Vol. VI, No. 1 2020

ISSN: 3851- 3068

ABUAD JOURNAL OF PUBLIC AND INTERNATIONAL LAW

AFE BABALOLA UNIVERSITY, ADO-EKITI NIGERIA

REPARATIVE COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW AND VICTIMS OF CORE INTERNATIONAL CRIMES IN NIGERIA

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ABSTRACT

The Rome Statute of the International Criminal Court evinces a victim-centred concept through the provisions of Article 75, by providing reparations to victims in addition to prosecutions of perpetrators. On the other hand, the operation of the International Criminal Court is built upon the principle of complementarity, which gives primacy to jurisdictions of domestic courts in prosecuting core international crimes over the ICC. Reparations are important to victims, in fact, it may appear that victims who participate in criminal proceedings do so with the aim of getting more than just prosecution of the perpetrators, but much more reparative remedy The concept and practice of reparations at the ICC, especially in the reparation decisions thus far, has its own peculiar challenges. Despite the challenges relating to the practice of reparation at the ICC, there is a growing concern as to whether victims have a right to seek reparations from their States and whether States in turn have the obligation of providing reparations to victims following the principle of complementarity. Thus, are State parties obliged to incorporate reparations in line with domestic prosecution of core international crimes in fulfilment of their obligations to prosecute? Assuming States parties are obliged, what would the principle of 'reparative complementarity' portend for a country like Nigeria where the concept of reparations to victims in criminal law context, appears alien? The paper interrogates the above questions and others in the light of the hundreds of thousands of displaced victims of the insurgency and armed conflicts in the country. The paper adopts a doctrinal and library based approach to examine the concept of reparative complementarity and its practical application to Nigeria's obligations to victims of crime in international criminal law. The paper argues for a variant of reparative complementarity which distils two main perspectives of State obligation in reparative complementarity and advocates for a more victim centred approach to criminal justice in Nigeria.

Keywords: ***Reparations, Victims, Criminal, Justice, ICC, Complementarity, Nigeria***

1.0 INTRODUCTION

The International Criminal Court (ICC)[1] established by the Rome Statute of the International Criminal Court (Rome Statute/ICC Statute) is saddled with

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the responsibility of prosecuting major perpetrators of core international crimes. The main focus of the Court is prosecutions which, is effectively hinged on the retributive theory of justice. However, the victims of core international crimes suffer gross violations of their human rights and immense losses such as loss of jobs; income; property; or even life, emotional and psychological trauma, etc. which, the conventional criminal justice system is not posed to redress. Thus, as much as ICC aims at ending impunity for perpetrators through prosecutions, it also incorporates a victim-centred concept, by introducing reparations to victims in Article 75, in addition to prosecutions. Unlike previous international criminal tribunals, the ICC is the first international criminal institution to make express provision for reparations.[2] The Court may make a reparative award following the conviction of a perpetrator for which, the perpetrator may be liable or from the Trust Fund for Victims (TFV).[3]

Reparation is a transitional justice measure aimed at repairing the injury suffered by victims from wrongs perpetuated against them.[4] Reparation is also described as 'a society's recognition, remorse and atonement for harms inflicted'.[5] The keywords which mark the essence of reparation are 'redress' and 'repair'.[6] Reparations as a transitional justice mechanism could be court-ordered, following prosecutions, otherwise known as juridical reparations or designed as a broad programme administered by government to victims (administrative). Even though widely perceived and equated to monetary compensation, reparations take many other forms as recognised by the United Nations (UN)[7] such as rehabilitation, restitution, satisfaction measures which

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[1] The International Criminal Court is also referred to as 'the Court' in this paper.

[2] Although hybrid criminal tribunals like the Extraordinary Chambers in the Court of Cambodia and the African Extraordinary chambers established in Senegal by the African Union in 2013, were granted powers to order reparation to victims within their jurisdictions. David Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation' [2010] (4) *Journal of International Criminal Justice*, 307-313. Eva Dwertmann, *The Reparations System of the International Criminal Court Its Implementation, Possibilities and Limitations* (Brill Publishers, 2010) 23.

[3] Articles 75 (2) and 79 of the ICC Statute.

[4] Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' [2013] (17) (3) *The International Journal of Human Rights*, 368-390. 369.

[5] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' [2004] (27) *Hastings International Law and Comparative Law Review*. 157- 219. 159.

[6] Principle 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law express reparations as intended to 'promote justice by redress'. A/RES/60/147 adopted by the United Nations General Assembly (UNGA) Resolution on 21 March. 2006 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> Accessed 20 December 2020.

[7] Basic Principles and Guidelines on the Right to a Remedy and Reparation. *Ibid.*

include moral reparations in form of public apology; acknowledgement of injustice; access to information about violations etc. or guarantee of non-repetition.[8] Compensation could be in form of payment for financially assessable damage, rehabilitation could include access to medical and psychological care. Restitution may be in form of return of property, release of an unlawfully detained person. Guarantee of non-repetition are measures taken by the State to ensure that victims are protected from future violations, which could include engendering civilian control of military and security forces, strengthening of the judiciary etc.

While the right of victims to reparations is largely controversial and a subject of debate in international law, some international human rights documents, while contemplating a general right to reparations,[9] admit a right to reparations with respect to certain violations. The International Covenant on Civil and Political Rights (ICCPR)[10] and the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (Torture Convention)[11] provide specifically for the right to reparations with respect to certain violations such as the right to reparations against unlawful arrest or detention;[12] False conviction[13] and; torture.[14] Reparations became a distinct feature of international criminal justice system following the provisions of Article 75 of the Rome Statute.[15] Consequently, in the context of massive violations of human rights, which amounts to international core crimes, reparations is an important remedy in international criminal justice.

In the national context, juridical reparations for large-scale systemic human rights violations are significantly different from civil law damages for tortious act or constitutional damages for human rights abuses. Reparations are rarely a feature of domestic criminal justice systems except where specifically

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[8] *Ibid.* Pablo De Greiff, 'Justice and Reparation' in De Greiff P. Ed. *Handbook of Reparation.* (Oxford University Press 2006). 451-477, 452.

[9] Article 2 (3) of the International Covenant on Civil and Political Right (ICCPR) provides for the right to an effective remedy from which several human rights bodies such as the Inter-American Court of Human Rights have repeatedly inferred a general right to reparations. Authors such as De Greiff argue that victims indeed have a right to reparations. Pablo De Greiff, [2006] *op. cit.* (n.8). M. Cherif Bassiouni, 'International Recognition of Victims' Right [2006] (6) (2) *Human Rights Law* Review 203-279.

[10] Adopted on 16 December 1966 by United Nations General Assembly.

[11] Adopted on 10 December, 1984 by United Nations General Assembly.

[12] Article 9 (5) ICCPR.

[13] Article 14 (6) ICCPR.

[14] Article 14 (1) of the Torture Convention.

[15] The view of the ICC Pre-Trial Chamber I in *The Prosecutor v Thomas Lubanga Dyilo* in the Decision on the Prosecutor's application for a warrant of arrest, 'the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent linked to its reparation system.' Pre-Trial Chamber I, 10 February 2006 ICC-01/04-01/06 par.136.

provided. However, in late twentieth century, the increasing focus on victims' rights and remedies in criminal law birth the recognition of victims' remedies in some jurisdictions, globally. In a common law jurisdiction like Nigeria, the criminal justice system, which is adversarial in nature, does not precisely, recognise reparations aside specific provisions for compensation and restitution in few cases, which are inapplicable to core international crimes.[16] In the context of large-scale human rights abuses, there are no existing domestic provisions, which recognise or conceptualise reparation as a practice in the Nigerian criminal justice system. At transition to a democratic system of government in 1999, Nigeria had received a recommendation from the Human Rights Violations Investigation Commission (HRVIC) commonly referred to as the 'Oputa Panel', for reparations to victims of human rights abuses of repressive military regimes, which was largely ignored.

Article 75 of the ICC Statute suggests that the Court has the discretionary power to grant reparations, while also tacitly implying that victims have the right to reparations and can approach the Court in this respect, in fact, victims have a right to make representations to the Court in respect of reparations.[17] In over two decades of its existence and operation, ICC has determined and granted three reparative orders to victims of core international crime following the conviction of major perpetrators.[18] The Court having convicted and sentenced *Thomas Lubanga Dyilo*, a former warlord of the Democratic Republic of Congo (DRC) for war crimes in 2012, made a symbolic and collective reparations award to victims of war crimes in 2015, which was upheld on appeal in 2016.[19] In the case of *Germain Katanga*, the Court convicted him of war crimes and crimes against humanity committed in the DRC in 2014 and made individual and collective reparations order against him

[16] Sections 321, 341 and 342 of the Administration of Criminal Justice Act (ACJA) also provide for compensation and restitution of property by the accused to victims of crime. There are also provisions, which allow victims the option of obtaining remedy by suing the accused under separate civil proceedings post-prosecution of the accused. Adeniyi Olatubosun, 'Compensation to Victims of Crime in Nigeria: A Critical Assessment of Criminal-Victim Relationship' [2002] (44) (2) *Journal of the Indian Law Institute*, 205-224.

[17] Article 75 (3). Elisabeth Barmugartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court' [2008] (90) (870) *International review of the Red Cross* 409-440; Sam Garkawe, 'The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis' [2001] (8) *International Review of Victimology* 269-289.

[18] The likely fourth case of reparation has not yet commenced. Bosco Ntaganda was convicted and sentenced in November 2019, for war crimes and crimes against humanity committed in Ituri in the Democratic Republic of Congo. As at October 2020, reparation proceedings against him have not commenced as the appeal against his conviction is still pending before the Court.

[19] *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Case Information Sheet ICC-PIDS-CIS-DRC-01-016/17_Eng. Available at <https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf> Accessed 30 December 2020.

in 2017, the most part of which was confirmed on Appeal in March 2018.[20] In the third case, ICC convicted *Ahmad Al Faqi Al Mahdi* of war crimes committed in Mali and ordered individual and collective reparations against him in 2017, which was confirmed by the Appeals Chamber in March 2018.[21] As at September 2020, none of the reparations orders has been fully implemented even though, the implementation plans in *Lubanga* and *Katanga*'s case have been drawn already and underway.[22]

Core international crimes are committed in the context of gross or systemic violations of the rights of victims and international criminal law seeks individual accountability for such violations in terms of punishment and reparations. Usually, victims of core international crimes are large in number and may sometimes run into tens or hundreds of thousands or more and some harms may be difficult or totally impossible to 'repair'. Thus, it may be practically impossible to grant individual reparations to all the victims of core international crimes. In granting reparative orders, the ICC has had to grapple with the appropriate reparative measure and the determination of victims entitled to reparations in each case and whether there are such concepts as 'direct or indirect victims', 'deserving or underserving victims' and generally ensure that there is no discrimination. Reparations at the ICC raises such questions as to the liability of convicted persons to victims in reparations, recovery of assets of convicted persons and the extent of the role of the Victims' Trust Fund in the administration of reparations. These issues become more complicated when considered in line with the enforcement or implementation of reparative orders. Reparation orders may be frustrated where the concerned State Party is uncooperative.

Despite the challenges relating to the practice of reparation at the ICC, there is growing concern as to whether victims have a right to seek reparations from their States and whether States in turn, owe the obligation of providing reparations to victims following the principle of complementarity. It is important to examine whether State parties are obliged to incorporate reparations in line with domestic prosecution of core international crimes in

[20] *The Prosecutor v Germain Katanga* ICC-01/04-01/07. Case Information Sheet ICC-PIDS-CIS-DRC-03-014/18_Eng. Available at <https://www.icc-cpi.int/drc/katanga/Documents/katangaEng.pdf> Accessed 30 December 2020.

[21] *The Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15. Case Information Sheet ICC-PIDS-CIS-MAL-01-08/16_Eng. Available at <https://www.icc-cpi.int/mali/al-mahdi/Documents/al-mahdiEng.pdf> Accessed 30 December 2020.

[22] ICC Case Information Sheet: Lubanga. Available at <https://www.icc-cpi.int/pages/cases/.aspx#Default=%7B"K"%3A""%2C"s"%3A11%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B"K"%3A""%7D>; ICC Case Information Sheet: Katanga Available at <https://www.icc-cpi.int/Pages/cases.aspx?k=MngPhaseOfCaseEN:Reparation/Compensation> Accessed 30 December 2020.

fulfilment of their obligations to prosecute. Assuming States parties are obliged, what would the principle of 'reparative complementarity'[23] portend for a country like Nigeria where the concept of reparations to victims in criminal law context, appears alien?[24]

Nigeria does not recognise victims of crime as active participants in the administration of criminal justice. There is no specific provision for the rights of victims in criminal justice processes, as there are, for the accused person. The rights of the accused person are in fact, constitutionally entrenched rights whereas, the victims have none expressly stated whatsoever. Despite several moves for the incorporation of victims' remedies in the criminal justice system, the attempt has been stalled as bill without much attention. Thus, it is unlikely that victims of core international crimes in Nigeria will have any respite, given the existing status of the criminal justice system in Nigeria vis-à-vis the reparation to victims in international criminal law. The paper examines the concept of reparative complementarity and Nigeria's obligations to victims of crime in international criminal law. The paper is divided into five sections. The first section provides a general background to the concept of reparation to victims in international criminal law. The second section examines the concept of reparative complementarity in international criminal law. The third section analyses possible violations of the provision of Rome Statute in Nigeria. The fourth section evaluates the obligations of Nigeria to victims of core international crimes and the possibility of discharging such obligations through reparative complementarity. The fifth section gives concluding remarks on the position of the paper.

2.0 REPARATIVE COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW

The Rome Statute is clear on the principle which guides the exercise of its jurisdiction.[25] Thus, cases are admissible before the Court through the outlined trigger mechanisms only where the conditions highlighted in Article 17 (1) are not present. Where a State is willing and able to prosecute core international crimes committed within its territory, the jurisdiction of the ICC cannot be successfully triggered in such situations. Even where a State is found

[23] The principle of reparative complementarity was first used by Moffett in his work, Luke Moffett, Reparative Complementarity Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court. (2013) *op. cit.* (n.4).

[24] This issue becomes more complex in jurisdictions where there is no specific law in the criminal justice system obliging domestic courts to order reparations to victims of core international crimes within their jurisdictions and their civil law provisions have little or no provisions for remedy to the victims against the perpetrators.

[25] Paragraphs 9 and 10 of the Preamble to the Rome Statute and Article 1 of the Rome Statute provide clearly that the jurisdiction of the ICC is complementary to that of national courts. This is further reinforced by the provisions of Article 17 of the Rome Statute on admissibility principle of cases at the Court.

unwilling and unable to prosecute, the duty of the ICC to prosecute is determined and influenced by such factors which does not preclude further prosecutions by competent domestic authorities. Such factors as the gravity threshold of the alleged crimes, prosecutorial discretion, apprehension of alleged offenders etc. place operational limit on actual prosecution and consequently the probability of juridical reparation to expectant victims at the ICC. Even though the Court will only prosecute the perpetrators 'most responsible for the crimes', this does not obviate the need for subsequent prosecution of lower cadre perpetrators.

While the provisions on the principle of complementarity appear simple, *prima facie*, it may raise pertinent concerns regarding reparation to victims of crimes within the jurisdiction of the Court. The principle of complementarity which guides admissibility of cases by the ICC is widely understood when contextualised with regard to the exercise of the Court's jurisdiction to prosecute identified offenders. However, as far as reparation is concerned, there is no prima facie evidence of the extension of same principle with respect to reparation of victims of core international crimes. Thus, the ICC cannot entertain a claim for reparation by victims of core international crimes where it has not admitted any case for prosecution in respect of such claim. The principle of complementarity respects the national sovereignty of States parties while, relying on their good faith to fulfil their obligation to prosecute core international crimes committed on their territory.

In its barely two decades of operation, the practical experience of the ICC with African States especially, has been that, States are often hampered by issues such as constitutional immunity, peace settlements and amnesty or sheer unwillingness to exercise their right of first refusal to prosecute crimes within their jurisdictions. Even though, there is a non-derogable obligation to prosecute such violations as contemplated by the Rome Statute, domestic prosecution is still a future reality for many African States. On the other hand, where States are willing and able to prosecute and a State has successfully prosecuted and convicted accused person(s) but makes no similar provisions for reparation to victims as the Rome Statute, victims may have to seek civil remedies by private means.

International criminal law is built on the concept of individual criminal responsibility; thus the perpetrator is primarily liable to provide reparation to victims. This paper holds the view that the obligation to provide reparation to victims exists irrespective of the apprehension, prosecution and conviction of the alleged perpetrators or otherwise. The reality of the victims' injuries cannot be denied on the grounds of the technicalities or fine details of the requirements of the criminal justice system. Where State agents acting in official capacity are responsible for the crime against victims, the State is

responsible to provide reparation to victims directly. In the event that the government under whose authority the crime was perpetuated has ceased to exist, the State, through the successive government is responsible to provide reparation to victims.[26]

The refusal or failure of a State to provide mechanisms for victims to receive reparation within its territory may leave victims with next to nothing in seeking repair of the harm they have suffered. The option of approaching the ICC is not available to victims as it is in the case of the obligation to prosecute alleged perpetrators. it does not seem that victims are able to approach regional human rights courts either. The probable option available to victims albeit, discretionary, is the assistance programme of the Victims' Trust Fund of the ICC. This option is largely discretionary and not at the behest of the victims nor an obligation of the Victims' Trust Fund to the victims. Thus, the principle of complementarity arises where the alleged perpetrator whether apprehended or not is unable or unwilling to make reparation to victims. The victims cannot be left helpless and consequently susceptible to re-victimisation or at the risk becoming perpetrators of core international crimes in a bid to help themselves overcome the ills of the crime they have suffered. In such circumstance, the State is obliged to provide reparation to victims.[27]

Holding the State responsible in complementary obligation for reparation to victims is not only plausible but also needful. The State stands *in parentis loco* to the victims and following the social contract theory which, strips victims of their retributive powers, State operate as the prosecuting authority in criminal cases and it ought to ensure that the interest of victims is promoted beyond preventing impunity of perpetrators. In many instances, the State may be held complicit, although indirectly, in the commission of core international crimes against victims. On one hand, such crimes may have been perpetrated by State agents, who acting in official capacity, violate international legal principles which may amount to core international crimes against the victims. On the

[26] Paragraph 11 of the UN Declaration.

[27] Following the provisions of Article 40 of the United Nations Responsibility of States for International Wrongful acts A/RES/56/83, States owe obligations to victims in strict liability. This does not translate to transfer of criminal liability to States, rather reparative liability. Paragraph 12 of the UN Declaration on Basic Principles enjoins States to provide compensation to victims of crime where the offender is unable to fulfil his obligation to compensate victims. Whereas the UN Declaration is soft law and provisions relates to compensation alone, the provision foreshadowed the responsibility of States to victims of core international crimes whose plights are more delicate and deserving of urgent attention. This study does not advocate nor suggest hierarchy of victims such that it arrogates supremacy of interest and needs to victims of core international crimes. However, going by the nature of core international crimes and the exigencies of needs which arises therefrom, it is important for State to prioritise the needs of victims of core international crimes, especially states which have no existing reparation system for victims of crime.

other hand, the State may have created the enabling environment which made the perpetration of such crime possible by its inactions and omissions, thus, rendering the victims susceptible to the harms inflicted on them. Therefore, notwithstanding the principle of individual criminal responsibility in international criminal law, as far as reparation is concerned, the obligation to provide reparation can be conceived as complementary. Whereas, the perpetrator is liable to the victims primarily, the State becomes liable to the victims where the perpetrator is incapable or unable to discharge his obligation. This is referred to as the first and concrete arm of the principle of reparative complementarity.

The second and abstract meaning of the principle of reparative complementarity arises from the measures to ensure full and effective reparation to victim of core international crimes. Flowing from the reparation experience at the ICC thus far, the apparent limitations of juridical reparation in addressing the reparative needs of victims of core international crimes is indisputable. Asides the impossibility of receiving reparation applications from each and every victim in a particular situation, victims who applied and are considered eligible for reparations may not necessarily be awarded reparation in the end. Although, one of the inherent limitations of reparations is the practical impossibility of granting reparation to every victim, constricting reparations to juridical forms only, undermines reparation opportunity to victims. Consequently, juridical reparation alone may not cater for the needs and interest of victims of core international crimes. The State must take the initiative of broad reparation programmes that will apply to a larger collective of victims than juridical reparation may provide for. This is particularly true for some forms of reparations which are uniquely within the domain of State authorities to execute. Some satisfaction measures and guarantee of non-repetition are within a State's exclusive authority to implement.[28]

3.0 VIOLATIONS OF THE ROME STATUTE IN NIGERIA

Since 2009, Nigeria has been plunged into a situation of internal armed conflict characterised by *Boko Haram*[29] insurgency in the North-eastern part

[28] Perhaps, a third and mute leg of the concept of reparative complementarity rests on the admissibility principle and mandate of the ICC. The ICC is only responsible for the prosecution of major perpetrators hence, only victims of crime perpetrated by major perpetrator will be entitled to apply and possible receive reparation at the Court. State may complement reparative efforts of the ICC by providing reparation to victims of lower cadre perpetrator who cannot be tried at the ICC and whose victims cannot approach the ICC for reparation.

[29] *Boko Haram's* has been literally translated to mean is 'western education or influence is forbidden' however its official name is jama' atu Ahlis Sunna Lidda' await wal Jihad which is an Arabic expression meaning people who are committed to the hadith of prophet Muhammed's teaching and Islamic jihad. Olaide Ismail Aro, 'Boko Haram Insurgency in

of the country.[30] Even though some narratives trace its existence as far back as the 1960s,[31] there is however a consensus that the group gained prominence in 2009 when it launched its first attack and subsequent attacks in Borno and against the United Nations building in Abuja. The offensive onslaught of the *Boko Haram* group has since been a horrendous menace in Nigeria, killing, maiming, abducting and displacing thousands of victims through their systematic and widespread attacks.[32] Although the geographical location of operation has been the same, there is increasing threat of the spread of the activities of the group to other regions of the country. In a bid to curtail the activities of *Boko Haram*, there are reports of incidences of crimes against humanity and possibly war crimes on the part of the Nigerian armed forces against the *Boko Haram* group and the civilian population.[33]

The United Nations estimated that since 2011, the armed conflict in the north eastern region has displaced about 2.4 million people within the region and

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Nigeria: Its Implication and Way Forward Towards Avoidance of Future Insurgency' [2013] (3) (11) *International Journal of Scientific and Research Publications* 1-8, 1. Adetoro Rasheed Aderenle, 'Boko Haram Insurgency in Nigeria as A Symptom of Poverty and Political Alienation' [2012] (3) (5) *IOSR Journal of Humanities and Social Sciences* 21-26, 21. Available at <https://www.researchgate.net/profile/Adetoro_Rasheed/publication/271293888_Boko_Haram_insurgency_in_Nigeria_as_a_symptom_of_poverty_and_political_alienation/links/57e19d7d08ae1f0b4d93ed85.pdf>. Accessed 12 January, 2021. Al Chukwuma Okoli, and Philip Iortyer, 'Terrorism and Humanitarian Crises in Nigeria: Insights from Boko Haram Insurgency' [2014] (14) (1) *GJHSS-F Global Journal of Human Social Sciences* 43.

[30] The activities of *Boko Haram* have spread across different States of the North eastern region of Nigeria including Borno, Adamawa, Yobe, and Niger states. Adetoro Rasheed Aderenle, [2012] *op. cit.* (n.29), 21.

[31] Olaide Ismail Aro, 'Boko Haram Insurgency in Nigeria: Its Implication and Way Forward Towards Avoidance of Future Insurgency' [2012] *op. cit.* (n. 29). Aro quotes Ekanem S.A. *et. al.* [2012] to have traced the existence of Boko Haram group to the 1960s but only started to draw attention in 2002. According to Aro the group operated under the name 'Shabaab Muslim Youth Organisation' since 1995. Alozieuwa also records that there are narratives which trace the existence of Boko Haram group to 1995. S. H. Alozieuwa, 'Contending Theories on Nigeria's Security Challenge in the Era of Boko Haram Insurgency' [2012] (7) (12) *Peace and Conflict Review*. I.Okoli et. al. also argue that Boko Haram group became a security threat to Nigeria since 2002. Al Chukwuma Okoli, and Philip Iortyer, 'Terrorism and Humanitarian Crises in Nigeria: Insights from Boko Haram Insurgency' [2014] *op cit.* (n. 29)

[32] Amnesty International 'Our Job is to Shoot, Slaughter and Kill' Boko Haram's Reign of Terror in North-East Nigeria. 14 April, 2015. 29-31. Available at <https://www.amnesty.org/en/documents/afr44/1360/2015/en/#:~:text=Armed%20Conflict-,Nigeria%3A%20'Our%20job%20is%20to%20shoot%2C%20slaughter%20and%20kill,terror%20in%20north%20east%20Nigeria&text=Boko%20Haram%20is%20brutally%20mistreating,crimes%20against%20humanity%20with%20impunity> Accessed 31 January, 2021.

[33] Amnesty International 'Stars on Their Shoulders, Blood on Their Hands - War Crimes Committed by the Nigerian Military' 3 June 2015, available at <https://www.amnesty.org/en/latest/news/2015/06/stars-on-their-shoulders-blood-on-their-hands/> Accessed 14 January 2021.

over 7 million people are at risk of starvation.[34] Cumulatively, thousands people have lost their lives as a result of the conflict, this is aside the physical destruction of buildings and public infrastructures across the states in the region. A large percentage of the victims are largely women, girls and children, who are vulnerable to further victimisation if they are left to cater for themselves. There are reports that male victims such as young boys and men have also being recruited by the *Boko Haram* group to replace apprehended or killed members and replenish the group. The best that many of the victims have received has been humanitarian assistance from international non-governmental organisation in terms of reliefs to internally displaced persons (IDPs) in camps located in the north-eastern part of the country. Aside creating the camps for IDPs and providing poorly administered, paltry relief materials to victims, which, are often diverted from the real beneficiaries, there is no record of any form of substantial remedy made available to victims either judicially or administratively.

Nigeria has been under preliminary examination and admissibility assessment by the Office of the Prosecutor (OTP) of the ICC since 2010. In December 2020, the OTP concluded preliminary examination of the Nigerian situation and decided to proceed to full investigation of the situation in Nigeria, subject to the order of the Court.[35] The preliminary examination had been focused on alleged war crimes and crimes against humanity committed in three highlighted situations in the country. The internal armed conflict between the Boko Haram and the Nigerian Military forces, Niger-Delta region and the North-Central States.[36] The disposition of Nigeria to the alleged crimes shows masked unwillingness to prosecute the major perpetrators through sham prosecutions.[37] Sadly, in addition to the sham prosecutions, Nigeria has

[34] The UN Refugee Agency (UNHCR) 'Nigeria Emergency' <https://www.unchr.org/nigeria-emergency.html> Accessed 14 January 2021.

[35] ICC – The Office of the Prosecutor. Report on Preliminary Examination Activities 2020 - 'Nigeria' P.67, Par. 265. Available at <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> Last Accessed 29 December, 2020.

[36] ICC Factsheet on States: Nigeria Available at <https://www.icc-cpi.int/nigeria> Accessed 14 January 2021.

[37] Nigeria has only managed to carry out under prosecution of core international crimes committed within its territory since 2009. First, by apprehending the lower cadre perpetrators and leaving the principal perpetrators most responsible for the alleged crime, Nigeria may not have fulfilled its obligation to prosecute the alleged crimes. Second, the legal framework for prosecution does not sufficiently capture the nature of the alleged offences in line with the provisions of the Rome Statute. A few prosecutions were conducted under the Terrorism (Prevention) Act 2011 and the Armed Forces Act 2004 for the prosecution of members of the armed forces alleged to have committed core international crimes. The mass trial of the alleged perpetrators at the special court of the Federal High Court at Kainji, Niger State could at best be described as sham trials. Largely, there have been more discharge due to lack of evidence. There has been no concrete report on the trials of members of the Nigerian armed forces who have been found guilty of some of the alleged crimes. What appears more

supposedly been offering amnesty to ex-members of the *Boko-Haram* group and in February 2020, introduced a bill to legislate amnesty and rehabilitation of repentant insurgents.[38] While it is important to rehabilitate and integrate repentant members of the armed group, it may be misplaced priority and misappropriation of resources to focus on the repentant members at the detriment of victims of the crimes they have perpetrated. While offering amnesty to repentant members of the armed group may be justifiable arguably, given the sovereignty of the country and the categories of perpetrators that are offered amnesty, such form of amnesty is synonymous with impunity and incompatible with Nigeria's obligations under the Rome Statute. Nigeria has clear and incontrovertible international obligations. It is implausible to conclude that a country which has failed at domesticating the legal instrument which criminalises core international crimes and enables it to prosecute offenders will be able to comply with its obligation to prosecute. Although the findings of the OTP are ongoing and unconcluded, it is doubtful that the alleged crimes have not been committed in the three distinct situations highlighted by the ICC.[39] The reality however, is that it may be difficult, but not impossible, to institute a civil action for reparation against a perpetrator, in a State that was unable or unwilling to exercise its criminal jurisdiction to prosecute the accused in the first place.

The existing legal framework in the criminal justice system is not likely to sustain an action for juridical reparation neither can the victims resort to a non-existent administrative reparation scheme. First, there is no general statutory definition of victims of crime, the construction of the term, 'victim' in criminal context is usually based on the statutory provisions criminalising the alleged act/omission. In Nigeria, the victim, is principally a witness for the prosecution's case and plays no active role in the prosecution of crime neither

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ridiculous is the amnesty offered by Nigerian government to some of the Boko Haram members.

[38] Earlier in 2016, the federal government under the auspices of a counter-insurgency tagged programme of Operation Safe Corridor (OSC), offered some form of rehabilitation and reintegration for 'repentant' and 'low-risk' *Boko Haram* members through vocational training. As at 2019, about 900 members had been reportedly rehabilitated. Victims have reportedly opposed the integration of such ex-members into their communities. This is aside the 1400 ex-*Boko Haram* whom Borno State government reportedly rehabilitated. reliefweb 'Accepting Ex-Boko Haram Fighters' 1 July, 2020. Available at <https://reliefweb.int/report/nigeria/accepting-ex-boko-haram-fighters> Accessed 20 January 2021. Subsequently in 2018, amnesty was extended to repentant *Boko Haram* members, following the abduction of 107 girls in Dapchi, Yobe State. Such move towards ex- *Boko Haram* members without matching focus on the plights of victims of the activities of *Boko Haram* suggests Nigeria is unconcerned about victims of crimes.

[39] An important point of consideration in determining admissibility of a situation at the ICC is the gravity threshold of the alleged crimes to bring them within the context of core international crimes and the identification of the major perpetrators most responsible for the crimes. With these requirements, the obligation to prosecute still hangs heavily on Nigeria.

is he entitled to any claim from the criminal justice process.[40] From the moment of the report of incidence of crime and filing of complaint of an alleged crime with the Police, the role of the victim in the criminal justice process remains passive. The apprehension of the alleged perpetrator and subsequent prosecution is at the discretion of the State and designated State agents acting on behalf of the State. Although the victim is supposedly represented by the State, he has no say in the conduct of the case by the Prosecutor and his interest or view do not matter at the criminal proceedings.

4.0 JUSTICE TO VICTIMS IN NIGERIA THROUGH REPARATIVE COMPLEMENTARITY

The notion of criminal justice is aptly couched by the popular dictum of Justice Oputa *JSC* in the Nigerian case of *Godwin Josiah v State*:

> Justice is not a one-way traffic. It is not justice for appellant only. Justice is not even a two-way traffic. It is really a three-ways traffic, for the appellant accused of heinous crime of murder; justice for the victim the murdered man... Whose blood is crying to heaven for vengeance, and finally justice for the society at large. The society whose social norms and values had been desecrated and broken by the criminal act complained of.[41]

Justice to victims can be conceived from the perspective of the restorative justice theory. Although there seems to be no general consensus on the exact conception of restorative justice,[42] the common idea is that restorative justice is focused on the victim.[43] Restorative justice theory in the context of criminal

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[40] The Administration of Criminal Justice Act (ACJA) empowers the court, irrespective of the limits to its civil or criminal jurisdiction, to award compensation, restitution or restoration of property to victims or victim's estate against the accused/defendant or even the State. However, in reality, prosecutors do not even pursue such provisions on behalf of victims. Prosecutors are often minded with getting a conviction against the offenders. It remains to be seen what the courts' disposition will be to the particular provision of the law. Secs. 314 (1); 321; 336 of the ACJA.

[41] (1985) 1 NWLR 125.

[42] Several authors have varying conception of the meaning and central themes of restorative justice. Some authors consider it as reconciliation, repair of social connection and peace building others view it as atonement for wrongs perpetuated against the victims. Margaret Urban Walker, 'Reparations and Restorative Justice' [2006] (37) (3) *Journal of Social Philosophy* 377-395, 378. Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' [2017] (5) (2) *Restorative Justice: An International Journal* 198-220. 200. Margarita Zernova, *Restorative Justice: Ideals and Realities* (Ashgate 2007) 1, 35-36. Andrew Ashworth, 'Some Doubts about Restorative Justice' [1993] (4) (2) *Criminal Law Forum* 277-299. 280.

[43] This poses an apparent limitation of the theory of restorative justice in criminal justice process. It may be inapplicable in cases involving crimes which are regarded as 'victimless' or

justice, takes a positivist view of the concept of crime.[44] It emphasises the role of the victim in the criminal justice process and advocates a shift from retributive approach to criminal justice to restorative aims.[45] In the conventional criminal justice system, the State represents the interest of the public and supposedly, that of the victims. Hence, in a typical criminal justice process, especially in common law jurisdictions like Nigeria, victims are not party to the legal proceedings, at best, they merely play roles as witnesses for the State and their interests seem to be subsumed in that of the State.[46]

In sharp contrast with the retributive theory of criminal justice which, focuses on the perpetrator, restorative justice theory seeks to make the victim a central focus of criminal justice process by underscoring their personality and the harm they have suffered as a result of the crime perpetuated against them. It is a theory of justice rooted in the ancient practice which, views crime as solely between the parties involved, i.e. the victim and the perpetrator, and criminal justice as aimed at restitution and reconciliation.[47] Restorative justice has no single version or single practical application, as many authors have varying definitions of what restorative justice entails and its components. Consequently, different models have emerged from the practice of restorative justice.[48] Among many strains of the restorative justice theory, this paper adopts the reparative perspective of the restorative justice theory. This view of restorative justice theory emphasises the provision of remedy to victims, for the wrong they have suffered or repair of the damage done to them as the primary aim of the criminal justice process. The Latin Maxim expressed as *Ubi jus ibi remedium* states that 'where there is a wrong there is a remedy', thus, victims have a right to remedy having suffered wrong. Reparation is regarded as one of the indispensable forms of remedy to victims of crime.

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circumstance crimes which may not necessarily have an identifiable victim but they are crimes because they are proscribed in the moral interest of the public. E.g. Possession of narcotic drugs, prostitution, etc.

[44] The South African Truth and Reconciliation Commission reports that restorative justice seeks to redefine crime from being characterised as an offence against the State to 'any injury to and violation of particular human beings.' Truth and Reconciliation Commission of South Africa Report. 1999. "Concepts and Principles". Volume 1, Chapter 5. London: Palgrave Macmillan. paragraph 82.

[45] Margarita Zernova, (2007). *op. cit.* (n.42) 53.

[46] In some civil law jurisdictions, victims are accorded right such as the opportunity to make impact statements. They may even be accorded the status of '*partie civile*'.

[47] Margarita Zernova, (2007) *op. cit.* (n.42) 7. Margaret Urban Walker [2006] *op. cit.* (n.42) 385.

[48] Zernova identified three broad categories of restorative justice models. She identifies victim/offender reconciliation/mediation programmes, family group conferencing and sentencing circles from various practices across different countries. Margarita Zernova, (2007) *Ibid.* 8.

Despite the overwhelming evidence of historical practice of reparation in the traditional criminal justice system of indigenous societies in Nigeria, the formal system of administration of criminal justice system does not offer victim reparative options except via remedies available through civil proceedings. In a State like Nigeria, where there is no recognised reparation system in relation to ordinary domestic crimes, proffering a reparation system for victims of core international crimes may require more specificity than systems which have recognised reparation system for victims in their national criminal justice system. Flowing from the reparations system at the ICC which combines both juridical and administrative forms of reparation, a more appropriate approach to the reparations to victims of core international crimes should combine both forms of reparation which is styled after the peculiar structure and nature of the Nigerian criminal justice system.

Second, in addition to substantive provisions on reparation to victim, Nigeria must provide procedural measures which afford victims the opportunity to enjoy their right to reparation.[49] With respect to juridical reparation, it is important that Nigeria recognises and define the rights and the role of victims in the criminal justice process in line with the provisions of the UN documents. Victims have both substantive and procedural rights which must be recognised in order to realise their rights to reparation especially, for core international crimes. In the administration of criminal justice in Nigeria, there is no evidence of measures to assess large claims, such as may arise from the prosecution of core crimes. Historically, there is no record of mass claims by victims of crime in Nigeria and it may seem Nigeria is averse to reparation in the context of large-scale human rights violations. As such, it is important in the light of the development in international criminal law regarding the concept of reparation, vis-à-vis the prevalent situation of victimisation of core international crimes in Nigeria, that the criminal justice system countenances the concept of reparation to victims.

In 2006 and in 2011 respectively, the National Assembly proposed a bill which was intended to provide remedies, broadly, to victims in the administration of criminal justice.[50] However, the bill has remained at the floor of the National Assembly without any significant progress in passing it into law. The Bill makes commendable provisions which, significantly improve the Nigerian position on victims' rights in the administration of

[49] As Moffett contends there are certain procedural provisions which States would have to adopt for domestic mechanisms to remedy victims' harm, including their protection and participation in proceedings to ensure effective reparations. Luke Moffett, [2013]. *op. cit.* (n.4). 383.

[50] Criminal Justice (Victim's Remedies) Bill 2006 and 2011 respectively. In 2011, the Bill was re-introduced under the same title as the 2006 Bill. The 2011 Bill contains 74 sections and divided into two parts. The first part deals with victims' rights while the second part deals with a national compensation scheme to make *ex-gratia* award for victims of violent crimes.

criminal justice to victims. The Bill aptly defines who a victim in line with the provision of the UN Basic Principles and outlines the principles which would guide the administration of criminal justice in Nigeria.[51] Suffice to state that one of the principles outlined in the Bill is the protection of victim's rights and the achievement of victim's remedies in the course of criminal proceedings.[52] While the Bill makes significant provisions for the participation of victims in criminal proceedings in order to provide evidence of injury or damage they have suffered for the purpose of restitution or compensation, the Bill is inadequately structured with its restrictive provision and probable inapplicability to the context of core international crimes. It is remarkable that award of reparation to victim under the Bill is not based on the conviction of the Accused. Where the Accused is acquitted or discharged by the court, the court may still award reparation to the victim *impropria motu* or at the instance of the victim.

Since Nigeria ratified the Rome Statute in 2001, Nigeria has not been able to successfully domesticate the provisions of the Rome Statute.[53] The last bill to domesticate the Rome Statute in 2012 has remained at the floor of the national Assembly.[54] The Enforcement and Punishment of Crimes Against Humanity, Genocide and other Related Offences Bill (2012) makes no significant provision for reparation to victims. In the first place, the Bill[55] does not define who a victim is although, it recognises the families of victims. Ironically, whereas the Bill makes provisions for national enforcement of reparation order by the ICC there is no concrete provision regarding domestic reparation to victims.[56]

The Crimes Against Humanity Bill only penuriously, provides for Special Victims Trust Fund, the funding of which is dependent on the forfeiture orders and fines ordered by the Court, otherwise there is no provisions as to the

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[51] See. 3 of the Criminal Justice (Victim's Remedies) Bill 2011[SB.44]. It is notable that the Victim's Remedies Bill considers a child, who, is born to a decedent victim after his demise, an indirect victim, provided that he would have been a dependant of the deceased victim if he had not died. Although, this construction of a victim is exclusively applicable to the provision in Part II, it is instructive that the Bill makes extensive provisions with reference to victims. Hence, it can be construed that a foetus, by extension may be regarded as a victim.

[52] See. 2 (e) – (g) of the Criminal Justice (Victim's Remedies) Bill 2011.

[53] There has been three differently proposed bills aimed at domesticating the Rome Statute in 2001, 2006 and the recent being 2012 respectively.

[54] The 2012 bill to provide for the Enforcement and Punishment of Crimes Against Humanity, Genocide and other Related Offences Bill (2012) has, however, not moved beyond the National Assembly.

[55] References to the 'Bill' in this section relates to Enforcement and Punishment of Crimes Against Humanity, Genocide and other Related Offences Bill (2012).

[56] See. 84 of the Enforcement and Punishment of Crimes Against Humanity, Genocide and other Related Offences Bill (2012).

funding of the Trust fund.[57] The Bill lacks exactitude as to the function of the Trust Fund except that it states that it shall be established for the 'benefit of the victims and families of the victim' and victims are entitled to 'compensation, restitution and recovery for economic, physical and psychological damages' from the Special Victims Trust Fund.[58] By inference, the provision suggests that victims of core international crimes have a right to some form of reparation, but, it is unclear, how victims may access such provisions by the Trust Fund whether; by direct application or; simply Court order.

Further provision of the Bill suggests that victims have to institute a separate action through civil proceedings to claim reparation.[59] This distasteful provision does not offer victims of core international crimes any respite with regards to reparation. It is difficult enough to be a victim of such magnitude of crimes but more difficult and unrealistic is to require victims to go through the rigours of instituting a separate legal action to claim reparation, given the attendant difficulties that trail civil actions in ordinary cases and the vulnerable state of victims of core international crimes and inherent diversity in their claims. The Bill simply states that victims may institute a civil action against 'appropriate parties' however it remains to be known who 'appropriate parties' might be. Although the preceding provisions suggest that the accused forfeits his assets to the Special Victims Trust Fund where the Court so determines but, it does not state specifically whether the accused alone bears the burden of reparation to victims. The provision regarding 'appropriate parties' further deepens this confusion.

Following the experience of the ICC thus far, it is more practicable and realistic to explore the two-pronged approach to victims' reparation. Domestic reparation should be juridical and administrative. The fragmentary provisions relating to restitution and compensation and the redundant Criminal Justice (Victim's Remedies) Bill 2011, there are existing premises to provide an argument for juridical reparations to victims of core international crime. Second, reparation should be administrative. No matter how comprehensive, juridical reparation might be, it cannot cater for all victims in need of reparation since, most criminal courts especially in adversarial systems like Nigeria, are not designed to be victim-centred but they are rather victim

[57] See. 93 of the proposed Bill makes provision for a Special Victim Trust Fund without any elaborate provisions regarding the functions of the Trust Fund. By the provisions of sec. 93 (2) of the Bill, upon conviction, the Court can only order forfeiture of the Offender's declared assets to the Special Victims Trust Fund.

[58] See. 93 (1) and (6) of the Bill.

[59] See. 93 (6) seem to suggest that victims may claim against 'appropriate parties' and are also entitled to receive reparation from the Special Victims Trust Fund. What remains unknown is who the appropriate parties

oriented in so far as, they can balance the interest of both victims and the accused.[60] In pursuance or juridical reparation, Nigeria should legislate victim's right to reparation; rights during criminal proceedings and different forms of reparation. The law should make provision for mass claim as well as individual claim for reparation irrespective of the apprehension, prosecution or conviction of the alleged offender. The legislation shall provide for a Trust Fund for Victims of core international crimes which shall be jointly and severally funded by the federal and state government and fines imposed by the Court including those from high profile corruption or money laundering cases. The Trust Fund shall complement reparative measure by providing appropriate reparation to properly identified and eligible victims of core international crimes who are unable to receive juridical reparations.

5.0 CONCLUSION

State parties to the Rome Statute like Nigeria should maintain the primary obligation in providing reparation to victims of core international crimes within their jurisdictions. The principle of reparative complementarity provides a better and more effective approach to reparation to victims of core international crimes by ensuring that the responsibility to provide reparation is not transferred to the ICC solely while State parties maintain an aloof stance to the plight of victims. The principle of reparative complementarity does not obviate the perpetrator's obligation to provide reparation, it only provides realistic measures to ensuring that victims of core international crimes receive reparations in the face of glaring limitations to reparation at the ICC. Nigeria should adopt this principle in providing reparation to victims of alleged crimes against humanity and war crime especially in the light of the overwhelming needs of the victims and the seeming unwillingness to pursue prosecutions.

[60] Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Law: Beyond Rhetoric and The Hague' [2015] (1) (31) *Journal of International Criminal Justice* 8