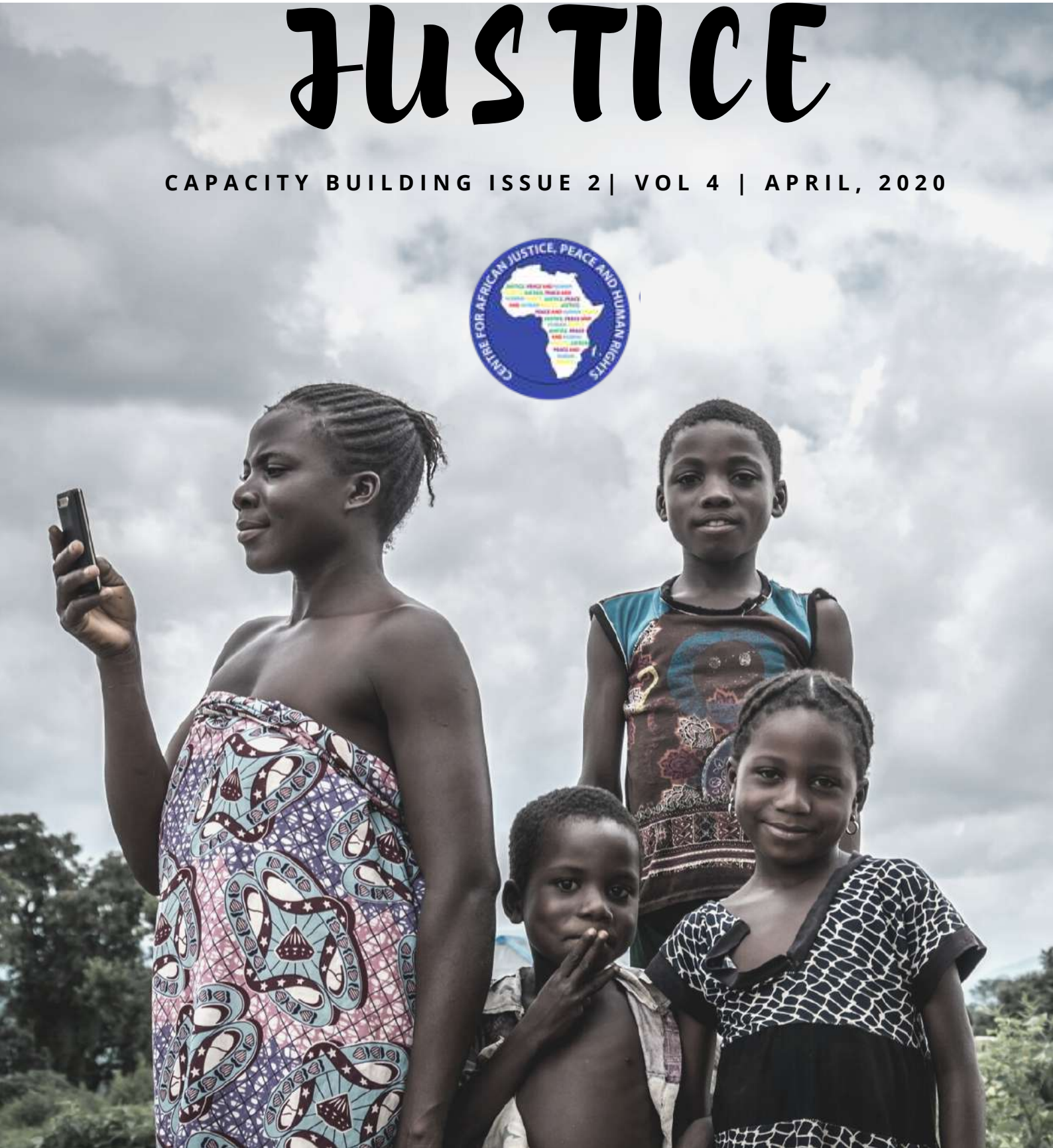
CENTRE FOR AFRICAN JUSTICE

CAPACITY BUILDING ISSUE 2| VOL 4 | APRIL, 2020



WITH SPECIAL EMPHASIS ON NIGERIA

Centre for African Justice, Peace and Human Rights

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“Some 123 countries are States Party to the Rome Statute of the International Criminal Court.

Out of them 33 are African States.

This amounts to the highest number of States Party from a particular region.”

–

International Criminal Court (ICC)

UNDERSTANDING THE METHODOLOGY BEHIND LEGAL CAPACITY BUILDING

WHAT IS IT?

Process by which individuals and organizations obtain, improve, and retain the skills, knowledge, tools, equipment and other resources needed to do their jobs competently or to a greater capacity.

HOW TO PROCEED?

- Conduct empirical research to assess the working of the governance by the African states in relation to the criminal justice sector in Africa.
- Conduct doctrinal research focusing on case-laws, statutes and other legal sources.
- Investigating through comparative studies the historical and cultural context that gives rise to the development of legal rules in different legal systems.

- Fundraising,
- Training centres
- Exposure visits
- Office and documentation support
- On-job training
- Learning centres
- Consultations

Having focal people working at ground zero in different African states.

- Understanding of the history of law, Comparing what the law was previously, and now and how it might be evolving or developing and if it is currently in tandem with the modern day problems and situations faced by these African states.
- Getting informed on how the social and economic crisis in these countries is affecting the people in terms of knowledge about the rule of law, general legal procedures and access to justice.

'Capacity-Building' suggests building something new from the ground up. 'Capacity-Development' is believed to better express an approach that builds on existing skills and knowledge, driving a dynamic and flexible process of change, borne by local actors.

If the African constitutions have overlooked or failed to address the innumerable regressive provisions and human rights abuses inherent in customary laws and practices which may have a cultural context behind it during its formation, this may result in certain crimes not being prosecuted.

All of these factors are taken into consideration in order to assess the working of the rule of law in these states.

CAPACITY BUILDING RESEARCH METHODOLOGY

Engage stakeholders

STEP 01

The more involved stakeholders are, the more effective decision-making are. It also makes development work more transparent.

Assess capacity needs and assets

STEP 02

What areas require additional training? What areas should be prioritized? In what ways capacity building can be incorporated into local and institutional development strategies?

Formulate a capacity building response

STEP 03

Institutional arrangements.
Leadership.
Knowledge.
Accountability.

Implement a capacity building response

STEP 04

It involves continual reassessment and expect change depending on changing situations.

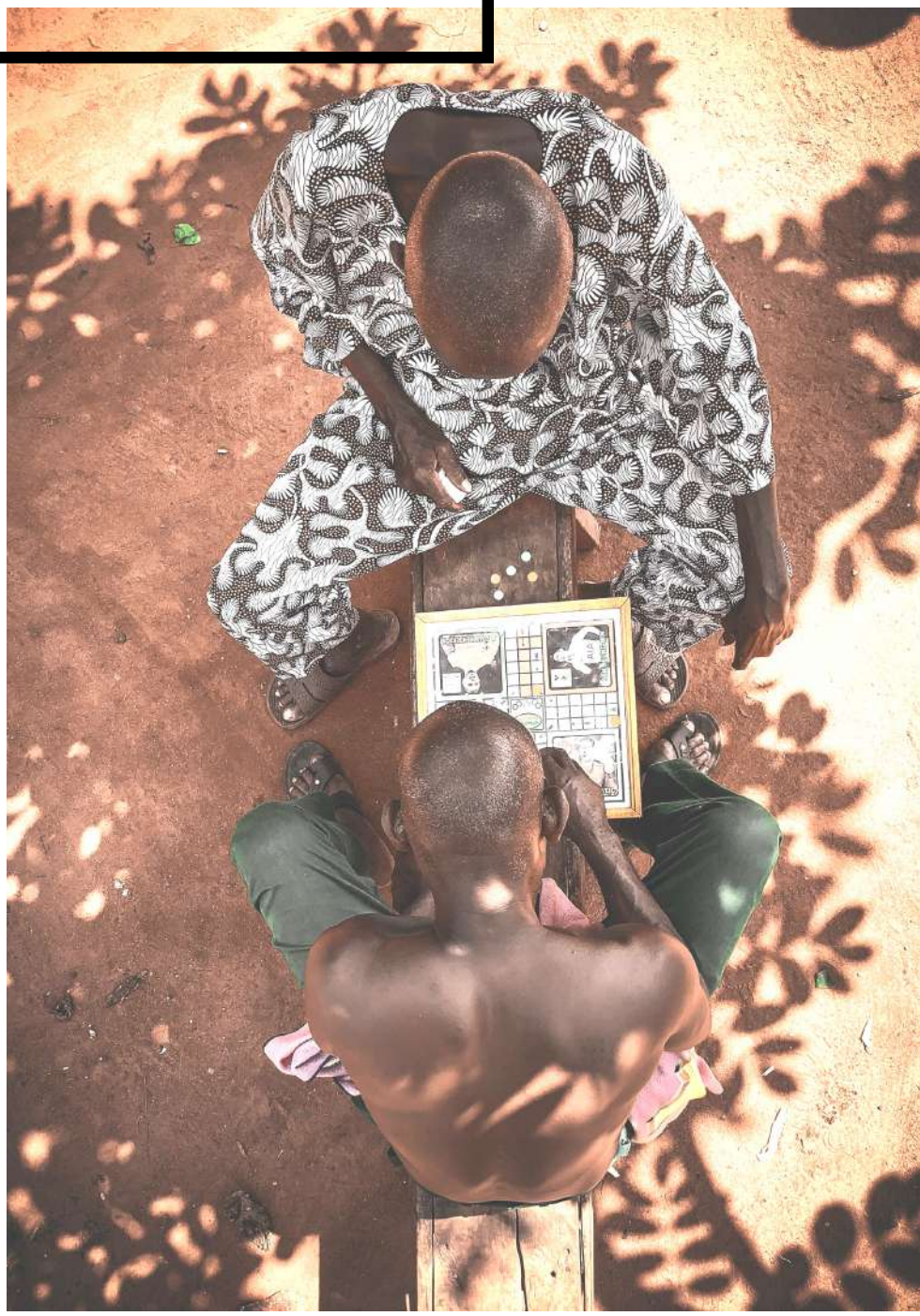
Evaluate capacity building

STEP 05

It promotes accountability. Measurements is based on changes in an institutions performance

LEGAL TRADITIONS IN NIGERIA: THE LAND OF MYRIAD LAWS

Words by Eden Shosanya



Nigeria has a rich and bountiful history. Composed of a number of different tribal kingdoms, the legal history of Nigeria is incredibly diverse with each tribe and ethnic group having their own way to resolve disputes. Nigeria, as a country full of unexploited resources, was of extreme interest to the British Empire. After the conclusion of the Napoleonic Wars, the British government claimed the lands of Nigeria as a protectorate separating them into the two distinct constituents of North and South.

Whilst Nigeria was formally introduced as a colony in 1914 the separation of North and South was still seen in the administrative handling of the colony with the British Empire focusing more strongly on the Southern parts of Nigeria and Lagos, in particular, due to the wet and fertile land found in the southern provinces and the ideal coastal location.

Although, there were calls for Nigerian independence after the conclusion of the Second World War, Nigeria was not formally granted independence from British rule until October of 1960. However, this did not mean that British influence vanished from Nigeria entirely. The legal system which has been left behind being just one of many reminders for Nigeria's former colony status.

The diverse history of Nigeria is highly evident in its legal heritage which comprises distinct legal systems: English Law, Common Law, Customary Law, and Sharia Law.

ENGLISH LAW

English law was derived from British rule in Nigeria. Within the inherited legal system of English Law there are three main components. These are English Common Law, the Doctrine of Equity, and the Statutes of General Application.

English Common law originated from the British Courts, namely the King's Bench.

Over time, this evolved into a law of judicial precedent, with judges following the ruling of their predecessors instead of looking at them as guidelines.

The Doctrine of Equity was developed through the chancery due to concern about the rigidity of common law rulings and through the actions of King James. This meant that common law rulings and equity were remedies that could be brought under the same action. Thus, equity is often used to supplement areas where common law rulings are lacking.

Statutes of general application are the laws made by the British parliament and were transposed into Nigerian law through statutes and legislation. Over the years more of these laws have been repealed or replaced by more Nigerian centric rulings.

However, some of these statutes were simply transposed directly into Nigerian High Court laws. One example is the rule on probate.

Photo: Royal Archives

COMMON LAW

Common Law in Nigeria came into being after its release from British rule. Similarly, to the British imposed Common Law, Nigerian common law is derived from the rulings of its judges.

The State Courts, who tend to deal with English law cases, and the Customary Courts that handle customary law cases, amongst others, are at the bottom of hierarchy of court systems in Nigeria.

Above, the State Courts are the Federal High Court, the High Court of a State, the Sharia Court of Appeal of a State and the Customary Court of Appeal.

Judgments from the aforementioned four courts can be appealed at the Court of Appeal that is based in Abuja. The Supreme Court of Nigeria, which is also based in Abuja, is the final appeal court in the country. The Supreme Court also deals with State to State cases.

CUSTOMARY LAW

There are over 250 ethnic groups in Nigeria, composed of numerous different communities. Amongst the largest groups are the Hausa-Fulani, Igbo and Yoruba people.

Customary law, therefore, is derived from the norms, values, and practices of Nigeria's indigenous peoples and their traditional ways of solving disputes.

The customary law of Nigeria's ethnic peoples are often passed down through oral traditions. This can lead to uncertainty when this type of law is being enforced.

The courts governing customary law are at the lowest level of the court hierarchy in Nigeria and are often presided over by individuals with little to no legal training.

Photo: Ben Curtis/ Associated Press

SHARIA LAW

Sharia law came to Nigeria in approximately 1068 BC through the Borno Empire. Historicaly, it was most often used in Northern Nigeria, where Islam is the prominent religion. However, Sharia law is present within other parts of Nigeria with Muslims using Sharia law in Lagos.

Although, a distinctly separate legal tradition Sharia law comes under the umbrella of Customary Law in Nigeria despite its separate court system.

The inclusion of Sharia law in the Nigerian legal system is evident through the Court of Appeals which is Nigeria's second highest court. Within the Court of Appeal, it is required by Nigeria's constitution that at least three judges who are well versed in Islamic Personal law are appointed as this is the court where the different legal traditions of Nigeria occur.

Nigeria's legal system has adapted and changed throughout its history, to better fit the needs of its people. The differing legal traditions and their various courts can often result in jurisdictional conflict when cases reach the Court of Appeal, despite the constitutional requirements.

However, the direct transposition of a set of laws via colonisation does not necessarily reflect the feelings of the Nigerian people in regards to their laws.

Despite some disagreement, the idea of a homogenised legal system that applies to the entirety of Nigeria is most often rejected by various religions and ethnic groups. These groups, who are of the opinion that their specific traditions and laws will not be recognised, firmly reject a legal unification of Nigeria's various legal traditions.

Centre for African Justice, Peace and Human Rights

"Of all regions, sub-Saharan Africa has the highest rates of education exclusion.

Over one-fifth of children between the ages of about six (6) and 11 are out of school, followed by one-third of youth between the ages of about 12 and 14.

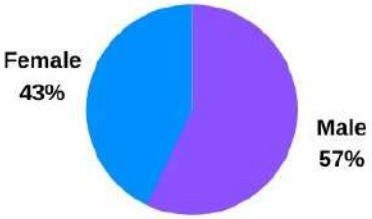
According to Unesco Institute for Statistics (UIS) data, almost 60% of youth between the ages of about 15 and 17 are not in school."

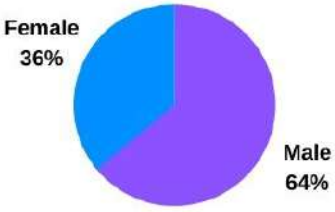
United Nations Education, Science and Culture Organisation (UNESCO)

NIGERIA

EDUCATION STATISTICS

Admissions into Nigerian undergraduate and postgraduate programmes in 2017, respectively





Nigerian University System Statistical Digest, 2017

Nigeria has a total of 34 universities with Law degrees (Federal, state and private owned)

News on the go

In 2018, 4 779 Law graduates passed their bar examination, out of a total of 5 846 students.

From the 161 First Class graduates, 113 were female and 48 male.

Vanguard News

"EDUCATION IS ONE OF THE MOST IMPORTANT ASPECTS OF SOCIAL AND ECONOMIC DEVELOPMENT", Demographic and Health Survey 2018

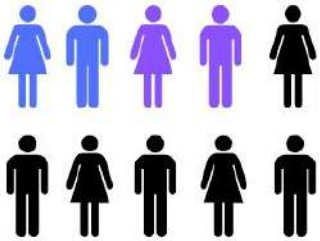
Between all 146 Nigerian universities, there is a total of 62 000 academic staff (21,86% female).

Non-teaching staff involves 127 259 people (35,27% female).

LEGAL STATISTICS

Each year, only 40% of people with legal problems solve them definetely, with only 20% engaging in formal institutions.

In 2014/2015, 49% considered courts to be too expensive.



*Afrobarometer 2017; HiiL, 2018.

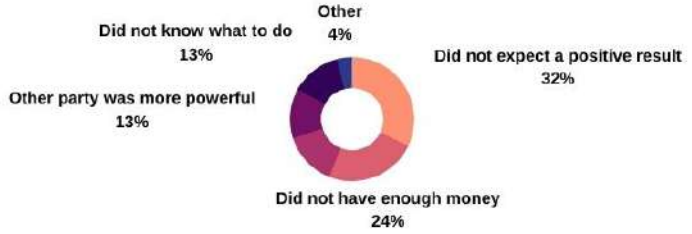
43% believe general corruption increased throughout 2018.

69% believe in corruption within the Police and 51% within judges and magistrates.

59% do not believe the government is effectively tackling corruption, and 41% do not believe ordinary people can make a difference.

*Global Corruption Barometer - Africa 2019

Deficient access to Justice
"Why did you choose not to take action?"



*HiiL, 2018.

Nigeria's 250 prisons are overcrowded, with 74 000 inmates, from which 68% are awaiting trial.

More than 2 000 people are in the death row, ranking the highest in Sb-Saharan Africa.

*Voa News

In 2018, 30% of those who contacted with a public official (were asked to) paid a bribery.

Police officers rank the highest on these public officials (33%), followed by land registry officers (26%).

*United Nations Office on Drugs and Crime

In 2019, Nigeria ranked worldwide 106/126 in the Rule of Law.

It is further placed 79/126 in civil justice and 72/126 in criminal justice.

It ranked 99/126 in fundamental rights and 100/126 in regulatory enforcement.

Barrister Patrick Mbata Okechukwu is a practicing lawyer in Lagos, Nigeria who has nine (9) years experience in the legal field. He specializes in matrimonial cases, matters pertaining to Children's Rights and Custody & Estate matters (Testate & Intestate). He studied Law at Ahmadu Bello University, Zaria from where he proceeded to the Nigerian Law school, Lagos.

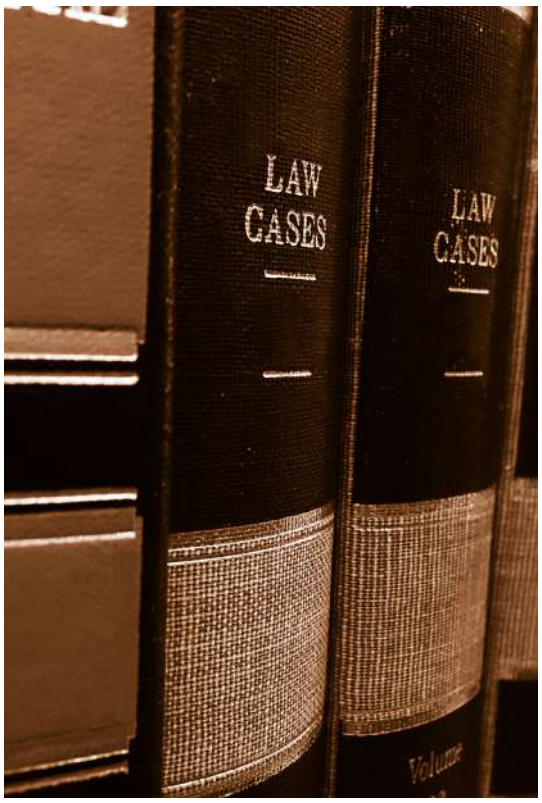
EXCLUSIVE

INTERVIEW

Understanding Nigeria's Legal Education system

Barrister Ken Nwankwo practices Law in Onitsha, Nigeria. He has nine (9) years experience and specializes in Revenue and Taxation matters. He studied Law at Nnamdi Azikiwe University in Awka before matriculating at the Abuja Campus of the Nigerian Law School. Barrister Nwankwo holds a Master's Degree and is currently working on his doctoral thesis.

What do you think about the current state of legal education in Nigeria?



Ken Nwankwo: In my opinion, what is taught in the Law school and University is quite different from what is really obtainable in legal practice. The legal education mostly focuses on the theoretical aspects of the law, thereby undermining the need for practical training provided to thepupils.

Patrick Mbata Okechukwu: Legal Education in Nigeria, as it is presently structured, might soon become grossly inadequate if there is no paradigm shift to present day realities like the effect of Artificial Intelligence (A.I.) on the Law and legal education/practice. The importance of the internet cannot be overemphasized.

How do you think we can revamp the structure of Legal Education in Nigeria? What is the way forward?

Ken Nwankwo: One of the ways to revamp the present structure of legal education is less theory and more practice. Exams should not be the core test of a potential attorney, Law students should be graded on their ability to solve practical legal problems.

Patrick Mbata Okechukwu: As I answered the previous question, the best way forward is the introduction of artificial intelligence in legal education. We need to use the latest technology and practices to bring about a change in the legal education system. Also, we need to get done with the outdated practices of teaching and the curriculum.

What are the challenges that women law students face in comparison to men?

Ken Nwankwo: I don't think women face any different or unique challenges in terms of legal education in our country. Both [women and men] get similar opportunities. It is up to the individual how he [or she] makes most of the opportunities presented at them. Men and women both go through the same challenges and obstacles when it comes to studying Law.

Patrick Mbata Okechukwu: In comparison to their male counterparts, I don't think women are disadvantaged in the study of Law. Experience has shown that women do better in Arts, Humanities and in disciplines that require oratorical capabilities (legal advocacy). Women are better endowed in the use of words. The only factor that can become an impediment is early marriage and child bearing. For a woman, the earlier she pursues her legal education, the better for everyone.

What do you think about Legal Capacity Building at the undergraduate and level?
Do you think it would be beneficial if we conduct training and workshops by bringing in experts on different subjects of law?

Ken Nwankwo: It is my firm belief that legal capacity building through training and workshops by experts who specialize in different areas of the Law would go a long way towards uplifting the quality of delivery of legal education thereby providing a stronger platform of learning for budding lawyers and Law students.

Patrick Mbata Okechukwu: There are different facets to legal capacity building. Personally, I am awed and, at the same time, worried about the extent at which artificial intelligence is taking over with less and less human interference. I'm told that with A.I. even medical solutions are provided online. What hope do we have with the Law in the near future? Though, coming back to capacity building, I think it is a great way to equip students and professionals with knowledge about different facets of Law through training and workshops. That would do a world of good to them.

What do you think of the International Criminal Court's (ICC's) approach towards Africa in terms of International Criminal Law?

Ken Nwankwo: The ICC, unfortunately, has failed to do what is necessary as regards with prosecuting African leaders who loot their countries dry and abuse human rights on a daily basis. The ICC has shown over the years and presently, in peculiar cases, that it lacks the independent investigative mechanism to operate effectively. It, therefore, appears to lean towards the government in power. Africa is filled with dictators who disobey court orders and literally order infringements on human rights. How do you explain government agents shooting at the peaceful protesters with live bullets and, thereafter, nothing happens? When these cases are brought before the ICC they should be ruthlessly dealt with for other leaders to learn.

Patrick Mbata Okechukwu: I will look at this from the perspective that [the United States of America] U.S.A., and some other superpowers in the world, have refused to sign [and/or ratify] the Rome Statute [of the International Criminal Court], thereby not subjecting themselves to the jurisdiction of the ICC. The U.S.A., Russia, China etc. have all refused to ratify [the Rome Statute] and subject themselves to the jurisdiction of the ICC. How come, with the series of unjustified wars that the USA has instigated in Vietnam, Libya, Afghanistan, Iraq, etc, no former President of the United States has been indicted to be prosecuted for war crimes? Why has it only been African leaders which have been, and are being, prosecuted for war crimes at the ICC? There have been calls for Africans to boycott the ICC. Al Bashir, the former President of Sudan, was even assisted by some African leaders in evading the ICC warrant for war crimes. The ICC becomes very powerful when African leaders are involved, but when powerful nations are involved it becomes toothless and weak.

HOW DO YOU PERCEIVE YOUR FUTURE AS A LAWYER IN NIGERIA? WHAT IMPACT DO YOU SEE YOURSELF BRINGING ABOUT?

Ken Nwankwo: Ours is a failed system. The system needs to be cured first. Only then can we think about making plans for the future. Our hands are tied. Court orders are being disobeyed with reckless abandon. It is survival of the fittest here. We can only do our best in a very crude system and pray for things to change for the better.

Patrick Mbata Okechukwu: The digital world is displacing anachronistic ways of doing things. If I want to remain relevant and make the desired impact then I must go digital; I must not be narrow-minded. It is very likely that, in the near future, only those with online presence will be impactful and the rest may just fizzle out into abysmal obliviousness.

A BRIEF INSIGHT INTO

THE MOST CONTROVERSIAL MAN IN AFRICA: OMAR HASSAN AHMAD AL BASHIR

WORDS BY MARVIN LINDIJER

Who is Omar Hassan Al Bashir?

Omar Hassan Ahmad Al Bashir, the former president of Sudan, was born in the north of Khartoum as the son of a traditionally pastoralist family. He attended military school and steadily rose in the ranks of the Sudanese army to the rank of Brigadier General. During his time as an army general, Al-Bashir participated in combat duty in the southern region of Sudan fighting mainly against the Sudan People's Liberation Army (SPLA). In 1989, Al-Bashir deposed his predecessor Sadiq al-Mahadi during a coup.. In a bid to establish a stable and civilian based Islamic government, he absolved the military government in 1993 and appointed himself as civilian president. Al-Bashir has been democratically elected on three occasions and served as president between 1989 and 2019. He has been under continuous scrutiny amid allegations of electoral fraud and human rights abuse during the Sudanese civil wars.

What is the Darfur war and the Sudanese civil wars?

In contemporary history, Sudan has been plagued with various internal conflicts primarily between the northern Arab tribes and southern African tribes. Since 1969, the war developed effectively into a struggle between Al Bashir's Government in the north against the Sudan People's Liberation Army (SPLA) in the south.

Above
Sudanese protesters march during a demonstration to commemorate 40 days since a sit-in massacre, in Khartoum,. Photo: Routers.

The SPLA was formed in western Sudan and claimed that Al Bashir's government was neglecting the arid southern region while arming Arab militia groups who would fight against civilians. The war resulted in millions of southerners being displaced, starved, and deprived of education and health care, with almost two million casualties.[1] Various attempts for peace and a ceasefire have been made by the international community. However, the presence of both the United Nations (UN) and the African Union (AU) peacekeepers has failed in achieving long lasting peace.

What crimes has Al Bashir been accused of committing?

On 14 July, 2008, the then prosecutor at the International Criminal Court (ICC), Luis Moreno Ocampo alleged that Al-Bashir bore individual criminal responsibility for genocide, crimes against humanity, and war crimes which were committed in the Darfur region of South Sudan between 2003 and 2008.[2] This pronouncement was followed by two arrest warrants. The first arrest warrant, with an indictment for two counts of war crimes and five counts of crimes against humanity including murder, extermination, forcible transfer, torture, rape and pillaging[3], was issued on 4 March, 2009 following a judgment by Judge Anita Usacka, Judge Akua Kuenyehia and Judge Sylvia Steiner. There was also a dissenting opinion that Al-Bashir should have been charged with genocide.[4] The second warrant was issued on 12 July, 2012 after the Pre-Trial Chamber held that there were reasonable grounds to believe that Al-Bashir, as de jure and de facto President of Sudan and Commander in Chief of the Sudanese Armed Forces, had committed various crimes under the Court's jurisdiction.[5]

The war resulted in millions of southerners being displaced, starved, and deprived of education and health care, with almost two million casualties.

[1] FACTBOX - Sudan's President Omar Hassan al-Bashir. (2008, July 14). Retrieved from https://www.reuters.com/article/uk-warcrimes-sudan-bashir-profile/factbox-sudans-president-omar-hassan-al-bashir-idUKL1435274220080714
[2]ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur. (2008, July 14). Retrieved from https://www.icc-cpi.int/Pages/item.aspx?name=a
[3]Warrant issued for Sudan's leader. (2009, March 4). Retrieved rom http://news.bbc.co.uk/2/hi/africa/7923102.stm
[4]International Criminal Court (4 March 2009). "Warrant of Arrest for Omar Hassan Ahmad Al Bashir" (PDF)
[5]Omar al-Bashir, Sudan's ex-dictator, could at last face justice. (2020, February 13).

Above: Sudanese refugees are calling on South Sudan's President Salva Kiir to mend relations in Sudan. Photo: Sam Mednick/Al Jazeera

Despite the efforts of both the ICC and human rights organisations, Al- Bashir remained a head of state who could avoid trial at the ICC

Why has his arrest warrant not been enforced?

Al Bashir has not yet arrived in the Hague, where the ICC is seated, for a number of reasons. Al-Bashir proclaims that the court lacks jurisdiction because, like the United States, China and Russia, Sudan has not ratified the Rome Statute[6]. This statement ignores the fact that jurisdiction is also triggered if the United Nations Security Council refers a situation to the ICC and that the Security Council adopted such a resolution in 2005.

The resolution is controversial and led to a political domino effect which included the African Union publicly condemning the warrant, Al-Bashir visiting several states that had ratified the Rome Statute and states like Saudi Arabia, Qatar, United Arab Emirates (UAE) and China.

These states, all of which had an obligation to arrest Al-Bashir and hand him over to the ICC allowed him to participate in state visits as per usual. So, despite the efforts of both the ICC and human rights organisations, Al- Bashir remained a head of state who could avoid trial at the ICC until he was forced out of power on 11 April, 2019.

[6]White, T. (2018, October 21). States 'failing to seize Sudan's dictator despite genocide charge'. Retrieved from https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant

Photo: Marina Riera Rodoreda/Human Rights

What next for al Bashir and the international criminal court?

Much has changed for both Al-Bashir and the Sudanese people since the first arrest warrant was issued. Months of protests and civil uprisings, which were sparked by rapid inflation and rising food prices in the last few months of his 30 year rule, led to Al Bashir being deposed. He was replaced by a transitional military council who has since, transferred power to a mixed civilian-military government headed by Prime Minister Abdalla Hamdock. As for Omar Hassan Al Bashir, he now sits in a Sudanese Prison. Abdallah Hamdock, recently with support of the civilian military council agreed to make him appear before the ICC, however, how Mr Bashir and his counterparts are to appear before the court is yet to be worked out. Because of the high political sensitivity of the issue, the current Sudanese government is hesitant as to the humiliation some Sudanese would feel if he were to be sent to The Hague.[7] Recently there have been discussions revolving around the idea of a hybrid court where he could appear in front of the ICC in Sudan rather than travelling to the ICC.[8] This is an obvious knock on effect of the controversy between the ICC and its role in Africa complicating the courts work; where a successful trial is based on effectively gaining custody of Mr Bashir.

Al-Bashir's extradition now depends on whether the Sudanese authorities transfer him, as they wish to do, or they follow the will of the Sudanese people and have a trial in Sudan despite concerns and criticisms by various actors that the situation in Sudan is not ideal for justice to be achieved.

[7]ibid 5

[8]Conclusions of the high-level AU UN consultations with the Government of Sudan on the Hybrid Operation - Sudan. (n.d.). Retrieved from https://reliefweb.int/report/sudan/conclusions-high-level-au-un-consultations-government-sudan-hybrid-operation

DIPLOMATIC IMMUNITY

As seen in the Vienna convention on diplomatic relations (VCDR)

Signatories

The VCDR has 60 signatories and 192 parties, yet most modern diplomatic immunity is considered customary international law.

Customary International Law

CIL comes into being through state practice, and *opino juris* (the belief that an action was carried out due to a legal obligation).

Types of immunities

There are two main types of diplomatic immunities that shall be discussed. These are personal immunity (*ratione personae)* and functional immunity (*ratione materiae).*

Both kinds of immunity protect the individual from criminal the criminal jurisdiction of receiving states, and in most cases from civil and administrative jurisdiction.

Their private residence, their person and their correspondence is inviolable.

Personal Immunity

Personal immunity is attached to the office of status of certain officials. This usually lasts as long as the individual remains in office. This includes Heads of State, and diplomats accredited to a foreign state.

Functional Immunity

Functional immunity relates to the actions one carries out whilst performing the necessary functions of their role (acts of state).

Derogation Grounds

Derogation from immunity can be found under cetain circumstances

Personal Immunity

- Prosecution in the Officials own State.
- Waiver of Immunity by the Officials own State.
- Proceedings before International Criminal Courts or Tribunals.
- The Official ceases to hold Office.

Functional Immunity

- Waiver of immunity by Officials own State.
- Real action related to private immovable property.
- An action relating to succession i.e. the execution of a will.
- Actions relating to commercial activity outside an individuals official function.

"Countries like Afghanistan, Central African Republic, Democratic Republic of the Congo, Lake Chad Basin, Somalia, South Sudan, Syrian Arab Republic and Yemen have the world's highest burden of people in need of emergency food, nutrition and livelihood assistance as a result of protracted conflict combined with other factors.

Approximately, 56 million people need urgent food and livelihood assistance in these countries."

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United Nations Food and Agriculture Organization (FAO)

DECODING THE CRIME OF STARVATION

WITH RESPECT TO ARMED CONFLICTS UNDER INTERNATIONAL CRIMINAL LAW

WORDS BY RISHI TANEJA

At present, there is no singular or specific definition of ***'Starvation'*** under International Law. There are no exclusive treaties that provide for an explicit definition of the term. However, in common parlance, the term "Starvation" means suffering or death due to lack of adequate food. Conflict and violence in several parts of the world are considered to be the main drivers behind hunger and food insecurity. Out of more than 800 million hungry (i.e. chronically food insecure) people in the world, about 490 million live in countries affected by conflict. That's 60 percent of the world's hungry people.[1]

The Rome Statute of the International Criminal Law criminalize starvation and clearly highlights that "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions"; shall constitute to a war crime under its pretext and be subject to prosecution by the Court.[2]

Despite criminalizing of starvation, there has yet to be a prosecution of starvation at the international level. Thus, the legalities concerning the crime are yet to be explored carefully and deliberately by the Court. It is still not well understood and the lack of precedent makes it even harder for the prosecution of such crimes. There are cases that have noted "starvation crimes", but only under a cloud of broader crimes against humanity.

In light of this, the article seeks to carefully unpuzzle the elements of the crime of starvation in order to understand what it entails in prosecuting such a crime under the current international criminal system.

1. FAO, 'The state of Food & Security around the world 2018 by FAO' <http://www.fao.org/3/I9553EN/i9553en.pdf>.
2. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) (1998) 2187 UNTS 3.

Elements of the Crime

The ICC Elements of Crime provide for four elements to establish this offence:

1. The perpetrator deprived civilians of objects indispensable to their survival, including willfully impeding relief supplies.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The first and second elements lay down the physical (***Actus Reus)*** and mental (***Mens Rea***) element for commission of the crime of starvation.

The remaining two elements are well-established elements necessary for any war crime listed under the Rome Statute. It is highly unlikely that the third and the fourth element (the link to an armed conflict and awareness of that factual circumstance) will ever be contentious. International prosecutors rarely, if ever, bring any war crimes prosecution without the clearest link to an armed conflict and where an accused's awareness is a matter of straightforward inference.

In sum, in the practical world of international criminal prosecutions, defining and applying these material elements is unlikely to present any significant remonstrance. The most testing challenge, however, is with regard to the commission and intent at the core of the crime.


Photo: newgrounds.com

1. **The perpetrator deprived civilians of objects indispensable to their survival**

The wording of Article 8(2)(b)(xxv) should be interpreted broadly and must not be only limited to starvation of food. Basic essentials that are necessary, and indispensable, for survival of the people must also be taken into consideration for the purposes of prosecution. The notion should also extend to "agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, irrigation works and facilities necessary to produce, harvest, process or stock foodstuffs, and to medical supplies."[3] Any kind of deprivation, be it direct (to interfering with material involved in the production of food and water supplies) or indirect (by destroying or disrupting farming equipments), shall come under the legalities of this offence.

However, it is to be noted that the criminality in this offence is not related to the death of the people, for there is already a specific offence for that (Murder), but creating a situation and deliberately placing people in a situation that could lead to their deaths. Starvation is criminalized as a process, not as a result.

Also, the above definition explicitly includes a category of acts ***"willfully impeding relief supplies"***. This encompasses the fact that such relief supplies cannot be hindered as there is an obligation not to impede them. It is also worth observing that IHL provides a humanitarian obligation both to allow and provide relief in blockaded areas. It envisages that deprivation can also occur through omission. Thus, deliberately refusing to take measures to supply the population with objects indispensable for survival in a way that would constitute a method of warfare is prohibited. This incorporates the prohibition of the use of methods of warfare, such as sieges and blockades, aimed at preventing the population from being supplied with objects indispensable for survival.[4]

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December, 1978) (1977), article 54(2).
4. Global Rights Compliance, 'Crime of Starvation and Methods of Prosecution and Accountability' (Policy Paper).

The exact meaning of "willful" varies under the International Criminal Law.[5] While in some cases, ICC has used willful to connote recklessness in other it provides that the term includes both intent and recklessness.[6]

2. The perpetrator intended to starve civilians as a method of warfare

Here, the words ***"method of warfare"*** are critical in terms of prosecution under the crime of starvation. Starvation should be used as a weapon against the population. If, for example, the destruction of food stock is merely a secondary consequence of the act or omission by the perpetrators then it will not be criminalized under this offence, as the perpetrator in such a scenario did not act for the required purpose. [7] Starvation should be a direct consequence of the act or omission by the perpetrator and must be intentionally used as a tool to gain military advantage. This may suggest that if starvation was employed not as a method of warfare, then the requirements of Article 8(2)(b)(xxv) would not be met. Further, the intent must be to starve civilians as a method of war and not just simply to starve them.

Further, inclusion of the word ***'intentionally'*** in the definition clearly highlights the fact that this crime cannot be committed by mere negligence or accident. The perpetrator must be aware that his act or omission would lead to starvation and that he/she should proceed with the desire to achieve that result.

Though, it does not necessarily mean that the perpetrator needs to have just one intent. He could have more than one intent or desire, but out of all them there should be an intention to starve as well.

It should be noted that the requisite intent should be to starve the people. That is an important qualifier. It is important to note that for the prosecution of the crime, the requirements under Article 30 of the Rome Statute must be fulfilled. The article states that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." It focuses on intent in two fold manner: First, Intent in relation to one's own conduct or personal conduct, wherein he 'means' to engage in a conduct. Second, intent in relation to a consequence, that the perpetrator means to cause that consequence or is aware of the consequences of that conduct.'

'***Knowledge'*** is defined in relation to circumstances (whereby the accused must be aware 'that a circumstance exists') or the consequences of the perpetrator's conduct (whereby, in this case, the accused must be aware that starvation 'will occur in the ordinary course of events'). Furthermore, the ICC Appeals Chamber has previously held that the word 'intentionally' 'refers to the basic intent required by article 30 of the Statute.[8]

3. The conduct took place in the context of and was associated with an international armed conflict.

This element is necessary for any war crime to be tried under the Rome Statute. Article 8(2(b(25))) applies to both international armed conflict and non-international armed conflict (NIAC). The latter is a recent development. The ICC gained jurisdiction over starvation as a war crime in non-international armed conflict in December, 2019 after a proposal made by Switzerland to amend the article was accepted.

5. Galić (IT-89-29-T), Trial Chamber, 5 December 2003, para. 54.
6. Bemba et al. (ICC-01/05-01/08), Pre-Trial Chamber, 15 June 2009, para, 369
7. D. Frank in R.S. Lee (ed.), The ICC, Elements of Crimes and Rules of Procedure and Evidence (2001), para. 203 on pg. 205.
8. Prosecutor v. Bemba et al., Appeal Judgment, ICC-01/05-01/13-2275-Red, 8 March 2018, para. 677.

An *"armed conflict"* is said to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." [9]

In Prosecutor v. Dario Kordić and Mario Čerkez, the Trial Chamber observed that "in order for norms of international humanitarian law to apply in relation to a particular location, there need not be actual combat activities in that location. All that is required is a showing that a state of armed conflict existed in the larger territory of which a given location forms a part."

Thus, in order to prove starvation as a war crime there needs to be both an armed conflict and the acts charged, starvation in this case, must be a consequence of the conflict.

4. **The perpetrator was aware of factual circumstances that established the existence of an armed conflict**

This is another element that is necessary for any war crime to be tried under the Rome Statute. The perpetrator needs to be aware or have some knowledge about the factual circumstances of an armed conflict. The degree of knowledge, even though low should be enough for his prosecution. It does not need to meet the standard of Article 30 of the Rome Statute.

Dr. Knut Dormann, in his commentary on Elements of war Crimes, explained that "On that basis, one can conclude only that some form of knowledge is required, which is below the standard of Art. 30 ICC Statute. The words awareness of the factual circumstance is implicit in the terms "took place in the context of and was associated with" seem to suggest that the perpetrator needs only to know the nexus between his/or acts and an armed conflict."[10]

Ergo, these are the four elements that form the backbone of a prosecution against the crime of starvation in the International Criminal Law with respect to international and non international armed conflicts respectively.

9. Para. 56, Prosecutor v. Dragoljub Kunarac et al., Cases No. T-96-23-A and IT-96-23/1-A, Judgement (AC), 12 June 2002.
10. Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (2003), pg 21.

Conclusion

After a scrupulous analysis of the elements of the crimes of starvation, I would like to conclude that codifying the law related to the crime of starvation would prove to be extremely beneficial for the prosecution of the crime and its perpetrators. It would help in bringing all the scattered pieces of the provisions relating to the crime together in IHL and ICL and prove to act as a clear and well established law. The intricacies that exist in its elements currently make it a challenging task for the prosecutors to prove the intent and commission of the act with regards to famines and forced starvation in the Court. A proper and well laid structure would do a world of good in bringing the perpetrators to justice.

As seen recently, the state parties finally voted in favour of adding the Crime of Starvation arising out of 'Non International Armed Conflict (NIAC)' to the Rome Statute.[11] The most pressing cases today – South Sudan, Syria and Yemen among them – are all considered Non-International Armed Conflicts. The amendment addresses a long standing loophole in the statute.

This definitely is a welcome step towards the progression of the law related to the Crime of Starvation and should lead to an increase in prosecutions relating to the crime.

Yet, there still lie some complexities in the law relating to the crime that need to be addressed immediately, because an inhumane act like forced starvation must be prevented and criminalized at any cost especially when an increasing number of people are being deprived of food and water due to conflicts each day.

11. 18th Session of the Assembly of States Parties of the ICC, 6 December 2019.

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