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Addressing Impunity for Serious Crimes: The Imperative for Domesticating the Rome Statute of the ICC in Nigeria*

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Abstract

Over the last decade, Nigeria has witnessed several high-intensity conflicts. It became a country under preliminary investigation by the International Criminal Court (ICC) following allegations of serious crimes. In 2013, the boko haram insurgency was classified as a "non-international armed conflict." Commentators appear divided over the capacity and willingness of domestic institutions to manage crimes arising from or connected with conflicts in Nigeria. Those who argue for unwillingness often point to the struggle to domesticate the Rome Statute of the International Criminal Court (Rome Statute) as one of the clearest indication that there is not sufficient interest. This article interrogates the question of seeming impunity for serious crimes in Nigeria and makes a case for domesticating the Rome Statute through an amendment to the Crimes against Humanity, War Crimes, Genocide and Related Offences Bill, 2012 pending before the National Assembly.

Keywords: Accountability, conflict, crimes, justice system.

1 Introduction

One indicator of a truly functional criminal justice system is how quickly and effectively it processes cases. In a sense, predictability is a fundamental parameter. Once within the system, the crime suspect ought to have a sense of what to expect and, more importantly, how long it would take to get through. In Nigeria,

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this is still a pipe dream.[1] The only certainty about its criminal justice system is entry. Everything else can go from good to terribly bad. Take the story of *Sikiru Alade*,[2] a young man from South West Nigeria, who was arrested and detained on suspicion of involvement in a robbery incident. He remained in detention awaiting trial for nearly a decade before West Africa's Community Court of Justice (ECOWAS Court) released him in June 2012. Even then, he was not physically released until November 2012. His is not an isolated case. There are several others but space does not permit a reflection review on those cases.

The implications of a dysfunctional criminal justice system[3] are enormous. The innocent could be presumed guilty[4] and may in fact suffer for crimes they did not commit. Worse still, we could breed a culture of impunity[5] where the guilty take advantage of the inefficiency of the system to subvert justice. This is partly the reason it is difficult to hold perpetrators of serious crimes to account in Nigeria.

One way to respond to the crisis described here is to strengthen the domestic system through legislative, policy, and institutional reforms.[6] Another, perhaps less attractive response is to dispense with domestic accountability for serious crimes. However, that raises an important question – could we possibly ignore national institutions in the quest for international justice?

1 Former President of Nigerian Bar Association, Mr. Joseph Bodunrin Daudu, describes Nigeria's criminal justice system as "inefficient, inadequate, corrupt, infrastructurally deficient, underfinanced, under-manned, and prone to abuse." *See* J.B. Daudu, 'Legislative Attention to Criminal Justice in Nigeria (1999-2009): How Adequate', Paper presented at the Annual General Conference of the Nigerian Bar Association, 18 August 2009, pp. 1-2 (on file with author).

2 *Sikiru Alade v. Federal Republic of Nigeria* – Suit No: ECW/CCJ/APP/05/11 (on file with author).

3 Dr. Chidi Odinkalu, chairman of the governing council of Nigeria's National Human Rights Commission, describes the dysfunction of Nigeria's criminal justice system in the following words: a system which is "unable to catch those who violates its rules; unable to ensure accountability even for the most basic crimes; detains those whom it cannot convict often for longer than it can hold them if it were to convict them and; without consequences kills many on whom it can't even pin any charges of criminal conduct." A.C. Odinkalu, 'Plea Bargaining & Criminal Justice Administration in Nigeria', Keynote remarks to National Association of Judicial Correspondents, Abuja, Nigeria, 5 March 2012, p. 5 quoted in S. Ibe, 'Arresting Escalating Pretrial Detention in Nigeria: Some Reform Ideas', *African Journal of Clinical Legal Education and Access to Justice*, Vol. 2, 2013, pp. 95-118.

4 Most jurisdictions around the world recognize the presumption of innocence until guilt is proven. In Nigeria, it is a constitutional requirement. However, poor pre-trial practices and other problems associated with the justice system have often created a presumption of guilt. For more on this, *see* M. Schoenteich, *Presumption of Guilt: The Global Overuse of Pre-Trial Detention*, Open Society Justice Initiative, New York, 2014.

5 *Criminal Force: Torture, Abuse and Extrajudicial Killings by the Nigeria Police Force*, Open Society Institute & Network on Police Reform in Nigeria, New York, 2010 documents the relative impunity with which crimes are committed by personnel of the Nigeria Police Force.

6 Nigeria appears to have taken the right step on legislative reforms with the enactment by the government of President Goodluck Jonathan of a new Administration of Criminal Justice Law in 2015. Although the law has bold provisions, implementation would be critical in the days ahead. For more on the law especially as it concerns pre-trial detention, *see* S. Ibe, 'Nigeria's Bold Legislative Agenda for Pretrial Justice Reform', OSF Voices, 23 July 2015, available at <www.opensocietyfoundations.org/voices/nigeria-s-bold-legislative-agenda-pretrial-justice-reform> (accessed on 10 August 2015).

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Clearly not. The international system relies on the national to succeed. This is the principle of complementarity. The ICC will assume jurisdiction over serious crimes only to the extent that the national system is "unwilling" or "unable" to prosecute.[7] The test of unwillingness and inability is fairly well stated in the Rome Statute – a state is said to be unwilling,[8] where it acts in a way that is "inconsistent with an intent to bring the person concerned to justice." The Court may reach this conclusion if the state fails to conduct proceedings "independently and impartially" or the case once begun experiences "unjustified delay." On the other hand, a state is deemed unable to prosecute[9] when "due to a total or substantial collapse or unavailability of its national judicial system," the state is not able to "obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." Although this provision is seemingly unambiguous, it is a bit more complex. Given the politics of international justice and the fact that the Court requires state co-operation to succeed, it is wont to be as liberal as possible in reaching a conclusion.

The complication is even more glaring in the context of the current controversy about the ICC's alleged undue focus on Africa[10] and African Union's (AU) response, through the establishment, at least as an idea, of a new African Court of Justice and Human Rights with criminal jurisdiction.[11] Although there are great arguments for and against a criminal court for Africa, it is clear that the ICC needs to enhance its outreach to States Parties from Africa to sustain their interest and co-operation.

7 Art. 17 of the Rome Statute of the International Criminal Court provides the legal basis for complementarity. For more on the principle of complementarity, *see Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, Open Society Foundations, 2011.

8 Art. 17(2).

9 Art. 17(3).

10 Africa hosts nine of nine situations before the ICC. Although some of the countries, for example, Cote d' Ivoire, Kenya, and Uganda, voluntarily submitted to the ICC, there are strong arguments against the conspicuous absence of countries such as Iraq, Afghanistan, and lately Syria from the ICC. The question of ratification by these countries of the ICC Statute is rather moot because one could argue that Sudan was referred by the UN Security Council and so the aforementioned countries could also be referred. However, the question of international politics comes to place. For interesting reflections on this topic, *see* M. du Plessis, T. Maluwa & A. O'Reilly, 'Africa and the International Criminal Court', *International Law*, 2013/01 (Chatham House), available at <www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf> (accessed on 14 October 2014) and A. Taylor, 'Why So Many African Leaders Hate the International Criminal Court', *The Washington Post*, 15 June 2015, available at <www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/> (accessed on 10 August 2015).

11 In February 2010, the African Union Commission began a review of the Protocol establishing the African Court of Justice and Human Rights. One of the main provisions of the amended Protocol was the expansion of the jurisdiction of the Court to cover certain international crimes. For an analysis of this review and implications for international justice on the continent, *see* M. du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes', Institute of Security Studies (ISS) Paper 235, June 2012, available at <http://dspace.africaportal.org/jspui/bitstream/123456789/32975/1/Paper235-AfricaCourt.pdf?1> (accessed on 10 August 2015).

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Since international justice (including by the ICC) ought to adopt a "bottom-up" approach, it makes sense to consider Nigeria's attempt at aligning its domestic system to the ICC's following admission as a State Party in 2001.[12] Although this paper essentially focuses on a review of a draft legislation designed to domesticate the ICC Statute in Nigeria,[13] it should, however, begin with a cursory look at the architecture for serious crimes.

2 The Architecture for Serious Crimes in Nigeria

As of the time of writing, Nigerian laws recognize only one of the four classes of crimes listed in the Rome Statute of the ICC.[14] The recognition of "war crimes" is as a result of the domestication of the four Geneva Conventions of 1949. Significantly, the articles included in the Geneva Conventions Act, 2004, mirror the definition of war crimes in the Rome Statute.[15] To that extent, Nigeria might be able to prosecute war crimes committed by its citizens or anyone else within its territory. The story is, however, different for the other three – genocide, crimes against humanity, and the crime of aggression. Nonetheless, the state can have recourse to customary international law to prosecute these crimes whenever they occur. In addition, Nigeria owes an obligation under the Statute to submit to the jurisdiction of the Court, in respect of all the crimes, as a State Party to the Stat-

12 Nigeria signed the Rome Statute on 1 June 2000 and subsequently ratified on 27 September 2001. *See* information at <www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/nigeria.aspx> (accessed on 14 October 2014).

13 At the time of writing, the 7th national assembly was in session. The assembly ended on 3 June 2015 and the 8th assembly was declared on 4 June 2015. The implication is that the bill reviewed in this piece will be introduced anew for consideration. This is important in that it offers relevant stakeholders the opportunity to strengthen the provisions and consult more widely ahead of passage.

14 The Rome Statute of the ICC creates four crimes – genocide (Art. 6), crimes against humanity (Art. 7), war crimes (Art. 8), and the crime of aggression (Art. 8 bis – inserted by Resolution RC/Res.6 of 11 June 2010). The only recognized crime is war crime by virtue of the domestication of the 1st-4th Geneva Conventions of 1949. *See* Geneva Conventions Act, Chapter G3, Laws of the Federation of Nigeria 2004. It is important to add that only grave breaches of Art. 50 of the 1st Geneva Convention, Art. 51 of the 2nd Geneva Convention, Art. 130 of the 3rd Geneva Convention, and Art. 147 of the 4th Geneva Convention are covered under the Geneva Conventions Act.

15 A combined reading of Art. 50 of the 1st Geneva Convention, Art. 51 of the 2nd Geneva Convention, Art. 130 of the 3rd Geneva Convention, and Art. 147 of the 4th Geneva Convention reveals the following acts recognized as war crimes in the ICC State – wilful killings; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; and unlawful deportation or transfer or unlawful confinement or taking of hostages. Indeed Art. 6(3) of the ICC Statute references the Geneva Conventions of 1949 in its definition of war crimes.

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ute. This is understandably why it is a country under *preliminary examination*.[16] The big question remains – why are the three Rome Statute crimes not recognized or defined under Nigerian law?

Nigeria operates the dualist system of international law.[17] This essentially means that no treaty becomes law until it undergoes a process of domestication by which the parliament (or National Assembly) transforms it into domestic legislation.[18] Although Nigeria became a State Party to the Rome Statute in 2001, and there have been two previous attempts to domesticate the Statute,[19] it is yet to become national law. So what is the implication for victims of such crimes?

Obvious answer is – for war crimes, they can look to the Attorney General of the Federation or anyone acting on his or her behalf to institute action in Abuja.[20] For the other crimes, perhaps, they probably have to look to the ICC for a remedy unless the state can provide a viable alternative. In the domestic legal system, victims may find solace only in existing criminal legislation, the Criminal Code Act[21] for Southern Nigeria and Penal Code (Northern States) Federal Provisions Act[22] for Northern Nigeria. These codes define several crimes – some of which are as serious as to carry the death penalty[23] but not specific Rome Statute crimes. In the absence of specific laws incorporating three of the four Rome Statute crimes,

16 Art. 53(1)(a)-(c) establishes the legal framework for a preliminary examination and requires the Office of the Prosecutor (OTP) to consider jurisdiction, admissibility, and interests as separate phases during the examination. In its 2013 Report on Preliminary Examination Activities, the OTP determined that the situation in respect of *boko haram* insurgency and the counter-insurgency response by Nigerian authorities amount to a non-international armed conflict. *See* Report at <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx> (accessed on 14 October 2014), p. 6.

17 For more on dualism generally, *see* F. de Londras, 'Dualism, Domestic Courts and the Rule of International Law', (16 April 2009) *in* M. Sellers & T. Tomaszewski (Ed.), *IUS Gentium: The Rule of Law in Comparative Perspective*, University College Dublin Law Research Paper No. 05/2009, Chapter 12, on file with author.

18 For more on dualism in the context of socioeconomic rights in Nigeria, *see* S. Ibe, 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges & Opportunities', *African Human Rights Law Journal*, Vol. 10, 2010, pp. 197-211, at 208-209.

19 Shortly after Nigeria became a state party in 2001, a new bill titled "Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill 2001" was sent to the legislature for passage. It failed to pass until the legislative year lapsed in 2003. In 2006, another bill titled: "Rome Statute (Ratification and Jurisdiction) Bill 2006" faced a similar fate.

20 Section 11, Geneva Conventions Act.

21 Chapter C38, Laws of the Federation of Nigeria, 2004, Vol. 4.

22 Chapter P3, Laws of the Federation of Nigeria, 2004, Vol. 13.

23 For instance, the crimes of treason (Sections 410-411 of Penal Code; Section 37 of Criminal Code), treachery (Section 49a of Criminal Code), murder (Sections 316 and 319(1) of the Criminal Code), armed robbery (leading to death), and kidnapping (in a few states in the South) carry the death sentence.

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perhaps a viable alternative for ensuring domestic accountability could be establishing a special tribunal with powers to try Rome Statute crimes.[24]

The impunity gap created by non-existing mechanisms for promoting domestic accountability triggered strident advocacy by the Nigerian Coalition for the International Criminal Court (NCICC)[25] to domesticate the Rome Statute. The most recent attempt is the fulcrum on which this article rests.

Nigeria's duty to domesticate extends to ensuring complementarity, to which we referred earlier in this article, and co-operation, which is absolutely crucial to the success of the ICC's mandate. Complementarity is a subject about which so much has been written.[26] It is also embedded in the Rome Statute. Paragraph 10 of the Preamble of the Statute makes clear that the "International Criminal Court established under this Statute *shall be complementary to national criminal jurisdictions*" (emphasis mine). This was done to ensure that states maintain primacy in terms of prosecution of the most serious international crimes occurring within their territories. It was the logical thing to do to get the support of states but also in view of the fact that the Court cannot prosecute all cases that come before it. In addition, it plays an important role namely, "to encourage state parties to implement the provisions of the Statute."[27] In concrete terms, complementarity in the context of ICC requires States Parties to adopt local legislation allowing prosecution of Rome Statute crimes by either creating offences based on the Statute or incorporating the provisions of the Statute which creates these offences[28] by reference.

Co-operation is absolutely necessary because the Court relies on states to provide the appropriate environment for its investigations as well as to effect arrests and transfer suspects to the Court. It has become clear that without co-operation from States Parties, the Court cannot successfully deliver on its mandate. Therefore, the Rome Statute requires states to adopt national mechanisms to facilitate co-operation with the ICC in its prosecution of international crimes as anticipated under Article 88. Co-operation extends to taking steps to ensure that ICC officials

24 The Tribunals of Inquiry Act, Chapter 447, Laws of the Federation of Nigeria, 1990 (as amended in 2004) empowers the President of Nigeria to set up a tribunal under an instrument. This legislation could be modified to specifically facilitate the establishment of a serious crimes tribunal. The full text is available at <www.nigeria-law.org/Tribunals%20of%20Inquiry%20Act.htm> (accessed on 17 February 2016).

25 NCICC is a coalition of civil society organizations, human rights defenders, and activists committed to promoting awareness about the ICC and domestication of the ICC Statute, amongst other objectives. For more, *see* the coalition's facebook page <www.facebook.com/nciccnigeria/> (accessed on 17 February 2016).

26 *See* for example, S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalyzing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, United Kingdom, 2013; *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya*, Open Society Foundations, New York, 2011; and M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, Martinus Nijhoff Publishers, The Hague, 2008.

27 L. Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court', *Chinese Journal of International Law*, Vol. 4, No. 1, 2005, pp. 121-132, at 123, available at <http://chinesejil.oxfordjournals.org/content/4/1/121.full.pdf+html> (accessed on 9 October 2014).

28 Namely Arts. 6, 7, and 8.

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enjoy immunity during the conduct of investigations as well as ratification/implementation of Agreement on Privileges and Immunities of the ICC (APIC).[29]

To conclude, although Nigeria is a state party to the Rome Statute and by virtue of that, has obligations, it has not developed the necessary architecture to prosecute all but one of the Rome Statute crimes. It is for this reason that the current effort to incorporate the Rome Statute into domestic legislation deserves support.

In the next section, we shall briefly review the Rome Statute bill and draw a comparison, where necessary, with the law in fellow common law and Rome Statute state party counterpart, Kenya (International Crimes Act, 2008) ("ICA-Kenya").[30]

3 Review of the Rome Statute Domestication Bill

The latest attempt at domesticating the Rome Statute in Nigeria takes the form of draft bill titled, "Crimes against Humanity, War Crimes, Genocide and Related Offences Bill 2012." It is a 10-part piece of draft legislation with one schedule.

The bill has got a rather long and unwieldy title: "An Act to Provide for the Enforcement and Punishment of Crimes against Humanity, War Crimes, Genocide and Related Offences and to Give Effect to Certain Provisions of the Rome Statute of the International Criminal Court in Nigeria, 2012."[31] Nevertheless, it is fairly clear as to what it sets out to achieve. It does not pretend to incorporate the entire provisions of the Rome Statute.

Speaking of wholesale incorporation, the bill adopts Parts 2, 3, 5, and 6-10 and Articles 51 and 52 of the Rome Statute[32] but expressly excludes Parts 1,[33] 4,[34] 11,[35] and 13[36] for understandable reasons – those provisions refer specifically to the ICC and not a local equivalent.

29 Adopted by the Assembly of States Parties – 1st Session, New York, 3-10 September 2002. Official records ICC-ASP/1/3, available at <www.icc-cpi.int/NR/rdonlyres/23F24FDC-E9C2-4C43-BE19-A19F5DDE8882/140090/Agreement_on_Priv_and_Imm_120704EN.pdf>.

30 Available at <www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf> (accessed on 28 October 2014).

31 For its part, the ICA-Kenya provides: "An Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions."

32 The ICA-Kenya contains similar provisions in Art. 4. Although there is no express exclusion of the other sections of the Rome Statute, it is presumed that they are impliedly excluded. Suffice it to note that expressly included articles have force of law in Kenya only in respect of ICC request to Kenya for assistance, the conduct of investigations by the prosecutor, bringing and determination of proceedings before the ICC, enforcement in Kenya of sentences of imprisonment and other measures imposed by the ICC, and the making of requests by Kenya to the ICC for assistance. *See* Art. 4(1).

33 Establishment of the ICC.

34 Composition and administration of the ICC.

35 Assembly of State Parties.

36 Final clauses.

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Significantly, the bill designates the Attorney General of the Federation (whose office is combined with that of the Minister of Justice)[37] as the authority responsible for exercising power, duty or function conferred or imposed by the Rome Statute, Rules of Procedure and Evidence, or Agreement on Privileges and Immunities in the absence of any provision to the contrary.[38] This is a rather controversial provision in view of the bureaucracy it entails for a federal state with 37 component units. Additionally, because successive occupants of the Office of Attorney General, since the dawn of democracy in 1999, have not demonstrated a reasonable interest or commitment to the mandate of the ICC. Interestingly, the two chambers of Nigeria's legislative branch appear to appreciate the identified challenge. Consequently, they have approved a proposal to amend the Constitution of the Federal Republic of Nigeria 1999 to separate the office of the Attorney General from that of the Minister of Justice (at the centre) and Attorney General from that of the Commissioner of Justice (at the state level).[39] The office of the Attorney General will be occupied by a career public servant, who is fairly independent while the office of the Minister of Justice will be occupied by a political appointee of the President or the Governor as the case may be. This is crucial because the Attorney General needs to be as independent of the government as possible to perform his/her functions impartially.

To enhance efficiency, decentralization of the process is recommended to allow state's attorneys general to take some responsibilities of the federal Attorney General provided there is a single coordinating unit, for example, an International Crimes Unit based in Abuja, which is responsible for ensuring coherence. Although Kenya is a smaller country, it adopts a similar approach. There are two officers responsible for ensuring compliance with obligations arising from the Rome Statute – the Minister of Foreign Affairs and the Attorney General. Requests for arrest and surrender of persons to the ICC may be made to the Minister of Foreign Affairs while all other requests shall be made to the Attorney General.[40]

In terms of the offences, the bill adopts the same definition of genocide as in Section 4(3) of the Rome Statute but prescribes the death penalty as punishment.[41] The same variation holds true for crimes against humanity[42] and

37 The 1999 Constitution establishes the office of the Attorney General and Minister of Justice for the federation (Section 150) and 36 states (Section 195) and makes the President and Governors appointing authorities. *See* 1999 Constitution of the Federal Republic of Nigeria, available at <www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (accessed on 10 August 2015).

38 Art. 3 of Rome Statute.

39 *See* 'Constitution Review: Office of AG, Justice Ministry to be Separated', *This Day Newspaper*, 22 October 2014, available at <www.thisdaylive.com/articles/constitution-review-office-of-attorney-general-justice-ministry-to-be-separated/191929/> (accessed on 28 October 2014).

40 Art. 21(1) ICA-Kenya.

41 Art. 6 references Section 319 of the Criminal Code on penalty for murder, namely death – for offences involving "wilful killing of a person." It also prescribes "imprisonment of not more than 30 years or whole life in other cases."

42 Section 5 of the Bill.

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war crimes.[43] The crime of aggression is, however, conspicuously missing.[44] Offences such as "conspiracy to commit an offence" or "aiding/abetting an offence" attract the same penalty of death as "prescribed for the principal offence."[45] These provisions resonate with the debate about the propriety of the death penalty in Nigeria.[46] The proponents of the inclusion of death penalty in the Rome Statute bill easily point to the Constitution of Nigeria, 1999, which recognises the death penalty.[47] Opponents argue that the Rome Statute does not prescribe death penalty for any offence. ICA-Kenya appears to adopt the former position with respect to existing law. To that extent, Article 5(3) prescribes death penalty "as for murder" if an intentional killing forms the basis of an offence. The punishment on conviction for murder is death.[48] Although it is an interesting debate and one that is worth exploring, it is, however, outside the remit of the current paper.

The bill criminalizes giving false or fabricated evidence;[49] bribery and corruption of a judge,[50] and officials of the court;[51] conspiracy to pervert the course of justice;[52] and interference with witnesses.[53]

43 Section 6 of the Bill.

44 Perhaps, this has something to do with the uncertainty surrounding the crime of aggression. Art. 5 of the Rome Statute lists the crime of aggression as one of four crimes over which the ICC could exercise jurisdiction. However, unlike the other three, there was no definition of the crime of aggression, and therefore, the Court could not exercise jurisdiction. The Review Conference of the Rome Statute hosted in Kampala, Uganda, from 31 May to 11 June 2010 came up with a definition but delayed ICC jurisdiction until 1 January 2017 when States Parties will make a decision to activate jurisdiction.

45 Section 8 of the Bill.

46 Although there is an unofficial moratorium against death penalty in Nigeria, four death row inmates in Edo State were executed in June 2013 following the approval of Adams Oshiomhole, former labour leader and governor of the state. Amnesty International led an international campaign against these executions. For a news report on the executions and the escape by a fifth death row inmate, *see* 'Nigeria Executions: "They almost executed him secretly,"' available at <www.amnesty.org/en/latest/news/2013/06/nigeria-death-penalty-feature/> (accessed on 10 August 2015).

47 Section 33 of the 1999 Constitution of Nigeria guarantees the right to life but makes an exception where deprivation of life is in execution of the sentence of a court in respect of a criminal offence for which the victim was found guilty. Earlier in this paper, some of the offences that carry the death penalty in Nigeria were listed (reference note 15 above).

48 Sections 203, 204, and 206 of Kenya Penal Code, Laws of Kenya, revised edition, 2010, Chapter 63, 1 August 1930 as updated through 12 July 2012. It should be noted that the Court of Appeal in Kenya has decided in Godfrey *Ngotho Mutiso v. R* that death penalty is not automatic to all suspects convicted of murder. Accordingly, judges have a discretion to vary sentences upon request for mitigation by a convict. *See* 'Death Sentence no longer automatic for Kenyan murder convicts', *International Commission for Jurists*, available at <www.icj-kenya.org/index.php/more-news/315-death-sentence-no-longer-automatic-for-kenyan-murder-convicts> (accessed on 29 October 2014).

49 Section 10.

50 Section 11.

51 Section 12.

52 Section 13.

53 Section 14.

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The offences may be tried upon an information and with the consent of the Attorney General of the Federation. This provision demonstrates the bureaucracy that could potentially characterize prosecution of international crimes if the bill succeeds in its current form. What this means is that no prosecution may proceed without the consent of the Attorney General. In the context of Nigeria where the Attorney General is always a political appointee and could therefore be vulnerable to the whims and caprices of the appointing authority, this provision might be abused for political considerations. To remedy this, it is recommended that the Attorney General of the Federation or the state may only refuse consent upon lawful and reasonable grounds – grounds which should be subject to judicial review.

Part III of the bill deals with defences and specifically makes available to an accused person, "any defence or justification available to him under the laws of Nigeria and international law."[54] This is remarkable in that it appears to offer wide latitude for accused persons. However, there is a caveat – where there is inconsistency between the national and international law, international law takes precedence.[55] This seems to violate the provisions of Section 1 of the 1999 Constitution of the Federal Republic of Nigeria, which recognizes the Constitution as the supreme law of the land and makes every other legislation inconsistent with the Constitution null and void to the extent of the inconsistency. This is therefore one provision that the draftsman might need to revisit.

The tendency to rely on "superior orders" to avoid criminal liability is directly addressed. It is not a defence under this bill.[56] The doctrine of "effective control" also gets some attention. Military commanders and superior officers have responsibility for the offences committed by forces under their effective control where there is knowledge or negligence on their part.[57]

The vexed question of immunity for heads of states also features in this bill. By Section 20(1), the provision of Article 27 of the Rome Statute[58] on irrelevance of official capacity is made subject to Section 308 of the 1999 Constitution, which confers immunity from criminal proceedings on the President, Vice President, Governors, and Deputy Governors. This is one question that African states do not all agree on. Some countries like Kenya,[59] South Africa,[60] and Uganda[61] do not

54 Section 17(1).
55 Section 17(2).
56 Section 18 (reference Art. 33 of the Rome Statute).
57 Section 19 (reference Art. 28 of Rome Statute).
58 Art. 27 appears to conflict with Art. 98 to the extent that the latter provision makes it clear that the ICC may not request co-operation or surrender from a state where that would require that state to act inconsistently with its obligations under international law with respect to the state … unless the court gets the co-operation of that third state. This is a rather knotty issue. However, some academics have interpreted Art. 27 as a waiver of any immunity that might otherwise apply to their officials under the ICC. *See* for example C. Gevers, 'Immunity and the Implementation Legislation in South Africa, Kenya and Uganda', available at <www.peacepalacelibrary.nl/ebooks/files/369659082.pdf> (accessed on 15 October 2014), p. 8.
59 Section 27(1) ICA-Kenya.
60 Section 4(2)(a) of the Rome Statute Act, 2002.
61 Arts. 25 and 26 of the Rome Statute Act, 2010.

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recognize immunity in the context of Rome Statute crimes for any of their officials. Others like Nigeria do.[62] Indeed, the African Union makes that a core part of the criminal jurisdiction conferred on the proposed African Court of Justice and Human Rights to the extent that no head of state or senior government official may be prosecuted whilst in office.[63]

Jurisdiction for Rome Statute offences is vested in the High Court and extends to offences committed outside Nigeria by or against a citizen or permanent resident; or if the accused is present in Nigeria after the commission of the offence. Jurisdiction is also temporal to the extent that it takes effect after the date of entry into force of this bill.[64] This is remarkable in that atrocities committed by all parties in the current *boko haram* insurgency in North-East Nigeria will be excluded from the purview of this law. Nigeria could, however, remedy this by inserting a clause which makes the law applicable effective from the date she became a state party to the Rome Statute.

There is a whole part of the bill dedicated to "request for assistance."[65] This part details how the request may be made, confidentiality and response requirements as well as how assistance might be provided, and the grounds for refusing a request. The provisions are fairly detailed and self-explanatory.

Arrest and surrender of persons also has a whole part dedicated to it. It details how the Attorney General may respond to requests from the ICC for arrest and surrender of persons.[66] Specifically, Section 52 requires the Attorney General to transmit requests to the High Court for necessary action. Expectedly, this action is made subject to Section 308 of the 1999 Constitution on immunity for certain political office holders as well as "competing interests."[67] Nigeria had to deal with a real case of arrest and surrender when the Sudanese president, Omar Al-Bashir, arrived Abuja for AU Special Summit on HIV/AIDS in July 2013. Unfortunately, the country failed, like Malawi and Chad before it, to arrest and surrender Al-Bashir thereby denying the court the co-operation it requires to exercise its functions as required by Article 87(7) of the Rome Statute. Assuming

62 Section 308 of the 1999 Constitution guarantees immunity from prosecution for the President, Vice President, Governors and their Deputies. For a review of this clause and its implications for the fight against corruption, *see* G. Ogbodo, 'The Immunity Clause under the 1999 Constitution and the Anti-Corruption Crusade: A Case of Strange Bed-Fellows?' Paper published by the Nigerian Institute of Advanced Legal Studies (NIALS), available at <http://nials-nigeria.org/pub/Dr.S.pdf> (accessed on 10 August 2015).

63 Art. 46A bis of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights provides that: "No charges shall be commenced or continued before the Court against a serving AU head of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office." The Draft Protocol is available at <www.coalitionfortheicc.org/documents/African_Court_Protocol_-_July_2014.pdf> (accessed on 29 October 2014).

64 Section 21.

65 Part V of the bill. This part essentially mirrors Arts. 92 and 93 of the Rome Statute.

66 This mirrors Art. 89 of the Rome Statute.

67 Competing interests refer to where the Attorney General receives request for arrest and surrender from the ICC and request for extradition of the same person on account of same crime. In this circumstance, the Attorney General will notify state(s) and the ICC and then determine, on the basis of guidelines, where to send the person. *See* Section 55 of the bill.

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the Rome Statute bill had become law in Nigeria at the time Al-Bashir visited, it is fairly clear that the Attorney General would have transmitted the ICC arrest warrant to the High Court for a decision on arrest and surrender. In the circumstances, the Court may have reached a decision one way or another probably after Al-Bashir's departure. It is therefore necessary to review this provision to confer some urgency on the process so that once the application is made, the Court should reach a decision the day following for arrest and surrender to be effected in a timely manner.

Part VII deals with enforcement of sentences and orders of the ICC in Nigeria. In compliance with obligations arising under Article 103(1) of the Rome Statute, the bill expresses Nigeria's readiness to host ICC prisoners, "subject to any conditions specified in the notification." This also extends to transfer of prisoners to the ICC for review of sentence[68] and to another state to complete sentence.[69] There is a logistical question to hosting ICC prisoners in Nigeria, namely in what prisons will such prisoners be held? While it is not expected that this legislation will provide an answer to this important question, it is useful for policy makers to think carefully about this in view of the current congestion problems in Nigeria's prisons.

Part VIII incorporates protection of national security information recognized under Article 72 of the Rome Statute. Specifically, Section 86(2) empowers the Attorney General to refuse the production of documents, disclosure of evidence or authorization of production of documents, or disclosure of information where she/he reaches a conclusion that to do so will be prejudicial to national security. The Attorney General is, however, required to consult with the ICC before reaching a conclusion and convey his/her decision to the ICC. This is a potentially sensitive but useful provision. What is important is to carefully strike a balance between protecting national security and prosecuting international crimes. This is not always easy to do, but it is nonetheless necessary.

Part IX deals with "sittings of the court." Specifically, Section 87 provides that the prosecutor may conduct investigations in Nigeria. The Court may also sit[70] and administer oaths in Nigeria.[71] This is fairly straightforward.

The final part of the bill – Part X – establishes a "Special Victims' Trust Fund"[72] for the benefit of crime victims and their families; incorporates "witness protection"[73] for persons who volunteer information which may be useful in the investigation of an offence; recognizes ICC's legal personality in Nigeria[74] and confers privileges and immunities on certain categories of its staff – judges, registrars and prosecutors as well as witnesses, counsel, experts, etc.;[75] allows the Attorney General to make regulations for the purpose of "giving effect to the

68 Section 72.
69 Section 73.
70 Section 88.
71 Section 90.
72 Section 93.
73 Section 94.
74 Section 96.
75 This is a requirement under Art. 48 of Rome Statute.

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principles and provisions of this Act";[76] and exhibits a "declaration of assets form."[77]

Certain sections of the final part will require considerable investments in infrastructure, personnel, and legal reform to make them happen. This is true particularly of "witness protection," which poses significant challenges for criminal investigations and prosecution at the moment. In this, Nigeria can learn from Kenya, which already has a witness protection agency.[78]

As for the "Special Victims' Trust Fund," there are a number of fundamental questions to be asked about the recently launched "Victims' Support Fund"[79] for victims of the *boko haram* insurgency. The first and most important relates to who a victim is. It is not clear from the committee's terms of reference how this might be addressed. The other question relates to whether or not the government of Nigeria has jumped the gun in establishing this fund in the absence of an implementing legislation for Rome Statute. Some might argue that the situation is sufficiently serious to warrant this important measure, but others will argue that if the situation is that important, then perhaps the government should take the extraordinary measure of fast-tracking the process of enacting the implementing legislation. We think that since the fund now exists, it should serve as a stimulus to fast track the Rome Statute bill currently before the National Assembly.

Great as the Rome Statute bill may be, it will only apply in respect of offences committed after it becomes law. This raises an important question – how do we address the serious crimes committed by all parties to the conflict in Nigeria's north-east region? The next section briefly offers insights into a piece of terrorism legislation, under whose framework perpetrators could be prosecuted.

4 Terrorism Prevention and International Crimes

The Terrorism (Prevention) (Amendment) Act, 2013 amends an earlier legislation[80] to provide for extra-territorial application and strengthen terrorist financing offences. Amongst other things, the Act prohibits "all acts of terrorism and financing of terrorism."[81] This provision now makes it possible for government and its institutions to investigate and punish terrorism financiers. The Act also expands the scope of offences to include the act of terrorism, an attempt or a

76 Section 98.
77 Required by Sections 93 and 95.
78 Witness Protection Agency – Kenya. *See* <www.wpa.go.ke/> (accessed on 28 October 2014).
79 Nigeria's government announced the constitution of a Committee on Victims' Support Fund on 14 July 2014. The Committee is headed by Theophilous Danjuma, a retired army general and has the primary responsibility of raising financial support for victims of insurgency and terror attacks across the country. *See* T. Usman, 'Boko Haram: Nigeria Constitutes Committee on Victims Support Fund', *Premium Times*, 15 July 2014, available at <www.premiumtimesng.com/news/164951-boko-haram-nigeria-constitutes-committee-on-victims-support-fund.html> (accessed on 30 October 2014).
80 Terrorism (Prevention) Act No. 10 of 2011.
81 Section 2(a).

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threat, an omission, assistance, inducement, etc.[82] It also expands the list of potential perpetrators to include "body corporate"[83] or corporate institutions as well as persons within or outside Nigeria. It is assumed that the authorities will liaise with international policing agencies such as INTERPOL to make arrest and prosecution of persons and organizations outside Nigeria possible.

Significantly, the Act now makes the Office of the National Security Adviser, the coordinating body for all security and enforcement agencies.[84] This is particularly useful in view of the difficulty in coordinating several agencies responsible for security and law enforcement and the attendant "turf wars" over what organizations takes credit or blame for the current security situation in the country. In addition, the Act domiciles the authority for the effective implementation and administration of the Act in the Attorney General of the Federation,[85] much like the Rome Act.

Crimes recognized under the Act include murder, kidnapping, or attacks of "internationally protected persons;"[86] violent attack on official premises, private accommodation, or means of transport of internationally protected persons or threats of such attack.[87] Other offence categories include attending terrorist' meetings;[88] soliciting and giving support to terrorist groups for commission of terrorist activities;[89] harbouring terrorists or hindering the arrest of a terrorist;[90] provision of training and instruction to terrorist groups or terrorists;[91] concealing information about acts of terrorism;[92] provision of devices to terrorists,[93] etc. These are fairly extensive provisions. The real challenge is with implementation. Unfortunately, terror-related cases are often shielded from the public, creating room for unnecessary speculations about how long it takes to conclude any one of the cases and whether justice is served.

Without going through the whole gamut of the law, it is good enough to support the fight against terrorism. However, government needs to support the legislative agenda with the necessary tangible inputs such as personnel, equipment and, more importantly, the intangibles such as trust, even-handedness, and respect for the rights of all parties to the conflict. Citizens and residents alike also have a part to play in providing the necessary intelligence and supporting the government and security institutions.

82 Section 2(2)(a-h). For this category, there is a maximum penalty upon conviction of death.
83 Section 2(2).
84 Section 1(a).
85 Section 2(2).
86 Section 3(a).
87 Conviction for any of these offences carries a sentence of life imprisonment. *See* Section 3.
88 Section 4.
89 Section 5.
90 Section 6.
91 Section 7.
92 Section 8.
93 Section 9.

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5 Concluding Remarks and Recommendations

Although there is a bill seeking to domesticate the Rome Statute in Nigeria, the necessary political will by government to ensure its passage into law appears to be lacking. In the absence of the necessary legal framework for prosecuting Rome Statute crimes other than war crimes in Nigeria, interested stakeholders may have to continue pushing the ICC to go beyond observation and make Nigeria a situation country. That decision may, however, push the ICC further down the slope with respect to its relationship with AU for reasons previously canvassed. Given this scenario, a strategic mid-way option is for the ICC and partners within civil society to intensify outreach to relevant institutions of government to ensure that there is a law domesticating the Rome Statute in Nigeria sooner rather than later and in the interim, for the state to trigger prosecutions under the Geneva Conventions Act for war crimes. To succeed with the latter, the government and its institutions will require all the support that stakeholders can muster. To be sure, stakeholders within and beyond Nigeria can and should play a role in promoting accountability for international crimes committed in Nigeria. Therefore, we offer the following recommendations as to what role each should play.

5.1 Government of Nigeria

1 Strengthen the current bill by removing the death penalty for all crimes, decentralizing the role of the Attorney General to make prosecutions more efficient and revising along the lines suggested in this paper.
2 Ensure the revised bill is passed by the 8th national assembly.
3 Provide institutional basis for an independent office of the Attorney General responsible for prosecuting international crimes in a decentralized fashion, including through establishment of an international crimes division to coordinate prosecutorial functions between federal and states' attorneys general.
4 Document all cases of suspected international crimes.
5 Provide support to judges and prosecutors involved in ensuring accountability for international crimes.
6 Protect civilians in areas in which anti-insurgency operations are ongoing.

5.2 Civil Society

1 Lead advocacy and lobby for the domestication of the Rome Statute of the International Criminal Court.
2 Monitor and provide periodic reports on alleged atrocities in Nigeria.
3 Link-up with international community to engage Nigeria in a dialogue on the subject.
4 Offer alternative and credible platform for the international criminal court to stay engaged in Nigeria.
5 Offer psycho-social, legal, and humanitarian support to victims and their families.

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5.3 International Criminal Court

1 Conduct investigations in a credible and non-partisan manner.
2 Engage in constructive dialogue with the government of Nigeria and civil society in the task of ensuring compliance with state obligations under the ICC Statute.
3 Solicit co-operation of state institutions in on-going investigations.
4 Provide regular updates on ICC investigations to the Government of Nigeria as well as civil society.

5.4 International Community

1 Support efforts to address the *boko haram* crisis in Nigeria.
2 Demand clear assurances that the fight against *boko haram* would not be a smokescreen to violate the rights of citizens.
3 Create a level-playing field for engagements in international criminal justice so as to find more allies within Africa to support these efforts.
4 Engage leaders and civil society in a dialogue on finding mutually acceptable solutions.