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# Prosecuting Offenders for Rape Committed in Armed Conflict: Interrogating the Accountability of the Nigerian State

by Dr. Caroline Omochavwe Oba\*

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## INTRODUCTION

Rape has occurred during armed conflict since the beginning of time. Occurrences of rape are recorded in ancient wars, and there are passages in the Bible that make allusion to it.[1] The common narrative has been that rape committed during armed conflict is an inevitable by-product of war or a collateral damage. Whatever the merit in these perceptions, rape in armed conflict has metamorphosed from a byproduct of war to a weapon of war itself. Various actors in armed conflicts around the globe seem to have realized that rape is a deadly, efficient, and cheap tool to achieve their objectives in a conflict. These include ethnic cleansing, as found in the Bosnia wars; crushing political dissent, as seen in the Democratic Republic of Congo; and subjugation of women, as seen in the Boko Haram insurgency in Nigeria. Though rape was not treated as a crime for a long time, it is now considered as a war crime,[2] a crime against humanity[3] and a possible modality or component of genocide.[4] It is, therefore, unsurprising that the Nobel Peace Prize for 2018 was awarded to two persons who have drawn the world's attention to this dangerous trend. Both laureates were cited "to have made crucial contributions to focusing attention on, and combating rape and such like in wars." [5]

In this article, the analysis of armed conflicts will be restricted to the ongoing conflict in the north-eastern part of Nigeria between Nigeria's military and Boko Haram insurgents. Rape as a weapon of war has been perpetrated in this conflict. Women and girls are abducted and used as sexual slaves, forced into marriages and impregnated by the insurgents. There have also been allegations of rapes against members of the Nigerian military in the internally displaced persons camps set up in the region.[6] Rape has been used as a tool of war against both men and women, but this

article centers on rape of women in the Boko Haram armed conflict.

## BACKGROUND

In both international and Nigerian criminal law, only individuals who perpetuated rape as a tool of war are prosecuted. No attention is given to the role of the state, either by omission or commission in the use of rape as a tool of war. The prosecution of individuals alone has not served as a deterrent, and the cycle of the violence has continued unabated.

Boko Haram was founded by Mohammed Yusuf, an Islamic scholar who formed the movement to establish an Islamic State where Islamic values could be pursued and there would be no western education. The insurgents were labeled Boko Haram, meaning western education is forbidden, by the local people in the northeastern city of Maiduguri.[7] Boko Haram believes that western education, particularly the education of women, is an evil thing, as a woman's role in life is to marry, have children, and take care of the home and family.[8]

Following the Nigerian government's crackdown on Boko Haram's activities in 2009, culminating in the extra-judicial execution of Mohammed Yusuf, the group declared war against the Nigerian State. Abduction of women and girls, who are subsequently used as sex slaves, married off or given to Boko Haram fighters as compensation for their contributions, is one of the war tactics of this group.

## THE ROLE OF THE STATE IN THE COMMISSION OF RAPE BY BOKO HARAM

Boko Haram has interfered in the operation of schools in the northeast and threatened violence to realize its

objectives of wiping out western education and establishing an Islamic education system. The situation peaked on April 14, 2014, when Boko Haram abducted 276 girls from their dormitory at Chibok secondary school in Borno State. Before this incident, intelligence reports detailed that the insurgents would be targeting schools. The government of Borno State was advised by the West African Examination Council (WAEC) that it was not safe to conduct the school examinations in Borno State, including Chibok. WAEC recommended that affected students be moved to the state capital to take examinations, but the recommendation was not heeded.[9] In addition, military authorities had information that Chibok was going to be attacked four hours before it happened, but no action was taken.[10] Consequently, the girls were abducted. After over two years in captivity, several girls were released, some of whom had become pregnant or nursing mothers.

In March 2018, Amnesty International alleged that a similar situation occurred, where the Nigerian government failed to act on information of an attack on Dapchi girls' secondary school in Yobe State.[11] Moreover, the insurgents have also abducted other women and girls from their communities and places where they were providing humanitarian services for victims of the insurgents' attacks, such as aid workers of the International Committee of the Red Cross.[12] The abduction of these women demonstrates gross dereliction on the part of the government to provide security for its citizens.

#### NIGERIAN PROSECUTION OF RAPE

Nigerian law criminalizes rape, whether committed in peace time or in a conflict situation, as seen in the penal code,[13] criminal code,[14] the criminal law of Lagos State,[15] the Child Rights Act of 2000,[16] and the Violence Against Persons Prohibition Act of 2015.[17] The Violence Against Persons Prohibition Act of 2015 brought innovations in the legal regime for prosecuting rape in Nigeria by broadening the definition of rape to include sexual invasion of any part of the victim's body.[18] The Act also increases the punishment for rape to life imprisonment and requires perpetrators of rape to register as a sex offender.[19] Internationally, Nigeria is a signatory of several treaties and conventions that condemn or criminalize rape and all forms of sexual violence in conflicts, and protects women against violence, such as the Rome

Statute;[20] the African Charter on Human and Peoples' Rights;[21] and the Protocol to the African Charter on Human and Peoples' Rights on the Right of Women.[22]

Despite the comprehensive legal regime available to prosecute offenders for rape, Nigeria has neglected to carry out its obligations. According to the Federal Ministry of Justice in Nigeria, about 1,500 arrests and prosecutions of Boko Haram members took place between 2015 and 2018. The offenses charged include acts of terrorism, concealing information about acts of terrorism, hostage taking, soliciting and rendering support/membership of a terrorist group, and provision of training and recruitment of members of a terrorist group. None of the defendants in these cases were charged with rape. This is despite widespread reports of women and girls being forced into marriages, and being raped or used as sex slaves by Boko Haram, as evidenced by the rescued Chibok girls found pregnant or with babies. In addition, allegations of rape against the military were not investigated independently and transparently before they were dismissed as baseless. This is because the investigations were done by the military itself making it a judge in its own cause.

#### INTERROGATING THE ACCOUNTABILITY OF THE STATE

The Nigerian Constitution makes security of life and property of its citizens the main responsibility of the government.[23] Though this provision is not justiciable under the Constitution, the African Charter on Human and Peoples' Rights contains similar provisions, which is justiciable.[24] Nigeria is also a signatory to several international treaties and conventions particularly the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women which guarantees protection of women from all forms of violence[25] and internally displaced women from all forms of violence, rape, and other kinds of sexual exploitation.[26] For any of these conventions to be enforceable in Nigeria, they must be ratified and domesticated by an act of parliament. Nigeria ratified the African Charter in 1983 and domesticated it in the same year by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[27] Under Article 18(3) of the African Charter, Nigeria is obligated to "ensure the elimination of discrimina-

tions against women and the protection of the rights of the women stipulated in international declarations and conventions”.[28] Based on this provision, it is my view that the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women, which is an international convention, is enforceable in Nigeria though it has not domesticated it.

The abduction of the Chibok and Dapchi school girls, despite prior intelligence reports, points to the logical conclusion that the Nigerian government has failed in its obligation to protect the rights of women against violence during a conflict. It is also my view that the allegation of rape against the military was handled improperly and falls short of acceptable standards. Nigeria is responsible for acts of its agents and the lack of transparent enquiry into the allegations connotes attempts to cover up the acts of its agent to avoid responsibility. The only way to check this is to ensure accountability.[29] A writer in International Humanitarian Law, Park J., stated that some states, by omission or commission, facilitate the use of rape as a weapon of war.[30] Nigeria’s failure to provide security for its citizens enabled the insurgents, so it should be held accountable. Where there is no accountability, states can be docile in the discharge of their responsibility. Responsibility without accountability gives rise to impunity.

Nigeria has also failed in its responsibility to prosecute offenders. When an offense has been committed, it falls on the state to investigate and prosecute the offenders. Under Article 11(3) of the Protocol to the African Charter on Human and Peoples’ Rights on the Right of Women, Nigeria is obliged “to bring perpetrators of violence, rape and other forms of sexual exploitation against women to justice before a competent court.” Since Nigeria has not shown the will to prosecute offenders of rape committed in conflict, it is unlikely that it will refer the issue to the International Criminal Court (ICC). If the United Nations Security Council, acting under Chapter VII of the United Nations Charter, refers the matter to the ICC, or the Prosecutor of the ICC initiates an investigation into the crimes, by virtue of the power conferred on the Prosecutor under Article 15 of the Rome Statute,[31] they are unlikely to get the cooperation needed from Nigeria for the ICC to effectively prosecute.

How can Nigeria be held accountable? One way is for

the African Union to conduct an inquiry into the rape committed in Nigeria during conflict and to request a report of measures taken to secure women and bring to justice persons who perpetrated rape during the conflict. There are already provisions in the African Charter and the Protocol to the African Charter on the Rights of Women requiring state parties to submit a report every two years on the legislative or other measures taken to give effect to the Charter.[32] However, there is no sanction recommended for states that fail to submit a report. This makes submission of the report optional for state parties. To enforce this provision, there should be sanctions for non-compliance. In addition, when a state is in a conflict situation, the state should be required to report efforts taken to protect the rights of women, and measures taken to bring perpetrators of rape in the conflict to justice. This can be done without derogating from the state’s sovereignty, as sovereignty is not a cloak to hide from international intervention, and the concept of state sovereignty is equated with responsibility rather than immunity. According to Timothy Zick, “[i]nterventions in the internal affairs of nations in particular those stemming from concerns regarding human rights, are now routine—a circumstance that substantially diminishes a nation’s internal sovereignty.”[33]

Where it is found that Nigeria’s failure to carry out its obligations is willful, then it should be sanctioned. In addition to condemning the action, sanctions can include making the state pay compensation to and rehabilitate the victims. So far, only the rescued Chibok girls have been rehabilitated, while other rescued women and girls are left to pick up the pieces of their lives alone. The rehabilitation of the Chibok girls was done not through a structured state policy, despite existing provisions providing for the establishment of mechanisms and accessible services for rehabilitation for victims of violence against women, but rather as an act of benevolence.[34] This is unacceptable, as the government must consider rehabilitation an obligation on its part, flowing from its failure to discharge its responsibility to its citizens.

## CONCLUSION

Nigeria’s primary responsibility is the security of lives and property of its citizens. It must secure women in the northeast from rape, by either Boko Haram insurgents or the Nigerian military. The Nigerian Con-





SUNRISE OVER HALEAKALA VIA FLICKR USER EWEN ROBERS, LICENSED UNDER CC BY.

stitution and international conventions, such as the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, all put this obligation on Nigeria. Carrying out this obligation will aid in the prevention of rape as a tool of war. By the same token, the government has an obligation to bring perpetrators of rape in armed conflict to justice. It should do so by either prosecuting these offenders at the national level, or if unwilling to prosecute rape as a war crime, handing offenders over to the International Criminal Court for prosecution. From the analysis in this article, Nigeria has not fulfilled its obligation. The use of rape as a tool of war goes on unabated and impunity is rife. It is my view that putting obligations on states, as done by the African Charter and the Protocol to the Charter on the Rights of Women, without any mechanism for enforcing accountability on the discharge of these obligations, leaves states at liberty to do as they please and these obligations end up no more than mere paperwork.

To break the cycle of rape as a weapon in the Boko Haram armed conflict, Nigeria must be held accountable for the role it plays in the commission of rape as a tool of war, and its duty to prosecute offenders. For an

end to come to the use of rape as a weapon of war in armed conflicts, a holistic approach is recommended that involves not only prosecuting the individual offenders, but looking at the role of the state and holding it accountable for its actions and inactions.

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1 See Genesis 34:2; Judges 19:23; 2 Samuel 13:14 (King James).

2 Rome Statute art. 8(2)(xxii), Jul. 17, 1998, 2187 U.N.T.S. 90.

3 *Id.* at art. 7(1)(g).

4 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sep. 2, 1998).

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13 Penal Code Act (2004), § 282 (Nigeria).

14 Criminal Code Act (2004), § 357 (Nigeria).

15 Criminal Law of Lagos State (2011), § 258 (Nigeria).

16 Child's Rights Act (2004), §§ 31-32 (Nigeria).

17 Violence Against Persons (Prohibition) (2015), § 1 (Nigeria) (applicable in the Federal Capital Territory Abuja and in the Nigerian states that have adopted it).

18 *Id.* at § 1(1).

19 *Id.* at § 1(2).

20 Rome Statute, *supra* note 2, at art. 7-8.

21 African Charter on Human and Peoples' Rights Act, Jun. 27,

- 1981, art. 5 & 18(3), 42 I.L.M. 58, 1520 U.N.T.S. 217 [hereinafter African Charter].
- 22 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, arts. 4, 11, Jul. 11, 2003 [hereinafter Protocol to the African Charter].
- 23 CONSTITUTION OF NIGERIA (1999), § 14(2)(b).
- 24 African Charter, supra note 21, at arts. 4, 6.
- 25 Protocol to the African Charter, supra note 22, at art. 3.
- 26 Id. at art. 11.
- 27 African Charter, supra note 21.
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