

Through the Nigerian Prism – An Appraisal of Constitutional Democracy and Acts of Terrorism

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Abstract

Terrorism, increasingly, is becoming part and parcel of the Nigerian experience. This is highly unfortunate in a country with considerable social, economic and religious tensions. Acts of terrorism seemingly threatens emerging democracy in the country. While the confrontation between acts of terrorism and democratic norms or traditions are not unique in the global experience, Nigeria as an emergent power in Africa is threatened as a nation, with dire consequences for the West African sub-region. Home grown terror groups such as Boko Haram have set up a confrontation with the Nigerian state that undermines the Constitution and democracy which emphasizes dialogue, debate and consensus. It is difficult for such rationality to co-exist with acts of terror perpetrated in the name of religion. Thus this paper seeks to describe and illuminate the Nigerian terrorism experience and challenges through the spectrum of constitutional democracy. It warns that this regional giant cannot win the fight against acts of terror through a response that is not in accordance with constitutional democracy.

I. INTRODUCTION

Terrorism, at the moment, is at the front burner of the Nigerian political agenda posing a risk to national integrity and a blow to development aspirations. Though other countries like Uganda, Kenya, and Tanzania have been unfortunate to experience terrorist acts since 1998, Nigeria had been relatively immune to such concerns until more recently.¹

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¹ In December 1998, US embassies in Dar es Salaam and Nairobi were bombed and there were bomb blasts in Kampala, East African Human Rights Report – Uganda, Uganda Report 2003, 1 E. African J. Hum. Rts. & Democracy 73 2003, p. 84; P. Kwesiga and S. Candia, 1st June 2012, “*Al-Shabaab Terrorist Sneaks into Uganda*”, New Vision: <http://www.newvision.co.ug/news/631574-al-shabab-terrorist-sneaks-into-uganda.html>. Site accessed on 12.2.2014; see also C. Irvine, 25th September 2013, “*Kenya Shopping Mall Terror Attack: Up to 130 Feared Dead*” The Telegraph: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10332852/kenya-shopping-mall-terror-attack-up-to-130-feared-dead.html>. Site accessed on 12.2.2014.

However, the challenge of terrorist acts in relatively fragile democracies is an issue that should concern policy makers and the general public in Africa.²

The domestic terrorism challenge started from political struggles for the control of oil resources in the Niger Delta.³ As the Nigerian Constitution and plethora of legislation awards absolute control over oil and gas resources to the Federal Government (FG) to the exclusion of marginalized host communities who suffer the pernicious impact of extant and past oil pollution.⁴ However the problem seems to have taken a positive turn with an amnesty deal between the FG and Movement for the Emancipation of the Niger Delta (MEND).⁵ Unfortunately, the terrorism gauntlet has been taken up by the Boko Haram sect, who seemly have less clear cut goals apart from the destruction of the secular Nigerian state and the declaration of a nation governed under Shariah law.⁶

Of course, terrorist acts are the antithesis of stable governments. The FG under the national constitution assumes duties and responsibilities such as providing good governance and security for citizens. It is, however, noted that constitutions are considerably only the preliminary steps in creating a legal order and by themselves can embody only as much meaning as the underlying culture permits.⁷ Consequently, the realization of democratic ideals usually depends on more than the wordings of any constitutional document.

² Although the numbers of deaths emanating from terrorist acts are relatively minor compared to those occurring from traffic accidents, gun homicides, natural disasters and diseases, terrorism seems to create disproportionate public concern. This can be attributed to the fear and passion generated by terrorist acts in which relatively small scale harm can produce large scale impacts. Hence its adoption by groups that lack the capacity of States. See S.P. Marks, "Branding the 'War on Terrorism': Is there a 'New Paradigm' of International Law?", *Michigan State Journal of International Law*, vol. 14 pp. 72-74; W. McCormack, *Understanding the Law of Terrorism*, Lexis Nexis, 2007 pp 3-7.

³ For an excellent background analysis to oil and gas conflicts in the Niger Delta see E.T., Bristol-Alagbariya, *Participation in Petroleum Development: Towards Sustainable Community Development in the Niger Delta*, CEPMLP, University of Dundee, 2000, pp 3-12.

⁴ Section 44(3) of the Constitution of the Federal Republic of Nigeria ('CFRN') 1999 states that "the entire property in and control of all minerals, mineral oils and natural gas in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation". Also s 1(1) of the Petroleum Act 1969 similarly ensures that the entire ownership and control of all petroleum in, under or upon any land is vested in the State. Y. Omorogbe, *Oil and Gas Law in Nigeria: Simplified Series*, Malthouse Press Ltd, Lagos, 2001, p. 34. Note that the "State" in this context refers to the Federal Government of Nigeria and not the federating units or states.

⁵ MEND is one of the largest militant groups in the Niger Delta region of Nigeria. It aims to fight against widespread oil pollution in the Niger Delta; and seeks greater involvement of indigenous people in the control and management of the petroleum sector. From 2006 to date, MEND has bombed public buildings, sabotaged petroleum infrastructure, kidnappings and guerrilla warfare. However, there have been relatively few attacks since an amnesty program in 2009. The program started by then President Umaru Yar'Adua offered cash and a pardon to militants so long as they surrendered their arms, Xan Rice, 6th August 2009, "*Nigeria Begins Amnesty for Niger Delta Militants*", *The Guardian*: <http://www.guardian.co.uk/world/2009/aug/06/niger-delta-militants-amnesty-launched>. Site accessed on 12.2.2014.

⁶ Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad (People Committed to the Propagation of the Prophet's Teachings and Jihad) is better known by its Hausa name Boko Haram (Western education is forbidden) is a radical Islamist group founded in 2002 with the aim of establishing an Islamic state in Nigeria. It is believed to have links with international terrorist groups such as Al Qaeda in the Islamic Magreb (AQIM) and al-Shabab. See J. Campbell et al, 26th December 2012, "*Boko Haram and Nigeria's Pervasive Violence*", Council on Foreign Relations: <http://www.cfr.org/Nigeria/boko-haram-nigerias-pervasive-violence/p29706>. Site accessed on 18.2.2014.

⁷ A.M. Emon, "The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law" in S. Choudry, *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford University Press, 2008, p 260.

Democracy, by its very nature, emphasizes the logic and rationality of dialogue, debate, choice and consensus over public policies in the pursuit of the fulfillment of the needs of the citizenry and the primary functions of meeting the public interest.⁸ This implies *inter alia* that individual rights and fundamental freedoms as well as common interest and public security ought to be safeguarded against terrorist acts. However, there is the concern that in protecting citizens, the state may wish to override personal freedoms and liberties in exchange for public safety and stability.⁹ This paper will argue that this is a false choice that ultimately endangers constitutional democracy to the detriment of citizens.¹⁰

The paper adopts a doctrinal research methodology to critically assess the Nigerian legislative and policy response to the terrorism challenge. The objective is to examine constitutional democracy against acts of terrorism as described in Nigerian counter terrorism law. Therefore, the paper is arranged as follows. Part II reviews constitutional democracy in Nigeria. Part III investigates international regime on terrorism as well as institutional and legal responses by the Nigerian state. Part IV assesses the definition of acts of terrorism under the Terrorism (Prevention) Act (TPA) 2011;¹¹ and Part V locates the fight against acts of terrorism within democratic governance.

II. CONSTITUTIONAL DEMOCRACY IN NIGERIA

Constitutional democracy or liberal democracy developed in Europe as a reaction to oppression caused by the fusion of state and church in the eighteenth century.¹² The theory posits that no man can rule without the consent of others.¹³ It is, therefore, premised on a representative structure that recognizes the fact that the *every-man* rule model is impracticable in a modern state.¹⁴ As a common form of representative democracy, constitutional democracy denotes the practice of principles such as universal suffrage, free and fair election, protection of individual rights and freedoms, separation of powers,

⁸ O. Oyewo, *Constitutionalism and The Oversight Functions of The Legislature in Nigeria*, Draft paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa Nairobi April 2007, p. 20.

⁹ The 'war on terror' does not simply endanger democratic values but threatens to vitiate democracy itself, reducing politics to security and democracy to formality. J. Hocking, "Protecting Democracy by Preserving Justice: Even for the Feared and the Hated", *UNSW Law Journal*, 2004, vol. 27, p. 338. See also E. Azinge, Roundtable on Aviation Terrorism: Imperatives for Best Practices Communiqué NIALS (Nigerian Institute of Advanced Legal Studies) Lagos, 19 January 2010. Note however that there does not have to be contradiction between security and human rights protection. See I. Cotler, Attorney General Canada, *Principles of Anti-Terrorism Act Review*, Speech given before Special Committee of the Senate on the Anti-Terrorism Act on 21 February 2005 in *University of New Brunswick Law Journal* 2005, Vol. 54 p. 54.

¹⁰ For the argument that terrorism is a separate and unusually pernicious criminal act worthy of a robust response, See C. Harding, "International Terrorism: The British Response", *Singapore Journal of Legal Studies*, 2002, p. 17; and V.V. Ramraj, "Terrorism, Security and Rights: A New Dialogue", *Singapore Journal of Legal Studies*, 2002, p. 5.

¹¹ The Terrorism (Prevention) Act (TPA) 2011 is the principal counter terrorism legislation in Nigeria. It has been recently amended, due to unfolding challenges not envisaged in the enactment, by the Terrorism (Prevention) (Amendment) Act 2013.

¹² R.A. Wokocho, "Democratic Governance, the Rule of Law and Sustainable Democracy in Nigeria", *Port Harcourt Law Journal*, 1999, Vol. 1, p. 116.

¹³ *Ibid.*

¹⁴ *Ibid.*

independent judiciary etc.¹⁵ Other features include multi-party politics and the protection of human rights.¹⁶

Furthermore, constitutional democracy requires government under law in which coalition and majority rule is balanced by minority and individual rights, and in which most rights are balanced by responsibilities.¹⁷ It entails a system in which government should be as limited as possible.¹⁸ This is due to the origins of constitutional democracy founded on the need to *inter alia* maintain law and order, ensure security of life, property and contract.¹⁹ For this writer, a very significant feature which also doubles as a goal for constitutional democracies is the balancing act between security and rights. This means that the state must be strong enough to protect its citizens as well as refrain from arbitrary use of power. Freedoms are ensured through institutional limits and control on governmental action, hence the challenge is to provide a vigorous institutional response to violence whilst controlling that response.²⁰

In most democratic systems, all laws usually flow from the constitution and any law inconsistent with the constitution is void to the extent of such inconsistency.²¹ Consequently, governmental authority must be legitimately exercised in accordance with written law and enforced in line with established procedure. The state is therefore inherently bound to respect as well as promote the rights of its citizens.

That is why democracies grant rights and may establish limits on specific freedoms.²² These usually exist in the form of legal limitations such as laws against defamation and slander in defense of public policy, safety and health as the case may be.²³ There may also be limits on attempts to undermine human rights and on the promotion of terrorism. J.S. Mill in his liberty principle stated that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others, on the utilitarian ground that adoption of the principle would promote the general good’.²⁴ The common justification for these limits is that they are

¹⁵ A. Nafiu et al., “Challenges of Constitutional Democracy and Good Governance”, The Tribune: <http://www.tribune.com.ng/index.php/tribune-law/7385-challenges-of-constitutional-democracy-and-good-governance>. Site accessed on 12.2.2014.

¹⁶ See T. Olagunju, A. Jinadu and S. Oyovbaire, *Transition to Democracy in Nigeria (1895-1993)*, Safari Books Export and Spectrum Books Limited, 1993, pp. 10-11.

¹⁷ *Supra* note 9.

¹⁸ In this regard, the concept of constitutional democracy is interwoven with constitutionalism or limited government which projects the idea of including certain rules and regulations geared towards preventing abuses or exercise of arbitrary power by government. See K.M. Mowoe, *Constitutional Law in Nigeria*, Malthouse Press Limited, Lagos, 2008, p. 9.

¹⁹ U. Ukiwo, Civil Society and Democratization in Nigeria, (paper presented at a Democracy Education Forum Organized by IHRHL in Port Harcourt, 29 June 1998) at 8.

²⁰ See W. McCormack, *Op. cit.* note 2. p. 1. This has been a challenge that has occupied western democracies for at least the past four hundred years. See generally, P. Chalk, “The Response to Terrorism as a Threat to Liberal Democracy”, *Australian Journal of Politics and History*, 1998, Vol. 44.

²¹ See I.O. Smith, *The Constitution of the Federal Republic of Nigeria: Annotated*, Ecovatch Publishing Nigeria Limited, Lagos, 1999, pp. 3-4. See also section 1(3) of the CFRN 1999.

²² K.M. Mowoe, *Constitutional Law in Nigeria*, *supra* note 18 at 523.

²³ See for example section 45 of the CFRN 1999.

²⁴ J.S. Mill, On Liberty in J.H. Ely, “Democracy and the Right to be Different”, *New York University Law Review*, Vol 56, 1981, at 401.

necessary to guarantee the existence of democracy, or the existence of the freedoms themselves.²⁵

One of the most important functions of government is to provide security within its borders, whilst maintaining the delicate balance between communal rights and individual freedoms. Therefore, a democratic government, as a matter of necessity should have checks and limitations for the protection of citizens and in particular minorities, through the guarantee of fundamental rights. This is why democratic nations that vigorously promote civil liberties seemingly claim a higher moral ground than other regimes. However, acts of terrorism within such states raise serious dilemma as to the price of freedom. In other words, whether to maintain civil liberties and thus risk being perceived as ineffective in countering violence; or alternatively to restrict civil liberties and thus risk delegitimizing its constitutional democratic mantle.²⁶

Democracy in Nigeria rests on the Constitution of the Federal Republic of Nigeria (CFRN) 1999, which proclaims that sovereignty is based on the people of Nigeria.²⁷ This is due to the presumption that citizens relinquish some of their rights while retaining other important ones, and that in turn, the state provides public security and order. The principles of Nigeria's democracy are secured in the 1999 Constitution which provides for duly elected Executive and Legislative arms of government at general elections conducted by the Independent National Electoral Commission (INEC).²⁸ The country shares similar features with other constitutional democracies such as representative government, recognition of fundamental rights and periodic elections. Being a heterogeneous state, it is considered that representation of all sections of the society is not just ideal but a necessity, in addition to adherence to the rule of law.²⁹

Furthermore, chapter IV of CFRN 1999 acknowledges individual human rights and the respect, protection and enforcement of such rights in the event of infringement. This is significant because it is believed that legal protections and liberties define democracy.³⁰ In *Federal Republic of Nigeria & Anor. V. Ifegwu*,³¹ the Supreme Court per Tobi JSC held that:

Fundamental rights inhere in man because they are part of man. If a hierarchical order of our laws is drawn, fundamental rights will not only take a pride of place but the first place.

²⁵ K.M. Mowoe, Constitutional Law in Nigeria, *supra* note 18 at 524. For example, allowing free speech for those advocating mass murder undermines the right to life and security.

²⁶ *Ibid.*

²⁷ Section 14 of the CFRN 1999. The 1999 Constitution is the 8th Nigerian Constitution since its formation with the amalgamation of Northern and Southern Protectorates of Nigeria in 1914. It is also the 4th Constitution since Independence from Great Britain in 1960.

²⁸ See sections 1(2), 14, 47-50, 130-135 of the CFRN 1999.

²⁹ Inter-Parliamentary Union, Article 22 of the Universal Declaration on Democracy, states that 'institutions and processes of democracy must accommodate the participation of all people in homogeneous as well as heterogeneous societies in order to safeguard diversity, pluralism and the right to be different in a climate of tolerance': http://www.uni-bonn.de/~uholtz/ZEF/welterklaerung_zur_demokratie.pdf. Site accessed on 18.2.2014.

³⁰ J. Hocking, *Supra* note 9 at p. 336.

³¹ (2003) 5 SC 252, p. 304.

Unfortunately, the predatory years of military rule and the dictatorship loom over extant democratic institutions and human rights culture. According to a published report, the major hurdle to deepening democracy in Nigeria, is authoritarian rule by an institutionalized oligarchy.³² That said, since the inception of democratic government in 1999, the courts have played a critical role in developing constitutional practice and the guarantee of fundamental rights.³³ The Fundamental Rights Enforcement Procedure Rules (FREPE) 2009, in particular, provides for speedy adjudication of fundamental rights matters.³⁴ This of course, deepens democratic access for the benefit of the citizenry.

Deciphering national posture towards the parallels of fundamental rights, on one hand and public order and national security on the other hand, may serve as a clear indicator of Nigeria's perspective in its *new* fight against terrorism. Under the 1999 Constitution, restriction on and derogation from fundamental rights are featured. According to section 45 of the CFRN 1999, reasonably justifiable limitations can be legitimately placed on some fundamental rights in the interest of public safety, public order, public morality and public health or for the purpose of protecting the rights and freedom of other persons

The case of *Inspector General of Police v. ANPP*³⁵ offers some insight in matters of public order, security and safety. In that case, the court in its judgment voided the provisions of Public Order Act³⁶ in line with democratic ideals. Adekeye JCA opined that it was wrong to continue to rely on colonial repression techniques which prevent people from exercising and enjoying their rights under the guise of the Public Order Act. The court held that:

The Public Order Act- relating to the issuance of police permit cannot be used as a camouflage to stifle the citizens' fundamental rights in the course of maintaining law and order.

On the other hand, the court in the prior case of *Asari-Dokubo v. Inspector General of Police*,³⁷ unequivocally upheld the need to safeguard national security against the interest of the individual. The court was of the view that:

Section 35 of the 1999 Constitution contains provisions to protect the personal liberty of the individual. However, a charge of treasonable felony is a very serious offence especially where national security is threatened or there is the real likelihood of its being threatened. The human rights or the individual rights must be suspended until the national security can be protected or well taken care of...³⁸

³² See USAID Report, Democracy and Governance Assessment of Nigeria 2006: http://pdf.usaid.gov/pdf_docs/PNADI079.pdf. Site accessed on 23.02.2014.

³³ T. Mamman and P.C. Okorie, Nurturing Constitutionalism through the Courts: Constitutional Adjudication and Democracy in Nigeria, *Nigerian Law School*, p. 1.

³⁴ See paragraph 3 of the FREPE Rules 2009 for the overriding objectives of the courts.

³⁵ (2008) WRN 65. It is viewed as a milestone in Nigeria's bid to enthrone constitutional democracy and guarantee citizens' right to congregate as the Court of Appeal, Abuja Division, struck down the Public Order Act.

³⁶ Cap P42 Laws of the Federation of Nigeria (LFN) 2004.

³⁷ (2006) 11 NWLR Pt 991 p. 324.

³⁸ *Ibid.* p. 336.

It is thus a matter of conjecture where the court will lean in respect of ensuring fundamental human rights or upholding national security concerns. The court in *Inspector General of Police v. ANPP* rightly identifies colonial hangover as a problem in entrenching democratic culture or norms.³⁹ Undoubtedly, colonial governments were strongly bent on the protection of public order and security, through a rule based on force and subjugation of native people.⁴⁰ It is, however, submitted that Nigerian jurisprudence increasingly favours the protection of human rights. The two cases merely illustrate the importance of the judiciary in balancing security and democratic considerations under the 1999 Constitution.

A. Terrorism in Nigeria: Contextual Background

Despite the antecedents of MEND, Nigerians until 2009 were seemingly not convinced that it was possible for domestic or international terrorism to be an intractable problem for the nation. On 26 July 2009, violence broke out in Bornu perpetrated by an Islamic sect known as the Boko Haram, which resulted in many casualties (about 800 people were killed).⁴¹ The group was alleged to have burnt schools, government establishments and churches. The Nigerian government moved in promptly with the military and police force to make arrests and contain the situation.⁴² In the process, the head of Boko Haram was killed and this raised serious issues of human rights abuse and extra-judicial killing by law enforcement agencies.⁴³

Since then, Nigeria has witnessed a lot of terrorist incidents which has strained the ethnic, religious and regional fabric of the nation. Notable acts of terrorism have included international and domestic elements. In relation to the former, on 25 December (Christmas day) 2009 Nigerian citizen, Umar Farouk Abdulmutallab, boarded a plane from Lagos, Nigeria en route Detroit USA. After a change over in Amsterdam to Delta Airlines, he attempted to blow up the plane. The unfortunate incident led to Nigeria's listing by the US as a 'Country of Interest' with respect to terrorism and tightened air security worldwide.⁴⁴ On the domestic front, suicide bombers infiltrated the Nigerian Police Headquarters on 16 June 2011, resulting in a bomb blast which may have accidentally detonated in the

³⁹ Supra note 36.

⁴⁰ A.A. Idowu, A.A. Adedeji and S.O. Oyelade, Public Order, State Security and Democracy In Nigeria, Paper presented at the *Nigerian Association of Law Teachers 39th Annual Conference (Proceeding) at Faculty of Law, University of Maiduguri, Maiduguri*, 13th – 15th October 2003 at 122.

⁴¹ The violence later spread to Yobe, Kano and Borno. The group founded by Mohammed Yussuf opposes secularism, western education and institutions.

⁴² See news reports available at: <http://english.aljazeera.net/news/africa/2009/07/2009730174233896352.html>. Site accessed on 12.02.2014. Also, in August 2011, eighteen people were killed when the UN building in Abuja was attacked by a Boko Haram suicide bomber. UN Secretary General, Ban Ki Moon described the attack as 'an assault on those who devote their lives to helping others', Mark Tran, 26th August, 2014, "*Nigeria attack: Islamist militants claim responsibility for UN building blast*", The Guardian: <http://www.theguardian.com/world/2011/aug/26/nigeria-attack-islamists-claim-responsibility>. Site accessed on 18.02.2014.

⁴³ Ibid.

⁴⁴ See George Agba and Philip Nyam, 4th January 2010, "*Nigeria: Govt Protests U.S. List of Terrorist Nations*", All Africa: <http://allafrica.com/stories/201001050013.html>. Site accessed on 18.02.2014.

car park killing two people (suspected bomber and a civil defence employee).⁴⁵ This is believed to be the first suicide bombing in Nigeria.⁴⁶

The brutality of Boko Haram attacks has placed the FG and security forces under strong criticism for alleged ineffectiveness and even incompetence. Increasingly, communities do not have confidence in the ability of the Nigerian state to address the Boko Haram problem. There is also suspicion of collaboration between rogue members of the security forces and Boko Haram.⁴⁷ Even worse, security forces arm youths in communities affected by terrorist attacks. Involving poorly trained and armed communities in direct confrontation with terror groups might arguably be regarded as an abdication of responsibility and such behavior clearly leaves room for significant problems when casualties occur.⁴⁸

III. INTERNATIONAL LEGAL REGIME ON TERRORISM

The international legal framework governing terrorism consists of a series of instruments at transnational level that contain a series of legally binding standards on nation states aimed at the prevention and control of international terrorism.⁴⁹ These instruments concentrate on particular variants of terrorism such as aviation protection, terrorism finance and protection of nuclear materials. Such developments have taken place usually under the auspices of the United Nations to ensure international cooperation and avoid resort to unilateral action.⁵⁰

⁴⁵ 16th June 2011, “Two Killed In Abuja Police Headquarters ‘Bomb Blast’”, Thisday Live: <http://www.thisdaylive.com/articles/multiple-explosions-rock-police-headquarters-in-abuja/93339/>. Site accessed on 14.02.2014.

⁴⁶ Other attacks that have strained Nigeria’s ethnic and religious co-existence include: the Christmas Day Massacre on 25 December 2011 in which over 30 people were reportedly killed in churches located at Madalla and Jos (Northern Nigeria); church bombings and reprisal attacks in which about 50 people were killed in Kaduna (Northern Nigeria); and attacks on Yobe College of Agriculture resulting in around 70 deaths. Martin Plaut, 25th December 2011, “Nigeria Churches hit by blast during Christmas”, BBC News: <http://bbc.co.uk/news/world-africa-16328940>. Site accessed on 20.02.2014; 18th June 2012, “Nigeria’s Boko Haram bombed Kaduna churches”, BBC News: <http://www.bbc.co.uk/news/world-africa-18496285>. Site accessed on 22.02.2014; and 22nd February 2014, “Gunmen Massacre 78 Students in Yobe”, Vanguard Newspapers: <http://www.vanguardngr.com/2013/09/gunmen-massacre-78-students-yobe/>. Site accessed on 22.02.2014.

⁴⁷ Kabiru Sokoto, the prime suspect in the Madalla Christmas attacks escaped from police custody the day after his initial arrest. Though he was later re-arrested following a public outcry. See 10th February 2012, “Xmas Day Bombing: Kabiru Sokoto Re-arrested”, The Nation: <http://www.thenationonlineng.net/2011/index.php/news/36389-xmas-day-bombing-kabiru-sokoto-re-arrested.html>. Site accessed on 22.02.2014.

⁴⁸ 9th September 2013, “Gunmen Kill 13 Civilian JTF Members in Borno”, Daily Times: <http://www.dailytimes.com.ng/article/gunmen-kill-13-civilian-jtf-members-borno>. Site accessed on 22.02.2014; see also, O. Audu, 14th September 2013, “Tension in Maiduguri as Police Kill Civilian-JTF” Premium Times: <http://premiumtimesng.com/news/144699-tension-maiduguri-police-shot-dead-civilian-jtf.html>. Site accessed on 22.02.2014.

⁴⁹ The application of international law in Nigeria is governed by section 12 (1) CFRN 1999. The section states that no treaty between Nigeria and any other country “shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.” Thus the domestication of international law in Nigeria requires an “implementing statute” to transform the treaty into municipal law. This may be through its substantive provisions; by reference to the treaty in question; or re-enactment of the treaty’s provisions. A. Oyeboode, *Of Norms, Values and Attitudes: The Cogency of International Law*, University of Lagos, Inaugural Lecture Series 2011, pp. 40-41. Under Article 26 of the Vienna Convention on the Law of Treaties 1969, Nigeria is obliged to perform her international obligations on the basis of the *pacta sunt servanda* principle. See also U. Ezech, *Tackling Terrorism – A Human Rights Perspective on the Terrorism (Prevention) Act 2011*, Faculty of Law, University of Lagos, LL.B thesis July 2012, p. 31.

⁵⁰ See S. Ali-Balogun, *The United Nations and Counter Terrorism: A Critical Assessment*, Faculty of Law, University of Lagos, Masters in International Law and Diplomacy (MILD) thesis November 2012, p. 35.

Nigeria is signatory to a number of international and regional instruments against terrorism.⁵¹ It should be noted that some of these instruments were ratified before the extant challenges with terrorism. For instance, the Convention on Offences and Certain Other Acts committed on Board Aircraft (1963) ratified on 7 April 1970; and Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988) ratified on 25 March 2003.⁵²

Despite the plethora of UN instruments, it is instructive that the UN does not have an internationally agreed definition of terrorism. It is this lacuna that has prevented the adoption of a comprehensive convention on international terrorism despite widespread concern among UN member states.⁵³ That said, the United Nations Ad-hoc Committee on International Terrorism began negotiations on a comprehensive international terrorism convention with the following draft definition in 2008.⁵⁴

Article 2 of the draft comprehensive convention states that:⁵⁵

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
 - a. Death or serious bodily injury to any person; or
 - b. Serious damage to public and private property including a place of public use, a State or government facility, a public transportation system or infrastructure facility or the environment; or
 - c. Damage to property, places, facilities or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act.

⁵¹ Note that Nigeria has not ratified or acceded to all UN instruments against terrorism. There is therefore a lacuna in the international treaty network against terrorism from the Nigerian perspective. See United Nations Office on Drugs and Crime Working Document, *A Review of the Legal Regime against Terrorism in West and Central Africa: Angola, Benin etc* United Nations, New York., 2009, pp. 2-3, 138 (available at www.unodc.org).

⁵² More recently, Nigeria has ratified the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) ratified on 24 February 2004; Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991) ratified on 10 May 2002; and International Convention for the Suppression of the Financing of Terrorism (1999) ratified on 16 June 2003. Note that none of these Conventions have been domesticated under Nigerian law. See: A Paper presented by the Federal Ministry of Justice at the Bayo Ojo Centre for Aviation and Transportation Law, Roundtable on Terrorism in the Aviation Industry: Imperatives for Best Practices in Nigeria held at Nigerian Institute of Advanced Legal Studies (NIALS) University of Lagos Campus, 19 January 2010.

⁵³ The main reason for the failure to agree on a terrorism definition stems from the insistence of the Organisation of the Islamic Conference (OIC) that any acceptable definition of terrorism should exclude armed struggle for liberation and self determination, particularly in situations of foreign occupation. See UN 101, EYE on the UN, Human Right Voices: http://www.humanrightsvoices.org/EYEontheUN/un_101/facts/?p=61. Site accessed 24.09.2014.

⁵⁴ UN Report of the Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996, General Assembly Official Records, Fifty-seventh Session, Supplement No. 37 (A/57/37); See also A.P. Schmid, "Terrorism and Human Rights: A Perspective from the United Nations" in M. Ranstorp and P. Wilkinson, *Terrorism and Human Rights*, Routledge, London, 2008, at 16.

⁵⁵ *Ibid.*

This definition, if the convention is ultimately endorsed, will provide a solid working definition of acts of terrorism especially those that have a significant international dimension. However, there is no lacuna under Nigerian law as acts of terrorism are defined under domestic law. At the regional level, Nigeria is party to the OAU Convention on the Prevention and Combating of Terrorism (AU Convention) made in Algiers in July 1999.⁵⁶ Also Nigeria adopted the Plan of Action for the Prevention and Combating of Terrorism in September 2002 in Algiers, Algeria. The Plan of Action requires member states to establish a forum to facilitate timely exchange and sharing of ideas and intelligence for combating terrorism within the continent.⁵⁷

On the sub-regional level, the Economic Community of West African States (ECOWAS) does not have any specific instruments on acts of terrorism. However, ECOWAS set up the Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) to underpin the commitment of member states to implement Anti-Money Laundering and Combating Financing of Terrorism (AML/CFT) regimes in the sub region. Note also the relevance of the ECOWAS Regional Convention on Judicial Mutual Legal Assistance on Criminal Matters (1992) and ECOWAS Regional Convention on Extradition (1994).

A. Institutional and Legal Response to Terrorism

The executive arm of the Nigerian Government is imbued with vast powers to ensure the defence of Nigerian territory e.g. war powers are exercisable by the President with or without notice and sanction of the National Assembly.⁵⁸ The President or such other authorized Minister of the Government of the Federation can exercise directive powers over the Nigerian Police Force with respect to the maintenance and securing of public safety and public order.⁵⁹ By section 305 CFRN 1999, the President also has power to issue

⁵⁶ Article 1 (3) defines terrorism as “any act which is a violation of the criminal laws of a state party and which may endanger the life, physical integrity or freedom of, or cause or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint or to act according to certain principles: or disrupt any public service, the delivery of any essential service to the public or to create a public emergency: or create general insurrection in a state”, Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, 13-14 October 2004, Algiers, Algeria, adopted in October 2004 at Algiers Mtg/HLIG/ConvTerror/Decl (II) Rev 2.

⁵⁷ Ibid p. 7. This resulted in the establishment of the African Centre for the Study and Research on Terrorism (ACSRT). The Centre is established in accordance with Section H Paragraphs 19-21, AU Action Plan for the Prevention and Fight against Terrorism. It ensures coordinated effort among AU Member States and regional mechanisms in preventing and combating terrorism. The centre also helps in implementing the AU counterterrorism framework. - About the African Centre for the Study and Research on Terrorism (ACSRT), 25th January, 2013, African Union Peace and Security: <http://www.peaceau.org/en/page/2-3591-static-about-african-centre-for-study-and-research-on-terrorism-ACSRT>. Site accessed 24.09.2014.

⁵⁸ See sections 5 (4) (a) - (b) & 5 (5) of the of the CFRN 1999.

⁵⁹ See section 215 (3) CFRN 1999. Note that much of the burden of fighting Boko Haram in the North Eastern region of Nigeria has fallen on the Nigerian army. Under s 8 of the Armed Forces Act, the President determines the operational use of the armed forces in Nigeria to maintain and secure public order and public safety, Armed Forces Act Cap A20 LFN 2004.

a proclamation of a state of emergency where there is an actual or imminent breakdown of public order and public safety in the Federation or any part thereof.⁶⁰

Clearly, the executive embodied by the President of the Federal Republic of Nigeria wields enormous powers in terms of execution and maintenance of laws enacted by the National Assembly. Furthermore, the President also has powers to ratify international instruments on terrorism and undertake transnational cooperation to fight the scourge of terrorism. This is crucial for the fight against the Boko Haram terror group as well as its international affiliates.

From the legislative angle, section 11 of the CFRN 1999 provides that the National Assembly may make laws for the Federation or any part thereof with respect to maintenance and securing of public safety and public order. While exercising its law making powers, the National Assembly is required to ensure that the three-fold goal of peace, order, and good governance is achieved through those laws.⁶¹ In other words, the legislative chambers are obliged to make laws to satisfy basic needs such as education, housing, health, security and social services.⁶²

Flowing from its constitutional powers, the National Assembly sought to address terrorist acts facing the nation through the Terrorism (Prevention) Act (TPA) 2011. The Act seeks to criminalize and punish all acts of terrorism committed in Nigeria. It also seeks the effective implementation of the Convention on the Prevention and Combating of Terrorism and the Convention on the Suppression of the Financing of Terrorism. The Act started as a private member bill and is based on the Commonwealth Secretariat's Model Legislative Provisions on Measures to Combat Terrorism.⁶³ The TPA has been recently amended by the Terrorism (Prevention) (Amendment) Act 2013. The Amended Act also makes provision for extra-territorial application of the Act and strengthens terrorist financing offences.

It is noteworthy that despite the importance of the TPA 2011 in providing clear definition on acts of terrorism, there were existing laws that can equally be invoked

60 See section 305 (3) (c), (d) and (f) of the CFRN 1999. Note that s 305(f) allows the President to impose a state of emergency where there is a public danger that clearly constitutes a threat to the existence of Nigeria. Undoubtedly, Boko Haram acts of terror constitute such a threat. On 31 December 2011, President Goodluck Jonathan declared a partial state of emergency in selected local government areas of Borno, Yobe, Plateau and Niger states to stem Boko Haram violence. The emergency proclamation was lifted on 19 July 2012. See 'Jonathan Declares State of Emergency in Borno, Others', The Vanguard newspaper 31 December 2011; M.M. Onuorah and I. Salami, "Jonathan Lifts State of Emergency in 15 Councils", The Guardian newspaper, 19 July 2012. See also CKN Nigeria, 15 May 2013, "State of Emergency Declared in 3 Northern States", CKN Nigeria: <http://www.cknnigeria.com/2013/05/state-of-emergency-declared-in-3.html>. Site accessed 28.02.2014.

61 See section 4(2) of the CFRN 1999. The laws must be consistent with the Constitution. The National Assembly can exercise its powers for the purpose of assisting in carrying out a policy which may affect matters which are directly within its legislative competence or even indirectly. See *A.G. Ondo State V. A.G. Federation & 35 Ors* (2002) 6 SC Part 1, p. 62.

62 M.A.O. Anigilaje, "Information Input in Law-making in a Developing Democracy: Nigerian Example", in I.A. Ayua (ed) *Nigerian Current Legal Problems NIALS*, 1998, Vols. 2 & 3, p. 132.

63 Document available at: <http://www.docstoc.com/docs/29745346/MODEL-LEGISLATIVE-PROVISIONS-ON-MEASURES-TO-COMBAT-TERRORISM>. Site accessed on 28.02.2014. The Terrorism bill went through second reading on September 17, 2008 and was passed into law on 3 June 2011. Note that in an effort to preserve rights and freedoms enshrined in the 1999 CFRN, the Senate Committees on National Security and Intelligence, Foreign Affairs and Human Rights, Judiciary and Legal Matters were involved in drafting the TPA 2011. See B. Agande, "Senate Moves to Combat Terrorism", *Vanguard*, 7 July 2010 p. 8.

against perpetrators of terror. The Criminal Code, for instance, criminalizes acts against marine navigational safety (s 349) and taking hostages (s 365). Also, there are criminal sanctions for assaults and violence against the person (Chapter 25), homicide and infanticide (Chapter 27), offences endangering life or health (Chapter 28).⁶⁴ Other laws on explosives, firearms and public order offences are also applicable to terrorism offences.⁶⁵ On an institutional basis, section 3 of the Nigerian Security and Civil Defence Corps (NSCDC) Act 2007 empowers the Nigerian Security and Civil Defence Corps (NSCDC) to monitor, investigate and take every necessary step to forestall acts of terrorism and other related matters. The focus of the NSCDC is on the manufacture, possession, requisition of weapons, explosives of nuclear, biological or chemical effect without lawful authority.⁶⁶

With respect to terrorism financing, section 15 of the Economic and Financial Crimes Commission (EFCC) Act 2004 specifically criminalizes terrorism and financing of terrorism. The section enables the Commission to freeze and confiscate assets of terrorists and their associates. The functions of the EFCC are *inter alia* the establishment and maintenance of a system of monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved, maintaining data, statistics, records and reports on persons and organizations involved.⁶⁷ Similarly, section 6 (6) of the Public Order Act prohibits organisations from recruiting, collecting funds or soliciting other forms of support for unlawful activities e.g. membership of terrorist groups.⁶⁸ Preventing terrorist finance is of course a key preventative mechanism in counter terrorism.

IV. ASSESSING THE ANTI-TERRORISM ACT 2011: DEFINITION OF ‘ACTS OF TERRORISM’

Under the TPA 2011 as amended, all acts of terrorism are prohibited. Section 1 TPA states that: a person or body corporate who knowingly in or outside Nigeria directly or indirectly willingly - does, attempts or threatens any act of terrorism; commits an act preparatory to or in furtherance to an act of terrorism; omits to do anything that is reasonably necessary to prevent an act of terrorism; assists or facilitates the activities of persons engaged in an act of terrorism or is an accessory to an offence under this Act; participates as an accomplice in or contributes to the commission of any act of terrorism or offences under this Act; assists, facilitates, organizes or directs the activities of persons or organizations engaged in any act of terrorism; is an accessory to any act of terrorism;

⁶⁴ Criminal Code, Cap C38 Laws of the Federation of Nigeria (LFN) 2004.

⁶⁵ See Explosives Act Cap L5 LFN 2004; Firearms Act F28 LFN 2004; and Public Order Act Cap P 42 LFN 2004.

⁶⁶ Section 4 (iv) NSCDC Act 2007.

⁶⁷ See section 6 of the EFCC Act Cap E1 LFN 2004. The Money Laundering (Prohibition) Act 2011 and Central Bank of Nigeria Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) Regulation 2009 (as amended) imposes criminal liability on a person or financial institution that knowingly assists in money laundering or fails to report suspicious transactions to the Nigerian Financial Intelligence Unit (NFIU). Also, the Terrorism Prevention (Freezing of International Terrorist Funds and Other Related Measure etc.) Regulation 2011 gives effect to TPA 2011 with specific focus on UN Security Council Resolutions 1257 and 1373.

⁶⁸ Cap 42 LFN 2004.

or incites, promotes or induces any other person by any means whatsoever to commit any act of terrorism or any of the offences referred to in this Act, commits an offence under this Act and is liable on conviction to maximum of death sentence.⁶⁹

The first thing to be noticed from the above is that the provision contemplates that a person accused of contravening this law must deliberately act or facilitate an act of terrorism. Thus, the criminal law principles of *mens rea* and *actus reus* are necessary for the conviction of a person accused under the law.

Secondly, section 1 (3) of the Act defines ‘act of terrorism’ as an act which is deliberately done with malice, aforethought and which:

- (a) may seriously damage a country or an international organization;
 - (b) is intended or can reasonably be regarded as having been intended to-
 - (i) unduly compel a government or international organization to perform or abstain from any act,
 - (ii) seriously intimidate a population;
 - (iii) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization or
 - (iv) otherwise influence such government or international organization by intimidation or coercion and
 - (c) involves or causes, as the case may be-
 - (i) an attack upon a person’s life which may cause serious bodily harm or death;
 - (ii) kidnapping of a person;
 - (iii) destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
 - (iv) the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for any of the purposes in paragraph (b) (iv) of this subsection;
 - (v) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into and development of biological and chemical weapons without lawful authority;
 - (vii) the release of dangerous substance or causing of fires, explosions or floods, the effect of which is to endanger human life;
 - (viii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
 - (d) an act or omission in or outside Nigeria which constitutes an offence within the scope of a counter-terrorism protocol and conventions duly ratified by Nigeria.
- (4) An act which disrupts a service but is committed in pursuance of a protest. However, demonstration or stoppage of work is not a terrorist act within the meaning of this definition provided that the act is not intended to result in any harm referred to in subsection (3) (b) (i), (ii) or (iv) of this section.

⁶⁹ See section 1 (1)(2) of the TPA 2011 as amended.

From the extensive definition reproduced above, there are key factors that are essential to and underpin an act of terrorism under Nigerian law. The Boko Haram activities outlined above clearly meet the terms of anti-terrorism legislation. Explosion, murder and intimidation of government in order to impose Islamic law on multi-religious Nigeria is covered by law. Such acts are also against the Nigerian Constitution and cannot be justified under any argument of self determination as the constitutional democratic process allows every Nigerian to participate in the electoral process. In this light, Sharia law has always been available to Muslims in many Northern States in Nigeria as an exercise in democratic choice.

For an act of terror to come within the TPA it must meet certain criteria. These are:

- the act must cause ‘serious damage’;
- the act must be intended or reasonably be regarded to intend undue compulsion, serious intimidation, serious destabilization or influence a government, international organization or people and
- involves violence, harm, illegal acts, interference or disruption.

The draftsman employs phrases such as ‘unduly compel’, ‘seriously intimidate’, ‘seriously destabilize’ and ‘otherwise influence’. Simply put, the motivation for the use of such phrases is not farfetched as terrorism is a sensitive issue and considered to be a serious breach of domestic and international peace. The use of broad strokes is also because terrorist acts have grave consequences on government and communities. As a result of the heightened mischief, the draftsmen of the counter-terrorism law have deemed it wise to insert wide-ranging phrases that capture acts inimical to society.

That said, it is arguable that the definition of ‘act of terrorism’ is too inclusive and almost vague as governmental authorities are given wide leeway in classification of terrorist acts. Interestingly, the problem of broad definition is not restricted to Nigeria but has been identified as a general defect with anti-terrorism laws.⁷⁰ One of the downsides of broad definitions is that it foists uncertainty on the legal system and may pose a difficult obstacle to successful prosecution of suspected terrorists. It is important that provisions of the law should meet certain standards of clarity and precision.⁷¹

Additionally, it is noteworthy that the definition under the TPA 2011 covers acts or omissions targeted at any country or international organization, without directly making reference to Nigeria as the target. This covers the situation where foreign embassies

⁷⁰ In October 2001, Amnesty International (AI) raised concerns that under the guise of fighting international terrorism, governments have rushed to introduce draconian measures that threaten human rights of their citizens, immigrants and refugees. According to AI, common features of the new anti-terror laws include broad or vague definitions of new offences, wide powers of detention without trial, prolonged incommunicado detention (which is known to facilitate torture), intrusions into privacy, and measures which effectively deny or restrict access to asylum or speeds up deportation. See C. Luminas, “Counter-Terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice”, *African Human Rights Law Journal*, 2007, Vol. 7, pp. 36-37.

⁷¹ Thus clear and unambiguous words are to be used in statutes which must be given their ordinary meaning. See *Garba v. Federal Civil Service Commission* (1988) 1 NWLR Pt. 71, 449; *Bamaiyi v. A-G Federation & Ors* (2001) 12 NWLR Pt. 727, 468.

are a target for international terrorists, or as occurred in Abuja Nigeria, the bombing of the United Nations building. It is a general principle of criminal law that the subject of the offence must be certain or ascertainable. Thus once it is clear that the target is not necessarily Nigeria, but a foreign government or international institution, then it would be possible to prosecute under the TPA 2011.

Furthermore, by virtue of section 1(3) (d) of the TPA 2011, acts or omission in or outside Nigeria which are offences under any international instrument duly ratified by Nigeria is punishable under the Act. Hence, Nigerian jurisprudence on terrorism is unrestricted as it applies to acts committed outside its borders as well as within. With respect to extra-territorial jurisdiction of the TPA 2011, it is important for municipal anti-terrorist legislation to provide for practical limits in terms of jurisdiction. As K. Roach rightly posits, terrorism prosecutions are difficult enough without a state asserting jurisdiction when another state is in a better position to prosecute.⁷²

The provisions of the Act are also extensive with regards to the kinds of actions or omissions criminalized under the Act. From the above definition, terrorist acts directed at individuals, government and public facilities including transport, infrastructure including oil and information system structures and the environment (including causing of fires and flood) are within the purview of the Act. Also, dealing in weapons of nuclear, biological and chemical nature is rightly contemplated by the law in view of modern concerns about terrorism. The end goal is to ensure that constitutional, political and socio-economic structures are not undermined and destabilized to the peril of the state.

The TPA 2011 requires proof of intention to intimidate or influence behaviour of the population, government or international organization concerned. There is, however, no express requirement to prove political, religious or ideological motive or motivation as an element of the act of terrorism. The question of motive or motivation is significant because for matters of terrorism, the potential for harm may depend on the motive or motivation. This seemingly implies that motive/motivation may distinguish a terrorist from an ordinary street criminal.⁷³

The TPA provides for a scale of penalties depending on the offences committed. This ranges from a term of imprisonment of not less than 2 or 3 years to 15 or 20 years. In addition, fines can be levied ranging from N5 million to N100 million. The death penalty is the maximum sentence on conviction.⁷⁴ The court before which a person is convicted of an offence under the Act may, in addition to any penalty imposed by the court, order the forfeiture of any proceeds or funds traceable to a terrorist act irrespective of the person in whose names such proceeds or funds are held or in whose possession they are found.⁷⁵ For corporate bodies found guilty under the Act, in addition to sanctions

⁷² See K. Roach, "A Comparison of South African and Canadian Anti-terrorism Legislation", *African Journal of Criminal Justice*, 2005, Vol. 18, at 133.

⁷³ See W. McCormack *supra* note 2 at 16-18.

⁷⁴ Section 1 (2) of the Terrorism (Prevention) (Amendment) Act 2013. This new penalty was introduced in 2013 amendment to replace life imprisonment as the maximum sentence in the TPA 2011. The Nigerian National Assembly sought to address public concern about Boko Haram by increasing legal penalties in counter terrorism legislation.

⁷⁵ Section 33(1) *ibid*.

provided, they may be subject to civil proceedings and administrative sanctions by the relevant authorities.⁷⁶

V. SITUATING THE FIGHT AGAINST ACTS OF TERRORISM IN DEMOCRATIC GOVERNANCE

Despite the plethora of international instruments and domestic laws applicable to terrorist acts, Nigeria seemingly struggles to utilize criminal law or anti-terror legislation against terrorist groups. Implementation issues have sometimes been a concern to Nigeria as a developing country. Effectively implementing the law in the face of terrorist acts has been difficult to date, as there has been no conclusive prosecution or conviction either with the law subsisting before the TPA 2011 nor since the enactment of the specialist law.

Hence, the amended TPA 2011 makes the Attorney - General of the Federation (AGF) the authority for the effective implementation and administration of the Act - to strengthen and enhance the existing legal regime to ensure conformity of Nigeria's counter-terrorism laws and policies with international standards and United Nations Conventions on Terrorism; maintain international co-operation essential for preventing and combating international acts of terrorism; and the effective prosecution of terrorism matters.⁷⁷ It is doubtful, if this 2013 amendment will automatically result in proper realisation of the TPA 2011 in light of a perceived absence of political will to prosecute on the part of the Nigerian Federal Government.

Furthermore, the amended TPA 2011 sought to resolve the jurisdictional conflict in the earlier law between the offices of the Inspector General of Police (IGP), Director-General of the State Security Services (SSS) and the National Security Adviser (NSA). This resulted in a public fight between the IGP and NSA for authority to take a lead role in the fight against terrorist acts.⁷⁸ The problem was that the office of NSA seemed to exist outside the law as there is no mention of the body in the CFRN 1999 nor in any statute. The 2013 amendment has addressed the administrative uncertainty that undermined counter-terrorism efforts.

The amended TPA 2011, established the Office of the National Security Adviser (ONSA) as the coordinating body for all security and enforcement agencies under the Act.⁷⁹ The functions of ONSA include:⁸⁰

- (a) Provide support to all relevant security, intelligence, law enforcement agencies and military services to prevent and combat acts of terrorism in Nigeria;

⁷⁶ Section 33(2) *ibid.*

⁷⁷ Section 1A (2) of the Terrorism (Prevention) (Amendment) Act 2013.

⁷⁸ The TPA 2011, unfortunately, failed to identify the agency with principal responsibility for tackling terrorism. During the drafting of the legislation, there was a view that the State Security Service (SSS) as a special security and intelligence agency should be the lead agency. Another view was to locate anti-terrorism efforts within a special department of the Nigerian Police. Some critics pointed out the general effectiveness of the police in crime fighting as a reason not to overburden the agency with extra responsibilities. See F. Awowole-Browne, Anti-terrorism bill mired in controversy, *The Sun* newspaper 23 August 2010.

⁷⁹ Section 1A (1) of the Terrorism (Prevention) (Amendment) Act 2013.

⁸⁰ Section 1A (1) (a) – (d), *Ibid.*

- (b) Ensure the effective formulation and implementation of a comprehensive counter-terrorism strategy for Nigeria;
- (c) Build capacity for the effective discharge of the functions of all relevant security, intelligence, law enforcement and military services under this Act or any other law on terrorism in Nigeria; and
- (d) Do such other acts or things that are necessary for the effective performance of the functions of the relevant security and enforcement agencies under this Act.

While the lead role of the ONSA is now beyond dispute, the TPA 2011 as amended provides a parallel role for law enforcement and security agencies that are responsible for gathering intelligence and investigation of terrorism offences; enforce anti-terrorism laws; conduct research into terrorism prevention measures; and education of the Nigerian public on information provision to the security services.⁸¹ The list of law enforcement and security agencies include the Nigerian Police Force; Department of State Security Services; Economic and Financial Crimes Commission; Nigerian Armed Forces; Nigeria Prison Services; National Agency for the Prohibition of Traffic in Persons; National Drug Law Enforcement Agencies; National Intelligence Agency etc. In the author's view, it is difficult to justify the effectiveness of 12 agencies and counting as valuable institutions combating terrorism.

Legal and institutional failure is perhaps best demonstrated in mounting 'acts of terror' carried out by the Nigerian security forces. Killing the founding head of Boko Haram illustrates the challenge faced by constitutional democracy. The execution of Mohammed Yussuf in police custody after the army had arrested him has seemingly caused more problems than it solved, as the organization has splintered into different groups and cells with conflicting and uncertain radical agenda.⁸² This singular incident shows that the rule of law and democratic tenets have not established deep roots in the Nigerian polity. Despite the public scandal, there has been no rigorous response by the FG to uncover and punish the perpetrators of this heinous crime.

In the fight against terrorism and in the guise of protecting citizens, Nigerian government security forces comprising of the military, police and intelligence personnel ("Joint Task Force") have reported been engaged in extrajudicial killing of hundreds of Boko Haram suspects and random members of the communities where attacks have occurred. In addition, the Joint Task Force is said to carry out operations with excessive force, physical abuse, secret detention, extortion, and destruction of private property.⁸³

⁸¹ Section 1A (3) and (4), *ibid.*

⁸² Boko Haram has seemingly splintered with the formation of Ansaru, *Jama'atu Ansarul Muslimina Fi Biladis Sudgn*, roughly translated as "Vanguards for the Protection of Muslims in Black Africa", Boko Haram: Splinter group, Ansaru emerges, Vanguard 1 February 2012; Boko Haram Splinter group, Ansaru kills Seven Foreign Captives, Daily Independent 10 March 2013.

⁸³ Human Rights Watch, October 2012, "*Spiraling Violence: Boko Haram Attacks and Security Forces Abuses in Nigeria*", p. 9: <http://www.hrw.org/sites/default/files/reports/nigeria1012webwcover.pdf>. Site accessed on 28.02.2014. According to Amnesty International, 950 terror suspects died in the first 6 months of 2013 in detention facilities run by the military JTF, Nigeria: Deaths of Hundreds of Boko Haram Suspects in Custody Requires Investigation: <https://www.amnesty.org/en/news/nigeria-deaths-hundreds-boko-haram-suspects-custody-requires-investigation-2013-10-15>. Site accessed 28.02.2014.

Other allegations of crimes carried out by security forces in their response to Boko Haram terrorism include: a reprisal attack on Maiduguri, Borno State and the Bama Massacre. In the former situation, after the killing, through the use of an Improvised Explosive Device, of a Lieutenant leading a Joint Task Force (JTF) patrol along Lagos street, in Gwange area of Maiduguri state, members of the JTF were alleged to have shot indiscriminately at members of the public and burnt 50 houses, shops and vehicles with casualty figures being put at 30.⁸⁴ For the Bama Massacre, security forces were alleged to have killed over 180 and destroyed over 2,000 houses in reprisal for Boko Haram attacks in Bama, Borno State. The true picture was revealed by satellite images, contradicting the Nigerian army's report of 36 deaths (30 Boko Haram members and 6 civilians) and 30 houses burnt. Many people were said to have died in an attempt to escape into Lake Chad.⁸⁵

It is increasingly clear that Nigerian citizens are caught between the terrorist rock of Boko Haram and hard reprisal attacks by security forces that are outside the ambit of counter-terrorism laws. There is a need for security forces to respect constitutional rights and liberties of citizens even in the face of the challenging destructive force facing the nation. Abandoning constitutional democratic principles in tackling acts of terror is not only ineffective but counter-productive. Assassinations, unlawful arrests and detention of citizens will more likely to aid terrorists by engendering the sympathy of a traumatized populace.

Without doubt, it is essential that the law be seen to be transparently applicable to crimes committed by Boko Haram suspects as well as rogue members of the JFT. This will ensure cooperation of the general public which is required for intelligence gathering and undermining Boko Haram propaganda that they are engaged in fight to establish Sharia law, which already exists in most Northern States in Nigeria. For this writer, public trust and confidence is the strength of constitutional democracy and this is the ultimate weapon against terrorist acts. Any nation that ignores or undermines democratic safeguards in fighting terrorism will be playing in the same amoral pit as terror groups. Ultimately, such action polarises the country and does not have any beneficial outcomes.

VI. CONCLUSION

This paper has sought to critically analyse and assess constitutional democracy and terrorist acts from the Nigerian perspective. Of note is the fact that Nigerian anti-terrorism jurisprudence is still at an embryonic stage and it is important at this crucial stage to get

⁸⁴ Agency Reporter, 9th October 2012, "*Soldiers go haywire...kill 30, burn 50 houses in Maiduguri to avenge army officer's death*", The Punch: <http://www.punchng.com/news/soldiers-go-haywire-kill-30-burn-50-houses-in-maiduguri-to-avenge-army-officers-death/>. Site accessed 28.02.2014; Agency Reporter, 9th October 2012, "*10 die in JTF's reprisal for officer's death*", The Nation: <http://thenationonline.net/new/news/10-die-in-jtfs-reprisal-for-officers-death/>. Site accessed 28.02.2014.

⁸⁵ George Agba and Sadiq Abubakar, 2nd May 2013, "*Baga Massacre: Human Rights Watch Accuses Army of Cover-Up*", Leadership Newspaper NG: <http://www.leadership.ng/news/020513/baga-massacre-human-rights-watch-accuses-army-cover>. Site accessed on 28.02.2014; Adam Nossiter, 29th April 2013, "*Massacre in Nigeria Spurs Outcry Over Military Tactics*", NYTimes.com: http://www.nytimes.com/2013/04/30/world/africa/outcry-over-military-tactics-after-massacre-in-nigeria.html?_r=0. Site accessed on 28.02.2014.

it right as a democratic country. Critical tensions generated by terrorism are heightened for a nascent democracy that already faces severe developmental challenges. It is not surprising after its long period of military dictatorship that the Nigerian state is seemingly more comfortable with repression and suppression as opposed to democratic values that lay emphasis on debate and dialogue.⁸⁶

In consonance with constitutional democracy, the Nigerian state has enacted the TPA 2011 as amended, as a response to acts of terrorism. This is despite the fact that terrorist acts are similarly covered under general criminal law. Unfortunately, counter terrorism law does not seem to have ensured an effective, robust but legal response from the poor functioning Nigerian state. To ensure that acts of terrorism do not undermine democratic tenets and the Nigerian state, terrorist suspects, victims and the general public are entitled to see the law in action.

There has to be an assurance that the state does not act in a lawless manner outside its constitutional mandate. Otherwise there may a fatal weakening of public trust and faith in the democratic state. Simply put, the proponents of terror will have succeeded in their goal of destroying the Nigerian State.

⁸⁶ That said, news reports of dialogue between the FG and Boko Haram to provide amnesty for acts of terrorism has divided the general public. Though talks between the Presidential Committee on Dialogue and Resolution of Security Challenges in the North and Boko Haram seem to have collapsed, there is a view that the rule of law should prevail with members of Boko Haram as well as rogue members of the security services facing the full penalty of the law, Temidayo Akinsuyi, 17th October 2013, "*Boko Haram: Reviewing FG's Amnesty Debacle*", Daily Independent: <http://dailyindependentnig.com/2013/04/boko-haram-reviewing-fgs-amnesty-debacle/>. Site accessed on 28.02.2014.

