

LLM Programme

Transnational Criminal Justice and Crime Prevention-An International and African Perspective

The Boko Haram Violence from the Perspective of International Criminal Law

**A Dissertation submitted to the Faculty of Law of the University of the Western Cape, in
partial fulfilment of the Requirements of the Degree of Masters of Law**



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At the Faculty of Law University of the Western Cape

October 2015.

DECLARATION

I, OJO Victoria Olayide, declare that *“The Boko Haram Violence from the Perspective of International Criminal Law”* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student: Ojo Victoria Olayide

Signature:.....

Date:.....

Supervisor: Professor Gerhard Werle

Signature:.....

Date:.....



DEDICATION

To *'Lolade* and *'Latoyo* my all.



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I am grateful to Prof. Dr. Gerhard Werle, my Supervisor, for his receptiveness to the idea of this research paper, his constructive criticism, and his efforts particularly at passing across knowledge of international criminal law. This research would not have been successful without his wealth of knowledge and redirection as appropriate.

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I am an accumulation of the kindness of a lot of people and I am grateful.

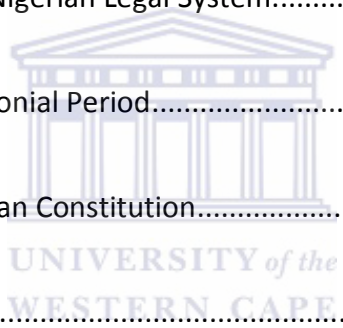
Above all, I appreciate God, the giver of wisdom.



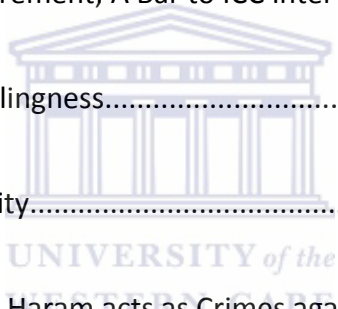
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KEYWORDS

1. Boko Haram
2. Violence
3. West Africa
4. Complementarity
5. Rome Statute
6. Nigeria
7. Terrorism
8. War Crimes
9. Crimes against Humanity
10. Constitution



ABBREVIATIONS AND ACRONYMS

AU-African Union

AU-PSC-African Union Peace and Security Council

ECOWAS-Economic Community of West African States

EFCC-Economic and Financial Crimes Commission

FCT-Federal Capital Territory

ICC-International Criminal Court

ICCPR-International Covenant on Civil and Political Rights

ICRC-International Committee of the Red Cross

ISIS-Islamic State of Iraq and the Levant

ICTY-International Criminal Tribunal for the Former Yugoslavia

JIT-Joint Investigation Team

JTF-Joint Task Force

LCBC-Lake Chad Basin Countries

LFN-Laws of the Federation of Nigeria

MEND-Movement for the Emancipation of the Niger Delta



MLPA-Money Laundering Prohibition Act

MNJTF-Multinational Joint Task Force

NGO-Non-Governmental Organization

OAU-Organization of African Unity

OIC-Organization of Islamic Conference

TPA-Terrorism Prevention Act

UN-United Nations

UNOCHA-United Nations Office for the Coordination of Humanitarian Affairs

US-TSA –United States Transportation Security Administration



CHAPTER ONE: INTRODUCTION

I. Background to the Study

The Boko Haram group gained notoriety in 2009 after the alleged extra judicial killing of the erstwhile leader of the group by government forces in an attempt to suppress their violence. They began as a religious group in Maiduguri, north-eastern Nigeria in 2002. The group has since placed Nigeria on international headlines as a result of the violent acts carried out with frightening frequency. Churches have been burnt, students kidnapped and killed in cold blood, public buildings and transportation systems bombed, whole towns sacked and civilians murdered, government installations attacked, women and children sold on the slave market among other chilling atrocities. The group is believed to have links with Al Qaeda and has reportedly pledged allegiance to ISIS.¹ Its style of raiding, suicide bombings and weapons used have improved dramatically over time. Despite all the engagements by the Nigeria military, the group seem to be gaining more territory and waxing stronger. As a result of the acts of violence perpetrated by the group, thousands of civilian casualties have been recorded from 2009 till date. The violence which started in North Eastern Nigeria has spread to border areas of Chad, Niger and Cameroon.

1 Aljazeera 'Boko Haram and defining the Al Qaeda Network' June 6, 2014. Available at <http://www.aljazeera.com/indepth/opinion/2014/06/boko-haram-al-qaeda-201463115816142554.html> (accessed on July 22, 2015).
BBC 'Nigeria's Boko Haram Pledges Allegiance to Islamic State' March 7, 2015. Available at <http://www.bbc.com/news/world-africa-31784538> (accessed on July 22, 2015).
The Daily Star Lebanon 'ISIS accepts allegiance of Nigeria's Jihadists Boko Haram' March 12, 2015. Available at <http://www.dailystar.com.lb/News/Middle-East/2015/Mar-12/290601-is-accepts-allegiance-of-nigeria-jihadists-boko-haram-tape.ashx> (accessed on July 22, 2015).

The Nigerian military has been accused of massive arbitrariness in its so called fight against terror. The State of Emergency declared by the government gave the military the opportunity to violate civilian rights unquestioned. Detention without constitutional guarantees under the guise of national security, deaths of thousands of individuals, torture of detainees and disappearance of thousands have been nailed at the door of the Nigerian military. Thousands remain in custody in sharp contrast with the paltry number of Boko Haram cases that have made it to the courts.

This paper will explore the history of the outbreak of religious related violence in Nigeria and the response of Nigeria and the African Union to the acts of the Boko Haram group both legally and procedurally. The intervention of the ICC as a viable option to combat the scourge of the group will also be examined. Other options such as trial in the Court of third States under the principle of universal jurisdiction and a special court jointly facilitated by the States involved will also be assessed.

II. Research Question

This paper seeks to address the following research questions:

1. Will the full adoption of the Shari'a legal regime adequately address the agitations of Boko Haram and tackle the violence in north-eastern Nigeria?
2. What are the legal and procedural responses of the Nigerian State and the African Union to the Boko Haram Violence?

3. Do the acts of Boko Haram fulfil the requirement as War Crimes and Crimes against Humanity as defined by the Rome Statute? If they do, does the complementarity requirement in the Statute allow the intervention of the ICC?

4. How effective would prosecution by third States through universal jurisdiction or the establishment of a special mechanism, such as a special court for the Boko Haram violence, be in dealing with the situation?

III. Objective of the Study

The general objective of the research is to address the options for dealing with the Boko Haram problem and explore the stance of international criminal law with regards to this peculiar circumstance. From the results, one may draw general conclusions to the impact of International Criminal Law in similar situations in Africa.

More directly, the aims of this study are;

- i. To explore the responsibility and the response of Nigeria to investigate and prosecute international crimes committed within its territory.
- ii. To examine Nigeria's legal and procedural framework for investigating and prosecuting such international crimes under its available domestic regime.
- iii. To identify the extent of involvement of the ICC and the applicability of the complementarity regime of the Court.
- iv. To consider the possible options that could be used to effectively deal with the Boko Haram group between the affected States.

IV. Significance of the Study

The Boko Haram group is relatively new as they shot into limelight in 2009. This implies that there is a dearth of legal scholarly work. This research paper is therefore pivotal in understanding the legal and procedural loopholes in the Nigerian domestic regime in dealing with the Boko Haram group. It has the potential to assist in an understanding of the attendant issues and at best may serve as a reference for the relevant authorities.

This research paper will be very instrumental in shedding light on the legal dichotomies and dimensions that presents itself in this very specific situation and serve as a pointer for future research on the Boko Haram problem.

Due to the fact that the field of international criminal law is a constantly developing one, the question of the determination of whether the acts of Boko Haram meet the threshold to be regarded as international crimes under the Rome Statute would be an important addition to the field.

V. Research Methodology

This is a qualitative study based upon library research. It will take a critical-analytical approach to the pertinent primary and secondary sources with a view to developing defensible answers to the research questions.

Primary sources that will be employed include Statutes, International Conventions, other sources of International Law, African treaties and Nigerian Laws. Literatures of International

Criminal law, International Law and other secondary sources are also employed. Reference will also be made to reports of international NGO's and other reports.

VI. Delimitation of the Study

The scope of this work is limited to the acts that may amount to war crimes and crimes against humanity as provided for by the Rome Statute and acts that may amount to terrorism under the relevant Nigerian law and the OAU Convention on the Prevention and Combating of Terrorism. Due to limited space, this research paper will focus majorly on the acts of Boko Haram and will not deal with the crimes committed by the government forces in depth.

VII. Organisation of the Paper

This paper is organised into five chapters. The first chapter is an introductory part which comprises background of the study, research question, objective of the study, significance of the study, delimitation of the study and research methodology.

Chapter two explores the history of the outbreak of religious-related violence in northern Nigeria and the place of the Shari'a legal regime in addressing the acts of Boko Haram as advocated for by some scholars.

The third chapter is devoted to the description of the response of the Nigerian State and the African Union to the Boko Haram violence.

Chapter four explores the intervention of the ICC as an option of dealing with Boko Haram acts. It considers the complementarity regime of the ICC as it relates to this specific circumstance. It

also compares the acts of Boko Haram with the definition of core crimes specifically crimes against humanity and war crimes within the Rome Statute.

Chapter five explores the other options that may be utilised as a response by the affected States. This chapter also concludes the research and gives recommendations.



CHAPTER TWO: Historical Background and Outline of the Boko Haram Violence

2.1 History of Religious-Related Violence in Northern Nigeria

The violence in Northern Nigeria has its roots in the history of the conservative practice of Islam in the region. This dates back to the jihad² of *Sheik Uthman dan Fodio* of *Sokoto* in the first decade of the nineteenth century.³ The jihad led to the establishment of a federation of Islamic states which recognized the supremacy of the Sultan as its religious and political ruler. The so-called Fulani Empire administered most of the present Northern Nigeria and Northern Cameroon. During the colonial years, the British system of indirect rule preserved the existing institutions and the Islamic regime in northern Nigeria which was already firmly entrenched. When Nigeria became independent in October 1960, the powerful northern region was still largely ruled through the Muslim emirs and their native administrations.⁴

On January 15, 1966, Nigeria experienced its first military coup. Closely followed by a second one in July of the same year, this resulted in military rule on and off, for about thirty years. The advent of military rule changed the structure of Muslim establishment in northern Nigeria. The region was carved into six states, political activity was banned, local government was reformed and the power of the traditional Islamic leadership structure was reduced significantly. A new Constitution was drawn up by the members of the constituent assembly and central to their

2 *Jihad* is an Arabic word (from *Jahada* meaning struggle) the original context means to strive and exert oneself. Today, it is used to mean 'holy war' or an equivalent of the English word 'crusade'. In this Jihad, Sheik Uthman Dan Fodio conquered most of the present day Northern Nigeria and Northern Cameroon and established a caliphate see Kent HB Politics of Islamic Jihad (2008) MA Thesis University of Canterbury 1.

3 Hickey R 'The 1982 Maitatsine Rising in Nigeria: A Note' (1984) 83 *African Affairs* 252.

4 Hickey (1984) 253.

debate was the position of the Shar'ia system within the Nigerian judicial system. Nigeria returned to civilian rule and the Constitution became effective on October 1, 1979. The majority of northern Muslims were reportedly displeased with its so-called secular nature.⁵ The Constitution was subsequently rejected and the religious leaders began to openly advocate for the establishment of an Islamic State in northern Nigeria.

2.2 From Maitatsine to Boko Haram

2.2.1 The Maitatsine Movement

The Maitatsine⁶ group developed against the backdrop of the socio-political problems in northern Nigeria before 1980. The period was characterized by acute poverty, youth joblessness and insecurity. The emergence of the group signalled the beginning of organized violence against the Nigerian State. The group preached a complete rejection of affluence, the so-called western education, materialism and any form of technology. The leader was recorded to have preached that any Muslim who read any other book beside the Quran is a pagan. The members who mostly belonged to the lowest class of the society carried out violent attacks against Muslims who did not share their beliefs, those who were considered as pagans, non-Muslims and the police, who were seen as a tool of the so-called secular State. On December 18, 1980, armed members of the group ambushed four police units and civilians leaving about

5 Hickey (1984)254.

6 The leader of the group was a dissident preacher who hailed from Marwa in Cameroon. The name of the group developed from the saying of the leader, '*wanda bata yarda ba Allah ta Tchine*' in Hausa which means 'May Allah curse anyone who disagrees with this version' later rendered as 'Maitatsine'. See Isichie E 'The Maitatsine Risings in Nigeria 1980-1985: A Revolt of the Disinherited' (1987) 17 *Journal of Religion in Africa* 195.

4,177 people dead.⁷ Several similar attacks were carried out by members of the group in Kaduna and Bulumkutu in 1982, 1984 in Yola and 1985 in Bauchi leading to the death of thousands of people.⁸ The leader of the group was killed by the military in one of such attacks. As a result, the members scattered and continued their reign of terror. Although the military was able to brutally quash the chain of violence and its spin offs; thousands of lives had been lost.

2.2.2 The Nigerian Muslim Brothers

The Nigerian Muslim Brothers group developed some years after the maitatsine movement. They claimed to have been inspired by the Iranian Ayatollah, Sayyid Qutb and Hassan al- Banna of Egypt. Led by Ibrahim Zaky Zaky of Zaria, their ideals consisted of the rejection of the Nigerian Constitution, flag and legal institutions and acceptance of the Shari'a legal regime as the only recognized legal authority.⁹ They carried out massive vandalism of government installations and attacks on so-called pagans.¹⁰

2.2.3 The Muslim Student Society

The Muslim Students Society was founded in 1954 and it grew into a national organization. The society became radicalized in the 1980s and rejected the Nigerian Constitution and any symbol of so-called secularism in the Nigerian State. A violent attack was carried out against Christian

7 Isichie (1987) 196.

8 Adesoji A 'The Boko Haram Uprising and Islamic Revivalism in Nigeria' (2010) 45 2 *Africa Spectrum* 96.

9 Kenny J 'Shari'a and Christianity in Nigeria: Islam and a 'Secular' State' (1996) 26 *Journal of Religion in Africa* 344.

10 Kenny (1996) 344.

faithful who gathered to see the Pope John Paul II on his visit to Kaduna in February 1982. This led to the death hundreds of people.¹¹

2.2.4 Other Related Crises

Several other similar crises with vast religious undertones in northern Nigeria have to be mentioned. The Kano metropolitan riot of October 1982, the Ilorin riot of March 1986, the nationwide crisis over Nigeria's membership in the Organization of the Islamic Conference (OIC) in 1986, the Kafanchan religious riots of March 1987, the Kaduna Polytechnic riot of March 1988, the riots resulting from the national debate on Shari'a at the Constituent Assembly in October/November 1988, the Bayero University crisis of 1989, the Bauchi riots of March/April 1991, the Kano riot of October 1991, the Zangon-Kataf riot of May 1992, the Kano civil disturbance of December 1991 and the Jos crisis.¹² Between 1999 and 2008, 28 other conflicts were reported; the most prominent of these are the recurrent Jos crises. According to Vormbaum and Akinmuwagun, 630 Yoruba, 604 Igbo and 430 Niger Delta People lost their lives to the 2011 Jos violence alone, public and private properties worth about 180 Billion Naira (over One Billion USD) were been destroyed in the course of the Jos violence.¹³

11 Kenny (1996) 344.

12 Adesoji (2010) 97.

13 Akinmuwagun TL & Vormbaum M 'The Nigerian 'Jos Crisis' from the Perspective of International Criminal Law' 135 in Werle G Fernandez L Vormbaum M (Eds) 'Africa and the International Criminal Court'(2014).

2.3 Emergence and Rise of Boko Haram

Boko Haram¹⁴ is a militant sect driven by the ideology of a fanatical Islamic practice.¹⁵ The group began in 2002 as an Islamic splinter group. The ideology of the group is not novel and their philosophy is similar to that of earlier groups. The group in a 2011 leadership statement gave an idea of its specific objectives;

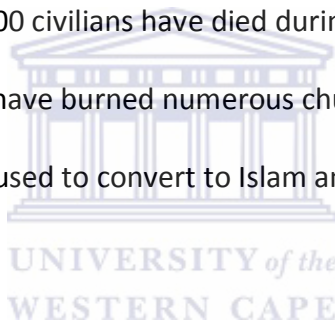
[W]e want to reiterate that we are warriors who are carrying out Jihad (religious war) in Nigeria and our struggle is based on the traditions of the holy prophet. We will never accept any system of government apart from the one stipulated by Islam because that is the only way that the Muslims can be liberated. We do not believe in any system of government, be it traditional or orthodox, except the Islamic system which is why we will keep on fighting against democracy, capitalism, socialism and whatever. We will not allow the Nigerian Constitution to replace the laws that have been enshrined in the Holy Qur'an; we will not allow adulterated conventional education (Boko) to replace Islamic teachings. We will not respect the Nigerian government because it is illegal. We will continue to fight its military and the police because they are not protecting Islam. We do not believe in the Nigerian judicial system and we will fight anyone who assist the government in perpetrating illegalities.¹⁶

The group claims to have over 40 000 members in Nigeria and neighbouring African countries, including Chad, Benin, Niger Republic, as well as in Somalia and Mauritania.¹⁷ The attacks by the group gathered momentum after the alleged extra-judicial execution of their leader by the

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- 14 The founders of Boko Haram called themselves *Jama'a Ah as-Sunna Li-da'wawa-al Jihad* which roughly translates from Arabic as 'People Committed to the Propagation of the Prophet's Teachings and Jihad'. Local Hausa-speaking communities named the group Boko Haram, translated 'Western education is forbidden', because of its strong position that western education and culture are corrupt and forbidden by Islam.
- 15 Aghedo I& Osumah O 'The Boko Haram Uprising: How Should Nigeria Respond?' (2012) 33*Third World Quarterly* 858.
- 16 Boko Haram Statement (Leadership 2011) See Agbiboa D 'The Ongoing Campaign of Terror in Nigeria: Boko Haram versus the State' (2013) 2 *Stability: International Journal of Security and Development* 4.
- 17 Aghedo & Osumah (2012) 858.

Nigerian military in July 2009.¹⁸ The group previously had been small and relatively unknown. They aim to impose Islamic law in Nigeria and have waged a violent campaign against all forms of organized government including traditional rule, western style education and any religion other than Islam.¹⁹

In an October 2012 report, Human Rights Watch estimated that about 1,500 civilians had died as a result of the violence perpetrated by the group, by November 2013; estimates showed that this figure had risen to 5,000 deaths.²⁰ In the first half of 2014, Human Rights Watch documented the death of at least 2,053 people.²¹ The total estimate from 2009 through July 2014, revealed that more than 7,000 civilians have died during Boko Haram related unrest and violence.²² Boko Haram members have burned numerous churches; some with worshippers trapped inside, killed men who refused to convert to Islam and abducted women and children.²³

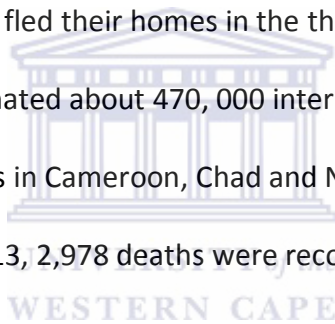


The acts which initially targeted citizens not of the Islamic faith, have become indiscriminate and grown to include audacious bombing of the United Nations headquarters building in

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- 18 Human Rights Watch 'Nigeria: Prosecute Killings by Security Forces' November 26 2009. Available at <http://www.hrw.org/news/2009/11/26/nigeria-prosecute-killings-security-forces> (accessed on March 19 2015).
- 19 Human Rights Watch 'Those Terrible Weeks in Their Camp Boko Haram Violence against Women and Girls in North East Nigeria' October 2014. Available at <http://www.hrw.org/sites/default/files/reports/nigeria1014web.pdf> (accessed on March 15, 2015).
- 19 Human Rights Watch Report October 2014 11.
- 20 Human Rights Watch Report October 2014 12.
- 21 Human Rights Watch Report October 2014 12.
- 22 Human Rights Watch Report October 2014 13.
- 23 Human Rights Watch 'Those Terrible Weeks in Their Camp Boko Haram Violence against Women and Girls in North East Nigeria' October (2014) 17.

Abuja(Nigeria’s capital city),²⁴ the killing of about 60 schoolboys in their school room in cold blood,²⁵ the so-called ‘Baga and Doron-Baga Massacre’ that left about 2000 people dead in a weekend,²⁶ the violent kidnapping of over 200 school girls from their school rooms in 2014 in Chibok²⁷ among other well orchestrated and executed acts. Deliberate attack of villages, mass killings of civilians and abductions particularly of women and children, spread from North Eastern Nigeria into border areas of northern Cameroon, Chad and Niger.

Between July and early September 2014, Boko Haram took control of more than ten major towns in Borno, Yobe, and Adamawa states of north-eastern Nigeria.²⁸ According to UNOCHA, an estimated 300,000 people have fled their homes in the three states. As at March 14, 2014, Human Rights Watch reports estimated about 470, 000 internally displaced persons and another 60,000 displaced Nigerians in Cameroon, Chad and Niger.²⁹ According to BBC, in 2012, 1,663 civilian lives were lost, in 2013, 2,978 deaths were recorded and in 2014, 9,033 civilians



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- 24 BBC ‘Nigeria Attack: Car Bomb Hits Nigeria’s UN Building’ August 27 2011. Available at <http://www.bbc.com/news/world-africa-14677957> (accessed on March 19 2015).
- 25 Reuters ‘Nigerian Islamist Kills 59 People in Boarding School Attack’ February 26 2014. Available at <http://www.reuters.com/article/2014/02/26/us-nigeria-violence-idUSBREA1P10M20140226> (accessed on July 16, 2015).
- 26 BBC ‘Boko Haram Attack: What Happened in Baga?’ February 2 2015. Available at <http://www.bbc.com/news/world-africa-30987043> (accessed on July 16, 2015).
- 27 CNN ‘As many as 200 girls abducted by Boko Haram, Nigerian officials say’ April 16 2014. Available at <http://edition.cnn.com/2014/04/15/world/africa/nigeria-girls-abducted/index.html> (accessed on March 16, 2015).
- 28 Human Rights Watch Report October 2014 16.
- 29 Human Rights Watch ‘Nigeria; Boko Haram Attacks Causes Humanitarian Crisis. Regional Governments, Agencies Should Protect Rights of the Displaced’ March 14 2014. Available at <http://www.hrw.org/news/2014/03/14/nigeria-boko-haram-attacks-cause-humanitarian-crisis> (accessed on March 18, 2015).

were killed by or as a result of Boko Haram violence.³⁰ Boko Haram has been engaged in a war over the territory of certain parts of northern Nigeria since declaring an Islamic Caliphate in August 2014.³¹ Frequent attacks have also been carried out in neighbouring Niger, Chad and Cameroon. Boko Haram allegedly funds its activities through kidnapping for ransom, a diverse network of black market dealings in arms and running a slave market, local and international benefactors and links to al-Qaeda and other well funded groups, Al-Shabab in Somalia and other local Al-Qaeda affiliates.³²

2.3.1 Acts of Government Forces

The government forces have been accused of brutality in their attempt to quash the Boko Haram violence. In 2012, the government declared the first state of emergency in north-east Nigeria. This enabled the forces to commence what it regarded as a massive crackdown on supposed members of Boko Haram in the region. The forces have been accused of descending into arbitrariness and extra judicial killings while attempting to combat the acts of the group. Amnesty International reported that since March 2011, more than 7,000 young men and boys have died in military detention and more than 1,200 have been unlawfully killed by the military since February 2012.³³ In June 2013 alone, about 1,400 corpses were deposited in a mortuary

30 BBC 'Boko Haram Attack: What Happened in Baga?' February 2 2015. Available at <http://www.bbc.com/news/world-africa-30987043> (accessed on July 16, 2015).

32 BBC 'Who are Nigeria's Boko Haram Islamists?' May 4 2015. Available at <http://www.bbc.com/news/world-africa-13809501> (accessed on October 2, 2015).

31 Washington Post 'This is how Boko Haram Funds its evil' Available at <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/06/this-is-how-boko-haram-funds-its-evil/> (accessed on July 13 2015).

33 Amnesty International Report 'Stars on their Shoulders, Blood on their Hands; War Crimes Committed by the Nigerian Military' 2 June 2015.

from Giwa barrack's detention facility, the notorious detention centre for Boko Haram suspects.³⁴

The government forces have been accused of mass arbitrary arrest and unlawful detention of about 20,000 young men and boys, countless acts of torture and ill treatment and enforced disappearance of an unascertainable number of people. They have also been accused of failure to act when they had knowledge that crimes were to be or being committed by the members of the Boko Haram group which led to the death of thousands of people.

Detainees have been held outside the protection of the law and have been denied access to their families, lawyers or the Courts by the government forces. It has been alleged that detainees have not been informed of the reasons for their arrest and their families not given knowledge of their fate or whereabouts. Many have been detained for years without charge. Although the Nigerian military refused to release official information on the number of persons in custody, the detainees are rumoured to be in thousands, among who are senior members of Boko Haram.³⁵

34 Amnesty International Report 'Nigeria: Horror in Numbers' June 3, 2015 available at <https://www.amnesty.org/en/latest/news/2015/06/nigeria-horror-in-numbers/> (accessed on July 16, 2015).

35 Reuters 'Nigerian Military Arrest Senior Boko Haram Member' June 18, 2014. Available at <http://www.reuters.com/article/2014/06/18/us-nigeria-blast-idUSKBN0ET2OD20140618> (accessed on October 13, 2015).

Vanguard 'Arrest of Suspected Boko Haram Members in Abia' June 20, 2014. Available at <http://www.vanguardngr.com/2014/06/arrest-suspected-boko-haram-members-abia/> (accessed on October 13, 2015). Among other high profile arrests of suspected members of Boko Haram who have been in custody without trial.

2.4 Shari'a Law within the Nigerian Legal System.

The major agitation of the Boko Haram group is that the Shari'a legal regime be accorded full constitutional backing. This would lead to the creation of an Islamic northern Nigeria. Many scholars have also argued that providing a proper place for the Shari'a legal regime in the Nigeria constitution would solve the Boko Haram problem and put a permanent end to the violence. An assessment of the Shari'a legal regime would be essential to understand this argument.

2.4.1 Shari'a during the Colonial Period

Shari'a has been variously described as the legal expression of Islam which has its primary source in the *Qur'an* and the *Hadiths*.³⁶ During the colonial period, the policy of indirect rule adopted by the British in Nigeria preserved all existing Islamic institutions. Although Shari'a law was not directly recognized, 'native law and custom,' was interpreted to cover the traditional norms in force and this included Shari'a law.³⁷ The Shari'a law allowed at that time extended to all matters, including criminal and capital offences except for penalties such as mutilation, lapidation and crucifixion.³⁸ There was flexibility in its interpretation and application and it largely relied on the discretion of the *emir* or *alkali* interpreting it.³⁹ Some years later, conflict ensued with relation to jurisdiction on the imposition of a death penalty. Subsequently, a distinction was made between the jurisdiction of Shar'ia courts and civil courts. Shari'a courts

36 Oba AA 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 *International & Comparative Law Quarterly* 819.

37 Kenny (1996) 340.

38 Kenny (1996) 340.

39 Kenny (1996) 340.

were allowed to deal with personal status and family law alone, while civil courts would deal with criminal law according to a single code applicable to all parts of Nigeria.⁴⁰

A native Courts Bill was passed in 1956 which made a distinction between application of Shari'a between Muslims and non-Muslims and provided the appropriate procedures for both circumstances.⁴¹

2.4.2 Shari'a and the Nigerian Constitution

Nigeria implemented a federal Constitution after independence. Under the Constitution, Shari'a law was defined only in relation to civil and personal matters such as marriage, family relationships, divorce, child custody, guardianship of infants and similar areas without criminal jurisdiction.⁴² It was not to be applied nationwide but only in places with a sizeable number of Muslims. A dispute in this area was to be adjudicated by the Shari'a court of the relevant state or the Federal Capital Territory (FCT) on the basis of original jurisdiction and the Shari'a court of appeal as an appellate jurisdiction.

On 8 October, 1999, Zamfara state became the first in Nigeria to fully implement traditional Shari'a in its entirety. This was done by enacting an act for a Shari'a court and court of appeal in the state and a Shari'a penal code.⁴³ This Act extended the jurisdiction of the Shari'a court and

40 Kenny (1996) 341.

41 Kenny (1996) 341.

42 Galadima H & Elaigwu J 'The Shadow of Shari'a over Nigerian Federalism' (2003) 33 *Journal of Federalism* 132.

43 Galadima & Elaigwu (2003) 138.

Shari'a court of appeal to include criminal matters. This was done by taking advantage of a legal loophole in section 277 of the constitution.⁴⁴ Section 277(1) provides;

*'[T]he shari'a Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with subsection (2) of this section.'*⁴⁵

The first part of Section 277(1) was interpreted to connote that states had the right to confer other jurisdictions on the court, in this case, criminal jurisdiction. Subsequently, the legality and validity of such interpretation could not be questioned.

So far, twelve out of the thirty six states in Nigeria have launched the Shari'a legal code, encompassing all aspects of Shari'a law including Islamic criminal law.⁴⁶ All these twelve states are in northern Nigeria. Penalties such as decapitations, amputation of limbs, flogging fornicators, sentencing adulterers to death by stoning were provided for under the new system.⁴⁷ The enactment of the Shari'a penal code has resulted in an uneasy co-existence of two distinct legal regimes in each of the implementing state.⁴⁸ Its adoption has raised many constitutional, legal and social questions which mostly remain unresolved.

44 Section 277(1) was interpreted to mean that the individual states had the right to confer other jurisdictions on the court, in this case, the criminal jurisdiction.

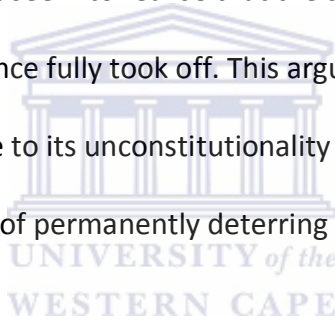
45 Italics mine.

46 Zamfara, Kano, Sokoto, Katsina, Bauchi, Borno, Jigawa, Kebbi, Yobe, Kaduna, Niger and Gombe States in Northern Nigeria have all adopted full implementation of Sharia as at 2002.

47 Galadima & Elaigwu (2003)139.

48 Iwobi AU 'Tiptoeing Through a Constitutional Minefield: The Great Shari'a Controversy in Nigeria' (2004) 48(2) *Journal of African Law* 134.

The question of Boko Haram's agitation for an Islamic state in northern Nigeria is a moot point. This is because the areas where the group now hold sway are the principal areas where Shari'a law in its entirety have been adopted. Kaniye Ebeku argued that the violence of Boko Haram can be effectively solved by constitutionalizing the full dimensions of Shari'a.⁴⁹ He asserts that the appropriate response of Nigeria to Boko Haram is constitutional rather than military. The validity of this position is called into question because Shari'a law seems to be powerless in the face of Boko Haram in Northern Nigeria when it has been adopted in its entirety since 2002. This argument does not take cognisance of that fact. The proponents of a constitutional solution to the Boko Haram problem do not seem to realise that the system has been fully in place since 2002 before the Boko Haram violence fully took off. This argument is therefore unsound. This is not a recommendable solution due to its unconstitutionality and the fact that its application has not been shown to be capable of permanently deterring the operations of the group.



2.5 Chapter Summary

This chapter has explored the history of violence in northern Nigeria. The operations of earlier groups with similar objectives and the development of the Boko Haram group have also been outlined. An assessment of the place of Shari'a law within the Nigerian legal system has been done to understand the soundness of the position that this could be a potential response to the Boko Haram agitations. It is concluded that the intricacies of the Boko Haram problem is too

49 Ebeku SK 'Beyond Terrorism: Boko Haram Attacks and National Constitutional Questions in Nigeria' (2011)1 *Sri Lanka Journal of International Law* 16.

enormous and mere inclusion of Shari'a law in the Constitution does not seem to be capable of permanently addressing the problem.



CHAPTER THREE: Response to the Boko Haram Violence

3.1. Domestic Prosecution of acts amounting to International Crimes

States have a responsibility not only to refrain from interfering with basic human rights but additionally to promote and protect it. This obligation is based on the idea that such crimes violate obligation *erga omnes* .i.e. obligation owed to all mankind.⁵⁰ Principles under which a State has jurisdiction to prosecute criminal acts are recognised by international law. A basic one is the territorial principle, in which States have jurisdiction over crimes committed in their territory. Similarly, under the nationality principle, a State has jurisdiction when the crimes are committed by its own nationals, even when committed outside its territory.⁵¹

In the Preamble to the Rome Statute, it is emphasized that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and...their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’. It is further stated that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’.⁵² Domestic Courts, especially the Court of the State where the alleged crime was committed will often be able to conduct criminal proceedings more easily, cheaply and quicker than an international tribunal would.⁵³ National jurisdiction over the so-called international crimes would take precedence over international jurisdiction. This is important to ensure State sovereignty and take advantage

50 Tomuschat C ‘The Duty to Prosecute International Crimes Committed by Individuals’ in Cremer et al, *Festschrift für Steinberger* (2002) 316.

51 Brown BS ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal of International Law* 391.

52 Werle G & Jessberger F *Principles of International Criminal Law* (2014) 79.

53 Werle & Jessberger (2014) 94.

of a decentralized prosecution by States closest to the crime and thus most directly affected by it.⁵⁴

The duty to prosecute crimes under international law also exists under treaty law for Genocide and War Crimes in international armed conflict.⁵⁵ The Geneva Conventions of 1949 and their first Additional Protocols, Article 5 and 7 of the Torture Convention⁵⁶ and Article 6 of the Genocide Convention⁵⁷ all clearly provide for the duty of States parties to prosecute treaty violations. The ICCPR on the other hand does not contain an explicit provision on this obligation. However, the obligation may be construed from the right to an effective remedy provided for in Article 2(3), coupled with substantive duties in other provisions, including its provision on right to life and the prohibition of torture.

The UN General Assembly Resolution 3074(XXVIII) of 3 December 1973 provides that perpetrators of war crimes and crimes against humanity should be punished. With regards to the traditional concept of jurisdiction, '[e]very state has the right to try its own nationals for war crimes and crimes against humanity'. On the principle of territoriality, it states in the fifth paragraph that, '[p]ersons against whom there is evidence of commission of war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes.'⁵⁸

54 Werle & Jessberger (2014) 95.

55 Werle & Jessberger (2014) 79.

56 The Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1984).

57 The Convention on the Prevention and Punishment of the Crime of Genocide (1948).

58 Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. Adopted by General Assembly Resolution 3074 (XXVIII)

It is the duty of the State where violations of international law have been committed or whose citizens commit these violations, to investigate and prosecute the alleged offenders. Roht-Arriaza opines that there are three clauses in modern multilateral human rights treaties which support a State's obligation to investigate egregious human rights violations and take action against the parties responsible.⁵⁹ First, criminal law treaties specify the obligation of States to prosecute and punish perpetrators of acts defined as crimes under international law in their respective territories. Second, the 'ensure and respect' provision common to many treaties have been interpreted to impose obligations on States to investigate and prosecute. The third is the right to a remedy included in many human rights instruments. This provides a strong basis for inferring an obligation to investigate and prosecute.

It has been stated that States have a wide discretion to act in the exercise of jurisdiction unless there is in existence a customary international law norm that is contrary to the exercise of the jurisdiction.⁶⁰

Although, it is acknowledged that States have the duty to investigate and prosecute acts constituting international crimes in their domain, there are certain impediments to the exercise of such duty. Inconsistency in the national legislation of the State or lack of adequate national legal regime addressing the acts could present a hurdle for national prosecution.⁶¹ Where a

of 3 December 1973. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/PersonsGuilty.aspx> (Accessed on June 2nd 2015).

59 Roht-Arriaza N 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations In International Law' (1990) 78 *California Law Review* 462.

60 Mack E 'Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity?' (2015) 24 *Minnesota Journal of International Law* 78.

61 Mack (2015) 83.

legal regime for crimes under national law simply does not exist, or where there are wide disparities in the definition of crimes under international law and the national law of the relevant State can be very problematic. Although these problems are vital to the successful exercise of national jurisdiction, they are not insurmountable.

With regards to crimes under the jurisdiction of the ICC, a policy paper of the Prosecutor in September 2003 stated as follows:

[I]t should... be recalled that the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only the right but also a duty of States. Indeed the principle underlying the concept of complementarity is that the States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that the national systems are expected to maintain and enforce adherence to international standards.⁶²

The prosecutor concluded that, 'national investigations and prosecutions, where they can properly be undertaken, will be the most effective means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses.'⁶³

3.2 Nigeria's Defence Mechanism: Policing and Judicial System

Nigeria operates a federal policing system. The Nigerian Police Force is created by section 214(1) of the Constitution.⁶⁴ Section 4 and 23 of the Police Act provide for the power to prevent

62 Nouwen SMH 'Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan' (2013) 37.

63 Burke-White W 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 1 *Harvard International Law Journal* 68.

64 'There shall be a police force for Nigeria, which shall be known as the Nigerian Police Force, and subject to the provisions of this section, no other police force shall be established for the federation or any part thereof'. Section 214(1) CFRN 1999.

commission of crime, apprehend offenders and conduct prosecutions.⁶⁵ In maintaining security, the Nigerian police are empowered to arrest, detain, search, detect and prosecute.⁶⁶

Although the police are regarded as the first line of defence, in emergency situations, the president, as the commander in chief of the armed forces, has the power to deploy the military to intervene in the cases of internal disturbances. The Nigerian military have been very instrumental in successfully quelling internal violence in the past.

Public prosecution is manned by the Ministry of Justice at both the state and the federal levels. The Attorney General is the Chief Prosecutor of the state. He is empowered to initiate, conduct, take over or discontinue any criminal proceeding in any court of law in the country except in the court martial.⁶⁷



3.3 Available Legal Regime for Boko Haram acts

3.3.1 Application of International Treaties

Most of the acts of Boko Haram like torture, sexual violence of girls and women and other similar acts would ordinarily fall under relevant international treaties signed and ratified by Nigeria. However, unlike the South African and the Kenyan Constitutions which provide expressly for the direct domestic application of ratified international treaties,⁶⁸ the Nigerian

65 Section 4 Nigerian Police Act Cap. P. 19 LFN 2004.

66 Babalola A 'Power of Police to Prosecute Criminal Cases: Nigeria and International Perspectives' (2014) 2 *European Journal of Business and Social Sciences* 132.

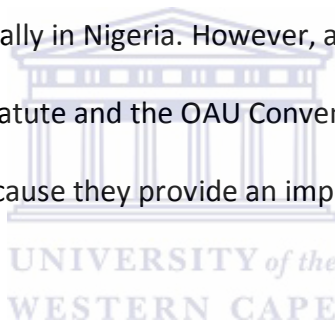
67 Babalola (2014)131.

68 Section 231(3) & (4) of the South African Constitution is very clear on this matter. Also Section 2(4) & (5) of the Kenyan Constitution also provides that general principles of international law are law in Kenya if they are not inconsistent with the Kenyan Constitution.

Constitution makes provision for a specific hurdle of domestication after ratification, before domestic application. Section 12 of the Constitution states that;

‘[N]o treaty shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.’

This implies that international treaties ratified by Nigeria have to go through the additional law making process of enactment before the National Assembly to acquire the force of law in Nigeria. The Rome Statute and the OAU Convention on the Prevention and Combating of Terrorism among other international treaties have not been domesticated. Therefore, they do not have the force of law domestically in Nigeria. However, a brief examination of Nigeria’s obligation under both the Rome Statute and the OAU Convention on Prevention and Combating of Terrorism is essential. This is because they provide an important basis to address some of the Boko Haram acts.



3.3.1.1 Rome Statute

Nigeria is a founder member of the ICC having joined the Court at inception in 2002. The obligations of Nigeria with regards to the core crimes in the Statute are very clear. Although there is no existing duty to domesticate the Rome Statute, it provides that States parties should ensure that there are procedures available under their national laws for all forms of cooperation with the Court with regards to procedure.⁶⁹ There have been repeated attempts to domesticate the Rome Statute so far unsuccessfully, and as such, commission of crimes in the

69 Article 88 Rome Statute.

Statute by Nigerian citizens or on the territory of Nigeria cannot be punishable in Nigeria on the basis of the Rome Statute.

3.3.1.2 The OAU Convention on the Prevention and Combating of Terrorism, 1999

The Convention⁷⁰ was enacted in 1999 and entered into force in 2002. The Convention does not define terrorism, but it provides the meaning of terrorist acts.⁷¹ It addresses acts that support the commission of terrorist acts and the also deals with intent to commit terrorist acts in article 3(a).⁷² The Convention creates obligations for States parties to review their national laws and establish criminal offences for terrorist acts. It also provides for cooperation, exchange of information and extradition of suspects between States parties for the prevention and combating of terrorism. Extra-territorial investigation and mutual legal assistance is also copiously provided for by the Convention. The Convention additionally enjoins the member States to sign related international instruments. The Convention is supplemented by a Protocol⁷³ which was adopted in Addis Ababa in 2004. The Protocol provides for additional commitments on States parties, mechanisms for implementation through the Peace and Security Council (PSC) of the African Union, the role of the commission, regional mechanisms and issues relating to the settlement of disputes.

70 Also known as the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1999.

71 Article 1(3) (a) (i-iii) OAU Convention on the Prevention and Combating of Terrorism, 1999.

72 Article 1 (3) (b) OAU Convention on the Prevention and Combating of Terrorism, 1999.

73 Protocol to the OAU Convention on the Prevention and Combating of Terrorism, 2004.

However, the Convention is also not applicable in Nigeria because it has not been domesticated. Alternatively, it has provided a relevant platform for the creation of the national Terrorism Prevention Act (TPA) which is currently in force and patterned after it.

3.3.2 National Laws

Under the current legal regime in Nigeria, the first option in dealing with Boko Haram acts is to charge them as ordinary crimes in the criminal and penal code such as murder, kidnapping, rape and so forth. This approach seems to be inadequate and has not been preferred by the prosecutorial authorities. An examination of the definition of the crimes in the criminal and penal code shows that they do not in any way capture the severity of the acts of Boko Haram. The definition of the offences in the criminal and penal code did not anticipate extreme circumstances such as the Boko Haram problem on ground and thus does not provide an adequate option. Because of this, the few cases that have been prosecuted have been charged on the basis of the Terrorism Prevention Act, a specialised law that adequately addresses situations such as the Boko Haram problem. Going forward, recourse has been made to terrorism and the terrorism laws only to reflect the internal legal framework with which Nigeria deals with the acts of the group.

Although Nigeria has a copious history with violent acts that could be regarded as terrorism, it lacked legislation criminalizing such acts before 2001. After the September 11, 2001 terrorist attack in America, attempts were made to enact anti-terrorism provisions in Nigeria. Rather than enact new law, the National Assembly included provisions in Section 15 of the Economic and Financial Crimes (EFCC) Establishment Act 2004 that define, prohibit and prescribe the

punishment for acts that may amount to terrorism.⁷⁴ As violent acts evolved and increased locally, particularly the actions of the Movement for the Emancipation of the Niger Delta (MEND) in what became known as oil terrorism, and later the Boko Haram group, efforts to create an adequate legal framework was resuscitated.⁷⁵ On January 3, 2010, Nigeria was blacklisted by the US Transportation Security Administration (TSA) by classifying it as a country of interest on the US Terror Watch List.⁷⁶ Consequently, two legislations that had been before the National Assembly since 2008 were passed. The Money Laundering (Prohibition) Act (MLPA), which had provisions relating to terrorism financing, and the Terrorism Prevention Act (TPA) were signed into law on June 3 2011.

The Terrorism (Prevention) Act⁷⁷ is currently the major legal framework that addresses acts that may amount to terrorism in Nigeria. It is a very specific law and it makes provisions for acts of terrorism without defining terrorism. It criminalizes varied levels of participation in acts that may amount to terrorism, including support for terrorism, harbouring of terrorists, terrorism financing among other acts incidental and related to the crime.

Its provisions relating to prohibition of acts of terrorism in article 1 is an expanded version of the provisions in the OAU Convention. It proscribes any form of terrorist organisation. In the same vein, it makes provision for extra territorial application of the Act especially in strengthening the combating of terrorism financing offences. It further empowers the Attorney

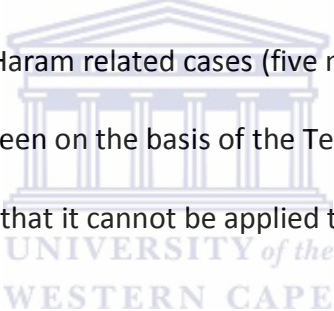
74 Sampson IT & Onuoha FC 'Forcing the Horse to Drink or Making It Realize its Thirst'? Understanding the Enactment of Anti-Terrorism Legislation (ATL) in Nigeria' (2011) 5 *Perspectives on Terrorism* 38.

75 Sampson & Onuoha (2011) 40.

76 Sampson & Onuoha (2011) 41.

77 Terrorism Prevention Act, Act No 10, 2011.

General of the Federation to institute and undertake criminal proceedings in addition to the responsibility of the law enforcement agencies to investigate and prosecute acts that fall under the TPA.⁷⁸ The Federal High Court is vested with sole jurisdiction to impose penalties specified in the Act.⁷⁹ The Act provides for long prison terms depending on the level of involvement of the accused and where death occurs as a result of the terrorist act, the accused may be sentenced to life imprisonment.⁸⁰ The TPA (Amendment) Act (2013) which amends the TPA (2011) makes provision for monetary fines, terms of imprisonment and introduces a maximum sentence of death penalty for offences under the Act.⁸¹ It also introduces the criminalisation of inchoate terrorism offences like incitement to commit and inducement to commit terrorism offenses.⁸² Currently, all the Boko Haram related cases (five major cases are on record) that have been charged to Court have been on the basis of the Terrorism Prevention Act.⁸³ A major challenge with this Act however, is that it cannot be applied to crimes that were committed before 2011 and 2013 respectively.



Currently, it is unclear how many Boko Haram members are in custody. According to the US Department of State report, in 2013, a Joint Investigation Team (JIT) set up by the Nigerian Defence Headquarters recommended for immediate trial over 500 Boko Haram suspects in custody, release of 167 detainees and a review of 614 inconclusive cases. Speculations are rife however that the military has in custody thousands of people arrested in connection with the

78 Section 30 (1-2) TPA.

79 Section 32 (1) TPA.

80 Section 33 (e) TPA.

81 Section 2(2) (h) TPA (Amendment) Act.

82 Section 2(2) (h) TPA (Amendment) Act.

83 US Department of State Bureau of Counter-terrorism Country Reports on Terrorism 2013. Available at <http://www.state.gov/j/ct/rls/crt/2013/224820.htm> (Accessed on October 2 2015).

group. Not much has been heard with regards to the investigation and the prosecution of these individuals.

3.4 Chapter Summary

The response of Nigeria to the Boko Haram violence has been explored in this chapter. It also provided an analysis of the responsibility of Nigeria to prosecute international crimes committed in its territory. It further highlighted Nigeria's policing and judicial system as it relates to the Boko Haram violence and tackled the legal responses particularly of the Terrorism Prevention Act and the application of related international conventions and instruments as a response to the Boko Haram group. Domestically, the option of dealing with the Boko Haram crimes as crimes under the Terrorism Prevention Act is available and may be utilised to prosecute suspects in custody.



CHAPTER FOUR: Potential for the Intervention of the ICC

4.1 Why the ICC Should Intervene in Nigeria

The ICC commenced preliminary investigation into the Nigerian situation in 2013.⁸⁴ This is inclusive of the Boko Haram and other crisis in the country. Of the crisis being investigated, Boko Haram is the only one that remains an active problem. There have been calls by members of the civil society for the investigation and prosecution of suspected senior members of the Boko Haram hierarchy in the custody of Nigeria by the ICC. Therefore, a consideration of the potential advantages of the intervention of the ICC for Boko Haram is essential.

4.1.1 Neutrality, Impartiality and Judicial Prejudice

Potentially, assuming Nigeria shows readiness to prosecute the Boko Haram suspects in custody, a major concern as expressed by civil society is the neutrality and impartiality of the judges who would potentially adjudicate over the cases in Nigeria. The Boko Haram situation is one that continues to receive a high level of publicity in Nigeria daily. This has led to a situation where supposed membership or mere sympathy with the ideals of the organisation generates a feeling of disgust in the general populace. It is doubtful whether the suspects have any chance of a fair trial before a Nigerian Court. This is because anyone suspected to be affiliated to the group is already presumed overwhelmingly guilty in the court of public opinion. The presumption of innocence is provided for in Article 11(1) of the Universal Declaration of Human

84 Preliminary Examination before the Court Available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx (Accessed on 6 October 2015).

Rights and other universal and regional human rights instruments.⁸⁵ A major pillar of the presumption of innocence rule is the fairness of a trial in a substantive and procedural way.⁸⁶

All the rights of the accused must be respected and protected before and during the trial.

Article 66(1) of the Rome Statute also makes this clear provision. The European Court of Human Rights addressed the presumption of innocence as follows:

'[I]t requires, *inter alia*, that when carrying out their duties, the members of a court should not start with a preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused...'⁸⁷

Trial in Nigeria may result in a situation of bias against the suspects and a lack of fair trial. It is important to avoid this as justice must not only be done; it must be seen as been done.⁸⁸ If a judicial process must be respected, it must be perceived as fair.⁸⁹

4.2. Complementarity Requirement; a Bar to ICC Intervention?

Article 1 of the ICC Statute provide that the Court 'shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern....and shall be complementary to national jurisdictions.'⁹⁰ Although the ICC provides the forum where major perpetrators of international crimes are held responsible

85 Provisions in other Human Rights Instruments include: Art 14(2) International Covenant on Civil and Political Rights (1976), Art 7(2) the American Convention on Human Rights (1978), Art 6(2) European Convention on Human Rights (1955), Art 7(1) (b) African Charter on Human and Peoples' Rights (1986), Art 40(2)(b)(1) Convention on the Rights of the Child (1990). See Schabas WA 'The International Criminal Court: A Commentary on the Rome Statute' (2010) 782.

86 Schabas (2010) 782.

87 Schabas (2010) 784.

88 Lippman M 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law' (1982) 5 *Houston Journal of International Law* 28.

89 Lippman (1982)28.

91 El Zeidy MM 'The Principle of Complementarity in International Criminal Law: Origin, Development and Practice' (2008) 157.

at the international level,⁹¹ realistically, direct enforcement of international criminal law through international Courts will continue to be the exception rather than the rule.⁹² The Rome Statute applies the principle of complementarity to its relationship with national jurisdictions. Even for core crimes, international law does not replace national jurisdiction but it is meant to supplement it.⁹³ Under the ICC mode, complementarity enables States parties to prosecute cases on their own in the first instance, and consequently protecting their sovereign rights to deal with cases before their domestic systems. National courts enjoy primacy of jurisdiction except under special circumstances where the ICC is entitled to take over and assert its jurisdiction.⁹⁴ This is similar to the system adopted by international human right bodies where a petitioner is mandated to exhaust domestic remedies.⁹⁵ Complementarity while not expressly mentioned in the Rome Statute is elucidated clearly in Article 17. Paragraph 1 suggests that there are four criteria to be examined before the question of complementarity is determined. First, whether the case is being investigated or prosecuted by a State that has jurisdiction; second, whether a State has investigated and concluded that there is no basis on which to prosecute; third, whether the accused has already been tried for the conduct; and finally, whether the case is of insufficient gravity to be brought before the Court.⁹⁶ In the Lubanga decision,⁹⁷ the Pre-Trial chamber addressed the complementarity requirement as set out in Art

92 Ludwin King EB 'Big Fish, Small Ponds: International Crimes in National Courts' (2015) 90 *Indiana Law Journal* 829.

93 Werle & Jessberger 'Principles of International Criminal Law' (2014) 93.

94 Werle & Jessberger (2014) 94.

95 Cassese A 'International Criminal Law' (2008) 343.

96 El Zeidy (2008) 159.

97 El Zeidy (2008) 160.

98 Prosecutor V. *Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, No ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 29.

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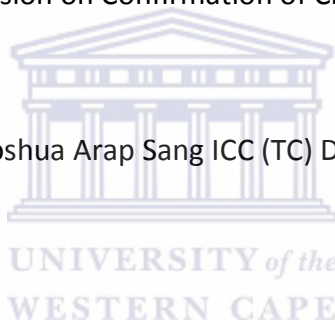
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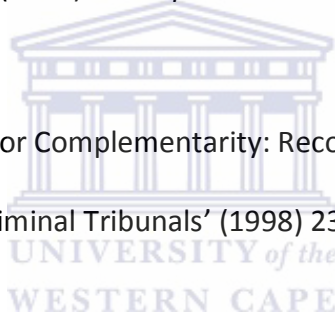
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