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CAN THE U.S. UNDERTAKE MILITARY ACTION IN NIGERIAN SOIL AGAINST TERRORIST ACTIVITIES?

THE RIGHT, POWER AND DUTY OF THE UNITED STATES TO INTERVENE AND CURB HUMAN RIGHTS VIOLATION POSED BY TERRORIST GROUPS AND GOVERNMENTAL INACTION IN NIGERIA UNDER INTERNATIONAL LAW

A Discussion Point

By

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1

PREAMBLE

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Much has been said, and a good deal indiscriminately written about the announcement by the U.S President, Donald J. Trump, and the congressional hearing by the U.S Congress concerning the crisis of religious freedom, killings, and genocide perpetrated by various extremist groups in Nigeria.

Many writers, speakers, and political publicists refer to it with notes of warning against the breach of Nigeria's sovereignty. Others give, without actual disposition, notes of caution that Nigeria, as a sovereign state, was immune to U.S interference and that such intended action breaches the principles of international law, which is anchored on territorial integrity and sovereign immunity.

Many points are interesting arguments, but they lack depth of analysis of international law and collectively constitute falsehood, intellectual hypocrisy, or an absence of knowledge of the principles and practice of international law, as well as of the positions of the United Nations and the United States in the global system.

2

PREAMBLE

The complexity of Nigeria's insecurity lies not solely in the various types of incidents and their intricate interconnections. It is also about how the incidents are layered – and how more layers of the problem are developing and advancing to more and more sophisticated and formidable systems that might turn insurmountable, like that of Yemen, Afghanistan, and Syria.

Although countering the problem of terrorism in Nigeria has become very complicated, Nigeria's insecurity, while complex, for now is neither insurmountable nor best addressed through internal military and police engagements because of the web of insecurity that has permeated Nigerian institutions and communities over time. But instead, through internal political will and systemic reform in the long run. In the immediate term, through external military intervention and intelligence assistance from a country like the United States in particular or the United Nations in general. Nigerians must realize this truth if they mean to see cessation of wanton killings and destruction.

Nigeria's situation did not start today. If the Nigerian government had a solution to it, insecurity could have been curtailed. I must inform you that Nigeria's political class and military intellectual resources, collectively, has a pattern of capacity limitation. It is not about a change in government or political leadership. It is about the system, national character, and level of intellectual capacity. It was on this note that I wrote to the former President of the United States, Barack Obama on May 6, 2014, on the following words:

1

ABSTRACT OF MY MESSAGE TO PRESIDENT BARACK OBAMA

ABSTRACT OF MY MESSAGE TO PRESIDENT BARACK OBAMA ON NIGERIA'S BOMBINGS AND ASSOCIATED HUMANITARIAN MALAISE ON MAY 6, 2014

"When I woke up this morning, I fought the intense thought that had hammered me all night. I recall that when I was a child, boys and girls in a playhouse at Akim Barracks, Calabar, Nigeria, played together. A quarrel broke out. The bigger folks mistreated the younger ones. I took an exclusive position, fought the bigger folks, and wounded six. My biological father, of late, an astute military officer and very strict disciplinarian of his life-days, was invited by the army authority for questioning. Having known his penal eccentricities, I trembled.

Astonishingly, MY DADDY SAID I WAS AMONG THE ELDEST AND THAT I HAD THE RESPONSIBILITY TO BREAK THE QUARREL. THAT WE WERE THE STRONGEST, SO WE HAD A RESPONSIBILITY TO PROTECT THE SMALLER, SOFTER, AND WEAKER ONES. THAT IT WAS THE RIGHT THING TO DO BECAUSE IF WE DON'T DO IT, NO ONE ELSE WOULD.

I know the degree of pain I sustain in seeing an increasing number of orphans, widows, and widowers in Nigeria, an immense number of public servants, self-employed, unemployed, and downtrodden citizens dying prematurely upon violent and cruel causes that remain inexplicable to reason. Some of those brains, perhaps, hold a great sense of talent and wisdom for the world's development.

2

ABSTRACT OF MY MESSAGE TO PRESIDENT BARACK OBAMA

Current violent attacks in Nigeria appear to carry a mixture of political and social undertones. The United Nations usually waits until internal conflict becomes a full-fledged war and transforms into an international conflict, and then the UN would offer last treatments after death.

As a firm believer in the United States of America and an admirer of U.S. intelligence, sincerity of purpose, and seamlessness, I'm appealing to President Barack Obama and the United States Congress to find a way to assist the Nigerian people and government. I'm persuaded that the Nigerian Federal Government would not, at this time, hesitate to admit that ego-sovereignty won't fix this. If she is lax or looks askance, there are extant international law mechanisms that could be deployed to weaken terrorism in Nigeria.

Nigeria needs American assistance. This is not psychobabble; it is a heartbreaking entreaty. And I entreat you to take responsibility for the common concern of mankind. Moral History will vindicate that responsibility.

Cyprian F. Edward-Ekpo,
Registrar, International Institute for Humanitarian and Environmental Law (ISHERL)."

The above is an extract of a letter I sent to former President Obama on May 6, 2014. In that letter, I highlighted the scope of the United States' power and duty in helping Nigeria overcome the simmering security crisis. President Obama's administration, perhaps due to assimilation of propaganda from many of those who are currently serving as Nigerian political leaders, seemingly had no interest in helping Nigeria. Instead, the U.S. government under President Obama seemed to be have been interested in regime change from the PDP-led government of Goodluck Jonathan to the APC-led government of Muhammadu Buhari. President Donald J. Trump's administration appears to have the interests of the victimized and potentially victimized populations at heart.

However, we have heard and read much about the mastery oppositions to the step intended by the United States, which are erroneously predicated on the doctrine of territorial integrity and sovereignty. At this juncture, it is pertinent to highlight the right, power, and duty of the United States to intervene against terrorists' activities in Nigeria under international law.

1

JURISDICTION AS BASIC PRINCIPLE OF INTERNATIONAL LAW

Jurisdiction reflects the basic principles of international law: state sovereignty, equality of states, non-interference in domestic affairs, and the right of interference in specific circumstances, which are anchored in the extraterritorial application of jurisdiction under international law.

The grounds for the exercise of jurisdiction are not identical in the cases of international law. While jurisdiction is closely linked to territory, it is not exclusively so. For example, many states have jurisdiction to try offences committed outside their territory, provided that they constitute international wrongful acts or international crimes.

Suffice it to say that, from the nature of the sovereignty of states. In contrast, a state is supreme internally within its own territory and must not intervene in the domestic affairs of another nation. The principles and rules of international law constrain the duty of non-intervention in another state's domestic jurisdiction. After all, just as international law cannot exist without the comity of nations, it is international law that gave birth to the principles of state sovereignty and sustains them, as Article 2(7) of the United Nations Charter makes clear. Otherwise, a situation in which nations would invade and absorb other countries at will through brute force, as in the antediluvian times, would have been commonplace.

2

In international law, emerging methods for addressing new problems have evolved. To this end, the doctrine of the extent of domestic jurisdiction is now limited by issues that fall within the ambit of *jus cogens* and *erga omnes* principles of international law. These are evident in certain forms of human rights that constitute peremptory norms and in specific acts that constitute international crimes. These range from the territorial principle to the universality principle.

In this respect, while states have a broad measure of discretion in matters occurring within their own territory, their discretion is limited only by prohibitive values of international law, which loom large in the context of human rights violations and international crimes.

That is to say, in matters of peremptory norms of human rights, which I will list here (as not all human rights are peremptory norms) and in issues of international crimes (for example, terrorism and genocide), the following authoritative personalities can deal with them:

1) The affected state can deal with it,
2) Two or more states can deal with it by means of a cross-state territorial jurisdiction established via a treaty (Example of such a cross-state territorial jurisdiction are found in the Channel Tunnel case International Arraignment signed on November 25, 1991 between France and the United Kingdom and Clause 1 (b) and (c) of the Israeli-Jordan Treaty of Peace of 1994).
3) The United Nations can deal with it under the capacity and duty provided in Article VII of the UN Charter.
4) If a state is unwilling or incapable of dealing with it as a duty, the United States (or any state) can deal with it through its foreign relations law, subject to the rules of international law.

1

SUMMARY

SUMMARY

In summary, under international law, the United Nations, the U.S. (or any nation) can undertake military action abroad in the following measures and under the following principles:

1) By primarily taking into consideration the observation of the **Prohibition on Force under Article 2(4) of the UN Charter.** Since this generally bars nations from using or threatening force against another state's territorial integrity or independence, but with two exceptions to the general prohibition on force: That is:
   - First Exception: **Self-Defense – Article 51 of the U.N. Charter** allows individual or collective self-defense if an "armed attack" occurs, until the UN Security Council acts. Currently, attempts are being made to expand the definition of "armed attack" also to include cyberattacks, support for proxies (such as the case of Iran supporting and sponsoring Hezbollah and Hamas, or the so-called axis of resistance, which gives Israel the right of self-defense against Iran).
   - Second Exception: **Under Chapter VII of the U.N. Charter,** the Security Council can authorize military force to maintain or restore international peace and security.

2

SUMMARY

2) **Humanitarian Intervention:** International law has expanded in scope following the principles of humanitarian law, and now exists collective responsibility of nations to protect civilian populations where humanitarian law has been grossly violated. Although this lacks broad consensus for unilateral military action.

3) **Customary International Law:** Customary international law is that aspect of law that sustains *erga omnes* principles of international law and peremptory norms of international human rights (*jus cogens* principles) and makes them binding on all states, regardless of whether or not a state has signed and ratified a treaty relating to such human rights instrument or for the prevention of international crimes.

Since *erga omnes* principles of international law attach to the common concern of mankind, a state cannot invoke the doctrine of sovereignty to prevent the international community from protecting the human rights of civilian populations when those rights constitute peremptory norms of international law. In addition, no state may invoke its municipal law as a justification for breaching an obligation of international law.

3

SUMMARY

Article 27 of the Vienna Convention on the Law of Treaties (VCLT) provides for the axiomatic principle of international law that "a State cannot rely on the provisions of its domestic law as justification for its failure to perform its international law obligations. The reason is that domestic law is the product of the State's unilateral will, and such will cannot validly override the performance of obligations under international law. In 1932, the Permanent Court of International Justice (PCIJ) in the case of Polish Nationals, emphasized that a State cannot adduced its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Similarly, the International Court of Justice (ICJ), in its decision on the Land and Maritime Boundary between *Cameroon and Nigeria (Cameroon v. Nigeria with Equatorial Guinea Intervening), 1999,* held that a state cannot invoke its domestic law and constitution against an international legal obligation.

That international law imposes obligations and liabilities upon states as well as individuals has since been recognized. Where Nigeria continuously fails to protect the human rights of citizens and residents against genocide caused by religious extremists and other forms of terrorism, it has breached its obligation under the International Covenant on Civil and Political Rights of 1966, particularly Article 2. It therefore cannot invoke its constitution or the doctrine of sovereignty to prevent the international community from intervening to salvage the situation.

4

SUMMARY

❖ PEREMPTORY NORMS OF INTERNATIONAL HUMAN RIGHTS LAW

Within the context of customary international law, a state violates peremptory norms of international human rights law if, as a matter of state policy or action, it **practices, encourages,** or **condones** the following international crimes or crimes against humanity:

a) Genocide,
b) Slavery or slave trade,
c) Systemic discrimination and extermination based on religious belief, race or sex,
d) Murder or causing the mass disappearance of individuals,
e) Mass torture or other cruel, inhuman, or degrading treatment or punishment,
f) Systemic racial discrimination or apartheid,
g) Other international crimes, including terrorism, harmful narcotic trading, hostage taking, pillage, and act of aggression
h) A constant pattern of gross violation of international recognized human rights,

5

SUMMARY

Customary international law of human rights was highlighted in **§. 702 of Third Restatement of U.S Foreign Relations Law, Volume 2 (1987), p. 165**

This leads us to the fourth measure. That is :

- Domestic authorizations made pursuant to international law, such as AUMFs (Authorizations for Use of Military Force) made in accordance with the U.S Foreign Relations Law, which grant presidential power for such duties, but must align with international legal frameworks and principles of international law. This is primarily needed in cases of terrorism or threats to national security as a justification. Authorizations for the Use of Military Force (AUMFs) are among the remedies for violations of *erga omnes* obligations under international human rights law. To this end, Congress can grant the President authority to act. (for example, the president of the United States was authorized to act against terrorism, in 2002 AUMF for Iraq) to use "all necessary and appropriate force". The President uses these AUMFs, alongside inherent powers, to deploy troops, with a specific scope and duration. The only limitation is that international law requires such actions to fit within the UN Charter's narrow exceptions or risk being deemed illegal.

THRESHOLD QUESTIONS

The threshold question regarding jurisdiction is whether the alleged conduct violates the law of nations and whether the rights violated fall within the principles of jus cogens, which command *erga omnes* obligations in international law.

We observe that the Preamble and Articles 55 and 56 of the UN Charter have made the treatment of a state's own citizens a matter of international concern when such treatment violates the *jus cogens* norms of human rights or international agreements. Human rights issues, particularly the peremptory norms, are no longer matters of exclusive jurisdiction and the sole power of an affected state.

It is at this dimension that the United States court can invoke laws such as the Alien Tort Act of 1790 to try cases of international crimes committed against nationals of other states and in foreign states, where such violations constitute the violation of the United States laws that are of a peremptory norm of international law character. This was substantially addressed by the U.S Court in the case of *Tadic v. Karadzic (1996.)*

International law against terrorism and genocide is so fundamental that it is *jus cogens*, or compelling law, which overrides all other principles of international law, including the well-established principle of sovereignty. Earlier, the U.S Supreme Court had recognized such a principle in the case of *Argentine Republic v. Amerada Hess Shipping Corporation (1989) when it considered the provisions of the* Foreign Immunity Act of 1976.

CONCLUSION

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Beyond the prevailing disposition of international law, Nigeria's insecurity indirectly affects U.S. national security and economic interests.

First, a large number of people enter the United States each year seeking refuge and asylum. Many of the complaints are tied to terrorism threats, religious extremists' torture, and threats to life in their own country. Some of those claims are justified and verifiable, especially concerning religious extremist terrorism and the displacement of persons in Nigeria. The United States will, in a sense, be protecting its own interests by intervening to prevent mass migration that has burdened the present Western world.

Secondly, we may pretend that the U.S is a secular state. The truth is, the U.S. as a nation was founded on the premise of the Christian Bible, which informs all its culture, values, ways of life, and laws, including foreign relations laws. When the U.S is convinced about the existence of religious genocide, which constitutes a violation of a peremptory norm of customary international law, it has a duty to intervene where the affected state, like Nigeria, is either unwilling or incapable of dealing with it, or if Nigeria practices or encourages or condones such a form of terrorism.

NOTE

NOTE

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