INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES: ITS ENFORCEMENT IN THE NIGERIAN PROSECUTION OF THE WAR AGAINST TERRORISM*

Abstract

In classical international law, States were held responsible for acts carried out by its agents in prosecution of its agenda. This practice was soon discovered to be a motivator for unthinkable barbarity on the part of officers of the state. At the close of the First World War, the victorious parties therefore sought to change the narrative by introducing and enforcing the concept of individual criminal responsibility for the barbarous acts carried out during the war. The rationale for this being that States as abstract entities do not have minds to conceive neither do, they have limbs to execute physical acts of criminality. From that time up until today, international law has developed the concept of individual criminal responsibility such that an individual who engages in criminality especially during armed conflict can no longer plead as a defence that he was acting on orders of or on behalf of a state. In the last one decade, the Nigerian state has been enmeshed in a fratricidal war against the terror group, Boko Haram. The war has led to the death of hundreds of thousands of civilians and combatants alike and the displacement of millions of people leading to a refugee crisis. The Nigerian army despite its gallantry has on account of outdated materiel been trammelled by the insurgents leading the army to react in a vengeful manner and in breach of the laws of armed conflict. Audio-visual materials are in the public domain of officers of the Nigerian army carrying out gruesome summary executions. This work sets out to draw the trajectory of the concept of individual criminal responsibility and to highlight the imperative of its application in Nigeria’s war against terror.

Keywords: Individual criminal responsibility, Armed conflict, boko haram, International Criminal Court

1. Introduction

Traditionally States were regarded as the primary and only subjects of international law, hence the original title given to the subject was simply put ‘The Law of Nations’. This notion was fuelled by the rise of positivism in the 18th century and the writings of Jurists of the time1. It is however necessary to point out that at the time, individuals were treated as subjects of International Law only as an exception to the general rule as it relates to the criminalisation of slavery and piracy2. However with the passage of time, the individual has come to be recognized as a subject of international law who possesses both rights and responsibilities and this is evident in the plethora of international instruments that grant such rights and

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2J. Anderson, ‘A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy (2013) Journal of Maritime Law &Commerce Vol. 44 No 1pg 47 states that it is from Cicero’s argument that the phrase ‘pirataesthostisgenerihumani (pirates are the enemy of all mankind) was coined. Between the period 1400-1600 prominent jurists at the time like Hugo Grapius and Alberico Gentili further shaped the concept with Gentili arguing in his work that acts of piracy were contra iusgentium, et contra humanae societies communion [against the law of nations and against the community of human society].
responsibilities to the individual. We will however focus on the responsibility of individuals in respect to international crimes as it relates to armed conflict. The concept of individual criminal responsibility as it relates to armed conflict cannot be divorced from the concept *Jus in bello* since as a matter of fact, individual criminal responsibility would typically arise when there is a breach of *Jus in bello*. Modern Historians point to the fact that the first concrete attempt at frowning at the use of force by the international community came with the escape of Napoleon Bonaparte from the Island of Elba and his entering into France with an armed force, earning him condemnation as an outlaw by the Congress of Vienna in 1815. This therefore served as a precedent when in 1919, the Treaty of Versailles seeing the destruction brought on the world by the First World War noted that the German government recognized the rights of the Allied and Associated powers to bring individuals accused of crimes against the laws and customs of war before military tribunals and also established the individual responsibility of Kaiser Wilhelm II irrespective of his status as King of Prussia and German Emperor. Although this did not achieve much result because of political and economic underpinnings, another precedent had been established, further enforcing the developing norm that armed conflict did not offer *Carte blanche* to the parties involved. The attempt made by allied powers to bring the Kaiser to justice were motivated by the horrors of the war and the desire to popularity of allied governments and politicians who had pledged during the war to bring the German leaders to trial for the commission of war crimes.

The Second World War had unleashed on the world an unprecedented level of barbaric violence and destruction, and at its close in 1945 there seemed to be a consensus among the Allied Powers that the perpetrators of these crimes against the laws of war be brought to book. This was especially so in view of the fact that there existed glaring evidence against Nazi Germany that it had targeted different categories of individual civilians, including gypsies, homosexuals, mentally ill and most horrendously the Jewish nationals. It was the height of Anti-Semitism as shown in the concentration camps of Auschwitz and Sobibor. Thus on 8th August 1945, the United States, France, United Kingdom, and the Soviet Union concluded the London Agreement which provided for the establishment of an International Military

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4See Advisory Opinion of the Inter America Court of Human rights in Re-Introduction of Death piracy in the Peruvian Constitution Case 16 HRLJ, 1995 p 9, 14, where it was affirmed that individual responsibility may only be invoked for violations that are defined in international instruments as crimes under international law.

5Supra note 2. This is not to be taken to mean that there have been no such attempts in earlier times as first recorded trial for breach for *Jus in bello* dates back to 1474 when a tribunal tried and convicted Peter Van Hagenbach for atrocities committed as Governor of Breisach.

6Article 227, Treaty of Versailles

7M.CherifBassiouni ‘World War I –The war to end all wars- and the birth of a handicapped international criminal justice system (2001-02) 30 Denv JIL &Pol’y 224,250.

8Several accounts have been published about this sad episode that has come to be known as the Jewish Holocaust. For further readings see, Gilbert M, The Holocaust 1986, A.G Israel v. Eichman (1961) 36 ILRS (10) See also O’Brien J. International law, (London: Cavendish Publishing; 2001) pg 784 - 787.
Tribunal\textsuperscript{9}. Annexed to the Agreement was the Charter of the Nuremberg Tribunal. And although this move of the Allied Powers was criticized on the grounds that it was an attempt of the victors of a war to finish off the vanquished\textsuperscript{10}, such criticisms could not hold water in the face of the glaring atrocities of the Nazi government\textsuperscript{11}. The tribunal indicted twenty four defendants on charges ranging from conspiracy or common plan, crimes against peace, war crimes and crimes against humanity\textsuperscript{12}. The convictions were termed a watershed and fairly established in International Criminal Jurisprudence that; senior officials within a state will be answerable for breaches of international law High office will not confer immunity. There will be no general defence of superior orders\textsuperscript{13}. The Tokyo tribunal also sat as fallout of the war and convicted two former Prime Ministers of Japan and a host of senior government officials\textsuperscript{14}. Since after these incidents, it has come to be established that people who commit atrocities during armed conflicts will be brought to book.

2. Development of Individual Criminal Responsibility from Nuremberg – The Rome Statute
The most outstanding challenge of the Nuremberg and Tokyo Tribunals was the argument that the tribunals and their verdicts were glaring examples of ex post facto which is frowned upon by all civilisations. The arguments had subsisted at the time and continued for a long time even after the tribunals had become \textit{functus officio}. The argument of ex post factor laws being applied against the norm was however countered by Judge Robert Jackson where he stated in delivering judgment as follows; ‘that four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason’\textsuperscript{15}. In subsequent conflicts ad hoc tribunals have also been set up through the instrumentality of the United Nations to try breaches of the laws of war as a result of the conflicts notably in Yugoslavia, Rwanda, and Sierra Leone. These different ad-hoc tribunals have however not had to grapple with the moral question of ex post facto on account of the fact that those brought before these tribunals were brought to face charges already previously spelt out in the Geneva Conventions and their Additional Protocols\textsuperscript{16}. It is therefore the forum that was established subsequent to the conflicts and alleged crimes committed and not the laws under which the accused persons were tried. We would now gloss over a few of those tribunals as it relates to the subject matter.

\textsuperscript{9}https://ihl-databases.icrc.org/ihl/INTRO/350 accessed 5/8/2019
\textsuperscript{10}The criticisms focused predominantly on jurisdiction, retroactivity and selectivity – the last two are now widely accepted as legitimate complaints against Nuremberg.
\textsuperscript{13}Supra note 1 pp. 784 - 787.
\textsuperscript{15}International Military Tribunal (Nuremberg) Judgment and Sentencing Reprinted (1947) 41 AJIL 172
\textsuperscript{16}M. Cherif Bassoumi in ‘The History of the Draft Code of Crimes against Peace and Security of Mankind (1993) 27 Israel L Rev 247,262’ states as follows, ‘The principal reason for the codification of International law after Nuremberg and Tokyo was to eliminate the problems generated by the absence of clearly defined offenses, elements and sanctions’.
2.1 International Criminal Tribunal for Yugoslavia (ICTY)

Following the disintegration of the Socialist Federal Republic of Yugoslavia in 1991, a violent struggle for territory ensued in which grave breaches of humanitarian law as had not been seen since the close of the Second World War were perpetrated. Allegations of Genocide, ethnic cleansing and total disregard for the rules and customs of war were made by the several parties to the conflict in the Region. Public outcry had therefore moved the United Nations to establish a Committee of experts to investigate and collect evidence of grave breaches of the Laws of Armed Conflict\(^\text{17}\). By May 1994, the Committee submitted its report which confirmed that grave breaches of the Geneva Conventions of 1949 had occurred\(^\text{18}\). The United Nations Security Council therefore set up an Ad hoc tribunal. The jurisdiction of the tribunal was restricted to the territory of Yugoslavia and covered events occurring after January 1 1991. This decision was subsequently ratified by the General Assembly\(^\text{19}\). The tribunal was empowered with jurisdiction over natural persons only\(^\text{20}\) and its jurisdiction supersedes national courts\(^\text{31}\). The statute precluded the possibility of immunity or a defence of superior orders\(^\text{22}\) and unlike the Nuremberg and Tokyo tribunals the ICTY was not clothed with powers to impose the death sentences. The ICTY is reputed to be the first tribunal to prosecute a sitting Head of State, Slobadan Milosevic\(^\text{23}\) against a long standing culture of impunity that countenanced the likes of Polpot\(^\text{24}\) Idi Amin\(^\text{25}\) and Mengistu\(^\text{26}\). The ICTY made significant contributions to the jurisprudence of International Humanitarian Law, particularly in relation to the definition of ‘crimes against humanity’ and ‘genocide’.

In relation to crimes against humanity, the ICTY Statute took a leaf from the Nuremberg Charter. It however incorporated new elements, in the sense that it was defined to include acts like, imprisonment, torture, and rape which were not included in the charter\(^\text{27}\). Also unlike the charters definition which made the crime exclusive to international armed conflicts, the ICTY extended it to include internal conflicts. This

\(^{19}\)General Assembly Resolution 48/88 December 1993
\(^{20}\)Article 6 ICTY Statute.
\(^{21}\)This was affirmed in the Tadic Case (1996) 35 ILM 32.
\(^{22}\)Article 7 (3) (4) ICTY Statute
\(^{23}\)The ICTY charged Slobadan Milosevic on 66 counts of Genocide, crimes against humanity, war crimes and grave breaches of the Geneva Conventions for his role during the wars in Croatia, Bosnia and Kosovo, Milosevic was forced to surrender to security forces on March 31, 2001, following an armed standoff at his fortified villa in Belgrade. In July 2001, he was transferred by Yugoslav government officials from jail in Belgrade to the UN custody in Bosnia. Milosevic refused legal representation and conducted his own defence. Unfortunately the trial ended without a verdict as Milosevic was found dead in his prison cell on March 11 2006
\(^{24}\)Alias,SalothSar – May 1925 – April 15 1998, Leader of Columbian Communist movement and Prime Minister 1976 – 1979. Reputed to have caused the death of between 1.7 - 2.5 million people in an attempt to ‘cleanse’ his country.
\(^{26}\)Ethiopian Head of State 1974 - 1991.
\(^{27}\)Article 5 ICTY Statute
issue came up in the Tadic case, but the tribunal held that customary international law had evolved since Nuremberg and that crime against humanity could be committed even in the absence of an armed conflict. The ICTY was able to hold that it is the large number of victims, the exceptional gravity of the acts, and their commission as part of a deliberate attack against a civilian population that elevates the acts from ordinary domestic crimes to crimes against humanity and thus a matter of collective international concern. Crimes against humanity also require a mental element, in that; the perpetrators must have the knowledge, constructive or actual of the widespread or systematic attack on a civilian population. The requirement ensures that the crime is committed as part of a mass atrocity and not a random crime that is unconnected to a state policy. Another resurgent milestone is the definition given by the tribunal to the term rape. In relation to genocide, the ICTY Statute adopted the definition of genocide in the Genocide Convention and took cognizance of the presence of intent which must be proven to obtain a verdict of guilt. ICTY jurisprudence however elaborates on the threshold of the special intent that must be demonstrated in a charge of genocide. This is most glaring in the case of Prosecutor v. Goran Jelisic where the tribunal held that although, the behaviour of the defendant appeared to indicate that he singled out Muslims; he killed arbitrarily rather than with the clear intention to destroy a group. This position was however upturned by the Appeal Chambers. It noted that occasional displays of randomness in the killings are not sufficient to negate the influence of intent evidenced by a relentless campaign to destroy the group. This however did not end in a guilty verdict as the Appeal Chamber was reluctant to refer the matter back to the trial chamber because; the defendant had already bagged a 40 year term (probable life term) for crimes against humanity and war crimes. The tribunal concluded its work in 2017. A total of 161 people were charged before it with various crimes and 151 faced trial. The rest either died before they could be brought to justice or had

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28 This position has influenced the drafts of the ICC Rome Statute in its definition of Crimes against Humanity in Article 7. Accordingly in contemporary international law the presence or existence of an armed conflict is not a requirement for committing crimes against humanity.
30 ibid
31 In Furunzidja case, it defined rape as ‘Coerced sexual penetration of a victim virginally or anally whether by the perpetrators penis or by some other object or the penetration of the victims mouth by the perpetrators penis. Coercion could involve force or the threat of force and the coercion might be imposed on the victim or a third party’—Prosecutor v Anto Furunzidja Case No II - 95 - 17/I - T 10 December 1998.
their cases dropped. The court convicted 90 people in all, including powerful presidents, generals and intelligence services leaders, most of whom were given long prison sentences.35

2.2 International Criminal Tribunal for Rwanda (ICTR)
The International Criminal Tribunal for Rwanda36 was set up by the United Nations Security Council as a direct response to the Genocide that had occurred in Rwanda against the minority Tutsis37 and perpetrated by the majority Hutu in the preceding months. The tribunal had the same structure as the ICTY but varied in few respects to suit particular needs. The statute empowered the tribunal with powers to prosecute persons, including Rwandan citizens responsible for violations of International Humanitarian Law in Rwandan territory and neighbouring territories between January I and December 31 1994. It went further to prescribe punishment for perpetrators of Genocide.38 The tribunal was empowered to try cases of crimes against humanity39 and in recognition of the internal nature of the crises breaches of Article 3 common to the Geneva Conventions and Additional Protocol II fall within the Jurisdiction of the tribunal.40 The tribunal was clothed with jurisdiction over natural person’s only and made provision also for individual criminal responsibility.41 Although the Tribunal had concurrent jurisdiction with national courts42, it was given primacy over such national courts and was empowered to request at any stage of trial, a national court to defer to its competence.43 The statute made provision for the principle of Non Bis in Idem and the organs of the tribunal include the Chambers, the Prosecutor and the Registry. The tribunal was precluded from handing down the death sentence.44 In 1998 the operation of the tribunal was expanded by the United Nations.45

The ICTR commenced sitting in January 1997 and one of the most prominent cases was the Prosecutor v Jean Paul Akayesu.46 In this case, the defendant had served as Mayor of Taba, a city in which thousands of Tutsis were systematically raped, tortured and murdered. He stood for a 15 count charge of various alleged offences. One of the major contents of the indictment was the inclusion of rape as a component of Genocide, and this is so because it was a novel aspect never handled by International law before the time. It was also the first time an international tribunal was called upon to interpret the definition of genocide as

35 https://www.icty.org/  
36 Hereinafter, referred to as ICTR  
37 Security Council Resolution 955 of 8 November 1994  
38 Article 2 (2) ICTR Statute defines Genocide, Acts committed with the intent to destroy in whole or part of a national, ethnic, racial, or religious groups such as (a) killing members of the group (b) causing serious bodily or mental harm to members of the group (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction or in part (d) imposing measures intended to prevent birth within the group (e) forcibly transferring children of the group to another group.  
39 Article 3 ICTR Statute  
40 Article 4 ICTR Statute  
41 Articles 5, 6 ICTR Statute  
42 Article 8 ICTR Statute  
43 Article 8(2) ICTR Statute  
44 Article 10 ICTR  
45 The chambers consist of 3 trial chambers and an Appeal chamber  
46 Article 23. This position was objected to by the Rwandan Government  
48 ICTR (5/1997/868).Or ICTR - 96 - 4 - T.
provided for in the Convention for the prevention and punishment of the crime of Genocide\textsuperscript{49}. According to the Convention, Genocide is defined as follows\textsuperscript{50};

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 births within the group; (e) Forcibly transferring children of the group to another group\textsuperscript{51}.

Beyond interpreting the definition of genocide, the ICTR also stated that the crime of rape was. ‘A physical invasion of a sexual nature, committed on a person under circumstance which are coercive’ and underscored that sexual assault constitutes genocide in the same way as any other act as long as it was committed with the specific intent to destroy in whole or in part a particular group targeted as such\textsuperscript{52}. On 2 September 1998, Akayesu was found guilty of nine counts of genocide, direct and public incitement to commit Genocide and Crimes against humanity for extermination, murder, torture, rape and other inhumane acts. He was sentenced to life imprisonment and is serving his term in a prison in Mali\textsuperscript{53}.

Another milestone achieved by the ICTR is in the case of \textit{Prosecutor v Jean Kabanda}\textsuperscript{54}. The accused had served as Prime Minister throughout the 100 days the Genocide continued. He was brought before the ICTR in 1997 and pleaded guilty to six count of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity. He was convicted on all counts and is serving a life sentence in a Malian jail\textsuperscript{55}. This is particularly considered a milestone because it will be the first time that a Head of Government acknowledged his guilt for genocide before an international tribunal and the first time a Head of government will be convicted for genocide\textsuperscript{56}. Also noteworthy is the ICTR Prosecution of Ferdinard Nahimana and Jean Bosco Barayaguiza\textsuperscript{57} and of Hassan Ngeze\textsuperscript{58}. The ICRC consolidated the indictment as \textit{Prosecutor v Ferdinand Nahimana, Jean Bosco

\textsuperscript{49}MP Scharf, Formerly Attorney - Adviser for United Nations Affairs at the U.S Department of State
\textsuperscript{50}Article 2Convention on the Prevention and Punishment of the Crime of Genocide
\textsuperscript{51}Although this looks straightforward and devoid of controversy on the surface, it is actually a tricky issue as the ICTR had to decide whether to employ the subjective or objective means of determining membership of any of the four groups referenced in the definition; viz, religious, ethnic, national and racial groups. For more on this, seehttp://www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaa%20Final%20ICD%20Format.pdf
\textsuperscript{52}Rape in international law is ‘sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or the mouth of the victim by the penis of the perpetrator by coercion or force or threat of force against the victim or a third person’
\textsuperscript{53}https://unictr.irmc.org/en/cases/ictr-96-4 accessed 17/1/2020
\textsuperscript{54}\textit{Prosecutor v Kabanda}.ICTR - 97 - 23 - 5.
\textsuperscript{55}http://news.bbc.co.uk/2/hi/afrika/1702224.stm accessed 17/1/2020
\textsuperscript{56}https://trialinternational.org/latest-post/jean-kambanda/ accessed 17/1/2020
\textsuperscript{57}Leaders of the Radio Television Libre Milles Callines (RTML).
\textsuperscript{58}Founder & Director of Kangura Newspaper.
Barayaguzi, Hassan Nyeze. This case marked the first time the role of the media was examined as a component of International Criminal Law since after Nuremberg. The accused were convicted and sentenced on charges of Genocide, incitement to commit genocide, and crimes against humanity. They are serving their sentences in Mali. At this material moment, a few of the perpetrators of these criminal acts are still at large with a bounty placed on their heads by the United Nations.

2.3 International Criminal Court

Following the establishment of ad hoc tribunals put in place to try breaches of international humanitarian law, the International Criminal Court was established on 1st July 2002. It came into being pursuant to attaining the mandatory 60 signatories to the Rome Statute of 1998 on 11th April 2002. It aims to bring to justice those responsible for humankind’s most egregious crimes. Although the successful establishment of the court has been greeted as a welcome development and the most significant progress made in International Criminal law in the last century, records will show that, the road to attaining this feat was certainly a bumpy ride. Evidence of the truism of the preceding statement abounds in the difficulty in attaining the required number of signatories and the length of time which the establishment of the court has taken. The court unlike the ad hoc status of the other tribunals put in place to try international crimes is a permanent institution governed by the Rome Statute with complementary relationship to national criminal jurisdictions. It is separate from and independent of the United Nations and can only come into a relationship with the United Nations in accordance with the provisions of its statute. The Seat of the court is at The Hague although it may seat elsewhere if it’s desirable. In addition to this it has an international

59 Popularly called the Media Case. ICTR - 99 - 52 - T.
60 For more information on this see https://www.irmct.org/en/cases/searching-fugitives
62 ‘Understanding the International Criminal Court’. A publication of the Public Information and Documentation Section of the International Criminal Court. Available online at https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf accessed 17/1/2020
63 Several endorsements of the court have come from various quarters. One of such is the statement credited to Mr. Kofi Annan,(Erstwhile Secretary General of the United Nations) who at the Rome Conference had stated thus; ‘The establishment of the court... is a gift of hope for future generations, and a giant step forward in the March towards universal human rights and the rule of law http://www.Crimesofwar.org/ICC-magazine/ICC-glassiushtml
64 The United States of America for examples is a major critic and despite having signed the statue in 2000 officially renounced its legal obligations in May 2002. Sources at http://www.Crimesofwar.org/ICC-magazine/ICC-glassiushtml
65 The first attempt at establishing a permanent International Criminal Court was made in 1872 by Gustav Moginer one of the founders of the ICRC who proposed a permanent court in response to the crimes of the Franco-Prussian war. http://iccnow.org/?mod=icherhistory accessed 17/1/2020
66 Article 17, ICC Statute.
67 Article 2, ICC Statute
68 Article 3, ICC Statute
legal personality and has a limited subject matter jurisdiction\textsuperscript{69}. In order to avoid ambiguity the statute copiously defines the crimes of genocide, war crimes and crimes against humanity\textsuperscript{70}. One of the major criticisms of the Nuremberg trials was that, the enabling statute of the tribunal had retroactive effect and this is properly guarded against by the Statute\textsuperscript{71}.

We should note at this point that the ICC is a court of last resort or secondary jurisdiction and this is a necessary occurrence on account of the fact that in international law states have primary jurisdiction to try offenses committed by their nationals or within their jurisdictions. The principle of complementarity is therefore introduced in the statute as a compromise between competing interests of sovereignty/national jurisdiction and international criminal law\textsuperscript{72}. The import of the principle of complementarity as contained in Article 17 is that the International Criminal Court will only have jurisdiction to try a case where a member of the court which has primary jurisdiction over a case is unwilling\textsuperscript{73} or is unable genuinely\textsuperscript{74} to exercise such jurisdiction\textsuperscript{75}. This is a radical departure from the previous ad hoc tribunals that had been established where such tribunals had primary jurisdiction over municipal courts.

**Crimes under the Rome Statute**

The Rome statute provides for four offenses for which the court is clothed with jurisdiction to try accused persons. These are the offenses of Aggression, Crimes against Humanity, War Crimes and Genocide. The crime of aggression although listed is technically not at this moment under the jurisdiction of the court because during the diplomatic conferences leading to the enactment of the statute the state parties could not come to a consensus on the definition and components of the offense. As at today, there is a proposed amendment made pursuant to the ICC Review Conference 2010 held in Uganda which offers a possible definition for the crime of aggression but the required sixty signatories have not been successfully obtained to make the proposed amendment come into effect\textsuperscript{76}.

\textsuperscript{69} Article 4, ICC Statute. Article 5, of the Statute provides that its jurisdiction is limited to Crimes of Genocide, Crimes against humanity, war crimes and Crimes of Aggression. Note that the Court cannot yet exercise jurisdiction over crimes of aggression pending the fulfilment of the conditions set out in Article 5 (3) ICC Statute.

\textsuperscript{70} Article 6, 7, 8, ICC Statute.

\textsuperscript{71} Paragraph 10 Preamble to ICC Statute and Article 17 ICC Statute

\textsuperscript{72} This will likely occur where an accused is a person of immense power within a state. E.g. is the case of ousted Sudanese President Omar Al’ Bahsir.

\textsuperscript{73} Examples of when this will occur is where the State in question is engaged in a protracted armed conflict that has led to failed institutions of State or where the municipal laws do not provide for the offenses committed and prescribed under the ICC Statute.


\textsuperscript{75} It defines aggression as ‘planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a state of an act of aggression which by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations'}
Another offence under the ICC Statute is ‘Crimes against Humanity’. This offence has been present since Nuremberg and conceptual definitions have been variously offered. The ICC Statute defines it as including Murder, Extermination, Enslavement, Deportation or forcible transfer of population, Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, Torture, Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, Enforced disappearance of persons, The crime of apartheid, Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.

The crime of genocide is also provided for under the ICC statute. It defines it as the intent to destroy in whole or in part, a national, ethnical, racial or religious group by killing its members, causing serious bodily or mental harm to its members, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group. This crime is so grave to the extent that a special convention is designated for it. Its gravity has been highlighted in cases that have come before international tribunals before it. It has been described as ‘the crime of crimes’ and the ICTY stated of it as follows, ‘among the grievous crimes this tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium’.

War crimes are provided for under Article 8 of the ICC Statue. It entails a breach of the laws and customs of war as contained in the Geneva Conventions of 1949 and their Additional Protocols of 1977. It will also entail the breach of customary international criminal law which has successfully been compiled by the International Committee of the Red Cross. It will include acts like Wilful killing, Torture or inhuman treatment, including biological experiments, Wilfully causing great suffering, or serious injury to body or health, Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power, Wilfully depriving a prisoner of war or other protected person of the rights of fair and

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77 According to Egon Schwelb in ‘Crimes against Humanity (1946) 23 BYBIL 178, 195, it is ‘an offense against the general principles of law which in certain circumstances become the concern of the international community, namely, if it has repercussions reaching across international frontiers or if it passes in magnitude or savagery any limits of what is tolerable by modern civilizations. Article 6 Nuremberg Statute defines it as ‘Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated’.

78 Article 7(1)

79 Article 6

80 Convention on the Prevention and Punishment of the Crime of Genocide 1948

81 Prosecutor v Jean Kabanda ICTR 97-23-S ICTR Trail Chamber.

82 Prosecutor v Radislav Kristic IT-98-33-A ICTY Appeals Chamber.
regular trial. Rome Statute of the International Criminal Court, Unlawful deportation or transfer or unlawful confinement, Taking of hostages. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts, Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, Intentionally directing attacks against civilian objects, that is, objects which are not military objectives. From the definition provided in the ICC Statute, the elements required to prove the commission of war crimes are that there must be an armed conflict, the acts must have been committed during the armed conflict and both civilians and combatants can be indicted for the offense.

Several examples abound of cases where individuals have been held to account for acts criminalised by the statute. The case of Jean Pierre Bemba is instructive. In late 2002, at the invitation of the then-Central African President Ange-Félix Patassé, MLC President and Commander-in-Chief Jean-Pierre Bemba formed a coalition with the CAR to oppose a coup led by the former chief-of-staff of the Central African armed forces. During the unsuccessful five-month operation in the CAR, MLC fighters went on a rampage of murder, rape and pillaging against civilians throughout the CAR. Prior to his arrest and surrender to the ICC in 2008, Bemba served as vice president of the Democratic Republic of Congo. In May 2008, the ICC issued an arrest warrant charging Bemba with rape as a crime against humanity and rape and pillaging as war crimes. The following day Belgian authorities arrested Bemba, in the country at the time, and surrendered him to the ICC. In June 2008, Pre-Trial Chamber II added murder charges, constituting both crimes against humanity and war crimes. Opening on 22 November 2010, Bemba was the first ICC suspect prosecuted for criminal responsibility as a military commander. The prosecutor alleged that he knew or should have known that combatants effectively under his control were committing crimes, and that he failed to respond appropriately. Visits by Bemba to the CAR during the MLC operation, orders by radio, speeches to his troops referring to war crimes, correspondences on official reports of such crimes, and inadequate training of MLC troops or resort to available MLC tribunals were presented as evidence of Bemba’s effective command, of his knowledge of the crimes being committed, and of his failure to take responsible action. On 21 March 2016, Trial Chamber III convicted Bemba of crimes against humanity and war crimes. Judges determined that the evidence demonstrated beyond a reasonable doubt that murder, rape, and pillaging had occurred as defined under the Rome Statute and that Bemba had effective authority and control over the direct MLC perpetrators. Judges further determined that Bemba showed disregard for international humanitarian law (IHL) during his operational command and failed to respond appropriately to reports of IHL violations. The trial resulted in the ICC’s first command responsibility conviction and first conviction for sexual and gender-based crimes. He was however acquitted on appeal in 2018. The case of Bosco Ntaganda is also instructive as he was found guilty of war crimes and crimes against humanity in July 2019 by the International Criminal Court and sentenced in November 2019.

3. The Nigerian Conflict

The sect known as Boko Haram was established around 2003 and operated within Maiduguri in Borno State. Its graduation into first a nationally and later a universally known terrorist group is occasioned by

83http://www.coalitionfortheicc.org/cases/jeanpierre-bemba-bemba
84https://www.icc-cpi.int/car/bemba
85https://www.icc-cpi.int/Pages/item.aspx?name=pr1466
ethno-religious, socio-cultural and especially political undercurrents within the Nigerian State. Beginning around 2009 it created a structured chain of command, held territory which it declared a Caliphate and from where it launched its attacks against the government and the citizens of Nigeria. The conflict has led to the death of at least 17,000 people outside the war front, a refugee crisis with about one million internally displaced persons and indiscriminate arrests of more than 20,000 persons. The violence perpetrated by the sect has created massive governmental challenges in terms of managing a war, internally displaced persons and all the challenges that emanate therefrom. The conflict graduated from a municipal issue to a non-international armed conflict around 2009 when the activities of the group met the threshold prescribed by international law therefore making international law applicable to the situation. Article 3 Common to the Four Geneva Conventions also fairly covers the field. Amnesty International in its 2015 report on Nigeria’s war on terror reports that it has documentary evidence in form of video clips and from oral interviews with detainees that torture and other acts constituting international crimes in different forms are rife in the theatre of war. The report states thus,

Suspects are usually beaten during ‘screening’ operations, during arrests and following arrests while in detention. Amnesty International has received 90 videos which show soldiers and members of the Civilian JTF beating suspects, making them lie down and walking on their backs, threatening them, humiliating them, tying their arms and making them roll in the mud, and in one case attempting to drown a suspect in a river. Several videos show soldiers loading detainees onto a military truck as if they are sand bags. Virtually all detainees are held in extremely poor conditions of detention that amount at a minimum to ill-treatment and may amount to torture, especially considering the large number of prisoners who have died from suffocation.

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86https://www.crisisgroup.org/boko-haram-insurgency
88By the provisions of Article 1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, the treaty will be applicable to a conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable the them to carry out sustained and concerted military operations and to implement this Protocol
89In the case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, each party to the conflict shall be bound to apply as a minimum the following provisions: 1. Persons taking no active part in the hostilities including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion, or faith, sex, birth, or wealth or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture (b) Taking of hostages (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized people….  
90Supra, p. 36.
There are also reported cases of outright murder. According to one lucky survivor named, Hussaini Kallo, a 31-year-old grain seller who was detained in Giwa for 18 months, told Amnesty International:

On that Thursday, soldiers packed their properties and removed their wives and children. In the evening they removed their armored tankers. Only three soldiers were left... The Boko Haram came in the morning and told us to follow them and take weapons. I said ‘no, I don’t know how to shoot, and I haven’t seen my father or mother for almost two years so I cannot join you.’ They loaded the weapons on their vehicles ran away from the barracks, most on bare feet. After our cells were opened by Boko Haram fighters, the detainees were given the option of either joining Boko Haram or going home. Hundreds of the detainees decided to go home. After the Boko Haram fighters left, together with their freed members and any other detainees who chose to join them, some residents in Maiduguri began to help the escaping detainees. They gave them clothes, water and food and offered a place to hide. From 9am onwards, soldiers and local Civilian JTF members started hunting down the escaped detainees. They conducted house-to-house searches and threatened to arrest any resident who was hiding a former detainee. Many residents told Amnesty International that they felt that they had no choice but to hand over detainees who were sheltering in their homes. Most rearrested detainees were extra judicially executed by soldiers that day, in some cases with the help of Civilian JTF member.

*Source: Amnesty International*
UGBOMA: Individual Responsibility For International Crimes: Its Enforcement In The Nigerian Prosecution Of The War Against Terrorism

Source: Amnesty International
The Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to Victims of Non-International Armed Conflicts 1977 (hereinafter referred to as APII) reinforces the provisions of Common Article 3. It prohibits in its Article 4(1) (2) all forms of cruel treatment and outrages upon personal dignity. It provides that the mentioned acts are prohibited ‘at any time and in any place whatsoever’.

91. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) collective punishments; c) taking of hostages; d) acts of terrorism; e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any
Victims of the conflict have been subjected in the hands of members of the Nigerian armed forces to torture\textsuperscript{92}, rape\textsuperscript{93}, murder\textsuperscript{94}. The subjection of detainees to scientific experiments and also psychological torture of detainees\textsuperscript{95} all fall under international offences of war crimes and crimes against humanity as provided for under the Rome Statute of the International Criminal Court\textsuperscript{96}.

In the ensuing circumstances, the issue of jurisdiction arises. The ICC Statute provides for the principle of complementarity which essentially grants jurisdiction to both the International Criminal Court and to national courts\textsuperscript{97}.

4. Conclusion and Recommendations

The Nigerian press is awash with news reports of the atrocities committed by the terrorist sect, boko haram. The Nigerian population and a very large section of the international community is therefore unaware of the extent of barbarity exhibited by the Nigerian army is their attempt to quell the insurrection. This is because the terrorist group, boko haram is not present in mainstream media. The sufferings of the non-combatants which include women, children and the aged is untold of. They are chased away from their homes, tortured and many are killed by way of summary executions on account of suspicion of being members or sympathisers of boko haram. This work has therefore tried to join the unpopular number of works that bring to the attention of the world that atrocities are daily being committed in Nigeria’s north east region by government forces.

In the circumstances the following are suggested; the Nigeria government should begin a rigorous campaign within its rank and file towards educating them on the existence of international crimes and the dangers of running foul of the law. The Nigerian government should commence dispassionate and unbiased investigations into the activities of its troops in the theatre of war and those who are found to have exhibited beastly tendencies brought to justice. In the event of the Nigerian government failing to act positively, the Prosecutor of the International Criminal Court should \textit{suo motu} commence investigations so that the principle of accountability which has been progressively applied since Nuremberg would be further retained and strengthened by ensuring that allegations against the Nigerian armed forces are investigated and if prima facie cases are established, those responsible no matter how highly placed are brought to book. The primary effect of this will be felt when Commanders in Chief will have to ensure that Officers and Soldiers under their command respect religiously the laws of armed conflict. Finally, the philosophy of love, patience, perseverance, and understanding should be taught to children from the earliest stages of socialization for in a society populated by people with such attributes the inevitable result will be peace and tranquility.

form of indecent assault; f) slavery and the slave trade in all their forms; g) pillage; h) threats to commit any of the foregoing acts.

\textsuperscript{92}Under article 8 (2) (c) (i)-4 of the Rome Statute of the International Criminal Court, torture constitutes a war crime when it is committed against protected persons under international humanitarian law, including members of armed forces who have laid down their arms and those placed \textit{hors de combat} by sickness, wounds, detention or any other cause

\textsuperscript{93}Article 7(1)(g) ICC Statute

\textsuperscript{94}Article 7(1)(a)

\textsuperscript{95}Article 7 (1)(h),(k) ICC Statute

\textsuperscript{96}Articles 7 & 8 ICC Statute.

\textsuperscript{97}See Footnotes 58, 59, 60.