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Nigeria's Commitment to Prosecuting International Crimes and the Place of the International Criminal Court

Titus Kehinde Adekunle & Nucha Suntai Gambo

Abstract

Since the beginning of Boko Haram insurgency in Nigeria in 2009, and the extrajudicial killing of Muhammed Yusuf (the group's founder and leader), there emerged accusations of human rights abuses against the Nigeria military on their counter insurgency struggles on one hand, and on the other hand, Boko Haram have committed atrocities involving crimes of murder, rape, kidnapping, using women and girls as suicide bombers. There were other crimes not associated with the Boko Haram insurgency. These include the ethnic and religious violence in the Middle Belt since the early 1990s, the clash between the Islamic Movement of Nigeria and the Nigerian Army in December 2015, and the killings of Biafran protesters in 2017. There is also the farmers/herders conflict which recorded more death in 2014 than Boko Haram. All these atrocities have gained the attention of the international community and many (especially the International Criminal Court-ICC) are pressurising and waiting to see the action of Nigeria in prosecuting such crimes. The ICC has jurisdiction over these crimes but can only prosecute when member states are unable or unwilling to prosecute. It is within this context that this paper seeks to examine what the Nigeria state has done and is still doing to bringing perpetrators of international crimes to justice; and to determine where and how the ICC can be involved. The ex-post factor research design was used for the study and secondary data were collected from textbooks, journal articles, reports, magazines, newspapers, and internet. Data were content analysed.

Keywords: Nigeria, International Criminal Court, international crimes, Prosecution, Jurisdiction

Introduction

The journey towards the prosecution of individuals responsible for international crimes (genocide, war crimes, crime against humanity, and crime of aggression) started in earnest in 1998 when the International Criminal Court (ICC) was created. The ICC is a permanent international legal institution responsible for the prosecution of individuals indicted for the breach of international humanitarian and human rights law. The International Law Commission (ILC) was saddled with the responsibility of drafting a statute for an international criminal court (Starke, 1977). The ILC submitted a draft statute in 1994 to the General Assembly (Bassiouni, 1999). After rigorous deliberations on the draft statute by Ad Hoc Committees in 1995, the General Assembly created the Preparatory Committee which held three week session in 1996 and another three sessions in 1997 amending the draft statute (Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1996). The PrepCom was able to address the issue of complementarity- where the proposed court will have jurisdiction only on cases a state is unwilling or unable to prosecute. The final dialogue for the creation of an international criminal court was the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court of 15 June, 1998 in Rome. 120 countries adopted the Rome Statute with later ratification by required number of 60

countries and the Rome Statute formally came into force on 1st July, 2002 (Gambo, 2019).

Since the beginning of Boko Haram insurgency in Nigeria in 2009, and the extrajudicial killing of Muhammed Yusuf (the group's founder and leader), there emerged accusations of human rights abuses against the Nigeria military on their counter insurgency struggles on one hand (The Economist, 2012), and on the other hand, Boko Haram have committed atrocities involving crimes of murder, rape, kidnapping, using women and girls as suicide bombers (Walker, 2013). There were other crimes not associated with the Boko Haram insurgency. These include the ethnic and religious violence in the Middle Belt since the early 1990s, the clash between the Islamic Movement of Nigeria (IMN) and the Nigerian Army in December 2015, and the killings of Biafran protesters in 2017 (ICC Report, 2017). There is also the farmers/herders conflict which recorded more death in 2014 than Boko Haram (Gambo, 2019). All these atrocities have gained the attention of the international community and many (especially the ICC) are pressurising and waiting to see the action of Nigeria in prosecuting such crimes (Onuora, 2012). It is within this context that this paper seeks to examine what the Nigeria state has done and is still doing to bringing perpetrators of international crimes to justice.

The Concept of International Crimes

This refers to crimes of concern to the international community namely genocide, war crimes, crime against humanity, and crime of aggression (Article 5, Rome Statute). Genocide is defined as “the intention to destroy, in whole or in part, a national, ethnical, racial or religious group” (Rome Statute, Article 6), while war crimes are “serious violations of the laws and customs applicable” in international and non-international armed conflicts (Article 8). Crime against humanity is “any of the following acts when committed as part of a widespread or systematic attack directed at any civilian population, with knowledge of the attack.” These acts include but not limited to murder, torture, enslavement, deportation, rape, sexual slavery, enforced prostitution, forced pregnancy, persecution, enforced disappearance, apartheid or imprisonment. One peculiarity about crimes against humanity is that they can be carried out during war or in peace times.

They are considered international because they touch on the conscience of mankind and humanity. Their impact can be felt across borders, and they are conscious, coordinated, systematic, and widespread atrocities targeted mostly at groups of individuals. They are mostly carried out by states or organized groups.

Nigeria’s Commitment to Prosecuting International Crimes

Nigeria is a state party to the Rome Statute and deposited her instrument of ratification on 27 September 2001 (ICC Preliminary Examination

Report, 2017). Being part of this anti-impunity institution is a commendable step by the country. However, the major work, which is the domestication of the Rome Statute has not been done. Nigeria still do not have a legal document that criminalises and outline punishments for international crimes of genocide, war crimes, crime against humanity and crime of aggression. This means that the country will not be able to compliment the activities of the ICC at the national level in prosecuting international crimes because the ICC operates based on the principle of complementarity, which gives state the primary responsibility of punishing perpetrators of such crimes. Be that as it may, there were various attempts at domesticating the Rome Statute in Nigeria. The work of Olugbo (2014) highlighted these various attempts. First, the Rome Statute of the ICC (Ratification and Jurisdiction) Bill 2001 was brought before the National Assembly. The bill experienced some bottle necks until its report came out in 2003 but was never assented into law. The second move at domesticating the Rome Statute was in 2006 when the same bill was re-forwarded to the National Assembly by the Ministry of Justice as the Rome Statute (Ratification and Jurisdiction) Bill 2006. Like its predecessor, this bill also did not become law. The third was the Federal Executive Council Draft Bill on the domestic implementation of the Rome Statute in Nigeria on 30 May 2012. The country seems to put less priority into prosecuting international crimes, thus the delay

in completing these legal frameworks towards domesticating the Rome Statute. This shows a lack of commitment on the side of Nigeria to its international obligation.

Apart from the bill processes, some progress has been made so far at actual prosecution using customary international law. The ICC identified eight potential cases in relation to the activities of Boko Haram and counter-insurgency by the Nigeria security forces (ICC Preliminary Examination Report, 2017). Six of the cases are against Boko Haram while two are against the Nigeria Army. According to this report, Nigeria have initiated prosecution of suspected Boko Haram members responsible for various crimes under the Rome Statute. It however noted that most of the prosecutions are targeted at ordinary direct perpetrators or the foot soldiers of Boko Haram instead of its leadership. On these prosecutions, the report posits that:

According to a statement of the Office of the Attorney-General of the Federation, several prosecutors were assigned to bring to court more than 2,300 Boko Haram suspects, currently detained in two military camps in north-western Nigeria. Four judges have been reportedly assigned to try these cases and defence counsels have been identified to represent the suspects. A first phase of proceedings addressing 575 detainees has reportedly concluded,

leading to 45 convictions and sentences between 3 and 31 years in jail and 468 acquittals due to the lack of relevant information. Thirty four (34) cases were struck out for lack of evidence and 28 cases were transferred to the Federal High Court Abuja Division and adjourned until next year due to the absence of relevant witnesses.

In relation to the crimes committed by the Nigeria Army in her counter-insurgency struggle against Boko Haram, only two inquiries have been initiated by the Nigeria authorities. They are the Special Board of Inquiry (SBI) instituted by the Nigerian Army, and the Presidential Investigation Panel instituted by the presidency to look into accusations of human rights abuses by the armed forces (ICC Preliminary Examination Report, 2017). These two reports have shown to be ineffective as no actual prosecution has been initiated against any member of the Nigeria Army, especially individual senior military officers.

From the above, it can be seen that out of the grave crimes committed by Boko Haram (mostly against unarmed civilians) only 45 convictions and sentences have been achieved so far. While no prosecution against any junior or senior officer of the Nigerian Army despite overwhelming evidences of human rights violations in the counter-insurgency struggle. Other crimes such as the ethnic and religious violence in the Middle Belt since the early 1990s,

the clash between the Islamic Movement of Nigeria (IMN) and the Nigerian Army in December 2015, and the killings of Biafran protesters in 2017 have not been properly investigated nor perpetrators prosecuted, neither the perpetrators of atrocity crimes in the farmer-herder conflict in the country. This proves the lack of willingness and capacity from the Nigeria authority to bring perpetrators of international crimes to justice and cover the impunity gap, thus granting ICC admissibility power based on complementarity and the obvious unwillingness and inability of the Nigeria authority to fulfil its obligation towards the Rome Statute.

The Place of the International Criminal Court

This part of the article will focus on analysing the moral and legal position of the ICC in relation to international crimes committed the state and non-state actors in Nigeria. These crimes ranges from crimes against humanity of murder, rape, and forced pregnancy, to war crimes. The analysis will be centered on the mandate of the ICC, the question of jurisdiction, and complementarity principle.

The Mandate of the Court

On one hand, the moral mandate of the Court can be seen in the preamble which vividly outlined the rationale for establishing the legal institution, the beliefs of the Court, and what it hopes to achieve. The preamble represents the collective views and wishes of the State Parties

to the Rome Statute. On the other hand, Article I of the Statute captures the legal mandate of the court. These are quoted below:

Preamble

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

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

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

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

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

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

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any

other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

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

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

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

Article 1

The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.

The jurisdiction and

functioning of the Court shall be governed by the provisions of this Statute.

From the preamble, it can be seen that the ICC was born out of the inherent humanism in all mankind to end the sufferings of vulnerable people caused by fellow human beings engaged in atrocity crimes. The preamble therefore serves as the moral compass of the Court and of the State Parties. Articulating the preamble and Article 1 together, the moral and legal mandate of the Court therefore is to bring perpetrators of international crimes to justice, to end impunity, to safe present and future generations from the evil of such crimes, and ultimately, to ensure peace and security in the world.

Jurisdiction

This part covers crimes that the Court can prosecute, individuals, and states that falls under the jurisdiction of the Court. First, *Article 5* outline crimes within the jurisdiction of the ICC thus: the crime of genocide, crimes against humanity, war crimes, and crime of aggression. The ICC the ICC therefore has jurisdiction over such crimes as stated above. Second, *Article 4(2)* allows the Court the legal power to exercise jurisdiction on the territory of state parties and the territory of a non-state party based on special agreement. This means that the ICC has jurisdiction over the crimes committed by state and non-state actors in Nigeria. Nigeria deposited her instrument of ratification of the Rome Statute on 27 September 2001, thereby becoming a member state. This also means that

the Court has jurisdiction over crimes committed by Nigeria nationals in other territories.

Complimentarity Principle

This principle of complimentarity states that the Court shall be complimentary to national criminal jurisdiction. It can only act as a help to national criminal justice systems. That is, it only compliment the efforts of domestic courts in prosecuting international crimes. This can be found in paragraph 10 of the ICC Preamble and Article 1 of the Rome Statute. However, this principle can only be invoked if and only when the state is not willing or unable to bring perpetrators of grave crimes to justice. It also means that, the Court is a court of last resort and will not interfere in a case which the state is genuinely prosecuting. Relating this principle to the crimes committed in the country, the study observed that there has not been any genuine willingness and ability by the Nigerian State to bring perpetrators to justice. Majority of the people prosecuted and sentenced to prison were the direct perpetrators who only take orders and some of whom were victims of arbitrary arrest and has nothing to do with the crimes. The structure of the state and non-state actors has not been explored to deal with the intermediary and senior levels of command (those involved in developing, authorising and overseeing the crimes). By complimentarity principle therefore, the ICC has jurisdiction and it is in a moral and legal position to open preliminary investigation into the alleged crimes

committed in the country. This is mainly because Nigeria has done little or nothing in bringing the intermediaries and senior level perpetrators to justice.

Conclusion

This article revealed that there are myriads of international crimes committed in Nigeria without a corresponding response of punishment for perpetrators. One of the major goal for investigating and prosecuting international crimes is to bring to reality the principle of *Command Responsibility*, a legal principle that states that: *a superior is responsible for crimes committed by his/her subordinates and for failing to prevent or punish those crimes.* Overtime, it has been discovered that those who engage in frontline battles, killing and maiming, are often directed by superiors. Punishments therefore, should not exclusively focus on these foot soldiers (which regrettably has been the case), rather, it should be focused on senior commanders who give orders for the commission of such crimes; and financiers. That is, those who provides money for the purchase of arms and ammunition and for payment of wages. Nigeria has failed in bringing these high level perpetrators to justice, thus, relegating on its commitment to the Rome Statute. Going forward, on one hand, Nigeria should first domesticate the Rome Statute to obtain the legal mandate for prosecuting international crimes. The country must also show strong political will and capacity to commit to the Rome Statute. The ICC on the other hand,

should move a step further by opening investigations into, and possible prosecutions of alleged crimes committed in Nigeria. For this global criminal justice regime to succeed, state parties must cooperate and work closely with criminal justice institutions, particularly the International Criminal Court.

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