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PROSECUTION OF CORE INTERNATIONAL CRIMES IN INTERNAL ARMED CONFLICTS AND THE QUESTION OF ACCOUNTABILITY IN NIGERIAN DOMESTIC COURTS

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Abstract

Nigeria fought a civil war between 1967 and 1970, in which a disputed estimate of 6,000,000 civilian deaths were recorded. Since the end of the war, there was never any post–conflict justice. Instead the Gen. Gowon administration declared a "no victor, no vanquished' policy and the post-war economic reconstruction commenced. From that period in history to date there have been allegations and counter allegations of war crimes now known as 'crimes against humanity.' The Asaba massacre left over 1500 dead by government troops with no accountability for crimes alleged to have been committed by both federal troops and the Biafran rebels. More recently, there are allegations of unlawful killing of civilians in the Boko Haram insurgency and herdsmen/farmers conflicts. In spite of the several internal armed conflicts that have taken place and that are still on-going, there has not been any accountability for Core International Crimes before any court of competent jurisdiction in Nigeria. As a matter of fact, there is no division of the Federal or State High Courts that is designated for the processing of war crimes charges. Inquiry into the reasons for lack of accountability for conflict generated Core International Crimes in Nigeria must inevitably lead into a critical examination of the legal framework for post-conflict justice in Nigeria, particularly as it relates to prosecution for the violation of the norms of war, violations of international humanitarian law (IHL), crimes against humanity, and genocide in internal armed conflicts.

Keywords: Internal Conflicts, Crimes Against humanity, Prosecution, Jurisdiction

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Introduction

As the old legal cliché goes, justice must not only be done but must been seen to have manifestly been done. This cliché is particularly very apposite in criminal cases in which the prohibited act is seen as much an injury to the entire society as it is to the immediate victim of the crime. Practical realisation of the proposition contained in this weather beaten cliché has however turned out to be a mirage, when dealing with some special categories of crimes in Nigeria. Injustice and impunity have continued unabated in a country like Nigeria where the law vests the rights to choose whether to prosecute war crimes and crimes against humanity on the executive. This has done more harm than good because such crimes are never prosecuted and the perpetrators are left without proper accountability. The increase in the spate of internal armed conflicts and the concomitant atrocities have necessitated the need to beam a search light into the Nigeria criminal justice system.

Despite several allegations of mass atrocities committed by armed insurgents and government security forces in the past and the current on-going multi-layered and multifaceted internal armed conflicts in Nigeria (the religious and ideologically driven Boko Haram insurgency has attained classic international notoriety in Nigerian internal armed conflicts) there has not been any reported accountability of any perpetrators before any court in Nigeria, at least under the correct legal label of the atrocity crimes that they have committed. In the absence of appropriate legal framework for the enforcement of international criminal law, in few instances in which there have been prosecutions for atrocious crimes, what ordinarily would have passed for classic cases of crimes against humanity or war crimes have been prosecuted as ordinary crimes of murder or terrorism in Nigeria. To process or prosecute acts which amount to war crimes or crimes against humanity as ordinary crimes undermines the very essence of international criminal justice. International crimes are crimes of special nature to which a greater degree of moral turpitude are attached. These crimes, because of their heinousness and magnitude, constitute an affront and egregious 'attack on human dignity, on the very notion of humanness.'[1] As Wald points out, conducts amounting to crimes against humanity or war crimes are so odious that they constitute an assault on the victims and offence against all humanity.[2] Any serious

[1] *Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, Judgment, para.271 (15th July 1999).
[2] P M Wald, 'Genocide and Crimes against Humanity', (2007) 6 Wash, U Global Stu. L. Rev. 621, 624. P M Wald as a Judge in the U S Court of Appeals for the D C Circuit (ret.); Judge, International Criminal Tribunal for Yugoslavia (1999 – 2001).

inquiry into the reasons why there have been a festering culture of impunity for Core International Crimes in Nigerian internal armed conflicts must inevitably lead one into a critical examination of whether there is at all any, and what form the legal framework for administration of international criminal justice is in Nigeria domestic courts, particularly in relation to prosecution for the violations of the norms of war crimes and crimes against humanity in the prosecution of such conflicts.

This paper highlight the factors that have combined together to breed a culture of impunity for the perpetrators of atrocity crimes in Nigeria. It identifies certain doctrinal, institutional, constitutional and legal challenges that have made it impossible for perpetrators of international crimes to be brought to justice under the right and correct label that their crimes fit into in international criminal jurisprudence. Some of these are (a) restrictive domestication of the four Geneva Conventions of 1949; (b) absence of domestic legislation on international crimes arising from failure to implement the Rome Statute and; (c) constitutional and doctrinal hurdles stacked against direct enforcement of customary international criminal law in domestic courts.

Restrictive Domestication of the four Geneva Conventions of 1949

Of the three core international crimes of genocide, crimes against humanity and war crimes, only war crimes have, partially and half-heartedly, been domesticated in Nigeria. The four Geneva Conventions of 1949[3] were enacted into law by the National Assembly of Nigeria. The local statute which domesticates the four Geneva Conventions is however riddled with some inexplicable restrictions,[4]that practically make the enforcement of the proscriptive norms of the Conventions impossible in Nigeria. Section 3 of the Genocide Convention Act,[5] specifically enacts the 'grave breaches' contained in Articles 50, 51, 130 and 147 respectively of the Geneva Conventions I, II, III and IV,[6] and prescribes death sentence for

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Ship wrecked members of the Armed Forces at Sea, 12 August, 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 12 August 1949 UNTS 287.

[4] Geneva Conventions Act No. 54 of 1960 Cap. G3, Laws of Federation of the Nigeria, 2004 Edition. Although Nigeria has ratified the 1977 Additional Protocols I and II to the Geneva Conventions of 1949 in 1988, these protocols have not been enacted into law by the National Assembly. The 2005 Additional Protocols to the Geneva Conventions has not be ratified by Nigeria.

[5] No. 54 of 1960, Cap. G3 Laws of the Federation of Nigeria, 2004.

[6] Article 50 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Article 51 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Ship wrecked members of the Armed Forces at Sea, 12 August, 1949, 75 U.N.T.S 85; Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War, 12

wilful killing, and imprisonment not exceeding four years, in respect of other crimes classified as 'grave breaches.' By the combined effect of the provisions of sections 3 (3) and 11 of the Geneva Conventions Act,[7] jurisdiction to try the offences classified as 'grave breaches' in Articles 49, 50, 129 and 146 of the Geneva Conventions I, II, III & IV of 1949 is vested in the High Court of the Federal Capital Territory, Abuja. Section 3 (2) of the Act confers on the High Court of the Federal Capital Territory, Abuja, extra-territorial jurisdiction with respect to 'grave breaches.'[8] The 'grave breaches' prohibitions of the four Geneva Conventions relate to conflicts of international character and therefore will be relevant only where Nigeria is involved in war or other forms of armed conflict with a foreign country. This means that violations which, though involve identical conducts as those prohibited in the 'grave breaches' provisions of the Geneva Conventions, committed in Nigerian internal armed conflicts are not covered by section 3(2).[9] The list of war crimes that are applicable to internal armed conflicts such as we have had, in Nigeria are those contained in common Article 3 of the Geneva Conventions. The Geneva Convention Act, while domesticating the proscriptions contained in Common Article 3 of the Geneva Convention of 1949, prescribes no punishment for the violations of these proscriptions.

More troubling provisions of the Act are those that vest in the President of the Federal Republic of Nigeria, the discretionary power to order the prosecution of an alleged perpetrator of war crimes other than 'grave breaches', and to by order, prescribe appropriate punishment for those categories of offences, subject to the statutory limit of seven years imprisonment.[10] War crimes other than the 'grave breaches' certainly include the violations

August 1949, 75 UNTS 85; Article 147 of the Geneva Convention Relative to the Protection o Civilian Persons in Time of War 12 August 1949 UNTS 287.

[7] No. 54 of 1960, Cap. G3 Laws of the Federation of Nigeria, 2004.

[8] Sections 3 (2) and 11 of the Geneva Conventions Act, 1960, Cap. G3 Laws of the Federation of Nigeria, 2004.provies: "3 (2) A person may be proceeded against, tried and sentenced in the Federal Capital Territory, Abuja for an offence under this section committed outside Nigeria as if the offence had been committed in the Federal Capital Territory, Abuja and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal Capital Territory, Abuja. ...11. (1) Proceedings for an offence under this Act or under an order made under this Act shall not be instituted except by or in behalf of the Attorney-General of the Federation.(2) Notwithstanding anything in any other written law, neither a magistrate's court nor a court-martial convened under any enactment applicable to the members of the armed forces of Nigeria shall have jurisdiction to try any person for an offence under section 3 of this Act or under an order made under section 4 of this Act.

[9] But see L Moir, 'Grave Breaches and Internal Armed Conflicts' (2009) Vol 7 Issue 4 *Journal of International Criminal Justice*, 763-787 (arguing that, '…the concept of grave breaches has…impacted in a significant way upon the substantive laws of internal armed conflicts and their enforcement against individuals').

[10] Section 4 of the Geneva Convention Act, Cap. G3, Laws of the Federation of Nigeria, 2004 provides '4. (1) The President may, by order provide that if any person-

(a) in Nigeria commits, or aids, abets or procures any other person to commit, whether in or outside Nigeria; or

enumerated in common Article 3 of the four Geneva Conventions, which are applicable to internal armed conflict or armed conflict of non-international character. Failure to prescribe specific punishment for violation of the proscriptions in common Article 3 renders the norms of war crimes applicable in internal armed conflicts inchoate and non-prosecutable, at least, until the President gives his discretionary order pursuant to section 4 of the Geneva Conventions Act. As it will be demonstrated in this article, failure to prescribe specific punishment for those enumerated crimes violates the principles of specificity, clarity and *nulla poena sine lege* which are the fundamental conceptual or doctrinal underpinnings of criminal law and the administration of criminal justice.

Similarly, subjecting the decision to prosecute to the discretionary powers of the President, in a fractious, multi-ethnic, federal conglomerate like Nigeria, is undoubtedly an establishment of a potentially capricious and arbitrary system of criminal justice. In a country where it has been hard to find leaders that can genuinely rise up to the exalted status of a statesman, vesting powers of the decision to prosecute and prescription of punishment for war crimes in a President, amounts to a dangerous and potentially explosive mechanism, by which a President may act arbitrarily and in outright subversion of the course of justice, where his own ethnic group is involved in one side to an internal conflict.

Absence of Domestic Legislation on International Crimes' Treaties

The modes of incorporation of treaties into domestic law diverge among countries operating under the 'monist' and the 'dualist' systems. Verdier and Versteeg note that, the fundamental question with respect to treaties is, whether ratified treaties may be given direct effect by courts without further legislative action.[11] In the countries with monist tradition, ratified treaties become enforceable as domestic law either automatically or after some

(b) being a citizen of Nigeria, or a member of, or attached or seconded to the armed forces of Nigeria, or a person to whom section 292 of the Armed Forces Act, applies, or a member of or serving with any voluntary aid society formed in Nigeria and recognised as such by the Federal Government, commits, whether in or outside Nigeria, or aids, abets or procures any other person to commit, whether in or outside Nigeria, any breach of any of the Conventions which may be specified in the order than one punishable under section 3 of this Act, he shall be liable to imprisonment for a term not exceeding seven years.
(2) A person may be proceeded against, tried and sentenced in the Federal Capital Territory, Abuja for an offence under an order made under this section committed outside Nigeria as if the offence had been committed in the Federal Capital Territory, Abuja and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal, Capital Territory, Abuja.'

[11] P Verdier and M Versteeg, 'Modes of Domestic Incorporation of International Law', (2016) University of Virginia School of Law Public Law and Legal Theory Research Paper Series 2016-15< <http"//ssrn.com/abstract=2726673> accessed 2nd June, 2018.

further actions such as formal proclamation or publication.[12] In countries with the dualist tradition, a treaty does not become enforceable domestically until it has become incorporated by domestic legislation. In Sloss and Alstine's view, a feature that distinguishes dualism is that no treaty has a formal status of law in the domestic legal system, unless the legislature enacts a statute to incorporate the treaty into domestic law.[13]

Nigeria as a former British Colony, and as one of the Commonwealth countries, inherited the British dualist treaty recognition tradition. In the British constitutional practice, while the sovereign may ratify treaties without any approval by Parliament, such treaties has to be enacted by the Parliament before they can become domestic law binding on courts in Britain. In *Hutchinson v Newbury Magistrates' Court,* [14] Buxton, L J alluded to this British practice when he stated *inter alia* that:

> … although state torture had long been an international crime in the highest sense and therefore a crime universally in whatsoever territory it occurred, it was only with the passing of Section 134 of the Criminal Justice Act 1998 that the English criminal courts acquire jurisdiction over "international torture" that is to say extra territorial, torture.

In *Abacha & Ors v Fawehinmi,*[15] the Nigerian Supreme Court held that a treaty that has not been enacted into domestic law by the National Assembly, has no force of law in Nigeria while interpreting section 12 (1) of the 1979 Constitution, which is *in pari materia* with Section 12(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Although on record, Nigeria ratified the Genocide Convention on 27 July 2009;[16] the

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[12] Verdier and Versteeg (n 11) p.8.

[13] D Sloss, and M V Alstine, 'International Law in Domestic Courts' (2015) <http://digitalcommons.law.scuk.edu/facpubs/889 pp 9 and 11 > accessed 2nd June 2018 noting that: '… even if the executive department has expressed consent as a matter of international law, in dualist system the legislature must 'incorporate' the treaty by standard legislation in order for it to have the force of domestic law. Otherwise, the treaty remains 'unincorporated' (although...some courts have recognized an influence for such treaties as well). This is the approach of almost all British Commonwealth States, as well as a few others. …on some subjects (e.g. Immunity, court procedure, the act of state doctrine) the actions of domestic courts, as state organs, constitute 'state practice' that drives the development and modification of customary international law.'

[14] Section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) deals only with the procedure for domesticating treaties in Nigeria. S12(1) of the Constitution state: '12 (1) 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.'

[15] (2000) LPELR – 14SC.

[16] *United Nations Treaty Collection*, 'Convention on the Prevention and Punishment of the Crime of Genocide'<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_ene accessed 3rd July, 2018.

Additional Protocol II to the Geneva Conventions on 10 October, 1988;[17] and the Rome Statute of the International Criminal Court (ICC),[18] there are, as yet, no local legislations on these treaties. No treaty has the force of law in Nigeria until such treaty has been enacted into law by the National Assembly.[19] And before such enactment bringing a treaty into force can be deemed to have been properly made, it must have been enacted into law by the National Assembly and must have been given assent by the President. Where such enactment incorporating a treaty into domestic law involves the making of a law with respect to matter not included in the Exclusive Legislative List,[20] the Bill to that effect passed by the National Assembly must be ratified by majority of the thirty-six State Houses of Assembly before the assent of the President. Criminal law is not one of the 68 items listed in the Exclusive Legislative List. It therefore follows that any enactment seeking to domesticate norms of international criminal law such as those contained in the Additional

[17] International Committee of the Red Cross, ' Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' *Treaties, State parties and commentaries* ,<https://ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=AM&nv=4d> accessed 23rd August 2018.

[18] T C Jaja, 'Revising the Status of Nigeria's Membership of the International Criminal Court', (2017), Federal Bar Association <www.fedbar.org/sections/International-Law-Section/Global-Perspectives/Winter-2017/Re-visiting-the-status-of-Nigerias-Membership-of-the-International-Criminal-Court.aspx> accessed 23rd August, 2018 stating that: 'Nigeria signed the Rome Statute on June 1, 2000, and ratified it on Sept. 27, 2001, becoming the 39th State Party...The Federal Ministry of Justice sent an Executive Bill entitled "The Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill 2001" to the National Assembly for adoption (pursuant to section 12 of the 1999 Federal Constitution). On June 1, 2004, the House of Representatives passed its own version of the Bill. The Bill was re-submitted to the executive arm of government in 2003. On May 19, 2005, the Senate passed a legislation implementing the Rome Statute. The Bill was never signed into law by the then President. The Rome Statute (Ratification and Jurisdiction) Bill, 2006 was passed by both chambers of the National Assembly but was not harmonised for assent of the President before the end of the last civilian administration in May 2007. The Bill is re-submitted by the Ministry of Justice which committed to re-submit the Bill as soon as possible during the 10th anniversary of the Rome Statute.'

[19] Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) stipulates: '12 (1) 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. (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty. (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation'..

[20] Division of power between the Government of the Federation and the constituent 36 states in Nigeria follows the following pattern, under section 4 of the Constitution of the Federal Republic of Nigeria, 199 (as amended). There is the Exclusive Legislative List composed of 68 items in respect of which only the National Assembly on legislative. There is also the Concurrent List containing 30 items in respect of which both the Government of the Federation and the constituent states can legislate on. Section 4(7) of the Constitution provides: '4(7) The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say – (a) any matter not includes in the Exclusive Legislative List set out in Part I of the second schedule to this condition; (b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the second schedule to this Constitution to the extent prescribed in the second column opposite thereto; and (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution'.

Protocol II to the Geneva Conventions of 1949, the Genocide Convention and the Rome Statute of the ICC, must go through the enacting protocols stated in section 12 (2) and (3) of the Constitution before they can become enforceable in Nigeria. Additional Protocol II of the Geneva Conventions applies to internal armed conflicts. The Rome Statute of the ICC applies to both international and non-international armed conflicts. Failure to domesticate these treaties renders their norms unenforceable in Nigeria.

Challenges of Customary International Criminal Law as Basis of Enforcement

No doubt customary international law is generally said to be binding irrespective of absence of local legislation on matters covered by its norms. The question at issue at this juncture is: Can a perpetrator of Core International crime be held accountable in the front of a Nigerian domestic court on the basis that his conducts are proscribed by the norms of customary international criminal law? The answer to this poser is in the negative. The enforcement of war crimes outside those covered by the 'grave breaches' provisions of the four 1949 Geneva Conventions, genocide and crimes against humanity in Nigeria at the moment on the basis of the rules of customary international criminal law will be very problematic. Arguably, the prohibited norms in the Additional Protocol II to the Geneva Conventions; the Genocide Convention and the Rome Statutes of the ICC, in relation to crimes against humanity, genocide and war crimes have become part of customary international law and therefore binding on all states,[21] Nigeria inclusive, as *jus cogens* or peremptory international norms; such postulations exist only in the realm of theory as far as domestic administration of criminal justice is concerned.[22] It is impossible to make customary international law the basis of the preferment of criminal charges in Nigerian courts for the following reasons. Firstly, the Constitution of the Federal Republic of Nigeria

[21] M C Bassiouni, 'Normative Framework of International Humanitarian Law Overlaps, Gaps and Ambiguities' (1998) 75 *International Law Studies*, 10-11 argues that : 'Customary law, however is binding only on the states that share in the custom and that express their will to be bound by it unless it becomes a general custom that is binding on all states. Consequently, states that do not follow the custom, unless it is a general custom, are not bound by it as a legal obligation. Nevertheless, a custom can rise to such a level of general acceptance that it may become binding even on those states that do not share in the custom or that may express their will not to be bound by it. This applies to those general customs that rise to a higher level of acceptance and which reflect a universal sense of opprobrium, namely *jus cogens* or a peremptory norm of international law. Among the international crimes that fall within this category are: aggression, genocide, "crimes against humanity", war crimes...'

[22] The norms of crimes of genocide, war crimes outside the Geneva Conventions of 1949, and crimes against humanity may only be binding on Nigeria to the extent that Nigeria may incur international responsibility where these crimes are committed as a result of deliberate state policy or a Nigerian who commit any of such crimes may be prosecuted in international criminal court or by domestic court of other states under universal jurisdiction.

1999 (as amended) is silent on the status of customary international law in domestic courts. Secondly, there is the charge that enforcement of customary international law in domestic courts in a constitutional democracy violates the democratic principle and the doctrine of separation of powers. Democratic principle connotes that the power of making law that will be considered binding on the citizen of a sovereign state, must be that vested on their elected representatives in the legislature, because the legislature is the governmental institution vested with law-making power. Acts of states otherwise called practice of states, which is one of the important constituent elements in the formation and identification of customary international law rules are principally derived from actions of the executive arm represented by heads of states, heads of government, foreign ministers and diplomats. Closely related to the foregoing theoretical postulation is the firmly held view that to allow the actions of the executive arm of government, to become law, binding on the citizens of a democratic country, strikes at the very foundation of democracy and the doctrine of separation of powers. Again it is also the thinking that to allow the judicial arm to enforce customary international law rules, absent of incorporating domestic legislation, violates the democratic principle and the doctrine of rule of law.

A comparative study of some jurisdictions shows that attempts at enforcing rules of international law domestically, without local enactment by the legislature have severally been resisted. In *R v Jones*,[23] Lord Bingham of Cornhill states:

> …an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far

[23] (2006) UKHL16 para. 29. See also F Berman, *Asserting Jurisdiction: International and European Legal Perspectives,* (2003) M Evans and S Konstantinidis (eds) 11 (adopted by the House of Lord in *R v Jones* (2006) UKTTL 16 para. 23 to the effect that: 'The first question is particular national legal system in view. Looking at it simply from the point of view of English law, the answer would seem to be no; international law could not create a crime triable directly, without the intervention of Parliament, in an English court. What international law could, however, do is to perform its well-understood validating function, by establishing the legal basis (legal justification) for Parliament to legislate, so far as it purports to exercise control over the conduct of non-nationals abroad. This answer is inevitably tied up with the attitude taken towards the possibility of the creation of new offence, under common law. In as much as the reception of customary international law into English law takes place under common law, and in as much as the development of new customary international law remains very much the consequence of international behaviour by the Executive, in which neither the legislature nor the courts, nor any other branch of the constitution, need have played any part, it would be odd if the Executive could, by means of that kind, acting in concert with other stated, amend or modify specifically the criminal law, with all the consequences that flow for the liberty of the individual and rights of personal property. There are, beside, powerful reasons of political accountability, regularity and legal certainty for saying that the power to create crimes should now be regarded as reserved exclusively to Parliament, by statute.'

outside the bounds of what is acceptable in our society as to attract criminal penalties.

In that case, one of the questions before the British House of Lords was whether customary international law of aggression was enforceable in Britain without domestic legislation establishing the crime; to which the House of Lords answered in the negative.[24] This seems to be a little at variance with Augusto Pinochet's case however it is important to state that Pinochet was held on house arrest in England before he was transferred to Chile on grounds of ill health and he was never convicted till his death though he was indicted and charged with several crimes amongst which was crime against humanity.[25] It should be noted that Pinochet's case marked a turning point in the development of international law jurisprudence as it sets two important precedents. The first one is the principle of universal jurisdiction which allows states to prosecute individuals irrespective of the nationality and locus or place of the commission of the offence. Secondly, immunity was withdrawn from heads of states or ex head of states where there are human rights violation. It is however doubtful that since this window of opportunity in Pinochet's case whether political office holders has been held accountable of human right abuses.[26]

In the US, the position is similar. In *Sosa v. Alvarez-Machain*,[27] Justice Scalia stated: '[T]he Framers would, I am confident, be appalled by the proposition that, for example, the American people's democratic adoption of the death penalty… could be judicially nullified because of the disapproving view of foreigners' , and further that: 'American law – the law made by the people's democratically elected representatives–does not recognise a category of activity that is so universally disapproved by other nations that it

[24] In his judgment in *R v Jones* (2006) UKHL 16 para 5.60-5.62, Lord Hoffman alluded to the democratic principle noting: 'I come then to the two reasons why I think that aggression is not a crime in English domestic law. The first is the democratic principle that is nowadays for Parliament and Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence. In the eighteenth century judges were less inhibited about creating new offences. Perhaps the last assertion of that power was by Viscount Simonds in *Shaw v Director of Public Prosecution* (1962) AC 220, 268...But this opinion has since been repudiated in *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* (1973) A.C. 435….The same reasoning applies to the incorporation into domestic law of new crimes in international law… They should not creep into existence as a result of an international consensus to which only the executive of this country is a party.'

[25] Pinochet died without standing trial for the crimes for which he was accused. See generally https//www.history.com accessed on 22nd May 2021

[26] V Diaz-Cerda, General Pinochet arrest: 20 years on, here's how it changed global justice. https://theconversation.com accessed on 22nd May 2021

[27] (2004) 159 L Ed 718, 765.

is automatically unlawful here.'[28] In Australia, argument based on automatic assimilation of genocide as an international criminal offence to domestic jurisdiction was rejected by Federal Court of Australia.[29]

Section 4 (1) and (6) of the Nigerian Constitution vests in the National Assembly and the States' Houses of Assembly, respectively, the legislative powers of the Federal Republic of Nigeria and the legislative powers of the states of the Nigerian federation.[30] It is certain that whenever the issue of the applicability of customary international criminal law, absent of domestic legislation, will come up, Nigerian courts will take the same position as their Australian, British, and U S counterparts.[31]

Customary International Law and the Inherent Characteristics of Criminal Law

Another big challenge faced in the enforcement of customary international criminal law in Nigeria is that it is bereft of certain essential technical components of domestic criminal law. Criminal law has three essential parts, each of which is very fundamental in the administration of justice. The three essential characteristics of criminal law are (a) prohibition, (b) procedural rules for administering criminal justice, and (c) punishment or penalty. Lord Atkins in *Proprietary Articles Trade Association v Attorney General for Canada*,[32] states that, '[t]he domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crime, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.' Glanville Williams defines crime as a legal wrong that can be followed by criminal proceedings which may result in punishment.[33]

[28] ibid.
[29] *Nulyarimmo v Thompson* (1999) 120 ILR 353.
[30] R O'Keefe, 'Customary International crimes in English Court' (2001) *BYIL* 293, 335.
[31] Section 4 (1) of the Constitution of the federal Republic of Nigeria 1999 (as amended) provides: '4(1) The legislative powers of the Federal Republic of Nigerian shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representative.' Jurisprudence of Nigerian Supreme Court is rich on non-applicability of treaties that are yet to be incorporated by local legislation. It is however difficult to find any pronouncement on the applicability of customary international law in criminal in criminal trials. This should however not be surprising because no one can be prosecuted for any crime in Nigeria except the crime and the punishment for its commission are provided for in a written law. See section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
[32] (1931) A. C. 310, 324
[33] G Williams, *Textbook of Criminal Law, (*2nd edn, Stevens & Sons1983) 27-29.

Okonkwo posits that the possibility of punishment is not the only distinguishing mark of a criminal trial, but it is probably the most important one.[34]

The Nigerian Criminal Code,[35] as a law codified from the common law, in theory, manifests to a substantial degree, the principle of *nulla poena sine lege*-meaning that a man may be punished only in accordance with the law.[36] Section 2 of the Nigerian Criminal Code defines an offence as act or omission which renders the person doing the act or making the omission liable to punishment.[37] While the main object of a civil action is to compensate a claimant as far as possible for the wrong done him, punishment is not only the distinguishing mark of a criminal trial but perhaps its most important aspect.[38] To understand criminality or criminal law in the domestic context therefore, it is necessary to focus on its three important components, which are the substantive, procedural and the punitive aspects.[39]

Contrary to the structure of domestic criminal law as explained above, the norms of customary international criminal law exist in bland prohibitions or legal propositions accepted as binding on individuals as well as States and the violation of which are also accepted as capable of giving rise individual's and arguably State's responsibility.

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[34] C O Okonkwo, *Okonkwo and Naish: Criminal Law in Nigeria*, (2nd edn, Spectrum Books Limited 1980) 19.

[35] Criminal Code Act, Cap. C38 Laws of the Federation of Nigeria, 2004.

[36] See Okonkwo (n32) 27 nothing that the principle of *nulla poena sine lege*: '…is now enshrined in the Fundamental Rights provisions of the Constitution. A man cannot be convicted of an unwritten offence. Written offences are usually defined with a reasonable amount of clarity, so that a man is left with considerable capacity of choice in deciding whether he will or will not infringe the law. He cannot be convicted for conduct which has been rendered criminal only subsequent to his commission of it, nor rendered liable to a punishment severer than that which was prescribed for his offence at the time that he committed it.'

[37] Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria, 2004.

[38] In *Abacha & Ors v Fawehinmi* (2000) LPELR – 14SC, the Supreme Court of Nigeria followed the position of the law in England in the interpretation of Section 12(1) of the Nigerian Constitution of 1979 and held per Ogundare, JSC: 'Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. See section 12(1) of the 1979 Constitution which provides: '12 (1) 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 (AFRC). (See now the re-enactment of section 12(1) of the 1999 Constitution). Before its enactment into law by the National Assembly, an international treaty has no such force of law to make its provisions justifiable in our courts. See the recent decision of the Privy Council in *Higgs & Anor v Minister of National Security & Ors, The Times* of December 1999 where it was held that – "In the law of England and The Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic courts had no jurisdiction to consume or apply a treaty, nor could unincorporated treaties change the law of the land..." In my respectful view, I think the above passage represents the correct position of the law, not only in England but in Nigeria as well.'

[39] T A Mensah, 'Law of the Sea, Environmental Law and Settlement of Disputes', in T M Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff Publishers 2007) 480, noting, after examining the definition of crime by Professor Glanville Williams that: 'A close examination of the definition brings to light the three elements of crime or criminal offence, namely, the substantive, the procedural and the punitive. The first is the criminal act that is a "legal wrong". This is the substantive element that makes the conduct or act criminal and criminalises the person who carries out the act… The second element in the definition is the procedural aspect manifested in the words "criminal proceedings". Finally, the word "punishment" refers to the punitive element, i.e the sanction.'

Customary international criminal norms contain neither procedure for enforcement nor specifically predetermined penalties or punishment for their violation. This however should not be surprising because the norms of customary international law generally arise from the practice of States and *opinio juris*.[40] The norms of customary law do not come into being by way of any deliberate international law-making process as could be found in the Parliament of a democratic State. As a matter of fact, even in relation to treaties, matter of punishment or penalty is usually reserved for domestic legislation.

At the international level, statutes of international criminal courts have left question of punishment to be imposed in each case to the discretion of the judges. For example the ICTY Statute[41] together with its Rules of Procedure and Evidence,[42] provide only general guidelines as to what factors should be considered in determining appropriate sentences. The factors which the judges of ICTY are required to take into consideration include 'such factors as the gravity of the offence and the individual circumstances of the convicted person.'[43] This structure of law is unsuited for domestic criminal law in Nigeria. In sum, the structure of customary international criminal law does not fit into the requirements of legal clarity, specificity and rigour explained above, which constitute the touchstone of fairness and due process in domestic criminal law. Absence of these constitutive requirements of proscription, procedure and punishment in the contents and structure of customary international criminal law renders it unenforceable in domestic court.

Customary International Criminal Law and the Principle of Legality

Closely related to the incompatibility of customary international criminal law with the inherent nature of domestic criminal law is the problem posed by the principle of legality to its loose contents.[44] The principle of legality encompasses the requirement that crime and

[40] Okonkwo (n 32) 20.
[41] Statute of the International Criminal Tribunal for the Former Yugoslavia adopted 25 May 1993 by Resolution 827 UN Dec.: S/RES827 (1993).
[42] Rules of Procedure and Evidence of the International Criminal Tribunal for Former Yugoslavia, UN DECIT/32/Rev.37 (1994), Rules 100 and 101.
[43] Rule 101 of the Rules of Procedure and Evidence of the International Criminal Tribunal for former Yugoslavia.
[44] See D Jacobs, 'Positivism and International Criminal Law: the Principle of Legality as a Rule of Conflict of Theories' (2012) p. 18 <http://ssrn.com/abstract=2046311> accessed on 3rd May 2018 noting that: 'One general point that needs to be made on customary international law in relation to positivism, and which applies also in the context of international criminal law, is that this source of law, in the operation of its identification necessarily implies the consideration of extra-legal considerations. Indeed, in examining whether a rule of conduct has attained a customary law status, one has to put oneself in the position of the legislator (States, in the case of customary international law) to determine whether there existed an intent to make this particular norm binding in international law, in a way that other sources of international law does not require. Indeed,

punishment must be defined by a written law and that legislation prohibiting a conduct must not be retroactive among other requirements. Cassese, Gaeta *et al* list the following as the contents of the principle of legality, i.e., (a) criminal offences may only be provided for in written law enacted by parliament, and not in customary rules or secondary legislation which does not emanate from the Parliament in accordance with the maxim *nullum crimen sine lege scripta*; (b) criminal legislation must comply with the principle of specificity, clarity and certainty expressed in the maxim, *nullum crimen sine lege sricta*; and (c) Criminal rules may not be retroactive, expressed in the maxim, *nullum crimen sine proevia lege*; and prohibition of resort to analogy in applying criminal rules.[45]Gallant identifies eight fundamental contents of the principle of legality, namely: (1) No act that was not criminal under a law applicable to the actor (pursuant to a previously promulgated statute) at the time of the act may be punished as a crime; (2) No act may be punished by a penalty that was not authorised by a law applicable to the actor (pursuant to a previously promulgated statute) at the time of the act; (3) No act may be punished by a court whose jurisdiction was not established at the time of the act; (4) No act may be punished on the basis of lesser or different evidence from that which could have been used at the time of the act; (5) No act may be punished except by a law that is sufficiently clear to provide notice that the act was prohibited of the time it was committed; (6) Interpretation and application of the law should be done on the basis of consistent principles; (7) Punishment is personal to the wrong dear meaning that collective punishment may not be imposed for individual crime; and (8) Everything not prohibited by law is permitted.[46] In Ikpang's view, the principle of legality is one of the 'venerated concepts in the Anglo-American and indeed Nigerian Criminal Law.'[47]

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while, in the case of a treaty, the signature and ratification of the treaty by States and its official entry into force will be the determining factor in determining the creation of a new legal rule, the informality of customary international law formation requires to delve into the actual intention of States to adopt a certain legal rule as customary. This in turn means that the various considerations that pertain to the adoption of the rule will need to be examined, and these considerations will inevitably be extra-legal, whether political, social or moral, as is the case in any decision to adopt a law.'

[45] See A Cassese, P Gaeta, et al., *Cassese's International Criminal Law Third Edition* (3rd edn, Oxford University Press 2012) 23-24.

[46] K S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 11.

[47] I Crisan, 'The Principle of legality "*nullum crimen nulla poena sine lege"* and their Roles' *Effectius Newsletter,* (2010) *issue 5* <https://es,csribd.com/document/196806247/The-Principle-of-Legality-Nullum-Crimen-Nulla-Poena-Sine-Lege-and-Their-Role-lulia-Crisan-Issue 5-16811416> accessed on 23rd August, 2018.

[47]Z A J Ikpang, 'Assessing the Principle of Legality in Nigeria Criminal Law' (2017) 5 *Journal of Law, Policy and Globalisation,* 604.

Crisan traces the origin of the principle to post-World War II when a set of compelling criminal statutes were established and the drafters of the Nuremberg Statute affirmed the notion of individual responsibility from legal, moral and criminal perspectives.[48] Cassese, Gaeta et al. go deeper noting that, '[h]istorically, this doctrine stems from the opposition of the baronial and knightly class to the arbitrary power of the monarchs, and found expression in Article 39 of Magna Carta libetarium of 1215.'[49] The principle is associated with attempts to constrain states, governments, judicial and legislative bodies from enacting on retroactive legislation, or *ex post facto* clause.[50] It also ensures that all criminal behaviour is criminalised and all punishments established before the commencement of any criminal prosecution.[51]

While distinguishing between types of conduct that are *mala in se*, i.e., inherently wicked such as murder and those that are *mala prohibita*, i.e., not regarded as serious, such as traffic parking offences, a scholar warns of the insignificance of or limited usefulness such distinction as 'we cannot escape the fact that the offending motorist and the murderer are treated in the same sort of way-they are tried and they are punished.'[52] A person cannot therefore be found guilty of a criminal offence unless two elements are present namely an *actus reus*, i.e., the guilty act and the *mens rea*, i.e., the guilty mind.[53] The *actus reus* and the *mens rea* of a crime are identifiable from the definition of the crime and the definition of the crime is derivable from the language in which the crime is couched.[54] This has to be the case because for a particular act or omission to amount to an offence, the ingredients, i.e, the *mens rea* and the *actus reus* must be identifiable from the definition of the offence.[55]

Customary international law norms are unwritten and will therefore fail the requirement of specificity.[56] Jacobs finds that international criminal tribunals had had to rely on a combination of practices from numerous sources such as treaty practices, resolution of international organisations, national army manuals and decisions of local courts and tribunals in ascertaining whether there are enough evidence of state practices and *opinion*

[48]Crisan (n 45).
[49] Cassese, Gaeta (n 43) 22.
[50]Crisan (n 45) 1.
[51] ibid.
[52] ibid.
[53]Okonkwo (n 32) 20.
[54]Ikpang (n 46) 119-120.
[55]Ikpang (n 46) 120.
[56] See *Knuller (Printing and Promotion) Ltd v Director of Public Prosecutions* (1973) AC 435 per Lord Reid.

juris in the determination of the existence and the normative contents of customary law.[57] There is no consistency in the relative weight given to these elements of evidence as well as the two elements of custom namely *opinion juris* and state practice.[58]

Another problem with customary law and the principle of legality lies in the difficulty of foreseeing the prescription of its norms given that the process of its formation lies in the 'border between law and non-law,'[59] It is this difficulty that has led a commentator to castigate the norms of customary international law as 'being dangerously indeterminate[60] and consequently makes foreseeability as constituent element of the principle legality very difficult.[61] A clear evidence of absence of clarity in the exact contents of the norms of customary law is the frequency in which judges of international criminal tribunals have had to rely on their personal moral evaluation in effort to establish certain norms of customary international law. In *Tadic Case*, the Appeal Chamber of ICTY while considering whether certain methods of warfare were prohibited in internal armed conflict finds that;

> …elementary consideration of humanity and common sense make it preposterous that the use by states of weapons prohibit in armed conflicts between themselves be allowed when state try to put down rebellion by their own nationals on their own territory. What is inhumane… in international wars cannot but be inhuman and inadmissible in civil strife.[62]

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[57] D Jacobs, 'Positivism and International Criminal Law: the Principle of Legality as a Rule of Conflict of Theories' (2012) p. 19 < http://ssrn.com/abstract=2046311> accessed on 3rd September 2018; See also A Cassese, P Gaeta, et al., *Cassese's International Criminal Law Third Edition* (Oxford University Press 2012) 13 noting that: '...[International Criminal Law] bears a strong resemblance to the criminal law of such common law countries as England, where next to statutory offences there exist many common law offences, developed through judicial precedents. However, the deficiency deriving from the unwritten nature of customary law is less conspicuous in England than in [International Criminal Law]. The existence of a huge wealth of judicial precedents built over centuries, the hierarchical structure of the judiciary coupled with the doctrine of "judicial precedent" (whereby courts are bound by the decisions of higher courts) tend to meet the exigencies of legal certainty and foreseeability proper to any system of criminal law. In contrast, [International Criminal Law] is still in its infancy, or at least adolescence: consequently, many of its rules still suffer from their loose content, contrary to the principle of specificity proper to criminal law. ...customary international rules may normally be drawn or inferred from judicial decisions, which to a very large extent have been handed down, chiefly in the past, by national criminal courts (whereas by now there exists a conspicuous number of judgments delivered by international criminal courts). As each state court tends to apply the general notions of national criminal law even when adjudicating international crimes, it often proves arduous to find views and concepts that are so uniform and consistent as to evidence the formation of a rule of customary international law.'

[58] Jacobs (n 55) 19.

[59] I Gradoni 'Nullum Crimen Sine Consuetudine: A Few Observations on how the International Criminal Tribunal for the Former Yugoslovia has been Identifying Custom' (2005) 19 < https://cris..unibo.it/handle/11585/7954> accessed on 16th September, 2018.

[60] Jacobs (n 55) 19-20.

[61] J D'Aspremont, *Formalism and the source of International Law* (Oxford University Press 2011) 164.

[62] Jacobs (n 55) p. 21 notes: 'The effect of the customary law process on foresee-ability is compounded by the rather liberal use by international tribunals of evidence that post-dates the actual conduct under investigation.

It usually takes judges of international criminal tribunals' complex efforts of scanning through several national laws, national decisions and treaties in the determination of whether a particular rule has reached a customary status and that this difficult search is also compounded by dissents from other judges, practitioners' and experts' opinion and the perspectives of academics.[63] It worries Jacobs how in the light of these complex context one can hope 'that an alleged perpetrator is expected to know that his conduct was criminal at the time it occurred when faced with customary rule.'[64]

The characteristics features of customary international criminal law enumerated above make it unsuited for the domain of Nigerian criminal justice system. The requirement of principle of legality in Nigerian criminal law has both statutory and constitutional support. In Nigeria, it is a constitutional requirement, not only that a crime must have been created by a written law, the punishment prescribed must also have been specified in a written law.[65] Ruminating over this issue, Okonkwo posits, '[a] man cannot be convicted of an unwritten offence.' Written offences are usually defined with reasonable amount of clarity, so that a man is left with considerable capacity of choice in deciding whether he will or will not infringe the law. He cannot be convicted for conduct which has been rendered criminal only subsequent to his commission of it nor rendered liable to 'a punishment severer than that which was prescribed for his offence at the time that he committed it.'[66] In *Phillip v Eyre*,[67] the court stated that , '... legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing law.' This is the rule against retroactive legislation, particularly more rigorously enforced in

For example, the ICTY has extensively relied on the ICC statute to determine the existence on an *opinion juris* or practice relating to certain crimes.'

[63]*Prosecutor v DuskoTadic*, Decision on the Defence Motion for Interlocutor Appeal on Jurisdiction, ICTY Appeal Chamber, 2 October 2005 para. 119.

[64] See Jacobs (n 55) 27 noting further that; '…even if one does not adhere to a strict application of the principle of legality, that requires a written law for example, it is often the case that customary law will in any case not satisfy requirements of foresee-ability and specificity that are usually required in respect of the principle of legality. As a result, it could be argued that customary law should, as much as possible, be avoided as a source of ICL.'

[65] Section 36(12) of the Constitution of the Federal Republic of Nigeria provides: 'Subject as otherwise provided for by this Constitution, a person shall not be convicted of a criminal offence unless that that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a Law.'

[66]Article 24 (2) of the ICTY Statute.

[67](1870) 6 QB 1.

criminal law. In Nigeria it is a core constitutional rule and a constituent element of the right to fair hearing. Section 36(8) of the Nigerian 1999 Constitution states that a person cannot be held guilty of a criminal offence on account of an act which did not constitute a crime at the time it was done, nor can a penalty be imposed which was not in existence at the time of the commission of a crime.

Section 2 of the Criminal Code Act,[68] which is applicable in each of the southern states of Nigeria, defines an 'offence' as that an act or omission which renders the person doing the act or making the omission liable to punishment under this Code or under any Act or Law.[69] Similarly, the Penal Code which is applicable in the northern states of Nigeria provides that every person shall be liable to punishment under the code for every act or omission contrary to the provisions of the code and such persons shall be guilty within the state.[70]Again sections 6 (5) and (6), 36(8) and (12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and case law on the right to fair hearing in Nigeria clearly cover the eight propositions articulated by Gallant.[71] Section 36 (8) of Nigerian 1999 Constitution stipulates that a person cannot be held guilty of a criminal offence on account of an act which did not constitute a crime at the time it was done, nor can a penalty be imposed which was not in existence at the time of the commission of a crime. In *Afolabi & Ors v Governor of Oyo State &Ors*, the Nigerian Supreme Court per Aniagolu, JSC stated:

> Based upon the presumption that a legislature does not intend what is unjust the courts have always learned against giving statutes a retrospective effect and usually regard them as applying to facts or matter which come into existence after the statutes were passed unless it is clearly shown that a retrospective effect was intended. The principle is *lex prospicit non respicit*, that is the law looks forward and not back.[72]

The issue is whether concerning statutes creating crimes it can clearly be shown that a retrospective effect was intended. It is clear that given the clear and express provisions of section 36 (8) of the Nigerian Constitution, any law showing intention of being retrospective

[68] Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria, 2004.
[69]Ikpang (n 46) 20.
[70] Section 2 Penal Code Act, Cap. P3, Laws of the Federation of Nigeria 2004.
[71] Gallant (n 44) 11.
[72] (1985) 9 SC 117, 164-165.

will be unconstitutional.[73] In the words of Mowoe, in the area of criminal law, even where the language of the statute requires retrospection, the statute will be unconstitutional having regard to the provision of section 36 (8) of Nigeria Constitution.[74]

Closely related to the foregoing is the requirement under section 36(12) of Nigeria Constitution to the effect that 'a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law.' The written law in the context of section 36 (12) of Nigeria constitution is an Act of the Nigerian National Assembly or Law of a state House of Assembly and other subsidiary legislations or instruments under the provision of these categories of legislations. In *Aoko v Fagbemi,*[75] it was held that it was unconstitutional to convict a woman on a charge alleging commission of adultery when there was no law prohibiting adultery as a conduct and prescribing punishment for its violation. A mere directive of the President of Nigeria or the Governor of a state in Nigeria cannot create a crime or prescribe the punishment for such crime. In *Okafor v Lagos State Government & Anor,*[76] the appellant was convicted for violating the directive of the Governor of Lagos state on the observance of 'no movement' restriction in a date presented as environmental sanitation day in Lagos State Nigeria. The Nigerian Court of Appeal, while reversing the decision of the lower court held:

> The offence which the appellant allegedly committed and for which she was convicted 'wandering, loitering and walking about in defiance of the monthly compulsory environmental sanitation exercise'… there is no such offence prescribed in any written law. The concomitance is that the purported trial conviction of the appellant for an offence that is not defined and the penalty therefore prescribed in a written law is a violation of her right to fair hearing.

Conclusion

In conclusion, it is clear from the foregoing analysis that, as the law stands today in Nigeria, there exists serious institutional, constitutional, doctrinal, and theoretical inhibitions that

[73] See section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
[74] K M Mowoe, *Constitutional Law in Nigeria* (Malthouse Press Limited 2008) 390; Section 36 (8) of the Constitution of the Federal Republic of Nigeria 1999 provides: '36(8) No person shall be held to be guilty of a criminal offence on the account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.
[75](1961) All NLR 400.
[76] See section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

have combined, in no small measure, to stack imponderable hurdles on the way of any effort aimed at bringing perpetrators of Core International Crimes to justice in Nigerian domestic courts under the appropriate label of crime. Some of these legal hurdles can be located in the failure to prescribe punishment for war crimes applicable in internal conflict (enumerated in Common Article 3 of the Geneva Conventions) in local implementation law called the Geneva Conventions Act and the grant of the discretionary power of the decision to prosecute and prescription of punishments for these crimes on the President of the Republic under the Act; a development that makes administration of internal criminal justice susceptible to executive arbitrariness. Also posing a great challenge is the failure of Nigeria to pass local implementation legislations in respect of international criminal law creating treaties such as the Rome Statute to which Nigeria is a signatory. The problem of lack of specificity, clarity and the doctrinal challenge that its norms do not arise from democratic parliamentary law-making process renders customary international criminal law impotent as a means of covering legal gaps arising from half-hearted domestication of the Geneva Conventions and the failure to make local criminal legislations in fulfilment of treaty obligations. The constitutional requirement that no one can be prosecuted except for an offence except such offence is well defined and the punishment for it prescribed in a written worsens the prospect of resort to customary international criminal law as a tool for bringing atrocity crimes perpetrators to justice in Nigerian domestic courts.