

# Acceptance of International Criminal Justice in Nigeria

## Legal Compliance, Myth or Reality?

Benson Chinedu Olugbuo

### Content

- 1 Introduction
- 2 Researching Acceptance
- 3 The Push and Pull of Acceptance
- 4 Understanding Acceptance in Nigeria
- 5 Conclusion
- 6 Bibliography



INTERNATIONAL  
NUREMBERG  
PRINCIPLES  
ACADEMY

# Acceptance of International Criminal Justice in Nigeria Legal Compliance, Myth or Reality?

Benson Chinedu Olugbuo<sup>1</sup>

## 1. Introduction

The International Criminal Court (ICC) recently announced that it had identified eight potential cases of crimes against humanity and war crimes in the war against insurgency in Nigeria.<sup>2</sup> This is in relation to the conflict between the Nigerian military and Boko Haram insurgents in north-east Nigeria.<sup>3</sup> The conflict has caused great suffering to civilians, and strained the relationship between communities and government forces (Badejogbin, 2013: 227; Onuoha, 2010: 54). It has further raised the possibility of an investigation by the ICC in Nigeria, and has heightened fears that the proposed investigation may unravel the military and expose it to international scrutiny. However, the ICC's possible investigation of the conflict goes beyond the fears of a possible investigation into the actions of the military. It also has to do with the primary purpose of this research, which is to understand the tension between legal compliance and the acceptance of international criminal justice in Nigeria, which is seen both as a myth and as reality depending on the context.

The Nigerian military has played a major role in the governance and development of the country. Both serving and retired military officers have continued to hold political roles in Nigeria's quest for democracy. The role of the military has been further consolidated due to the current engagement between the Nigerian military and Boko Haram insurgents. However, since 1999 there has been an uninterrupted civilian administration, although some of the civilian leaders are former military Heads of State like former President Olusegun Obasanjo and the current President, Mohammadu Buhari.

Since November 18, 2010, Nigeria has been under preliminary examination by the ICC. The preliminary examination is examining the internal conflict between the Nigerian security forces and members of Boko Haram. The office of the prosecutor of the ICC has received no less than

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<sup>2</sup>See the Report of Preliminary Examination 15 November 2015, available online at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>, accessed 19 February 2016.

<sup>3</sup> Boko in Hausa language means 'Western education' or 'Western influence' and Haram in Arabic means 'sinful' or 'forbidden.' Boko Haram translated literally means 'Western education or influence is sinful and forbidden'. However the Nigerian Islamic militant group prefers to call itself 'Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad' which means 'People Committed to the Propagation of the Prophet's Teachings and Jihad.' See Human Rights Watch (2012) 'Spiralling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria' October 2012 available online at <https://www.hrw.org/report/2012/10/11/spiraling-violence/boko-haram-attacks-and-security-force-abuses-nigeria>, accessed 19 February 2016; Andrew Walker (2012) 'What Is Boko Haram?' United States Institute for Peace Special Report 308, 1- 16;<http://www.usip.org/sites/default/files/SR308.pdf>, accessed 19 February 2016.

94 communications detailing crimes within the jurisdiction of the ICC, committed in the course of the conflict. Since Nigeria ratified the Rome Statute in 2001, there have been three failed attempts to domesticate the Rome Statute into national law. The need to domesticate the Statute is significant for the 1999 Constitution of the Federal Republic of Nigeria, which provides that no treaty is enforceable until it is enacted as a domestic law.<sup>4</sup> This means that Nigeria practices a dual system of incorporating international norms. The Nigerian judiciary has confirmed this arrangement of the law in several cases.

However, some of the issues that have affected the national implementation of the Rome Statute and acceptance of international criminal justice lie more generally in the nature of the Nigerian legal system. Under the Nigerian Constitution, criminal law is the responsibility of each state in the federation as it is not in the exclusive and concurrent legislative list. This means that every state in Nigeria has the power to regulate the administration of criminal justice in its jurisdiction. Therefore, any law passed by the National Assembly on the administration of criminal justice is applicable only to the Federal Capital Territory, Abuja, until other states in the federation pass counterpart legislation to supplement the federal law. Therefore, it will require the states in Nigeria to adopt and enact laws within their jurisdiction for a national legislation to have the force of law in a state.

## **2. Researching Acceptance**

This chapter analyses whether there is a willingness on the part of the Nigerian government to accept international criminal justice, and if compliance with legal norms can be rated as an indication of acceptance. It argues that the legal acceptance of international criminal justice is subject to political interests. This is because the use and application of such justice in Nigeria has not shown clear commitments to its acceptance.

It is important at this stage to clearly define the crimes within the jurisdiction of the ICC that are of interest in this research. The jurisdiction of the ICC is limited to the most serious crimes of concern to the international community as a whole. Therefore, the Court has jurisdiction over the crime of genocide; crimes against humanity; war crimes; and the crime of aggression.<sup>5</sup> Regarding the crime of aggression, the Review Conference of the Rome Statute held in Kampala, Uganda from May 31 to June 11, 2010 adopted a definition of the crime of aggression. However, the ICC will have jurisdiction over the crime, subject to a decision to be taken after January 1, 2017 by the same majority of state parties as is required for the adoption of an amendment to the Statute.<sup>6</sup> According to the Rome Statute, the crime of genocide is committed when it can be established that the perpetrator acted with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group and committed any of the following crimes: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical

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<sup>4</sup> Section 12 of the 1999 Constitution.

<sup>5</sup> Article 5 of the ICC Rome Statute.

<sup>6</sup> Assembly of States Parties resolution RC/Res.6 adopted at the 13th plenary meeting, on 11 June 2010, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf), accessed 2nd February 2016.

destruction in whole or in part; (d) imposing measures intended to prevent births within the group; or (e) forcibly transferring children of the group to another group.<sup>7</sup> Crimes against humanity involve several acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>8</sup> The ICC also has jurisdiction in respect of war crimes, in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. In addition, these crimes are related to the grave breaches of the Geneva Conventions of August 12, 1949. War crimes also include other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.<sup>9</sup>

For the purposes of this study, acceptance is defined as a convergence of legal and political interests in the application of international criminal justice. Acceptance is thus not only rooted in the decisions of the Government of Nigeria, but also in the actions and inactions of officials, lawyers, judges, victims, survivors, and the general public. Although the main focus of this chapter is to interrogate the acceptance of the Government of Nigeria, it also briefly considers actors and factors that influence the decisions of the Government.

To answer the questions regarding acceptance, the chapter is based on different research methods, comprising the analysis of legal texts and documents on the acceptance of international criminal justice in Nigeria, and semi-structured key informant interviews with Nigerians between October and December 2015 in Abuja. There was also a Focus Group Discussion organised with Civil Society Organisations working on justice sector reform issues in Nigeria at the headquarters of the National Human Rights Commission on November 12, 2015.<sup>10</sup> The research also benefitted from a dialogue session between the Nigerian Military and staff of Amnesty International during the unveiling of the Human Rights Desk at the Department of Civil-Military Affairs, Army Headquarters, Abuja on February 18, 2016. The objective of these discussions was to understand the framework and practise of legal compliance under Nigerian law in relation to international criminal justice. The media was studied in particular, including reports relating to the acceptance of international criminal justice by government officials through pronouncements and official documents provided to the public.

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<sup>7</sup> Article 6 of the Rome Statute.

<sup>8</sup> See Article 7 of the Rome Statute. These acts include the following crimes (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law; (i) enforced disappearance of people; (j) the crime of apartheid; and (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>9</sup> *Ibid.*

<sup>10</sup> The Focus Group Discussion was at the margins of the strategy workshop on the domestication of The Rome Statute of the International Criminal Court organised by the Nigerian Coalition for the International Criminal Court on 12th November 2015 in Abuja, Nigeria.

### 3. The Push and Pull of Acceptance

The politics of international criminal justice in Nigeria cannot be separated from developments in Africa and beyond. Although this study does not set out to substitute applicable theories of international criminal justice, it is necessary to look at some of the issues and concepts affecting acceptance of international criminal justice on the continent more generally. Given that the ICC mainly intervenes in African states, at present there is a rather sour attitude towards international justice in Nigeria (and elsewhere on the continent), suggesting that it is imperial and drawing on memories of slavery and servitude seen during the colonial period.<sup>11</sup> This image is being used against the ICC, which is accused of being part of a Western conspiracy targeting African leaders. Some legal scholars have held against this, arguing that the ICC is not focusing only on Africa, that many of the cases are self-referrals, and that the chief prosecutor of the ICC adheres to the rules rather than the political interests of powerful non-African states as represented by the permanent members of the United Nations Security Council (UNSC) (Jalloh, 2009, 445; Clarke, 2009, 237). It is important to stress that many African governments supported the establishment of the ICC. Senegal was the first country to ratify the Rome Statute, and as many as 34 African States had ratified by November 2015. Nevertheless, at present most of the cases under investigation are from the continent, rendering it an experiment lab of the ICC (Igwe, 2008, 294-323).

The indictments against Sudan's current President Al-Bashir and Kenya's sitting President Uhuru Kenyatta have strained the relationship between Africa and the ICC. With reference to the case of President Al-Bashir, the African Union (AU) subsequently passed a resolution not to cooperate with the ICC in his arrest and surrender. In addition, the AU has conferred criminal jurisdiction to the African Court of Justice on Human and Peoples' Rights. Some scholars see this move as a smokescreen and unnecessary distraction (Murungu, 2011:1067).<sup>12</sup> Others call for circumspection, arguing that the decision to establish a criminal chamber of the African Court of Justice on Human and Peoples Rights predates the establishment of the ICC and the politics of international criminal justice in the continent.<sup>13</sup> These developments have diminished the reputation of the ICC and its deterrent effect. Some African leaders of countries that are state parties to the ICC have even threatened to withdraw from the Court. For some academics, Africa's fight with the ICC is triggered by the relationship between the ICC and the UNSC, because the Rome Statute gives the Security Council leverage on the activities of the ICC, even though the majority of permanent members of the UNSC are not state parties to the ICC. Moreover, the first Chief Prosecutor of the ICC has been personally accused of not handling some situations well, leading to accusations of bias and a lack of independence (Olugbuo, 2014, 351; Schabas, 2008, 731).

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<sup>11</sup> See Geoffrey Lugano 'Changing faces' on acceptance of international criminal intervention in Kenya' in this volume.

<sup>12</sup> See also Stephen Lamony, 'African Court not ready for international crimes', *African Arguments*, 10 December 2012, available online at <http://allafrica.com/stories/201212101500.html>, accessed 19 February 2016.

<sup>13</sup> Chidi Odinkalu 'Concerning the Criminal Jurisdiction of the African Court – A response to Stephen Lamony's', *African Arguments*, 19 December 2012, available online at <http://allafrica.com/stories/201212190889.html>, accessed 19 February 2016.

As a powerful player in Africa's continental affairs, Nigeria has to balance competing demands regarding its obligation to the international community and leadership status on the continent. It is this push and pull of continental leadership that results in the oscillating visions of acceptance of international justice in Nigeria. Different events have demonstrated this dilemma. In 2013, Nigeria welcomed President Al-Bashir despite the arrest warrant issued by the ICC against him. When the ICC Prosecutor requested information on the invitation, the Nigerian Government replied that the event was organised by the AU and that Nigeria was merely the host of the event and thus not responsible for attendees, such as President Al-Bashir. When pressed further, the Government argued that when it realised the error in inviting Al-Bashir, Nigeria activated a legal process that could not be completed before he left Nigeria (Udombana, 2014: 57). Nigeria's response did not clearly address the issue of its legal obligation to arrest Al-Bashir as a state party to the Rome Statute. In addition, it did not make clear what the legal process was that had been activated before the departure of President Al-Bashir.

Another recent event is the allegation that President Muhammadu Buhari, the President of Nigeria, flew President Al-Bashir to Sudan on his presidential jet after the India-Africa Forum Summit in October 2015.<sup>14</sup> President Buhari, is aware of the fact that President Al-Bashir is wanted by the ICC for international crimes connected with the Darfur conflict. It seems President Buhari is reminding non-Africans that solidarity for African leaders does not exclude impunity for international crimes, especially when the African Union passed a resolution of non-cooperation with the ICC on the arrest and surrender of the President Al-Bashir.<sup>15</sup> For a President that rode to power through a campaign to change how things are done, Nigerians expected their President to do things differently.<sup>16</sup> This is in recognition of the fact that Nigeria has an obligation to arrest President Al-Bashir and surrender him to the ICC.

In June 2015, an Amnesty International report was published which accused high ranking military officers of the Nigerian military of complicity in the crimes committed against civilians and members of Boko Haram.<sup>17</sup> This information mirrors findings of other organisations working in northern Nigeria.<sup>18</sup> Importantly, though, the report mentions names of high-ranking military officers, incurring the wrath of the Nigerian military establishment. Therefore, the push and pull of acceptance in Nigeria is reflected in both regional and domestic politics. In a dialogue session organised at the army headquarters between the staff of Amnesty International and the

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<sup>14</sup> The Breaking Times 'How Buhari Smuggled Fugitive Omar al-Bashir Out of India to Sudan' 2nd November 2015, available online at <http://www.thebreakingtimes.com/breaking-news-how-buhari-smuggled-fugitive-omar-al-bashir-out-of-india-to-sudan/>, accessed 20 February 2016.

<sup>15</sup> See African Union's Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV).

<sup>16</sup> Premium Times 'Presidential Media Chat: 10 Questions for President Buhari' December 30, 2015, available online at <http://www.premiumtimesng.com/news/headlines/195923-presidential-media-chat-10-questions-for-president-buhari.html>, accessed 20 February 2015.

<sup>17</sup> Amnesty International 'Stars on Their Shoulders, Blood on Their Hands - War Crimes Committed by the Nigerian Military' 3 June 2015, available online at <https://www.amnesty.org/en/latest/news/2015/06/stars-on-their-shoulders-blood-on-their-hands/>, accessed 19 February 2016.

<sup>18</sup> Centre for Democracy and Development 'Boko Haram' (2014) 4 West Africa Insight, available online at <http://westafricainsight.org/boko-haram/sang-betail-et-cash-le-vol-de-betail-et-leconomie-souterraine-nigeriane-en-plein-essor/>, accessed 22 February 2016; Idayat Hassan and Benson Olugbuo 'Winning the War and Not Just the Battle: A Masterplan for ending the Boko Haram Conflict in the North-East, Centre for Democracy and Development Briefing Note, August 2015, available online at <http://westafricainsight.org/terrorism-and-trafficking/winning-the-war-and-not-just-the-battle/>, accessed 22 February 2016.

Chief of Army Staff, the Nigerian Army made a presentation on developments in the northeast, the setting-up of a human rights desk at the Defence Headquarters, and investigations carried out by the army into allegations of human rights abuses.<sup>19</sup> Amnesty International promised to review the reports of the Government and to reply formally to the issues raised at the dialogue session. Amnesty International also reiterated its recommendation that Nigeria had the obligation to investigate and prosecute those culpable for international crimes committed by officers of the Nigerian military in accordance with the complementarity principle of the Rome Statute of the ICC.<sup>20</sup> The establishment of the Human Rights Desk will no doubt help in enhancing the relationship between the civilians and the military. However, it still does not effectively deal with past human rights abuses, which Amnesty International believes should be investigated by an independent panel constituted by the Government and not by the Nigerian military.<sup>21</sup>

#### 4. Understanding Acceptance in Nigeria

Nigeria is a member of several regional, continental, and international organisations with different objectives, including the protection of human rights, international justice, and the fight against impunity. These organisations include the Economic Community of the West African States, the African Union, and the United Nations. In addition, Nigeria has ratified several regional and international instruments aimed at promoting and protecting human rights. Some of these instruments ratified by Nigeria clearly prioritise international justice.<sup>22</sup> Nigeria has also domesticated some of the treaties that it has ratified. For instance, it has given effect to the provisions of the four Geneva Conventions of 1949 and the two additional Protocols of 1977.<sup>23</sup> The Geneva Convention Act, which is applicable throughout Nigeria, covers people of all nationalities, regardless of where the offence was committed.<sup>24</sup> This means that a criminal can be tried in Nigeria for an international crime committed outside its borders, as long as the suspect is present in Nigeria.

Nigeria signed the Rome Statute of the International Criminal Court (ICC) on June 1, 2000 and deposited its instrument of ratification on September 27, 2001. The ICC has had jurisdiction over international crimes committed in Nigeria since July 1, 2002. In addition, the ICC operates on the principle of complementarity, which places the primary obligation to investigate and

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<sup>19</sup> Personal notes during the Dialogue Session between Amnesty International and the Nigerian Military in Abuja, 18 February 2016.

<sup>20</sup> Vanguard Newspapers 'Boko Haram: There are still systematic violation of human rights by Nigerian Military — Amnesty International' 19 February 2016, available online at <http://www.vanguardngr.com/2016/02/boko-haram-there-are-still-systematic-violation-of-human-rights-by-nigerian-military-amnesty-int/>, accessed 20 February 2016.

<sup>21</sup> Personal notes during the Dialogue Session between Amnesty International and the Nigerian Military in Abuja, 18 February 2016.

<sup>22</sup> Convention against Torture 1984; Genocide Convention of 1948; Geneva Conventions and their Optional Protocols; Rome Statute of the International Criminal Court.

<sup>23</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 12 August 1949 6 UST 3114 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and the Shipwrecked Members of Armed Forces at Sea 12 August 1949, 6 UST 3217 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War 12 August 1949, 6 UST 3316 (Third Geneva Convention); Geneva Convention Relative to the protection of Civilian People in Time of War 1949 6UST 3516; (Fourth Geneva Convention) collectively referred to as the 1949 Geneva Conventions; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11) 8 June 1977.

<sup>24</sup> Section 12 Geneva Conventions Act 1961.

prosecute international crimes on state parties. Only when the state in question is unwilling or unable to prosecute, will the ICC have jurisdiction over the case. Unwillingness, inability, and inactivity are generally understood as signs of abdication of primary responsibility to investigate and prosecute (Robinson, 2010, 67). Therefore, in order to fulfil the ICC's goal to end impunity for international crimes, its intervention is seen as a last resort as it is not a court of first instance (Olugbuo, 2011, 249).

The ratification and domestic implementation of the Rome Statute in Nigeria is a shared responsibility between the Executive and the Legislature. The Judiciary also has a role to play in the sense that it has to interpret the rights, privileges, and responsibilities that would affect Nigerian citizens as a result of these treaties. In the case of the Rome Statute, the Nigerian Attorney-General and Minister of Justice set up an interministerial committee that produced a draft of the Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill, 2012 which was subsequently presented to the Federal Executive Council for approval. After approval, the Bill was submitted to the National Assembly for translation into national law.

According to several sources, due to the input of the interministerial committee, the current Bill is an improvement on the previous versions submitted to the National Assembly for translation into domestic law in 2001 and 2006.<sup>25</sup> The Bill provides a template for cooperation between the ICC and Nigeria, which is a positive development compared to previous arrangements.<sup>26</sup> The objectives of the ICC Bill are to: (a) provide for measures under Nigerian law for the punishment and enforcement of international crimes of genocide, crimes against humanity and war crimes; (b) give effect to certain provisions of the Rome Statute of the International Criminal Court adopted in Rome on July 17, 1998; and (c) enable cooperation with the International Criminal Court in the performance of its functions under the Rome Statute.<sup>27</sup>

The ICC Bill makes provision for limited universal jurisdiction for international crimes committed outside Nigeria if the accused person is present in Nigeria. It also provides for proceedings to be instituted against any person that committed international crimes if the person is a citizen or permanent resident of Nigeria, has committed the offence against a citizen or permanent resident of Nigeria, or is present in Nigeria after the commission of the offence.<sup>28</sup> The ICC Bill vests original jurisdiction for adjudication of international crimes in the Federal High Courts, the High Court of the Federal Capital Territory, and the High Court of any state in Nigeria.<sup>29</sup>

Nigerian courts are also empowered to try international crimes committed by a person outside Nigeria. Proceedings may be instituted against the person for international crimes outside Nigeria and courts in Nigeria have jurisdiction to try the offence, as it was committed within the

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<sup>25</sup> Focus Group Discussions in November 2015 in Abuja.

<sup>26</sup> Parts of the analyses of the ICC Bill appeared in Benson Olugbuo, 'Nigeria and the International Criminal Court: Challenges and Opportunities' In *International Criminal Justice in Africa: Challenges and Opportunities* edited by Beitel van der Merwe (2014) Nairobi: Konrad Adenauer Stiftung, 83 – 105.

<sup>27</sup> See section 1 of the ICC Bill.

<sup>28</sup> Section 22 of the ICC Bill.

<sup>29</sup> Section 99 of the ICC Bill.



territorial jurisdiction of Nigerian courts.<sup>30</sup> It should be noted that if section 23 of the Bill is read in isolation, the textual interpretation is that Nigerian courts can indict people who have committed international crimes outside Nigeria *in absentia*. However, read with section 22, which deals with the jurisdiction of Nigerian courts for international crimes, it means that Nigeria can only prosecute those responsible for international crimes committed outside Nigeria if they are present in Nigeria. However, it may be argued that courts in Nigeria will have jurisdiction over people who commit international crimes against Nigerian citizens or permanent residents.<sup>31</sup>

Under the principle of positive complementarity, the ICC Bill provides that Nigeria may request assistance from the ICC in relation to the investigation and prosecutions of crimes under the Rome Statute for which the maximum penalty under Nigerian law is a term of imprisonment of not less than five years.<sup>32</sup> The ICC Bill also provides that Nigeria may act as a state of enforcement of sentences by the ICC, and for the Nigerian Attorney-General to notify the relevant government ministries, departments, and agencies including the National Security Adviser whenever the need arises.<sup>33</sup> However, there is a differentiation between citizens of Nigeria and foreigners as the Bill provides that the home state of the foreigner needs to consent to the convicted person serving his or her sentence in Nigeria.<sup>34</sup> The ICC Bill further provides that the prosecutor of the ICC may conduct investigations in Nigeria as provided for under the Rome Statute.<sup>35</sup> Lastly, ICC judges can sit in Nigeria to gather evidence, conduct or continue a proceeding, give a judgment in a proceeding, or review a sentence imposed by the ICC.<sup>36</sup>

In relation to the rights of victims of international crimes, the Bill makes provision for the establishment of a Special Victims' Trust Fund (SVTF) for the benefit of victims of crimes and the families of the victims.<sup>37</sup> The Bill also provides for the forfeiture of assets to the SVTF for those convicted of international crimes in Nigeria,<sup>38</sup> and that a victim of an international crime can institute a civil action against appropriate parties and is entitled to compensation, restitution, and recovery for economic and psychological damages, which shall be met from resources provided by the SVTF.<sup>39</sup> The ICC Bill also provides for the protection of witnesses and their families from intimidation, threats, and reprisals from a person charged with an offence or their associates, or any form of reprisals from people in positions of authority.<sup>40</sup> The Bill recognises the legal personality of the ICC to conduct investigations in Nigeria, grants privileges and immunities to ICC officials in the discharge of their duties in the country, and domesticates the relevant provisions of the Agreement on Privileges and Immunities of the Court.<sup>41</sup> Despite

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<sup>30</sup> Section 23 of the ICC Bill.

<sup>31</sup> Section 22(b) of the ICC Bill.

<sup>32</sup> Section 51 of the ICC Bill.

<sup>33</sup> Section 69 of the ICC Bill.

<sup>34</sup> Section 70 of the ICC Bill.

<sup>35</sup> Section 87 of the ICC Bill.

<sup>36</sup> Section 88 of the ICC Bill.

<sup>37</sup> Section 93 of the ICC Bill.

<sup>38</sup> Section 93(2) of the ICC Bill.

<sup>39</sup> Section 93(6) of the ICC Bill.

<sup>40</sup> Section 94 of the ICC Bill.

<sup>41</sup> Section 96 of the ICC Bill

several positive provisions in the Bill, a number of aspects need to be addressed in order for it to make a contribution in the fight against impunity in Nigeria.

First, the Bill provides that obligations under the Rome Statute shall be discharged by the Attorney-General on behalf of the Government.<sup>42</sup> This provision is unnecessary and may result in political interference by the Attorney-General in the investigation and prosecution of international crimes. The alternative to this provision is the establishment of an independent coordinating body or inter-ministerial committee that would handle the relationship between the ICC and Nigeria. However, it is submitted that judges of the High Courts in Nigeria should be mandated by the Bill to act on behalf of Nigeria since it has already been stated that the High Courts have original jurisdiction for international crimes.

Second, the Bill provides that the consent of the Attorney-General is required for all prosecutions under the Bill, whether in Nigeria or elsewhere.<sup>43</sup> However, the Attorney-General is a political appointee and may be influenced by the executive in the discharge of duties under the Rome Statute. The consent for prosecution should be obtained from the Office of the Permanent Secretary, Director of Public Prosecution, or Solicitor-General of the Federation who is a career civil servant.<sup>44</sup>

Third, the Bill protects the immunity clause of the Nigerian Constitution,<sup>45</sup> which provides for the immunity of government officials including the President, Vice President, Governor, and Deputy Governor.<sup>46</sup> However, this provision is incompatible with Article 27 of the Rome Statute.<sup>47</sup> Nigeria can either amend the 1999 Constitution to bring it in conformity with the Rome Statute, or give the provision a purposive interpretation to the effect that any Nigerian leader that commits any of the crimes provided for under the Rome Statute cannot claim immunity under the Constitution as a bar to prosecution. The amendment option would better serve the people. It would also send a strong signal to those who commit international crimes and serve as a deterrent to potential dictators in the country. Mohammed Ladan therefore argues for an amendment of the Nigerian Constitution. For him:

*'[an] amendment could be minor, and may simply consist of the addition of a provision making an exception to the principle of immunity for the Head of State or other officials, should they commit one of the crimes listed under the Statute.'* (Ladan, 2002)

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<sup>42</sup> Section 3 of the ICC Bill.

<sup>43</sup> Section 16 of the ICC Bill.

<sup>44</sup> See For example section 17 of Uganda's International Criminal Court Act 2010.

<sup>45</sup> Section 20 of the ICC Bill.

<sup>46</sup> See Section 308 of the Nigerian Constitution of 1999.

<sup>47</sup> Article 27 provides: '1. This Statute shall apply equally to all people without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.' 2. Immunities or special procedural rules that may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The downside of this suggestion is the cumbersome procedure for altering the Constitution as provided under Section 9 of the Nigerian Constitution. This makes this suggestion difficult to attain in the short term.

Fourth, in relation to the rights of victims to institute civil proceedings in order to make claims for compensation, restitution, and recovery for economic damages, this proceeding is unnecessary. Victims or relatives of victims should be able to approach the SVTF for an award based on the judgment and recommendation of the High Court. The SVTF should be open to contributions and government subventions and should be used to alleviate the suffering of victims of international crimes. It is unnecessary for such assistance to be suspended pending the conviction of the accused. The Bill also needs to state clearly who is a victim of international crimes, as the current bill does not have a definition of a victim of international crime in Nigeria (Hassan and Olugbuo, 2015, 120).

Fifth, the Bill does not provide for the regulation of sentences for international crimes. This means that Nigerian courts can apply the death sentence even though the maximum penalty provided for under the Rome Statute is life imprisonment. However, the Rome Statute also provides that '[n]othing in this part affects the application by states of the penalties prescribed by their national law, nor the law of the states which do not provide for penalties prescribed in this part.'<sup>48</sup>

From the foregoing, the Nigerian Government seems to be willing to confront impunity by way of the domestication of the Rome Statute under Nigerian law. However, the reality is that since the Bill was handed over to the National Assembly nothing has been heard of it. It is expected that the Nigerian Government should galvanise the support needed for the National Assembly to pass the Bill into national law as a sign of acceptance of international justice.

If the dominant argument is that legal compliance is a form of acceptance, then it is possible to argue that the Nigerian Government has shown commitment to acceptance through the domestic implementation of the Rome Statute. However, the Bill was proposed by the administration of former President Goodluck Jonathan, and it has not yet been passed into law. During a stakeholders' workshop organised in November 2015 to rally civil society support for the domestic implementation of the Rome Statute under President Buhari, several participants observed that the submission of a Bill to the National Assembly is not an end in itself and requires advocacy, constant monitoring, and buy-in by the leaders of the National Assembly.<sup>49</sup> Commentators pointed out the advocacy work that was carried out by different stakeholders before the Violence against People Prohibition Act and the Administration of Criminal Justice Act were passed as laws in May 2015. The discussions above reveal that, although the Rome Statute implementation Bill is an executive Bill, it required a cross section of Nigerians to show interest for it to receive the attention of the law makers. In fact, a senior legislative assistant in the National Assembly argues that the reason the Bill was not passed in the last administration

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<sup>48</sup> Article 80 of the Rome Statute of the International Criminal Court.

<sup>49</sup> The meeting was organised by the Nigerian Coalition for the International Criminal Court in Abuja Nigeria.

was that no civil society or government agency showed interest in it. It is possible that the inter-ministerial agency formed by the Government may have believed that its responsibility ended with the submission of the Bill to the National Assembly.

Politicians use international treaties to gain political capital at home, and law-makers adopt legislation without knowing the importance of the laws or how they will be implemented. The use of international criminal justice as a political tool is well established (Branch, 2007, 179; Nouwen and Werner, 2011, 941). Different political elites have employed international justice as a way of keeping their opponents at bay and Nigeria is not an exception to this. For example, during the 2015 general elections, different political parties threatened to drag each other to the ICC for electoral related offences. Even the ICC has noted that the intervention of the ICC Prosecutor during the 2015 general elections helped to defuse tension and reduce the possibility of the commission of crime. Another development is that the weakness of the criminal justice system in Nigeria makes international justice attractive to victims and survivors who believe they will get justice from the ICC without fully understanding how it functions. Therefore, while some victims accept and embrace international justice, government's acceptance is hinged on political capital and convenience.

## 5. Conclusion

Acceptance can be viewed from different angles. The focus of this chapter has been on the ratification and domestic implementation of international instruments. In a focus group discussion with NGO actors in Nigeria, participants argued that political leaders pick and choose international instruments to ratify and domesticate depending on circumstances and political convenience.<sup>50</sup> Furthermore, they argued that law-makers will readily pass a law on the prevention of terrorism with an amendment in quick succession while instruments like the Rome Statute are deliberately delayed because the politicians are wary of the aftermath of having such a law under the national judicial system. This is especially the case where an insurgency is ongoing and the rules of engagement are not clearly defined. Several participants stated that there is no willingness on the part of the Nigerian Government to accept international criminal justice.<sup>51</sup> Others said the signing of the Rome Statute was more of a political decision than genuine interest in the activities of the ICC. In addition, some argued that the current status of the domestication of the Rome Statute more than thirteen years after ratification is clear evidence that the Government had no intention of accepting international criminal justice.<sup>52</sup> However, things are not that simple. The ratification and domestication implementation of the Rome Statute is subject to different layers of Government action. While the Executive is responsible for the ratification of international treaties, it is the responsibility of Parliament to pass bills into law. For a Government that set-up an inter-ministerial agency to draft provisions of the Statute, it can be seen as a minimum element of acceptance.

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<sup>50</sup> Focus Group Discussions in Abuja 12th November 2015.

<sup>51</sup> Ibid

<sup>52</sup> Ibid.

Acceptance in Nigeria is therefore both a myth and a reality. For some civil society organisations, there is nothing concrete to show that Nigeria clearly accepts international justice. The Government chooses when to accept, what to accept, and how to accept international justice and at time even questions the relevance of international justice in solidarity with other African countries.<sup>53</sup> Government agencies see Nigeria as a compliant nation in relation to the acceptance of international criminal justice. This is evidenced by the ratification of different international treaties and the ongoing process of their incorporation into national law. However, there is a disconnect between the actions of the Government and the commitment to international justice they claim to have shown over the years. It is also possible that this changing acceptance is as a result of different policies by different governments in power. In other words, the commitment of the Nigerian Government to international justice is subject to the policies of the government in power. It can be invoked when politically expedient, and relegated to the back door when not needed. A further study is recommended to understand whether acceptance in Nigeria can be measured as a continuum or subject to the policies of the government in power.

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<sup>53</sup> Ibid.

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