref750572. > accessed on 17th April 2015.

Richardson, L,'What Terrorists Want' *The New York Times*, 10th September 10, 2006. <http://www.nytimes.com/2006/09/10/books/chapters/0910-1st-rich.html?pagewanted=print&_r=0 > accessed on 21st June 2015.

Rubin, M, 'It's About Christianity, Not the Girls' May 13, 2014. < https://www.commentarymagazine.com/2014/05/13its-about-christianity-not-the-girls/ > accessed on 6th June 2015.

Schaefer, B, D, and Groves, S, 'The U.S. Should Not Join the International Criminal Court' The Heritage Foundation, Washington, DC. 18th August 2009. < http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court > accessed on 27th May 2015.

Shelley, L, I, 'ISIS, Boko Haram, and the Growing Role of Human Trafficking in the 21st Century Terrorism' *The Daily Beast*, December 26, 2014. < http://www.thedaily beast.com/articles/2014/12/26/isis-boko-haram-and-the-growing-role-of-human-trafficking-in-21st-century-terrorism.html > accessed on 17th July 2015.

Shobiye, H, 'Biden Counsels Buhari on Terror War' *The Nation Nigeria*, July 20, 2015. < http://www.thenationonlineng.net/biden-counsels-buhari-on-terror-war/ > accessed on 21st July 2015.

Thakur, R, 'The United Nations and the Elusive Quest for Peace'. <http:// www.un.org/en/ga/63/.../ pdf/qatar_en.pd…> accessed on 16 November 2014. Judgment: The Law Relating to War Crimes and Crimes Against Humanity. < http://www.avalon.law.yale.edu/imt/judlawre.asp > accessed on 23rd April 2015.

Thormundsson, J, 'The Sources of International Criminal Law with Reference to the Human Rights Principles of Domestic Criminal Law' Stockholm Institute for Scandinavian Law' (1957) 1957-2009. <http://www.scandinavian law.se/pdf/39-17.pdf> accessed on 28 December 2014.

Trindade, A, A, C, 'Jus Cogens: The Determination and Gradual Expansion of Its Material

Content in Contemporary International Case Law' (2012) 12. http://www/oas.org/.../3%20-%20cancado.LRC... Accessed on 2 September 2015.

Williams, S, 'Hybrid International Criminal Tribunals' (2014). < http://www.oxfordbibliographies.com/view/document/obo-978019976953/obo 9780199 > accessed on 10th May 2015.

Wood, M, 'Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents: Introductory Note' < http:// www.legal.un.org/avl/ha/cppcipp/cppcipp.html > accessed on 23rd June 2015.

Zenn, J, 'Nigerian al-Qaedaism' Vol. 16, *Current Trends in Islamist Ideology*, 99. < http://www.hudson.org/content/…/zenn. pdf > accessed on 12th September 2015.

Zheng, A, 'Questions and Answers: The Case of the Prosecutor v. Laurent Gbagbo' (2012) 5th April 2012. < http://www.amicc.org/icc/cdi > accessed on 27th May 2015. < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211related%20cases/icc02110112/Pages/index.aspx > accessed on 27th May 2015.