

The Justice vs Reconciliation Dichotomy in the Struggle Against Gross Human Rights

Abuses: The Nigerian Experience

By

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1. 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 and 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 for 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 has to work together to 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 terrorised by the Lord's Resistant Army (LRA) pressurised 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 realised that this was a people driven process and had to support the process.

On the other hand in Nigeria, when the militants in the Niger Delta threatened the main source of 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 front burner again. These are trying times for Nigeria as general elections take place in the first quarter of 2015. The Boko Haram insurgency has put Nigeria in the spot light for the wrong things. The Nigeria is currently under preliminary examinations and the prosecutor of the International Criminal Court 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 continue to

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haunt the 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 Niger Delta militants.

This paper 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. Since this conference focuses on the activities of international justice institutions, provisions of the Rome Statute of the International Criminal Court will be discussed and analysed in relation to the debate between amnesty, prosecution and the interests of justice. This paper 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.

2. Justice, reconciliation and the “Interests of Justice” in the Rome Statute

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 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

¹ Para 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 “Enhancing the Protection of the Rights of Victims’ of International Crimes: A Model for East Africa” (2011) African Human Rights Law Journal Vol. 11 No.2, 608 – 638 at 624.

these countries identify these ceremonies closer than 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 and 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 art 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, Mr Kofi Annan in 2004 stated 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, Mr 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 on-going 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 the vulnerable in the society including women, children and the aged.

⁴ Ibid.

⁵ Louise Mallinder Can Amnesties and International Justice be Reconciled? (2007) 1 *The International Journal of Transitional Justice*, 208 at 208–209.

⁶ Diane F. Orentlicher “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1991) 100 (8) *The Yale Law Journal* 2537 at 2542.

⁷ Charles Villa-Vicencio “Why perpetrators should not always be prosecuted: Where the International Criminal Court and Truth Commissions meet” 49 *Emory Law Journal* (2000) 205 at 208.

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 6 February 2012).

⁹ See Message from Mr. 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 (eds) *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (2009) Berlin: Springer-Verlag Berlin Heidelberg, 3 (emphasises in the original).

2.1 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 for 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 recognised by the ICC.¹³ The former Secretary-General of the UN, Mr 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

2.2 Literature review on Article 53 of the Rome Statute

Several authors and commentators and 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, it argued that it reflects general view of scholars on this issue as ideas and views are divergent and varies 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

¹⁰ Manhoush H. Arsanjani “International Criminal Court and National Amnesty Laws: The Future of the International Criminal Court” (1999) 93 *American Journal of International Law* 65 at 67.

¹¹ Louise Mallinder *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008) Oxford: Hart Publishing 280.

¹² Ruth Wedgwood “The International Criminal Court: An American View” (1999) 10 *European Journal of International Law* 93 at 96.

¹³ Michael Kourabas “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?” 14 *University of California Davis Journal of International Law & Policy* (2007) 59 at 61.

¹⁴ Kofi Annan, Speech at the Witwatersrand University Graduation Ceremony (September 1, 1998) quoted in Charles Villa-Vicencio “Why perpetrators should not always be prosecuted: Where the International Criminal Court and Truth Commissions meet” 49 *Emory Law Journal* (2000) 205 at 222. See also Charles Villa-Vicencio “The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet” (1999 – 2000) 14 (1) *Journal of Law and Religion* 165 at 187.

forms of justice.¹⁵ This will involve an overall assessment of the reality on 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 ‘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 Mahnouch 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

¹⁵ Kai Ambos “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* (2009) Berlin: Springer-Verlag Berlin Heidelberg, 85.

¹⁶ Ibid.

¹⁷ Michael P. Scharf “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) 32 *Cornell International Law Journal* 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 Mahnouch H. Arsanjani “International Criminal Court and National Amnesty Laws: The Future of the International Criminal Court” (1999) 93 *American Journal of International Law* 65 at 67.

¹⁹ Thomas Hethe Clark “The Prosecutor of the International Criminal Court, Amnesties and the Interests of Justice: Striking a Delicate Balance” (2005) 4 *Washington University Global Studies Law Review* 389 at 407.

²⁰ Charles Villa-Vicencio “Why perpetrators should not always be prosecuted :Where the International Criminal Court and Truth Commissions meet” 49 *Emory Law Journal* (2000) 205 at 214

²¹ Dražan Dukic “Transitional justice and International Criminal Court – in “the interests of justice”?” (2007) Volume 89 number 867 *International Committee of the Red Cross* 691 at 700.

²² Gerhard Hafner, Kristen Boon, Anne Rubesame and Jonathan Huston “A Response to the American View as Presented by Ruth Wedgewood” (1999) 10 *European Journal of International Law* 108 at 112.

²³ Eric Blumenson “The Challenge of a Global Standard of Justice: Peace, Pluralism, and punishment at the International Criminal Court (2006) 44 *Columbia Journal of Transnational Law* 801 at 859.

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 that fact that justice may be achieved without criminal prosecution.²⁶ He further argues that the OTP 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 “[a]rticle 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

2.3 Views of the Prosecutor of the International Criminal Court

On the other hand, the Office of the Prosecutor (OTP) of the International Criminal Court 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.³² This view is shared by non-governmental organisations like Human Rights Watch and Amnesty International who are Steering Committee members of the Coalition for

²⁴ Richard Goldstone and Nicole Fritz ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers’ (2000) 13 *Leiden Journal of International Law* 655 at 656.

²⁵ Ibid.

²⁶ Chris Gallavan “Article 53 of the Rome Statute of the International Criminal Court: In the interests of justice?” (2003) 14 *Kings College Law Journal* 179 at 184.

²⁷ Ibid.

²⁸ Ibid at 186.

²⁹ Jessica Gavron, “Amnesties in light of developments in international law and the establishment of the International Criminal Court” (2002) 51 *International and Comparative Law Quarterly* 91 at 110.

³⁰ Ibid.

³¹ Carsten Stahn “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court” (2005) 3 *Journal of International Criminal Justice* 695 at 698.

³² International Criminal Court “Policy Paper on the Interests of Justice” September 2007.

the International Criminal Court.³³ Errol Mendes argues that “[a]rticle 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.”³⁴

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.”³⁵ 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.”³⁶ In making this statement the papers alludes to the provision of article 16 of the Rome Statute³⁷ 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.³⁸ However, Henry Lovat argues that art 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.³⁹ This means that the deferral of cases should not be exercised only by the UNSC under art 16 of the Rome Statute but should be expanded to accommodate the role of the prosecutor in art 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.

³³ 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 “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 2005.

³⁴ Errol P. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham: United Kingdom, 2010) 33.

³⁵ Office of the Prosecutor of the ICC, *Policy Paper on the Interests of Justice*, September 2007.

³⁶ *Ibid.*

³⁷ Art 16 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.”

³⁸ Errol P. Mendes at 34.

³⁹ Henry Lovat “Delineating the Interests of Justice” (2006) 35 (2) *Denver Journal of International Law and Policy* 275 at 282.

The OTP does not see its activities as having political undertones.⁴⁰ The OTP has argued that it applies the law without political considerations.⁴¹ However, it appears the OTP is not immune from political considerations and decisions in the prosecution of international crimes.⁴² 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.⁴³ 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.⁴⁴ The Rome Statute contains glaring ambiguities which has led to different interpretations by several scholars.⁴⁵ 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.

From the discussions above, it can be concluded that the “interests of justice” provisions accommodates amnesties and alternative justice mechanisms and 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 on the Nigerian situation, there is nothing wrong with Nigeria granting amnesty to her citizens in promoting justice and reconciliation. Where it becomes problematic is when those granted amnesty may

⁴⁰ Luis Moreno-Ocampo “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* (2009) Berlin: Springer-Verlag Berlin Heidelberg,

⁴¹ Luis Moreno-Ocampo “Council on Foreign Relations Keynote Address by the Prosecutor of the ICC”, Washington DC 4 February 2010.

⁴² Kamari Maxine Clarke *Fictions of Justice: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) New York: Cambridge University Press 237.

⁴³ Benson Olugbuo “Positive Complementarity and the Fight Against Impunity in Africa” in Chacha Murungu & Japhet Biegon, (eds.), *Prosecuting International Crimes in Africa* (2011) Pretoria: Pretoria University Law Press, 249 - 274.

⁴⁴ Ruth Wedgwood “The International Criminal Court: An American View” (1999) 10 *European Journal of International Law* 93 at 95.

⁴⁵ See for example art 27 and art 98 (1) of the Rome Statute in relation to the immunity of state officials. See generally Paola Gaeta ‘Does President Al Bashir enjoy immunity from arrest?’ (2009) 7 *Journal of International Criminal Justice* 315 at 316; Robert Cryer ‘Prosecuting the Leaders: Promises, Politics and Practicalities’ (2009) 1 *Göttingen Journal of International Law* 45 at 64 and Johan D van der Vyver ‘Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court’ (2011) 11 (2) *African Human Rights Law Journal* 683 at 693.

have committed international crimes and are subject to arrest warrants from the International Criminal Court. In addition, blanket amnesty without any form of restitution or show of remorse for crimes committed should be avoided in its totality.

3. 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 recognise 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.⁴⁶ 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.”⁴⁷ 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 judgment of the Supreme Court of Nigeria in *Fawehinmi vs. Babangida* as the reason behind its refusal to officially release the report.⁴⁸ 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 criticised by Nigerians including legal scholars as a means of suppressing the truth.⁴⁹ The report has been unofficially released online by CSOs in

⁴⁶ The Nigerian ICC Bill 2012.

⁴⁷ Para 89 of the Oputa Panel Report.

⁴⁸ *Fawehinmi vs. Babangida* (2003) 12 WRN 1; (2003) NWLR (PT 808) 604.

⁴⁹ Hakeem Yusuf “Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria” (2007) 1 *International Journal of Transitional Justice* 268 at 283.

Nigeria and abroad.⁵⁰ A fall out of the Oputal 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 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 criminals by the Organisation of Islamic Conference.⁵¹ However its attraction to militant Muslim youths in Nigeria remains a recipe for disaster and reinforces the argument that it’s 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. But the ultimate aims of Boko Haram and LRA is to overthrow the governments in Uganda and Nigeria using religion and brutal insurgency as weapons of warfare and foundation for their political dreams and aspirations.

3.1 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 Movement for the Actualization of the Sovereign State of Biafra (MASSOB), Odua Peoples’ Congress (OPC), Movement for the Emancipation of Niger-Delta (MEND), and 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

⁵⁰ 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.

⁵¹ Nigeria Watch “Islamic body OIC distances itself from Boko Haram calling it a criminal group” 3 June 2014.

Niger Delta Republic in 1967.⁵² 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 the MOSOP which aimed at the self determination of the Ogoni people. The non-violent protests of the group turned violent when prominent citizens of Ogoni land were killed by youths who accused them of selling out to the government.⁵³ This development led to the arrest of 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 oil wells and threatened the mainstay of Nigeria's economy.

In June 2009, the government of late Umaru Musa Yar'Adua declared an amnesty which allowed militants to hand in weapons for cash and other benefits of rehabilitation.⁵⁴ Both Asari Dokubo, Henry Okah and several other militants benefitted from the amnesty. This was pursuant to the provisions of the Nigerian Constitution of 1999.⁵⁵ 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 which is the main stay of the Nigerian economy. Okah was rearrested in October 2010 due to involvement in the October 1 bombing during the independence celebration. He was convicted by a South Africa Court and sentenced to twenty four years imprisonment.⁵⁶ With the emergence of Goodluck Jonathan as the President of Nigeria, the activities of Niger Delta insurgents have reduced seriously. 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 are currently encouraging the current President to contest for the 2015 presidency.

⁵² Eghosa E. Osaghae "The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State" (1995) 94 (376) African Affairs, 325 – 344.

⁵³ Human Rights Watch 'Nigeria: The Ogoni Crisis - A Case-Study of Military Repression In South-eastern Nigeria, July 1995 Vol. 7, No. 5.

⁵⁴ See Nigeria First "Text of President Yar'Adua's Amnesty Proclamation" 25 June 2009.

⁵⁵ Section 175 of the Constitution of Nigeria.

⁵⁶ The Vanguard Newspaper 'Breaking news: S/Africa court convicts Henry Okah of 13 acts of 'terrorism' 21 January, 2013

Meanwhile one of the problems the north has with President Jonathan is 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.

3.2 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.⁵⁷ According to a report by Human Rights Watch, Boko in 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.⁵⁸ The Office of the High Commissioner for Human Rights argues that some of the crimes committed by Boko Haram amounts to crimes against humanity and has urged the Nigerian government to ensure that perpetrators of the violence are brought to justice.⁵⁹ 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 the recent violent clashes after the parliamentary and presidential elections in 2011.⁶⁰ In a recent 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.⁶¹

⁵⁷ See Human Rights Watch "Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria" October 2012; Andrew Walker "What Is Boko Haram?" United States Institute for Peace Special Report 308; Freedom Onuoha "The Islamist challenge: Nigeria's Boko Haram crisis explained" (2010) 19 (2) *African Security Review* 54-67.

⁵⁸ The Economist "Nigeria's crisis: A threat to the entire country" 29 September 2012.

⁵⁹ Lisa Schlein "UN Human Rights Chief Condemns Boko Haram Attacks" 23 June 2012.

⁶⁰ International Criminal Court "The Office of the Prosecutor: Report on Preliminary Examination activities" 13 December 2011.

⁶¹ Madu Onuora "Nigeria backs ICC's efforts to check impunity" Guardian Newspapers 4 July 2012.

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.⁶² In 2014 alone Boko Haram has carried out a campaign of impunity in North eastern Nigeria including the recent 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 2014.⁶³ In addition, the United Nations Security Council Al-Qaida Sanctions Committee had added Boko Haram to its Sanctions List.⁶⁴ The UNSC argues that,

Since summer 2012 Boko Haram has undertaken a campaign of violence against Nigerian schools and students. In June 2013, the group attacked schools in Maiduguri and Damaturu, Nigeria, killing at least 22 children; in July, an attack on a school in the village of Mamudo, Nigeria killed at least 42 people, most of them students. On September 29, 2013 Boko Haram attacked an agricultural school in Yobe, Nigeria, shooting dead 50 students in their dormitory as they slept. On April 14, 2014, Boko Haram abducted approximately 300 girls from a school in northern Nigeria. Abubakar Shekau claimed responsibility for the attack in a video released by Boko Haram and threatened to sell the girls into slavery. Boko Haram militants subsequently attacked a staging base for rescuers on May 5, 2014, killing an additional 310 people.⁶⁵

Recently a former President of Nigeria Olusegun Obasanjo stated that some the kidnapped girls may never be found and the likelihood that some of the girls were pregnant for Boko Haram members is very high.⁶⁶ The kidnap of the Chibok girls have 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.⁶⁷ Although a few of them have escaped, a good number of them are still held hostage by Boko Haram members.

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 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

⁶² Oluwatoyin Badejogbin 'Boko Haram: An enquiry into the socio-political context of Nigeria's counter-terrorism response' (2013) 17 *Law Democracy and Development*, 247.

⁶³ Oren Dorell 'Terrorists kidnap more than 200 Nigerian girls' US Today 21 April 2014.

⁶⁴ United Nations Security Council SC/11410 of 22 May 2014.

⁶⁵ Ibid.

⁶⁶ Ini Ekott "Exclusive: Obasanjo says half of abducted Chibok girls may never be found" 12 June 2014 Premium Times.

⁶⁷ The "BringBackOurGirls" campaign has gained worldwide fame both in capitals of the world and social media.

often degenerate into inter-religious conflicts. Hence, the boundary between ethnic and religious conflicts in Nigeria is very hazy and not well defined.⁶⁸ Nigeria has witnessed ethnic, economic, religious and political conflicts since independence and current threat 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.⁶⁹ 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 to negotiate peace with the government.

4. Conclusion

This paper 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 paper 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. This paper argues that it is a difficult choice to make when one is asked to choose between justice and reconciliation. They are 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 ensuing that the oils continued to flow. It did not solve the problem of the Niger-Delta question. With the emergence of Goodluck Jonathan, it appears that the Niger-Delta militancy has 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 International Criminal Court 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

⁶⁸ David Alabi, "Religious Conflicts in Northern Nigeria: A Critical Analysis" in Sofiri Joab-Peterside & Ukoha Ukiwo (eds) *The Travails and Challenges of Democracy in Nigeria, 1999 – 2003 and Beyond* (2007) Port Harcourt: Centre for Advanced Social Sciences, 95.

⁶⁹ Nigerian Watch "Sultan of Sokoto requests full amnesty for Boko Haram members" 6 March 2013.

Rome Statute allows the Prosecutor to recognise 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 of indicted by the International Criminal Court. 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 terrorism related activities in Nigeria.