THE IMPERATIVES OF INTERNATIONAL CRIMINAL TRIBUNALS AND INTERNATIONAL CRIMINAL COURT ON CRIME OF GENOCIDE

BY

ALFA HALIMA IKUJI

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MAY, 2011

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DECLARATION

I hereby declare that this dissertation has been written by me and it is a record of my research work. It has not been presented in any previous application for higher degree. All quotations are indicated and the sources are fully acknowledged.

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ALFA, HALIMA IKUJI **DATE**

CERTIFICATION

This thesis entitled: “The Imperatives of International Criminal Tribunals and International Criminal Court (ICC) on Crime on Genocide” meets the regulations governing the award of the degree of Master of Law (LL.M) of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

_____ _____

PROF. SANI IDRIS **DATE**
Chairman Supervisory Committee

_____ _____

PROF. MOHAMMED TWAFIQ LADAN **DATE**
Member Supervisory Committee

_____ _____

DR. YUSUF DANKOFA **DATE**
Head, Department of Public Law

_____ _____

DEAN, POSTGRADUATE SCHOOL **DATE**

DEDICATION

This thesis is dedicated to Almighty Allah for his abiding mercies and to my beloved husband Alhaji Mohammed Alfa who instilled in me the virtue of hardworking, perseverance and for his encouragement and belief in me.

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It is to Almighty Allah that we give gratitude for sparing our lives till today, we pray for its continuous guidance and protection.

I am indebted to so many people too numerous to mention in this thesis. I must start by expressing my profound gratitude to my husband who had to be lonely at home during most of my numerous trips to Zaria in the course of this programme and to all my friends and children.

The completion of this work was made possible by my agile and hardworking supervisor. I would like to express my since appreciation and gratitude to my supervisor Professor Sani Idris and former Dean of Law who took his time and painstakingly read the work, to him I am greatly indebted and may Allah reward him abundantly.

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Finally, to all the person herein before mentioned and those I might have inadvertently left out. I am indeed, a debt which one acknowledges with both delight and great sense of pride.

ABSTRACT

The idea of a strong standing tribunal to try serious violations of international law has been around since the end of World War II. After WWII, the Nuremberg and Tokyo tribunals were set of ad-hoc by the Allies, the victors of the World War II to try the principals of the loosing axis power. While the Nuremberg was regarded as more successful and significant than the Tokyo tribunal. During the years of the cold war, the idea of the future of International Criminal Court largely occupied the back burner of the International affairs. With the fall of the Soviet Union in the early 1990's various tribunal and international conflicts broke out in the world. Most notably, after the break-up of former Yugoslavia and the modern Balkan wars, it was clear war crime, genocide and crimes against humanity were occurring on a mass scale. Similarly, tribal warfare between the Hutus and Tutsis in several African countries including Rwanda and Burundi lead to enormous human right abuses. The United Nations Security Council established ad-hoc tribunals to address the international crimes arising from those crises, the tribunals were set up specifically for the propose of those local conflicts, they revived the interest in the need to established a permanent global criminal court. And in 1998, the Rome statute was drafted, which set forth the legal frame work for a standing tribunal to address war crimes, genocide and crimes against humanity, this was achieved in April 2002. The ICC formally come in existence on July 1st, 2002. The coalition of countries and civil society organisations in more 150 countries work in partnership to strengthen international corporation with the ICC, ensure that the court is fair, effective and independent; make justice both visible and universal. An advanced strong national laws, that deliver justice to victims of war crimes, genocides and crimes against humanity. The provision of the Rome statute do not instill enough confidence to preclude the possibility.

TABLE OF CASES

ABBREVIATIONS

1.	A.J.I.L.	American Journal if International Law
2.	C.C.L	Control Council Law
3.	I.C.R.C	Internal Committee of the Red Cross
4.	I.C.J.	Internal Court of Justice
5.	I.C.C	International Criminal Court
6.	I.C.T.R	International Criminal Tribunal for Rwanda
7.	IC.T.F.Y	International Criminal Tribunal for Former Yugoslavia
8.	I.L.C	International Law Commission
9.	I.L.M	International Law Manual
10.	UN	United Nations
11.	UNGAR	United Nations General Assembly Resolutions
12.	UNSCR	United Nations Security Council Resolution.

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CHAPTER ONE

INTRODUCTION

In 1945, two monumental tribunals arose out of the ashes of World War II. The International Military Tribunals at Nuremberg, Germany and Tokyo, Japan. Both were established by the victorious nations of the World War II, in order to provide swift justice for the victims of atrocities and punishment for the perpetrators.

In the decades after the war, several adhoc tribunals were established to deal with various states sponsored crimes, including those tribunals set up in Bosnia and Rwanda in the 1990s. An all encompassing tool of Justice, though had yet to be organized.

The 1998 meeting of nations in Rome however addressed the wide spread desire for international justice by creating the International Criminal Court (ICC). The ICC was constructed by the United Nations to be a permanent, non-partisan judicial instrument to promote the Rule of Law and ensure that gravest crimes do not go unpunished.

Those “grave crimes” include genocide, crimes against humanity; war crimes and the crimes of aggression. The court officially became operational on July, 1, 2002 in Hague, Netherlands.

The entry into force of the ICC statute has enabled the court to exercise jurisdiction to try individuals accused of war crimes, crimes against humanity and genocide. The court has jurisdiction over crimes committed by individuals who

are nationals of states which have ratified its statute, or who have committed crimes on the territory of such states. Those conditions are not applicable when a case is referred to the court by the United Nations security council.

In addition, the court can only act when the relevant state is unable or unwilling to carry out investigation or prosecutions.

The ICC is a permanent court with potentially universal and over half of the states have so far ratified its statute. Although the U.S initially started an active anti-ICC campaign, its opposition has recently lessened since its strategy to undermine the court has proven to be ineffective and its fears have prove to be unfounded.

The ICC would not undermine the sovereignty of nations because it would function only where states are unable or unwilling to.

The imperatives of International Criminal Tribunal, A case study of Crimes of genocide, deal with the historical evolution of this important branch of Public International Law. It is the aim of this research work to critically analyse and appraise the contribution of international community to the development of world peace. Over the years from antiquity, to the modern times, rules, regulations, protocol and conventions were evolved which govern the contract of hostilities in both international and non-international conflicts.

The world has witnessed some of the most gruesome attacks on humanity by totalitarian and authoritarian regimes leading to the murder of innocent people to such alarming proposition that the international community could not ignore.

Global response to the United Nations to make genocide on international crime and bring its perpetrator to justice. These efforts culminated in the United Nations Convention on the Prevention and Punishment of the Crime of genocide in 1948.

And the event in former Yugoslavia and Rwanda which led to the destruction of thousands of innocent lives further strengthened the need for an International Criminal Court, which had long been under consideration. And with the adoption of the Rome Statute of International Criminal Court, International community took major steps towards ending the culture of impunity that has so often prevailed in our world.

> "*In the prospect of an International Criminal Court lies the promise of universal justice. That is the simple soaring hope of this vision, we are close to its realization and we will do our part to see it through till the end. We ask you to do yours in our struggle to ensure that no ruler, no state, no junta and no army anywhere can abuse human right with impunity. Only then will the innocent of distant wars and conflicts know that they may sleep under the cover of justice; that they too have rights and that those who violate that rights will be punished".*

The words of the former United Nations Secretary-General, quoted above, aptly demonstrated global view with concern on the negative. It also indicates the direction of international community wants or intends to go in the quest to curb incidences of genocide around the world.[1]

[1] Kofi Anan, *Former United Nations Secretary General.* Available at http://www.un.org/law/icc/general/overview.htm 16th November, 2010

The history of mankind is the story of power struggle, confrontations and armed conflict between nations, people and individuals. From earliest times, men have been pre-occupied with the problem of how to control the effect of violence and its attendant human sufferings with varying degrees of success.

For example, prior to the middle of the 19th Century, agreements to protect victims of wars were of more transient character, binding only, upon the contracting parties thereto and based upon strict reciprocity. In reality, they constituted purely military agreement usually effectively only for the duration of a particular period of hostility. This state of affairs was changed by the birth of modern law.

The general assembly in 1995 session therefore decided to convene a preparatory committee of member states; non governmental and intergovernmental statutes in light of the myriad of amendment to ILC drafts as at 1997, several version of the ILC drafts were in circulation each reflecting the view of diverse interests. It was left to the prep-com session in Zutphen, Netherlands to consolidate the various proposals into coherent text.

1.2 STATEMENT OF PROBLEM

In recent times social conflicts have become more pronounced in the world encompassing a broad range of conflicts usually manifested in outright war or tyrannical governments. And there have been also various techniques over the years by the international community to prevent, manage and resolve conflicts, many of the most severe persistent threats to global peace and stability are arising not from conflicts between major political entities but from increased discord within states along the ethnic racial religious linguistic.[2]

1.3 OBJECTIVES OF THE RESEARCH

The objectives of any research work along the dimension of imperative of international criminal tribunals will certainly be to promote the fundamental ideals which the concept represents and also strives towards dissemination of the rule and procedure which are not adequately known to belligerents and civilians.

It will also involve an objective analysis of the extent of successes or otherwise of those efforts made by the international community to end impunity across the globe.

The study will then conclude by making observations and recommendations on the initiatives made by the international community to end impunity. The study will finally analyse the successes and failure, of international criminal tribunals.

[2] *Contemporary Conflicts in Africa,* http://www.synpase.acd12001.htm 16th November, 2010

The central anchor of the entire discussion will be the international criminal tribunal of Forrmer Yugoslavia and Rwanda, Special Criminal Tribunals of Sierra Leone and the International Criminal Court (ICC). The analysis of the research will be based upon authoritative expositions, propositions of respected and universally acclaimed authors and jurist of contemporary and legal philosophy especially in the area of judicial pronouncement of international criminal tribunals and International Criminal Court (ICC).

The purview of the research will be limited to the consequential global initiative in the formation of international criminal tribunals applicable in both international and non-international particularly with respect to crime of genocide. Also, it will be imperative to articulate the role of the international community through the United Nations in the search for the maintenance of international peace and security more especially now that we are in a new epoch in human history. The international community's resolve to establish tribunals for war crimes committed in Rwanda and the former Yugoslavia.[3]

1.4 JUSTIFICATION OF THE RESEARCH

There is no justification whatsoever for acts of torture, indiscriminate violence or any other grave out rages upon personal dignity. The spate of armed conflicts across the globe makes this research justifiable. For instance, the war in

[3] The statute of International Committee of Red Cross (ICRC) contained in handbook of the Red Cross and red Crescent Movement, 13th edition pp.448-449. 1996

Bosnia and Herzegovina in 1992-1995 resulted to death of so many people and left a lot to be desired, it indicates clearly that there is the absolute need of such kind of international criminal tribunals. And there is need of crimes of genocide to be adequately developed and disseminated in order to give protection to members of the civilian population.

Again, there can never be a better justification to this research than the situation in Rwanda sometimes in 1994 when Rwanda was thrown into serious state of genocide.

In the final analysis, the Nigerian situation from Civil War, Zangon Kataf, Boko Haram, and Jos crisis. The Sierra Leone crisis and the Kosovo crisis of 1998 all culminates to justify the process of this research are potent signs that this universal set of rule is as topical and necessary as ever it. Hopes that the exception and that the law's enforcement will be as systematic as the rules themselves are intended to be universal.

1.5 SCOPE OF THE RESEARCH

The scope of the study will be guided by its aims and objectives. And the unprecedented spate of armed conflict both international and non-international in the 1990's in former Yugoslavia, Rwanda and most recently in Darfur (Sudan) precipitated this research. Those conflicts are posing a very serious threat to the members of the civilian community as well as civilian objects. In this regard, the crucial challenge facing both the United Nations and the international community

in the fundamental issue of maintenance of international peace and security in the form of superiority of diplomacy over resort to armed conflicts.[4]

There is fundamental need for the rules of international criminal tribunals and international criminal court to be widely and effectively disseminated both to the combatants and members of the civilian population in peace time and during hostilities.[5] It is also the scope of this research to consider the consequences of situation involving outbreaks of violence within the territory of a state. It is essential to address all those who in practice may resort to force. This covers not only the established authorities but also at a different level, all those who commit acts of violence.

1.6 RESEARCH METHODOLOGY

The theoretical and doctrinal method of approach will be use in carry out the study. The principal sources of materials for this research are statutes, textbooks, journals, law reports, conference proceedings both (national and international).

The central anchor of the entire discussion will be four Geneva conventions and the two additional protocols, the analysis of the research will be based upon authoritative expositions of some jurist. Also declarations and

[4] United Nations Charter particularly article 1.
[5] Provision of Article 48 of the 2nd Geneva Convention and Article 127 of the 3rd Convention and article 144 of the fourth Convention.

resolutions of international conferences and information accessed from the internet will be used.

1.7 Literature Review

The history of mankind is a story of power struggles, confrontations and armed conflicts between peoples and individuals.

We are aware today that law follows events more often than it proceeds its community and permanence, since it is usage which gives it form. It is for this reason although we not always conscious of it, that history holds so large a place in the study of legal disciplines albeit the crime of genocide. It is the divine position that when Almighty Allah created the Earth he promulgated laws before mankind was subsequently created. It is crystal clear that from the beginning of creation for a society to be peaceful laws must be in place.[6]

It is in this direction or line that since antiquity men have tried with greater or lesser success, to control the effects of violence so as to limit the suffering, which is its inevitable consequences. Almost two thousand years ago before Christ, King Honourable of Babylonia codified rules of conduct in war.[7]

Also in the seventeenth century, the Dutch legal scholar and diplomat Grotius Wrotiz his De Jure back acpalis, a first attempt to draw up rules of international law protecting the victims of conflicts. A century later, Rousseau's

[6] ICRC Annual Report for 1996 p.2 on Human Rights and the ICRC
[7] The Teachings of International Humanitarian Law in Nigeria, Universities. Edited by Ajala and Sagay 1998 at p.3.

social contract set forth the basic principle on which the Geneva Conventions are founded.[8]

It is imperative to note that treaty making process with due respect to rules of warfare date back to the 1860's when on two different occasions an international conference convened to enter into a treaty with respect to one highly specific aspect of the Law of War: one in Geneva in 1864[9], on the fate of wounded soldiers on the battle field and the other in St. Petersburg in 1968, prohibiting the use of explosive rifle bullets. These marked the inception of Law of war and its codification.

Quincy Wright in his book "A Study of War" wrote that taken as a whole, the war practice of primitive peoples illustrate various types of international rules of war known at this present time, rules distinguishing types of enemies, rules defining circumstance, formalities and authority for beginning and ending war, rules describing limitations of person, time, place and methods of its conducts.

In the 18th Century, war becomes a struggle between professional crimes with smaller number of soldiers. Civilians were no longer directly involved because the crimes had their own supply services and pillage war forbidden. War had become an art with its own rules, although these were sometime[10] violated, the breaches were exceptional.

[8] Quoted from Kalshavan, F.. Constraints on the Waging of War. Op.cit.
[9] Ibid
[10] Ibid, p.99

For a proper understanding of the subject of this research recourse must be made by making an attempt to understand what is Genocide is all about by its definition or meaning. And conflict is considered to be pervasive social process, which occurs at all levels of life. It includes personal, groups or organizational and international. It furthers the view that Genocide is one of the ubiquitous events and encompasses a broad range of phenomena including class, racial, religious.

There are varied examples of codes that were elaborated for the conduct of war and the pronouncements of domestic tribunals to the effect that these codes had international implications.[11] In 1818 for example, two enlightment were court-martialled, convicted and subsequently sentenced to death by a U.S. military tribunal. They were tried for violations of the laws and usages of war in that they were found to have excited the creek Indian to war against the United States. Despite the public outrage in Britain over the trial, British government accepted the decision of the tribunal because the US was exercising criminal jurisdiction on the basis of international not U.S. Law[12].

By the turn of the 20th Century, the international community enjoyed the synergistic benefits of two forces at work. On the one hand, there was increasing state practice in relation to the domestic punishment of violations of the Laws of War. Contemporaneously the international community had reached agreement at

[11] Lachs: War Crimes: An Attempt to Define the Issues Stevens and Sons, London (1945), p.11.
[12] McCormick T: Supra note 1 at p.40.

the Hague peace conference for the first multilateral convention, regulating the conduct of war. The combination of these development resulted in a growing recognition and acceptance of a principle of individual responsibility for violations of the International Law of War Crimes.[13]

It was in relation to the attempt by the Turkish Ottoman Empire to extermination the Armenia people in the period shortly before World War 1 broke out that the terminology of crimes against humanity reoccurred. Nevertheless the Allied powers were greatly disappointed with the outcome of the trials of war criminals conducted by German tribunals under their agreement, but this served to accentuate the weakness in resorting to domestic tribunals for such trials in Lieu of an independently constituted international court.[14]

It was not long before the political will of states to acknowledge the inherent limitations of a theory of domestic jurisdiction for international crimes was again put to rest. The outbreak of a Second World War and widespread concern over the atrocities in Nazi Germany were factors that reawakened interest in the concept of an International Panel Tribunal.

In what is famously referred to as Moscow Declaration of 1st November, 1943, the Allied powers affirmed that resolve to prosecute and try Nazis. The stage for evolving the mechanism for this was set of month earlier at the London Conference of the Allied powers which established the United Nations

[13] McCormick T: Op.cit. supra note 1 at p.43.
[14] Willis J.F., Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War Westport, (1982) at P.26.

Commission for the investigation of war crimes. The Nuremberg trials commenced in October 1945 with indictments served on 24 Nazi.

The phrase “genocide” was freely used by the parties in the course of proceedings, shortly after the trials, there began a process in the United Nations to prescribe firm measures against the recurrence and punishment of the type of acts that have been characterized as the “Jewish Holicoust”.

In 1981, the General Assembly of the United Nations encouraged by the end of Cold War and the Road to Rome, ILC resume work. The proposal was adopted on 22nd February, 1991 by the Security Council.

The statute of the Rwanda Tribunal shares close similarly with that of Yugoslavia Tribunal. The Rwandan genocide took place within the context of an internal armed conflict; the two adhoc tribunals had a decisive impact on the renewed drive to establish a tribunal on a permanent basis.

Finally, on 15 June, 1998, the Diplomatic Conference convened at the headquarters of the FAO in Rome, which was attended by over 150 countries and mostly of non-governmental organization. On 17th July despite a desperate by the United States to scuttle the talks, the conference adopted the statute of International Criminal Court. The statute in many ways mirrors, the most current synthesis of universal standards of culpability for crimes of high morality

1.8 ORGANISATIONAL STRUCTURE

This research is essentially divided into five chapters with crime of genocide as the common threat and equally establishing the parameter of coordinating the entire discourse. The first chapter is a general introduction on the historical development of international criminal tribunals and International Criminal Court (ICC) and objectives of the study, the scope, methodology, justification and organizational layout. It finally considers the structure and order of presentation of the research.

Chapter two deals with the concept of international criminal law, it gives an insight into the establishment, composition and objectives of international criminal tribunals and discussion. And finally analysed the legal and practical measures for the prevention of crime of genocide by the tribunals and currently in the Rome Statute.

Chapter three will expose the criminal justice and judicial mechanism of the international criminal tribunals, it deals also with the concept of principles of universal jurisdiction.

Chapter four; a case study of crime of genocides under the international criminal law, it further expose the origin, meaning, scope of genocide and imposition of penal sanction for the breach of crime of genocide and generally treated the enforcement machinery. Competence/jurisdiction of international criminal tribunals of former Yugoslav and Rwanda while permanent International Criminal Court will be concluded in the chapter four. And Chapter five, the final

part of this research work will bring the discourse to its conclusion with an appraisal of global initiative to end impunity and the imperatives of International Criminal Tribunals, International Criminal Court whether they failed or succeeded and make observation, suggestions and recommendations.

CHAPTER TWO

2.0 THE CONCEPT OF CRIME UNDER INTERNATIONAL LAW

2.1 International Crime

What constitute an international crime is one of those concepts so difficult to define that most writers and even international conventions such as Red Cross Conventions of 1948 and their protocols of (1977) and the statute of the international criminal court, avoid defining it. Nevertheless some efforts have been made.

According to Professor Quincy Wright a crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest and which may not be adequately punished by the exercise of the normal jurisdiction of any state.[15]

And, "*The Osborn's Concise Law Dictionary* defines a crime as "*an act, default or conduct prejudiced to the community, the commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings…*"[16] perhaps the most comprehensive effort so far made at defining international crimes was the one made by the international law commission in its draft articles on the origin of state responsibility (1996).

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[15] Gledhiu, Allen *The Penal Codes of Northern Nigeria and Sudan"* 1963 (London) quoted in Chukkol , Law of Crime in Nigeria

[16] I.E. Sagay, SAN *The Nature and Characteristics of International Criminal Justice and Administration,* NAILS, Lagos, 20th May, 2006.

Article 19 of the international crimes and international delicts of International Law Commissions in its draft articles (1990).

1. An act of state, which constitutes a breach of an international obligation, is an internationally wrongful act regardless of the subject matter of the obligation in breach.
2. An international wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interest of the international community that its breach is recognized as a crime by that community as a whole constitute an international crime.
   i. There must be a serious breach of an international obligation
   ii. That international obligation must itself be essential to an aspect of human existence.

In this definition; (a) the maintenance of international peace and security and the prohibition of aggression, (b) the right to self determination and the prohibition of colonial domination (c) the safeguarding of the human being such as the prohibition of slavery, genocide, apartheid and presumably war crimes, crimes against humanity and terrorism are illustrative of what constitutes an international crime.[17]

[17] "*The Law of Nuremberg Trial*" 41 American Journal of International Law (1947)

It is clear that the act constituting the offence must be grave in the sense in which the scourge of war was described in the preamble to the charter of the United Nations as having brought untold sorrow to mankind.[18]

The gravity of the type of offences currently characterized as international crime is also fully captured in the opening paragraphs of the preamble to the statute of the international criminal court otherwise known as the Rome Statute (1998) which states inter alia that;

> *During the twentieth century, millions of children, women and men had been victims of unimaginable atrocities that deeply shocked the conscience of humanity and that such grave crime threatened the peace, security and well-being of the world". It affirmed that most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. It also states that "the determination of the parties to put an end to impunity of the perpetrators of those crimes and thus to contribute to their prevention".*[19]

Arguably the First International crime was the prosecution of Pater Von Hogenbacch in 1474 for atrocities committed during an attempt to compel Breisach to submit to Burdandian rule by a tribunal comprising judges drawn from states and principalities Article 27 of the Treaty of Versailles provided that German Emperor William II should be tried in an International Court to answer charge for flagrant offence against international morality and the sacred authority

[18] Ibid
[19] Article 19 of the Draft Constitution Article on the Origin of State Responsibility.

of the treaties. But since Netherlands refused to give up the accused, the trial never took place and William II died in exile in Holland in 1941.

With the established of the International Criminal Court, with an extensive list of what constitute International Crime, the true nature and characteristics of an international crime has been revealed. As has been observed in *Digest of International Law* by White[20] the question of the existence of international crime has been brought more sharply into focus as a result of the programmes example war crimes following the Second World War, the signing of the genocide convention and the step being taken by the General Assembly of the UN towards establishing a code of International Crimes. 'What acts should be classified as a crime under international law in the last analysis is intimately connected with the question of the machinery by which such acts should be dealt with". The machinery, the international crime court and its statute have been established with the singular exception what constitute an international crime is no longer difficult to answer, nor is an act constituting such an offence any longer difficult to identify.[21]

2.2.2 Crime of Genocide

The categorization or classes of international crime is contained in article 5 of the statute of the International Criminal Court, as follows:

[20] McCarmack, T.LH and Simpson, G.J. (eds) *The Law of Crimes: National and International* Hague/London, 1997 p.37
[21] Majorie Whiteman *Digest of International Law* , Vol. II p.835 published Cambridge Press, London, 1968.

The origins of Genocide Convention show that it was the intention of the United nations to condemn and punish Genocide as a crime under international law… involving a denial of the right of existence of entire human group a denial which shocks the conscience of mankind and result law to the spirit and aims of the United Nations (resolution 96) of the General Assembly December 11,1946. The first consequence arising from this conception is that the principles underlying the convention are principles, which are recognized by civilized nations as binding on state, even without any conventional obligation. A second consequence is the universal characters both of the condemnation of genocide and of the cooperation required in order to liberate mankind from such obvious preamble to the convention.[22]

Unlike crimes against humanity, genocide has been codified and its definition is not generally subject to debate. The statutes of the ad hoc tribunals for the former Yugoslav and for Rwanda adopted verbatim the definition of genocide found in article 2 of the 1948 convention on the prevention and punishment of the crime of genocide

The first requirement implies that acts of genocide can only be committed against the list of groups i.e. an identifiable national, ethical, racial or religious group. The intent to destroy for example a political or social group would therefore not fall under the definition of genocide. Political and cultural groups

[22] Reservation to the Convention on Genocide case (Advisory opinion), ICJ Report Vol. 15 1951 p.23

were excluded from the original General Assembly draft of the convention because of strong opposition to their inclusion.

In the **Barcelona Case** (Second phase), the court recognized the outlawing of acts of genocide as obligation erga omnes for which due to the importance of the rights involved, all the statute can be held to have legal interest in their protection.[23]

The second limb element of the definition of genocide represents a challenge for the present or who will be obliged to establish the requisite state of mind of the accused, i.e. the specific criminal intent to destroy based on national, ethical, racial and religious groups. Therefore the killing of one individual with such intent is genocide while the killing of a thousand without the intent to destroy a group completely is not genocide but homicide.[24] The former type was however distinguished from the latter by the General Assembly in 1948, when it drafted the convention genocide "*is the denial of the right of existence of entire human group", "homicide is the denial of the right to life of individual human beings".* The ultimate target is the group itself. Hence, the actus reus prohibited act may be restricted to one human being, but the mens rea or mental element must be directed against the life of the group.[25] In other words, "*genocide occur when the intent is to eradicate the individual for no other reason than they are a member of the specific group".*

[23] Barcelona Traction case Belgium vs. Spain ICJ report Vol.3 1970 paras 33 & 34.
[24] Deji Adekunle, *Historical Development of War Crime,* being a paper presented at 2 week certificate courts on International Criminal Justice, NIALS, Lagos 2 June (2006).
[25] Schabas, W.; *An Introduction of International Criminal Court,* Cambridge, Press, London (2004) 2nd Edition p.6

Some light as to specific intent required may also be found in the **Karadsic and Mladic case** in which the ICTY suggested that the specific intent may also be inferred from the circumstances which can be perpetrated against a group with an aggravated criminal intent and the intent to the crime of genocide need not be clearly expressed… The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in article 4 of the statute. [26]

The third element of genocide requires that the crime be among the listed acts. But the exact scope remains however vague i.e. "causing serious bodily or mental harm to members of the group" or "deliberately inflicting on the group conditions of the life calculated to bring about its physical in whole or in part". It is also been described by commentators as a psychological damage, which would lead to the destruction of the group.[27]

2.2.3 Crime Against Humanity

Crime against humanity is a term in international law, which refers to acts or murderous prosecutions against a body of people. Those are acts so grave, on a scale so large, that their very execution diminishes the human race. The Allied powers in 1915 issued a statement explicitly charging Turkey of committing a crime against humanity.

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[26] Webb J. *Genocide Treaty-Ethnic Cleaning, Substantive and procedural hurdles in application of the Genocide Convention,* Georgram Journal of international and Comparative Law No. 379, 1993 p.391

[27] *Prosecutor vs Mladic and Karadic. Review of the Indictment, pursuant to role of the rule of procedure and evidence*, Case No. 11-955-R61, 11 July, 1996, para. 5.92 and 9.4

The London Charter of the International Military Tribunal was “The statute” that set down the Laws and Procedure by which a post World War II Nuremberg Trials were conducted.[28]

The most comprehensive source of rules concerning armed conflict are the four Geneva Convention of 1977. Whilst state are obliged to suppress and punish the violations of all the provisions of those instruments there are special provisions of a special status whose violations are classified as grave breaches such grave breaches represent some of the most serious violation of international humanitarian law. They are the specific acts listed in the Geneva Conventions and Protocol I, including willful killing, torture or inhuman treatment and willfully causing great injury as follow:

i. Grave breaches specified in the four 1949 Geneva Conventions

- Willful killing;
- Torture or inhuman treatment
- Biological experiments
- Willfully causing great suffering
- Causing serious injury to body or health
- Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wrongfully.
- Unlawful deportation or transfer.
- Unlawful confinement of a protected person[29]

[28] 1996 ILF Report, p.91

- Taking of hostage

ii. Grave Breaches specified in the third and fourth 1949 Geneva Convention

- Compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile pore;
- Willfully depriving a prisoner or a protected persons of the rights or far and regular trial prescribed in the conventions.[30]

iii. Grave Breaches specified in the additional protocol 1 of 1977

- Seriously endangering by any willfully and unjustified acts or omission, physical or mental health and integrity of persons who are in the power of the adverse party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state health of the person concerned or not consistent with generally applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and in no way deprived of liberty.[31]

[29] Article 150,151, 130, 147 respectively (Geneva Conventions of 1949).
[30] Article 130 and 147 third and fourth Geneva Convention of 1949.
[31] Article 11 and 85 of additional protocol 1 of 1977.

iv. When committed willfully and if they cause death or serious injury to body and health;

- Making the civilian population or individual civilians the object of attack;
- Launching an indiscriminate attack affecting the civilian population of civilian objects in the knowledge that such attack will cause excessive loss of life injury to civilian or damage of civilian objects.
- Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects.
- Making non-defended localities and demilitarized zones, the object of attack.
- Making a person the object of an attack in the knowledge that he is *house de combat.*
- The perfidious use of distinctive emblem of the Red Cross and Red Crescent or other protective signs.

v. When committed willfully and in violation of the convention and the protocol

- The transfer by the occupying power of parts of its own civilian population into the territory it occupies or the deportation or transfer of all or parts of the population of the occupied territory within or outside the territory.
- Unjustifiable delay in the repatriation of prisoners of war or civilians.

- Practice of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- Attacking clearly recognised historic monuments works of art or places of worship which constitute the cultural or spiritual heritage of people and to which special protection therefore when such objects are not located in the immediate proximity of military objectives or used by the adverse part in support of its military effort;
- Depriving a person protected by the convention or by protocol I of the rights of fair and regular trial.[32]

The definition of crimes against humanity in ICC statute is more specific.

It 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;

a. Murder
b. Extermination;
c. Enslavement
d. Deportation or forceful transfer of population
e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.
f. Torture.

[32] ICRC *Penal repression punishing war crimes, a document from committee of International Red Cross*, advisory service on International Humanitarian Law, (1999) p.61

Regarding the class of crimes against humanity enumerated in the ICC statute offences such as enforced prostitution, forced pregnancy and enforced disappearance of a person are now included. These practices often associated with ethnic clashing as in the case of disappearance pursuit of power by terror and elimination of political opposition belong to any modern description of crimes against humanity by virtue of the role they place in policies of repression against civilian populations.

While the discrepancies of the definition of crimes against humanity can also be found between the statutes of the tribunals for the former Yugoslavia (CITY) and for Rwanda (ICTR). Article 5 of the ICTY statute provides as follows:

> *The International Tribunal shall have 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. Prosecution on political, racial and religious grounds; other inhuman acts"*

And the ICTR statute on the other hand, provides the same list of crimes although there is different whereas the ICTR statute does not require crimes to be committed in an armed conflict.

2.2.4 War Crimes

The Rome Statute (The Statute of International Criminal Court) set in article 8 define War Crimes in a specific manner, namely; violations of the laws or custom of war. Such violation shall include, but not be limited to murder ill-treatment or deportation to slave labour or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Moreover, a new class of international crimes was added to the Nuremberg categories for example the following where not so characterized at Nuremberg are now recognised as war crimes;

i. Willfully causing great suffering or serious injury to body or health

ii. Torture or inhuman treatment including biological experimentation.

iii. Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; etc.

This expansion of Acts constituting war crimes is particularly noticeably in the extensive provisions intended to punish combatants who inflict death, injury, pain and destruction in civilian population and their property.[33] Thus Article 8(2) of the statute provides as follows:

[33] Article 5 of the Statute of the International Criminal Court,

"other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely any of the following acts".

i. Intentionally directing attacks against the civilian populations as such or against individuals civilian not taking part in hostilities;

ii. Intentionally directing attacks against civilian objects, that is objects which are not military objectives;

iii. Intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacemaking mission in accordance with the charter of the United Nations.

Other prohibited acts include

i. Compelling nationals of the hostile party in operations of war directed against their own country.

ii. Employing poison or weapons including poisonous gases and liquid instead be regarded as a form of aggression. There may be other reasons; understandably, an exhaustive list of instances of aggression might leave gaps, which could encourage manipulation by potential aggressors. Any definitions of aggression probably should leave a margin for discretion and therefore makes an exhaustive definition impossible. Therefore the judicial review of aggression might prove a useful counterbalance to the monopolizing power of the security council.

iii. Committing outrageous upon personal dignity in particular humiliating and degrading treatment.

iv. Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization or any other forms of sexual violence.

v. Using civilian population as a shield against attack.

vi. Using starvation of civilians as a method of warfare and so on.

All those new additions to the list of international crimes is based on the experience of the international community arising from war particularly in civil wars, in the last 50 years. Those includes conflicts in Cambodia, Vietnam, Yugoslavia, Somalia, Rwanda, Liberia, Sierra Leone and so on.

2.2.5 Crime of Aggression

Aggression is a crime for which a definition (in its form as a state's wrongful act) has not yet been achieved, despite United Nations discussion lasting many decades and culminating in the disappointing general assembly resolution 3314(xxix) adopted by consensus on 14 December 1974, as it is well known, the definition laid down in that resolution is not exhaustive as stated in Article 4 of the resolution, which states further that "the security council may determine that other acts (than those listed in Article 2 and 3 as amounting to aggression). This definition was deliberately incomplete is quite understandable; to defined aggression also means among other things to decide whether so called pre-emptive self defense is lawful under the charter or must instead be regarded as a form of aggression. There may be other reasons; understandably an exhaustive list of instances of aggression might leave gaps, which could encourage manipulation by potential aggressors. Any definitions of aggression

probably should leave a margin for discretion and therefore makes an exhaustive definition impossible. Therefore the judicial review of aggression might prove a useful counter balance to the monopolosing power of the security council.

The work of the ILC and the statute of the ad-hoc tribunals for the former Yugoslavia and Rwanda confirmed that the exact parameters of the crimes against humanity, which are crucial in criminal proceedings. Equally commendable is the recognition and the conferment of jurisdiction on ICC by Article 5 of the Rome Statute over the crime of aggression through such jurisdiction will not exist until a definition is agreed upon by the state parties.

2.2.6 Establishment, Composition and Objectives of International Criminal Tribunals

Widespread violations of international crime had become a practice in the contemporary world. Thus, growing concerns of the international community resulted in a demand for international criminal tribunal for crimes recognised under customary international law as a threat to international peace and security. The Nuremberg and Tokyo tribunal and the two ad-hoc tribunals international criminal tribunal for the former Yugoslavia, followed by the International Criminal Court,. In response to the serious violations of international crime, those tribunals were established by Security Council on ad-hoc basis. The International Criminal Tribunal of Former Yugoslavia (ICTY) was empowered to determine individual criminal responsibility in trial for crimes under the International Criminal Tribunal

of former Yugoslavia (ICTY) statute. It's restricted to crimes committed on the territory of the former Yugoslavia.

The International Criminal Tribunal of Rwanda (ICTR) was set up by the United Nation Security Council following the recognition of the internal conflict in Rwanda as a threat to international peace and security. It was established in order to prosecute persons responsible for serious violation of international criminal law in the territory of Rwanda and Rwanda Citizens responsible for such violations in the territory of neighbouring state and geographically limited. The crime must be committed on political, ethnic, racial or religious grounds. The primary goal of the tribunals was to contribute to the restoration of peace in the territory of former Yugoslavia and Rwanda

On the other hand, the International Criminal Court, although empowered with jurisdiction for prosecution of international crimes differs from the tribunals. However, the statutes and the jurisprudence of the tribunals significantly contributed to the creation of the International Criminal Court (ICC). It was in recognition of this that Jonathan J. Channey states:

"The ICTY and ICTR have legitimated the prosecution of international crimes… thus created a substantial and tangible body of jurisprudence which was lacking in the past".[34]

Therefore one of the primary objectives of the United Nations is securing universal respect for the human rights and fundamental freedoms of individual

[34] Article 8(2)(b) and (e) which deals respectively with war crimes in international armed conflicts and war crimes in non-international war crimes.

throughout the world. The establishment of the permanent international criminal court such as the International Criminal Court (ICC) is seen as a decisive step in this connection.

2.2.7 Nuremberg International Criminal Tribunal "Trials of the Nazi's"

There have been several attempts to draw precedents from the International Criminal Court or more appropriately the international military tribunals which proceeded it in Nuremberg and Yugoslavia, the dream of international criminal jurisdiction albeit too ad-hoc was realized and with the establishment of this tribunal, the international Criminal Tribunal of Yugoslavia (ICTY) was empowered to determine individual criminal responsibility in trial for crimes under the ICTY statute its restricted to crimes committed on the territory of the former Yugoslavia.

The Nuremberg and Tokyo trials after the Second World War immediately represented progress towards the creation of a body with truly international criminal jurisdiction. But they were greatly influenced by their origin and in effect applied the law and justice of the Victims rather than those of the universal community of state.

And for over 45 years, the international community represented by United Nations endeavoured to use the lesson drawn from Nuremberg to establish a permanent international criminal court, operating on the basis of international criminal code, but its efforts proved abortive the debates of the international law

commission which was entrusted with the task of drawing up a code of offences against the peace and security of mankind and a statute for international court. [35]

The tragic events in the former Yugoslavia the international community at least made aware of the atrocities committed and alerted the courageous report of Tadevz Mazowicki agreed to the establishment of an international criminal tribunal for the former Yugoslavia which was instituted by resolution 808 and 827 of the United Nations Security Council adopted in Tokyo from some historical dating to as far back as 6th century BC.[36]

The outbreak of a Second World war and wide spread concern over the atrocities in nazi Germany were factors that reawakened interest in the concept of an international panel tribunal, by 1942, a special body constituted by another non-governmental organizations the commission on panel reconstruction was able to report that while there was evidence of growing acceptance of the concept, many states still favoured trial of war crime by domestic counts.[37]

In what is famously referred to as the Moscow declarations of 1st November 1943, the allied powers affirmed their resolve to prosecute and try Nazis for war crimes. The stage for evolving the mechanism for this was set a month earlier at the London Conference of the Allied powers, which established the United Nations Commission for the investigation of war crimes. This

[35] Kittch al-savee, K. *International Criminal Law,* Oxford University Press, 2001 p.35
[36] Channel J. *Progress in International Criminal Law"* American Journal of International Law, A.J.I.L/1947/93/2 p452-464
[37] U.N *War Crimes and Development of the Law of War* 1948, pp.95-99

commission mandated its committee on enforcement to consider the establishment of an international court for the trial of war criminals.

By 1944, the commission had elaborated a draft convention for the establishment of a United Nations war crimes court basing its text largely on the 1937 treaty prepared by the league and inspired by the efforts of bodies such as the London International Assembly.

The allies on 8th August 1945 activated an interim solution in the form of an Agreement for the prosecution and punishment of major war criminals for the European axis and the establishment of the charter of the international military tribunal. This treaty was eventually adopted by nineteen other states, which sought to expose their support for the concept.

The Nuremberg trials commenced in October 1945 with indictment served on 24 Nazi leaders and were concluded in less than a year. Under the charter, the tribunals were competent to try three broad categories of crimes namely crimes against peace, crimes against humanity and war crimes.

The first two categories were in traversal. Since the alleged crimes were committed before the charter was adopted the arguments of exposit fact criminality and the legality of retroactive criminal liability were canvassed before the tribunal. It was also argued that the charter being a source of conventional international law was binding only on the parties who are the proper subjects of international law and not individuals. The tribunals rejected those contentions outright.

In the judgement of the Nuremberg international military tribunal on the 30th of September 1946, one of the judges Mr. Justice Birket made the following remarks.

> *The charges in the indictment that the defendants planned and waged aggressive wars are charged of the utmost gravity. War is essentially an evil thing. Its consequence are not confined to the belligerent states alone bout affect the world.*[38]

But still it considered the prohibition of retroactive criminality as a principle of justice and that justice required that nazi atrocities be punished.[39] These objectives were of course not new having been canvassed with equal vigour by the American delegates at the allied commission on the responsibility for authors of war constituted to determine the liability of German officials for war crime after the First World War. The difference here however was the decisive shift of international opinion and a willingness to confer jurisdiction on an international tribunal.[40]

The significance of the Nuremberg and Tokyo war crimes tribunals to the subsequent evolution of the international criminal court cannot be overemphasized. It was admittedly an interim measure pending the completion of the draft embarked upon by Committee II of the United Nations Commission for the investigation of International Crimes.

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[38] Forencz, Hmso, Comd 6964 (1964) 13, 14 Amj. Int. (1947) B.186
[39] Schabas, W. *An Introduction to the International Criminal Court.* Cambridge Press, London (2004) 2nd Edition p.6
[40] McCormark, Fro Su Tzu to the Sixth Committee, *The Evolution of an International Cirminal Regime,* Kluwar, 1997 at p.32

However, the trials firmly established the notion of individual criminal responsibility for international crimes.[41]

2.2.8 International criminal Tribunal of Rwanda

It is a notorious fact that decades of ethnic tension, which culminated in the genocide in Rwanda in 1994 had created a climate of instability affecting all states in the Great Lakes region of central Africa. Fighting did break out in Northern Rwanda in 1990 between the mainly Hutu government and the Tutsi led Rwanda Patriotic Front (RPF). While peace talks brokered by Tanzania and the OAU led to a peace agreement in 1993, which agreement provided for a transitional government and for election in April 1994 and in 8th November 1994, the international criminal tribunal for Rwanda (ICTR) was established by the United Nations Security Resolution 955 of November, 1994. The purpose was to prosecute persons responsible for serious violation of international crimes in the territory of Rwanda and the Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring state between 1st January and 31st December 1994. At the same time, the Security Council adopted the statute of the tribunal and requested the Secretary General to make arrangement for its effective functioning.

The International Criminal Tribunal for Rwanda ICTR was set up by the United Nations Security council following the recognition of the international conflict in Rwanda as a threat to international peace and security at that time the

[41] Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal.

Prime Minister and Cabinet Ministers and United Nation Peacekeepers were among the first victims. The killings were mainly carried out by the armed forces and on 22 February, 1995 the Security Council passed resolution 977 designating the town of Arusha in the United Republic of Tanazania as the seat of the Tribunal.

The tribunal which has a relatively wide Jurisdiction is mandated to prosecute persons responsible for genocide and other serious violation of international humanitarian law. The statute of tribunal more or less follows the genocide convention of 1948. The ICTR published its first indictment on 28 November 1995 against eight people.

Opening a completely new area for tribunals of this nature, Article 4 of the statute empowers the tribunal to prosecute persons who committed or are to be committed serious violations of Article 3 common to the Geneva convention of 1949 for the protection of war victims and of 1977 additional protocol II relating to the protection of victims of non international armed conflicts.

The Rwanda Tribunal has been the object of criticism; the Rwanda government opposed the creation of the tribunal in the first place citing two main reasons. That the most severe punishment to be meted out by the tribunal would be imprisonment but death penalty supposed to be the punishment for those proved to have been involved in the genocide.

Secondly, the Rwandan government argued that it was unrealistic to limit the tribunal jurisdiction to the period 1 January to 31 December 1993. other

reasons includes the likelihood that judges from countries which have been in one way or another involved in the war would show bias, and the fact that those found guilty would serve their sentence in countries offering prison facilities and not in Rwandan jails.[42]

In the eye of the Rwandan government, therefore the tribunal would be ineffective; moreover, it would serve no useful purpose since it would not meet the expectations of the Rwandan people. The government has confirmed to take a very hostile attitude towards the tribunal whose personnel in Kigali have reportedly been subjected to harassment and even manhandled in the course of their work.

Despite the initial criticism and seemingly lack of cooperation with the tribunal acting on their request by the tribunals president before the seminar on the international criminal tribunal and the enforcement of the international humanitarian law, jointly organized by the OAU and the ICRC, the OAU secretary general recommended in his report of 25 May 1997 that African heads of state discussed the difficulties encountered by the tribunal in carrying out its mandate and give it their full cooperation.[43]

For the first time in history, the OAU raised the issue of penal sanctions for war crime and serious violations of international humanitarian law committed

[42] Tavernier Poul, '*The experience of International Criminal Tribunal for the Former Yugoslavia and Rwanda"* published in http://www.ico.org/corceng/nsf/c12

[43] *Prosecuting Genocide in Rwanda:* ICTR and national trials Lawyer committee for Human Rights Washington CT July, 1977.

within the context of international conflicts in Africa. The heads of state agreed to cooperate with tribunal.

The meaningful political support was subsequently matched by deed with some states namely (Gabon, Kenya and Cameroon) decided to transfer some criminals sought by the Tribunal to Arusha.

In the final analysis, it is clear that the significance of tribunals like the international criminal tribunal of Rwanda does not lie in number of persons who appear before them, but is the signals set out by their creation.

As Meron say:

> *No matter how many atrocities cases those international tribunals may eventually try their very existence sends a powerful message. Their statute rules of procedure and evidence and practice stimulate to the development of the law. The possible fear by the state that activities of such tribunals might pre-empt national prosecution could also have the beneficial effort of spurring prosecutions before the nation court for serious violations of international crimes".*[44]

The creation of the International Criminal Court for Rwanda marks a refusal to accept impunity. It also signals the international community to ensuring respect of international criminal law and trying those responsible for seriously violating it.

[44] Introductory note to the report by the OAU Secretary General to the 3rd Ordinary of the conference of heads of states and government and sixty – sixth ordinary session of the Council of Minister, Harare, Zimbabwe, 26 May 1992 (not published).

2.2.10 Permanent International Criminal Court

The international criminal court is an independent treaty based on permanent judicial institution with jurisdiction over persons who commit the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. The court is intended to contribute to the deterrence of such crimes as well as to the maintenance of international peace, security and respect of international justice. It is complementary to national jurisdictions and its statute and rules of procedure and evidence guarantee fair and public trials consistent with international recognised human rights.[45]

The adoption of the statue of an international criminal court has been widely welcomed as an important building block in ensuring international accountability. Now that the statute has received the necessary 60 ratifications for its entry into force, it is the first time the world has a permanent mechanism for prosecuting genocide, crimes against humanity and war crimes.[46] Past attempts to deal with international atrocities have been ad-hoc in nature. The international military tribunal for Nuremberg and Far East and the recent military tribunal for the former Yugoslav and Rwanda have temporal and territorial restrictions on the jurisdiction.[47]

The International Criminal Court (ICC) will not face those limits, the ICC will be a permanent institution with jurisdiction over core crimes of genocide,

[45] Co-operation agreement between OAU and ICRC 4 May 1992 (Not published).
[46] Hafner-Gerhard; "*A Response to American view* as presentation by Ruth Wedgewood" published in European Journal of International Law (1999) vol. 10 p.115
[47] Rome Statute, Article 5

crimes against humanity, war crimes and aggression once it defined and once a state ratifies the ICC treaty or consents to jurisdiction on ad-hoc basis.[48]

The court is also meant to guarantee lasting respect for and the enforcement of international justice, as a judicial institution, it is to conduct fair, impartial and efficient investigations, prosecutions and trials.

The ICC statutes rules of procedure, evidence and other supplementary texts provide safeguards to ensure the integrity of the court's proceedings. At all stages of proceedings the rights of the accused and other actors are guaranteed through both substantive law and procedural mechanisms. In addition, the statute contains innovative provision permitting victims to participate in proceeding and to obtain reparations from the court.

The principle of complementarity established the boundaries of the court's jurisdiction. Unlike the ad-hoc tribunal which take primacy over the national courts. The International Criminal Court (ICC) proceed on the opposite assumption. Complementarity, as established in the statute's preamble and in article 1 and 17 to 20 assumes that national courts will assume jurisdiction. These provisions create a presumption in favour of action at the level of states. In other words, the ICC does not enjoy primacy over national courts but should only step in when competent domestic prosecutor or court fails or are unwilling or unable to act. The Rome Statute make it clear that states judicial authorities have the primary responsibility of prosecuting and punishing international crimes. This

[48] Ibid Article 12, (3)

should be their normal task and the ICC can only deal with cases where national judicial system do not prove to be up to the assignment.

Although the ICC gives priority to national prosecuting of crimes under its statutes, the court can determine the admissibility of a case. Accordingly, the court may carry out the prosecution of a case, which has been prosecuted by a state with jurisdiction, if the standards stipulated in article 1 are not met.

The ICC has the power to determine the competence of the national investigations and court's proceeding and where appropriate brings a decision in order to achieve its goal of eliminating impunity for international crimes.

It is submitted that, with these laudable achievements of the adoption of the Rome statute an its coming into effect with the ratification of 60 signatory states on 1st July 2002 that landmark provisions and machinery to halt culture of impunity and exact compliance and violations of international criminal court law of justice will be achieved.

2.2.11 Special Criminal Tribunal of Sierra - Leone

In 1991, war in neighbouring Liberia spilled into Sierra-Leone, which soon engulfed the country on a bloody and costly civil war resulting in the death of thousands as well as displacing almost half of the population. It also created major security problems for the government culminating in the overthrow of the Momoh administration in April 1992.

The situation during the Sierra Leone;s decade long civil war was no less awosome and was known internationally for its horrific atrocities especially the

widespread amputations of villagers' limbs. There were also specific abuses directed against women. Indeed violence against women was not just incidental to the conflict, but was routinely used as a tool of war, sexual violence was used in a widespread and systematic way as a weapon and women were raped in extraordinarily brutal ways.[49]

The largest number of atrocities committed by fighters of the Revolutionary United Front (RUF) the rebel movement that started the war led by Corporal Foday Sankoh. The Armed Force Revolutionary Council on army faction that seized power in 1997 and was ousted the following year also deliberately targeted women and girls. The official Sierra-Leone Army and an irregular pro-government militia group, the civil defence forces, employed similar tactics although on a less widespread scale.

For example, the Truth and Reconciliation Commission (TRC) found that "many women suffer a double victimization, in that they were compelled against their will to join the armed forces and today they are victimized by society for having played a combative role on the conflict. A special court has been set up to try alleged perpetrators of serious crimes under international humanitarian law and Sierra Leonean Law.

The establishment of special criminal tribunal of Sierra Leone is of the primary objectives of the United Nations in securing universal respect for human

[49] African Renewal, January 2005.

rights and freedom of individuals throughout the world. It have indicted several accused person including the former Liberian president Charles Taylor.

The idea of establishing this tribunal is that the conduct of armed conflicts is governed by rules, which appears to have been found in almost all societies without geographical limitation. The idea also is aimed to restrain the parties to an armed conflict from wanton cruelty and ruthlessness and to provide essential protection to those most directly affected by the conflict because without such legal restraints war may all too easily degenerate into utter barbarism; this above is the statement of one of the judges in ***Prosecutor vs Aliyu Kwandewa and Muwanina Faffan.***[50]

With the prosecution of former Liberian president and the establishment of this tribunal all potential warlords now know that depending on how a conflict develops there is a place on international criminal law and it is clear that international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment and those who incite war crimes against humanity will no longer find willing helpers.[51]

2.2.12 Legal and Practical Measures for the Preventions of Genocides by the Tribunals

The two ad-hoc international criminal tribunals for the former Yugoslavia and Rwanda were put in place and the serious violations of international criminal

[50] SMT No. 17-83-11 August (2007).
[51] Prosecutor vs Fodeysanko (2003) April, 5 MIT, No. 432

law and contribute towards the restoration and maintenance of peace in both the tribunals are mandated to prosecute those responsible for the crime of genocide, crime against humanity, war crimes and violation of the law and custom war under article 3 of the ICTY and recognised by Article 3 of the Geneva convention.

The first major judgment by the appeals chamber of the Yugoslav tribunal clarified important legal issues relating to the creation of the body declared that crimes against humanity could be committed in peacetime and established culpability for war crimes committed during internal armed conflicts. Other judgements such as the ***Erdemovic Case*** which excludes recourse to a defence of duress promoted in inclusion in the ICC statutes of a provision preserving such a defence. Also in the ***Blaskic Case***.[52] The court ruled on the admissibility of documents that could impinge on national security, that ruling resulted in Article 72 of the statute.

While the International Criminal Tribunal for Rwanda has been alive to its mandate to help restore and maintain peace and bring about national reconciliation by trying persons responsible for acts of genocide and other grave breaches of international humanitarian law committed in Rwanda and Rwandan citizens suspected by committing such acts and violations in neighbouring states between 1 January 31 December 1994.[53] This tribunal has to its credit the first conviction on genocide by an international court; and in addition, the tribunal has

[52] Case No. IT 96-22-A (1998) III TLR 298
[53] Article 3(1)(d) of the Rome Statute

power to prosecute person charged with crimes against humanity, which include; murder, extermination, enslavement; deportation, torture, rape, prosecution on political, racial or religious grounds. But the statute specifies that they have fallen within the purview of the tribunal when committed in a widespread or systematic attack against any civilian population on national, political, religious or ethnic grounds. Thus in the case of ***Prosecutor vs Jean Paul Akayesu***[54] . The conviction by the Rwandan Tribunal of Jean Paul Akayesu on 2 September 1998 of nine counts of genocide, crimes against humanity and war crimes is one that could allay any fears regarding the ability of the tribunal to deliver. This was the first judgement by handed down by the tribunal, the first conviction on genocide an international court and it open a complete new era for tribunals for this nature, Article 4 of the statute empowered the tribunal to prosecute persons who commit or order to be committed serious violations of article 3 common to the Geneva conventions of 1949. Such violations include rape, enforced prostitution.

To this end the work of the two ad-hoc tribunals of the former Yugoslav and Rwanda is a welcome development; which has convinced the international community on the need to establish a permanent International Criminal Court. Which in 1995 the General Assembly convened an ad-hoc committee to consider the draft statute submitted by the International Law Commission (ILC). It became apparent from the deliberations of the ad-hoc committee and lessons learned

[54] Case No. IT-95-14 Ar 108 bis (1998) 110 ILR 677

from the Yugoslav and Rwanda Tribunals that considerable work needed to be done before the statute of the court could be adopted.

On 17th July despite a desperate attempt by United States to scuttle the talks, the conference adopted the statute of the international court. The statute in many ways mirrors the most current synthesis of universal standards of culpability for crime of high morality. It has one of the most complex international instruments ever negotiated a sophisticated web to highly technical provisions drawn from comparative criminal law combined with a series of more political propositions which touch the very heart of state concern. With their own sovereignty. In ***Prosecutor v Furundzija[55].*** The Yugoslav tribunal described the significance of the statute thus:

> *… in many arrears the statute may be regarded as indicative of the legal view i.e. opinion juris of a great number of states… depending on the matter in issue the Rome statute may be taken to restate reflect or clarify customary rules to crystallize them, whereas in some areas it creates new laws or modifies existing law. At any event the Rome statute by and large may be taken as constitution and authoritative expression of the legal views of a great number of states.[56]*

It is apposite to state that despite some of the inadequacies of the Rome statute, it explicit definition and murder and extermination as international crimes whether in time of war or peace is a significant advancement in international humanitarian law. Thus, murder and extermination by governments are within the

[55] Case NO. ICTR -96-4-T "African Tribunal Convicts Rwandan Genocide Suspect" BBC online network, 2 September, 2007.
[56] Decision of ICTY, Trial Chamber 1 of 3 March 2000.

general definition of genocide. In this respect, the Rome statutes meets the extensive criticisms of the genocide convention that it is too narrow and should have include the murder or extermination of people for reasons others than the attempt to destroy indelible groups, although not under the crime of genocide. The ICC now covers almost all cases of democide with the exception of murder of political opponents or others that is not part of the widespread or systematic attack on the population.

CHAPTER THREE

3.1 CRIMINAL JURISDICTION AND JUDICIAL MECHANISM OF INTERNATIONAL CRIMINAL TRIBUNALS

3.2 Introduction

This chapter addresses the fundamental issue regarding the courts that have jurisdiction to prosecute the breaches of crime of genocide, the competence of the court and tribunals and the procedural mechanism put in place by the instrumentality of the Rome Statute, Geneva Conventions and Additional Protocol and those two ad-hoc tribunals of former Yugoslavia and Rwanda taking into consideration the fact that they are in the vanguard of international repression of serious violations of humanitarian law. Their activities serve as a basis for the work of the permanent international court. The credibility of such international tribunal nevertheless depends on the decisions made to determine the guilt or innocence of accused persons while ensuring that all the judicial guarantee designed to secure respect for the individual are provided. Despite all the indignation aroused by the crimes the international criminal tribunals are called upon to prosecute, the accused must be accorded the right to a fair hearing or trial.

To this end the courts with the jurisdiction coupled with other competence will be examined within the context of the provisions of the conventions and additional protocol. The procedural guarantees to ensure fair trail by both

national and international courts and finally preliminary reflections on the procedural rules of the statute of the International Criminal Court adopted in Rome on 17th July 1998 conclude this chapter.

3.2 COURTS WITH JURISDICTION

The provisions of the Geneva conventions and the additional protocol dealing with grave breaches of international crimes law assign the jurisdiction to prosecute such persons, these efforts culminated in the United Nations convention on the prevention and punishment of the crime of Genocide in 1948.[57] The resolve of the United Nations to end impunity around the globe as evidenced by the Genocide Convention provided the impetus for the setting up of the various ad hoc military tribunals to hold accountable those who have carried out crimes which could be described as genocide after the Second World War.[58]

Despite those worthwhile developments the need for a permanent tribunal with worldwide jurisdiction to punish these crimes was considered desirable. The events in the former Yugoslavia, which led to the destruction of thousands of innocent lives, further strengthened the need for an International Criminal Court which had long been under consideration.[59] Unlike the ad hoc tribunal, the court is a permanent institution, which ensures that the international community can make immediate use of its services in the event of atrocities occurring and also

[57] United Nations Multilateral Treaty Framework: *An invitation to Universal Participation Focus,* 2004, Treaties on the Protection of Civilian 2004.
[58] Nuremberg International Military Tribunal Trials for Nazi war criminals (1945-46)
[59] Shaw, MN. *International Law* (4th Ed.) Cambridge University Press 1997 p.187

acts as a deterrent to those who would perpetuate such crimes. The courts is empowered to try any individual for the most serious crimes concerned to the international community as a whole crime of Genocide inclusive and seeks to establish a fair and just international criminal justice system with competent and impartial judges and independent prosecutor.[60]

It is important to note that ICC regime is merely complementary to national criminal jurisdiction. This means that the International Criminal Court will only act when the national jurisdiction is unable or unwilling to genuinely prosecute or in the case of referral by the Security Council,[61] even the Geneva convention and additional protocol did not establish any court to prosecute those responsible for the violations of its provision by the national courts of the state parties shall assume jurisdiction or rather the high contracting parties should bring such person regardless of their nationality before its own courts.

Again the high contracting party may also if it prefers and in accordance with the provision of its own legislations hand such persons over for trials to another high contracting party concerned provided such high contracting party had made out prima facie case.[62]

It should be noted that while nations agree that the criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international such national institutions are often either

[60] http://www.un.ord/law/icc/general/overview/htm. visited 8/9/2007
[61] The provision of article 49,50, 129 and 146 of the first, second, third and fourth Geneva Conventions respectively.
[62] International Criminal Court – Wikipedia the Free Encyclopedia available http://en.wikipedia.org/wiki/icc visited 15th Sept. 2007

unwilling or unable to act. Usually for one or two reasons. Governments often lack the political will to prosecute their own citizens or even high level officials as was the case in the former Yugoslavia or national institutions may have collapsed as in the case of Rwanda.

The problem of this aspect i.e. the jurisdiction of ICC on genocide was the provision of article 98 of the International Criminal Court i.e. (Rome Statute) of 1998 which provides that:

> *The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the sate or diplomatic immunity of a person or property of a third state, unless they can first obtain the cooperation of that state for the waiver of the immunity.*

Also section (2) provides

> "*The court may not proceed with the request for surrender which would require the request state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the court, unless the court can first obtain the cooperation of the sending state for the giving of consent for the surrender.*

For example the US therefore effectively used this provision to pressurize some countries to enter into bilateral agreements to exempt her nationals from the courts jurisdiction i.e (ICC) as at 1st July 2003 a total of 48 countries had signed bilateral agreement with the US and majority of them are small and poor

countries that have not ratified the ICC treaty any way and therefore have no obligation to transform US personnel to the court.

Thus under the Geneva conventions and additional protocols clarified the provision of the statute which provide that the national courts that would exercise jurisdiction with respect to genocide and other international crime shall be military courts, civil courts can only assume jurisdiction if the existing law of the detaining power has power to try members of its armed forces.[63]

And the jurisdiction for the prosecution of those who violate the provision of crime of genocide is imposed on the state parties who are to use their national legal machinery to effect the prosecution but they must comply with the procedural guarantees of fair trail.

3.3 PROCEDURAL GUARANTEE UNDER THE INTERNATIONAL CRIMINAL LAW

The last paragraph of article 49, 50, 129,146 of the second, third fourth Geneva conventions provides for procedural guarantees of fair trial and defence of accused persons, in all circumstances the accused person shall benefit by safeguards of proper trial and defence which shall not be less favourable than those provided by article 105 and those following the Geneva convention; relative to the treatment of prisoners dealing with rights and means of defence of the accused persons; thus

[63] Article 4 of the third Geneva Convention of 1949

> *The prisoner of war shall be entitled to assistance by one of his prisoner comrades to defence by a qualified advocate or counsel of his own choice, to the calling of witness and if he deems necessary, to the services of a competent interpreter, he shall be advised of those rights by the detaining power in due time before the trial…*

And article 51 of the Rome Statute provide the rules of procedure and evidence which shall enter into force upon adoption by a two-third majority of the members of the assembly of states parties.

While in urgent cases where the rules do not provide for a specific situation before the court, the judges may by a two third majority, draw up provisional rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of states parties, but in the event of conflict between the statute and the rules of procedure and evidence, the statute shall prevail.

Again article 106 of the Geneva convention provides for the right of every prisoner of war to appeal or petition from any sentence pronounced upon him, with a view to quashing or revising of the sentence or to reopen the trial. While article 107 provides for the right of a prisoner of war to be notified of findings and sentence and to be reported to the protecting power and communicated to the prisoner representative concerned.

Article 108 provides that sentence pronounced on prisoners of war after a conviction has become duly enforceable shall be served in the same manner or

conditions as in the case of the armed forces of the detaining power, which must conform to the requirement of the health and humanity.

The provision dealing with procedure in the conventions is further enhanced by the provisions of protocol 1 additional to the Geneva conventions. It provides that[64]

a. Any person arrested detained or interned for actions related to the armed conflict shall be informed promptly in a language he understands of the reason why those measures have been taken against him. Except in cases of arrest or detention for penal offences such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest detention or internment have ceased to exist.
b. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned; they shall wherever possible be held in the same place and accommodated as family units.
c. Persons who are arrested, detained for reasons related to the armed conflict shall enjoy the protection provided by the article under final release or re-establishment even after the end of the armed conflict.

[64] Article 75 of the Additional Protocol of 8th June 1997.

d. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes and genocide. The following principles shall apply.
e. Persons who are accused of such crimes shall be submitted for the purpose of prosecution and trial in accordance with this applicable rules of international law and
f. Any such person who do not benefit from more favourable treatment under the conventions or this protocol shall be accorded the treatment provided by the articles whether or not the crimes of which they accused constitute grave breaches of the conventions or this protocol.

Historically, the international community did not establish procedural mechanism to enforce penal responsibility for commission of grave breaches of international crime genocide inclusive prior to 1993 when the International Criminal Tribunal for the former Yugoslavia[65] was established by Security Council of the United Nations in response to the shock of the tragic events that followed the disintegration of the former Yugoslavia. The international community finally becomes aware of the atrocities committed and alerted by the courageous reports of ***Tadeusz vs. Mazoweicki.*** A second tribunal was subsequently set up to prosecute persons responsible for genocide in the territory of Rwanda and the Rwandan citizen responsible for such acts committed in the territory of neighboring states; by the Security Council 1994. The totality of the provision of

[65] Article 3 of the Statute

article 75 of additional protocol 1 of 1977 provides for fair hearing in criminal matters.

The parties shall be accorded the right to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The rule prohibiting double jeopardy should be observed i.e. once a person has been prosecuted or punished by the one party for an offence in respect of which a final judgement acquitting or convicting was given, the person cannot be charged under the same law and judicial procedure. This guards against putting the life and limbs of persons to test twice and the proceedings should be conducted in public and the sentence pronounced to the public.

Finally, these are all statutory checks and balances to ensure that an accused person is accorded a fair trail.

Specifically, Article 66 of the Rome statutes provides that

1. Everyone shall be presumed innocent until proven guilty before the court in accordance with the applicable law.
2. The onus is on the prosecutor to prove the guilt of the accused.
3. in order to convict the accused, the court must be convinced of the guilt of the accused beyond reasonable doubt.

And article 67 guarantees the rights of the accused. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of Rome Statute.

The statute of the ICTY and ICTR attach criminal responsibility for planning execution ordering or aiding and abetting in the planning or execution. In **Tadic case** the trial chamber held that actual physical presence when the crime is committed is not necessary as an accused who is found to be concerned with the killing can be held to have participated in the crime. The court held further that the aider and abettor of an act, would be responsible for all that result from the commission of the act in question.

The tribunals do not punish incomplete crimes otherwise known as inchoate offences in common law jurisdiction, this however does not apply in the crime of genocide which punishes an incitement to commit genocide. But the ICC in distinction from the ICTY and ICTR attached criminal responsibility over inchoate offences or attempts in relation to the crimes within the jurisdiction of the court.

In other words trials in absentia are prohibited in criminal prosecutions as they have a set of rights includes proffering a defence to the charges and allegations. The provision has been transposed in the international criminal system as part of its procedures. But under the statutes of the international criminal tribunal for Yugoslavia and Rwanda, trials in absentia is prohibited.[66]

The ICTY appeals chamber in ***Prosecutor vs Tihomir Blaskic***[67] has held that absentia proceedings may be permitted where in exceptional cases of

[66] Article 21(4)(d) of the ICTY and article 20(4)(d) of the ICTR state.
[67] Case No. IT-95-14 AR 108; *Decision on Subpoena,* ICTY A Ch. 29, Oct. 1997 paragraph 59

contempt of the ICTY the person charged fails to appear in court thereby obstructing the administration of justice.

In ***Jean Bosco Barayagwizu vs Prosecutor***[68] the accused refused to attained his trial on the ground that he would not get a trial from the tribunal. The ICTR held that in instances or situations where the accused has been informed of his trial and fails to attend the ICTR statute or human right cannot prevent the case from proceeding in his absence.

But the provisions of ICC statute on trial in absentia are more detailed than those of the ad-hoc tribunals of Yugoslavia and Rwanda. Under the ICC statute, the accused person shall be present during the trial, except where the accused continues to disrupt the trial in which case the accused may be removed. However, the removed accused can still observe the trial and instruct his counsel from outside the courtroom through the use of communication technology if required.

From the beginning it is clear that trials in absentia are prohibited in the international criminal process and the two ad hoc tribunals made no permissible provisions for its exception save as interpreted and applied in the case law of the ICTY in Blaski (supra).

[68] Case No. ICTR -97-19, ICTR Ch. 1 *Decision on the Defence Counsel withdrawal from the proceedings* 3 Oct. 2000

3.4 JURISDICTION OF INTERNATIONAL CRIMINAL TRIBUNAL OF FORMER YUGOSLAVIA AND RWANDA

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established on 11th February 1993 by the Security Council to prosecute persons responsible for genocide or other international crimes while that of Rwanda on 18th November 1994.

The aim of the Security Council was to put an end to such violations and to contribute to the restoration and maintenance of peace.

The ICTY has jurisdiction over the following crimes; grave breaches of the Geneva conventions of 1949; violations of the law or customs of war, genocide and crimes against humanity.

And the ICTR on the other hand has the mandate to prosecute persons responsible for genocide and other serious violations of international crimes committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1st January and 31st December 1994. The ICTR has relatively wide jurisdiction to prosecute persons responsible for genocide and other serious violations of International humanitarian law.

The statute of the tribunal more or less follows the Genocide convention of 1948 in defining genocide as any act committed with intent to destroy in whole or in part a national, ethnic, racial or religious group. The statute also provides that

genocide itself, conspiracy, to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are all punishable.[69]

The application of the principles of customary international law and the respect to ICTY and ICTR has fuelled allegations of violations of the principle of legality. The subject matter jurisdictions of the ICTY are encapsulated in four areas: Grave breaches of the 1949 Geneva Conventions[70]

The application of the principles of customary international law and the respect to ICTY and ICTR has felled allegations of violations of the principle of legality. The subject matter jurisdictions of the ICTY are encapsulated in four areas: Grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war[71] genocide and crimes against humanity. The ICTR jurisdiction includes the crime of genocide and violation of article 3 common to the 1949 Geneva Conventions and the 1977 additional protocol 11 to those convention.

The defects has been cured in the ICC by an elaboration of the crimes within the jurisdiction of the court except the crime of aggression which is yet to be defined.

The ICTY[72] and ICTR contained similar provisions on the prevision of Non Bis in Idem in their statute. The ICTY in article 10, provides that no person shall

[69] African Tribunal Convicts Rwanda Genocide suspect "BBC Online Newyork, 2nd September 1998.
[70] *Amelioration condition of the wounded, sick and shipwreck members of the armed forces at sea* (No.11), 75 UNTE, 87 Convention Relative to the Prisoners of War (No. 111) 75 UNIS p.135
[71] Ibid Article 4 and 13
[72] Article 101 ICTY

be tried before a national court for acts constituting serious violations of international humanitarian law under the present statute, for which he or she has already been tried by the international tribunal. However, subsection 2 qualifies it by providing that a person who is tried by the national courts for acts constituting serious violations of international crimes may be subsequently tried by the international tribunal only; if the acts for which he or she was tried was characterized as an ordinary crimes of the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

However, in considering the penalty to be imposed on a person convicted of a crime under the present statute, the international tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

In ***Prosecutor v. Dusko Tadic***[73] the prosecutor by a motion of a formal request to the Federal Republic of Germany to defer to the competence of the tribunal in the investigation of the activities of Dusko Tadic. The request was granted. The accused (Tadic) was subsequently charged by the ICTY. He challenged the competence and jurisdiction of the ICTY to try him when he was already prosecuted in Germany. The court held that he had not yet been tried and a trial by the ICTY bars a subsequent trial by any other court on the same

[73] Case o. IT-94-ICTY Ch. II *Decision on Defence Motion on the Principle of Neb is in Idem*, 14 November 1995 paragraph 9

conduct. On appeal to the appeal chamber of the ICTY it was held inter alia that primary of jurisdiction was necessary to prevent the accused from forum shopping and to prevent proceedings designed to shield war criminals.

It must be appreciated that the ICTY and ICTR both have concurrent jurisdiction with the national courts as well as primacy of jurisdiction.[74] Thus, the international tribunals of Rwanda and Yugoslavia may at any time or stage of proceedings in a national court request the national court defer to the competence of the international tribunal in accordance with the statute and rules and procedure and evidence of the tribunal.

Though the provisions of the statute of the ICTY and ICTR vest it with primacy of jurisdiction over national courts it must specifically make a request for the deferral of any matter before the national court to it.

Where a request for deferral has not been made and the case proceeds in national courts, if circumstances are such that ICTY feels justifiable that the trial in the national court was used as a shield or it was not impartial and independent the court may proceed to retry the case and the principle of ***ne bis in idem*** will not apply.

In ***Aleksovski (appeals chamber)***[75] the appeals chamber considered the element of double jeopardy, which arose from the facts of case. The accused appeared twice for sentence for the same conduct suffering the consequent

[74] Article of the ICTY and article of the ICTR paragraph p.190
[75] Case No. IT-94-ICTY Ch. 11 *Decision on Defence Motion on the Principle of Ne bis in Idem*, 14 NO. 1993 paragraph 190.

anxiety and distress, and also that he has been detained a second time for a period of release of nine months. In consequence of which his sentence was revised and shortened.

It should be noted that the establishment of the two tribunals and their mandate to monitor respect for the rules of international crime and to prosecute persons responsible for serious violations has several major implication for the evolution of this body of law.

The judgement handed down by the two chambers of the tribunals will represent a substantial addition to existing case law relating to certain crimes, particularly genocide. Again, the principles of direct individual criminal responsibility is now established in international law. Henceforth, international courts will be able to prosecute private individuals for violations of international law, even if these violations are committed with the internal framework of a particular state.

The establishment of the two tribunals has certainly given fresh impetus to the debate and finally these tribunals make a contribution to the development of international justice by recognizing the need for justice in international relation.

3.5 PROCEDURE RULES AND STATUTES OF INTERNATIONAL CRIMINAL COURT

The establishment of ICC has transformed the landscape of international justice. The permanent court represents more away from the ad hoc nature of

earlier tribunals created to respond to individual conflicts. Thus, the ICC is built around a vision of international justice.

The International Criminal Court (ICC) will fulfill two objectives:-

- safeguarding higher values such as the protection of human rights, an obligation that transcends state orders;
- and the accountability for those responsible for the commission of these crimes, so as to put an end to the impunity that is often associated with these violations.[76]

In terms of structure the Rome statute contains a preamble and 128 articles grouped into 13 sections; it is a comprehensive text that established the ICC determines the composition and function; delineates its subject matter as well as its jurisdiction both temporary and substantively; codifies the crime as well as include the corresponding sentence and procedural rules and develops the procedural norms and the general principles of criminal law that will be reflected in the operational criminal court.

The court's headquarters is located in the Hague; it will not only try states but rather individuals and will not prosecute those crimes considered gross violations as indicated in the statute. Furthermore, it does not try to substitute for

[76] Broom Hall, B; "*The International Criminal court*:- A checklist for National Implementation in M.C. Bassouni (ed) ICC *ratification and national implementing legislation,* France:- ERs 1999

states in the exercise of criminal jurisdiction but complementary with national courts.[77]

The court may be activated by the prosecutor, by a state party or by the UN Security council. Nevertheless, a state party can request the removal of the prosecutor or can contest the competence of the court of the admissibility of the cases, except in the situation that the case has been sent to the court by the Security Council since it is understood to act on behalf of the international community. It is for this reason that the Security Council can ask for the suspension for up to twelve months of an investigation and judgement initiated by the court.

The ICC will fill many gaps in the international legal system. It will have jurisdiction over individuals. Unlike the international court of justice, which is concerned with issues of state responsibility. Furthermore, unlike tribunals that have been established by the Security Council on the ad hoc basis such as the International Criminal Tribunal of the former Yugoslavia and for Rwanda (ICTY/R), the jurisdiction of the ICC will not be restricted to dealing with crimes committed in one specific conflict or by one specific regime during one specific time period and will be able to act more quickly after an atrocity has been

[77] Ladan, M.T, *An overview of International Criminal Court,* being the paper presented to the sensitization workshop on the International Criminal Court, ICC organised by the Nigerian Institute of Advance legal studies, 2006.

committed. However the ICC wil only have jurisdiction over crimes committed after it has come into existence (article 11).[78]

As a treaty based institution the ICC will have a unique relationship with the UN system. Unlike the ICTY/R, the ICC is not a creation of the Security Council, nor will be managed by the UN general assembly

However, it will receive some financial support from UN particularly when the Security Council refers matters to it for investigation (article 3, 13(b) and 115(b)). The precise relationship between the ICC and the UN will be detailed in a specific agreement that will be approved by the ICC assembly of state parties (article 2).[79]

The issue of the court's jurisdiction is a crucial one in the ICC operational set up. In a situation where crimes such as genocide covered by the statute have been committed, under what circumstances can the court exercise its jurisdiction to try persons accused of committing a crime listed in the statute.

The ICC has jurisdiction over national persons unlike the international military tribunal at Nuremberg which exercised jurisdiction over individuals and organizations. The ICC reinforces the notions that states do not operate in abstraction and so even where crimes against humanity and other violations which are protected under this statute are committed in the name of a state, the ICC will look to a person behind it. The Nuremberg Tribunal aside from being the

[78] Article 11 of the ICC Rome Statute of 17 July 1998.
[79] Bassouni, M.C (ed) *The Statute of the ICC*. Transactional published 1998.

first prosecution also consideration individual responsibility in favour of the doctrine of state responsibility, which at time was the prevailing norm.

The statute contains three mechanisms by which the jurisdiction of the court could be triggered.

i. Compliant by a state party

The first mechanism that could activate the jurisdiction of the court relates to a complaint lodged by a state party or state parties to the trial in accordance with article 14. A state party could lodge a compliant with the prosecutor and request him/her to investigate the situation. It has been suggested that the state lodging the compliant may be one of the following; the state on whose territory the act was committed; the custodial state on whose territory the alleged offender is present, the state of the nationality of the suspect or the state of the nationality of the victims, the court could then initiate an investigation into possible crimes. But the wording of article 14, contain no such restrictions, indeed the provisions of article 14 are so wide that a state party without connecting factor to the crime could make a compliant to the prosecutor.

ii. Referral by the Security council

The second possible trigger mechanism enables the Security Council under chapter 7 to refer a “matter or situation” in which one or more crimes under article 5 have been committed to the prosecutor and the prosecutor could then investigate and possibly prosecute arising from that “situation”.

iii. The Prosecutor's Initiative

The prosecutor may initiative investigations on his own initiative on the basis of information about the commission of crimes within the jurisdiction of the court as listed in articles 6, 7 and 8.

And the conditions for exercising jurisdiction is where a state is a party to the statute whether it is an original party or a party by accession, *suo moto* accepts the jurisdictions of the court with respect to the crime referred to in Article 5 and define in detail in article 6, 7 and 8.

The jurisdiction of the court is exercisable if:

- The crimes were committed in the territory of a party
- On board a vessel or aircraft of a party or
- If the suspect is a national of a party.[80]

And a non-party can by declaration lodged with the registrar of the court accepted the jurisdiction of the court with respect to a particular crime or situation.[81]

The court's jurisdiction is limited to crime committed after the entry into the force of the statute. If a state accedes to the statute after it has come into force, then the courts jurisdiction with regard to that state will come into effect only with regard to crimes committed after that state become a party.

A cause is admissible in the following circumstances;

[80] Roy, S.L; (ed) *The Internationals Criminal Court:* Issue Negotiations, Results, the Hague, Netherland, Kluwer Publishers, 1999

[81]

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.
b. The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.
c. The person concerned has already been tried for conduct which is the subject of the complain and a trial by the court is not permitted under article 20, paragraph 3; which prohibits the retrial of a person who has been tried by another court of competent jurisdiction.
d. The suspect had been tried previously in another court and had been convicted or acquitted for the same crime or conduct who formed the basis of the crime for which the suspect is being charged before the ICC.

However, when the earlier proceedings were sharp proceeding meant to shield the suspect from criminal responsibility or if the earlier proceedings were grossly defective for lack of impartiality or due process or any other grave lapse, the doctrine of ***ne bis in idem, or autrafois convict or acquit*** will not apply.

Finally time does not run in favour of an international crime. By article 29, the crimes within the jurisdiction of the court shall not be subjected to any statute of limitations. This is in accordance with Resolution 2391(xxiii) of the UN General Assembly on the non-applicability of statutory limitations to the crime of

genocide, crime against humanity, war crimes etc. it is the application of this principle that enables Nazi war criminals to be traced, arrested and convicted up till the present times. [82]

The preamble to the states that the court shall be complementary to national criminal jurisdictions. Complementary is a fundamental philosophy underlying the creation of the court. It is the recognition that the primary responsibility for investigating, prosecuting and trying international criminal court only acts as a complement to national court and comes into operation when domestic prosecutors or courts fails to act. This is a sharp contrast to ICTY and ICTR, which have supremacy over national courts. The ICTY and ICTR statutes provide that those tribunals may formally request national court to defer to the competence of international tribunals.[83]

In this context, the ICC statute established a concept of inadmissibility once national jurisdiction has been exercised over a case. The approach serves to emphasis that the primary responsibility to prosecute international crimes rest with states.

The complementary role of the ICC is intended to actively facilitate a climate that serves to encourage and expand the prosecution for international crimes to domestic courts while simultaneously strengthening national

[82] Ibid
[83] Professor, I.E Sagay; *The Jurisdictions of the International Criminal Court,* NIALS, Lagos, May, 20, 2006.

jurisdictions. The court will exercise jurisdiction only when a state is unwilling or unable to proceed with a viable prosecution.

But the ICC may carryout the prosecution of a case, which has been prosecuted by a state with jurisdiction over it. If the standards stipulated in article 17 are not met. The ICC has power to determine the competence of the national investigations and the courts proceedings and where appropriate bring a decision in order to achieve its goal eliminating impunity for international crimes.

In order to determine unwillingness in a particular case, the court shall consider have regard to principles of due process recognized by international law, whether one or more of the following exist.

In order to determine inability in a particular case, the court shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. There can be no peace without justice, no justice without law and no meaningful law without a curt to decide what is just and lawful under any given circumstance. The guarantee the perpetrators of crimes of genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end.

The delay inherent in setting up an ad-hoc tribunal can have several that depending on how a conflict develops, there is in place an international court to try those that violate the laws.

As a treaty based institution, the ICC will have a unique relationship with the UN system, unlike the ICTY the ICC is not a creation of Security Council nor will be managed by the UN General Assembly.

3.6 THE PRINCIPLES OF UNIVERSAL JURISDICTION

The concept of the world for the rights and needs of individuals in the contemporary world is explicable by a higher consciousness among the international community of the sanctity of life and the dignity and worth of human beings.

The international law has come to embrace the concept of international crimes as well as that of crimes against humanity. Also crimes of genocides are understood to mean offences committed against the international community as a whole which are therefore subject to trial by any and all states irrespective of the nationality of the offenders or the place of commission of the criminal acts. This is otherwise known as crime of universal jurisdictions.

Although there has always been a worldwide desire to institutionalize a framework to contain international criminality especially in relation to crimes of genocide. It was only in the past few years that firm steps were taken to realize this. The convention on the prevention and punishment of the crime of genocide, 1948 had envisaged that genocide acts were to be tried by such international penal tribunal, as may have jurisdiction with respect to those contracting parties, which shall have accepted its jurisdiction.

Ordinarily, perpetrators of the international crime should be tried by the courts of their own country, assuming that national legislation provides for prosecutions. In other words, every country should be able to prosecute and try its own criminals whether crimes are on such a scale as to constitute crimes against humanity or genocide, there are however many states that have not incorporated in their national law the minimum standards of criminal justice that would provide prosecution of the alleged perpetrators of these crimes.[84]

The principles of the universal declaration has developed as a result of the inability of states to fight impunity at the national level and due to the fact that victims of these serious crimes and human rights organisations are now realizing they can force the hand of justice by loading complaints and forcing states to face their international obligations.

Universal jurisdictions is based partly on conventional and partly on customary international law it provided for in the 1984 United Nations convention against torture, and in the four Geneva Conventions of 1949, the principle applies at the level of the national and international courts. It is essentially criminal but can also take the form of a civil action.[85]

The criminal or civil jurisdiction of a national court is called 'universal" when the court in disregard of the criteria of the nationality of the victim or a presumed perpetrator, location of a constitution element of crime or an attack on the

[84] Cassese, Antonio; *The Statute of International Criminal Court Preliminary reflections,* Published in European Journal of international Law Vol. 10. No. 1 (1999) p1.60

[85] UN DOC.5/25704 (3 May, 1993) reproduced in 32 ILM (1993) 1159 *An Article 9(2) of Statute of International Tribunal of Rwanda* annex to SC, Res. 955 of 8 November, 1994.

fundamental interest of the state can nevertheless hear a case involving the criminal acts of foreigners committed in foreign countries or other areas beyond the sovereignty of any states

For example, in Belgium, the June 16, 1993 Act as amended by a March 23 1999 Act established the universal jurisdiction of the Belgium courts to try those accused of the most serious crimes like genocide, regardless of the nationality of the perpetrators of the victim, their place of residence or where the crime was committed.

The Law is an important tool in the struggle for international criminal justice. In its application Belgium courts have consistently held that they have jurisdiction to try all persons accused of genocides. Whether or not there was any element linking the crime with Belgium. The alleged perpetrators could be prosecuted in Belgium or not. In June 2001, four Rwandans were tried and convicted by the Assize Court of Brussels' after a two month trial.[86]

France too has now become known for implementing the principle of universal jurisdiction in its national courts as shown by the 'Beach de Brazzavile au Congo" and ***Ely oula Dah*** cases. Generally, states have restricted the application of the principle and diplomatic considerations'. The establishments of international criminal jurisdictions is therefore an 'article' to this development.

Traditionally states under territoriality or even the passive personality principle may assume jurisdiction for offences which at the same time are

[86] Klip Andre; *Witness before the International Criminal Tribunal for the former Yugoslavia,* Vol. 67 1996 pp.367

universal to the effect that any state in the international community can prosecute.

The International criminal court as in that of ICTY and ICTR makes state cooperation crucial to its effectiveness. This is because the decisions, orders and requests of Internationals Criminal Courts can only be enforced by others like national authorities or international organisations. As contra-distinguished from national criminal courts, international tribunals have no enforcement agencies at their disposal. They are rendered impotent without the intermediary of national authorities for they cannot execute warrants of arrest, they cannot seize evidentiary material, cannot compel witness to give testimony, nor search the scene where crimes have alleged committed. For all these reasons international courts must look to state authorities and request them to take action to assist the court officers and investigators.[87]

Article 109 provides that for the enforcement of fine or forfeiture for example ordered by the ICC states parties are obliged to give effect to fines for forfeitures ordered by the court, or to take measures to recover equivalent value where forfeiture is not possible and to make appropriated transfer to the ICC.

[87] Adeola, O.P; *Paper presented at the 2 week certificate course on international Criminal Justice and the administration,* NIALS, Lagos, 18 May & 2 June 2006.

CHAPTER FOUR

4.0 THE CONCEPT OF CRIME OF GENOCIDE UNDER THE INTERNATIONAL CRIMINAL LAW

4.1 ORIGIN, SCOPE, MEANING, AND DEFINITION OF GENOCIDE

> *"Thus for the time being I sent to the East only my "Death's Head Units" with the orders to killing without pity or mercy all men, women and children of polish race or language. Only in such a way will we win the vital space that we needed. Who still talks nowadays about the Armenians?"*[88]

Raphael Lemkin a polish scholar of International Law is credited with the coinage of the word in 1941, Lemkin fled the Poland and following the German Occupation in 1939 and at the end of the 2nd World War moved over to America where he began his lobby to the United Nations for the adoption of the International genocide convention. Although he has used the term "acts of barbarity" to refer to historical destruction of racial, religious or other social groups, he was satisfied with this very broad term and did not further encourage its use until he come across the work of Plato where the Greek word "genos" meaning "race" or "tribe". He then added the Latin word "cide" meaning "killer" or "acts of killing" akin to homicide or suicide to coin the word genocide.[89]

Although many of the words or phrases used to describe genocide in the Rome statute have been judicial defined by the ICC recourse to interpretations

[88] Adolf Hitler, *To his Army Commanders*, August 22, 1939
[89] Lemkin, R. *Axis Rule in Occupied Europe: Law of Occupation, An Analysis of Government Proposed for Rodous*: Washington D.C. for International Peace, 1994.

given by the various and ad-hoc tribunals to similar provisions of genocide convention which provide valuable guide to the ingredient of the crime.

The genocide convention was among the first conventions of the United Nations to address humanitarian issues. It was adopted in 1948 in response to Nazi atrocities committed during World War II and following General Assembly Resolution 180(11) of December 1947 in which the UN recognized the genocide as an international crime which entails the national and international responsibility of individuals persons and states". Under Article 1 "*the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish".*

The International Court of Justice (ICT) noted in the reservation to the convention on genocide as follows

The origin of the convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international law… involving a denial of the right of existence of human group a denial which shocks the conscience of mankind and result in great losses to humanity and which is contrary to moral law and the spirit and aims of the United Nations (Resolution 69) of the General Assembly, of December 11, 1946. The first consequence from his conception is that the principle underlying the convention are principles, which were recognized by civilized nations as biding on state, even without any conventional obligation. A second consequence is the universal character of the

condemnation of genocide and the cooperation required in order to liberate mankind from such an obvious scourage (preamble to the convention).[90]

In the ***Barcelona case second phase***, the ICJ recognized the acts of genocide as obligations ***erga omnes*** for which, due to the importance of the right involved, all the states can be held to have legal in their protection.[91]

Which breaking down the definition, three essential elements are required:

1. An identifiable national ethnic, racial or religious group;
2. The intent to destroy such a group in which or in part (mens rea); and
3. The commission of any of the listed acts in conjunction with the identifiable group (actus reus).

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

The second element of this definition of genocide certainly represents a challenge for the prosecutor, who will be oblige to established the requisite state or mind (mens rea) of the accused i.e. the specific criminal to intent to one of the

[90] *Reservation to the Convention on Genocide cases* (Advisory opinion) O. ober, 1995 p.141 and ICJ Report Vol. 15, 1951 p.23

[91] *Barcelona Traction Case* (Belgium vs Spain) ICJ Report. Vol. 3 1970, p.33 & 34.

enumerate groups. The ILC, in commenting on its draft code of crimes against the peace and security of mankind stated in this regard:

> *"A general intent to commit one of the enumerated acts combined with general awareness of the probable consequences of such act will respect to the immediate victim or victims is not sufficient of the crime of genocide. The definition of this crime requires a specific intent with respect to the overall consequences of the prohibited acts".*[92]

Therefore the killing of one individual with such intent is genocide but the killing of a thousand without the intent would only be homicide.[93]

The former type was however distinguished from the latter by the General Assembly in 1948 when it drafted the convention genocide is the "denial of the right to life of individual human beings". The ultimate target is the group itself. Hence the actus reus (prohibited act) may be restricted to one human being but mens rea or mental element must be directed against this type of the group".[94] In other words genocide occurs when the intent is to eradicate the individuals for no other reasons than that they are members of the specific group.[95]

Some light as to specific intent required may also be found in ***Karadsic and Mladic Case*** in which the ICTY suggested that the specific intent may also be inferred from the circumstances.

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[92] 1996 ILC Report UN Doc./A/51/10. P.88
[93] Aldrrich, G.H. (Sept/Oct/1977) *Comment on the Geneva Protocols International Review of the Red Cross.*
[94] Bassaoinim, C. *International Criminal Law; A Draft International Criminal Code;* Sijatholl and Noordholl, Aphen and den RIja 1980 p.73
[95] Webb J. *Genocide Treaty/Eltenic, Geojia* Journal of International and Cooperative Law. No. 3777 1998 p.391

> "*Genocide requires that the acts be perpetrated against a group with an aggravated criminal intent namely that of destroying the group in whole or in part. The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with specific intent suffices (…)".*[96]

The intent, peculiar to the crime of genocide need not be clearly expressed (…). The intent may be inferred from certain number of facts such as the general political doctrine which give rise to the acts possibly covered by the definition in Article 4 (of the statute), or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate or which the perpetrators themselves consider to violate, the very foundation of the group acts which are not in themselves covered in the list in Article 4(2) which are committed as part of the same pattern of conduct'.

The third element of the definition of genocide requires that the crime be among the listed acts, the exact scope remains however, vague i.e. causing serious bodily or mental harm to members of the group "or deliberately inflicting on the group conditions of life calculated to bring about its physical destructions in whole or in part" for the former, it is not clear what it is covered by "mental harm". It has been described by commentators as a psychological damage which would lead to the destruction of the group[97] or bodily harm "*which involves some*

[96] *Prosecutor vs Mladic and Karadic, Review of the Indictment pursuant to the role of procedure and evidence Case No.*IT-95-5-R61, 11, July, 1996
[97] Webb J. op. cit (note 6) p.393

types of impairment of mental faculties". Nor is it clear what is considered to be calculated to bring about the physical destruction in whole or in part of the group.

Considering the jurisdiction of the *International Criminal Tribunal of former Yugoslavia*[98] (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)[99] were established on 11 February 1993 and 3 November 1993 respectively by the security council to prosecute persons, responsible for flagrant violations of International crime. The aim of the security council is to put an end to such violations and to contribute to the restoration and maintenance of peace and the establishment of ad-hoc tribunal as a signal to the perpetrators and to the victims that such conduct i.e. genocide could not be tolerated.

The conferment of jurisdiction on ICTY and ICTR over the crimes of genocide and violations of Article 3 common to the 1948 Geneva conventions and of Additional Protocols I Couple with the fact that the Rome statute of the International Criminal Court (ICC)[100] with jurisdiction over all serious violation of the law of war, in civil conflicts and international engagement as well as crimes of genocide even when they occur outside a state of war. In essence, the ICC will be a permanent institution with automatic jurisdiction over the crimes of genocide[101] and other international crimes.

[98] UN Security Council Resolution 827 (1993) 3217 meeting 25, May 193.
[99] United Nation Security Council Resolution 955 (1994), 345 3rd meeting, 9th November, 1994.
[100] UN Doc./A/Conf.183/9 (17, July 1998).
[101] Article 5, 6 and 8

4.2 CAUSES, STAGES, AND ENABLING CONDITIONS FOR GENOCIDE

The world has witnessed some of the most gruesome attacks on humanity by authoritarian regimes leading to the murder of innocent people to such alarming propositions that the international community could not ignore.[102]

These efforts culminated in the United Nations Convention on the prevention and punishment of the crime of genocide in 1948. The convention was signed in New York on 9th December, 1948 but entered in to force on 12th July 1951 after the deposit of the twentieth instrument of ratification and accession in accordance with Article XIII. The convention confirmed genocide as a crime under international law.[103]

To sustain a charge of genocide, three main ingredients are required from the foregoing definition, first there must be an identifiable national, ethnical, racial or religious groups. But this excludes social and political groups although the Rome statue like the then genocide code did not define those groups, the ICTR while referring to similar provisions in the genocide of 1948 in the Akayesu case, concluded that:

> "*The drafters perceived the crime of genocide as target only stable, permanent groups, whose membership is determined by birth, the drafters excluded more mobile groups, such as political and economic groups that one joins voluntary".*

[102] Akper, A.P. *Crimes of Genocide under the International Criminal Law,* NISA, Lagps/Abuja. 2006
[103] General Assembly Resolution, 9-11 December 1946.

The Akayesu case is considered significant in the sense that the tribunal enriched existing jurisprudence on this concept of genocide.[104]

Thus, a view of the legal definition of genocide would reveal that it is broad enough to include such acts as murder, mental damage preventing birth, removing children from the group etc.[105]

Yet is also narrow in another way, as it does not include the intent to destroy political, economic and other non-indelible group. But it is argued that history against non-indelible killing by government manifesting murder and the intent to commit murder in the act itself. For example soldiers lining up civilian against the wall and shooting them to death without a fair trails manifesting government murder. It is therefore opined that progress in the knowledge of genocide depends largely on the clarity and the significance of the concept used in describing acts constituting genocide it is further argued that interpretation given to acts that constitute genocide should as much as possible refer to real world behaviours and events that can be clearly understood as such regardless to the observers and their prejudices.[106]

It is for these reason that genocide scholars have tried to developed their own definition of genocide that would better fit their understanding of such Government murder. For example according to *Frank Chalk* and *Kurt Jonassah* "*genocide is a form of one mass killing in which the state or authority intends to*

[104] Magnavrella P., *Justice in Africa* (Anerhortort Ash gate, 2000). P. 97
[105] ICTR – 96-41 Dated 02, November, 1998.
[106] http://en.wikipedia.org/ICC. Visited, 6th September, 2007.

destroy a group as that group and membership in its as defined by the perpetrators".[107]

Israel W. Charny on the other hand state that "*genocide is the generic sense in the mass killing of substantial number of human beings when not in the course of military forces of an avoided enemy under conditions of the essential defenseless and helplessness of the victim".*[108]

Finally, to Steve, T. Katz the concept of "*genocide applied when only there is an entire group as such a group is defined by the perpetrators".*[109]

An appraisal of all the above definition show that the definition of genocide can be categorized into three broad types, namely the legal definition the common definition and the general definition, the legal definition is contained in the genocide convention and Rome statute.

Despite, some of the inadequacies of the Rome statute, it explicit definition of murder and extermination as international crimes, whether in time of war or peace.[110] In this respect Rome statute meets the extensive criticism of the genocide convention which is too narrow and it should have included the murder or extermination of people for reason other than the attempt to destroy indelible groups, although not under the crime of genocide. The ICC or Rome statute now covers almost all cases of homicide with the exception of murder of political

[107] Op. cit at 14, p.13
[108] Totten, S.W and T.W Charny; (eds) *Centaury of Genocide eye witness Accounts and critical view,* New York (1977) p.30
[109] Katz, *The Holocaust in Historical perspective, the Holocaust & and the Mass Death before the Modern Age,* New York, 1994 p.14
[110] Article 7 of the Rome Statute

opponents or other than is not part of the widespread or systematic attack on the population.

Finally, unlike crimes against humanity, genocide has been codified and its definition is not generally subject to debate. Because the ad-hoc tribunals for the former Yugoslavia and Rwanda adopted verbatim the definition of genocide found in Article 8 of the 1948 convention on the prevention and punishment of crime of genocide.

Genocide means any of the following acts committed with the intent to destroy in whole or part, a national, ethnical, racial or religious group, as such, Article 7 of genocide convention provides;

a. Killing members of the groups;
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 groups;
e. Forcibly transferring children of the group to another group;

And the following acts should be punished;

a. Genocide
b. Conspiracy to commit genocide
c. Direct and public incitement to commit genocide
d. Attempt to commit genocide; and
e. Complicity in genocide.

4.3 PENAL SNACTIONS FOR BREACHES OF THE CRIME OF GENOCIDE

Every law implies penalties for violations of its values, the genocide convention and Rome statute indeed provides for penalties, putting them into effect in unquestionably a serious matter.

A careful look at the penal regime of the genocide convention, Rome statute and additional protocol, however shows that substance remain valid on the whole and that the difficulties encountered nowadays arise mainly from the fact the means and the will to implement these instruments are lacking. The problem is therefore more political than legal.

For example, the case of ***Ahmed Harun and Aliyu Ashe***, a former Sudan Minister and Janjaweed Militia leaders were indicted by the Chief prosecutor of the International Criminal Court (ICC). It was only recent that Sudan Government announced the arrest of Aliyu Ashe of Janjaweed. They were accused of master minding the genocide in the Darfur region of Sudan. The Sudan government insisting on their responsibility for introducing adequate measures in its national legislation for the prosecution of those responsible for violations.

Also, in 2002 Israel Air Force F16 targeted and bombarded Gaza which killed several Hamas officials and fourteen Civilian Nine children. Judge Fernando Andrew of the Spanish National Court open the case at the request of Palestinian relative of victims of the attack. But Israel prosecutor in April 2005 urged the Spanish judge to suspend on the bases that they are conducting an

investigation, but Judge Andrew rejected the request saying that, he was acting under Spanish observed of the principle of universal jurisdiction which hold that grave crimes such as genocide can be prosecuted in Spain even if the alleged crime have been committed elsewhere.

It is against this background that this research proposed to examine the elaborate penal regime and the concomitant sanction in the genocide convention and the additional protocol. The mandate given to the high contracting parties to enact any legislation necessary to provide effective penal sanctions for person committing or ordering to be committed, any of the grave breaches of the conventions. To what extent have the state parties fulfilled their obligation under the treaty to repress violations by imposing sanctions.

International humanitarian law, has played a vital tool in developing concept for penal sanctions, for grave reaches of basic obligations under the genocide conventions, Geneva convention and additional protocols.

Officially capacity invoked by a head of state of person in same other public position, is excluded as a defence or a ground for mitigation of effective punishment by Article 27. No immunities or other procedural obstacles. This is one of the few provisions which has survived since Nuremberg without being substantially amended.[111]

[111] *Agreement for the Prosecution and Punishment of Major War crimes of European Axis,* Adopted August 8 1945, UN 279.

One of the few issues under discussion during the codification efforts since the Second World War has been whether the rule extends to all public officials from very to the bottom. The 1948 genocide convention limited the rule to "constitutionally responsible ruler" taking into consideration national immunity rules.[112]

The genocide convention provides that; "*the high contracting parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed any of the grave breaches of the present convention define".*

Each high contracting parties shall be under the obligation to search for persons alleged to have committed such grave breaches and shall bring such persons, regardless of their nationality before its own courts. It may also, if it prefers in accordance with the provision of its own legislation, hand such persons over for trial to another high contracting party concerned, provided such high contracting party has made out a prima facie case.

But the ILD Draft Code of 1991 (Article 13) and 1996 (Article 7) extended the national immunities to heads of states, ministers and public officials although the 1946 Draft Code (Article 3) did not clearly include Ministers.[113]

On the other hand initially the ILC did not want to exclude the possibility of mitigation of punishment explicitly, the ILC however, did not consider it necessary

[112] *Convention for the Prevention and Punishment of the Crime of Genocide,* in Artonio Planzer, Review of Red Cross, September 1998 no. 324 p.445 to 446
[113] Jean, S. Report in year Book 1955, Article 462-3 p.253

to exclude procedural immunity explicitly its exclusion was considered a logical corollary to the lack of substantive immunity.[114] All those outstanding issues are addressed in Article 27 of the Rome statute where they are resolved in favour of an unlimited prosecution of perpetrators acting in their official capacity. In ***Prosecutor v Colonel Theonester Bogosora***[115] who was charged on two counts for genocide. He was a former defence minister in Rwanda Government in 1994, he was sentenced to life imprisonment together with three others, this was the greatest justice the ICC ever gave, it shows that there is no hiding place. He was accused of planned, preparation or execution of each of the crimes alleged. In addition or in the alternative, he was accused of having or having reason to know that his subordinates were preparing to commit those crimes or that they had done so and that he had yet taken the necessary and reasonable measures to prevent the sad crimes from being committed or to punish the perpetuators of the genocide in Rwanda.

The statutory limitations on the crime of genocide within the jurisdictions of the court is ruled out by Article 29, such rule is possible because of court jurisdiction is limited to the core crimes set out in (Article 5 to 9) namely war crimes, crimes against humanity and genocide. This was also the court rule in ***Prosecution v Rosco Mladic***[116]

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[114] Report of the ILC on the Work of its forty eight session, June 5, 1996.
[115] Prosecutor vs Colonel Bogosora case No. 18 -94 ICC P.17687 18th December 2008.
[116] *Treaty Ethnic Cleansing, substantive and procedural Hurdel in the application of Genocide Convention to the alleged crimes in the former Yugoslavia* "Georgia Journal of International and Comparative Law No.377, 1993 p.391

In former instruments or drafts, a statute of limitations were either not totally excluded or the question was left open due to uncertainty about the crimes to be included in the instrument. It may be argued however, that under the current international criminal law no statutory limitations are permitted for the core crimes, crime of genocide inclusive and that national legislation has to be amended accordingly.

The Rome statute also embodies a traditional concept of justice that provides for the prosecution and punishment of the guilty and obliges the court to establish principles relating to reparation to or in respect to victim including restitution and compensation (Article 75). Furthermore, (Article 79) provides that a trust fund will be established by the decision of the assembly of states parties. The fund will be managed according to criteria to be determined by the assembly and (Article 79(30). The court can decide whether to compensate victims through this fund and it may order that money or other property collected through fines and forfeiture be transferred to the fund.

The Rome statute provides penalties in respect of those convicted for crime of genocide, crimes against humanity, war crimes and the crime of aggression.[117] The statute applies equally to all persons irrespective of official capacity.

[117] Cassese, Antonio, *The statute of ICC some preliminary Reflection,* published in European Journal of International Law Vol. 1 No. 1 (1999) p.160

Article 77 provides that subject to Article 110 the court may impose one of the following penalties;

a. Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
b. A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of convicted persons.

The statute further provides that in addition to imprisonment, the court may order;

a. A fine under the criteria provided for in the rules and practice and evidence.
b. A forfeiture of proceeds property and assets derived directly or indirectly from that crime without prejudice to the rights of bonafide third parties.

The court is enjoyed by the Rome statute to take into account the gravity of the crime and the individual circumstances of the convicted person in determining the sentence.[118] Furthermore in imposing the sentence of imprisonment, the court shall direct the time if any previously spent in detention in accordance with the order of the court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 40 years imprisonment or a sentence of life imprisonment[119] when justified by the extreme gravity of the crime and the individual circumstances of

[118] Cassese, Antonio, op. cit at p.161
[119] *Rome Statute of International Criminal Court,* UN DOC. A/Conf. 183/9, 17th July, 1988) published at http://www.un.org/icchereafter ICC statute

the convicted person. In addition, but not alone, the court may order payment or indirectly from the crimes, factors such as gravity of the crime and individual circumstances are to be considered in determining and where sentence is being passed for more than one conviction at a time, a joint sentence not exceeding thirty years of life shall be imposed.

The death penalty is not included among the possible sentences, nevertheless, the statute expressly declare that it does not affect the application of the statute parties of penalties prescribed by their national law. Non-inclusion of the death penalty therefore has no consequences for sentences passed under national law after national proceedings before the court of state parties.

Part of the statute on enforcement under Article 103-111 sets out the regime by which the sentences handed down by the court will be enforced. Like all cooperation provisions of the statute this part reflects the extent to which the court and states parties will interact in promoting the international rule of law. The enforcement articles divided into those which apply to all states parties and those which do not.

The provision relating to sentences of imprisonment apply to such states that express their willingness to allow persons convicted by the court to serve their sentences on their territory (Article 103). While enforcement is subject to the courts provision and although governed by national law. Must be consistent with widely accepted international treaty standards regarding treatment of prisoners Article 106). The court has the right to decide on any reduction of sentence and

is to hold reviews for this purpose after two thirds of the sentence or twenty-five years in case of life imprisonment have been served. States of enforcement are to cooperate with the court in seeking surrender of a prisoner from a third state following escape (Article III).

Also the statute goes beyond this and gives victims a voice to testify to participate at all stages of a court proceedings and to protect their safety, interest, identity and privacy. Such inclusive participation reflects the principles of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power to be implemented by national judicial systems. The inclusion of these provisions in the statute hope that the court will provide an effective forum for addressing grave injustice to victims the world over. The above applies in other international crimes, like crime against humanity, war crimes etc.

The principle of absolute independence and dignity of every sovereign authority and the international community induced every sovereign state to respect the independence and dignity of other sovereign states. Each and every one decline to exercise by means of courts within its territorial jurisdiction over the person or any sovereign, ambassador of any other state, though such sovereign, ambassador be within its territory and therefore but for the common agreement subject to its jurisdiction was long decided in the English of ***Mighell v Sultan of Jehore***[120]

[120] L.R (1894) 1 QBD p.149

This principle has been shattered in the celebrated case of ***R. V Bow Street metropolitan Stipendiary Magistrate and Exparte Pinochet Ugarte***[121] by the landmark decision of English house of lords that the international community recognizes certain crimes genocide inclusive which transcends sovereignty jurisdiction that pass rulers and dictators may no longer hide under the cloak of state or sovereign immunity to escape prosecution or arrest and extradition to any state that may prosecute them for certain crimes. The decision of the court laid down a fundamental principle that immunity is not absolute because such crimes transcends any definition of official function, that there could be immunity for such acts.

Again Article 27 of the statute of International Criminal Court, which provides;

a. "This statute shall apply equally to all persons without any distinction based on official capacity. In particular official capacity as ahead of state or government, or member of parliament of government or elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute nor shall it in and of itself constitute a group for reduction of sentence".
b. "Immunity of special procedure rules which may attach to the official capacity of a person whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person".

[121] Ibid

It is therefore submitted that position of sitting head of state or government or a former head of state or government or any other person with respect to criminal responsibility of genocide are defined by Article 5 of this Rome statute of which is not different. That is to say there are no immunities or special procedural rules which may attach to the official capacity of a person who commits an international crime, once that state becomes a party to the statute or accepts the jurisdiction of the court by declaration under Article 12(3) of the statute.

Municipal constitutions may provide for restriction on legal proceedings against a person holding the office of president or vice president, governor or deputy governor as provided in Section 308 of the Constitution of the Federal Republic of Nigeria 1999, this provision is in conflict with Article 27 of the statute of International Criminal Court and necessitates a constitutional amendment providing an exception to this absolute immunity of head of state or other officials, should they commit any of the crimes listed in the statute[122]

In the light of the provisions of Article 27 of the statute, the only option open to a state unwilling to surrender its sitting heads of state, who is indicted by the International Court is to invoke the principle of complementarily which is enshrined in the preamble in the statute thus Article 27 states that;

1) The statute shall apply equally to all persons without any distinction based on official capacity..
2) Immunities or special procedural rules which may attach to the official capacity of a person whether under

[122] M.T. Ladan, "*Issues in Domestic Implementation of the Rome Statute in Nigeria"* a paper presented at a round table season with parliament/implementation strategies, workshop organized by Nigerian coalition on ICC on 14th November, 2002, Abuja.

> national or international law, shall not bar the court from exercising its jurisdiction over such persons.

Emphasizing that the International Criminal Court established under this statute shall be complementary to national criminal jurisdiction.

This means a stable party can prosecute its head of state or any state official for commission of crimes within the jurisdiction of the ICC in its own court, and the ICC can only assume jurisdiction when the state refuse or is unwilling to prosecute such persons whether the state surrender the sitting head of state or government or prosecute him in its court's it is well settled that immunity should no longer be absolute and should not prevent the ICC from prosecuting the perpetrators of international crime listed under the statute.

This is what influence prosecutor Luis Moreno –Ocampo to charged Sudan President Omar Hassan Al-Bashir for war crime and genocide in the Dafur Sudan crises which killed about 300,000 people since 2003 and left about 2.2 million homeless.

Even when the International Criminal Tribunal for Rwanda was alive to its mandate to help in restoring peace and bring about national reconciliation by trying persons responsible for genocide and other grave breaches of international crimes committed in Rwanda, this tribunal has to its credit the first conviction on genocide by an international court and the first time for example the International court found the crime of rape to be an act of genocide thus in the case of

Prosecutor vs Jean Paul Akayesu[123], this was the first judgement to be handled down by the tribunal, the first conviction on genocide by an international court.

From the foregoing analysis of the penal sanctions for breaches for international crimes the most effective unarguably is the prosecution and trial of the accused persons and the attendant conviction in appropriate case to stem the tide of the culture of impunity which perpetrators evade justice and put in place an international criminal justice machinery to prosecute violations of genocide. To this end, the work of the two ad hoc International Criminal Tribunal for the former Yugoslavia and Rwanda is a welcome development; which has convinced the international community on the need to establish a permanent International Criminal Court, which is now a reality with the signing of the Rome Statute of International Criminal Court on 17 July 1998, and its coming into force on 1st July 2002.

4.4 GEOGRAPHCIAL CONTEXT AND IMPERIALISTIC POLICIES

> *"The victims allies had themselves committed grave crimes and the U. S atomic bombing of Hiroshima and Nagasaki were the most horrific war crimes of the Pacific war… but only the atrocities committed by the Japanese were punished, in short the war crimes trial represented "victors" justice".*

[123] Rwanda Tribunal case No. ICTR 94-4-T & BCC Online Network 2, September 1998..

The above aparthy quoted the opinion of an Indian judge in his dissenting opinion of Tokyo Tribunal that try Japanese political and military leaders following the World War II.

Strictly, the U.S opposed the ICC from the beginning, surprising and disappointing many people, Human rights organizations and social justice groups around the world, and from within the U.S were very critical of the U.S stance given its dominance in the world affairs. The U.S did eventually signed up to the ICC just before the Dec. 2000 deadline to ensure that it would be a state party that could participate in decision making about how the court work.

However, by May, 2002 the Bush Administration 'unsigned' the Rome Statute, they even went ahead to threatened military actions if U.S National were held at the Hague. They continue pressure many counties sign agreements not to surrender its citizens to the I.C.C

On 3rd August, 2002 U.S President George W. Bush signed into law. The American Service Members Protection Act (ASPA) of 2002. In addition, the law provides for the withdrawal of its military assistance from countries ratifying the ICC treaty and restricts U.S participation in United Nations Peacekeeping unless the U.S obtains immunity from prosecutions, and at the same time, those provisions can be waived by the President on 'National Interest grounds".

Another provision of the bill allows the U.S to assist international efforts to bring to justice those accused of genocide, War crimes and crimes against humanity, including efforts by the ICC. This can be seen as saying "**we will help**

you bring others to justice, but not us". This has also been seen by many as another part of the efforts by the U.S to undermine various International agreements and trying to exempt itself from various obligations. To that end, the U.S is seeking agreement with other countries not to surrender or transfer U.S nationals to the ICC.

In July, 2002 the United Nations Security Council agreed on resolution 1422 to exempt peace-keepers from prosecution, but this is unlawful because the resolution undermines the ICC which is an international treaty.

Be what S.C has done is to amend a treaty agreed between state parties a power in this case only given to the Assembly of State parties. Moreover the council is exceeding its powers by seeking to amend a treaty which is fully consistent with the U.N. Charter.

In addition, by invoking Chapter VII of the U.N Charter, the SC has wrongly characterized the US threat to veto peace-keeping operations as either a threat to peace, a breach to peace or an act of aggression, none of those terms apply to court created to establish accountability for the worst possible crimes under international law.

Washington asked the Security Council to approve a complete, indefinite exemption from the court's jurisdiction from U.S nationals and even threatened to veto the renewal of UN peacekeeping operations if it did not get its way. By the other countries i.e. council members particularly those associated with the European Union (EU) refused to go along". In the end; the two sides

compromised by approving a resolution that granted an exemption of one year for all individuals from countries that has not ratified the Rome statute.

Thus, this resolution was weaker than what the U.S was going for which was to “permanently exempt Americans from the reach of the International criminal court.

By July 1, 2003 48 countries have signed agreement with U.S and most the majority of them are small and poor countries that have not ratified the ICC treaty anyway and therefore have no obligation to transfer US national to the ICC. Such countries include India, Egypt, Romania, Israel and Philippines.

The pressure by the U.S has caused some friction with their allies in the E.U. The E.U legal service issues an opinion that any member that signed a bilateral immunity accord with Washington world be violating the Rome statute.

Following operations cast lead, citing the blockade and destructions of civilian infrastructure in Gaza. Turkish activists charted Mari Marmara a ship with relief materials, the Israel navy commandos intercept the Mavi Marmara in its way to Gaza in which nine Turkish activist were killed and four injured.

There is mounting pressure on Israel after U.N report into the incident and accused Israel of grave violating of human rights and international humanitarian law.

The Turkish victim asked ICC to pursue Israel gun men over raid on ship, the ICC is being urged to prosecute members of the Israel defence force for the raid on a Gaza bound aid ship.

The request is a significant step towards a criminal investigation by the ICC, which experts say has jurisdiction to prosecute those involved in the raid despite Israel not recognizing its jurisdiction, because the attack on the ship occurred in the international waters which directly violated many parts of the International Law as well as international public criminal law.

But Israel condemned the reports of UN as “biased” and distorted. It has created its own state appointed inquiry headed by retired Supreme court, Justice Jacob Turks.

It should be noted that neither Israel nor the Palestine territories are parties to the Rome statute, which established the ICC. An investigation involving the two countries is possible only after a reference from the UN Security Council.

The victims were backed up by Desmond de Silva a former UN War Crimes Prosecutor who said there were technical grounds for asking the ICC to intervene.

4.4.1 The African Union (AU) and International Criminal Court

The decision of the AU summit held in Libya reached a consensus not to execute an arrest warrant for African indicted personalities. The AU said that the decision was taken in conformity with the Rules of Procedure of the Assembly and the Executive Council and was not and could not have been dictated by any one member state against all the other member state.

A.U argues that the position reflects the consistent position of the AU commitment to combating impurity and promoting democracy, the rule of law and good governance on the continent as enunciated in the constitutive Act of the Union.

The idea also is the need to empower the African Court on Human Rights and People's Rights to deal with serious crimes of International concern in a manner complementary to national jurisdiction.

They also argued that, the Rome Statute which is the founding text of the ICC prevents the prosecutor from initiating investigation into cases being looked into by the national judiciary.

In 2004, the United Nations Security Council formed a UN Commission of Inquiry to look into Darfur, headed by former president of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Italian Antonia Cassese.

The commission concluded that the government did not pursue a policy of genocide in the Darfur region but that Khartoum and government sponsored Arab militias known as the Janjaweed engaged in widespread and systematic abuse that may constitute crimes against humanity. And the Sudanese judiciary is unable or unwilling to prosecute these crimes and thus recommended referring the salvation to the ICC.

But the A.U reiterated calls the UN Security Council to halt the ICC proceedings against the Sudanese head of state in accordance with Article 16 of the Rome Statute.

The AU leaders regards as a western tools and what about the genocide of Iraqi children during the 1990s when 500,000 died and the then U.S Secretary of State Madaline Albright said “that their death were worth it”. The ICC has an image problem on its hands when it comes to its involvement in African states. Obviously the crudest critique that has been leveled at the ICC and office of prosecutor is that it’s a neo-colonialist opinion.

Also, in October, 2010 Kenya invites Al-Bashir to IGAD summit as he challenge World to arrest him. Kenya which is signatory to the Rome statute Treaty which forms the basis of the ICC has an obligation to arrest Al-Bashir given an outstanding arrest warrant for him issued a year ago on charges related to crimes committed in Sudan’s Western region Darfur.[124]

But the Kenya’s Foreign Minister, Wetangula said that the visit came as part of an ongoing effort by Inter-Governmental Authority (IGAD) to review the progress on the implementation of the 2005 comprehensive Peace Agreement.[125]

Also the African parliamentarians are accusing the ICC for selectively pursuing justice by focusing on investigating suspected criminals mainly from this continent. They said while the ICC is keen on investigating war crimes and crimes against humanity in Kenya, Uganda, Sudan, the court is sitting on

[124] www.newvision.co/ng/PA/8/459/69 7628
[125] www.sudantribune.com/spip.php

numerous complaints against western leaders who are accused of causing untold suffering from wars they stated in the Middle East.

They are of the view that the ICC appears to act under influence of some Western powers who use it as an instrument to weed out leaders who are against their policies in Africa.[126]

The ICC process of indictment is usually politicized, for instance, the United State's voice is loudest yet it isn't a member of the ICC But those who are members but with little international influence cannot have their grievance listened to.

In Africa the ICC prosecutor has opened cases against 16 individuals for alleged crimes from Northern Uganda, the Democratic Republic of Congo, the Central African Republic and the Darfur Region of Sudan[127]

But the critics of ICC have often cited the atrocities in Gaza as an example of the court's bias against Africa, by not investigating the atrocities thereof. In addition, more than 50 complaints against former US President George W. Bush and ex-British Prime Minister Tony Blair have been forwarded to the ICC for investigation with no lack.

It is possibly because of that perceived bias that the African Union and the organization of Islamic Conference (OIC) have stood in defence of Sudan's President Omar Hassan Al-Bashir for war crimes committed in Darfur.

[126] www.doujacobs.blogspot.com/g-on
[127] www.insightonconflict.org.conflicts/

4.5 Genocide, Crime against Humanity and War Crime's Highlight on Nigeria

4.5.1 Biafaran War

Agitation for succession among the more than 250 ethnic groups in Nigeria started almost immediately after the British engineered amalgamation of January 1, 1914, which joined the South and North to form what is Nigeria, vast distance differences of history and tradition and ethological, racial, tribal, political, social and religious barriers all hampered the creation of a unified state.

In 1967, Biafara attempted to secede from the Nigerian federation that effort culminated in a devastating, intense and prolonged civil war, scholar differ in their view of its history and consequence by broad agreement exist in some pertinent issues, "the civil war spanning a thirty-month period'.

From May 30 1967 to January 12, 1970 was precipitated by a combination of of factors, those events triggered the first Military coup on January 15, 1966 by predominantly young Igbo army officers led by Major Chukwuma Kaduna Nzeogwu himself an Igbo from Eastern Nigeria, prominent Northern politicians such as Prime-Minister and Premier of Northern Region were killed. In process there was no casualties in the East reinforcing the belief in many quarters

especially in the Northern region that the coup was ethnically motivated to achieve domination by the Igbo and other ethnic groups.[128]

Nzeogwu's Coup failed, but a counter coup, led by another Igbo major General Johnson, Umunake Aguyi-Ironsi abolished the federal structure.

Although the new government arrested the suspect plotters of the 1st coup, there were never tried.

Consequently on July 29, 1966 a revenge Coup by largely northern officers led to the killing of the Nigerian Heads of State at Ibadan while making an official visit.

Ojukwu, unilaterally declared Biafara's Independence from Nigeria on the May, 30, 1967. citing the Nigerian government inability to protect the lives of Easterners and suggesting its culpability in genocide.

The federal government of Nigeria responded to Biafara's declaration of Independence with its own declaration of war. The civil war fought almost entirely in the Eastern region resulting to the death of millions of unarmed civilians and massive destruction of property.[129]

Biafara's alleged genocide, fuelling International sympathy. Although a term of observers found considerable evidence of famine and death as the result of the war, it uncovered no proof of genocide in the systematic destruction of property. Although, claims of starvation and genocide. The secured military raid,

[128] Alexander, Madiebo (1980) *The Nigerian Revolution and the Biafara War,* Enugu, Nigeria, Fourth Dimension Publishers,
[129] Njoku, H.M (1987) *Tragedy without Heroes: The Nigerian-Biafran War*, Enugu, Nigeria; Fourth Dimension Publishers.

political support for some members of international community and international organization.

In contrast to the policies of extinction underpinning the Holocaust and Rwandan genocide, those of the Nigerian government did not call for the extermination of Igbos, but instead sought to address the threat of succession.[130]

4.5.2 1980 Maitatsine to Boko Haram Conflicts

Between the Maitatsine religious riots of 1980 and the Latest Boko Haram, there have been more than 20 cases of ethno-religious conflagration resulting in more than 10,000 deaths and destructions of properties worth billions of Naira. In contrast with Zangon-Kataf and Plateau Ethnic cleansing. Conflict of 1980 and Boko Haram of 2009 was largely between some extremist religious groups and the security agencies.

> "*I was a bigot, a fanatic and an ignoramus of man fighting tireless, maiming and actually sending the innocent of the great beyond prematurely, all in the name of religion".*[131]

Mohammed Abdulazeez, a one time Maitatsine henchman, uttered above those words. The Maitatsine riots later spread to Yola, Maiduguri, Bauchi and Gombe, the Kano incident stands out for being the first religious crisis that took a huge toll on human lives and property. The very first violence in Kano shocked many Nigerians to their marrows. For the ten days the incident lasted, law

[130] Ijalaye, David (1971) *Was Biafra at Anytime a State in International Law?* American Journal of International Law, 65:551
[131] www.onwar/com/.../nigeria1980.htm

enforcement agencies had a difficult time containing the crisis. The then civilian President signing into law the unlawful society order of 1982 which prohibited groups such as the Maitatsine Sect from operating under what ever guise.[132]

That was not the last religious crisis to be linked to the Maitatsine Sect, later in 2009 Maiduguri reputation as a hotbed of ethno-religious crisis against come to the fore, and in a fashion that reminded many of the Maitatsine riot.[133] A group of religious zealots who tagged themselves Boko Haram orchestrated an orgy of violence in four northern states including Borno, the capital of Maiduguri. The others are Bauchi, Kano and Yobe, more than one thousand innocent lives in just four days. The Boko Haram members were said to be opposed to western education.[134] Questions were asked to how the young sect leader was able to recruit and indoctrines his members without the knowledge of security officials and set them loose on the society leading to the tragic deaths of many Nigerians.[135]

The researcher have found that at the heart of this violence is the poverty and political maneuvering and not religion.[136] And they are taking advantage of broken down structural condition in Nigeria that people can take law in to their own hands without getting reprimanded. Because the attacks were committed by

[132] www.newswatchngr.com/index.php
[133] www.jastor.org/stable/1580374
[134] www.photious.com/countries/nigeria
[135] www.prevention.net/page/php.
[136] English.aljazeera.net/news/Africa/2

frustrated and unemployed youths and orchestrated by religious leaders and politicians who manipulate them to retain power.[137]

4.5.2 Zangon Kataf Ethno Religious Crisis and Plateau Ethnic Cleansing

In March 1987 after the last Maitatsine riot was recorded, Christians and Moslems engaged each other in a superiority fight in Kafanchan between Christian and Moslems, the Christians and Native Kaje's were accused of destroying Mosques in the Southern Kaduna.

At times, all it took was for two people of different faiths or ethnic groups to pick up a minor quarrel, or to have political differences. This was the situation in May 1992 when a communal feud between the Indigenous Katafs and the Hausas in Kaduna state, later assumed religious dimension and even spread to other towns within the state leaving deaths and destruction in its wake.

That of Jos, the first of which was in September 2001 was said to have been sparked off by political differences between the mainly Christian natives and the settler community made up of the Hausa/Fulani. By the time the dust raised by the squabble had settled, hundreds of people lost their lives while property and business that took pains up in ruins.

Conservative estimates put the cost of human lives wasted in Jos and other towns within the state since 2001 at over 4,000. This include Yelwa-Shandam the Violence which led to the imposition of state of emergency in the

[137] En.wikipedia.org/wiki/book-haram

state during the Joshua Dariye administration as well as the recent bud bloody conflict.

The horror which was unleashed in Jos and its environs between Sunday 17 and Wednesday 2010 defines any analysis and categorizations, though officials as usual underestimated the total number of those brutally murdered and injured. It is clear the thousands of people were exterminated in a manner akin to genocide, but nothing illustrates the scale of madness more poignantly than what happened in Kuru Karama village on Tuesday, January 19, 2010, not less than 150 innocent unarmed Muslim men, women and children were rounded up and exterminated.[138]

Civil conflict tin Nigeria is not peculiar to the Plateau state but the nature frequency and scale of the conflict in Plateau, particularly the recent one is unique in the history of evil. It is essentially been between a Christian majority and a Muslim minority mediate by the state government which has not hidden its partisanship.

[138] www.crimesofwar.org/thebook/ethnic

CHAPTER FIVE

5.0 SUMMARY, CONCLUSION, OBSERVATOIN AND RECOMENDATION

5.1 SUMMARY

In a brief form, the research work critically analyses the global initiative to end impunity and the imperative of international criminal tribunals with crime of genocide as a case study.

The research work gives insight into the concept of crimes under the international crimes.

Chapter one gave an insight of the background of the study which aptly demonstrate global view and concerned, statement of problems, aims and objectives on the research was critically looked at. The chapter also justifying the reason behind the research. The scope and methodology of the research adopted was treated in the concluded part of the chapter.

Chapter two explicitly spelt out the legal and practical measures for the prevention of genocide by tribunals and the concept of crime is well elaborated.

Chapter three of the research partly raised up an interesting issue in the criminal jurisdiction and judicial mechanism of international criminal tribunals and ICC. Also, the concept of universal jurisdiction were looked at, procedural guarantee of those tribunals were dealt with, as well as distinction between the tribunals and Rome statute were fully elaborated.

Chapter four of the research was the case study of the research which expose the origin, scope and meaning and definition of genocide.

Finally, the concluding part of the work in chapter five focused on summary, conclusion, observation, and recommendation.

5.2 CONCLUSION

It seems undeniable that today's unanimous and prompt condemnation of any direct attack on international peace and security is paralleled by almost universal disapproval on the part of state towards certain other activities. The international community as a whole and not merely violates principle formally embodied in the genocide convention and even outside the scope of the convention principles which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of international criminal court.

International law has come to embrace the concept of international crimes as well as that of crime against humanity and crimes of genocide, while under international law are subsumed offences declared as such by way of treaties which requires parties to them to include such crimes in their respective criminal code, by international crimes like genocide, war crimes and crime against humanity are understood to mean offences committed against the international community as a whole which are therefore subject to trial by all states, irrespective of the nationality of the offenders or the place of commission of the

criminal acts. This is otherwise known as crimes of universal jurisdiction.[1] The attitude of the world today is one of zero tolerance for heinous acts in times of war, especially with respect to the civilian population.

The truth of the matter, which has a compelling force in our present context is that the state, particularly in contemporary Africa has never been known as a great respect of human right and fundamental freedoms. Across the continent, government is characterized by an acute disregard for liberties. The ascendance of military dictatorship on the African political scene shortly after political independence only brought a new dimension to the pattern of human rights violations that had characterized the neo-colonial state in Africa.

Besides a military government no matter how much it pretended to be benevolent required coercion to sustain itself in power. This was also inevitable because military government manifested the triumph of unconditionally consequent upon the breakdown of fight of civility.[2] This has made military rule in Africa where the military had ruled for more years than a constitutional governments. A military coup by its very nature and the coercive rule which followed certainly detracts from human rights including especially the right to participate fully process of leadership section.[3]

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[1] Akin Oyebode, "*International Criminal Law as part of International Law"* paper presented at Nigerian Institute of International Affairs NIALS, May 19, 2006.
[2] Mimko, Oluwafemi, "*The Political Economics of Human Rights Violations and Imperative of Human Right violation in Contemporary Africa,* 1998, Chapter 2in Yomi DInakin et al (eds) Ado reading in Law Vol. 1 ARL .
[3] Ibid

The political context in which almost always international crimes are committed has a powerful pressure on exercising of national jurisdiction. Unimaginable atrocities that occurred on the territory of Yugoslavia and Rwanda respectively were not peculiar of the concerned states only but of the International community as a whole, thus justifying the establishment of the ICTY and ICTR. Not only that the two states where crimes were committed have been reluctant to enforce national jurisdiction but also that they refused to cooperate with tribunals despite the binding obligation imposed on them by security council resolutions. The ICC although treaty based and primarily aimed at strengthening international law enforcement while prioritizing and facilitating national jurisdictions may face obstacles related to state cooperation. While cooperation states will be able and willing to carry out a prosecution for international crimes in domestic courts the non-cooperative states will refuse to extradite, prosecute or provide evidence.[4]

Again, Lewis Ocampo the ICC prosecutor issued indictment warrant for the arrest of Sudan President Omar Hassan Al-Bashir. But African Union (AU) has given full backing to Bashir in its submit last year and decided that no Africa nation will cooperate with the ICC in apprehending him even if party to the Rome statute.

[4] Shikyil, S.S. *Crimes against Humanity Under the International Criminal Court Statute,* NIALS, Lagos 26, May, 2006.

Last year, in a joint press conference with U.S Secretary of State Hilary Clinton, Kenyan Foreign Minister defended the AU. The wanted the UN Security Council (UNSC) to invoke the power under Article 16 of the Rome Statute to suspend Bashir's Indictment of a year.

The creation and the existence of the court have been controversial with a number of states. The disagreement continue to surround the source and nature of the courts jurisdiction. Some countries object to the court saying that there is very little supervision of the courts apparatus and that the court's verdicts may become subject to political motives.

It is instructive to note that some years before the creation of the court, Hans Carell, in what can be described as his vision stated that;

> "*from now on, all potential warloads must know that depending on how a conflict develops, there might be established an international tribunal. Before which those will be brought who violate the laws of war and humanitarian law.*[5]

Today, that International tribunal is in existence and the knowledge require to avoid the consequences of the legal regime as far as it relates to genocide is what this thesis or research has attempted to provide by examining the origin, nature, meaning and definition of genocide.[6]

This is in order to engender proper understanding of the crime of genocide and why it has become an international crime with universal jurisdiction. The

[5] The United Nation under Secretary General for Legal Affairs, *The establishment of ICC Overview*, available at http//www.org/law/icc/gneeraloverview.htm
[6] Ibid

primary objective of criminalizing genocide by the Rome statute is to ensure effective deterrence and to put an end to impunity. By its establishment, the message that is been sent to all and sundry is that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out punishment be it head of state, commanding officers, the lowliest soldiers in the field or militia recruits.

Whether the ICC will develop as a truly important institution in international law enforcement and will affect development of universal standards and their implementation in national legislations. The statute adopted mostly a stated oriented approach.

In sum, the procedure for trying person's accused of those serious infractions of international criminal law is now in a position to bid good bye to impunity, what this means is that international criminal law has now become entrenched in international law and world is definitely going to be more wholesome place on account of this development. The only obstacle facing ICC is the obstinate refusal of certain big powers to come under its regime.

Notwithstanding the fact that we live in an interdependent world where no single state can claim a monopoly of authority or control is enough to suggest that those who will exhibit reluctance to come on board would be compelled to have second thoughts, more so it is in the interest of each and every member of the international community to combat international criminality.

5.3 OBSERVATIONS

In the course of this research, the following were observed as the shortcomings

1. Having undertaken a historical excursion of the efforts of the world community to see that violations of Law of international concern do not go unpunished, from the trial of Nazi's, the establishment of the two adhoc tribunals for the former Yugoslavia and Rwanda, culminating in the Millennial event of framing a treaty for a permanent International Criminal Court in Rome, in July 17, 1998, one can conclude without fear of contradiction that the impunity which the violations of crimes of genocide go unpunished is not due to death of appropriate penal machinery and sanctions for breaches but the lack of political and moral will on the part of state parties.

   For instance Ahmed Harun and Aliyu Ashe a minister and leader of Janjaweed (Military militia) were indicted by the International Criminal Court for genocide in Dafur region, but Sudan government refused to make arrest them until sometimes in October 2008 when Aliyu Ashe was arrested leaving Ahmad Harun.

   Again, Lewis Ocompo the ICC prosecutor issued indictment warrant for the arrest of Sudan President, Omar Hassan Al-Bashir for the allegation of genocide committed in the Western reign of Dafur. But the Arab League and African Union (AU) leaders objected arguing its is not what is needed to solve the Dafur Crisis.

They accused the ICC of being nothing more than a tool of the Western countries, while in Africa the ICC Open it cases against individuals for alleged crimes, but the court's bias against Gaza atrocities, the court is like a backing dog one that is capable of biting.

2. With respect to the principle of complementarily there is a sharp contrast to ICTY and ICTR with that of ICC the two ad-hoc tribunals have supremacy over national courts, because ICTY and ICTR statute provide that those tribunals may formerly request national courts to transfer a case to the competent international tribunals, and in the case of international criminal court, it was are reversed in favour of national court.

3. The researcher observed that, the principle of complementarity may be subjected to abuse. It will be used as a shield by states to frustrate international justice. This is particularly so with regard to crime of genocide which are usually perpetrated with the help and assistance or the connivance of national authorities for example, the Janjaweed Militia in Sudan Western region of Darfur, Zangon Kataf in Kaduna State and Jos Plateau ethnic cleansing. Because hostilities in any society lies with its leaders rather than its followers and the system of reward and punishment lies in their hands, in such cases, states authorities may pretend to investigate and try crime and may even conduct proceeding but only for the purpose of actually protecting the allegedly responsible person.

4. The researcher also observed that the Rome state i.e. ICC statute did not make provision nor articulate the consequence of non-cooperation by a state in the event of failure to state to cooperate.
5. It was observed that the ICC process of indictment is usually politicized. For example the United State's voice is loudest yet, the US which has not yet ratified; or sing the statute, while members of the ICC with little international influence cannot be have their grievance listened to.
6. The researcher also observed that the existence of the court collides directly with its new imperial policies that assume the task of policing the world. In agreement with the doctrine of preventive action formulated by President Bush the Union of International community rejects the effort to grants US soldiers immunity against a denunciation of human rights violation before the ICC.
7. Although, nations of the world have contributed so much in the promotion of peace and security through the International Criminal Court, by way of putting together collective resources, security has not been completely achieved due to non cooperative attitudes of some states. For instance in Sudan, when the ICC prosecutor mounted pressure on Sudan government. They announced the arrest of Aliyu Ashe Leader of Janjaweed Militia, but they refused to hand him over to ICC saying that they would conduct their own investigation.

The researcher, observed that the Rome statute did not make provision nor articulate the consequences of non-cooperative by the state in the event

of failure of state to cooperate e.g. the Sudan President Al-Bashir Managed to maintain ability to travel regionally to countries such as Ethiopia, Egypt, Eritrea, Libya and going as far as Zimbabwe and Mauritania.

And Kenya which is signatory to the Rome Statute treaty which form the basis of the ICC has invited him in this October, 2010 to attend Inter-Governmental Authority Development (IGAD) Summit.

8. It was also observed that, since orders and request to the ICC are to be enforced through national jurisdiction, like all international treaties, the enforcement of the ICC statute will depend on states political will to implement it. Moreover lack of universal support will seriously undermine the court without the cooperation of some of the most powerful state not only the efficacy of the court will be impeded like the US which continue to pressure many countries to sign agreement not to surrender U.S. citizens to the ICC. But they were vocal in the area of human rights and often amongst the first to promote human rights as a global issue in the past but refuse to sign up and ratified Rome statutes'.

9. It is observed that Nigeria had signed the Rome statute but up to now, it was yet to be domesticated and the protocols are yet to be.

10. It was observed that the character of the political and traditional leadership has to made difference in averting what could have easily turned into genocide.

11. It was observed that the ICC have shown interest to lunch an examination of the violence that result of petition filed by the Socio-Economic Rights and Accountability Project (SERAP) to Mr Ocompo's office. The petition requested the Ocompo to use his position to investigate proprio motu allegations of unlawful killing of at least 326 people and perpetration of other crimes under the international law committed in Plateau State. It is also a good news for international justice especially given the persistent lack of political will by the Nigerian government to address the problems. It is clear that thousand of people were estimated in a manner akin to genocide

5.4 RECOMMENDATION

Also in the course of this research, the following were writer's recommendation.

1. As the writer first observed, it is recommended that the ICC statute be amended so that, the court is no longer a barking dog, one that is capable of biting.
2. With regard to the second observation, it is our submission that Article 17 and 18 of the Rome statute be amended, because the provision of ICTY and ICTR is more appropriate.
3. with respect to third observations, the writer recommends that all judicial guarantees must be in place to ensure fair prosecution.

4. As the researcher observed in Item four, it is recommended that, it would have been appropriate to provide for the possibility of the security council to step in and adopting sanctions even where the matters had been previously referred by this body to the courts. One fails to see why the security council should not act upon chapter VII of the United Nations charter if a state refuse to cooperate and such refusal amounts to threat to peace
5. It is also recommended that Article 87 of the Rome statute that talks about request for cooperation be amended, because in the event of failure of states to cooperate, the article could have been specified that assembly of state might agree upon counter measures to non-cooperating states.
6. It is our submission that Article 124 of the Rome statute be deleted, which allows a new state party to opt out for excluding from the court jurisdiction, on war crimes allegedly committed by its nationals or on its territory for the period of seven years. It is recommended that, the degree of homicide should determine what amounts to genocide, unlike the present situation where killing of a single people with specific intent amount to genocide, while killing of a million people in the absence of intent does not constitute genocide.
7. It is submitted that for proper implementation of International Criminal Court statute, prosecutions holding perpetrators accountable demonstrates that the principle of the Rule of Law stands above political decisions. Because failure to prosecute promotes impunity and denies that some consider as the most effective insurance against future repression.

The state of affairs no longer hold way with the establishment of the two-adhoc tribunals of this former Yugoslavia and Rwanda with mandate to prosecute and punish those guilty of atrocities perpetrated in Rwanda and Yugoslavia, the two tribunals certainly help to stern impunity and facilitate national reconciliation and trying those responsible for serious crime.

8. The ICC Must also reach out to the community with information about the ICC, its mandate and current operations. It must investigate and prosecution violations during the conflicts and ensure that the operation in the field are conducted in a manner that is sensitive to the mass poverty in the world. Above all the ICC must be mindful of the views and perspective of the people. Like some of the Arab's views whether there is real justice at ICC.
9. As the researcher observed on Item nine, in order to implement the protocols Nigeria need to amend Cap. 162 Laws of the Federation of Nigeria 1990.
10. It is recommended that the federal government and international community must act to stop top-officials of the Plateau state government from sponsorship of the ethnic cleaning because this is no longer national problem but an international issue. And the state government must wake up and show its partisan cassacks in the conflicts which has spanned more than a decade leading to the loss of thousands lives and properties .
11. It is also recommended that from the fore going analysis of the procedural mechanism employed by the national and international tribunals called upon to prosecute breaches of international crimes that the accused should and

must be given and accorded the right to fair trail. It must equally help victims make their voices heard.

12. It is recommended that, there was need for amendment to the ICC statute so that the court can confiscating the assets of those prosecuted under the Rome Statute.

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