



The Justice versus Reconciliation Dichotomy in the Struggle Against Gross Human Rights Violations: The Nigerian Experience

Idayat Hassan* and Benson Olugbuo**

Abstract

The Boko Haram conflict in Nigeria has caused a lot of deaths, mass abductions and gross human rights abuses resulting in the dislocation of several families as refugees in neighbouring countries. Other victims have been rendered homeless and destitute as internally displaced persons. The Nigerian government's response has not been very effective fuelling the suspicion that the insurgency is a combination Islamic militancy and political competition for power. It does not seem that the solution to the Boko Haram conflict is military engagement as other conflicts have shown. This article uses the Nigerian experience between the Niger Delta militants and the Boko Haram insurgency as a case study to discuss the difficult choices between peace, justice and reconciliation. It focuses on the activities of international justice institutions, provisions of the Rome Statute of the International Criminal Court, and the debate between amnesty, prosecution and the interests of justice. The article argues that the emergence of Boko Haram as a terrorist group in Nigeria affiliated with other international terrorist groups has raised the stakes. The involvement of the Court in the conflict is also very significant as it is not bound by any amnesty or reconciliation programme that could be reached between the Nigerian government and Boko Haram members.

Résumé

Le conflit Boko Haram au Nigéria a causé de nombreux morts, des enlèvements de masse et des abus grossiers des droits de l'homme, résultant dans la dislocation de plusieurs familles comme réfugiés dans les pays voisins. D'autres victimes ont été rendu sans-abri et pauvres en tant que personnes déplacées. La réponse du Gouvernement nigérian n'a pas été très efficace, attisant la suspicion que la

* Director of the CDD-West Africa, Abuja, Nigeria. Email: ihasan@cddwestafrica.org

** CDD-West Africa, Abuja, Nigeria. Email: benolugbuo@gmail.com

rébellion est un combiné de militantisme islamique et de compétition politique pour le pouvoir. Il ne semble pas que la solution au conflit Boko Haram soit l'engagement militaire comme d'autres conflits l'ont montré. Cet article utilise l'expérience nigériane entre les militants du Delta du Niger et la rébellion comme étude de cas pour discuter des choix difficiles entre paix, justice et réconciliation. Il met l'accent sur les activités des institutions de la justice internationale, les dispositions du Statut de Rome du Tribunal Pénal International et le débat entre amnistie, poursuite et intérêts de la justice. L'article soutient que l'émergence de Boko Haram, en tant que groupe terroriste au Nigéria affilié à d'autres groupes terroristes internationaux, a élevé les enjeux. L'implication de la Cour dans le conflit est aussi très significative, puisqu'elle n'est pas liée par un programme d'amnistie ou de réconciliation qui pourrait être réalisé entre le Gouvernement Nigérian et Boko Haram.

Introduction

Conflicts bring out the worst in human beings. During civil wars or internal conflicts, a lot of things go wrong and a lot of people are affected. People suffer unnecessarily. For example, the suffering in Syria by the civilian populations has been unprecedented. And they are not alone. From Iraq to Mali, from Nigeria to Pakistan, conflicts exact a huge price on the civilian population. Victims and survivors of crimes want justice. Several of them will demand the punishment of perpetrators while others will want peace and reconciliation. There is no easy way to define the relationship between justice and reconciliation. While some see the two as diametrically opposed to each other, others insist that the two have to work together to resolve conflicts and move a nation forward. A vivid example in Africa where the issue of justice and reconciliation became very controversial is when the people of northern Uganda, consistently terrorized by the Lord's Resistant Army (LRA), pressurized the government of President Yoweri Museveni to enact an Amnesty Law granting the LRA officials immunity from prosecution. Although the government was reluctant in acceding to the request, the president realized that this was a people driven process which he had to support.

On the other hand in Nigeria, when the militants in the Niger Delta threatened the main source of the Nigerian economy – oil, the government of late President Umaru Musa Yar'Adua granted the militants amnesty in order to end the insurgency. With the escalation of the Boko Haram insurgency in Nigeria, the issue of amnesty has come to the fore again. The Boko Haram insurgency has put Nigeria in the spotlight for the wrong reasons. Nigeria is currently under preliminary examinations and the prosecutor of the International Criminal Court (ICC) has declared that the conflict in

Nigeria is a non-international armed conflict between the government of Nigeria and the Boko Haram terrorists. The abduction of over 200 girls from Government Girls Secondary School, Chibok raised the stakes. Although the girls are yet to be rescued, the reverberations of the incident continued to haunt the erstwhile government of President Goodluck Jonathan and the international community regarding the inability of both local security forces and international intelligence to secure the release of the girls. The question in the minds of several Nigerians is whether Boko Haram is ready to lay down their weapons and embrace dialogue with the federal government just like the Niger Delta militants.

This article uses the Nigerian experience between the Niger Delta militants and the Boko Haram insurgency as a case study to discuss the difficult choices between justice and reconciliation. It focuses on the activities of international justice institutions, provisions of the Rome Statute of the ICC, the debate between amnesty, prosecution and the interests of justice. The article is divided into four sections. The second section discusses the provision of the Rome Statute on issues of justice and reconciliation through the interests of justice provision in Article 53 of the Rome Statute. The third section applies the findings of the discussions to the conflicts in Nigeria with special emphasis on the conflicts in the Niger Delta and northern parts of Nigeria. The fourth section is the conclusion.

Justice, Reconciliation and the ‘Interests of Justice’ in the Rome Statute

There are several definitions of justice. For example, the United Nations defines ‘justice’ as ‘an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of the society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant’.¹ On the other hand the Nuremberg Declaration on Peace and Justice defines ‘peace’ as sustainable peace and ‘justice’ as accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs.² In addition, reconciliation is a transitional justice procedure where two warring parties are reconciled. It is embedded in the African cultural experience and has been documented in several countries like Uganda and Rwanda where they have used mechanisms like Mato oput and Gacaca as instruments for justice and reconciliation.³ It has been shown that citizens of these countries identify more closely with these ceremonies

than with Western justice mechanisms because they provide opportunity for truth and reconciliation of warring parties to a considerable extent.⁴

However, there have been arguments and counter-arguments on the need to prosecute individuals who commit international crimes or to grant them amnesty which reinforces the option of reconciliation.⁵ For example, Diane Orentlicher supports the view that prosecution of international crimes promotes peace and justice by arguing that criminal prosecutions act as deterrence against impunity, future abuses and repression.⁶ However, Charles Villa-Vicencio has stated that there are instances, especially in transitional societies, when amnesties and alternative means of conflict resolution will have to be applied to ensure the survival of the state.⁷ The 'interests of justice' provision in Article 53 of the Rome Statute presents the dilemma between peace and justice and has been the subject of intense debate, discussions and analysis by academics and scholars.

The former Secretary General of the UN Kofi Annan stated in 2004 that, '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities'.⁸ The current UN Secretary General Ban Ki-moon has also argued that '[f]ighting impunity and pursuing peace are not incompatible objectives – they can work in tandem, even in an ongoing conflict situation. This requires us to address very real dilemmas, and the international community must seize every opportunity to do so'.⁹ These dilemmas confront sub-Saharan Africa daily where there have been several wars with high human casualty and untold hardship on the civilian population especially affecting the vulnerable in society including women, children and the aged.

Background Information on Rome Statute Negotiations on Amnesties

During negotiations in Rome, states could not agree on the whether amnesty for atrocities should be allowed to trump prosecution of international crimes because of the sensitivity of the issue.¹⁰ Though some delegates were sympathetic with countries like South Africa in relation to the Truth and Reconciliation Commission set up by the government to review the injustices of apartheid, there was concern that amnesty provisions obtainable in some countries will defeat the cause of justice.¹¹ The United States government also issued a document during the discussions at Rome requesting the recognition of amnesties in judging the admissibility of a case. Several delegates did not accept the proposal and there was no consensus on amnesty in the Rome Statute.¹² The 'interests of justice' provision in Article 53 of the Rome Statute

is a compromise provision to avoid the debate on whether amnesties for international crimes should be recognized by the ICC.¹³ Kofi Annan stated in 1998 that the amnesty offered by the South African government to its citizens through the establishment of the Truth and Reconciliation Commission will pass the ICC test of accountability for international crimes.¹⁴

Literature Review on Article 53 of the Rome Statute

Several authors and commentators are divided on the meaning of interests of justice and whether Article 53 of the Rome Statute accommodates alternative justice mechanisms. While discussions in this section cannot be said to be conclusive of the ideas on the issues, we argue that they reflect the general views of scholars on this issue as ideas and views are divergent and vary from one author to the other. For example, Kai Ambos has noted that the ‘interest of justice’ in the Rome Statute is not limited to criminal justice only but includes alternative forms of justice.¹⁵ This involves an overall assessment of the reality on the ground taking into account the fact that peace and reconciliation are the ultimate goals of every process of transition.¹⁶ Michael Scharf argues that Article 53 ‘reflect[s] “creative ambiguity” which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the Court’.¹⁷ Mahnoush Arsanjani is of the view that ‘[u]nder Article 53, the [Rome] Statute allows the Prosecutor to refrain from proceeding with an investigation if it would not serve “the interest of justice”’.¹⁸ Thomas Clark has stated that ‘the legal regime established by the Rome Statute does not, in cases where the jurisdictional requirements of the Court are otherwise met, foreclose the use of amnesties and alternative justice mechanisms when they are in “the interests of justice”’.¹⁹ Furthermore, Charles Villa-Vicencio has argued for the recognition of ‘restorative justice’ as opposed to retributive justice in the fight against impunity.²⁰ Dražan Dukic has stated that ‘it is clear that, [a]rt 53 intends to formulate some circumstances in which the initiation of an investigation or prosecution would be ill-advised’.²¹

Other authors have stated that ‘individual interests measured by the gravity of the crime and the interests of victims must be weighed against a more general interests of justice’.²² Eric Blumenson while acknowledging the limitations placed on the Prosecutor by the Rome Statute argues that ‘one justification for declining to pursue a case is that doing so would serve the interests of justice, the Rome Statute should not prevent the prosecutor from considering a broad range of conflicting considerations when their weight is very great’.²³ Richard Goldstone and Nicole Fritz argue that ‘there are contexts in which the award of amnesty will comport with the “Interests of justice” provided that

these adhere to international prescribed guidelines'.²⁴ They further argue that the Rome Statute, 'allow for the accommodation of amnesties where these are consistent with justice'.²⁵ Chris Gallavan is of the view that the Rome Statute revolves around the interests of victims with a presupposition for prosecution why ignoring issues of reconciliation and the fact that justice may be achieved without criminal prosecution.²⁶ He further argues that the prosecutor should be availed of the ability to consider the political ramifications of instigating an investigation or prosecution.²⁷ Article 53 'potentially gives the Prosecutor, the ability to consider wider issues of justice beyond those directly involved in the case'.²⁸

Jessica Gavron argues for and against the application of amnesties by the ICC. In the first instance she is of the view that the interest of justice 'is usually limited to considerations directly bearing on the case itself'.²⁹ However, she also states that it is 'potentially arguable that a prosecution that is likely to spark further atrocities is not in the interests of justice'.³⁰ Carsten Stahn is of the view that 'Article 53(2)(c) suggests that the term "interests of justice" may embody a broader concept, which is not only confined to considerations of "criminal justice". The Prosecutor might invoke the concept of interests to justify departures from classical prosecution based on both amnesties and alternative methods of providing justice'.³¹

Despite the arguments above, the prosecutor and several NGOs argue that Article 53 of the Rome Statute should be given a restrictive interpretation. The NGOs argue that the application of the 'interests of justice' should be limited in scope in relation to the prosecutorial discretions of the prosecutor. For example, HRW argues that the prosecutor 'should adopt a strict construction of the term "interests of justice" in order to adhere to the context of the Statute, its object and purpose, and to the requirements of international law'.³² HRW further argues that the 'prosecutor may not fail to initiate an investigation or decide not to proceed with the investigation because of national efforts, such as truth commissions, national amnesties, or traditional reconciliation methods, or because of concerns regarding an ongoing peace process, since that would be contrary to the object and purpose of the Rome Statute'.³³

However, Human Rights Watch (HRW) alternatively argues that it is the responsibility of the UNSC under Article 16 of the Statute to make a determination if there is a tension or conflict between the work of the ICC and the maintenance of international peace and security. HRW argues that it is the UNSC and not the prosecutor that is empowered to act when an investigation or prosecution of international crimes is a threat to peace and security.³⁴ HRW also argues that allowing the prosecutor to make decisions based on political developments will undermine the independence and integrity of the ICC.³⁵ HRW correctly argues that during the negotiations

for the Rome Statute, there was no consensus on the meaning of the phrase 'in the interests of justice'.³⁶ However, HRW questions the interpretations of participants at the Rome conference who argue that Article 53 gives the prosecutor an opportunity to recognize alternative justice mechanisms in the prosecution of international crimes.³⁷

Another non-governmental organisation, Amnesty International (AI) supports the views expressed by HRW regarding the interpretation of Article 53 of the Rome Statute. In an open letter to the prosecutor of the ICC, AI argues that Article 53 of the Rome Statute does not give the prosecutor the power to suspend investigations and that only the UNSC acting under Article 16 of the Rome Statute has such powers.³⁸ AI is also of the view that the suspension of investigations by the prosecutor under Article 53 of the Rome Statute will be prejudicial to the right of victims.³⁹ Furthermore, AI argues that suspending investigations will affect the public perception of the general public in relation to the independence of the prosecutor from external diplomatic or political pressure.⁴⁰ Another NGO, FIDH argues that in any decision not to prosecute, the 'prosecutor will have to account for the inevitably negative impact that a potential decision not to investigate or not to prosecute could have for the end of impunity, the prevention of the most serious crimes of international concern, and the lasting respect for and enforcement of international justice'.⁴¹

Views of the Prosecutor of the ICC

The Office of the Prosecutor (OTP) of the ICC currently occupied by Fatou Bensouda prefers a restrictive interpretation of the 'interests of justice' on the assumption that the primary responsibility of the ICC is exclusively criminal prosecution.⁴² This view is shared by non-governmental organisations like HRW and AI who are Steering Committee members of the Coalition for the International Criminal Court.⁴³ Errol Mendes argues that 'Article 53 does not provide an exhaustive list of considerations for the Prosecutor to consider what may be in the interests of justice in determining whether to begin an investigation or prosecution...[g]iven the high thresholds of jurisdiction and admissibility, there is the strongest of presumptions in favour of seeking accountability for the most serious of crimes'.⁴⁴

The OTP in the policy paper on the 'interests of justice' has stated it 'fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice'.⁴⁵ The paper further argues that 'the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the

mandate of other institutions'.⁴⁶ In making this statement the papers alludes to the provision of Article 16 of the Rome Statute⁴⁷ which provides the Security Council with the opportunity to defer investigations by the ICC in a resolution adopted by the UN Security Council under Chapter VII of the Charter of the United Nations.

Errol further believes that the Security Council is better equipped to deal with the issue of justice and security as provided under the Rome Statute in order to avoid the ICC becoming enmeshed in politically charged situations.⁴⁸ However, Henry Lovat argues that Article 16 confers only a right but not a duty or obligation on the UNSC to defer investigations and prosecutions of the ICC in the interest of international peace and security.⁴⁹ This means that the deferral of cases should not be exercised only by the UNSC under Article 16 of the Rome Statute but should be expanded to accommodate the role of the prosecutor in Article 53. It further raises the issue whether the deferring cases under the 'interests of justice' will involve the OTP making political decisions or whether prosecutorial discretions are political in nature.

The OTP does not see its activities as having political undertones.⁵⁰ The OTP has argues that it applies the law without political considerations.⁵¹ However, it appears the OTP is not immune from political considerations and decisions in the prosecution of international crimes.⁵² The Court can minimize its exposure to political decisions by managing expectations and having minimum thresholds in its rules of engagement in the investigation and prosecution of international crimes. Furthermore, the OTP should also use the principle of positive complementarity to enhance the activities of the ICC.⁵³ The current confrontation between the ICC and critics is as a result of undue expectations on the part of those who believe the Court to be a perfect justice institution. This ideal is misplaced as the ICC is far from perfect.⁵⁴ The Rome Statute contains glaring ambiguities which has led to different interpretations by several scholars.⁵⁵ It has also been the subject of intense debate in relations to its activities in Africa where all the cases are currently situated. An effective communication policy backed with openness in addressing issues of impunity will help the OTP's prosecutorial policies to develop positively.

Justice, Reconciliation and Transitional Justice: The Nigerian Experience

In relation to truth, reconciliation and victims' rights to reparation, the Nigerian criminal law system does not recognize the right of victims of crimes to reparations. This is similar to several countries in Africa that operate the common law system. However the Rome Statute Bill currently before

the Nigerian National Assembly provides for a Special Victims Trust Fund which is a welcome development.⁵⁶ In addition, there have been various attempts to address human rights abuses in Nigeria through transitional justice mechanisms. For example, the Nigerian government in June 1999 set up the Human Rights Violations Investigation Commission (Oputa Panel) which sat from June 1999 to May 2002 and submitted its report to the government of Nigeria. The Oputa Report holds military incursion into politics as one of the issues responsible for human rights violations in Nigeria. The report argues that '[m]ilitary rule has left, in its wake, a sad legacy of human rights violations, stunted national growth, a corporatist and static state, increased corruption, destroying its own internal cohesion in the process of governing, and posing the greatest threat to democracy and national integration'.⁵⁷ The open and transparent process adopted by the Oputa Panel allowed several Nigerians to present their views and seek for redress.

However, the government of Nigeria refused to release the report citing the judgement of the Supreme Court of Nigeria in *Fawehinmi vs. Babangida* as the reason behind its refusal to officially release the report.⁵⁸ The Supreme Court in that case held that under the 1999 Constitution, the Federal Government of Nigeria had no power to set up a Tribunal of Inquiry as the power was now under the residual legislative list exercisable by states only and not the federal government unlike the 1966 Constitution which made provision for such. The decision to withhold the report has been criticized by Nigerians including legal scholars as a means of suppressing the truth.⁵⁹ The report has been unofficially released online by CSOs in Nigeria and abroad.⁶⁰ A fall out of the Oputa Panel Report and the Supreme Court decision is the setting up of truth and reconciliation commissions by State governments in Nigeria to address human rights abuses. These include the Rivers State Truth and Reconciliation Commission set up in November 2007, Osun State Truth and Reconciliation Commission set up in February 2011 and Ogun State Truth and Reconciliation Committee set up in September 2011.

The next sections of this article discuss the Niger-Delta and northern Nigeria conflicts. These are not the only conflicts that have been recorded in Nigeria. However, it is argued that these two conflicts reflect deep-rooted contradictions of national development. They touch on two fundamental issues that threaten peaceful co-existence in Nigeria. These are issues of religion and resource control or self-determination, aptly represented by MEND and Boko Haram. It is conceded that Boko Haram has been denounced by mainstream Muslim organisations in Nigeria and has been labelled as criminal by the Organization of Islamic Conference.⁶¹ However its attraction to militant Muslim youths in Nigeria remains a recipe for disaster and reinforces the

argument that its religious leanings cannot be denied. In fact some similarities can be drawn between Boko Haram and the Lord's Resistance Army (LRA) that operated in northern Uganda for more than two decades. While the LRA uses the ten commandment of the Bible as a weapon of influence and power, Boko Haram uses the Koran as a rallying point. In addition, the ultimate aim of Boko Haram and LRA is to overthrow the governments in Uganda and Nigeria using religion and brutal insurgency as weapons of warfare and as a foundation for achieving their political dreams and aspirations.

Resource Control and the Movement for the Emancipation of the Niger Delta

The complex mix between religion, ethnicity, politics and control of natural resources in Nigeria have led to the proliferation of ethnic based militia groups including the Movement for the Actualization of the Sovereign State of Biafra (MASSOB), Odua Peoples' Congress (OPC), the Movement for the Emancipation of Niger Delta (MEND), and the Movement for the Survival of Ogoni People (MOSOP) amongst others taking up arms against the state. The Niger Delta crisis is as old as the Nigerian nation. Early agitations for the emancipation of the Niger Delta were led by people like Isaac Adaka Boro alongside others who declared the Niger Delta Republic in 1967.⁶² Though the insurrection lasted for twelve days, it ignited a quest for the emancipation of minority groups in the region. Later the agitation for resource control was taken over by renowned poet and author, Ken Saro Wiwa who formed MOSOP aimed at the self-determination of the Ogoni people. The non-violent protests of the group turned violent when prominent citizens of Ogoniland were killed by youths who accused them of selling out to the government.⁶³ This development led to the arrest of the MOSOP leadership. The Nigerian government also set up a kangaroo court that tried and sentenced Ken Saro Wiwa and nine others to death. There was wide spread condemnation of the sentences and plea for clemency. However, the Abacha-led government hanged Saro Wiwa and his colleagues leading to the suspension of Nigeria from Commonwealth as other sanctions were levelled against the government. The death of Saro Wiwa also led to the formation of other militant groups like the Niger Delta Volunteer Force led by Asari Dokubo and MEND led by Henry Okah. These two groups exerted maximum pressure on Nigeria's oil wells.

In June 2009, the government of the late Umaru Musa Yar'Adua declared an amnesty which allowed militants to hand in weapons for cash and other benefits of rehabilitation.⁶⁴ Both Asari Dokubo, Henry Okah and several other militants benefited from the amnesty. This was pursuant to the provisions

of the Nigerian Constitution of 1999.⁶⁵ The amnesty proclamation was in response to the agitation of Niger Delta militants for self-determination and the crippling effects of its campaign on the production and export of crude oil, the mainstay of the Nigerian economy. Okah was rearrested in October 2010 due to involvement in the 1 October bombing during the independence celebration. He was convicted by a South Africa Court and sentenced to twenty-four years imprisonment.⁶⁶

With the emergence of Goodluck Jonathan as the President of Nigeria, the activities of Niger Delta insurgents were seriously reduced. It is also interesting that Boko Haram and its affiliates are the current threats to the cooperate existence of the Nigerian state. One issue that can be taken from the Niger Delta insurgency is the political dynamics of these groups. Most of the Niger Delta militants encouraged the erstwhile president to contest for the 2015 presidency. Meanwhile one of the problems the north had with President Jonathan was his refusal to abide by an unofficial agreement to run for only one term and the fact that the People's Democratic Party agreed to a power rotation by which the north was entitled to the presidency after the tenure of Olusegun Obasanjo. So there is a clear mixture of the campaign for self-determination and control of power. The same thing can still be witnessed in the discussions below regarding the political leanings of Boko Haram.

Boko Haram and Religious Insurgency in Northern Nigeria

The government of Nigeria is currently battling a militant Islamic group known as Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad (Boko Haram) accused of committing several human rights abuses against civilians.⁶⁷ According to a report by Human Rights Watch, Boko in the Hausa language means 'Western education' or 'Western influence' and haram in Arabic means 'sinful' or 'forbidden'. Boko Haram translated literally means 'Western education or influence is sinful and forbidden'. However the Nigerian Islamic militant group prefers to call itself 'Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad' which means 'People Committed to the Propagation of the Prophet's Teachings and Jihad'. There have also been allegations that Nigerian security forces have committed serious violations against its citizens while trying to end the terrorist attacks by Boko Haram.⁶⁸ The Office of the High Commissioner for Human Rights argues that some of the crimes committed by Boko Haram amount to crimes against humanity and has urged the Nigerian government to ensure that perpetrators of the violence are brought to justice.⁶⁹ The ICC has listed Nigeria as a country under preliminary examination and the office of the prosecutor of the ICC has

received several communications since 2005 in relation to the situation in Nigeria. These include the ethnic and religious conflicts that have occurred in central Nigeria since 2004 and violent clashes after the parliamentary and presidential elections in 2011.⁷⁰ In a visit to Nigeria, the prosecutor of the ICC, Fatou Bensouda stated that Nigeria is not under investigation but preliminary analysis and that as long as the government is prosecuting those responsible for international crimes, the jurisdiction of the ICC will not be activated.⁷¹ From 2013 to early 2015 the Boko Haram conflict assumed a deadlier dimension leading to the deaths of thousands and displacements of Nigerians as internally displaced persons and refugees in neighbouring countries.⁷²

The current war on terror against the Boko Haram sect is not a new phenomenon. The only troubling issue is that Boko Haram has assumed a wider dimension linking up with other AL-Qaeda affiliates in Africa. In addition, the attacks of Boko Haram have increased in intensity and sophistication.⁷³ In 2014 alone Boko Haram carried out a campaign of impunity in north-eastern Nigeria including bomb blasts in Abuja, Jos, Kaduna, Mubi and the abduction of over 200 girls of Government Girls Secondary School, Chibok in Borno State in April 2014.⁷⁴ In addition, the UN Security Council Al-Qaida Sanctions Committee has added Boko Haram to its Sanctions List.⁷⁵

A former President of Nigeria Olusegun Obasanjo stated in 2014 that some of the kidnapped girls may never be found and the likelihood that some of the girls were pregnant by Boko Haram members is very high.⁷⁶ The kidnap of the Chibok girls unsettled the Nigerian government, exposed the weakness of the Nigerian military and led to both local and international campaign for the release of the girls.⁷⁷ Although a few of them have escaped, a good number of them are still held hostage by Boko Haram members many months after their abduction. Besides Boko Haram activities in Nigeria, the sources of conflicts in Nigeria are myriad. These include corruption, religious and ethnic issues, competition for scarce resources and an inability to implement laws for national development. Several conflicts in Nigeria have a combination of religious, ethnic and political connotations. In fact, most religious conflicts in Nigeria usually assume inter-ethnic colouration even when they begin as purely religious disagreements. In addition, the reverse is sometimes the case where socio-economic conflicts often degenerate into inter-religious conflicts. Hence, the boundary between ethnic and religious conflicts in Nigeria is very hazy and not well defined.⁷⁸ Nigeria has witnessed ethnic, economic, religious and political conflicts since independence and the current incursion by Boko Haram and affiliated groups is threatening the

security of the Nigerian state. The limited success recorded by the amnesty granted to the Niger Delta militants has also prompted several highly placed Nigerians including the Sultan of Sokoto to request the Federal Government to grant amnesty to Boko Haram members.⁷⁹ Whether the government will accede to the request is subject to debate. This is because the government has consistently maintained that Boko Haram members do not have any genuine interest in negotiating peace with the government.

From earlier discussions, it can be concluded that the 'interests of justice' provisions accommodate amnesties and alternative justice mechanisms; the analyses of Article 53 of the Rome Statute supports this claim. The OTP has the opportunity to defer investigations and prosecution of crimes when it is in the 'interests of justice' though this should be limited in scope and practice. Furthermore, it is reiterated that the alternative means of justice embarked upon by states should meet minimum standards of justice and have the support and input of victims and their survivors. Applying the discussions above to the Nigerian situation, there is nothing wrong with Nigeria granting amnesty to its citizens in promoting justice and reconciliation. Where it becomes problematic is when those granted amnesty may have committed international crimes and are subject to arrest warrants from the ICC. In addition, blanket amnesty without any form of restitution or show of remorse for crimes committed should be avoided in its totality. Some authors have discussed how amnesties can be made acceptable to the public and the international community. For instance, Robert Weiner believes that the following conditions should be met for an amnesty to be acceptable:

- a) that the amnesty should not preclude an individual investigation and adjudication of the facts in each case;
- b) that the amnesty should not prejudice the victim's opportunity to seek and obtain reparations from the state, even if it does foreclose civil liability for the individual guilty parties;
- c) that the amnesty should not preclude and should be offset by public acknowledgment and publication of the relevant facts, including the identities of perpetrators;
- d) that the amnesty should not be available to persons who have not submitted to the personal jurisdiction of the relevant authorities; and
- e) that those seeking amnesty must affirmatively petition, and that they participate in the investigation of the facts by making a full disclosure of their role in the acts and omissions for which amnesty is sought.⁸⁰

There is nothing currently on the ground to show that Boko Haram is willing to abide with the above conditions. In addition, while the government can

proclaim amnesty for the militants, it does seem that the federal government may be legally hampered in setting up another truth and reconciliation commission based on the outcome of the Oputa panel report. However, states that are currently affected by Boko Haram can set up truth and reconciliation commissions to probe atrocities and recommend individuals to the proposed amnesty commission as the case may be. The problem with this scenario is that both the government and Boko Haram are currently engaged in fierce military combat to the extent that Boko Haram has annexed some parts of Nigeria and declared them caliphates.⁸¹ The general elections in Nigeria were recently postponed because the military could not guarantee the security of lives and property during the elections.⁸² Furthermore, a regional task force against Boko Haram constituting soldiers from Cameroon, Chad, Benin and Niger has been set up to fight the insurgency and has the backing of the both the African Union and the UN.⁸³ Therefore, it can be concluded that the Boko Haram conflict is a threat to the corporate existence of Nigeria and other neighbouring countries which means that amnesty is currently not an option for Boko Haram members.

Conclusion

This article has looked at the dichotomy between justice and reconciliation using the activities of the Nigerian MEND and Boko Haram as case studies. It has discussed the provision of the Rome Statute on issues of justice and reconciliation through the interests of justice provision in Article 53 of the Rome Statute. In addition, the article has applied the findings of the discussions to the conflicts in Nigeria with special emphasis on the conflicts in the Niger Delta and northern parts of Nigeria. We argue that there is a difficult choice to make when one is asked to choose between justice and reconciliation. They are both very important elements. However, there are possibilities that the two can work together when they are used effectively. The deployment of the amnesty for Niger Delta militants achieved the goal of ensuring that the oils continued to flow. It did not solve the Niger Delta question. Following the emergence of Goodluck Jonathan, it appeared that the Niger-Delta militancy had been pacified. However, the underlying issues that caused the insurgency in the first place are yet to be addressed.

The emergence of Boko Haram as a terrorist group in Nigeria affiliated with other international terrorist groups has raised the stakes in Nigeria. The involvement of the ICC in the conflict is also very significant. This is because the ICC is not bound by any amnesty or reconciliation programme entered between the Nigerian government and Boko Haram members. Although, it can be argued that Article 53 of the Rome Statute allows the

Prosecutor to recognize non-judicial mechanisms, the interpretation of the ICC Prosecutor is different and very restricted in application. Until there is a shift, the likes of Boko Haram can only enjoy transitional mechanisms that operate within the boundaries of Nigeria and may be liable for prosecution if indicted by the ICC. In addition, the transnational nature of Boko Haram means that any of the West African countries neighbouring Nigeria where Boko Haram members operate can actually prosecute them for international crimes. For instance, the amnesty granted to members of MEND did not stop the South African government from prosecuting Henry Okah for terrorism related activities in Nigeria. Therefore, Benin, Cameroon, Chad and Niger all have primary responsibilities to investigate and prosecute Boko Haram members for international crimes committed either in Nigeria or under their territorial jurisdiction.

Notes

1. Paragraph 7 of the Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, UNSC S/2004/616.
2. Nuremberg Declaration on Peace and Justice General Assembly of the United Nations A/62/885 of 19 June 2008.
3. Benson Olugbuo and Mukundi Wachira, 2011, 'Enhancing the protection of the rights of victims of international crimes: a model for East Africa', *African Human Rights Law Journal* 11 (2): 608–38.
4. Ibid.
5. Louise Mallinder, 2007, 'Can amnesties and international justice be reconciled?', *The International Journal of Transitional Justice* 1: 208–9.
6. Diane F. Orentlicher, 1991, 'Settling accounts: the duty to prosecute human rights violations of a prior regime', *The Yale Law Journal* 100 (8): 2537–615.
7. Charles Villa-Vicencio, 2000, 'Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet', *Emory Law Journal* 49: 205.
8. United Nations: Report of the Secretary General on 'The rule of law and transitional justice in conflict and post-conflict societies', S/2004/616, available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>, accessed 12 February 2015.
9. See Message from Ban Ki-moon, Secretary General of the United Nations, for the Meeting on Building a Future on Peace and Justice in Kai Ambos, Judith Large and Marieke Wierda, 2009, eds, *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*, Berlin: Springer-Verlag. Berlin Heidelberg. (Emphasises in the original.)
10. Manhoush H. Arsanjani, 1999, 'International Criminal Court and national amnesty laws: the future of the International Criminal Court', *American Journal of International Law* 93: 65 at 67.

11. Louise Mallinder, 2008, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Oxford: Hart Publishing.
12. Ruth Wedgwood, 1999, 'The International Criminal Court: an American view', *European Journal of International Law* 10: 93 at 96.
13. Michael Kourabas, 2007, 'A Vienna Convention interpretation of the "interests of justice" provision of the Rome Statute, the legality of domestic amnesty agreements, and the situation in northern Uganda: a "great qualitative step forward," or a normative retreat?', *University of California Davis Journal of International Law and Policy* 14: 59 at 61.
14. Kofi Annan, 1998, Speech at the Witwatersrand University Graduation Ceremony, 1 September, quoted in Charles Villa-Vicencio, 2000, 'Why perpetrators should not always be prosecuted: where the International Criminal Court and truth Commissions meet', *Emory Law Journal* 49: 205 at 222. See also Charles Villa-Vicencio, 1999–2000, 'The reek of cruelty and the quest for healing: where retributive and restorative justice meet', *Journal of Law and Religion* 14 (1): 165 at 187.
15. Kai Ambos, 2009, 'The legal framework of transitional justice', in Kai Ambos, Judith Large and Marieke Wierda, eds, *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*, Berlin: Springer-Verlag Berlin Heidelberg.
16. Ibid.
17. Michael P. Scharf, 1999, 'The Amnesty exception to the jurisdiction of the International Criminal Court', *Cornell International Law Journal* 32: 507 at 522. Scharf stated that this argument is as a result of discussions with Judge Phillip Kirsch who was the Chairman of the Rome Diplomatic Conference that adopted the Rome Statute in July 1998.
18. Manhoush H. Arsanjani, 1999, 'International Criminal Court and national amnesty laws: the future of the International Criminal Court', *American Journal of International Law* 93: 65 at 67.
19. Thomas Hethe Clark, 2005, 'The prosecutor of the International Criminal Court, amnesties and the interests of justice: striking a delicate balance', *Washington University Global Studies Law Review* 4: 389 at 407.
20. Charles Villa-Vicencio, 2000, 'Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet', *Emory Law Journal* 49: 205 at 214
21. Drazan Dukic, 2007, 'Transitional justice and International Criminal Court – in "the interests of justice"?'', *International Committee of the Red Cross* 89 (867): 691 at 700.
22. Gerhard Hafner, Kristen Boon, 1999, Anne Rubesame and Jonathan Huston 'A response to the American view as presented by Ruth Wedgwood', *European Journal of International Law* 10: 108 at 112.
23. Eric Blumenson, 2006, 'The challenge of a global standard of justice: peace, pluralism, and punishment at the International Criminal Court', *Columbia Journal of Transnational Law* 44: 801 at 859.

24. Richard Goldstone and Nicole Fritz, 2000, “In the interests of justice” and independent referral: the ICC prosecutor’s unprecedented powers’, *Leiden Journal of International Law* 13: 655 at 656.
25. Ibid.
26. Chris Gallavin, 2003, ‘Article 53 of the Rome Statute of the International Criminal Court: in the interests of justice?’, *Kings College Law Journal* 14: 179 at 184.
27. Ibid.
28. Ibid at 186.
29. Jessica Gavron, 2002, ‘Amnesties in light of developments in international law and the establishment of the International Criminal Court’, *International and Comparative Law Quarterly* 51: 91 at 110.
30. Ibid.
31. Carsten Stahn, 2005, ‘Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court’, *Journal of International Criminal Justice* 3: 695 at 698.
32. HRW, 2005, ‘Policy Paper: The Meaning of “Interests of Justice” in Article 53 of the Rome Statute’, June, available online at <http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>, accessed 12 February 2015.
33. HRW, 5.
34. Ibid.
35. HRW, 8.
36. HRW, 3.
37. HRW, 4.
38. See Amnesty International, 2005, ‘Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice’ AI Index: IOR 40/023/2005, 17 June, available online at http://www.iccnw.org/documents/AI_LetterOTP_Interests_Aug05.pdf, accessed 12 February 2015.
39. Ibid.
40. Ibid.
41. See FIDH, 2006, ‘Comments on the Office of the Prosecutor’s draft policy paper on “The interest of Justice”’, 14 September, available online at http://www.fidh.org/IMG/pdf/FIDH_comments_-_interests_of_justice_-_final.pdf, accessed 10 January 2013.
42. International Criminal Court, 2007, ‘Policy Paper on the Interests of Justice’, September.
43. See for example Human Rights Watch Policy Paper: The Meaning of ‘Interests of Justice’ in Article 53 of the Rome Statute. See also Amnesty International, 2005, ‘Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice’ AI Index: IOR 40/023/2005, 17 June.
44. Errol P. Mendes, 2010, *Peace and Justice at the International Criminal Court: A Court of Last Resort*, Cheltenham, 33.

45. Office of the Prosecutor of the ICC, Policy Paper on the Interests of Justice, September 2007.
46. Ibid.
47. Art ICLE16 provides that, 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.
48. Errol P. Mendes at 34.
49. Henry Lovat, 2006, 'Delineating the interests of justice', *Denver Journal of International Law and Policy* 35 (2): 275 at 282.
50. Luis Moreno-Ocampo, 2009, 'Building a Future on Peace and Justice: The International Criminal Court' in Kai Ambos, Judith Large and Marieke Wierda, eds, *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*, Berlin: Springer-Verlag Berlin Heidelberg,
51. Luis Moreno-Ocampo, 2010, 'Council on Foreign Relations Keynote Address by the Prosecutor of the ICC', Washington DC, 4 February.
52. Kamari Maxine Clarke, 2009, *Fictions of Justice: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa*, New York: Cambridge University Press.
53. Benson Olugbuo, 2011, 'Positive complementarity and the fight against impunity in Africa', in Chacha Murungu and Japhet Biegon, eds, *Prosecuting International Crimes in Africa*, Pretoria: Pretoria University Law Press.
54. Ruth Wedgwood, 1999, 'The International Criminal Court: an American view', *European Journal of International Law* 10: 93 at 95.
55. See for example Article 27 and Article 98 (1) of the Rome Statute in relation to the immunity of state officials. See generally Paola Gaeta, 2009, 'Does President Al enjoy immunity from arrest?', *Journal of International Criminal Justice* 7: 315 at 316; Robert Cryer, 2009, 'Prosecuting the leaders: promises, politics and practicalities', *Göttingen Journal of International Law* 1: 45 at 64 and Johan D. van der Vyver, 2011, 'Prosecuting the President of Sudan: a dispute between the African Union and the International Criminal Court', *African Human Rights Law Journal* 11 (2): 683 at 693.
56. The Nigerian International Criminal Court Bill 2012.
57. Paragraph 89 of the Oputa Panel Report.
58. *Fawehinmi vs. Babangida* (2003) 12 WRN 1; (2003) NWLR (PT 808) 604.
59. Hakeem Yusuf, 2007, 'Travails of truth: achieving justice for victims of impunity in Nigeria', *International Journal of Transitional Justice*, 1: 268 at 283.
60. See 'Synoptic Overview of HRVIC Report: Conclusions And Recommendations (Including Chairman's Foreword)' presented to President, Commander-In-Chief of the Armed Forces of the Federal Republic of Nigeria Chief Olusegun Obasanjo GCFR submitted by Human Rights Violations Investigation Commission May, 2002.
61. Nigeria Watch, 2014, 'Islamic body OIC distances itself from Boko Haram calling it a criminal group', 3 June.

62. Eghosa E. Osaghae, 1995, 'The Ogoni uprising: oil politics, minority agitation and the future of the Nigerian state', *African Affairs* 94 (376): 325–44.
63. Human Rights Watch, 1995, 'Nigeria: The Ogoni Crisis – A Case-Study of Military Repression In South-eastern Nigeria', 7 (5), July.
64. See Nigeria First 'Text of President Yar'Adua's Amnesty Proclamation', 25 June 2009.
65. Section 175 of the Constitution of Nigeria.
66. The Vanguard Newspaper, 2013, 'Breaking news: S/Africa court convicts Henry Okah of 13 acts of 'terrorism'', 21 January.
67. See Human Rights Watch, 2012, 'Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria', October; Andrew Walker 'What Is Boko Haram?' United States Institute for Peace Special Report 308; Freedom Onuoha, 2010, 'The Islamist challenge: Nigeria's Boko Haram crisis explained', *African Security Review* 19 (2): 54–67.
68. *The Economist*, 2012, 'Nigeria's crisis: a threat to the entire country', 29 September.
69. Lisa Schlein, 2012, 'UN Human Rights Chief Condemns Boko Haram Attacks', 23 June. [n.p.]
70. International Criminal Court, 2011, 'The Office of the Prosecutor: Report on Preliminary Examination activities', 13 December.
71. Madu Onuora, 2012, 'Nigeria backs ICC's efforts to check impunity', *Guardian*, 4 July.
72. Michael Shodipo, 2015, 'The rise of Boko Haram and the response of civil society' Insight on Conflict 12 February, available online at <http://www.insightonconflict.org/2015/02/boko-haram-civil-society-nigeria/>, accessed 12 February 2015.
73. Oluwatoyin Badejogbin, 2013, 'Boko Haram: an enquiry into the socio-political context of Nigeria's counter-terrorism response', *Law Democracy and Development* 17: 247.
74. Oren Dorell, 2014, 'Terrorists kidnap more than 200 Nigerian girls', *US Today*, 21 April.
75. United Nations Security Council SC/11410 of 22 May 2014.
76. Ini Ekott, 2014, 'Exclusive: Obasanjo says half of abducted Chibok girls may never be found', *Premium Times*, 12 June.
77. The 'BringBackOurGirls' campaign has gained worldwide fame both in capitals of the world and social media.
78. David Alabi, 2007, 'Religious conflicts in northern Nigeria: a critical analysis', in Sofiri Joab-Peterside and Ukoha Ukiwo, eds, *The Travails and Challenges of Democracy in Nigeria, 1999-2003 and Beyond*, Port Harcourt: Centre for Advanced Social Sciences.
79. Nigerian Watch, 2013, 'Sultan of Sokoto requests full amnesty for Boko Haram members', 6 March.
80. Robert Weiner, 1995, 'Trying to make ends meet: reconciling the law and practice of human rights amnesties', *St Mary's Law Journal* 26: 857 at 871.

81. Punch Newspapers, 2014, 'Boko Haram declares Gwoza Islamic caliphate', 25 August, available online at <http://www.punchng.com/news/boko-haram-declares-gwoza-islamic-caliphate/>, accessed 12 February 2015.
82. Vanguard Newspapers, 2015, 'INEC postpones elections', 8 February, available online at <http://www.vanguardngr.com/2015/02/inec-postpones-elections/>, accessed 12 February 2015.
83. Aaron Maasho, 2015, 'African Union backs plan for regional task force to fight Boko Haram', 29 January, available online at <http://uk.reuters.com/article/2015/01/29/uk-africa-security-idUKKBN0L22RT20150129>, accessed 12 February 2015.