

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.

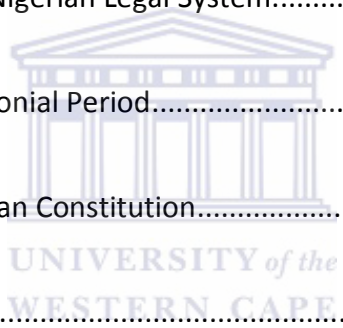
Above all, I appreciate God, the giver of wisdom.



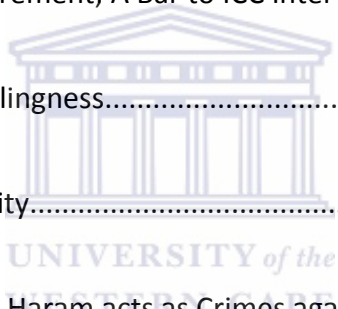
TABLE OF CONTENTS

Declaration.....	i
Dedication.....	ii
Acknowledgement.....	iii
Table of Contents.....	iv
Keywords.....	v
Abbreviations and Acronyms.....	vi
Chapter One: Introduction.....	1
I. Background to the Study.....	1
II. Research Question.....	2
III. Objective of the Study.....	3
IV. Significance of the Study.....	4
V. Research Methodology.....	4
VI. Delimitation of the Study.....	5
VII. Organisation of the Paper.....	5
Chapter Two: Historical Background and Outline of Boko Haram Violence.....	7
2.1 History of Religious-Related Violence in Northern Nigeria.....	7
2.2 From Maitatsine to Boko Haram.....	8

2.2.1 The Maitatsine Movement.....	8
2.2.2 The Nigerian Muslim Brothers.....	9
2.2.3 The Muslim Student Society.....	9
2.2.4 Other Related Crises.....	10
2.3 Emergence and Rise of Boko Haram.....	11
2.3.1 Acts of Government Forces.....	14
2.4 Shari’a Law within the Nigerian Legal System.....	15
2.4.1 Shari’a during the Colonial Period.....	16
2.4.2 Shari’a and the Nigerian Constitution.....	17
2.5 Chapter Summary.....	19
Chapter Three: Response to the Boko Haram Violence.....	21
3.1. Domestic Prosecution of acts amounting to International Crimes.....	21
3.2 Nigeria’s Defence Mechanism: Policing and Judicial System.....	24
3.3 Available Legal Regime for Boko Haram acts.....	25
3.3.1 Application of International Treaties.....	25
3.3.1.1 Rome Statute.....	26



3.3.1.2 The OAU Convention on the Prevention and Combating of Terrorism, 1999.....	27
3.3.2 National Laws.....	28
3.4 Chapter Summary.....	31
Chapter Four: Potential for the Intervention of the ICC	32
4.1. Why the ICC Should Intervene in Nigeria.....	32
4.1.1 Neutrality, Impartiality and Judicial Prejudice	32
4.2 Complementarity Requirement; A Bar to ICC Intervention?.....	33
4.2.1 The Criterion of Unwillingness.....	36
4.2.2 The Criterion of Inability.....	38
4.3 An Assessment of Boko Haram acts as Crimes against humanity.....	40
4.4.1 The Nature of the Attack (Contextual Element).....	41
4.4.2 The Policy Element.....	42
4.4.3 Commission of individual acts.....	44
4.4.4 Civilian Population.....	45
4.4.5 Nexus Requirement.....	46
4.4.6 Mental Element.....	47



4.5 Boko Haram acts as War Crimes.....	47
4.5.1 Existence of an armed Conflict.....	48
4.5.2 Character of Armed Conflict.....	49
4.5.3 Nexus between the Individual Act and the Armed Conflict.....	52
4.5.4 Protected Interest and Persons.....	52
4.5.5 Mental Element.....	54
4.5.6 Individual Acts.....	54
4.6 Chapter Summary.....	55
CHAPTER Five: Other Possible Responses to the Boko Haram Violence.....	56
5.1 Prosecution under the Principle of Universal Jurisdiction.....	56
5.1.2 Application of Universal Jurisdiction for the Crimes of Boko Haram.....	58
5.1.2.1 Application of Universal Jurisdiction for Crimes against Humanity and War Crimes.....	60
5.1.2.2 The Application of Universal Jurisdiction for Terrorism.....	62
5.2. Establishment of a Mixed Court for Boko Haram.....	64

5.3. Concluding Remarks and Recommendations.....	65
5.3.1 Concluding Remarks.....	65
5.3.2 Recommendations.....	66
5.3.2.1 On Domestic Prosecutions.....	67
5.3.2.2 On ICC Intervention.....	68
5.3.2.3 On the Application of Universal Jurisdiction and the Establishment of a Mixed Court.....	68
BIBLIOGRAPHY.....	72
A. Primary Sources.....	72
i. International Legal Instruments.....	72
ii. National Laws.....	73
iii. Cases.....	73
iv. Reports.....	74
B. Secondary Sources.....	75
i. Books.....	75
ii. Chapters in Books.....	76
iii. Journal Articles.....	76
iv. Internet Sources.....	79
C. Others.....	83



i. African Union.....83

ii. Unpublished Thesis.....84

iii. UN Document.....84



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;

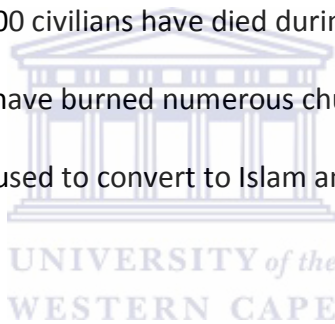
[W]e want to reiterate that we are warriors who are carrying out Jihad (religious war) in Nigeria and our struggle is based on the traditions of the holy prophet. We will never accept any system of government apart from the one stipulated by Islam because that is the only way that the Muslims can be 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

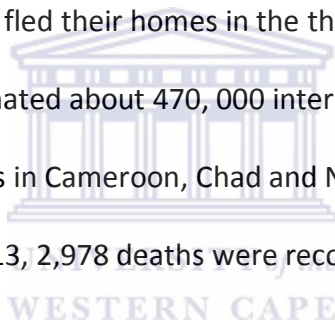


The acts which initially targeted citizens not of the Islamic faith, have become indiscriminate and grown to include audacious bombing of the United Nations headquarters building in

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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.

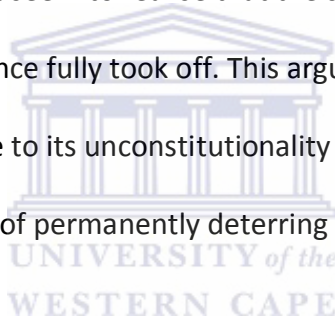
45 Italics mine.

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-Ariaza 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.

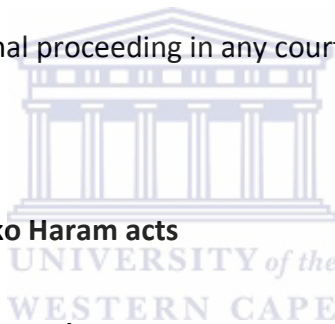
63 Burke-White W 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 1 *Harvard International Law Journal* 68.

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.

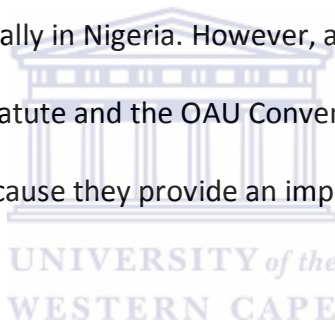
67 Babalola (2014)131.

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.

17(1) (a)-(c) in a two-fold manner. The first is that there is a requirement to check whether the State has taken action that satisfies Art 17(1) (a)-(c). In this context, not every investigation carried out by a State would be sufficient.⁹⁸ The second test applies when there already exist proceedings before the national courts, and there is a need to determine the quality of such proceedings. In this context, only the 'unwillingness' or 'inability' determination may be applied.⁹⁹ Where a State with jurisdiction over the case may have been investigating or prosecuting, the case may still be deemed admissible if it is proven that the State is 'unwilling' or 'unable' to carry out 'genuine' investigation and prosecution.¹⁰⁰ The criteria of unwillingness or inability do not always have to be both present. This is based on an interpretation of the wording of Art 17(1) (b) and the use of the conjunction 'or'. The presence of one of the two should be sufficient. Genuineness has been described as mostly similar to the concept of good faith and thus not a criterion independent of unwillingness or inability.¹⁰¹ However, its presence raises the threshold of objective scrutiny in testing the quality of States' national proceeding.¹⁰² A careful reading of the provision would show that it is only when domestic investigations and/or prosecutions have been or are being conducted would it be necessary to determine unwillingness, inability and genuineness. The ICC Appeals Chamber in the *Katanga* Admissibility Judgement stated as follows:

[I]n considering whether a case is inadmissible under Article 17(1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or

99 El Zeidy (2008) 161.

100 El Zeidy (2008) 161.

101 El Zeidy (2008) 161.

102 See El Zeidy (2008)164 and Nouwen (2013) 62.

103 El Zeidy (2008) 165.

(2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second- halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability...¹⁰³

At this point, it is important to consider the actions that have been taken so far by the Nigerian authority. This would assist in an assessment of unwillingness or inability to genuinely investigate and prosecute Boko Haram suspects in custody. This is important to determine whether the complementarity regime will be a bar to the intervention of the ICC in the Boko Haram situation in Nigeria.

4.2.1 The Criterion of Unwillingness

Article 17(2) provides three conditions where unwillingness may be said to exist. According to the provisions, the presence of one or more would suffice. The first condition is when proceedings are being undertaken to shield the person concerned from criminal responsibility.

It has been stated that this is the most subjective ground of unwillingness because it entails an enquiry into the intent of a State.¹⁰⁴ This does not seem to be relevant to the Nigerian condition as there is no evidence to suggest that the Boko Haram suspects in custody are being shielded from criminal responsibility.

The second criteria relates to unjustified delay in the proceedings inconsistent with an intention to bring the person to justice. This seems to be a more objective requirement.¹⁰⁵ Nouwen opines that the absence of the intent to bring to justice need not be positively proven, but can

104 Admissibility Judgment *Katanga* (AC).

106 Nouwen (2013) 63.

107 El Zeidy (2008) 168.

be inferred from an unjustified delay or lack of impartiality and independence seemingly inconsistent with such an intent.¹⁰⁶ It has been stated that in order to determine Article 17(2)(b), three questions have to be answered. The first is whether there has been a delay in the proceedings; the second is whether such a delay was unjustified; and, third, whether such an unjustified delay was in the circumstance of the situation or case accompanied by the intention not to bring the person concerned to justice.¹⁰⁷ The question remains that if it may be proven that there was an unjustified delay in the process, would this not generate a presumption that the State involved did not intend to bring the suspects concerned to justice? El Zeidy opines that 'the language of Article 17(2)(b) is not designed to address delays that touch upon the individual rights of the accused strictly, but rather to address delay relating to the entire criminal process; that is a delay that directly impacts on the idea of bringing an accused to justice'.¹⁰⁸ Although there has been no strict time limits provided for what constitutes delay, the idea of reasonableness should come into play. In *Ratiani v. Georgia*,¹⁰⁹ the Human Rights Committee stated that what constitutes undue delay depends on the circumstances of each case. Since 2009, hundreds of people have been detained in Nigeria without investigation and prosecution.¹¹⁰ In this instance, the criterion of unjustified delay would be appropriate in relation to this condition. Nigeria's law enforcement and investigation mechanism is available

108 Nouwen (2013) 63.

109 El Zeidy (2008) 181.

110 El Zeidy (2008) 183.

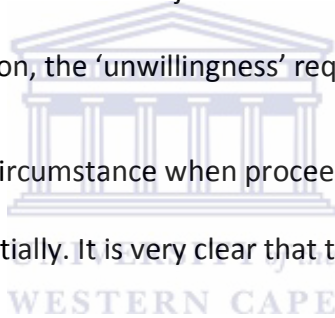
111 *Ratiani v. Georgia*, HRC, Communication No. 975/2001, UN Doc. CCPR/C/84/D/975/2001, 04/08/2005, para.10.7.

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

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).

and fully functional, the judiciary has not in any way been disabled by the crisis and the government currently been said to have in custody hundreds of Boko Haram suspects including some of their higher ranking officers. Under the Nigerian law, the crimes committed are federal crimes and directly under the jurisdiction of the Federal High Court. The cases may be adjudicated in any Federal High Court in any of the unaffected regions in the country. There were five recorded and highly publicised prosecutions in 2013. Since then, there have been no available data relating to any significant action been taken to investigate and prosecute hundreds (or thousands) of suspects in custody.¹¹¹ If lack of ‘an intent to bring the persons concerned to justice’ can be inferred from an unjustified delay, then the second criteria would have been fulfilled and in my opinion, the ‘unwillingness’ requirement has been met.

The third condition relates to the circumstance when proceedings were not or are not being conducted independently or impartially. It is very clear that this criterion is not relevant to the Nigerian circumstance.



4.2.2 The Criterion of Inability

Article 17(3) addresses the criterion of inability. This has been described as an objective element.¹¹² Inability can be inferred from the lack of capacity of a State to investigate and prosecute resulting from social disturbance, natural disaster, chaos resulting from a civil war, or the unavailability of an effective judicial system that is proficient to guarantee a full and

112 This was documented by the US Department of State, published in the US Department of State 2013 Country Report. Available at <http://www.state.gov/j/ct/rls/crt/2013/224820.htm> (last accessed on October 8, 2015).

114 El Zeidy (2008) 222.

effective domestic criminal process.¹¹³ Article 17(3) contains three elements that underlie the criterion of inability. They are; inability of the State to secure the custody of the accused; inability of the State to gather the necessary evidence and testimony; and the inability of the State to otherwise conduct the proceedings in situations other than the inability to obtain the accused or the necessary evidence. The Court stated in the *Admissibility Decision Bemba*¹¹⁴ that in determining inability, the causes and consequences of inability to investigate and prosecute shall be considered. In this vein, the jurisdiction of the ICC may come into play only when it identifies a deficiency in the State organs, resulting from a breakdown of State judicial institutions, or widespread anarchy.¹¹⁵ Certain normative factors can also render a system unavailable to genuinely investigate and prosecute.¹¹⁶ Examples include the application of amnesty or immunity laws, lack of necessary extradition treaties, absence of jurisdiction under domestic law including other foreseeable factors. It has been stated that States with fully functional criminal justice systems can also be found 'unable', provided that, in the particular case, the system is unavailable genuinely to conduct proceedings.¹¹⁷

With relation to the criterion established in Article 17(3), it is apparent that in the first instance, Nigeria is not unable to secure the custody of the suspects. On different occasions, self-confessed senior members of Boko Haram have been arrested by the Nigerian authorities in

115 El Zeidy (2008) 222.

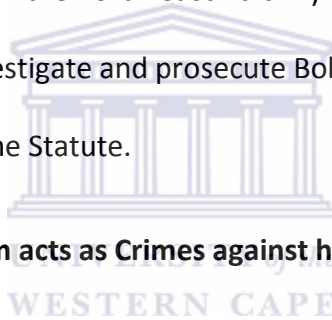
116 Admissibility Decision Bemba (TC): [243]-[246].

117 El Zeidy (2008) 223.

118 Nouwen (2013) 65.

119 Nouwen (2013) 65.

combat; some have also surrendered to the authorities of their own accord.¹¹⁸ With regards to inability to gather necessary evidence and testimony, it is unclear whether this is really a problem for the Nigerian authorities. Usually, whenever a major attack occurs, the first people on the scene are usually the police and the relevant authorities. Except for areas where there have been actual combat on territory, this cannot be raised as a legitimate problem. For prosecution, the crimes in question are federal crimes and cases can be instituted in any Federal High Court in the remaining unaffected five regions of Nigeria. The Courts are available, there is no shortage of the relevant personnel and the Nigerian legal system as a whole is largely unaffected by the violence in the north-east. It is my opinion therefore that Nigeria cannot be said to be unable to investigate and prosecute Boko Haram members in custody based on the provisions in the Rome Statute.



4.3. An Assessment of Boko Haram acts as Crimes against humanity

The provisions of Article 7 of the Rome Statute deal exclusively with crimes against humanity. The crime is said to occur when any of the acts specified in Article 7(1) are committed as a part of a widespread or systematic attack against a civilian population, with knowledge of the attack. Crimes against humanity are particularly odious offences that constitute a serious attack on human dignity and a grave humiliation or degradation of persons.¹¹⁹

118 March 22, 2014 'Nigerian Troops Capture Top Leaders of Boko Haram; Kill Seventy Insurgents'. Available at <http://news2.onlinenigeria.com/news/top-stories/343322-nigerian-troops-capture-top-boko-haram-leader-kill-70-insurgents.html> (Accessed on October 15, 2015).

'Seventy Boko Haram Members Captured' Available at <https://www.naij.com/62549.html> (Accessed on October 15,2015).

119 Cassese (2008) 98.

4.4.1 The Nature of the Attack (Contextual Element)

A critical basic requirement is that the commission of any of the individual acts must be widespread or systematic,¹²⁰ and the perpetrator must have knowledge that the actions are part of a widespread or systematic attack.¹²¹ For crimes against humanity, the Rome Statute excludes any nexus to armed conflict.¹²² It is not clear whether the condition of ‘widespread or systematic’ is cumulative or disjunctive. A widespread or systematic attack against a fundamental human right also constitutes a threat to peace in a broader sense, encompassing the security and well being of the world.¹²³ The attack in question must be intended to violate the protected human rights of a civilian population. The widespread or systematic character of the attack can relate to the extension of the attacks over a broad geographical area or the number of victims involved.¹²⁴ An attack was deemed widespread because it ‘affected hundreds of thousands of individuals and took place across wide swathes of the territory of the Darfur region’.¹²⁵ It must be ‘massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victim’.¹²⁶ An attack was held to be systematic because, ‘it lasted for well over five years and the acts of violence of which it was comprised followed, to a

120 Article 7(1) Rome Statute.

121 Article 30 Rome Statute.

122 Schabas (2010)144.

123 Werle & Jessberger (2014) 333.

124 Werle & Jessberger (2014) 339.

125 *Bashir* (ICC-02/05-01/09), Decision on the Prosecutions’ Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (2009) para. 84.

126 *Bemba* (ICC-01/05-01/08), Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (2009) para.83.

considerable extent, a similar pattern'.¹²⁷ The widespread requirement is measured quantitatively.

The Boko Haram attacks have been carried out on a regular basis since 2009 and have resulted in the death of thousands, injury of hundreds of thousands and the displacement of hundreds of thousands of citizens. They have also been carried out across a large area of the territory of north-eastern Nigeria with regular incursions into Niger, northern Cameroon and Chad.¹²⁸ The manner in which Boko Haram attacks have been carried out also points to the widespread and systematic element. Most of the Boko Haram attacks have been carried out with sophisticated weapons, perpetrators usually dressed in military uniforms with bullet proof and executed in an organised manner. Many of the attacks have been described as well orchestrated and executed with precision and expertise.¹²⁹



4.4.2 The Policy Element

Article 7(2) (a) describe attack as the multiple commission of the individual acts 'pursuant to or in furtherance of a State or organizational policy to commit such attack'. This provision has generated a lot of debate in recent times. Werle & Jessberger opine that the policy in question need not be explicit or clearly and precisely stipulated, nor is it necessary that it be decided

127 *Bashir* (2009) para. 85.

128 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).

129 The same have been said by survivors about the *Baga* and *Doron Baga* Massacre, the abduction of the *Chibok* Girls and many of the more popular Boko Haram attacks.

upon at the highest levels.¹³⁰ The important factor is that the actual aim of the policy is an attack on a civilian population. The presence of a policy element can be inferred from the totality of the circumstances including actual events, political platforms or writings, public statements or propaganda programmes, including the creation of an administrative structure. The body responsible for the policy must be specific namely a State or an organization. A State can be viewed in a functional sense which could include relatively stable entities that control areas de facto.¹³¹ An organization on the other hand, may include groups of persons that govern a specific territory or are have the ability to do so. One must note that the crucial factor is not the internal structure of the group, but its potential, to commit a widespread and systematic attack on a civilian population.¹³² According to the Pre- Trial Chamber 11 of the ICC, ‘such a policy may be made by a group of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalized.’¹³³ The Pre-Trial Chamber 1 in *Katanga* stated that, ‘an attack which is planned, directed or organized-as opposed to spontaneous or isolated acts of violence’ would satisfy this criterion.¹³⁴

The attacks of Boko Haram have been targeted at a civilian population. Initially, the violence was directed at Christians and anyone who did not share their beliefs. This is apparent in the fact that the earliest targets of the group were churches. Later, the group began to attack general areas such as markets, transportation systems, educational facilities and office

130 Werle & Jessberger (2014) 342.

131 Werle & Jessberger (2014) 342.

132 Werle & Jessberger (2014) 343.

133 Schabas (2010) 150.

134 *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of Charges (2008) Para. 398.

buildings. These attacks are usually carried out in areas that are not viewed as being ‘Muslim enough’.¹³⁵ The group has repeatedly communicated its policies through public broadcasts and videos while taking responsibility for the latest attack and pressing its demands to the government. The group has declared an Islamic caliphate, declared that western education is sinful and attacks educational institutions at all levels, attacked government installations, and religious organisations that do not subscribe to their beliefs severally.¹³⁶ Although the administrative structure of the group is unknown, it is clear that it has the potential to commit a widespread and systematic attack, and it has controlled a large expanse of land *de facto* in Borno, Yobe and Adamawa state.¹³⁷

4.4.3 Commission of individual acts

With relation to the commission of crimes against humanity, the elements of crimes include the commission of one of the acts stated in Article 7(1) within the appropriate context. According to Cassese, such acts must cause or consist of murder, great suffering, serious injury to body, mental or physical health; or take the form of torture, rape, or even enforced disappearance of persons.¹³⁸ The acts in question include murder,¹³⁹ extermination,¹⁴⁰ enslavement,¹⁴¹

135 Human Rights Watch Report ‘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).

136 Car Bomb attack on the UN Building in 2011; Murder of Boarding School students in cold blood in 2014; Abduction of over 200 schoolgirls in *Chibok* in 2014, the *Baga* and *Doron Baga* massacre of January 2015 among uncountable acts of violence against citizens.

137 Human Rights Watch Report ‘Those Terrible Weeks in Their Camp Boko Haram Violence against Women and Girls in North East Nigeria’ October (2014) 17.

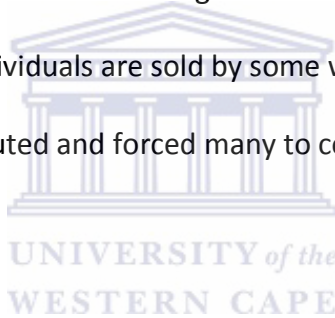
138 Cassese (2008) 174.

139 Article 7(1) (a) ICC Statute.

140 Article 7(1) (b) ICC Statute.

141 Article 7(2) (c) ICC Statute.

deportation or forcible transfer of population,¹⁴² Imprisonment,¹⁴³ Torture,¹⁴⁴ Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity,¹⁴⁵ persecution,¹⁴⁶ enforced disappearance of persons,¹⁴⁷ apartheid,¹⁴⁸ and a catch all category of any other inhumane act of similar character.¹⁴⁹ With the exception of the crime of apartheid, almost all the listed crimes can be proven to have been committed by the Boko Haram group in Nigeria. The group has killed thousands of men, women and children, under different circumstances. Girls have been kidnapped from schools, while boys are murdered in cold blood. Girls and women have been kidnapped and forced to serve as sex slaves and provide domestic services for the fighters. There are allegations of an active slave market where kidnapped individuals are sold by some who managed to escape from their camps. Also, the group has persecuted and forced many to convert to Islam with those who refuse murdered for their faith.¹⁵⁰



4.4.4 Civilian Population

The ambit of crimes against humanity covers any civilian population as stipulated in Article 7(1).

The victims may be all encompassing as targets are usually non-discriminatory.¹⁵¹ A civilian

142 Article 7(1) (d) ICC Statute.

143 Article 7(1) (e) ICC Statute.

144 Article 7(1) (f) ICC Statute.

145 Article 7(1) (g) ICC Statute.

146 Article 7(1) (h) ICC Statute.

147 Article 7(1) (i) ICC Statute.

148 Article 7(1) (j) ICC Statute.

149 Article 7(1) (k) ICC Statute.

150 Human Rights Watch Report '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).

151 Cassese (2008) 176.

population has been described as any group of people with shared characteristics which makes it the target of an attack.¹⁵² A civilian population refers to any group bound by nationality, ethnicity, religion, political affiliations or other identifiable characteristics.¹⁵³ Such shared characteristics may be as mundane as a geographical location. Most of the target of the Boko Haram group is based on religious affiliations; by attacking religious organisations, educational status; attack on schools and educational facilities; government installations, transportation facilities and anything/any group of people regarded as 'western'.

4.4.5 Nexus Requirement

There must be a link between the act perpetrated by the accused and the attack directed against a civilian population. This implies that the acts must be in furtherance of the widespread or systematic attack against the civilian population.¹⁵⁴ Under some circumstances, a single act can constitute a crime against humanity when it is committed within the overall context, but an isolated act cannot.¹⁵⁵ A consistent factor in all of the acts of Boko Haram is that the group is quick to take responsibility for the attack in a public broadcast.¹⁵⁶ This fits the

152 Werle & Jessberger (2014) 334.

153 *Bemba* ICC (2012), *Ruto and Sang* ICC (2012).

154 Schabas (2010) 155.

155 Schabas (2010)155.

156 May 5, 2014 'I abducted your girls; Nigerian Extremist Leader Admits' available at <http://time.com/87658/boko-haram-nigeria-kidnapped-girls/> (Accessed on October 10, 2015).

January 21, 2015 'Boko Haram Leader Claims Baga Attack' available at <http://www.aljazeera.com/news/africa/2015/01/boko-haram-leader-claims-baga-attack-201512133826450169.html> (Accessed on October 10, 2015).

March 24, 2015 'Boko Haram: Shekau Claims responsibility for Attacks on Giwa Barracks, threatens to attack universities' available at <http://www.premiumtimesng.com/news/157374-boko-haram-shekau-claims-responsibility-attack-giwa-barracks-threatens-attack-universities-civilian-jtf.html> (Accessed on October 10, 2015).

individual acts into the overall pattern of the acts of the group. In each of such broadcast, the group further reiterates its policy and threatens further action in order to achieve its aim.

4.4.6 Mental Element

The *mens rea* element of the act is knowledge as provided for in Article 7(1). This is reflective of Article 30 which relates to general provisions for mental element for crimes in the Statute. An accused person that lacks knowledge cannot be found guilty of crimes against humanity. With regard to Boko Haram, one can conclude that the perpetrators have knowledge of the context in which they attack the civilian population. However, it is necessary that each individual case is investigated to further establish this point.



4.5. Boko Haram acts as War Crimes

War crimes are violations of a rule of international humanitarian law creating direct criminal responsibility under international law.¹⁵⁷ It extends to both international and internal armed conflict. It can also be described as the criminal violation of the rules of international humanitarian law. International humanitarian law has to a large extent attained the character of customary international law. The distinct nature of war crimes is that it is based on a violation of a rule of international humanitarian law that is established either by treaty or under customary international law.¹⁵⁸

157 Werle & Jessberger (2014) 392.

158 Werle & Jessberger (2014) 403.

4.5.1 Existence of an Armed Conflict

An important element of war crimes as provided for in Article 8 is the existence of an armed conflict. This is essential to contextualise the acts in question as a major distinction in determining whether such acts would be regarded as war crimes or not.¹⁵⁹ As provided for in Article 8(2) (a) with regards to the grave breaches of the Geneva Convention, the jurisprudence of the ICTY is that the acts must be committed in the context of an international armed conflict against persons or property protected under the four Geneva Conventions.¹⁶⁰ The ICTY Appeals Chamber defined armed conflict as follows:

'[W]e find that an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'¹⁶¹

Whether the armed conflict is international or non-international, there must be a nexus between the acts of the perpetrator and the armed conflict as the laws of war crimes may only be applied to armed conflict. A typical armed conflict scenario could be inter-state, intra- state or transnational conflict.¹⁶² Transnational conflict is waged between State armed forces and non-State armed groups or between non-State groups, but take place on the territory of more than one State.¹⁶³

159 Schabas (2010)199.

160 Dormann K, Doswald-Beck L & Kolb R 'Elements of War Crimes Under the Rome Statute of the International Criminal Law; Sources and Commentary' (2008) 18.

161 *Tadic* ICTY (AC), decision of 2 October 1995, para. 70.

162 Werle & Jessberger (2014) 411.

163 Werle & Jessberger (2014) 411.

4.5.2 Character of Armed Conflict

The distinction between conflicts of an international or a non-international character is important to determine the legal regime applicable to the conflict. Conventionally, non-international armed conflicts have been addressed as a domestic matter. Conflicts between government forces and other armed groups or between armed groups that take place within the territory of a single State can qualify as non-international armed conflict. It is necessary however, that such conflict achieves a certain degree of organisation.¹⁶⁴ Although the Rome Statute does not define what an international armed conflict is, Art 8(2) (a)-(b) relates directly to war crimes of an international character while Art 8(2) (c) deals with the case of an armed conflict not of an international character. In this distinction, Article 8(2) (a) adopts the rules on grave breaches of the Geneva Conventions. Article 8(2) (b) addresses 'other serious violations of the laws and customs of war', while Article 8(2) (c) contains the crimes found in the Common Article 3 of the Geneva Conventions. Article 8(2) (e) deals with acts arising from sources other than the Geneva Conventions and applicable in non-international armed conflict. Article 8(2) (d) governs the crimes described in Article 8(2) (c) and does not apply to 'situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence, or other acts of a similar nature'.¹⁶⁵ The Pre-trial Chamber II in *Bemba* stated that, 'non-international armed conflict is characterised by the outbreak of an armed nature, but which takes place within the confine of a States territory. The hostilities may break out (i) between government authorities

164 Werle & Jessberger (2014) 417.

165 Schabas (2010) 204.

and organized dissident armed groups, or (ii) between such groups.’¹⁶⁶ In *Lubanga*, the Pre-Trial Chamber I interpreted Article 8(2)(f) and focused on the ability of the armed group in question to plan and carry out military operations for a prolonged period of time.¹⁶⁷ Article 8(2) (f) requires that the conflict be protracted. This is essentially an indication of the intensity of the conflict. It is important to note that the law of war crimes would come to play in a conflict not of an international character if the intra-State conflict is comparable to an inter-State conflict. This may be the case if the parties are highly organised, have the ability to control the belligerents connected with it regardless of whether State troops are involved in the conflict.¹⁶⁸ The legal classification of the Boko Haram conflict in this instance would depend on many factors. However, it is important to note that the violence in this instant has been protracted and consistent since 2009, and the group may be regarded as being sufficiently organised. The ICRC commentary on ‘Common Article 3’ highlights the following conditions in the determination of the applicability and the existence of an internal armed conflict:

[a]) Party in revolt should have: an organized military force; an authority responsible for its acts within a specific territory; and means of ensuring compliance with the convention.

b) The *de jure* government is forced to resort to use of military force against the insurgents who are organised as military in possession of part of the State’s territory.

c) The *de jure* government recognized the insurgents as belligerents or accorded them such recognition for the purposes of the convention; the insurgents claimed the right to be treated as belligerents.

d) The UN Security Council or General Assembly has acknowledged the dispute as posing a threat to international peace.¹⁶⁹

166 *Bemba* (ICC-01/05-01/08), Decision Pursuant Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 232.

167 *Lubanga* (ICC-01-04/01-06), Decision on the Confirmation of Charges, 29 January 2007, para 234.

168 Werle & Jessberger (2014) 419.

169 Para. 4438, Commentary on Additional Protocol II; *Akayesu* ICTR (1998) 619.

Violations of international humanitarian law applicable to non-international armed conflict can also entail criminal responsibility under customary international law. Under the ICC Statute and in accordance with customary international law, the protection of persons in non-international armed conflict is comparable, albeit narrower, to their protection in an international armed conflict.¹⁷⁰

In the Nigerian scenario, the parties to the armed conflict are known and there have been sustained and concerted military operations between the Boko Haram fighters and the Nigerian military. It is not clear however, how to classify the acts of Boko Haram. Initially when the attacks started in 2009, they targeted Nigerian cities and citizens. Gradually, the group began sporadic incursions into border areas of neighbouring West African States; Niger, Chad and Cameroon. Currently, attacks, killings and kidnappings in the three countries have almost become as frequent as those in the north-eastern Nigeria.¹⁷¹ The Nigerian military have been engaging with the Boko Haram fighters within Nigeria on the one hand. Also, the Multinational Joint Task Force (MNJTF) set up by the AU to aid the Nigerian military also comprises of forces from Nigeria, Chad, Cameroon and Niger. The group has also been consistent in its incursions and attacks of border areas of Chad, Niger and northern Cameroon. This makes it very difficult to state categorically whether the context in question is of an international or a non-international character.

170 Werle & Jessberger (2014) 408.

171 BBC 'Nigeria's Boko Haram Militant Attack Chad' available at <http://www.bbc.com/news/world-africa-31453951>. BBC 'Boko Haram Launches Attack in Niger' available at <http://www.bbc.com/news/world-africa-31162979>. BBC 'Boko Haram in Cameroon Kidnappings' available at <http://www.bbc.com/news/world-africa-30873243>. (Accessed on 12 October 2015). These are a sample of the many attacks that have been carried out by Boko Haram in the three countries.

4.5.3 Nexus between the Individual Act and the Armed Conflict

The conduct must take place in the context of and associated with an armed conflict.¹⁷² Also, war crimes may be committed outside the areas of actual combat if it exhibits a close connection to the armed conflict.¹⁷³ In this vein, there must be a functional relationship between the conduct in question and the armed conflict. In Nigeria, information relating to the actual engagements of Boko Haram with the Nigeria military on the front is very scant. However, the looting of villages, bomb attacks, summary executions of civilians and the destruction of properties that happen alongside is noteworthy. Most of the conducts complained of have taken place in close connection with ongoing military engagement in many instances.¹⁷⁴



4.5.4 Protected Interest and Persons

The law of war crimes protects fundamental individual rights during armed conflicts.¹⁷⁵ Many of the grave breaches provision in Article 8(2) (a) employ the expression 'protected person'. It is required in the prosecution of the war crimes to ascertain that the victim was a protected person. In the situation of an armed conflict, protected persons are exposed to specific dangers. Under international law, the distinction between lawful and unlawful conduct is primarily

172 Werle & Jessberger (2014)422.

173 Werle & Jessberger (2014)423.

174 May 8, 2013 'Nigeria at War' Available at <http://newsrescue.com/nigeria-at-war/#axzz3p9Z44foF> (Accessed on October 10, 2015).

May 17, 2013 'Boko Haram Members May Face War Crimes Charges' Available at <http://www.premiumtimesng.com/news/134808-boko-haram-members-may-face-war-crimes-charges-un.html> (Accessed on October 10, 2015).

175 Werle & Jessberger (2014) 409.

decided by a consideration of the victims of the acts in question.¹⁷⁶ With relation to Article 8(2)(c) of the Rome Statute, the notion of protected person was not employed, rather victims were described as ‘persons taking no active part in hostilities, including armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause’. With relation to an international armed conflict, victims of the grave breaches of the Conventions must be wounded or sick (Geneva Conventions I and II Article 13), shipwrecked (Geneva Convention II Article 13), those who have fallen in the hands of the enemy (Geneva Convention III Article 4A) and Prisoners of War.¹⁷⁷ The fourth Geneva Convention in Article 4(1) protects those in the hands of a hostile party or located in the territory that such hostile party controls.¹⁷⁸ In an internal armed conflict, the provisions of the Common Article 3(1) of the Geneva Conventions provide protection for those who do not take part in hostilities, members of the armed forces who have laid down their arms or placed *hors de combat*. The same position is adopted in Article 8(2) (c) of the Rome Statute. The most important factor is that the victim did not participate directly in hostilities at the time of the commission of the crimes.¹⁷⁹ Most of the acts of the Boko Haram group have specifically targeted unarmed citizens who have not been involved in any way in the hostilities between the group and the government forces. These citizens have been killed, wounded, abducted and properties have been looted and destroyed.

176 Werle & Jessberger (2014) 427.

177 Werle & Jessberger (2014) 428.

178 Werle & Jessberger (2014) 428.

179 Werle & Jessberger (2014) 430.

4.5.5 Mental Element

The perpetrator must be aware of the circumstances that establish the character of the conflict. Knowledge of the existence of the armed conflict by the accused is a very essential element of the crime. According to Schabas; 'there is a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms: took place in the context of and associated with'.¹⁸⁰ The alleged perpetrator must be aware of the factual circumstances that establish the existence of the armed conflict. Knowledge is an important component of the mental element of crimes in the Rome Statute particularly in Article 30 and 32.



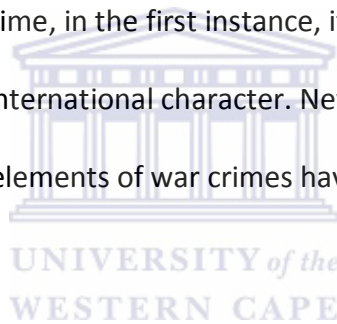
4.5.6 Individual Acts

Article 8 being the longest provision in the Rome Statute divides war crimes into four broad categories. Two categories are applicable to international armed conflict and the other two applicable to non-international armed conflict. With relation to the Boko Haram violence, some of the relevant punishable acts include the following: wilful killing, murder,¹⁸¹ torture,¹⁸² cruel or inhuman treatment,¹⁸³ causing great suffering,¹⁸⁴ taking hostages,¹⁸⁵ attacking civilians,¹⁸⁶ attacking civilian objects,¹⁸⁷ among other prohibited acts provided for in Article 8.

180 Schabas (2010) 209.
181 Article 8(2) (a) (i), article 8(2) (c) (i).
182 Article 8(2) (a) (ii), 8(2) (c) (i).
183 Article 8(2) (a) (iii), 8(2) (c) (i).
184 Article 8(2) (a) (iii).
185 Article 8(2) (a) (vii), 8(2) (c)(iii).
186 Article 8(2) (b) (i).
187 Article 8(2) (b) (ii).

4.6 Chapter Summary

This chapter addressed the prospect of ICC intervention in Nigeria by examining the potential neutrality and the independence of full scale prosecution of Boko Haram suspects in custody before Nigerian Courts. It further examined the complementarity regime of the ICC to understand whether the Court is in a position to intervene in Nigeria. Finally, this chapter compared the acts in question to the provisions of Crimes against Humanity and War Crimes in the Rome Statute to understand whether the required threshold has been met. It concluded with regards to crimes against humanity that the acts of Boko Haram meet the threshold requirements. However, for war crime, in the first instance, it is not clear whether the conflict in question is of an internal or an international character. Nevertheless, this does not stop the ICC from intervening as the other elements of war crimes have been shown to be present in the acts of Boko Haram.



CHAPTER FIVE: Other Possible Responses to the Boko Haram Violence

The reluctance of the Nigerian authorities to investigate and prosecute and the challenges relating to a potential ICC intervention has made the consideration of other possible alternative responses to the Boko Haram violence imperative. Hence, this chapter looks into other possible responses aside from domestic prosecution and the option of the intervention of the ICC, for the investigation and prosecution and consequently the resolution of the Boko Haram violence.

5.1 Prosecution under the Principle of Universal Jurisdiction

The principle of universal jurisdiction takes over from territoriality and personality, and permits States with no nexus to the crime or the alleged offender to prosecute for the crimes in question.¹⁸⁸ It provides States with jurisdiction over a category of offences recognised as offences of universal concern, regardless of where they are committed, who commits and against whom they are committed.¹⁸⁹ The universality principle grants domestic jurisdiction for crimes under international law to States. The principle presumes that every State has an interest to exercise jurisdiction to combat crimes which has been condemned universally. The State in question acts without the delegation of jurisdiction to it by the State directly linked to the crime, or by the international community at large.¹⁹⁰ Randall argues that the ambit of universal jurisdiction has expanded significantly, from traditional crimes like piracy and slave trading, to include terrorism, apartheid, torture and other human rights violations.¹⁹¹ An

188 Randall KC 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review* 785.

189 Randall (1988) 788.

190 Strapatsas N 'Universal Jurisdiction and the International Criminal Court' (2003) 29 *Manitoba Law Journal* 3.

191 Randall (1988) 789.

American district court in 1981, while prosecuting a terrorist act in Guyana noted that 'nations have begun to extend universal jurisdiction to crimes considered in the modern era to be as great a threat to the wellbeing of the international community as piracy'.¹⁹² In the *Eichmann* trial in Jerusalem, while explaining the basis for Israel's jurisdiction, the district Court stated that:

'[T]he State of Israel's 'right to punish' the accused derives, in our view from two cumulative sources: first, a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations....'¹⁹³

The judgement demonstrates the legitimacy of universal jurisdiction over war crimes and crimes against humanity. The Supreme Court of Israel in its judgement further stated:

'[T]here is full justification for applying here the principle of universal jurisdiction since the international character of crimes against humanity dealt with in this case is no longer in doubt... Not only do all the crimes attributed to the appellant bear an international character, their harmful and murderous effects were so embracing and widespread to shake the international community to its very foundations.'¹⁹⁴

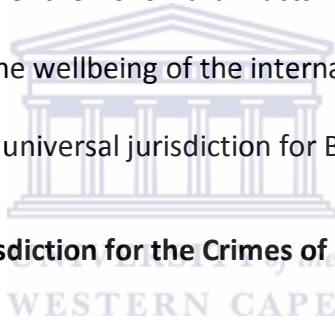
The basic premise of universal jurisdiction is the interest of every State to bring perpetrators of crimes of international concern to justice. Also, these States must have jurisdiction to be able to deal with the crimes under their domestic legal regimes. According to Randall, terrorists and human rights offenders are comparable to pirates, slave traders and war criminals. This is because their offences involve reprehensible acts that often indiscriminately endanger human

192 Randall (1988) 790.

193 Attorney General of Israel V. Eichmann 36 I.L.R 277.

194 Randall (1988) 812.

lives and property interests.¹⁹⁵ The unilateral application of the principle of universal jurisdiction can be justified when exercised in the first instance, in a manner to avoid interfering in another States affair and with the intention of making it difficult for the perpetrator to go unpunished.¹⁹⁶ The ICTY in *Furudnzija*, in considering the nature of prohibition against torture, stated that the *erga omnes* obligation of preventing torture is derived from *jus cogens* which give rise to an absolute universal jurisdiction. The Court further stated that all those who commit the act of torture are considered as *hostis humani generis*, which is enemy of all mankind.¹⁹⁷ This implies that all States have the responsibility to punish such offenders if found. The logical question to ask is whether the Boko Haram acts have reached the threshold to be regarded as crimes that threaten the wellbeing of the international community. Therefore, a consideration of the application of universal jurisdiction for Boko Haram crimes is essential.



5.1.2 Application of Universal Jurisdiction for the Crimes of Boko Haram

In the previous chapters, the acts of Boko Haram have been addressed as amounting to crimes against humanity and war crimes under the ICC Statute and the crime of terrorism under Nigerian law. Because of this, in discussing the universal character, the acts in question will be addressed in a two-fold manner. In the first instance, they will be dealt with as core crimes in the ICC Statute (crimes against humanity and war crimes) and secondly as the crime of terrorism under Nigerian law.

195 Randall (1988) 815.

196 Strapatsas (2003) 5.

197 Prosecutor v. *Furudnzija* No.: IT-95-17/I-T (Judgment, 10 December 1998).

To invoke universal jurisdiction, certain hurdles have to be crossed. A major hurdle is the presence of the suspect in the territory of the third-party State and the issue of double criminality. On the presence of the suspect in the territory of the by-stander State, this goes without saying. Despite the absence of territoriality and nationality, the third State does not prosecute without a sufficient link to the crime. The sufficient link would be the presence of the suspect in its territory. With regard to double criminality, the offence in question must be criminal under the laws of the requested State and under the laws of the territory of the offence (the *lex locus delicti*) and the State must possess the appropriate legal regime for dealing with the crime in question.¹⁹⁸ This is a fundamental requirement. With regards to Boko Haram acts, the premise of this argument is that for instance, if some key members of the group are captured in any of the neighbouring countries, they should be able to investigate and prosecute them on their territory. This would be without regard to the fact that the majority of the crimes complained of were actually committed in Nigeria. Most of the neighbouring countries to Nigeria have ratified the OAU Convention on the Prevention and Combating of Terrorism and are also parties to the Rome Statute. This implies that on a simplistic level, they possess the basic legal framework to deal with the crimes. In this hypothetical scenario, if senior members of Boko Haram flee to Niger and are arrested, chances are that if such persons are extradited and handed over to the Nigerian authorities, it is unlikely that they will be prosecuted in a timely fashion, if prosecuted at all. In this instance, universal jurisdiction may be an option that can be utilised in other to allow Niger to prosecute the suspects and ensure that the crimes committed do not go unpunished.

198 Cameron (2004) 77.

5.1.2.1 Application of Universal Jurisdiction for Crimes against Humanity and War Crimes

To determine the *jus cogens* status of an international crime, factors to consider include: the historical legal evolution of the crime, the number of States that have outlawed the crime at the national level, the number of prosecutions based on the crime and their characterisations.¹⁹⁹ It is noted however, that not all *jus cogens* crimes consist of all the stated elements at the same time. For instance, although certain acts may threaten the peace and security of the international community, their gravity may depend on the context of their occurrence and the nature of the crimes committed. The status of war crimes and crimes against humanity as crimes in which the international community have a collective legal interest is without question.²⁰⁰ This is apparent from an observation of the evolution of the crimes, the national jurisdictions where the crimes have been prohibited, and the number of prosecutions on the basis of the crimes. Also, the abundance of international conventions and treaties addressing the elements of both crimes are a signal of the nature of interest in the crimes. A logical consequence of the *jus cogens* character of war crimes and crimes against humanity is that every State has the right to investigate, prosecute, punish or extradite alleged perpetrators if found on their territory or any territory under their jurisdiction. Absolute universal jurisdiction applies to crimes against humanity and war crimes because of the Hague Convention, the Geneva Conventions and the core crimes of the ICC which constitute *delicta juris gentium*.²⁰¹ With regards to international crimes, a State may unilaterally act upon its legal

199 Strapatsas (2003) 13.

200 Werle & Jessberger (2014) 75.

201 Strapatsas (2003)29.

interests derived from obligation *erga omnes*.²⁰² With regards to war crimes, the widely ratified Geneva Conventions of 1949 and the Additional Protocol of 1977²⁰³ creates an obligation to criminalise the extraterritorial commission of acts amounting to war crimes and the prosecution of alleged offenders. It is not clear however, whether the 'grave breaches' regime applies to the offences committed during an internal or a non-international armed conflict, particularly with regard to an obligation of third party States to investigate and prosecute alleged offenders. A consideration of the pattern with which the ICC Statute deals with both categories of crimes might suggest a tolerance to this position. This reasoning has been adopted by Cameron who opines that it is 'without doubt that there is now a permissive rule obliging States other than the territorial State to hunt down, prosecute and punish offenders present in their territories.'²⁰⁴ For crimes against humanity, while it is impossible to deny the existence of extraterritorial jurisdiction, the issue is far from resolved and there is no consensus on it.²⁰⁵ By nature, war crimes whether during international or non-international armed conflict are particularly gruesome and egregious. The better argument speaks for applying universal jurisdiction even in cases of war crimes committed during an internal armed conflict and for crimes against humanity.

202 Stapatsas (2003) 30.

203 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75UNTS 31, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949, 75UNTS 85, Geneva Convention (III) Relative to the Treatment of Prisoners at War 1949, 75UNTS 135, Geneva Convention (III) Relative to the Protection of Civilian Persons in Time of War 1949, 75UNTS 287. Protocol 1 Additional to the Geneva Conventions of 12th August 1949 Relating to the Protection of Victims of Armed Conflict 1977, 1125 UNTS 3.

204 Cameron I 'Jurisdiction and Admissibility Issues Under the ICC Statute'69 in McGoldrick D, Rowe P, Donnelly E(Eds.) 'The Permanent International Criminal Court: Legal and Policy Issues'(2004).

205 Cameron (2004) 70.

5.1.2.2 The Application of Universal Jurisdiction for Terrorism

The interests protected by criminalizing terrorism are human rights, legitimately formed governments, political processes of the State and international peace and security.²⁰⁶ The major question with relation to the crime of terrorism is: Is the acts of terrorism committed in a manner that 'deeply shocks the conscience of humanity' and generates interests in the international community as a whole, understood in the same way like the core crimes of the Rome Statute?²⁰⁷ Also, has the international community agreed concerning the norms violated by the crime of terrorism for such a time for it to attain an international consensus? This presents some challenges as the crime of terrorism will logically run into the same problems that make it difficult for it to be subject to an internationally accepted definition. However, in this instance, terrorism has been criminalized within the Nigerian legal system. This is the same approach utilised by the UN Special Court for Lebanon while applying the provisions of Lebanese criminal law on terrorism as the applicable law pursuant to Article 2 of the Tribunal's Statute.²⁰⁸ It would be overambitious to claim that the crime of terrorism has a *jus cogens* character as that is far from the truth. Alternatively, one could consider the crime from the perspective of the protected interest. If indeed the protected interests are human rights, legitimately formed government, the political processes of States and international peace and security, would it be logical to infer that once the protected interests have been violated in a

206 Nagle LE 'Should Terrorism be Subject To Universal Jurisdiction?'(2010) 8 *Santa Clara Journal of International Law* 91.

207 Nagle (2010) 91.

208 Saul B 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents a New International Crime of Transnational Terrorism' (2011) 24 *Leiden Journal of International Law* 677 and Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?' (2011) 24 *Leiden Journal of International Law* 655.

manner that shocks the 'conscience of humanity' and could affect 'international peace and security', universal jurisdiction should apply? In other words, if the threshold of the violation with regards to the crime of terrorism is high enough for the international community to take notice, then universal jurisdiction should apply with relation to the crime. The criterion for the application of the principle of universal jurisdiction should relate to the heinous nature of the crimes and its violations of the interests protected.²⁰⁹ A downside of this trend of argument is that it fails to take the context of such acts into consideration. The context is one of the major factors that differentiate acts of terrorism from other crimes. The opinion of the Appeals Chamber of the Lebanon Tribunal which purports to identify an extant customary international crime of transnational terrorism is duly noted.²¹⁰ One thing is clear however, the practices and customs of States with regards to terrorism is largely unsettled, and as such, it is difficult to attain a clear determinant on a general assent on whether the crime should be a subject of universal jurisdiction or not. Therefore, the crime of terrorism in my opinion should not be subject to universal jurisdiction until such a time that there is a clearer indication of the consensus of the international community on its position. An exception to this, in the case of Boko Haram is that, all of the neighbouring countries of Nigeria that could utilise universal jurisdiction are parties to the OAU Convention on the Prevention and Combating of Terrorism and this could provide a uniform legal basis in the exercise of universal jurisdiction.

209 Van der Vyver (1999) 117.

210 Saul (2011) 677.

5.2. Establishment of a Mixed Court for Boko Haram

Internationalized courts and tribunals are patterned after a mixed system combining both domestic and international elements. They are usually located in the territory of the State where the acts in question were committed and made up of both international and national judges and prosecutors with substantive law including national and international elements.²¹¹ A consideration of the nature of the Boko Haram problem would show that over time, the crimes committed have become transnational, albeit sub-regional. Another option to the resolution of the problem must be acknowledged. Regardless of the efforts that may or may not be going on in Nigeria, with regards to the members of Boko Haram, the offences committed in Niger, Chad and Cameroon credited to the same individuals has not been given any attention. Utilising a mixed court would be a tidy solution that will take into consideration all the interests of the States involved. Historically, establishing international tribunals and special courts have helped to cement the idea of individual responsibility for international crimes.²¹² Mixed Courts have been utilised in Cambodia, East Timor, Sierra Leone and Kosovo to end conflict.²¹³ The ongoing trial of former Chadian dictator Hissene Habre before the Extraordinary African Chambers in the Senegalese Court is also indicative of the fact that such a mixed mechanism can prove to be useful.²¹⁴ One of the major factors that usually lead to the call for internationalized or hybrid

211 Simbeye (2002) 83.

212 Simbeye Y 'Internationalized Criminal Courts and Tribunals: Practice and Prospect' (2002) 4 *International Law Forum du droit international* 82.

213 Simbeye (2002) 83.

214 Human Rights Watch 'The Trial of Hissene Habre' available at <https://www.hrw.org/tag/hissene-habre> (Accessed on October 15, 2015).

Courts or tribunals is the doubt of the possibility of a prosecution or an effective prosecution in national courts.

With regards to the Boko Haram problem, egregious acts violating national laws of at least four States and international law have been committed on a large scale since 2009. There is no record that any of the other States involved are taking any actions with regards to the investigation and prosecution of members of Boko Haram in their custody. Nigeria as a major stakeholder is also not taking significant steps to prosecute suspects in custody. The establishment of a mixed court could provide the relevant platform where the prosecution of the suspects would be carried out in a manner agreed upon by all the parties involved.

5.3. Concluding Remarks and Recommendations

5.3.1 Concluding Remarks

The most serious crimes of international concern 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.²¹⁵ This is because these grave crimes threaten the peace, security and the well-being of the world.²¹⁶ It is further stated that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'.²¹⁷

The acts committed by the Boko Haram group since 2009, in Nigeria and neighbouring countries, must not be tolerated by the relevant authorities. An examination of the legal regime

216 Preamble to the Rome Statute Paragraph 4.

217 Preamble to the Rome Statute Paragraph 3.

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

of Nigeria has shown the ways in which the crimes may be addressed. First, the argument of constitutionalizing the Shari'a legal regime has been shown to be unconstitutional, illegal and impractical. Another option is that they may be addressed as ordinary crimes in the Nigerian criminal code, which may be inadequate, or as crimes under the national Terrorism Prevention Act (TPA). From the perspective of international crimes, an examination of the complementarity regime of the ICC has been done, coupled with a consideration whether the acts in question meet the threshold to be dealt with as war crimes and crimes against humanity under the Rome Statute. Also, the option of investigation and prosecution under the principle of universal jurisdiction or utilising a mixed or hybrid mechanism has been addressed.

It is clear that with regards to the Boko Haram crimes, there are options available for Nigeria and the neighbouring States to utilise to put an end to the violence that currently ravages them and ensure that justice is done. This is why the inaction of the government and the prosecutorial authority, with key members of Boko Haram in custody, is deeply puzzling.

5.3.2 Recommendations

It is essential that the Nigerian authorities intensify their efforts in the investigation and prosecution of the suspects in custody. This would help to allay the fears of the citizenry and improve the reputation of the government with regards to condoning impunity and large scale fundamental rights violations. More importantly, the response of the government in Nigeria to the Boko Haram problem has principally been one of military might. Several declarations of state of emergency since January 1, 2012, setting up dusk-to-dawn curfews, and setting up joint

task forces, among other efforts, have not solved the problem.²¹⁸ Also, the intervention of the AU with setting up a Multinational Joint Task Force (MNJTF) has also not made a significant difference in the violent crimes being committed on an almost daily basis.²¹⁹

5.3.2.1 On Domestic Prosecutions

Apparently, there is a general lack of political will to investigate and prosecute the Boko Haram crimes and suspects in custody in Nigeria. This is clear from the lukewarm attitude towards the prosecution of suspects who have been in custody since 2009. The option of prosecution under the available domestic legal regime considering the crimes committed have been assessed, it is clear that in principle, this would have been the best or the normal response to the crimes. However, practically, it does not seem to be realistic as the option has not been effectively utilised so far by the Nigerian authorities. The challenges relating to domestic prosecutions are acknowledged. The basis of any legal system is its domestic legal regime. However, the attitude of the Nigerian prosecutorial authorities to the Boko Haram suspects in custody has been

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- 219 'Nigeria Declares State of Emergency' January 1, 2012. Available at <http://www.capitalfm.co.ke/news/2012/01/nigeria-declares-state-of-emergency/> (Accessed on 15 October, 2015).
Aljazeera 'Nigerian President Declares State of Emergency' May 15, 2013. Available at <http://www.aljazeera.com/news/africa/2013/05/2013514192543867669.html> (Accessed on 15 October, 2015).
See Generally Odomovo AS 'Insurgency, Counter Insurgency and Human Rights Violations in Nigeria' (2014) 3 *the Age of Human Rights Journal* 55.
- 220 'African Union Inauguration of the Multi National Joint Task Force Headquarters against the Boko Haram Terrorist Group' 25 May, 2015 Available at <http://www.peaceau.org/en/article/inauguration-of-the-headquarters-of-the-multinational-joint-task-force-against-the-boko-haram-terrorist-group> (accessed on July 24, 2015).
VOA 'Lake Chad Countries agree on Military Taskforce Amid Insecurity' 18 March 2014. Available at <http://www.voanews.com/content/lake-chad-countries-agree-on-military-task-force-amid-insecurity/1873650.html> (accessed on July 24, 2015).

largely un-encouraging and this is why relying on domestic prosecutions, though the most obvious, is quite impractical. It is thus not a recommendable option.

5.3.2.2 On ICC Intervention

The option of the intervention of the ICC has been assessed in great detail. It is clear that the Court is in the position to intervene in the Boko Haram crisis. Also, should the Court decide to exercise its prosecutorial discretion and intervene in the Nigerian situation, it could potentially result in considerable success. However, considering the inter-relationship between the ICC and the African Union as a whole currently, it is doubtful that the Court would decide to investigate and prosecute another situation in Africa. The Court would have to take a very careful consideration of this circumstance in order not to fuel the perception of bias towards African States. The stance of the African Union towards the ICC has become unfriendly in recent years.²²⁰ If the ICC exercises its prosecutorial discretion in the Nigerian situation, it is doubtful that the much needed support would be provided for the Court by the African Union and the Nigerian authorities. Therefore, while this option is preferable, it is not the most practical.

5.3.2.3 On the Application of Universal Jurisdiction and the Establishment of a Mixed Court

Utilising a mixed court has the potential of taking into account all the previously neglected aspects of the Boko Haram problem, lead to a logical end of the conflict and ensure that impunity is not allowed to continue unabated. The mixed court may be established pursuant to an agreement between Nigeria, Niger, Chad and Cameroon, with its seat in any of the four

221 ISS Today June 11 2013 'AU-ICC Relationship Under the Spotlight Again' Available at <https://www.issafrica.org/iss-today/au-icc-relations-under-the-spotlight-again> (Accessed on October 15, 2015).

countries. The legal framework of the Court can be agreed upon by the consenting States. To a reasonable extent, the countries involved all have fully functional judicial systems, and they are all close geographically to make investigations less problematic. Potentially, the Court may be composed of experienced prosecutors and judges from the four States. Unlike the Special Court for Sierra Leone with three organs (two trial chambers and an appeals chamber), a simple model of a trial and appeals chamber should be sufficient. The jurisdiction of the Court should include crimes under international law and the national laws of the four States involved including elements of the crime of terrorism in the national laws of the States. The Court should focus on persons 'who bear the greatest responsibility for commission of the crimes.'²²¹ This would include the egregious crimes committed by the leadership of Boko Haram and the military leadership responsible for the most serious violations of rights principally in Nigeria and also the other three countries. Funding is usually a major challenge with mechanisms such as the proposed mixed court because international or regional justice is typically an expensive venture. Potentially, the States in question are in a good position to fund the Court if supported by the African Union (AU), Economic Community of West African States (ECOWAS) and the Lake Chad Basin Commission Countries (LCBC) to which they all belong.

Utilising a special/mixed court as a response to the Boko Haram problem comes with many advantages. In the first instance, the interests of all the States involved would be taken into account. This implies that those who have committed the most serious crimes of concern can be held accountable. A mixed Court also provides a forum where offences committed in four

221 This is the approach recommended by the UN Security Council in Resolution 1315(2000) with regards to the personal jurisdiction of the Special Court of Sierra Leone.

different States would be brought under a uniform legal regime, thus providing the needed legal uniformity and certainty. With regards to practical issues like support and technical assistance, a mixed court of this form has a higher potential of success because of the resources that can be contributed by States involved. Also, as evidenced by the Hissene Habre trial, the support of the African Union and other sub-regional organisations is crucial for the success of this mechanism. Utilising a mixed court as a response to this problem would also ensure that the individuals that are responsible for the commission of these egregious crimes are held personally responsible through a uniform regime.

It is acknowledged that the option of a mixed court to account for the crimes committed in all the four countries is not a simple option, indeed it is a technical, expensive and potentially, a time consuming venture. However, it has the capacity to see that justice is done for the violent crimes that have been committed since 2009 and send a message that impunity is not to be tolerated.

With regards to the options of the application of universal jurisdiction by third States and the establishment of a mixed court, both present a more practical and foreseeable response to the Boko Haram problem. A major advantage is that with relation to both options, the lack of political will by the Nigerian government does not hinder justice being done. Both options also give the opportunity for the development of an African solution to what is essentially an African problem. Either of the two mechanisms although idealistic, are the most practical responses to the Boko Haram problem.

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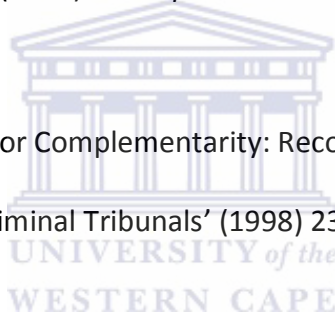
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