Admissibility and Jurisdiction before the International Criminal Court Regarding the Boko Haram Situation in Nigeria

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ABSTRACT

Terrorism is nothing new in present situations all over the world. Though there are different political manipulations of its definition, terrorism is a menace that affects the whole world at large. Boko Haram, a terrorist group based mainly in Nigeria started its first attack in 2004, and it has since been responsible for thousands of deaths of both Muslims and Christians in the country. The terrorist group is said to be demanding the adoption of the Islamic system of government and as a result has bombed many churches and schools. In 2011, the terrorist group attacked the United Nations Office in Abuja with the aid of one of its suicide bombers. The terrorist activities of Boko Haram in Nigeria have been under the purview and preliminary criteria known as preliminary investigations as carried out by the Office of the Prosecutor of the International Criminal Court since 2010. The Office of the Prosecutor came out with a report in 2013 that concluded there is a reasonable basis to believe that Boko Haram has been committing crimes against humanity of murder and persecution since July 2009. However, up until date, despite the abduction of over 300 schoolgirls by the terrorist group, the Nigerian government has not been able to bring the girls back or prosecute the perpetrators. When a State party to the Rome Statute has some form of armed conflict going on in its region, a referral may be made to the ICC to intervene. However, it must first be determined whether the crimes committed are those within the court’s jurisdiction and also whether the situation is admissible especially with regards to the complementary criteria as provided for in the Rome Statute. This paper will look into the admissibility of the Boko Haram situation and whether the International Criminal Court has jurisdiction over the crimes committed.
Keywords: Boko Haram, International Criminal Court, jurisdiction, admissibility, Rome statute, preliminary examinations, investigations, office of the prosecutor

INTRODUCTION

Terrorism is a recurrent or some form of violence directed against human and non-human objects. This violence is usually carried out with the purpose of changing or sustaining at least a certain subjective norm or belief in at least one particular territorial unit or population. It is usually planned in secrecy at underground, unknown and probably ever-changing locations and members of such groups would normally hide their true identity and never disclose their whereabouts in order to protect their space and their violent agendas. In order to sustain their objectives and goals, continuous fear and violence are used (Gibbs 1989).

In United States, terrorist activity is said to encompass series of activities, which are ordinarily unlawful under the laws of the place where they have been committed. Some of these activities include:

- The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organisation) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; a violent attack upon an internationally protected person...or upon the liberty of such a person; an assassination; the use of any biological agent, chemical agent, or nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; a threat, attempt, or conspiracy to do any of the foregoing (Roach 2012) (8 U.S.C).

Terrorism has also been defined as an intentional and politically-motivated violence perpetrated against non-combatant targets (civilians) by sub-national groups or clandestine agents (22 U.S.C). Therefore, in a situation where the Secretary of State of the United States confirms a group as a Foreign Terrorist Organisation – FTO; the following are the three consequences of being called a FTO. Firstly, the FTO may have its assets frozen; secondly, the FTO members are prohibited from entering the United States, and lastly, anyone who knowingly provides material support or resources to FTO is subject to criminal prosecution. Consequently, the resulting effects following a FTO designation could prevent Boko Haram from exponentially growing and continuing to torment Nigerians and the rest of the world (8 U.S.C) (18 U.S.C).

Christian Much believes that the International Criminal Court would play an important role in combating the surge of terrorism (Much, 2006). If a terrorist group is labelled an FTO, it will help the ICC to monitor its activities through data collected by governmental and non-governmental...
organisations rather than if their activities are left to be on its own. After all, what all these terrorist organisations want is attention. The sooner seriously they are taken, the sooner they can be caught and prosecuted. Though terrorism in itself is not a crime under the Rome Statute, terrorists will usually normally commit crimes under the jurisdiction of the ICC in the form of crimes against humanity, genocide and in some cases, war crimes too (Watkins, 2011).

Boko Haram has its base in Nigeria. It has been described as a cultural movement that means ‘refuse Western education’ that started out as non-violent movement demanding the installation of full Muslim sharia law throughout Nigeria. Boko Haram is officially called Jama’atu Ahlis Sunna Lidda’awati Wal-Jihad [people committed to the propagation of the Prophet’s teachings and jihad]. It arose in Maiduguri, Borno, NE Nigeria, and has since spread across the nation’s north, where Muslims are the majority and poverty is widespread; it is especially active in the states of Borno, Yobe, and Adamawa in the north east of Nigeria, especially in rural areas. Some have claimed that the frustration with the Nigerian government neglect and corruption has contributed to the influence of the group, which is loosely modelled on the Taliban. Boko Haram also has operated in areas of Cameroon and Niger bordering Northeast Nigeria, but has mainly sought a safe haven and to recruit there (Columbia Electronic Encyclopedia, 2014).

Boko Haram mounted its first attack in 2004 and has since been responsible for varying violence including church burnings in the North and killings of Christians and Muslims alike. Since the middle of 2011, Boko Haram has become more violent, more daring attacks such as on the UN offices in the capital city of Abuja, blowing up government buildings including police stations and attacking Christian churches during the Christmas holidays. Thousands have been killed as a result (American Foreign Policy Interests, 2012). Thereafter, the Boko Haram situation attracted the attention of the ICC through communications made by various NGOs and civil bodies especially making it easy for the ICC to intervene and give preliminary examinations because Nigeria is a State Party to the Rome Statute and has been a member since 27 September 2001.

The preliminary examination of the situation of Nigeria was made public in November 2010. It was initiated by the Prosecutor taking into consideration information on alleged crimes, including information sent by individuals or groups, States and non-governmental organisations, as well as additional information sought by the Office to analyse the seriousness of the allegations. Different groups committed alleged crimes at different times in different regions of Nigeria; however, this paper is interested in the activities of the Boko Haram. This paper seeks to look into the jurisdiction and the admissibility of the Boko Haram situation in Nigeria with regards to the pre-trial processes before the international criminal court. The ICC has been receiving communications (mostly

THE PROCESS OF PRELIMINARY EXAMINATIONS BY THE OFFICE OF THE PROSECUTOR

The bulk of the process of preliminary examinations is the framework of decisions on jurisdiction and admissibility as it rests on the shoulders of the Prosecutor of the ICC but it is not final. It only helps to kick off the next process, which is the full investigation into a situation. When a situation in a particular country has been referred to the International Criminal Court, the Office of the Prosecutor (OTP) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute to warrant investigation by the Court. For this purpose, OTP analyses all situations brought to its attention based on statutory criteria and the information available.

Article 15 (1) & (2) of the Rome Statute provides that the Prosecutor may establish an investigation proprio motu (on their own) on the basis of information on crimes within the jurisdiction of the Court. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

In order to differentiate the situations that would give rise to an investigation from those that do not, the OTP has a sorting process that consists of 4 consecutive phases, namely:

a. In the first phase, the Office does an initial assessment of all information on alleged crimes received under Article 15 of the Rome Statute (which are called ‘article 15 communications’) to separate the information on crimes that are outside the jurisdiction of the Court. There are 4 crimes recognised by the Rome Statute and hence the ICC as well; thus, any crimes that do not fall within these four will disqualify such a crime to be prosecuted before the ICC.

b. In phase 2, the Office analyses all information on alleged crimes received or collected to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall under the subject-matter jurisdiction of the Court as per article 5 of the Rome Statute.

c. In phase 3, the Office analyses admissibility in terms of complementarity and gravity as per article 17 of the Rome Statute.

d. In phase 4, having concluded from its preliminary examination that the case is admissible prima facie, the Office, taking into account
the gravity of the crimes and the interests of victims, examines under article 53(1)(c) whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. For instance, several NGOs and even some Ugandans felt that since there were negotiations and conciliations going on with the Lord Resistance Army, the Ugandan government was too fast in jumping into laps of the ICC (Keller, 2008).

Article 15(6) states that if after the preliminary examination the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

From the Report on Preliminary Examination activities, 2011, the Office of the Prosecutor as at that time had not received any information with regards to the activities of Boko Haram. However, Nigeria was already being put through the preliminary examination process with regards to the killings that took place between July 2002 and April 2011, which led to the deaths of thousands of people in Nigeria as a result of inter-communal, sectarian and political violence. The OTP from their sources contended that these deaths were unevenly distributed over time and place (OTP 2011).

**JURISDICTION AND ADMISSIBILITY**

Article 15 (3) – (5) provides that if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. The refusal of the Pre-Trial Chamber to authorise the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

The above provision shows that the process of determining whether there is jurisdiction and admissibility of a situation before the ICC is a continuous process that starts from the preliminary examinations, through full investigations, up until the pre-trial and finally the trial stage.

Jurisdiction of the ICC comprises of 3 parts and they all share the nemesis of whether a crime within the jurisdiction of the Court has been or is being committed. The first part is about temporal jurisdiction which looks into whether the crimes were committed from the date of entry into force of the Statute, which is from the 1st of July.
2002 onwards, the date of entry into force for an acceding State, date specified in a Security Council referral or in a declaration lodged pursuant to article 12(3). The second part of jurisdiction assessment is relating to territorial or personal jurisdiction. Territorial or personal jurisdiction looks into whether crimes alleged were or are still being committed on the territory or by a national of a State Party of the Rome Statute or by a State not Party that has presented a declaration accepting the jurisdiction of the Court, or that it arises in a situation referred by the Security Council. The third part is concerned with material jurisdiction and this directly related to the crimes recognised by the ICC as provided for in the Rome Statute - genocide; crimes against humanity; war crimes; and aggression (OTP 2012).

The ICC will determine whether it has jurisdiction first before it considers the issue of admissibility. Article 19(1) of the Rome Statute provides that the Court shall satisfy itself that it has jurisdiction in any case brought before it. The provision further states that the Court may, on its own motion, determine the admissibility of a case in accordance with article 17 afterwards. It has been contended that the ICC does not get its jurisdiction from the inherent nature of the crimes within its jurisdiction but that it gets its authority from the specific surrendering of jurisdictional competence on the part of either the territorial or the national State of those that ratified the Rome Statute.

Admissibility looks into both complementarity and gravity. Complementarity is clear to a certain extent but not the same can be said of the gravity criterion. In the Ugandan case, the defence argued that since there was already some national proceedings going on in Uganda at the time with regards reconciliation and amnesty for war criminals, the Ugandan Government could be said to have fulfilled their part of willingness to take responsibility for the problems in their country. As a result, the ICC should not take the admissibility of the situation. However, the court ruled in favour of the Ugandan Government because the Ugandan Attorney General insisted that their Government would only look into the case of other suspects and surrender the cases before the ICC to be exclusively dealt with by the ICC (The Prosecutor v. Joseph Kony 2009).

The Report on Preliminary Examinations Activities, 2013 summarised the complementarity principle and the interests of justice in the following words:

*Complementarity involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office, taking into consideration the Office's policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant domestic investigations or prosecutions exist, the Prosecution will assess their genuineness. Gravity includes an assessment of the scale, nature, manner and impact of the alleged crimes committed in the*
situation. The ‘interests of justice’ is a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (OTP 2013).

The 2012 report of the Office of the Prosecutor stated that there was a reasonable basis to believe that since July 2009, Boko Haram has committed the following acts constituting crimes against humanity: (i) murder under article 7(1) (a) and (ii) persecution under article 7(1) (h) of the Statute. The report stated that commencing from the July of 2009, the Boko Haram had propelled a widespread and systematic attack in the Northern part of Nigeria that has resulted in the execution and bombardments of more than 1,300 Christian and Muslims civilians in different locations throughout Nigeria including Yobe, Kaduna Borno, Bauchi, Katsina, Gombe and Kano States in the North, as well as Abuja, Kaduna and Plateau States in Central Nigeria. The frequent display of these violent activities shows that the group is well armed with the resources to carry out recurrent widespread and systematic attacks, and this exhibits that the group possesses organisational control and internal coordination to that effect.

These attacks were carried out in order to fulfil the mandate of the Boko Haram leadership, which is to establish an Islamic system of government exclusively in the Northern part of Nigerian notwithstanding the existence of the laws that may be guiding the Christians in the area. Opponents to this goal have been targeted as well. Boko Haram leaders or spokesmen have issued public statements revealing their intention to attack civilians in furtherance of this policy including a January 2012 ultimatum urging Christians to leave Northern Nigeria. The targeting of an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other ground is a constitutive element of the crime of persecution under article 7(1) (OTP 2012).

Article 7 of the Rome Statute provides that crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack and these acts include:

Murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under
international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Rome Statute).

In the 2013 Report on Preliminary Examination activities, the Office of the Prosecutor restated as they had already done in 2012 Report that there was a reasonable basis to believe that crimes against humanity had been committed in Nigeria, namely the acts of murder and persecution attributed to Boko Haram. Therefore, the Prosecutor has decided that the preliminary examination of the situation in Nigeria should cross over to the 3rd stage (admissibility) with a view to assessing whether the national authorities are conducting genuine proceedings in relation to those who appear to bear the greatest responsibility for such crimes and the gravity of such crimes.

However, with the abduction of over 240 school girl whom have been reported to be used as sexual slaves while others were married off without their consent, the crimes of humanity may extend to enslavement, rape, sexual slavery, enforced prostitution and forced pregnancy.

THE BOKO HARAM SITUATION IN NIGERIA

Boko Haram members are alleged to have killed numerous Christian worshipers, police officers and soldiers, as well as local politicians, community leaders and Islamic clerics who oppose the group. The Nigerian Chief of Army Staff stated that Boko Haram is responsible for killing 3,000 persons since the start of its violent campaign. According to Human Rights Watch, more than 1,200 Christian and Muslim civilians have been killed in so many attacks allegedly conducted by Boko Haram. Such attacks were alleged to have taken place in twelve northern and central Nigerian states, as well as in Abuja. It was reported in OTP Report 2012 that on 26 August 2011, Boko Haram attacked the United Nations Headquarters in Abuja with a vehicle-borne suicide bomb, resulting in the deaths dozens of people. There were allegations, so said the Report, that the response of the Nigerian security forces against suspected Boko Haram members has involved the excessive use of force, as well as summary executions of civilians.

As a result of these religious persecutions, Boko Haram has caught the eye of United States government and it has been attributed that there is a newly founded concentration on Boko Haram’s operation, which arises from the fact that the United States has always placed religious freedom at the core of human rights and societal stability. Additionally, military leaders have expressed concern that Boko Haram is capable of posing a threat to the United States homeland.

Furthermore, Boko Haram has caught the attention of the United States and Nigerian officials chiefly because of Boko
Haram’s recent public message, declaring Boko Haram’s intention to carry out a religious cleansing against Christians in Nigeria. Moreover, scholars have suggested that a correlation exists between religious persecution and terrorism in which such intolerance of other non-Muslim religions breeds terrorist groups within that particular country. Numerous governments and non-governmental organisations and world leaders have condemned Boko Haram’s vicious attacks on churches and non-Muslims. Because of Boko Haram’s deadly targeting of non-Muslims or “infidels”, a number of organisations had filed a petition with the United States Secretary of State urging that Boko Haram is pronounced a foreign terrorist organisation. Boko Haram’s intense hatred for any other religion or even Islamic sect that does not conform to their radical beliefs was depicted on the Christmas Eve of 2003 when the organisation launched its first brutal attack against non-Muslims. Boko Haram has since evolved into a highly sophisticated, globally linked, suicide-bombing terrorist entity with global aspirations (Nees, 2013).

Human Rights Watch reported that the armed forces of Nigerian and other related governmental parastatals have employed the use of inhumane and degrading treatment, torture and extra-judicial executions of civilians with the hope of combating terrorism in the country. Such acts are not in line with the principles entailed in the Convention Against Torture and the International Convention on Civil and Political Rights, as well as other relevant human rights principles provided in the Universal Declaration of Human Rights (UDHR), all of which Nigeria is party to without reservations. The Convention against Torture states that in all circumstances there shall be no use of torture and it particularly states in its Article 10 that the internal political instability or any other public emergency that a country may be undergoing cannot be used as a form of justification for torture. Reports were also made against the security forces as they were found transferring some suspected members of the Boko Haram to places unknown to the general populace. Despite the provisions of Article 10 of the Convention Against Torture, which requires the Nigerian government to look into the above stated allegations against its armed forces and other security agencies, its government continues to disassociate herself from the allegations of crying foul of yellow journalism. The report of extra-judicial executions such as execution of family members and other forms of mass executions have escalated since 2009. These executions of suspected members of the Boko Haram infringed upon the rights to life, due process, amongst other rights, which can be seen in most international human laws and treaties and are well incorporated into Chapter 4 of the 1999 Constitution of the Nigerian. These reported activities of the Boko Haram members and the Nigerian security agencies also raise allegations of crimes against humanity. The Rome Statute of the International...
Criminal Court, which Nigeria has ratified, codifies the substantive elements of crimes against humanity. Articles 7 of the Rome Statute give provisions that rape, persecution, acts of murder, torture, and enforced disappearances are crimes against humanity when as part of a widespread or systematic attack against civilian populations in furtherance of a State or organisational policy or plan. The October 8 attack by Nigerian troops was reported to have targeted civilians and also there were widespread reports of disappearances, torture and extra-judicial executions carried out by the Nigerian government, which could implicate criminal charges against not only the Boko Haram but the Nigerian government as well before the ICC pending the unwillingness of the government to investigate into the situation in general (Addison, 2012).

EFFORTS BY THE NIGERIAN GOVERNMENT TO PROSECUTE THE TERRORISTS

According to the 2013 Report of the OTP Preliminary Examinations, the prosecutor to the International Criminal Court contended that the information available to the OTP indicated that the Nigerian government has been and are presently putting together proceedings against members of Boko Haram for crimes recognised under the Rome Statute. Also, the Nigerian authorities have provided a significant body of information on national proceedings, which the Office is analysing as part of its admissibility assessment (OTP 2013). It would have been that the OTP does not have the cooperation of the Nigerian Government but this is not the case as the OTP frequently visits the Office of the Attorney General of the Federal Republic of Nigeria in order to get further assistance in getting more information about the situation regarding the insurgence of the Boko Haram. Non-governmental organisations, with offices around the country, are also on ground providing the OTP with the necessary information of all happenings regarding the Boko Haram and the evidences provided by the NGOs are corroborated by witnesses, victims are other stakeholders.

Also, a Federal High Court in Lagos headed by Justice Saliu Saidu on the 5th of November 2014, only a few days ago, sentenced a financier of the Boko Haram terrorist group to 10 years’ imprisonment with hard labour. The Boko Haram financier was among four suspects secretly tried before the judge by the Department of State Security (DSS). The suspects included Adamu Mohammed, Mohammed Mustapha, Bura Husseni and Mohammed Ibrahim (THISDAY 2014). Also in the same week, November 6, 2014, a Nigerian Senator by the name of Ali Ndume was linked to be a financer of the Boko Haram and was facing criminal charge before a Federal High Court in Abuja.

The major challenge faced by the OTP with regards to prosecuting members of the Boko Haram group is the determination of whether there is a genuine proceeding going on in Nigeria and also the OTP has
to give such a proceeding space to breathe before its genuineness can be determined (Hansen, 2012). The other challenge would be regarding the mechanisms for arrest, if it happens that the OTP has decided to prosecute certain members of the Boko Haram group. This problem of how to arrest perpetrators is a general obstacle that ICC faces in most of its cases and a very topical example is the inability of the ICC to arrest Al-Bashir, the President of Sudan.

CONCLUSION

The general situation in Nigeria came to the ICC in 2005; however, it is uncertain when exactly the particular situation relating to Boko Haram was brought into the preliminary examination process. The 2011 Report on the Preliminary Examination Activities did not make any mention of Boko Haram situation though the terrorist group has been attacking since 2009.

The preliminary examinations started for the Boko Haram situation after 2011. Initially, the court was just considering the crimes against humanity in terms of murder and persecutions; in the 2013 report of the Office of the Prosecutor, it was stated that with the conflict between the Nigerian Armed Forces and the Boko Haram, the probability is that war crimes would have been committed. The abduction of over 240 schoolgirls, crimes of enslavement, rape, sexual slavery, enforced prostitution and forced pregnancy would have to be included in the preliminary examinations of the OTP.

The Office of the Prosecutor normally determines the jurisdiction and admissibility from the preliminary examination stage, notwithstanding the final say or upturn by the Pre-Trial Chambers who will decide whether the prosecutor should go ahead with full investigations or not, which will mean that the ICC has jurisdiction and admissibility over a particular situations once the Pre-Trial Chambers gives a go ahead for a full investigation.

At present, the Office of the Prosecutor is looking into the admissibility stage of the Boko Haram situation. It has already been determined that the International Criminal Court has temporal, territorial and material jurisdiction over the Boko Haram situation. Though the Pre-Trial Chambers can still overturn this assumption, it is unlikely that the report of the prosecutor will be overturned notwithstanding. The 3rd stage of the preliminary examinations will require the fulfilment of the complementarity principle of whether the Nigerian government is conducting genuine proceedings in relation to those most responsible for such crimes, and whether the gravity of such crimes and the interest of the victims are being considered. The Nigerian government may pass the complementarity test of conducting national proceedings against members of Boko Haram but it seems nothing is being done to appease the victims of the crimes. The 2014 Report of the OTP’s activities, which is yet to be released, will determine whether the Boko Haram situation will be left to National prosecution or whether the Pre-Trial Chambers will order a full-blown investigation into the matter.
The problem faced by the Office of the Prosecutor is not so much about who the perpetrators of crimes committed under the Rome Statute are in the case of Boko Haram and in most instances; it is that it is impossible for the ICC in general to arrest the perpetrators without the help of the government involved or other foreign security institutions.

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