CHAPTER 16

GROSS HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF ARMED CONFLICT: THE CAUTIONARY TALE THAT UGANDA OFFERS NIGERIA

Emma Lubaale and Ademola Oluborode Jegede***

1 Introduction

Gross human rights violations are a common feature of armed conflicts in African states. There is a link between human rights violations and international crimes, with the literature demonstrating that some human rights violations are serious enough to meet the threshold of international crimes such as crimes against humanity.[1] This link may be` gleaned from the elements of crimes and definitions of crimes against humanity, thus making it practical to make a case for prosecution in terms of international criminal law.[2] Armed conflicts in Nigeria, as in several other African states including the Central African Republic, Uganda, Burundi, Kenya, Mali, Somalia, South Sudan, the Democratic Republic of the Congo and Sudan, are not an exception. Before its return to democracy in 1999, in Nigeria there have been gross violations of rights in armed conflicts associated with ethnicity and the indigene/settler question as evident in the crises in the Tiv-Jukun,[3] Ezza-Ezillo,[4] Ife-Modakeke[5] and Jos-Kaduna[6] communities; and natural resources interlinked with ethnic and indigene/

* LLB (Makerere) LLM LLD (Pretoria); Senior Lecturer, University of Venda, Thohoyandou, South Africa; elubaale@yahoo.co.uk

** LLB (Ife) LLM LLD (Pretoria); Professor, University of Venda, Thohoyandou, South Africa; ademolajegede@gmail.com

1 J Pablo 'The close relationship between serious human rights violations and crimes against humanity: International criminalisation of serious abuses' (2017) 17 *Anuario Mexicano de Derecho Internacional* 146.

2 As above.

3 R Ciboh 'Newspaper inquest into Tiv-Jukun Conflict 2001: An analysis of ethnic inequality and domination in contemporary Nigeria' (2014) 21 *New Media and Mass Communication* 42-43.

4 P Mbah & C Nwangwu 'Sub-ethnic identity and conflict in Nigeria: The policy option for the resolution of the conflict between Ezza and Ezillo in Ebonyi State' (2014) 5 *Mediterranean Journal of Social Sciences* 681.

5 OO Akanji 'Group rights and conflicts in Africa: A critical reflection on Ife-Modakeke, Nigeria' (2009) 16 *International Journal on Minority and Group Rights* 31.

6 SO Uhunmwuangho & A Epelle 'Challenges and solutions to ethno-religious conflicts in Nigeria: Case study of the Jos crises' (2011) 13 *Journal of Sustainable Development in Africa* 109.

settler questions, as discernible from the Ijaw-Ilaje,[7] Urhobo-Itshekiri[8] and Niger Delta[9] situations. Hence, the return to democracy in 1999 heralded in a new Constitution and great optimism regarding accountability for human rights violations. However, 20 years on nothing much has changed as post-1999 has recorded the most prominent of all lingering conflicts in recent times, that is, the Boko Haram (meaning that Western education is sinful) conflict which is engulfing different states in the northern part of the country.[10]

The Boko Haram conflict dates back to 2009 when Boko Haram, an armed group in Nigeria, resorted to violence, targeting both national security forces and civilians.[11] To contain the violence perpetrated by the Boko Haram armed group, Nigeria's national security forces have over the years increasingly fought back.[12] Worthy to note, violence is often inevitable in situations of armed conflict. In the Boko Haram conflict, for example, human rights violations have been pervasive, with reports documenting violations against human dignity including the killing of civilians, imprisonment, abductions, forced marriage, rape, sexual slavery, the recruitment and use of child solders, targeting and destruction of civilian property, extra-judicial executions, torture, arbitrary arrests, unlawful detention, enforced disappearance and death while in custody.[13] What is especially appalling is that Nigerian security forces who, ideally, should be protecting civilians and conducting armed conflict in accordance with humanitarian law, are implicated in these atrocities.[14] The atrocities committed cut into the core of humanity, constituting a violation of the full spectrum of the fundamental rights guaranteed under the Nigerian

7 OO Christopher 'Communal conflict management, information communication and utilisation in Ondo State, Nigeria: A case study of Ijaw/Ilaje crises' (2008) 5 *Journal of Library and Information Science* 141.

8 AO Anthony 'An evaluation of the causes and efforts adopted in managing the ethnic conflicts, identity and settlement pattern among the different ethnic groups in Warri, Delta State, Nigeria' (2014) 3 *International Journal of Science and Research* 344 346.

9 NS Akpan 'Governance and communal conflicts in a post-democratic Nigeria: A case of the oil-producing Niger Delta Region' (2010) 2/3 *Journal of African Studies and Development* 65.

10 AO Jegede 'Bridging the peace gap in Nigeria: The Panel of the Wise as a constitutional essential' (2016) 60 *Journal of African Law* 264.

11 C Dowd & A Drury 'Marginalisation, insurgency and civilian insecurity: Boko Haram and the Lord's Resistance Army' (2017) 5 *Peacebuilding* 136; Amnesty International 'Nigeria: Boko Haram and Nigerian military committing crimes under international law in north east Nigeria: Amnesty International written statement to the 28th session of the UN Human Rights Council (2-27 March 2015)' AFR 44/1033/2015 20 February 2015, http://www.refworld.org/pdfid/54eee0894.pdf (accessed 11 August 2018); Amnesty International 'Nigeria: Still waiting for justice, still waiting for change. Government must prioritise accountability in the north-east' (2016), http://www.refworld.org/docid/56e925bc4.html (accessed 11 August 2018); Human Rights Watch 'Nigeria: Events of 2017' (2017), https://www.hrw.org/world-report/2018/country-chapters/nigeria (accessed 10 August 2018); Human Rights Watch 'Spiraling violence Boko Haram attacks and security force abuses in Nigeria' (2016), https://reliefweb.int/report/nigeria/spiraling-violence-boko-haram-attacks-and-security-force-abuses-nigeria (accessed 11 August 2018).

12 As above.

13 As above.

14 As above.

1999 Constitution[15] and several international and regional human rights treaties to which Nigeria is party, such as the International Covenant on Civil and Political Rights (ICCPR)[16] and the African Charter on Human and Peoples' Rights (African Charter),[17] which is a part of the Nigerian law.[18]

Nigeria's relationship with the International Criminal Court (ICC) dates back to 2001 when it ratified the Rome Statute of the International Criminal Court (Rome Statute).[19] This Statute proscribes four international crimes, namely, the crime of aggression, war crimes, genocide and crimes against humanity.[20] By virtue of Nigeria's ratification of the Rome Statute, the ICC can exercise jurisdiction over any conduct that falls within the ambit of the foregoing four crimes. On 18 November 2010 Nigeria had another encounter with the ICC. On this day, the Office of the Prosecutor of the ICC announced a preliminary examination into the atrocities that were allegedly committed during the Boko Haram conflict.[21] Based on serious allegation of rights associated with these conflicts, a further 2013 report reveals that there was reason to believe that Nigerian security forces and the Boko Haram armed group committed war crimes and crimes against humanity.[22] Such a finding arguably suggests that accountability is pivotal and that international criminal justice is an option for Nigeria to advance such accountability. This should be expected in that commentators note that the ICC potential for international crimes is an effective legal response to gross violations of human rights which sadly feature in the commission of international crimes.[23]

For instance, the ICC applies the principle of complementarity which is significant to the above argument. According to that principle, among others, the ICC only assumes jurisdiction over international crimes when the state having jurisdiction over such crimes is unable or unwilling to prosecute.[24] This signifies that with states having the opportunity of the 'first bite at the apple' in so far as prosecution is concerned, in principle, the ICC is a court of last resort. This signifies that the bulk of prosecutions

15 Constitution of the Federal Republic of Nigeria 1999 (Cap C23 LFN 2004).
16 Eg, Nigeria is a party to the International Covenant on Civil and Political Rights (ICCPR) which guarantees a number of rights violated during the Boko Haram conflict such as the right to life, freedom from torture, to mention but a few.
17 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986 (1982) 21 ILM 58 (African Charter).
18 African Charter (Ratification and Enforcement) Act (Cap 10, Laws of Federation of Nigeria 2004).
19 Coalition for the International Criminal Court 'Status of ratification of the Rome Statute', http://iccnow.org/documents/CICC__ICC_Recommendations_17th_session_Universal_Periodic_Review.pdf (accessed 10 August 2018).
20 United Nations General Assembly, Rome Statute of the International Criminal Court, 17 July 1998 (Rome Statute) art 5.
21 International Criminal Court 'Nigeria', https://www.icc-cpi.int/nigeria (accessed 10 August 2018).
22 As above.
23 See eg J Iontcheva 'Nationalising international criminal law: The International Criminal Court as a roving mixed court' (2004) *University of Chicago Public Law and Legal Theory Working Paper* 3.
24 Art 17 Rome Statute.

for international crimes as a means of addressing gross violations of human rights in armed conflicts ought and should be conducted in domestic courts. Ultimately, this suggests that accountability rests heavily on what transpires in national criminal justice systems in so far as such international crimes are concerned. Hence, with preliminary examinations indicating that gross human rights violations capable of grounding international crimes have allegedly been committed during the Boko Haram conflict, the role of Nigeria's criminal justice system in advancing accountability for these crimes cannot be overemphasised. Moreover, the history of Nigeria being characterised by human rights violations, many of which were not addressed, brings persuasive momentum to bear on Nigeria's criminal justice to hold perpetrators of human rights violations to account.[25] The time for such accountability cannot be more auspicious than post-1999 Nigeria where there has been a legitimate expectation of an effective bridge between a past that lacked accountability and a future keen on addressing impunity in all its forms. With regard to the Boko Haram conflict, in particular, there have been numerous calls for accountability from rights groups including Amnesty International and Human Rights Watch.[26] The Nigerian government, under the leadership of President Muhammadu Buhari, has weighed in on this need, going as far as to make promises to have all perpetrators of human rights violations during this conflict held to account.[27] The overarching question, however, is as to the extent to which Nigeria's current legislative framework ensures that the goal of accountability at the national level is achieved.

The purpose of this chapter is to demonstrate two points. The first is that although the principle of complementarity allows states to exercise jurisdiction over international crimes that are of human rights significance before the ICC intervenes, Nigeria's current legislative framework limits the effectiveness of this arrangement. The second is that the limitations Nigeria is contending with in so far as accountability at the national level is concerned are not unique to Nigeria. Other states, including Uganda, have walked this path before and their experiences constitute useful insights for Nigeria. In addressing these two issues, the chapter is divided into four parts. Subsequent to the present introduction, the second part discusses the principle of complementarity with a view to placing national prosecutions in Nigeria within the broader context of international criminal justice. The third part briefly analyses Nigeria's legislative framework with a view to assessing whether it would ensure that life is breathed on the notion of complementarity. The fourth part invokes a comparative dimension to the

25 A Adegboyega 'Military regimes and nation building in Nigeria, 1966-1999' (2013) 5 *African Journal of History and Culture* 138-142; UB Ikpe 'Patrimonialism and military regimes in Nigeria' (2000) 5 *African Journal of Political Science* 146; O Babatunde 'Democratisation and the military in Nigeria: A case for an enduring civil-military relations in the fourth republic and beyond Global' (2015) 3 *Journal of Political Science and Administration* 44-52.

26 Amnesty International (n 11); Human Rights Watch (n 11).

27 Amnesty International 2016 (n 9) 1; E Anule 'Buhari to Trump: We'll tackle human rights abuses in Nigeria' (2018), https://newtelegraphonline.com/2018/05/buhari-to-trump-well-tackle-human-rights-abuses-in-nigeria/ (accessed 11 August 2018).

discussion by drawing insight from prosecution of international crimes in Uganda. This discussion highlights the prevailing challenges in the context of Uganda and in so doing identifies salient points to serve as lessons for Nigeria as it grapples with international criminal justice at the national level. The chapter ultimately draws the conclusion that the domestication of the Rome Statute remains pivotal in advancing international criminal justice in Nigeria failing which the ICC is left with wider discretion to intervene.

2 The principle of complementarity and the critical role of national proceedings in Nigeria

The ICC came into operation in 2002 following 60 ratifications of the Rome Statute of 1998. As already alluded to, the ICC has jurisdiction over war crimes, crimes against humanity, the crime of aggression and genocide. At the heart of the operations of the ICC is the principle of complementarity. The term 'complementarity' appears nowhere in the Rome Statute. However, it has been inferred from certain provisions within the Rome Statute, including the Preamble, article 1 and article 17.[28] In terms of the Preamble and article 1 of the Rome Statute, the ICC is merely 'complementary to national criminal jurisdictions'[29] bearing in mind that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'.[30] The Rome Statute envisages that 'effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.[31] To further buttress this role, the Rome Statute sets down the criteria for admissibility of cases before the ICC, underscoring that the ICC can only exercise jurisdiction over a case if a state which has jurisdiction over such a case 'is unwilling or unable genuinely to carry out the investigation or prosecution'.[32] This arrangement suggests that if a state with jurisdiction over such a case is able and willingly to genuinely investigate or prosecute, then the said case is not admissible before the ICC. All the foregoing provisions reflect the critical role of national prosecutions in advancing international criminal justice is considered to be of paramount importance under the ICC regime. This set-up is contrastable from the regime of International Criminal Tribunal of the Yugoslavia (ICTY)[33] and the International Criminal Tribunal of Rwanda (ICTR).[34] The ICTY and ICTR regimes give primacy of prosecution of international crimes to international criminal forums,[35] with international criminal forums merely deferring to national jurisdictions as and when they so wish.

28 See Preamble, arts 1 and 17 of the Rome Statute.
29 Preamble and art 1 Rome Statute.
30 Preamble to Rome Statute.
31 As above.
32 Art 17 Rome Statute.
33 Statute of the International Criminal Tribunal of the Yugoslavia 1993 (ICTY Statute).
34 Statute of the International Criminal Tribunal of Rwanda (ICTR Statute).
35 See 9(2)(a) and 8(2)(a) of the ICTY and ICTR Statutes respectively.

The greater emphasis on national jurisdictions in the ICC international criminal justice regime, however, is not a coincidence. The drafting history of the Rome Statute reveals that although states welcomed the idea of a permanent international criminal court, they remained extremely sceptical about such a court wielding profound power to such an extent as to trump over states' sovereignty.[36] For states, therefore, viewing the ICC as merely complementary to national courts was an assurance to them (states) of their primacy in so far as accountability for international crimes was concerned. The idea of the ICC merely being a court of last resort seems appealing to states. Not surprisingly, in terms of article 17 of the Rome Statute, a case becomes admissible before the ICC only when the state with jurisdiction is unable or unwilling to prosecute. To further advance the role of national courts in prosecuting international crimes, some commentators take the view that the complementarity transcends the ICC merely waiting for national courts to fail to prosecute so that the ICC intervenes.[37] It also encompasses a proactive role on the part of the ICC to support national courts with a view to ensuring that these states do not fall into the trap of being 'unable or unwilling' as to trigger the exercise of jurisdiction by the ICC. Commentators also suggest practical steps of ensuring that national prosecutions are effective including offering technical support and expertise where necessary.[38]

In light of the foregoing, although the Rome Statute establishes the ICC, international criminal justice under the ICC regime rests heavily on national criminal justice systems. This, indeed, seems logical in light of the fact that the ICC hardly has the requisite resources to prosecute all the international crimes across continents. Burden sharing between the ICC and national criminal justice systems, therefore, becomes inevitable. It has also been argued, rightly so, that conducting proceedings in closer proximity to crime scenes brings with it profound advantages including access to evidence, victims and witnesses.[39] Crucially also, the ICC does not have a police force. This therefore suggests that national courts play a key role in ensuring the attendance of those accused of crimes, with national criminal justice systems better placed in performing the role of effecting arrests. National proceedings could also contribute to greater legitimacy of international criminal justice. This is particularly critical in the wake of claims of the ICC's bias against African states. Concerned commentators allege that Africa is being witch-hunted while Western

36 F Jessberger & J Geneuss 'The many faces of the International Criminal Court' (2012) 10 *Journal of International Criminal Justice* 1085; O Bekou 'In the hands of the state: Implementing legislation and complementarity' in C Stahn & M ElZeidy (eds) *Complementarity of the International Criminal Court: From theory to practice Volumes I and II* (2011) 836.

37 WW Burke-White 'Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice' (2008) 49 *Harvard International Law Journal* 53.

38 As above.

39 LJ Laplante 'The domestication of international criminal law: A proposal for expanding the International Criminal Court's sphere of influence' (2010) 43 *Journal of Marshal Law Review* 645.

states are left to loom large.[40] Whether or not the foregoing claims hold weight is beyond the scope of the present discussion. Remarkably, however, international criminal justice within African national criminal justice systems could perhaps play a role in ensuring greater legitimacy of the international criminal justice agenda or even lay to rest claims of bias in international criminal justice. Moreover, the ICC, having only been established in 2002, only has jurisdiction over crimes committed after 2002, thus suggesting that to close this accountability gap, states carry the entire burden of prosecution of crimes committed prior to 2002. The Office of the Prosecutor of the ICC could not be more emphatic in underscoring the added advantage of prosecuting international crimes at the national level, reporting that 'national investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice'.[41]

It is apparent that the structure of the ICC regime strives, to the greatest extent possible, to ensure that national courts exercise jurisdiction. This may also be gleaned from a number of factors including the ICC's interpretation of nature of proceedings expected of national courts. Notably, the ICC does not expect national criminal justice systems to prosecute the atrocities committed in exactly the same way that the ICC would prosecute them. For example, states can rely on ordinary crimes including murder, rape, theft and assault to prosecute international crimes as opposed to relying on international crimes such as crimes against humanity, war crimes, genocide and the crime of aggression. The legal characterisation of crimes, in the ICC's view, does not matter. For example, instead of prosecuting the war crime of murder as such, a national court may rely on the ordinary crime of murder under a state's penal or criminal code to prosecute the war crime of murder. Moreover, whereas the ICC has a wide range of modes of criminal responsibility including command responsibility and co-perpetration,[42] states are not expected to invoke these exact forms of criminal responsibility to prosecute perpetrators of human rights violations. Loosely put, the ICC cannot rely on the fact that prosecutions at the national level do not mirror prosecutions at the ICC to admit a case before the ICC in terms of article 17 of the Rome Statute. What this suggests is that states without specific national legislation on prosecution international crimes are expected to advance the cause of international criminal justice on the basis of existing criminal legislation such as Penal Code legislation on ordinary crimes.

40 Guardian African Network 'African revolt threatens international criminal court's legitimacy' (2016), https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia (accessed 10 August 2018); N Feldman 'ICC is too focused on Africa, must take the blame for SA's departure' (2016), https://mg.co.za/article/2016-10-25-icc-is-too-focused-on-africa-must-take-the-blame-for-sas-departure (accessed 10 August 2018).

41 ICC Office of the Prosecutor 'Paper on some policy issues before the Office of the Prosecutor' (2003), https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (accessed 10 August 2018).

42 Arts 25 and 28 Rome Statute.

The ICC has given meaningful content to article 17 in so far as national proceedings are concerned. In *Prosecutor v Lubanga*, for example, the ICC gave meaningful content to the phrase 'case being investigated' as used in article 17(1)(a).[43] In this case Pre-Trial Chamber 1 invoked the 'same person same conduct' test to give meaning to this phrase.[44] According to the ICC, in assessing whether national proceedings are sufficient to exclude the intervention of the ICC in terms of article 17 of the Rome Statute, the emphasis is to be placed on the conduct and the person prosecuted. If the conduct and the person prosecuted by the national courts are the same as the person and conduct the ICC seeks to prosecute, then such a case is not admissible before the ICC. Notably, the fact that a national court prosecutes the same person for the crime of murder as opposed to the war crime of murder is merely an issue of characterisation in the ICC's view. In the end, it is the same person and the same conduct and such a case becomes inadmissible before the ICC. This position was buttressed in the case of *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Hussein*, where Pre-Trial Chamber 1 ruled that 'a domestic investigation or prosecution for ordinary crimes to the extent that the case covers the same conduct shall be considered sufficient'.[45] The ICC ruled in this case that the emphasis is not to be placed on the legal characterisation of the crime. Rather, it is on the conduct. Moreover, in *The Prosecutor v Muthaura et al* the Appeals Chamber of the ICC added that the 'same person same conduct' test does not necessarily require national proceedings to result into a conviction.[46] Therefore, the fact that proceedings at the national level result into acquittals, of themselves cannot found a basis for admission of cases before the ICC.

The approach of the ICC regime is somewhat different from that of the ICTR and ICTY regimes. In the latter regimes, prosecution on the basis of ordinary crimes founds a basis for another prosecution before the ICTY and the ICTR.[47] The approach of these regimes resonates with the arguments of commentators who are of the opinion that relying on ordinary crimes to prosecute international crimes is tantamount to trivialising the gravity of international crimes which in their view constitute grave breaches of international concern which ought to be characterised

43 *The Prosecutor v Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I Decision of 10 February 2006, para 31.

44 As above.

45 *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Hussein* ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013, paras 88, 108, 133, 200, 201.

46 *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11-274 30-08-2011 1/43 NM PT OA, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, para 31.

47 See arts 10(2) (a) and 9(2) (a) of the Statute of the ICTY and Statute of the ICTR respectively. See also the ICTR case of *Prosecutor v Bagaragaza*, decision on rule 11bis (Case ICTR-05-86-art 11), ICTY, 30 August 2006, para 17 in which the ICTR Appeals Chamber ruled that characterisation of a crime as ordinary warrants a new prosecution.

and prosecuted as such.[48] In their view, therefore, since prosecutions based on ordinary crimes would have constituted a trivialisation of an international crime, subsequent prosecution suffices.[49] Be that as it may, the ICC regime appears to have deemed recourse to ordinary crimes by national criminal justice systems as the only practical way to ensuring that national courts exercise jurisdiction over international crimes. This seems logical in the sense that several parties to the Rome Statute are dualist states. This means that they cannot apply the definitions of international crimes under the Rome Statute directly without domesticating it. Given that less than half of state parties to the Rome Statute do not have national laws domesticating the Rome Statute, to insist on national criminal justice systems conducting prosecutions which are identical or mirror those of the ICC would undoubtedly be to place unreasonable demands on states. If anything, it would collide head on with state sovereignty as the ICC would appear to dictate to states how to manage their national criminal proceedings, an issue that was hotly debated during the drafting history of the Rome Statute. Considered together, therefore, in principle Nigeria, as a party to the Rome Statute, is not mandated by the Rome Statute to domesticate this Statute.[50] Put differently, notionally Nigeria is expected to effectively prosecute the atrocities committed during the Boko Haram conflict with or without implementing legislation. However, the issue that remains unresolved and one that forms the crux of the next part is whether, in light of Nigeria's current legislative framework on crime and criminal responsibility, Nigeria can effectively prosecute these atrocities.

3 The current criminal law framework of Nigeria and accountability for human rights violations committed during the Boko Haram conflict

As earlier mentioned, during the Boko Haram conflict a host of human rights violations have been committed including the killing of civilians, imprisonment, abductions, forced marriages, rape, sexual slavery, the recruitment and use of child solders, the targeting and destruction of

48 D Sedman 'Should the prosecution of ordinary crimes in domestic jurisdictions satisfy the complementarity principle?' in C Stahn & L van den Herik (eds) *Future perspectives on international criminal justice* (2010) 266; X Philippe 'The principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 390.

49 As above.

50 On the arguments on practicality of relying on ordinary crimes to prosecute international crimes, see HJ Heller 'A sentence-based theory of complementarity' (2012) 53 *Harvard International Law Journal* 234; A Acirocop *Accountability for mass atrocities: The LRA conflict in Uganda* PhD thesis, University of Pretoria, 2011 182-184; SF Materu The post-election violence in Kenya: Domestic and international legal responses (2015) 89-114; W Burke & S Kaplan 'Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation' (2008) *University of Pennsylavania Law School, Public Law Research Paper Series* 8-13; A Okuta *Smallest share of the pie? Accountability for international crimes at the domestic level: Case studies of Kenya, Uganda and Côte d'Ivoire* PhD thesis, University of Amsterdam, 2016 154-155.

civilian property, extra-judicial executions, torture, arbitrary arrests, unlawful detention, enforced disappearance and death while in custody.[51] It is trite that for national courts to prosecute crimes, they need to have jurisdiction over them. This suggests that the crimes have to be properly defined. This requirement finds force in the supreme law of Nigeria, that is, the Constitution. In terms of its section 36(8), '[n]o person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence'.[52] Suffice it to note that this is not merely a criminal law principle, but is a fundamental human right finding force in several international human rights instruments including the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (ICCPR).[53] The rule explains, in part, the principle of legality under criminal law. In terms of article 15(1) of ICCPR, for example, the rule of legality requires that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'.[54] This rule, among others, bars the retrospective application of criminal laws. A critical reading of article 15(1) of ICCPR, in particular its reference to 'international law', could lead to the reasonable conclusion that article 15(1) creates an entry point via which international law, including Rome Statute crimes, can be applied in Nigeria directly. To advance the foregoing argument, however, would be to act as if article 38(12) of the Constitution of Nigeria does not exist. Article 36(12) provides:

> Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

The emphasis on national law is distinguishable from international law. Moreover, Nigeria is a dualist state in terms of the section 12 of the Constitution which makes it explicit that '[n]o treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly'. Thus, even though Nigeria has been a party to the Rome Statute since 2001, way before the atrocities in the Boko Haram conflict were perpetrated, this Statute cannot be applied directly in the Nigerian context. Although there is a draft legislation on international crimes in Nigeria, namely, the Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill of 2012, this Bill has not been enacted into law.

51 Amnesty International (n 11).
52 See the Constitution of the Federal Republic of Nigeria 1999 (Constitution of Nigeria).
53 The Universal Declaration of Human Rights, of course, is merely a declaration and so cannot be ratified, with arguments to the effect that it has attained customary international law status. Nigeria ratified ICCPR on 28 June 2001.
54 Constitution of Federal Republic of Nigeria, 1999.

Therefore, in so far as breathing life into the notion of complementarity as envisaged by the ICC regime is concerned, prosecutions in the Nigerian context would have to be based on existing general domestic legislation on crime. There are several legislations in Nigeria that proscribe conduct that bears some similarity to the conduct proscribed under the Rome Statute. These cannot all be discussed here. Therefore, recourse is made to the most comprehensive federal legislation on criminal law in Nigeria – the Criminal Code Act.[55] Since Nigeria is a former British colony, its laws are a remnant of British colonialism. Upon attainment of independence, hardly any amendments have been made to the Criminal Code Act and it continues to be the basis for criminal prosecutions. Dating back to 1916, when it was first enacted into Nigerian law, it is the fallback position for prosecution of international crimes under the ICC regime. However, to what extent can this Code ensure accountability for the atrocities committed during the Boko Haram conflict?

In so far as the prosecution of international crimes is concerned, many criminal law principles come into play including the definition of crimes, the modes of liability, the rules of procedure applicable to criminal prosecution, the rights of victims in criminal prosecution, the rights of the accused and the sentencing framework.[56] It is, however, not feasible to address all these procedural aspects without a link to a substantive crime. For this purpose, therefore, the focus is placed on Nigeria's Criminal Code Act in terms of its provisions on the offence of rape. The emphasis is placed on rape because sexual and reproductive violence was and continues to be pervasive in the Boko Haram conflict, with both Boko Haram rebels and Nigerian security forces being implicated in the commission of this offence.[57] It is conceded that not all definitions of crimes under Nigeria's Criminal Code contain as many flaws as the definition of rape. Nonetheless, the conclusions drawn in respect of the definition of rape and its prosecution illustrate the limitations of having recourse to ordinary crimes to prosecute international crimes in Nigeria. In terms of section 357 of the Nigerian Criminal Code Act, rape is defined as follows:

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation, or by means of false or fraudulent representation as to the nature of the act or in the case of a married woman, by personating her husband is guilty of an offence which is called rape.

Suffice it to note that this is the definition that was handed down during the colonial era and to date it remains alive and well. It is this definition to which Nigeria will have to have recourse in addressing the pervasive sexual and reproductive violence documented during the Boko Haram conflict. The above definition contains a few salient points that make such a recourse legally useless. First, it is clear that only males can

55 Criminal Code Act, Ch 77, Laws of the Federation of Nigeria 1990.
56 CR Snyman *Criminal law* (2008) 29-49.
57 Amnesty International (n 11); Human Rights Watch (n 11).

perpetrate rape. This suggests that the Nigerian criminal justice system cannot prosecute women who perpetrate rape. Moreover, international criminal law recognises the principle of command responsibility as a form of criminal responsibility. In terms of this mode of responsibility, commanders may be held accountable if they fail to take 'necessary and reasonable' steps to prevent the commission of atrocities.[58]

The implication of Nigeria's definition of rape suggests that female commanders cannot be held criminally liable because females are not envisaged in so far as the perpetration of rape is concerned. Second, it is evident that only females can be victims of rape. This element is especially disturbing in light of reports suggesting that males have been and continue to be victims of rape in situations of armed conflict.[59] Precisely put, this definition suggests that rape cases against men cannot be entertained under Nigeria's criminal justice system. Third, since the term 'carnal knowledge' has been defined by Nigerian courts to mean penetration of the vagina by the penis,[60] the definition of rape under Nigerian law automatically excludes penetration by means of other objects. It will be recalled here that in the ICTR case of *The Prosecutor v Akayesu* (*Akayesu* case), the tribunal went to great lengths to give meaningful content to rape in situations of conflict, going as far as to encompass penetration by objects such as pieces of wood and penetration of other parts of the body other than the vagina.[61] The ICC, in the 2016 judgment of *Prosecutor v Bemba* (*Bemba* case) has also weighed in on the nature of rape during conflict, with its decision building on the praiseworthy pace set in the *Akayesu* case.[62] The approach of the ICC in the *Bemba* case found force in the comprehensive definition of rape as contained in the ICC's Elements of Crimes document which definition is a total departure from Nigeria's definition.[63] Overall, the narrow interpretation accorded to the definition of rape under Nigerian law suggests that a wide range of conduct warranting prosecution would fall through the cracks as it would not measure up to the narrow definition of rape.

58 Art 28 Rome Statute.

59 S Sivakumaran 'Sexual violence against men in armed conflict' (2007) 18 *European Journal of International Law* 253.

60 See eg the Supreme Court of Nigeria decision in the case of *Ogunbayo v The State* (1973) 1 where it was held that the essential ingredients of the offence of rape are penetration and lack of consent. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape. It has been held in several legal and judicial authorities that for rape to be proved there must have been penetration of the vagina, even if slight. This definition has been adopted and invoked in other cases including *Upahar v The State* (2003) 6 NWLR (Pt 816) 230.

61 *The Prosecutor v Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998 para 598.

62 *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Pre-Trial Chamber III, 21 March 2016, paras 99, 100 and 101.

63 See broad definition of rape under the International Criminal Court Elements of Crimes (2011) 8 28.

Granted, the ICC has made it clear that national prosecutions do not have to mirror ICC prosecutions, with recourse to ordinary crimes by national courts being an option. However, realistically speaking, would the national prosecution of rape and perhaps other forms of sexual violence in Nigeria really satisfy article 17 of the Rome State as to block the intervention of the ICC? The issue of definition of crimes is only the tip of the iceberg. This is because the prosecution of criminal offences transcends definitions. It also encompasses the application of procedures some of which complicate prosecution or make it close to impossible. For example, in most sexual offences the prosecution often requires corroborative evidence taking several forms, including evidence of fighting back on the part of the female, stained clothes, medical evidence and bruises or injuries. Without this form of evidence, convictions remain an impossible outcome.[64] It is to be noted, however, that the circumstances under which sexual violence occurs in situations of armed conflict is far different to rape in times of peace. The coercive nature of the environment, first of all, rules out issues of consent, fighting back, resisting, and so forth, many of which constitute corroborative evidence in ordinary prosecutions.[65] In situations of conflict the coercive environment and the constant movement from one region to another automatically destroy the chain of evidence. Moreover, victims often make reports long after the rape has occurred. For example, reports could be made years after they have fortunately escaped from their abductors. Insisting on corroborative evidence for such victims is tantamount to the secondary victimisation of victims by the criminal justice system. Unfortunately, if the international crime of rape is to be prosecuted as an ordinary crime, these same procedures are applicable. Conversely, the ICC takes all these unique circumstances into account by, among others, not making corroboration a requirement.[66] The issue that would fall to be resolved, therefore, is whether these colonial archaic laws based on which national prosecutions are based can continue to rest uncomfortably alongside the evolving international criminal justice framework and, perhaps most importantly, to breathe life to the principle of complementarity. Is it then justified to argue that by virtue of the complementarity principle, ratification of the Rome Statute implicitly places an obligation on Nigeria to domesticate the Rome Statute failing which admissibility of cases before the ICC becomes rife?

For a country such as Nigeria, as with many former British colonies, holding onto these colonial laws and procedures is especially disturbing in light of the fact that the United Kingdom, from where all these laws find their roots, has since made reforms to its criminal codes. The

64 EOC Obidimma 'Time for a new definition of rape in Nigeria' (2015) 5 *Research on Humanities and Social Sciences* 112-121.

65 On coercive circumstances under which sexual violence occurs in situations of armed conflict, see Akayesu case (n 61) para 598.

66 International Criminal Court Rules of Procedure and Evidence (2002). In terms of Rule 63(4) of these Rules, 'a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence'.

definition of rape in the United Kingdom differs from that entrenched in the Nigerian Criminal Code.[67] Moreover, the United Kingdom, on realising the need to have a firm grip on international crimes, has not only become a party to the Rome Statute,[68] but has also enacted specific legislation on international crimes and has relied on it to hold perpetrators to account.[69] Considered together, Nigeria's current criminal law framework makes it an uphill task for the article 17 of the Rome Statute threshold to be met. For example, the mere fact that Nigeria cannot prosecute rape by means of objects or rape by women automatically places it out of reach of such perpetrators. Inevitably, this triggers the intervention of the ICC because the ICC would be prosecuting a different conduct which is not recognised under Nigerian law. The limited modes of criminal liability under Nigerian law, though beyond the scope of the present discussion, also create challenges. For example, the fact that Nigeria's Criminal Code Act does not recognise command responsibility as a mode of liability could mean that commanders cannot be effectively held to account. This, of itself, is an entry point for the ICC to admit a case. That said, what lessons can Nigeria draw from Uganda, a country that has grappled with the dilemma of national prosecution of international crimes long before Nigeria was confronted with it?

4 Domestic prosecution of international crimes in Uganda: Lessons for Nigeria

Conflict has been pervasive in Uganda with the northern and eastern parts of the country being the most affected. This conflict dates back to 1986 when an armed group called the Lord's Resistance Army (LRA) resorted to armed conflict, committing atrocities not only in Uganda but in other regions including Sudan and the Democratic Republic of the Congo.[70] The Ugandan National Defence Forces (UPDF) responded to these atrocities and in the course of this, they too violated human rights.[71] The atrocities committed by both the LRA and UPDF include rape, the killing of civilians, recruiting and enlisting children to work as soldiers, torture and sexual slavery.[72] These atrocities have been characterised as international crimes and as evidence of this, the cases forming part of the ICC's list of cases presently encompass alleged perpetrators of human rights violations

67 Eg, the definition of rape under sec 1 of the Sexual Offences Act of the United Kingdom (2003) is gender inclusive. In addition, it encompasses penetration of other parts of the body including the anus and mouth.

68 The United Kingdom ratified the Rome Statute on 4 October 2001. On status of ratification, see Coalition (n 19).

69 International Criminal Court Act of United Kingdom 2001. Note here that knowing full well that it is a dualist state, the United Kingdom took a targeted step, having to enact legislation on international crimes prior to even ratifying the Rome Statute.

70 Human Rights Watch 'Uprooted and forgotten: Impunity and human rights abuses in northern Uganda' September (2005) 17, https://www.hrw.org/reports/2005/uganda0905/ (accessed 10 August 2018).

71 As above.

72 As above.

during the LRA conflict. The case against Dominque Ongwen currently pending before the ICC is one such example.[73]

Uganda ratified the Rome Statute in 2002 and was also the first state to refer its situation to the ICC. To give effect to the notion of complementarity, Uganda established the International Criminal Division (ICD) in 2010. The ICD has jurisdiction over international crimes including those committed during the LRA conflict. Currently, there is one case pertaining to the LRA conflict pending before the ICD and this case is against Thomas Kwoyelo, a former commander in the LRA who was arrested in the DRC in 2008.[74] Uganda also enacted the International Criminal Court Act (ICC Act) in 2010 with a view to domesticating the Rome Statute.[75] This Act constitutes the most comprehensive law on international crimes in Uganda, giving the ICD jurisdiction over all four international crimes under the Rome Statute. In terms of the crimes proscribed, the ICC Act draws on the definitions offered by the Rome Statute. It also encompasses a wide range of modes of liability, including command responsibility. Properly implemented, the ICC Act constitutes a ray of hope for Uganda in so far as international criminal justice is concerned. Especially unfortunate is the fact that this Act is redundant because having been enacted 2010, it cannot be applied retrospectively to atrocities committed by Kwoyelo (arrested in 2008) and all other atrocities committed before 2010. Uganda therefore is having recourse to general legislation on ordinary crimes including the Penal Code Act which was enacted as far back as 1950 during the British colonial era. Given the datedness of this Act, international crimes were not envisaged.[76] Therefore, in having recourse to the Penal Code Act, reference is made to ordinary crimes such as rape, murder and kidnapping to prosecute international crimes such as the war crime of rape, the war crime of murder and the crime of conscripting or enlisting children under the age of 15 years to serve as soldiers. The inadequacy of these crimes cannot be overemphasised in light of the brief discussion above pertaining to the crime of rape in Nigeria.

Now, bringing the discussion closer to the Nigerian context, a few salient points are worth noting. Uganda's ICC Act, though critical to the prosecution of international crimes, came way too late as to be relied on to prosecute the international crimes committed during the LRA conflict. In Nigeria there have been numerous calls for the government to enact the 2012 Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill into law.[77] These calls, however, have fallen on deaf ears.

73 Dominique Ongwen, a former child soldier and also commander in the LRA, currently faces 70 charges of crimes against humanity and war crimes in respect of the atrocities committed during the LRA conflict. See ICC Website at https://www.icc-cpi.int/uganda (accessed 11 August 2018).

74 *Uganda v Kwoyelo Thomas alias Latoni* (International Crimes Division of the High Court of Uganda) HCT-00-ICD-Case 0002 of 2010 (11 November 2011).

75 See International Criminal Court Act of 2010.

76 See Penal Code of Uganda, Ch 120.

77 Calls have been made by both Human Rights Watch and Amnesty International. See Amnesty International and Human Rights Watch (n 11).

Just as in the case of Uganda, Nigeria is left with no option but to rely on ordinary crimes to prosecute the atrocities committed during the Boko Haram conflict. Without a law domesticating the Rome Statute, it may be difficult for Nigeria to challenge the ICC's intervention. In 2016, for example, Dominic Ongwen was surrendered to the ICC for prosecution. Following this action, there were complaints by sections of the Ugandan society to the effect that the ICC was undermining the principle of complementarity.[78] The argument, as it were, was that with Uganda's ICD in place, Uganda had sufficient capacity to prosecute Ongwen and, therefore, that the ICC was out of order to admit the Ongwen case.[79] Commentators contend that there was no evidence to prove that Uganda was unable or unwilling to prosecute Ongwen since Uganda has a fully-fledged ICD in place.[80] Of course, Uganda, on its own motion, referred its situation to the ICC way back in 2004 so it would be hard for arguments of disregard of national prosecutions to be sustained. Be that as it may, would Uganda have successfully challenged the admissibility of the Ongwen case before the ICC? Pertinent to note, some of the crimes Ongwen is being charged with include conscripting or enlisting children under the age of 15 years to serve as soldiers and rape.[81] Uganda's definition of rape is identical to that of Nigeria, meaning that based on this definition, some conduct remains unprosecutable in Uganda. As the ICC Act is not applicable to the LRA conflict, there is no other law that defines the crime of conscripting or enlisting children under the age of 15 years to serve as soldiers. What this means then is that Uganda cannot effectively prosecute this crime. In light of these circumstances, the Ongwen case would still be admissible before the ICC. In fact, even the *Kwoyelo* case currently before the ICD is admissible before the ICC, of course if the ICC so wishes, because the legislative framework leaves many atrocities out of reach of the ICD. These realities are a cautionary tale for Nigeria on the need to not only domesticate the Rome Statute, but also to brace itself in so far as the issue of admissibility is concerned. Should the ICC decide to prosecute the atrocities committed during the Boko Haram conflict, it would be hard or close to impossible to successfully challenge admissibility because the current national laws applicable in Nigeria are not up to speed with developments in international criminal justice.

5 Conclusion

Gross human rights violations associated with armed conflicts have featured and continue to feature in Nigeria. Efforts to address the situation is critical to Nigeria's commitment to democracy. The purpose of this

78 LO Ogora 'How the trial of Dominic Ongwen has shaped attitudes toward international criminal justice in Uganda', https://www.ijmonitor.org/2017/08/how-the-trial-of-dominic-ongwen-has-shaped-attitudes-toward-international-criminal-justice-in-uganda/ (accessed 10 August 2018).

79 As above.

80 As above.

81 See generally ICC website on proceedings against Dominique Ongwen on ICC website at https://www.icc-cpi.int/uganda (accessed 11 August 2018).

chapter was to assess whether Nigeria's current legal framework would ensure the effective prosecution of the human rights violations committed during the Boko Haram conflict. The chapter also sought to draw some insight from Uganda. The chapter has demonstrated that despite taking the praiseworthy step to ratify the Rome Statute, Nigeria's failure to domesticate this Statute places international criminal justice out of reach. The prevailing situation in Uganda all the more underscores the need for the timely domestication of the Rome Statute. The current framework in Nigeria, however, does not reflect a commitment to international criminal justice and, arguably, accountability for gross violations of human rights in that context. Victims of these atrocities continue to clamour for justice, leaving the ball in the courts of the Nigerian government. As Nigeria marks 20 years of democracy, it will be interesting to watch how it plays the ball of international criminal justice as a legal response to gross human rights violations in armed conflicts context.