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INTERNATIONAL LEGAL REGIMES ON THE CRIME OF GENOCIDE: PRESCIPTION FOR REINVIGORATION

DANIEL FRIDAY ATIDOGA Ph.D[1]

Abstract

Humanity for ages was caught in a paradoxical epoch of self-destruction and reckless impunity, occasioned by man, to man of same human family. This grave impunity enjoyed and thrived on the wings of global ambivalence and tyranny of silence, as there existed no unified regulatory regime for prohibition, prevention and sanction. At the wake of a new era of awareness and globalization, the Convention for the Prevention and Punishment for the Crime of Genocide, 1948 was adopted. This was to put an end to reckless genocidal atrocities and sadistic fantacies of tyrannical rulers. No instrument of law was ever heralded and celebrated like the Genocide Convention. Pitiably however, the act of genocide became a reoccurring decimal for so many reasons, amongst which is the inherent loopholes in the law of genocide itself. These loopholes are the concern of this paper. Consequently, this paper examines the international legal regime on genocide, with a bird"s eye view on the principal treaty, statutes of adhoc tribunals and statute of permanent international criminal court (ICC). This is with a view of identifying loopholes in the laws and making prescription for strengthening them. The paper observed that, the law only protects certain category of persons. Political groups, social groups and trade groups were not protected. It was also found that the law of genocide only emphasizes and envisages the happening of genocide events. No any provision in the entire laws contemplates preventive measures. The paper therefore, recommends that the laws of genocide should have a broader protective shield, which provides for protection of all groups. The paper also recommends that the laws of genocide shouldbe invested with a legal teeth and fierce legal claws to pursue genocide prevention, rather than waiting for the tumultuous combat of curative measures.

Key Words: Genocide, International Law, crime, Court, Tribunal

1.1 Introduction

For half a century now, genocide as a phenomenon has been subjected to increasing scrutiny from legal experts, scholars, states persons and citizens alike.[2] It is in the

[1] Professor of Law Faculty of Law University of the Gambia Banjul- Republic of the Gambia dr.atidoga@gmail.com

course of such thorough scrutiny that Winston Churchill called it ―a crime without a name‖, the Genocide Convention described it as an ―odious scourge‖ and numerous scholars styled it as ―the ultimate crime, the pinnacle of evil‖.[3] Acts of genocide have doubtlessly assumed the status of a re-occurring malignant tumor. Its recent occurrences in states like Cambodia, Rwanda, Bosnia, Darfur, East Tumor, Iran, Kenya, and Uganda and contentiously in Nigeria have attracted further international attention and legal developments in addition to the existing ones. These past and present legal developments includes the establishment of legal regimes for combating the ‗odious scourge' such as, the Genocide Convention of 1948, Statute of International Criminal Tribunal for Yugoslavia (SICTY), Statute of International Criminal Tribunal for Rwanda (SICTR), Statute of International Court of Justice (SICJ), Statute of International Criminal Court (SICC) etc. Corresponding executor institutions such as the International Court of Justice, International Criminal Courts and the ad hoc tribunals/special courts were also institutionalized for the purposes of combating genocide – ―the ultimate crime‖.

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

1.2 Legal Regime for Combating the Crime of Genocide

1.2.1 Convention on the Prevention and Punishment of the Crime of Genocide, 1948[4]

I. General Overview

The law of genocide is the prohibition of the ultimate threat to the existence of protected groups. The law which is fashioned from a criminal law perspective though aimed at individuals yet focuses on the activities of such individuals as state agents in pursuit of state genocidal policies. ―The centerpiece in any discussion of the law of genocide is the Convention on the Prevention and punishment of the crime of

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

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

[4] (1951) 78 UNTS 277.

Genocide, Genocide Convention adopted by the United Nations General Assembly on9 December 1948‖,[5] which became operational in January 1951. Surprisingly, sixty- four years after its adoption and sixty-one years after it became operational, the ratification of Genocide Convention is minimal in comparison with other more recent human rights treaties, as less than one hundred and fifty nations are signatories to the treaty. It was rightly observed that, the reason for less enthusiasm by states on the ratification of Genocide Convention cannot be the existence of doubt as to the universal condemnation of genocide, such rather testifies to unease amongst some states because of the serious demand imposed on state parties to prosecute or extradict persons, including heads of states for trial.[6]

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

The origin of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international law, involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and resulted in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from the conception is that the principles underlying the Convention are principles recognized by civilized nations as binding even without conventional obligations.[7]

The statement above may be a pointer to the judicial recognition of the crime of genocide as a prohibition in the light of customary legal norms from which no state can derogate from. It may therefore follow that, the prohibition of genocide is a customary international law which vest responsibility to prevent and punish all acts perceived as such by all civilized nations, irrespective of whether such civilized nations are parties to any treaty prohibiting genocide or not. This thinking was furtheremphasized in 2006, when the International Court of Justice observed that, the prohibition of genocide stands as a preemptory norm (*jus cogens*) in international law, being the first time it has ever made such declaration about a legal rule.[8]

The Genocide Convention is an international treaty at the general realm of public international law, which draws inspiration from elements of international criminal law, international humanitarian law and international human rights law.[9] The

[5] Schabas, W.A., *Genocide in International Law* (2nd ed.) (Cambridge: Cambridge University Press, 2009) p. 3.

[6] *Ibid.*

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

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

[9] Schabas, *op. cit.,* n. 4, p. 7.

repulsive disposition to genocide is linked with right to life and dire the protection of the sanctity of life as provided in national law[10] and International Declarations and Conventions,[11] while these instruments concern themselves with individual rights to life, the Genocide Convention is primarily associated with the right to life of human groups. While states ensure the protection of the right to life of individuals within their jurisdiction by prohibition of murder in criminal law, the repression of genocide proceeds differently, the crime being directed against the entire international community rather than an individual.[12] ―It is a frontal attack on the value of human life as an abstract protected value in a manner different from the crime of murder‖.[13]

Much energy has been dissipated by legal researchers in situating what is today thought as the shortfalls of the Genocide Convention. It has been rightly argued that, the definition of genocide advanced by the convention seem too restrictive and narrow to accommodate acts that should fall within the purview of the crime of genocide. The Convention seem not to take into cognizance, in clear and unambiguous manner, many of the major human rights violation and mass killing perpetrated by dictators and their accomplishes.[14]

II. Provisions of the Convention

The preamble to the Genocide Convention reflects both the accomplishments of the prior General Assembly resolution and sets the normative stage for the convention‘s binding article.[15] The preamble to the Convention states:

The contracting parties having considered the declaration made by the General Assembly Resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by civilized world;

Recognizes that at all period of human history genocide has inflicted great loss on humanity; and

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

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

[12] Schabas, *op. cit.,* n. 4, p. 8.

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

[14] Schabas, *op. cit.,* n. 4, p. 8.

[15] Morton and Singh, *op. cit.,* n. 1, p. 54.

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.

Hereby agree as hereinafter provided

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

Article I

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.[16]

The article clearly points to the fact that the obligation to prevent and punish genocide arises when genocidal activities are committed either at times of war or times of peace. It must however, be stated that the use of the word ―in time of peace‖ is some how ambiguous because the existence of genocide of any nature does not depict peace. However, Zachariah may be right to have observed that ―peace‖ in the context it was used in Article I of the Convention may be in contrast to ―war‖ strictly so called.[17] Even though Genocide Convention has been criticized as merely reproducing crimes within the purview of domestic laws; while this may be true, Article I of the Convention however, re-situated such criminal conducts within the domain of international law, which consequently ignites state parties' obligation to prevent and punish such conducts. This therefore gives right of intervention by outside parties to pursue genocide, therefore piecing the shield of state sovereignty which often works against intervention.

Article II

In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent birth within the group;

[16] Art. 1 Genocide Convention.

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

(e) Forcible transferring children of the group to another group.[18]

The above definitive elements constitute the *actus reus* and *mens reus* of the crime of genocide. The meaning ascribed to ―genocide‖ by Article II of the Convention has sparked a very hot scholarly debate over its utility and completeness.[19] This heated debate has over the years brought to fore some seeming inadequacies of the Conventions definition. The definition was limited to the protection of only the groups specified in Article II. Political, economic and social groups were excluded from protection by the Convention. Also visibly omitted from the convention is ―cultural genocide‖, which was very central to Lemkin‘s perception of genocide as a phenomenon. Furthermore, the intent requirement for the crime stipulated in ArticleII of the Convention is very ambiguous and evasive. Haven failed to furnish a proper framework for the extraction of the intent requirement of the crime. The Convention therefore dumps such heinous duty to the subjective opinion of judges and jury. Intent should simply be viewed, as intent of general criminal responsibility to avoid excessive technicality of special intent requirement which is gloomy and evasive.

Article III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.[20]

This Article did a very fundamental thing in the jurisprudence of the law of genocide – It enlarged the scope of the law of genocide by projecting further the purview of acts that fall within its legal parameters. The provision simply criminalized preliminary acts pursuant to genocide which may actually fall short of the commission of the actual offence of genocide. In the first ever verdict by an international court system handed down on the crime of genocide, delivered in 1998 against Jean Paul Akayesu, the International Criminal Tribunal for Rwanda (ICTR) found Akayesu not only guilty of genocide, but also of public incitement to commit

[18] Art. II, Genocide Convention.

[19] Charny, I. (ed.), Towards the Understanding and Prevention of Genocide: Proceedings of the International Conference of the Holocaust and Genocide Studies (Boulder, C.O: Westview Press, 1984) p. 65; Dadrian, V.N., ―A Typology of Genocide‖ *International Review of Modern Sociology* (1975) Vol. 5, p. 123; Drost, P., *The Crime of State,* Vol.2 (Leyden: A.W. Sythoff); Feni, H., *Lives at Risk: A Study of Violation of Life Integrity in 50 States in 1987, based on the Amnesty International 1988 Report* (New York: Institute of Genocide Studies, 1990) pp. 23-25 all cited in Morton and Singh, *op. cit,* n. 1, p.56.

[20] Art. III, Genocide Convention.

genocide.[21] The ICTR also convicted Rwanda's former Prime Minister, Jean Kambanda of genocide, conspiracy to commit genocide, and incitement genocide.[22] Article III of the Convention has therefore expended the sphere of genocide prosecution into new areas of inchoate offences.

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

Article IV

Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.[23]

This article tends to erode the contentious doctrine of immunity of some classes of leaders and public officials from criminal prosecution. The provision seems very mindful of the historical antecedent of complicity of rulers in the perpetration of genocide and set out t downplay the defence of sovereignty advanced by rulers. By clearly stating in Article IV that criminal responsibility extends beyond private individuals to state functionaries, the Convention expands the range of culprits that can be held accountable for genocidal acts committed by them.[24]

Morton and Singh argued vehemently that, Article IV should have been strengthened by express stipulation rejecting the plea of superior command as a defence to actions or inactions that results in genocide.[25] It must be observed that the plea of superior command hold no weight, as such are only excusable only to the extent that the offender does not know that the command was illegal, and to a further extend that the command was not manifestly illegal.[26] In line with the suggestion and argument of Morton and Singh, to dispel any ambiguity on the place of the plea of superior

[21] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR-96-4-T), Judgment of 2 September, 1998.[22] *Prosecutor v. Jean Kambanda* (Case No. ICTR-97-23-S), Judgment of 4 September, 1998. [23] Art. IV Genocide Convention.

[24] Morton and Singh, *op. cit.,* n. 1, p. 57.

[25] *Id.*

[26] *R v. Finta* (1994) 1 SCR 701; Military *Prosecutor v. Melinki,* (1985) 2 Palestine Year Book of International Law, p. 69; all cited in Schabas, *op. cit.,* n. 4, p. 380.

command, the Charter of the International Military Tribunal for the Nuremberg excluded the defence of superior command altogether.[27]

Article V

The contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.[28]

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

Article VI

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted it jurisdiction.[29]

This article has jurisdictional limiting consequence for prosecution of the crime of genocide. It is not in tune with the original draft of the convention, which allows for universal jurisdiction in the prosecution of genocide. However, that was pushed out from the final convention after serious debate. Consequently, the first part of Article VI only recognizes the jurisdiction of the state in the territory of which genocide was committed, the second part of the article confers jurisdiction on international penal tribunals as long as the contracting parties have accepted that tribunal‘s jurisdiction.[30] The reference to international tribunals by Article VI was only activated in the 1990s when the ICTY and ICTR were established and the creation of International Criminal Court (ICC) in 2002, before these time it was not effective, since no such bodies were in existence.

Article VII

[27] Art. 8, Agreement for the Prosecution of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279.

[28] Art. V, Genocide Convention.

[29] Art. VI, Genocide Convention.

[30] Morton and Singh, *op. cit.,* n. 1, p. 58.

Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extraditions. The contracting parties pledge their laws and treaties in force.[31]

This article encourages the prosecution of genocide by eroding the possibility of falsely protecting culprits from extradition on the ground that, they are sought to be extradited on the basis of a political crime. This Article VII did well by clearly situating the act of genocide in Article II and other acts enumerated in Article III outside political crime. By these, states that are complicit in genocide cannot rightly refuse the extradition of persons accused of genocide on the basis that genocidal acts are political crimes.

Article VIII

Any contracting party may call upon the competent organ of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.[32]

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

Article IX

Disputes between the contracting parties relating to the interpretation, application or fulfillment of the present convention, including those relating to the responsibility ofa state for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the party to the dispute.[33]

This article gave International Court of Justice (ICJ) the power to interpret the applicability or otherwise of the convention at the request of any of the parties to a dispute. This article is a clarion call on the ICJ to adjudicate genocide cases and provide advisory opinion to the General Assembly of the United Nations and parties to the Convention. In 1951, the ICJ was requested by the General Assembly of the

[31] Art. VII, Genocide Convention. [32]

Art. VIII, Genocide Convention.[33]

Art. IX, Genocide Convention.

United Nations to give an advisory opinion on the consequences of reservation made by parties to the Genocide Convention, which was also objected to by parties to the Convention. The ICJ ruled that parties registering reservations, which are subsequently objected to by other parties to the convention remain parties to the convention.[34] On three instances in the 1990s, states explored Article IX of the Genocide Convention to initiate proceeding in the ICJ on the charges of genocide.[35] Agood example is the case of *Bosnia Herzegovina v. Serbia Montenegro*[36] where the ICJ final ruling on 26th February, 2007 on the case instituted by Republic of Bosnia against the Federal Republic of Yugoslavia on March20th 1993 was given. The legal exploration and exposition by ICJ in this case was a milestone achievement in the lawof genocide.

Articles X-XIX

These are articles that boarders on technicalities of the convention ranging from languages of the convention; last date of signature; request for the revision of the convention; life span of the convention; place of domiciliation of the original convention and the registration of the convention with the Secretary General of the United Nations on the date of its coming into force.

The articles of the Convention that boarders on technicalities have three important articles:

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

III. Genocide Convention: Some Matters Arising

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

[34] Morton & Singh, *op. cit.,* n. 1, p. 59.

[35] *Ibid.*

[36] Case concerning the Application of Genocide Convention, Judgment of 26th February, 2007.

The potency of the Genocide Convention was primarily weakened by the divergent state interest and individual state objectives at the time of drafting the convention, which undoubtedly led to a compromising situation, distantly away from what proponents of the Convention had envisioned.[37] Kuper emphatically states that, ‗‗the compromises reached at the drafting stage jeopardized the convention‘s effectiveness and implementation‘‘.[38] Indeed, about seven decades after the Genocide Convention, there was little reason to praise the convention for its contribution to either the prevention or punishment of the crime of genocide.

An effective assessment of the legal regime on genocide, midwife by the Genocide Convention requires a consideration of the two operative terms – prevention and punishment – found in the title of the 1948 Genocide Convention. While prevention shares an equal status with punishment in the convention‘s title, there are however, no direct prevention provisions in the treaty. The omission of preventive measures is said to be a reflection of the general lack of knowledge of the cause or causes of genocide, as the divergent political position of states during the drafting process.[39] The causes of genocide are thus; argued to include, human nature,[40] fear of death,[41] material deprivation and ethnic diversity,[42] economic system[43] and the presence of war,[44] which serves as a cover for the elimination of individuals based on their common group features.

The absence of a compelling theory that uncovers the necessary and sufficient causes of genocide hinders the treaty from providing clear cut preventive measures. Therefore, the prevention of genocide deducible from the convention relies majorly on deterrence which is a form of threat of punishment on those contemplating the perpetration of genocide.[45] Morton and Singh argued that, ‗for the prevention of genocide through the threat of punishment to be credible, a consistent record of bringing perpetrators of genocide to justice must be established‘.[46] Thus, while prevention remains a central purpose of the Genocide Convention, it is however

[37] Kuper, L., *The Prevention of Genocide*, (New Haven: Yale University Press, 1985) p. 100.

[38] *Id.*

[39] See Generally: Morton & Singh, *op. cit,* n. 1, pp. 60-61.

[40] Lorenz, K., *On Aggression* (New York: Bantam, 1966); Kosler, A., Janus: A Summing Up (London: Hutchinson, 1978).

[41] Charny, I., (ed.) *Towards the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide* (Boulder, C.O: Westview Press, 1984).

[42] Falk, R., ―Comparative Protection of Human Rights in Capitalist and Socialist Countries‖ *Universal Human Rights* (1979) Vol. 1, pp. 3-29.

[43] *Ibid.*

[44] Markusen, E., ―Genocide and Warfare‖ in Stragier, C.B. and Flynn, M. (eds.) *Genocide, War and Human Survival* (London: Rowman & Little Field, 1996) pp. 75-86.

[45] Morton and Singh, *op. cit.,* n. 1, p. 61.

[46] *Ibid.*

dependent on the effective accomplishment of the punishment goal, which is more directly addressed in the treaty.[47]

On punishment for genocide, the Genocide Convention is a forceful attempt to replicate the Nuremberg principle into time of peace, by which captured enemies were hold individually liable for acts of aggression and crimes against humanity. The problem here is that, while the Nuremberg Tribunal had physical custody of perpetrators for justice, the Genocide Convention provided for two judicial levels - domestic and international, as provided for in Articles V and VI of the Genocide Convention. The implication of these is that, punishment for genocide in domestic and international domain may vary considerably. It has been shown that, international prosecution of genocide seem to be more fruitful, as domestic prosecution is often hampered by complicity of the prosecuting state in the acts. This makes domestic prosecution of genocide much less likely. This certainly accounts for the unimpressive performance of national courts in the punishment of acts of genocide committed by their own citizens.[48]

If domestic prosecution of genocide is rendered ineffective due to complicity of state in genocidal atrocities, the only punishment avenue will remain international prosecution, through the instrumentality of International Court of Justice (ICJ), as set forth in Article VI of the Genocide Convention. Since ICJ only enjoys jurisdiction on consenting states, the ICJ is limited in its ability to adjudicate in genocide cases, hence, international prosecution of genocide is dependent on either the creation of *ad hoc* tribunals for specific instances of genocide, like was done in the case of former Yugoslavia and Rwanda or the establishment of a permanent International Criminal Court.[49] It must be observed however, that the status of genocide as *urga omnes*, might have the potency of clothing ICJ with universal jurisdiction on prosecution of the crime, therefore eroding the limitation of consent of parties that is required for ICJ to activate its adjudicatory prowess.

1.2.2 Statute of International Criminal Tribunal for former Yugoslavia (SICTY)

II. General Overview

The International Criminal Tribunal for former Yugoslavia was established in 1993 by the instrumentality of its enabling statute (SICTY) for the prosecution of persons responsible for the serious violations of international humanitarian law in the former Yugoslavia.[50] The fall of the Soviet Union in 1989, was followed by emergence of a

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[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.*

lot of independent Balkan States in Eastern Europe. This situation ushered in massive violation of human rights, wide spread catastrophic conflict and widespread and systemic humanitarian atrocities, which includes an unprecedented, genocidal ―ethnic cleansing‖ policies, organized torture, murder, existence of concentration camps, rape and other atrocities of varying degrees.[51] The lists of acts punishable under theSICTY are:

- Grave breaches of the 1949 Geneva Convention;[52]
- Violation of Laws and Customs of War;[53]
- Genocide;[54] and
- Crimes against humanity.[55]

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

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

It must be noted however that, the Statute of ICTY vested on the Tribunal and the National Courts Concurrent Jurisdiction to prosecute persons for international crimes committed in the territory of former Yugoslavia.[56] Where there is conflict, the tribunal will have edge over the National Court.[57] By these, the International Tribunal is invested with legal teeth to masticate and override the jurisdiction of the national courts, and even demand that cases at the national court be referred to the tribunal at any stage of the proceedings.[58] A trial by the tribunal may not again be subjected to another trial before any national court. However, an accused person tried before a national court may be subjected to trial again by the tribunal, where the crime for

[51] *Ibid.*

[52] Art. 2 Statute of ICTY.

[53] Art. 3 *Id.*

[54] Art. 4 *Id.*

[55] Art. 5 *Id.*

[56] Art. 9(1) *Id.*

[57] Art. 9(2) *Id.*

[58] *Id.*

which such an accused person is tried was characterized as an ordinary crime and/or where there is evidence of bias at the trial.

III. Major Cases on Genocide Decided under the Statute of ICTY

There are some significant pronouncement dealing with the interpretation and application of Article 4 (genocide) of the Statute of ICTY. The trial chamber rulings in *Jelisic*,[59] *Krstic*[60] and *Sikirika*[61] and the appeals decision in *Jelisic*.[62] In the course of the judgments, the ICTY has made important pronouncement on the nature and character of genocide[63] in the context of the Yugoslavian crises, which gave a lucid appreciation of genocide in the light of the Statute of ICTY.

Prosecutor v. Radislav Krstic,[64] is a landmark case in which the ICTY handed down the tribunal‘s first genocide conviction in August, 2001, where the trial chamber held that, the 1995 Srebrenica massacres in which Bosnian Serb forces executed 7,000 – 8,000 Bosnian Muslim men constituted genocide.

The crises that engulfed Yugoslavia in the 1990s generated serious global outcry, consequent upon the scale of atrocities which was unprecedented in recent times. The Srebrenica massacre is core to the Yugoslavian calamity. Southwick rightly observed that, ―the word ‗Srebrenica‘ carries a pall of tragedy uttered with a mixture of historical import and regret; it has become a euphemism for un-speakable events.‖[65]

The decision in *Krstic* set forth a comprehensive account of the Srebrenica tragedy. The ICTY found that following the takeover of the town and the execution of Bosnian Muslims men of military age, the Serb forces further transported away from the area nearly all Bosnian Muslim women, children and elderly;[66] an act which the tribunal said resulted in ―the physical disappearance of the Bosnian Muslim population in Srebrenica‖.[67] The *Krstic* trial chambers of ICTY concluded that, these act, perpetrated by Serb forces constituted genocide.[68] For actively participating in thekillings, Radislav *Krstic*, the Serb officer was tried, convicted and sentenced to forty

[59] *Prosecutor v. Jelisic, Case No*. IT-95-10T, Judgment of ICTY of 19th October, 1999.

[60] *Prosecutor v. Krstic,* Case No. IT-98-33-T, Trial Judgment of ICTY of 2nd August, 2001.

[61] *Prosecutor v. Sikirica,* Case No. IT-95-8-T, Judgment of ICTY on Defence of Motion to acquit of 3rd September, 2001.

[62] *Prosecutor v. Jelisic,* Case No. IT-95-10-A, Appeal Judgment of ICTY of 5th July, 2001.

[63] Schabas, W.A., ―Was Genocide Committed in Bosnia and Herzegovina? First Judgment of International Criminal Tribunal for the former Yugoslavia‖ *Fordham International Law Journal* (2001) Vol. 25 (23) p. 22.

[64] *Krstic*, *op. cit.,* n. 2, p. 59.

[65] Southwick, K.G., ―Srebrenica as Genocide? The *Krstic* Decision and the Language of the Unpeakable‖, *Yale Human Rights and Development Law Journal* (2005) Vol. 8, p. 189.

[66] *Krstic*, *op. cit.,* n. 59, para. 52.

[67] *Id.*, para. 595.

[68] *Ibid.*

six years imprisonment, through the Appeal Chamber of ICTY, reduced the sentence to thirty five years in April, 2004.[69] The Appeal Chamber reduced *Krstic* sentence after establishing that *Krstic* aided and abetted genocide not as a co-operator, as initially determined by the Trial Chambers.[70] On 19th April, 2004, the ICTY Appeal Chamber Affirmed the Trial Chamber finding of genocide perpetrated by the Serb forces at Srebrenica.[71]

The finding of genocide in *Krstic* case by ICTY was based on a critical analysis of Srebrenican situation in the context of the law of genocide as encapsulated in the Statute of ICTY.[72] In arriving at a conclusion of genocide, the ICTY Chamber had to agree that, the atrocities were committed with the requisite specific intent set down in the laws of genocide,[73] particularly in line with the provision of Article 4(2) of the ICTY Statute. The ICTY found specific intent to destroy part of Bosnian Muslim group because of the clear imputation that, ―the Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings[74] with the forcible transfer of women, children[75] and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica‖.[76] It is the further finding of ICTY that, ―the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslim in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on the territory‖.[77] These observations were what informed the conclusion of ICTY that the activities of the Serb forces were within the meaning of Article 4 of the Statute of ICTY. Hence, that, genocide had indeed taken place at Srebrenica.[78]

In disagreeing with the finding of genocide arrived at by the ICTY, Southwick fiercely contended that, the ICTY failed to consider the defence substantial evidence which reasonably situate the Srebrenica massacre away from genocide, but as aneffort to remove a military threat in one of the conflict‘s most hotly contested region.[79] She further contended that, ―the chamber reached its questionable

[69] *Prosecutor v. Krstic,* Case No. IT-98-33-T, Appeal Judgment, paras. 266-275.

[70] *Id.*

[71] *Id.*, para. 38.

[72] Art. 4(2).

[73] Arts. II and III Genocide Convention, Art. 4(2) Statute of ICTY; Art. 2(2) Statute of ICTR and Art. 6 Rome Statute of ICC.

[74] Art. 4(2)(a) Statute of ICTY; Art. 4(2)(e).

[75] Art. 4(2)(e) *Id.*

[76] Krstic, *op. cit.,* n. 2, para. 595.

[77] *Id.* Para. 593.

[78] Southwick, *op. cit.,* n. 64, p. 196.

[79] *Id.*

conclusion because it applied an overly broad standard of intent‖[80] and that adequate consideration was not given to the possible motives underlying the execution. She stated further that, the chamber was too expansive in its interpretation of terms in the definition of genocide, thereby excessively broadening the circumstances under which genocidal intent may be inferred.[81]

In disagreement with the contentions of Southwick, this writer wish to humbly state that, the nature of the massacre that characterized the Srebrenica situation is depictful of nothing but an act of genocide. The contention that, the Serb forces only employ effort to remove a military threat in one of the conflict‘s hotly contested region could be anything but reasonable and intelligible argument in the light of the nature of atrocities perpetrated. It must equally be noted that, a conflict situation in a hotly contested conflict region is not a defence to genocide, because genocidal acts whether committed in time of peace or in time of war is a crime under international law.[82] Respectfully, it must be stated that, the heavy whether created by Southwick on the assertion that, the ICTY applied a broad standard of intent without giving adequate consideration to the possible motive underlying the killings, is tantamount to an argument in pursuit of a wild goose in a thick forest of a far-fetched technicality. Even though the standard of intent and the motive for the crime of genocide was not expressly stated in the Statute of ICTY or the Genocide Convention of 1948, basic principles of criminal law demands that intention and/or motive of an accused person, which caused the prohibited act is derivable more from conduct of the accused or circumstances surrounding the prohibited act which gives room for inference on the state of mind of the perpetrator at the time of the commission of the crime.[83] Consequently, this writer is in total agreement with the conclusion of ICTY in *Krstic* case on the finding of genocide in Srebrenica.

In querying the finding of genocide by the ICTY in *Krstic* case, Schabas is of the opinion that, where physical destruction is the intention of the Serb forces, the transportation of the women, children and the elderly to the more secured area would not have taken place. He states:

Would some one truly bent upon the physical destruction of a group, and cold- blooded enough to murder more than 7,000 defenceless men and boys, go to the

[80] *Id.*

[81] *Id.*

[82] Art. I, Genocide Convention.

[83] Atidoga, D.F., ―Analysis of Darfur Crisis in the Context of the Crime of Genocide‖, *Journal of Private & Comparative Law* (JPCL) 2010-2011 Vols. 4 & 5, p. 217. A Publication of Dept. of Private Law, Ahmadu Bello University, Zaria.

trouble of organizing transport so that women, children and the elderly could be evaluated.[84]

With respect, this opinion held by Schabas seems far away from the intendment of Article 4(2) of the Statute of ICTY and Article II of the Genocide Convention. The killing of men and boys of military age, means taking away the potent and procreating population of a group, which offends the provision of Article 4(2)(d) of the Statute of ICTY and Article II(d) of the Genocide Convention. The act of transferring the women and children of a targeted group whose active male population have been destroyed, can not fall, short of offending the Statute of ICTY[85] and Genocide Convention.[86] The argument as to the intention and/or motive for the act of killing and forcible transfer should only be visualized and ascertained by the conduct and the circumstance created by the Serb forces. We certainly do not expect the Serb forces to disclose their true intention in the face of charges of genocide. This is only deducible from circumstantial evidence and the nature of recklessness in the conduct of perpetrator(s). It must be stated further that, Schabas in his opinion seem unmindful of the fact that the act of killing alone, without what he portrayed as the evacuation of women, children and elderly to safety, may simpliciter amounts to genocide if the requisite intent is established. The issue of intent and/or motive seems to have been driven too far to an illusory domain, distantly away from realities. Can a man in state of sanity who used an iron club and delivered several fatal blows on the head of his victim be said not to have the motive or intention to kill? It is thereforeour humble opinion that, the issue of intent and motive in genocide cases should be appreciated and understood in the light of the most basic principles of criminal law, which in our opinion is just what the ICTY did in *Krstic* case.

Prosecutor v. Goran Jelisic[87]

In this case, the ICTY gave its first judgment in a genocide case in October, 1999. The accused person Goran Jelisic was a ―low level‖ thug, who was personally responsible for the extermination of several dozen of Muslim victims in concentration camps in the Brcko region of Northwest Bosnia and Herzegovina. Upon arrest and arraignment before the ICTY, Jelisic pleaded guilty to counts of war crimes and crimes against humanity but pleaded not guilty to genocide.[88] Nevertheless, the prosecutor proceeded with the trial on genocide. During the trial, the chamber announced that it would enter an acquittal on the charge of genocide. Consequently, a

[84] Schabas, *op. cit.,* n. 5, p. 46.

[85] Art. 4(2)(e).

[86] Art. II(e).

[87] Case No. IT-95-10-T, Judgment of 19th October, 1999.

[88] Jelisic, *id*.

summary judgment was issued on October 19, 1999,[89] which was followed two months later by a more substantial ratio on 14th December, 1999.[90]

The prosecutor appealed against the decision of the trial chamber of the acquittal on the charge of genocide contending that the prosecution was prevented from being heard by the trial chamber. In July 2001 ruling, the appeal chamber held that the trial chamber ought to have allowed the case to proceed since there was sufficient evidence on the charge of genocide for the defence to rebut. Even though the appeal chamber sustained the grievances of the prosecutor, Jelisic's acquittal for genocide was allowed to stand in the interest of justice.[91]

Prosecutor v. Sikirica[92]

This case deals with persecution in concentration camps, the Trial Chamber granted a defence to dismiss the charge of genocide, this time after the prosecution has been heard.[93] Within a few days of the dismissed of the genocide charge, the accused agreed to plead guilty to a charge of crime against humanity.[94]

Prosecutor v. Brdjanin[95]

In this case, the trial chamber of ICTY examined whether specific intent for genocide could be inferred, the court considered four factors: (a) the extend of the actual destruction; (b) the existence of genocidal plan or policy; (c) the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct; (d) the utterance of the accused. The trial chamber concluded that examination of these factors in the situation of the targeting of Bosnian Muslims and Bosnian Croats of the Autonomous Region of Krajina do not allow the trial chamber to legitimately draw the inference that the underlying offences were committed with the specific intent requirement for the crime of genocide.[96]

However, in *Prosecutor v. Stakic,*[97] the Trial Chamber of ICTY observed:

It is generally accepted, particularly in the jurisprudence of both this Tribunal and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred either from the facts, the concrete circumstances, or a pattern of purposeful action.[98]

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[89] Jelisic, *id*.

[90] Jelisic, *id*.

[91] Jelisic, *id*., para. 77.

[92] Sikirica, *op. cit.,* n. 60.

[93] *Id*.

[94] Schabas, *op. cit.,* n. 62, p. 29.

[95] ICTY (Trial Chamber) Judgment of 1st September, 2004.

[96] Sikirica, *id*., paras. 971-989.

[97] ICTY (Trial Chamber), Judgment of 29th July, 2003.

[98] *Id*., para. 526.

This position in Stakic buttresses our earlier opinion that intent and/or motive in genocide cases should be logically inferred from circumstances of the situation in question and general pattern of behaviour of perpetrator. It is a further call to eschew the baseless academic exercise and legal gymnastics often canvassed in the interpretation of the intent requirement of genocide *dolus specialis* and embrace primary interpretation based on the basic principle of criminal law.

1.2.3Statute of International Criminal Tribunal for Rwanda (SICTR)

I. General Overview

Ethnic violence was unleashed on Rwanda at the aftermath of the sudden death of Rwandan's President Habyarimana; as many as one million Rwandans were killed within 100 day. The ethnic division along which the violence took place between victim and perpetrators was indicative of the fact that the crimes of genocide were taking place. Having failed to prevent the destruction of lives, the UN Security Council took action to prosecute those believed to be responsible for the killings. In July 1994, the UN Security Council adopted Resolution 935, establishing the commission of experts to investigate human rights violations in Rwanda. Following the Yugoslavian model, the UN Security Council decided to establish the International Criminal Tribunal for Rwanda (ICTR),[99] by the instrumentality of its enabling statute, i.e. Statute of International Criminal Tribunal for Rwanda (SICTR).

The Statute of ICTR set out the category of crimes over which the tribunal has jurisdiction. These crimes include:

- Genocide;[100]
- Crimes against humanity;[101] and
- Serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977.[102]

The Statute of ICTR confers powers on the institution of ICTR to prosecute those responsible for the grave violation of international humanitarian and human rights law committed in Rwanda and the territory of neighbouring states committed between the period of 1st January and 31st December, 1994. Though the ICTR, aside from the crime of genocide, has jurisdiction to adjudicate on crimes against humanity and serious violation of Article 3 common to the Geneva Convention. These research is however concern only with the jurisdiction of ICTR on the crime of genocide.

[99] UN Security Council Resolution 995, Annex, Nov. 8, 1994.

[100] Art. 2, Statute of ICTR.

[101] Art. 3, *Id.*

[102] Art. 4, *Id.*

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

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such:

(a) killing member of the group;
(b) causing serious bodily or mental harm to member of the group;
(c) deliberately inflicting on the group a condition of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent birth within the group;
(e) forcibly transferring children of the group to another group.[103]

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

Major Cases on Genocide Decided under the Statute of ICTR

On 9th January 1997, the ICTR held its first trial in the case of *Prosecutor v. Jean- Paul Akayesu*[104] a case that was regarded as one of the most momentous cases in international law.[105] During the 1994 Rwandan Genocide, Jean-Paul Akayesu was the Mayor of Taba, a city in which thousands of Tutsis were systematically raped, torture and murdered. At the commencement of the trial, Akayesu was arraigned on 12 count charges of genocide, crimes against humanity and violations of common Article 3 of the 1949 Geneva Conventions in the form of murder, torture and cruel treatment. In June 1997, the prosecutor brought three additional counts of crimes against humanity and violations of common Article 3/Additional Protocol II for rape, inhumane acts and indecent assault.[106] These additional counts marked the first time in the history of international law that rape was considered as a component of genocide.[107]

On 2nd 1998, the ICTR found Akayesu guilty of nine counts of genocide, direct and public incitement to commit genocide and crimes against humanity for extermination,

[103] Art. 2, *Id.*

[104] *Akayesu, op. cit.,* n. 20.

[105] Scharf, M.P., –Statute of International Criminal Tribunal for Rwanda‖ *United Nations Advisory Library of International Law* (2008) p. 2 (obtained from www.un.org/law/avl (accessed on 26 October, 2012).

[106] Report of ICTR (S/1997/868).

[107] *Id.*

torture, rape and other inhumane acts. This case marked the first in which an international tribunal was called upon to interpret the definition of genocide as defined in Article II of the Genocide Convention of 1948.[108] In interpreting the definition of genocide, the ICTR held that, the crime of rape was ―a physical invasion of sexual nature, committed on a person under circumstances which are coercive‖.[109] The tribunal further emphasized that sexual assault could amount to ―genocide in the same way as any other act as long as it was committed with specific intent to destroy, in whole or in part, a particular group, targeted as such‖.[110] Akayesu is now serving life imprisonment in Mali.[111]

In *Prosecutor v. Jean Kambanda,*[112] the ICTR also evolved two major precedents. The accused person was the Prime Minister of the Interim Government of Rwanda throughout the period of genocide. Kambanda was arraigned before ICTR in October 1997 on six counts of genocide conspiracy to commit genocide, complicity in genocide and crimes against humanity, which he pleaded guilty. Kambanda‘s plea of guilt and subsequent conviction was the first time in international law that a Head of Government acknowledge his guilt for genocide and was accordingly convicted. Like Jean Paul Akayesu, Jean Kambanda is serving a life imprisonment term in Mali.[113]

Prosecutor v. Nahimana & 2 Or,[114] in this case, the ICTR prosecuted Ferdinand Nahimana and Jean-Bosco Barayagwiza, leaders of Radio Television Libre Milles Collines (RTLM), and Hassan Ngeze founder and director of Kangura Newspaper. The ICTR consolidated the indictment of these three men into a single trial, commonly referred to as ―The Media Case‖. The trial was the first time since Nuremberg, that the role of the media was considered as a component of international criminal law.[115] In 2003, the accused persons (Nahimana, Barayagwiza and Ngeze) were convicted on counts of genocide, and crimes against humanity. Nehimana and Ngeze were sentenced to life imprisonment and Barayagwiza was sentenced to 35 years on appeal, Nahimana‘s and Ngeze‘s sentences were respectively dropped to 30 and 35 years respectively.[116]

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[108] See: ICTR Fact Sheet No. 1, *The Tribunal at a Glance.*

[109] *Akayesu, op. cit.,* n. 20, para. 598.

[110] *Id.*, para. 731, see also: Obote-Odora, Ant –Rape and Sexual Violence in International Law: ICTR Contribution‖ *New Eng. J. Int''l & Comp. L.* (2005) Vol. 12(1) p. 137.

[111] Scharf, *op. cit.,* n. 104, p. 3.

[112] Case No. (ICTR-97-23-S), Judgment of 4th September, 1998.

[113] Scharf, *op. cit.,* n. 104, p. 3.

[114] Case No. (ICTR-99-52-T).

[115] Scharf, *op. cit.,* n. 104, p. 3.

[116] *Id.*

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

1.2.3 Statute of International Court of Justice (SICJ)

II. Powers of ICJ on Genocide

Although the Statute of ICJ is binding only on cases before the ICJ, it musthowever, be stated that, Article 38(1) of the Statute of ICJ ―is generally regarded as a complete statement of the sources of international law‖.[117] The Article provides:

1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59 (which provides that ICJ decisions bind only the parties to the case before the court), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means of determination of the rule of law.[118]

The above provision of Article 38(1) (a)-(d) of the Statute of ICJ provides the basis and scope of the adjudicatory powers of the ICJ in relation to the crime of genocide. Sub-paragraph (a) of Article 38(1)[119] particularly gave very clear mandate to ICJ to adjudicate on and interpret the Genocide Convention, Rome Statute of ICC, Statutes of ICTR and ICTY on genocide and even other areas which the treaties dwelled on. Furthermore, if genocide as a crime is regarded as *orga omnes* and which prohibition is seen as a customary rule of international law or *jus cogen* from which no derogation is allowed; then, sub-paragraph (b) of Article 38(1)[120] might have enough momentum to activate the adjudicatory powers of the ICJ in favour of adjudicating on genocide. The foregoing argument may also suffice for the provision of sub- paragraph (c) of Article 38(1),[121] if the prohibition and punishment for genocide is recognized as a general principle of law by civilized nations.

III. Genocide Cases Decided under SICJ

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[117] Brownlie, I., *Principles of Public International Law*3 (5th edn. 1998) cited in Nersessian, D.L., *op. cit.,* n.2, p. 237.

[118] Statute of ICJ, Art. 38(1) 59 Stat. 1055 (1945).

[119] Statute of ICJ.

[120] *Id.*

[121] *Id.*

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

Bosnia v. Yugoslavia Case[122]

This was the first case heard by ICJ on the crime of genocide, brought before the court by Bosnia and Herzegovina against Yugoslavia in 1993. In its application, Bosnia claimed that the effort of the Serbs to establish a ―Greater Serbian State‖ resulted in the systematic bombing of Bosnian cities and the intentional targeting of its Muslim citizens. The application of Bosnia before the ICJ also contends that the Serbs policy of driving out innocent civilians of a different ethnic or religious group from their homes, so-called ―ethnic cleansing‖ was indulged in by Serbian forces in Bosnia on a scale that dwarfs any thing seen in Europe since Nazi times. Theapplication declared that the evidence discloses a *prima facie* case of genocide committed against Bosnia and requested that all appropriate actions be taken by the court in line with the stipulations and standards of the Genocide Convention.[123]

The ICJ in its ruling in 1994, did not issue a finding of genocide or otherwise in Bosnia. However, the court did asked the Federal Republic of Yugoslavia to ensure that any military, paramilitary or irregular armed unit which may be directed or supported…do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia or against other national, ethnical, racial or religious group.[124]

Yugoslavia v. NATO Cases[125]

The cases were instituted before the ICJ by the Federal Republic of Yugoslavia on 29th April, 1999. They are ten separate cases against Canada, Germany, France, United Kingdom, Belgium, United States, Italy, Portugal, Netherlands and Spain. TheRepublic of Yugoslavia accused each of these countries of bombing Yugoslavia territory in violation of their international obligation, including the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.[126] In two of the ten cases *Yugoslavia v. Spain* and *Yugoslavia v. United States of America*, the ICJ concluded that it manifestly lacked jurisdiction and it accordingly ordered that those two cases be removed from the docket. The reference to the ―physical destruction of a national group‖ caused by NATO

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

[123] *Id*., see generally, Morton and Singh, *op. cit.,* n. 1, p. 65.

[124] Morton and Singh, *Id*.

[125] Judgment of ICJ.

[126] Art. II(e), Genocide Convention.

bombings constituted a charge by Yugoslavia of the commission of the crime of genocide.[127]

By a majority vote of eleven (11) to four (4), the ICJ ruled that, the threat itself amount to an act of genocide within the meaning of Article II of the Genocide Convention. The court further ruled that, it does not appear at the present stage of the proceedings that the bombings which form the subject of Yugoslavia‘s application indeed entail the element of intent, towards a group as required. Article II of the Genocide Convention.[128] This research considers the above ruling as very appropriate in the circumstance.

Croatia v. Yugoslavia Case[129]

On 2nd July, 1999 the Republic of Croatia instituted an action before the ICJ against the Federal Republic of Yugoslavia for alleged violation of Genocide Convention between 1991 and 1995. In its application, Croatia contended that, acts of genocide were committed in Croatian soil by Yugoslavian armed forces, intelligent agents and various paramilitary detachments. Croatia‘s application states further that, in ―addition, by directing, encouraging, and urging Croatian citizens of Serb ethnicity, Yugoslavia engaged in a conduct amounting to a second round of ethniccleansing‖.[130]

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

Bosnia – Herzegovina v. Serbia Montenegro[131]

In February 2007, the ICJ published its final ruling on the application of the Genocide Convention case, fourteen years after the commencement of the case. Notwithstanding the political happenings and changes that occurred during this period, the judgment was welcomed by many with much anticipation. In the judgment, the ICJ concluded that, the ―undertaking to prevent‖ in Article I of the Genocide Convention is ―normative and compelling‖,[132] unqualified[133] and bears

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[127] Morton and Singh, *op. cit.,* n. 1, p. 65.

[128] *Id.* pp. 65-67.

[129] ICJ, Application of the Convention of the Convention on the Prevention and Punishment of the Crime of Genocide(*Croatia v. Yugoslavia*), 2nd June, 1999.

[130] *Id.*

[131] ICJ, Case concerning the application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), February, 2007.

[132] *Id.*, para. 427.

[133] *Id.*, para. 162.

direct obligation on states parties,[134] and that a referred to the Security Council does not absolve state parties of general obligation of prevention, the court observed.[135] The court further noted that, the obligation to prevent is not to mandatorily succeed, but to exercise ―due diligence‖ by engaging all reasonable means available to them toprevent genocide.[136]

1.2.4 Statute of International Criminal Court (SICC)

II. Overview

The Rome Statute of ICC reflects states agreement over how to institutionalize a broad range of international criminal justice norms, while still protecting national sovereignty.[137] The Rome Statute of ICC established the International Criminal Court (ICC) as the first independent permanent International Criminal Court with global jurisdiction as opposed to territorial jurisdiction.

The International Law Commission (ILC) was mandated by the UN-General Assembly to prepare a draft Statute of ICC, by which act, the legal machinery for the establishment of the court was let loose. By the year 1994, a draft Statute of the ICC was presented to the UN General Assembly by the ILC, with a recommendation that a conference of plenipotentiaries be convened to negotiate the treaty. Based on the foregoing, the General Assembly created *ad hoc* committees which midwife a conference that lasted five weeks in Rome. After intense deliberation with the representatives of 160 states, the Rome Statute of ICC was given birth to.[138] The Rome Statute of ICC was then adopted on the 17th July, 1998 by a total vote of 120 to7, with 21 states abstaining.

The Statute of ICC is made up of 128 Articles accompanied by the ‗Elements of Crimes' provisions. It was on the strength of the legal instrument that the institution of ICC emerged on 1st July, 2002.[139]

II. *Relevant Provisions*

The Rome Statute of ICC confers jurisdiction on the ICC to try cases that boarders on; the crime of genocide,[140] crime against humanity;[141] war crime;[142] and the crime

[134] *Id.*, para. 165.

[135] *Id.*, para. 427.

[136] *Id.*, para. 430, see generally: Mayroz, E., ―The Legal Duty to ‗Prevent' after the onset of ‗Genocide'‖ *Journal of Genocide Research* (2012) Vol. 14(1), pp. 79-98.

[137] Schiff, B.N., *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008) p. 68.

[138] *Id.*, pp. 69-72; See also Zakariya, M., *op. cit.*, n. 16, p. 76.

[139] *Id.*

of aggression.[143] It is very important to state that, this research shall predominately dwell on the provisions of the Rome Statute of ICC that boarder on the crime of genocide, the workings of the statute and the common aspiration of state parties. The preamble of the Rome Statute of ICC like in other treaties, sets out the common aspiration of its partakers and a normative stage for the bindingness of subsequent provisions of the Statute. The preamble to the Rome Statute of ICC provides:

The state parties to the statute, conscious that all people are united by common bound, their cultures pieces together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shook the conscience of humanity;

Recognizing that such grave crimes threaten the peace, security and well-being of the world;

Affirming that the most serious crimes of concern to international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international co-operation,

Determined to put an end to impunity for the perpetrators of those crimes and thus to contribute to the prevention of such crimes;

Recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes;

Reaffirming the purposes and principles of the Charter of the United Nations, and in particular that all states shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations;

Emphasizing in this connection that nothing in this statute shall be taken as authorizing any state part to intervene in an armed conflict or in the internal affairs of any state;

Determined to these ends and for the sake of the present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over must serious crimes of concern to the international community as a whole;

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[140] Art. 5(1)(a), Statute of ICC.

[141] Art. 5(1)(b), *Id*.

[142] Art. 5(1)(e), *id.*

[143] Art. 5(1)(e), *id,* However, on the crime of aggression by Art. 5(2), the jurisdiction of the ICC will only be activated, at a later date on the fulfillment of certain acts.

Emphasizing that the International Criminal Court established under this Statute shall be complimentary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows[144]

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

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

The court shall apply:

(a) In the first place [its] statute, elements of crime (meaning the elements of the offences of genocide, crimes against humanity and war crimes that are agreed upon and adopted by the parties to the convention),
(b) In the second place, where appropriate, applicable treaties and principles and rules of international law of armed conflicts,
(c) Failing that, general principle of law derived by the court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the ICC's] statute and with international law and international recognize norms and standards.[145]

The Rome Statute of ICC further provides that, ―the court may apply principles and rules of law as interpreted in its previous decision‖.[146] This development is a positive progression and a welcome development on the role of *stare decisis* in international law. This emerging position presupposes that, a previous decision of the ICC can bind other parties before the court in subsequent trials, where issues to be resolved are identical or in fours. This position is at radical variance with the position of the Statute of ICJ, which is to the effect that legal rulings in ICJ decisions only binds the parties to the case before the court for which ruling proceeded.[147] The implication of

[144] Preamble to the Rome Statute of ICC.

[145] Art. 21(1) Rome Statute of ICC.

[146] Art. 21(2), *id.*

[147] Art. 59, Statute of ICJ.

this is that, the principle of *stare decisis* is unknown to the jurisprudence of ICJ. It must however, be observed that the bindingness of *stare decisis* evolved in the jurisprudence of ICC may only be limited to cases before the ICC.

By the provision of Article 21(1) of the Rome Statute of ICC, it is very clear that the Statute emphasizes primarily the application of its own provision, as a basis for assuming its adjudicatory powers.[148] It is equally to embrace applicable treaties and established principles and norms of international law[149] in relation to the violation of its provision concerning crimes which the ICC has jurisdiction. By subjecting the principles derived from national laws of state parties to inconsistency test,[150] the Rome Statute of ICC has visibly demonstrated its preference for existing international standards to take precedent over norms derived from domestic criminal justice system.

On the crime of genocide which is the central nerve of this research; the Rome Statute of ICC in Article 5, listed it as one of the most serious crimes of concern to international community, of which the court has jurisdiction to entertain.[151] The definitive provision, which encapsulates the elements of the crime of genocide and series of acts that may constitute genocide, is provided for in Article 6.[152] In identical wordings as the provisions of Articles II,[153] 2[154] and 4,[155] it provides:

For the purpose of this statute ―genocide‖ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent birth within the group;
(e) forcibly transfer of children of the group to another group.[156]

148 Art. 21(1)(a), Rome Statute of ICC.

149 Art. 21(1)(b), *id.*

150 Art. 21(1)©, *id.*

151 Art. 5, Rome Statute of ICC.

152 Rome Statute of ICC.

153 Genocide Convention of 1948.

154 Statute of International Criminal Tribunal for Rwanda (SICTR).

155 Statute of International Criminal Tribunal for Yugoslavia (SICTY).

156 Art. 6, Rome Statute of ICC.

This provision is a reproduction of statutes[157] earlier discussed in the previous chapter and even this chapter of the research. It must therefore be made clear that, its reproduction here in relation to the Rome Statute of ICC is for the purpose ofemphasis. It follows therefore, that, all the earlier discussions on the elements of genocide discussed under other relevant laws applies here *mutatis mutandis.*

III Utility of Rome Statute of ICC

Laplante asked, ―how do we evaluate the effectiveness of ICC?‖,[158] such an inquiry itis observed, may focus on the number of arrest warrants, indictments and prosecution credited to the court since it commences operation in 2002.[159] It was contended that such a criteria of assessment in so short a time is rather far fetched; and that the true test of assessing the success of ICC is whether the court has helped to combat impunity and deter future human rights atrocities across the globe.[160]

A culmination of work of over a century preceded the entry into force of the Rome Statute of ICC which gave the breath of life to ICC itself.[161] High aspiration is said to motivate the effort, with the emergence of the Rome Statute and the court representing ―the hope of governments from all around the world, that the force of international law can restrain the evil impulses that have stained history with the blood of millions of innocent victims‖.[162]

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

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[157] Art. 2, Statute of ICTR; Art. 4, Statute of ICTY; and Art. II, Genocide Convention.

[158] Laplante, L.J., ―The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court Sphere of Influence‖ *J. Marshall L. Rev.* (2010) Vol. 43, p. 635.

[159] *Id.*

[160] *Id.*

[161] Burke-White, W.W., ―Proactive Comprimentarity: The International Criminal Court and National Courts in the Rome System of International Justice‖ *HARV. INT"L L.J* (2008) 49, pp. 53-54.

[162] Newton, M.A. (Lieutenant Colonel), ―Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of International Court‖ *MIL. L. Rev.* (2001) 167, 20, 23.

statutes into their own domestic laws, pursuant to the much talked about principle of complementarities entrenched in the Rome Statute.[163]

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

So far, the ICC has opened cases against twenty six individuals in connection with five African countries. Twenty five of these cases remained opened, while the twenty sixth against Darfur rebel leader Bashar Idriss Abu Garda was dismissed by the judges. The cases evolved from investigations into crises in Libya, Kenya's post- election violence of 2007-2008, rebellion and counter-insurgency in the Darfur region of Sudan, the Lord's Resistance Army conflict in Central Africa, civil conflict in Eastern Democratic Republic of Congo (DRC), and the 2002-2003 conflict in the Central African Republic. The Prosecutor is also examining a 2010-2011 violence in Cote d'Ivoire, a 2009 military crackdown on opposition supporters in Guinea, and an inter-communal violence in Jos – North Central Nigeria, but has not opened formal investigation with regards to the Guinea and Nigeria situations.[164]

Democratic Republic of Congo, Kenya, Nigeria, Guinea and Central African Republic are state parties to the ICC. Sudan, Libya and Cote d'Ivoire are not state parties. Assuming jurisdiction in Sudan and Libya stems from referrals by the UN Security Council to ICC, while jurisdiction in Cote d'Ivoire was granted by virtue of a declaration submitted by the Ivorian Government on October 1st, 2003, whichaccepted the jurisdiction of the court as of 19th September 2002.[165]

The German complementarily law allows crime against humanity as defined in Rome Statute of ICC to be prosecuted by German domestic courts even if they are outside the jurisdiction of the court. Consequently, in December, 2005 Uzbekistan activist filed a complaint against Uzbek Interior Minister Zokirjon Almatov in connection with the Andijan massacre. Almatov was visiting Germany at the time for hospital treatment. However, the Prosecutor did not act in prosecuting Almatov saying that, chances of successful prosecution were ―non-existent‖ as the government of Uzbekistan would not co-operate in the gathering of evidence.[166] In May 2011 the trial of *Ignace Murwanashyaka* and *Straton Musoni,* both Rwandan citizens began in Stuttgart, Germany. They were arraigned for twenty six counts charge of crimes

[163] See: Arts. 17-19 and the Preamble, Rome Statute of ICC.

[164] ―International Criminal Court Cases in Africa: Status and Policy Issues‖ (July 22, 2011) *Congregational Research Service,* p. 6. www.crs.gov (Accessed on 1st December, 2012).

[165] ICC Office of the Prosecutor Weekly Briefing, 15-21 February, 2011.

[166] Germany: Prosecutor Denies Uzbek Victims Justice, *Human Right Watch,* 6/4/2006.

against humanity and thirty nine count charges of war crimes, allegedly committed in the Democratic Republic of Congo.[167]

In United Kingdom, in the year 2007, Corporal Donald Payne became the first British person to be convicted of a war crime. He pleaded guilty under ICC implementing legislation for inhumane treatment of Baha Monsa an Iraqi detainee following the 2003 invasion of Iraq. He was sentenced to one year in jail and dismissed from the army. Three other soldiers were acquitted of war crimes in the same trial.[168]

So far, the activities of ICC is predominantly in Africa.

Democratic Republic of Congo (DRC)

In the year 2003, ICC initiated investigation into war crimes and crimes against humanity allegedly committed in the Ituri region of DRC. War Lords and fighters surrounding the region, moved into the area terrorizing civilians. In 2004, with the atrocities ongoing and spreading, the DRC President recommended that ICC investigation should consider crimes committed all over the nation. The ICC issued four arrest warrants in its first DRC investigation. Three suspects are in custody while the fourth is at large. A second investigation dwelled on sexual crimes and other abuses committed in the Eastern provinces of North and South Kivu. One case has been made public in connection with Kivus investigation, and the suspect arrested in France and transferred to ICC custody.[169]

Central African Republic (CAR)

The government referred crimes within the jurisdiction of ICC, committed anywhere on the territory of CAR to the ICC prosecutor in January 2005.[170] In May 2008, the ICC issued a warrant of arrest for Jean-Pierre Bemba Gombo. A former DRC rebel leader turned politician and businessman. The warrant of arrest alleged that as a Commander of the Movement for the Liberation of Congo (MLC), one of the two main DRC rebel groups during its civil war between 1998-2003, Bemba had supervised systematic attacks on civilians in CAR.[171]

Bemba was subsequently arrested in May 2008 at Belgium and was handed over to ICC in July 2008. He was charged for war crimes and crimes against humanity for

[167] ―Rwanda: Ignace Marwana and Straton Masoni Tried‖ *BBC News*, 4May, 2011, http://www.bbc.co.uk/news/world-africa-13275795 (Last visited 5th May, 2011).

[168] ―UK Soldier Jailed over Iraqis Abuse‖ Channel 4, 30th April, 2007 cited in *International Criminal Court*. www.http://en.wikipedia.org/wiki/international-criminal-court-investigation-in-the-Democratic-Republic-of-the- Congo (Accessed on 21st December, 2012).

[169] *Op. cit.,* n. 163, p. 22.

[170] ―Prosecutor Receives Referral Concerning Central African Republic‖ *ICC Office of the Prosecutor Press Release*, 7th January, 2005.

[171] *Op. cit.,* n. 163,p. 25.

alleged rape, murder and pillaging.[172] Bembas trial commenced on 22nd November, 2010.

Uganda

The government of Uganda a party to the Rome Statute of ICC referred the situation concerning the Lord‘s Resistance Army (LRA) to ICC in 2003.[173] In October 2005, the ICC issued arrest warrant for LRA leaders. The LRA was accused of a systematic pattern of brutalization of civilians, including murder, forced abduction, sexual enslavement, and mutilation, which constitutes crimes against humanity and war crimes.

Despite the fact that the atrocities of the LRA have been widely documented, ICC activities on Uganda have been accepted by some domestic and international opposition due to the heated debate on what may constitute justice for the war-turn communities of Northern Uganda and whether the ICC has helped or hindered the pursuit of peace agreement.[174]

Sudan

ICC assumed jurisdiction in Sudan by the instrumentality of UN Security Council since Sudan is not party to the Rome Statute of ICC. UN Security Council Resolution1593 of 2005, referred the situation in Darfur to the ICC prosecutor.[175] Even though Sudan is not a party to ICC, it is however argued that the resolution of the UN is binding on all UN Members States, including Sudan.

In May 2007 Sudan former Interior Minister Ahmed Muhammed Haruna and Ali Muhammed Ali (Ali Kushayb) an alleged former Janjaweed leader in Darfur, were publicly issued warrants of arrest.[176] They were both accused of war crimes and crimes against humanity perpetrated in Darfur in 2003 and 2004. Arrest was difficult because the Sudan government failed to comply with corporation obligation in relation to enforcement of warrants of arrests.

In June 2010, two rebel leaders fought by ICC prosecutor, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus voluntarily made themselves available for prosecution by the ICC, the both face charges of war crimes.[177]

[172] ICC Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the *Prosecutor v. Jean-Pierre Bamba Gombo*, of June 15th 2009.

[173] ―President of Uganda refers to the situation concerning the Lord Resistance Army (LRA) to the ICC‖ *ICC Office of the Prosecutor Press Release*, January 29, 2004.

[174] Allen, T., *Trial Justice: The International Criminal Court and the Lord"s Resistance Army*, (London: Zeet Books, 2006).

[175] UN. SC/8351.

[176] ―Warrants of Arrest for Minister of State for Humanitarian Affairs of Sudan and a Leader of Militia Iyanja-Weed‖. *ICC Press Release* 2nd May, 2007.

[177] *Op. cit.,* n. 163, p. 13.

On March 4, 2009, ICC issued an arrest warrant for Sudan President Omar Hassan al-Bashir for war crimes, crimes against humanity and genocide, referring to alleged attacks by Sudanese security forces and pro-government militia in Darfur region of Sudan.[178] However, most observers and analysts behave that Sudan will not handover their incumbent President to ICC.[179] True to type, up till now, Omar al-Bashir has not honoured the arrest warrant and he is still the President of Sudan.

Kenya

Upon approval by ICC judges, the office of the prosecutor opened an investigation in Kenya post election crisis of 2007-2008. This was the first time the ICC prosecutor opened up a case without referral from the state or from the UN Security Council.

On 15th December, 2010 the prosecutor of the ICC presented two cases against six persons for alleged crimes against humanity. The prosecutor applied for summons from the judges, which they issued and the six persons voluntarily appeared before the court, where the denied responsibility for the alleged crimes.[180]

Libya

On June 27, 2011 ICC judges issued an arrest warrant for Libyan Leader Moammar Qadhafi, his son Sayf Islam Qadhafi and intelligent chief Abdullah al-Sennusi for crimes against humanity, which includes murder and persecution orchestrated by a plan to suppress any challenge to Qadhafi's absolute authority.[181]

It must be stated that, the prosecution in ICC tends to be very economical with the use of the word ―genocide‖ in framing charges against suspect. This arguably may be borne because of the slippery and somewhat confusing nature of the concept act that should be visualized with cases of genocide are often subsumed into charges of crimes against humanity and/or war crimes. Perhaps, the prosecuting authority of the ICC is only desirous of playing safe in pursuit of conviction. Hence, not wanting to take risk of venturing into contentious domain of genocide.

1.2.5 Constitution of the Federal Republic of Nigeria, 1999 (as Amended)

The Constitution of the Federal Republic of Nigeria 1999 as amended is the grundnorm of the existing legal order in the geographical entity constituting the Nigerian state. The supremacy of the constitution was clearly echoed in the constitution itself, when it states:

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178 *Id.,* p. 14.

179 Worshop, P., ―No Quick Way to Enforce ICC Warrant for Beshir‖ *Reuters,* March 5, 2009.

180 *Op. cit.,* n. 163, p. 9.

181 *Id.,* p. 8.

This constitution is supreme and its provisions shall have binding force on all authorities and persons, throughout the Federal Republic of Nigeria.[182]

The foregoing provision is a clear pronouncement on the dominance and exalted position of the Nigerian Constitution and its potency in regulating and checking the activities of individuals and authorities in the Federal Republic of Nigeria. It follows therefore, that, all persons or authorities in Nigeria are subject to the supreme powers of the constitution.

The Constitution[183] further extends the frontiers of her powers beyond persons and authorities to the domain of other subsidiary laws or legislation made in pursuit of the objective of good governance. She states:

If any other law is inconsistent with the provision of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency bevoid.[184]

The effect of this provision is that no law that contravenes any provision of the constitution can survive. It is a definite inconsistency test with the Constitution as the standard.

In relation to the crime of genocide, it must be stated that, the Constitution of the Federal Republic of Nigeria, 1999 as amended did not make any express stipulation in contemplation of the crime of genocide, neither did any of the subsidiary legislation regulating crime and criminality in Nigeria,[185] make any express reference to the crime of genocide its prohibition and sanction. However, some acts could technically constitute genocide, though not so stated, if the perpetration of such acts were done with the requisite intent. For instance, the constitution guarantees right to life, thereby, prohibiting unlawful deprivation of life. It provides:

Every person has the right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.[186]

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[182] Supremacy of the section 1(1) CFRN, 1999 as amended.

[183] CFRN, 1999 as amended.

[184] Section 1(3) CFRN, 1999 as amended.

[185] The Legislations regulating crimes and criminality in Nigeria are: *The Criminal Code,* which finds application in Southern Nigeria; the *Penal Code,* which is applicable in Northern Nigeria; and the *Sharia Penal Code,* which is an Islamic criminal justice Code, which operates side by side with the *Penal Code* in some Northern States of Nigeria.

[186] Section 33(1) CFRN, 1999 as amended. Subsection (2) of same section provides further exceptional situation where one can suffer lawful deprivation of life, i.e. (a) self defence (b) effecting lawful arrest or escape of a felon (c) suppression of riot insurrection or muting.

Aside from this constitutional provision prohibiting the deprivation of life, the Nigeria criminal law also, in recognition of the sanctity of life vehemently prohibits the killing of a person.[187] It may therefore follow that, killing of members of a targeted group because of their group identity may only ignite prosecution for unlawful killing, but technically within the purview of the crime of genocide.

It may equally follow that, the violation of some other rights guaranteed by the constitution, which violation may constitute derogation of the dignity of human person,[188] if done to a targeted group, with the requisite intent, will only be a violation of constitutionally guaranteed right and not genocide even though such acts may seem clearly genocidal.

The fate of the Nigerian Constitution on the crime of genocide is like the fate of some global and regional human rights instruments which clearly guarantees numerous human rights and prohibit their violate, such violation with impunity may technically be characterized as ―genocide‖ while such descriptive nomenclature is totally alien and not protected by the instruments. For instance, Universal Declaration of Human Rights,[189] International Covenant on Civil and Political Rights,[190] Covenant of the Right of the Child,[191] African Charter on Human and Peoples Rights,[192] all prohibits the unlawful deprivation of life and frowns against inhuman and degrading treatment, but such violations cannot suffice as genocide under these instruments, however genocidal such violations may seem.

The summation of all these is that, Nigeria does not have a specific domestic legislation prohibiting and punishing genocide in its strict meaning.

However, even though Nigeria is not a state party to the Genocide Convention, she is a signatory to the Rome Statute of ICC which criminalizes ―genocide‖, ―war crimes‖ and ―crimes against humanity‖. The Rome Statute of ICC is therefore, the only life line capable of transmitting responsibility and vesting obligation concerning genocide on Nigeria. Efforts to domesticate the provision of ICC Statute on genocide, war crimes and crimes against humanity by the Nigerian National Assembly have not yet received the force of law.

It must be noted however, that, Nigeria having ratified the Rome Statute of ICC on 27th September, 2001, has only the status of a signatory to the treaty. The non-

[187] See: Sections 306, 308 and 316 of the *Criminal Code*; Sections 220, 221 and 223 *Penal Code* and Section 200 of the *Sharia Penal Code*.

[188] S. 34, CFRN, 1999.

[189] Art. 3, UDHR.

[190] Art. 6, ICCPR.

[191] Art. 6, CRC.

[192] Art. 4 ACHPR.

domestication of the treaty makes it non-justifiable in Nigerian domestic court, because it is only by domestication that a treaty can be incorporated into Nigerian lawas an act of the National Assembly.[193] This position of law was echoed in *African Reinsurance Corporation Case*[194]. The implication of the foregoing is that, one may not be able to invoke the jurisdiction of municipal court of directly enforce the provision of Rome Statute of ICC in Nigeria.[195] This disposition in Nigeria flows from the provision of section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It provides:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.[196]

The section further provides that:

The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the exclusive list for the purpose of implementing a treaty.[197]

The process of domestication of Rome Statute of ICC in Nigeria demands that the provision of Rome Statute of ICC be enacted into law by the operation of Rome Statute of ICC (Ratification and Enforcement) Act of a particular number and a stipulated year. This is however subject to religiously following the stipulations of subsections (2) and (3) of section 12, Constitution of the Federal Republic of Nigeria, 1999 (as amended), which was the method used by the National Assembly in 1983 to adapt African Charter on Human and Peoples‘ Right as Cap. 10 Laws of the Federation of Nigeria, 1990.[198]

It is after the process of domestication is commenced and completed that the provision of Article 6 of the Rome Statute of ICC which dwells on ―genocide‖ can beentertained in Nigerian court.[199] For now, genocide in Nigeria still remains a matter of international concern.

However, it is important to strongly note that Nigeria has already taken a very visible step in the process of domestication of Rome Statute of International Criminal Court,

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[193] See generally; Ladan, M.T., *Material and Cases in Public International Law*, (Zaria: A.B.U. Press, 2008) pp. 240-241.

[194] (1989) 3 NWLR (Pt. 31), p. 811 at 834.

[195] Ladan, *op. cit.,* n. 192, p. 240.

[196] Section 12(1) CFRN, 1999 (as amended).

[197] Section 12(2), *id.*

[198] Ladan, *op. cit.,* n. 192, p. 241.

[199] *Id.*

which as already observed, elaborately provided for the crime of genocide. The Federal Government of Nigeria has constituted a special working group of highly proficient experts. The membership of this group includes: Chief Joe-Kyari Gadzama (SAN), (Chairman), Professor Muhammad Tawfiq Ladan, Professor Adedeji Olusegun Adekunle, Professor Ademola Popoola and Professor Ademola Abass, other members includes representatives of Nigeria Bar Association, National Human Rights Commission etc.[200]

The special working group was commissioned by the Honourable Attorney-General of the Federation and Minister of Justice, Mohammed Bello Adoke (SAN) on the 22nd March, 2011. The objective of the special working group is to among others assess and proffer the best strategy for promoting the domestication of Rome Statute of International Criminal Court in Nigeria. The group completed its mandate and furnished the Attorney-General with a preliminary report on 14th day off September, 2011.[201]

1.3 Concluding Remark

The laws of genocide which on coming into operation were celebrate with high enthusiasm rarely associated with any instrument of law, did not meet the expectation of the yearning and wailing world. This is because the monstrous and blood thirsty adventure of genocide continues unhindered. Humanity is still being treated as a helpless pond in a chase game of impunity. A lot of reasons may be postulated forthis gross failure.

These reasons ranges from nonexistent strong institution, global look warmness on the acceptability of the treaty and the weakness of the law itself, amongst others. The later is the trust of this paper. The paper therefore examined the entire international legal machineries on the crime of genocide, from the Convention for the Prevention and Punishment of the Crime of Genocide to statutes of ad hoc tribunals and international courts, identifying the inherent loopholes.

The paper therefore, recommends that the laws of genocide should have a broader protective shield, which provides for protection of all groups. The paper also recommends that the laws of genocide should be invested with a legal teeth and fiercelegal claws to pursue genocide prevention, rather than waiting for the tumultuous combat of curative measures.

[200] See preliminary report of the special working group on the implementation of the Rome Statute of International Criminal Court in Nigeria; submitted to the Honourable Attorney-General of the Federation and Minister of Justice, Muhammed Bello Adoke (SAN) on September 14th 2011.

[201] *Id.,* Detail of the preliminary report of the special working group, will be examined in the next chapter of this work, which shall dwell on the domestic implementation of the law of genocide in Nigeria.