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The International Criminal Court and the Nigerian Crisis: An Inquiry into the Boko Haram Ideology and Practices from an Islamic Law Perspective

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Abstract

Since its foundation in 1999 Boko Haram has carried out numerous acts of violence on the territory of Nigeria. The Office of the Prosecutor (OTP) of the International Criminal Court (ICC) has been monitoring the violence between Boko Haram and Nigerian armed forces as part of a preliminary investigation. It has stated that there is reason to believe that Boko Haram is responsible for war crimes and crimes against humanity and that the violence between Boko Haram and the armed forces has reached the level of an armed conflict of non-international character under international law. This paper assesses certain types of behaviour of Boko Haram from an Islamic law perspective and examines whether Islamic law condemns or justifies such acts. Arguably, it would help the ICC in asserting the legitimacy of its judgments, if it was able to prove that such judgments are compatible with the legal and belief system recognised by the actors at trial. In turn it would enable the Court to deal with at least some of the criticism aimed at it, for being an imperialistic institution.

Keywords

International Criminal Court; Boko Haram in Nigeria; Islamic law (Shari'a); *jihādī* ideology; martyrdom; suicide bombings; inciting to and committing suicide; terrorism; *hirābah*; *takfīr*

1 Introduction

Nigeria ratified the Rome Statute¹ on 27 September 2001. During the period up to, and inclusive of, 1 June 2013, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) received 65 communications under Article 15 of the Rome Statute in relation to Nigeria. 28 of these were included in the preliminary examination.² The Court publicly announced that it was undertaking a preliminary examination into events in Nigeria on 18 November 2010. At the invitation of the Attorney-General and Minister for Justice, the OTP undertook a mission to Nigeria in July 2012, and gathered information on the attacks which had been attributed to Boko Haram.³ Following on from this mission, the OTP determined that there was a reasonable basis to believe that since 2009 Boko Haram has committed acts constituting the crimes against humanity of murder under Article 7(1)(a) of the Rome Statute and persecution under Article 7(1)(h) of the Statute.⁴ According to the OTP 2012 Report, since 2009 the group has ‘launched a widespread and systematic attack that has resulted in the killing of more than 1,200 Christian and Muslims [sic] civilians in different locations throughout Nigeria.’⁵ With regard to war crimes, the OTP in its recent Report on Preliminary Examination Activities 2013,⁶ determined that an armed conflict of non-international character did exist on the territory of Nigeria between the Nigerian security forces and Boko Haram and it was consequently proceeding with the investigation with regard to both crimes against humanity and war crimes.

This paper will tackle some important questions about the *jihādī* ideology and practices of Boko Haram from an Islamic law perspective and will examine whether Islamic law condemns or justifies such acts. Among these questions are the following: Can members of

* A version of this paper was presented by Dr. Mohamed Elewa Badar as part of the Guest Lecture Series of the Office of the Prosecutor of the International Criminal Court, 30 January 2014.

¹ Rome Statute of the International Criminal Court, 1998, A/CONF.183/9

² See International Criminal Court, ‘Nigeria’, available online at

<http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx> (visited 19 September 2013).

³ See Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2012’, available online at

<http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pages/report-on-preliminary-examination-activities-2012.aspx> (visited 9 September 2013), at para. 93.

⁴ See The Office of the Prosecutor, ‘Situation in Nigeria Article 5 Report’, available online at <<http://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%2005%20August%202013.PDF>> (visited 18 September 2013), at para. 15.

⁵ *Ibid* at para. 15 and see also paras 46-51

⁶ Office of the Prosecutor, *supra* n 3, at paras 214-218.

Boko Haram claim that they are immune from prosecution as these crimes were committed during the context of *jihād*? Who can declare *jihād* and against whom this can be declared? Are the alleged crimes committed by these groups prohibited under Islamic law? Answers to these questions will provide important guidance to the ICC as it proceeds with the Nigerian situation. In the past the Court has been heavily criticised as an imperialist institution, imposing a Westernised view of justice on African states. In order to counter some of these criticisms the Court needs to be open to an analysis of the implementation of Shari'a law in situations and cases where it is relevant, such as in Nigeria. This will help to legitimise the Court's decisions and judgments.

Section 2 of this paper traces the rise of Boko Haram in Nigeria and discusses the motivations of this group. It describes some of its violent activities and the reactions of the Nigerian government and armed forces. It also explores the incorporation of Shari'a based rules into the Nigerian legal system. Section 3 provides an analysis of Boko Haram's *jihādī* ideology, how the practice of suicide attacks was misrepresented as martyrdom to the impressionable followers of this group, and the criminal liability of those who incited the commission of such attacks under Islamic law.

2 Nigeria and the Rise of Boko Haram

Nigeria is a federation of 36 states, and a federal capital territory of Abuja, with 168 million inhabitants; making it the most populous country in Africa.⁷ It has almost 350 ethnic groups, speaking about 250 different languages.⁸ About 50% of the population are Muslim, 40% are Christian, and 10% follow traditional African religions.⁹ Most Muslims live in North-Nigeria, whereas Christians and the traditional African religions believers inhabit the southern half of the country.¹⁰ The southern part of the country has primarily been influenced by western politics, education, culture and economy.¹¹

⁷ T Brinkel and S Ait-Hida, 'Boko Haram and Jihad in Nigeria' (2012) 40 *South African Journal of Military Studies* 1-21, at 7. See also The Office of the Prosecutor, *supra* n 3, at para.18.

⁸ Brinkel and Ait-Hida, *supra* n 7, 8.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*; See also CRS Report for Congress, 'Nigeria: Current Issues', available online at <<http://fpc.state.gov/documents/organization/102651.pdf>> (visited 19 June 2013), 11.

The political history of Nigeria ‘has been dotted with images of violent conflagrations and acts of terrorism’¹² since colonial times and inter-communal and ethnic violence have continued to define the State’s history since independence in 1960.¹³ Since 1999, central and northern parts of Nigeria, which had previously been relatively peaceful,¹⁴ have been affected by serious inter-communal political and sectarian and religious violence.¹⁵ The main causes include ethnic and or religious divisions in the states, as well as a struggle for political power, poverty and unemployment.¹⁶ A US National Council Intelligence report from 2005 predicted that Nigeria would disintegrate within 15 years¹⁷ and ‘to many public commentators and even some prominent Nigerian leaders, the country is cascading towards becoming a failed state.’¹⁸ This all has as a consequence that ‘many Muslims are becoming increasingly sceptical about a system that has brought them little benefit and has served well the interests of the established elite.’¹⁹ They would therefore, as noted by Brinkel and Ait-Hida, ‘show an alternative to the dominant political culture by leading an exemplary life that is marked by austerity, community service and rejection of corruption.’²⁰

2.1 The Rise of Boko Haram

Against the background of state failure, poverty and unemployment, the radical group of Boko Haram emerged in the mid-1990s.²¹ According to the then Nigerian Director of Defence Information, Colonel Mohammed Yerima, the sect has existed since 1995 under the leadership of Abubakah Lawan. The group later came under the control of Mohammed

¹² O Osumah, ‘Boko Haram Insurgency in Northern Nigeria and the Vicious Cycle of Internal Insecurity’ (2013) 24:3 *Small Wars and Insurgencies* 536-560, 537.

¹³ I Aghedo and O Osumah, ‘The Boko Haram Uprising: How Should Nigeria Respond?’ (2012) 33:5 *Third World Quarterly* 853-869.

¹⁴ A Epelle, ‘Challenges and Solutions to Ethno-religious Conflicts in Nigeria: Case Study of the Jobs Crisis’ (2011) 13:5 *Journal of Sustainable Development in Africa*, 109-124, 109.

¹⁵ FC Onuoha, ‘The Islamist Challenge: Nigeria’s Boko Haram Crisis Explained’ (2010) 19 *African Security Review* 54-67, at 54. See also GJ Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (Amsterdam University Press, Amsterdam 2010), 147.

¹⁶ The Office of the Prosecutor, *supra* n 3, at para. 77-80.

¹⁷ O Agbaje, ‘The US Intelligence Report’, *The Guardian*, Tuesday 14 June 2005, 65.

¹⁸ O Osumah, *supra* n 12.

¹⁹ D Isaacs, ‘Islam in Nigeria: simmering tensions’, *BBC News*, 24 September 2003. Available at <<http://news.bbc.co.uk/1/hi/world/africa/3155279.stm>> (visited 9 September 2013).

²⁰ See T Brinkel and S Ait-Hida, *supra* n 7, 5; R Loimeier, ‘Boko Haram: The Development of a Militant Religious Movement in Nigeria’ (2012) 2-3 *African Spectrum* 137-155; O Osumah, *supra* n 12 and D Agbiboa, ‘Why Boko Haram Exists: The Relative Deprivation Perspective’ (2013) 3:1 *African Conflict and Peacebuilding Review* 144-157.

²¹ T Brinkel and S Ait-Hida, *supra* n 7, 10; On the establishment and development of Boko Haram, see generally O Osumah, *supra* n 12 and JP Pham, ‘Boko Haram’s Evolving Threat’ (2012) 20 *Africa Security Brief* 1-8.

Yusuf, and became rooted in the Islamic Yusuifyya.²² Mohammed Yusuf was a charismatic preacher of violent, extreme Islam, and was responsible for radicalisation of Boko Haram.²³ However, following the revolt of 2009 – the attempt to overthrow the authority of the state – he was captured and brutally killed in police custody.²⁴ After his death, Abubakar Shekau became the new leader.²⁵ However, reports of his death were published in August 2013.²⁶

The sect itself was founded in Maiduguri but moved in 2004 to Kanamma, in the federal state of Yobe, which is close to the border with Niger.²⁷ Since then, this has been the base from which Boko Haram has organised its assaults.²⁸ The sect is financed by a number of sources of income, including contributions by members of the sect and donations by politicians, government functionaries and organisations within Nigeria,²⁹ and from abroad.³⁰

Boko Haram has over 280,000 members across the 19 states of North Nigeria, Chad and Sudan.³¹ Most members of the sect are young boys and men who moved from the rural areas to urban areas, in search for a better life.³² As a result of unemployment in the cities, many of them ended up attending school, such as Almajiri, which provides cheap education and imbues the young boys with a radical interpretation of Islam, thus preparing them to contribute in ethno-religious conflicts.³³ Therefore, ‘Boko Haram provided the disenchanting with a platform from which to attack the system which they believe is largely responsible for their situation.’³⁴ Members behave as if they belong to a religious sect, pray in their own mosques, do not mix with the local residents and are recognised by their long beards and

²² T Brinkel and S Ait-Hida, *supra* n 7, 10.

²³ *Ibid.*

²⁴ FC Onuoha, *supra* n 15, 60.

²⁵ T Brinkel and S Ait-Hida, *supra* n 7, 11.

²⁶ BBC News, ‘Abubakar Shekau of Nigeria's Boko Haram “may be dead”’, 19 August 2013. Available online at <<http://www.bbc.co.uk/news/world-africa-23761048>> (visited 19 September 2013). A Nigerian intelligence report stated that Shekau was shot on 30 June 2013 when soldiers raided a Boko Haram base at Sambisa Forest in north-eastern Nigeria and died in July or August 2013. However, Boko Haram has not commented on this report.

²⁷ FC Onuoha, *supra* n 15, 55.

²⁸ T Brinkel and S Ait-Hida, *supra* n 7, 10.

²⁹ *Ibid.*

³⁰ FC Onuoha, *supra* n 15, 56.

³¹ *Ibid.*, 58.

³² *Ibid.*, 62.

³³ T Brinkel and S Ait-Hida, *supra* n 7, 9; A Walker, ‘What is Boko Haram?’ (United States Institute for Peace, Washington, 2012), available online at <<http://www.usip.org/sites/default/files/SR308.pdf>> (visited 9 September 2013), 6.

³⁴ FC Onuoha, *supra* n 15, 63.

turbans.³⁵ However, their main feature is their ‘adherence to a specific form of radical Islam.’³⁶ They see themselves as Muslims who, in their view, preach the only true interpretation of Islam.³⁷

2.2 The Boko Haram Revolt

The ideological aim of Boko Haram is the introduction of strict Shari’a law in the whole of Nigeria.³⁸ This is reflected in the name itself. Boko Haram means literally: ‘Western education/civilisation is evil.’³⁹ For this group, only education based on the lessons of the Qur’ān and the Sunnah are an adequate alternative to Western and secular education.⁴⁰ Boko Haram is therefore against those in northern Nigeria who are known as ‘*yan boko*’,⁴¹ literally ‘child of the book,’ who are regarded as the ‘elite created by the policy of indirect rule used by the British to colonize Nigeria’,⁴² and who have been influenced by money and corrupt Western values.⁴³ To be *yan boko*, as noted by Walker, ‘is to be spiritually and morally corrupt, lacking in religious piety, and guilty of criminally enriching oneself rather than dedicating oneself to the Muslim *Umma* (community).’⁴⁴ Shari’a law is intended ‘to clean the Nigerian system which is populated by Western education and uphold the law all over the country.’⁴⁵

Since 2009, Boko Haram members have killed a number of Christian worshippers in churches, police officers, soldiers, as well as local politicians, community leaders, and Islamic clerics who resist the sect.⁴⁶ Until recently the activities by Boko Haram had mainly been in North Nigeria,⁴⁷ however, in August 2011 Boko Haram attacked the headquarters of the United Nations in Abuja, killing at 26 people.⁴⁸

³⁵ Ibid, 56.

³⁶ T Brinkel and S Ait-Hida, *supra* n 7, 12.

³⁷ Ibid; FC Onuoha, *supra* n 15, 57.

³⁸ Ibid; GJ Weimann, *supra* n 15, 147; and A Walker, *supra* n 33, 1.

³⁹ H O Yusuf, ‘Harvest of Violence: The Neglect of Basic Rights and the Boko Haram Insurgency in Nigeria’, (2013) 6:3 *Critical Studies on Terrorism* 371-391. T Brinkel and S Ait-Hida, *supra* n 7, 11.

⁴⁰ T Brinkel and S Ait-Hida, *supra* n 7, 11.

⁴¹ A Walker, *supra* n 33, 7.

⁴² T Brinkel and S Ait-Hida, *supra* n 7, 11.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ FC Onuoha, *supra* n 15, 57.

⁴⁶ Office of the Prosecutor, *supra* n 3, at paras 81-83.

⁴⁷ T Brinkel and S Ait-Hida, *supra* n 7, 2.

⁴⁸ Office of the Prosecutor, *supra* n 3, at para 82; A Walker, *supra* n 33, 6.

In an attempt to deal with Boko Haram, President Goodluck Jonathan sent a Joint Task Force (JTF), to the North of Nigeria.⁴⁹ Security agents killed hundreds of suspected members of the sect, with Nigerian authorities arresting over hundreds of people during the raids across the North of Nigeria. However, many of those detained were isolated and held without due process, were detained in inhuman conditions and were the subject of physical abuse, thus, violating their human rights, as noted by Human Rights Watch.⁵⁰ As a consequence, these abuses and violations helped further stimulate the sect's campaign of violence.⁵¹ In May 2013 President Goodluck Jonathan declared a state of emergency in three north-eastern states, claiming that Boko Haram threatened the existence of Nigeria.⁵² A further 3,000 troops were deployed to the JTF, raising its total number to 8,000.⁵³ Some reports highlight the success of the JTF in combating Boko Haram; however, the group has not been defeated and the violence continues.⁵⁴ Civilians in Borno fear the JTF as 'harassment is common in an environment where almost every man is treated as a potential Boko Haram member.'⁵⁵ This had led to men in Borno and Yobe setting up vigilante groups whose role is to identify Islamists to the military. In June 2013, a terrorism proscription order⁵⁶ was adopted under the 2011 Nigerian Terrorism Prevention Act,⁵⁷ which declared Boko Haram to be a terrorist group, thus adding a criminal justice dimension to the situation.⁵⁸ Attacks continued throughout the beginning of 2014 and the violence has not dissipated.⁵⁹

The group has attracted significant attention from the international community. For example, the UN Security Council has condemned Boko Haram attacks,⁶⁰ and the European Parliament adopted a resolution in July 2013 strongly condemning the escalation of violence

⁴⁹ Ibid.

⁵⁰ Ibid; A Walker, *supra* n 33, 13.

⁵¹ Ibid.

⁵² See International Institute for Strategic Studies, 'Nigeria's emergency: countering Boko Haram' (2013) 19, Comment 23.

⁵³ There are fears that serious human rights abuses are being committed under the cover of the Task Force. See *ibid*, 1.

⁵⁴ Ibid, 1.

⁵⁵ See *Ibid*, 1.

⁵⁶ Terrorism (Prevention) (Proscription Order) Notice 2013.

⁵⁷ Terrorism Prevention Act, 2011 (As Amended).

⁵⁸ Institute for Security Studies, 'Why Nigeria Needs a Criminal Tribunal and Not Amnesty for Boko Haram', 24 June 2013, available online at <<http://www.issafrica.org/iss-today/why-nigeria-needs-a-criminal-tribunal-and-not-amnesty-for-boko-haram>> (visited 7 October 2013).

⁵⁹ 'Nigeria Boko Haram crisis: Emir's palace burnt in Bama', *BBC News Africa*, 20 February 2014, available at <<http://www.bbc.com/news/world-africa-26275207>> (visited 6 March 2014).

⁶⁰ Security Council Press Statement on Terrorist Attacks in Nigeria, SC/10507 Afr/2309.

on the part of Boko Haram.⁶¹ In addition, a number of individual states have condemned the actions of the group and have recognised the group as a terrorist organisation, including the US which placed a bounty of US\$7million on the group's leader through its Rewards for Justice programme⁶² in 2011 and the UK which recognised Boko Haram as a terrorist organisation under the Terrorism Act 2000 in 2013.⁶³

2. The Implementation of Shari'a in Nigeria

Nigeria's legal system is founded on common law principles, a legacy of its past as a British colony. Prior to colonisation, however, the law applicable in the territory was based on custom. In the northern part of modern day Nigeria, the majority of the population was – and still is – Muslim, and thus the local laws were based on Islam. During colonial times, both common law rules, in the form of received English law, and customary law rules, including Shari'a law in the north, were applied in relation to civil law issues, as long as they were not repugnant to English law.⁶⁴ Shari'a courts, 'area courts',⁶⁵ based on this customary system, were established to deal with personal and civil issues under Shari'a law. With regard to criminal law, the British enacted a Criminal Code. However, this was met with dissatisfaction from Muslims in the north who felt that this Code did not adequately reflect Islamic principles. Thus, a Penal Code, which was more reflective of these principles, was adopted in respect of the northern states.⁶⁶

Nigeria embraced democracy in 1998 after the death of the Nigerian dictator General Sani Abacha.⁶⁷ The move to democracy⁶⁸ coincided with the adoption of a new Constitution on 29 May 1999, essentially a reinstatement of the 1979 constitution,⁶⁹ which has precedence over all other sources of law.⁷⁰ Article 38(1) of this document guarantees freedom of religion and

⁶¹ 'Situation in Nigeria', European Parliament resolution of 4 July 2013 on the situation in Nigeria (2013/2691(RSP)), 8.

⁶² Rewards for Justice, available online at <<http://www.rewardsforjustice.net>> (visited 7 October 2013).

⁶³ Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2013/1746.

⁶⁴ VO Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question' (2004) 26 *Human Rights Quarterly* 730-759, 736.

⁶⁵ P Ostien and A Dekker, 'Sharia and National Law in Nigeria', in JM Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (Leiden University Press, Leiden 2010) 553-612.

⁶⁶ *Ibid*, 574.

⁶⁷ VO Nmehielle, *supra* n 64, 730-731.

⁶⁸ AF Akwara and BO Ojomah, 'Religion, Politics and Democracy in Nigeria' (2013) 9:2 *Canadian Social Science* 48-61, 52-55.

⁶⁹ P Ostien and A Dekker, *supra* n 65, 574.

⁷⁰ Section 1(3) Constitution of Nigerian 1999.

Article 1(1) clarifies that the Constitution is applicable to all regions of Nigeria. In addition, Article 10 confirms that Nigeria does not endorse a state religion.⁷¹

Within months of the enactment of the Constitution however, the governors of twelve states in the north of the country declared that the Islamic legal system would be fully implemented within their states and that Shari'a law would apply to all aspects of a person's life, including criminal acts, in parallel with the secular legal system.⁷² This went far beyond the previous system where Shari'a law was implemented in relation to civil and personal matters only. In these states Shari'a Penal Codes and Criminal Procedure Codes were implemented alongside the extant Penal and Criminal Codes. The pre-existing codes were applied in the Magistrate's and High Courts whereas the Shari'a Codes were applied in the Shari'a Courts.⁷³ The substantive offences which are covered in eighteen chapters of the Penal Code have been condensed into three chapters of the Shari'a Penal Codes. These deal with different categories of offences, i.e. Hudūd and Hudud-Related Offences, Qisas and Qisas-Related Offences and Ta'azir Offences. The first two chapters have been redrafted in line with the Maliki doctrine and 'classical punishments' are imposed.⁷⁴ Shari'a law provides for the imposition of much more severe sentences and penalties than the Penal Code, including amputation and stoning.⁷⁵

Another difficulty with the implementation of Shari'a law was that because the police are a federal institution in Nigeria, no institution could enforce these penalties. This led to the rise of vigilante groups who would 'operate primarily in the cities against individuals or groups who were, or were perceived to be, violating shari'a norms.'⁷⁶ Thus, the implementation of Shari'a law led to dissatisfaction among many Nigerians which resulted in violent ethnic clashes and the loss of many lives in some parts of the region.⁷⁷

It should be noted however, that the implementation of Shari'a law in the northern states has not been uniform. State governors were 'caught between popular demands for the

⁷¹ AF Akwara and BO Ojomah, *supra* n 68, 52-55.

⁷² VO Nmehielle, *supra* n 64, 731-732.

⁷³ P Ostien and A Dekker, *supra* n 65, 589.

⁷⁴ *Ibid*, 589.

⁷⁵ KN Roberts, 'Constitutionality of Shari'a Law in Nigeria and the Higher Conviction Rate of Muslim Women under Shari'a Fornication and Adultery Laws' (2005) 14:2 *Southern California Review of Law and Women's Studies* 315-336.

⁷⁶ D Cook, 'Boko Haram: A Prognosis', (2011) James A. Baker III Institute for Public Policy, Rice University, 1-33, at 22 available online at <http://bakerinstitute.org/files/735/>, 7.

⁷⁷ VO Nmehielle, *supra* n 64, 732.

introduction of the sharia and the exigencies of their office, established by the secular Nigerian Constitution.⁷⁸ Some governors, often with an eye on international reaction and future promotion,⁷⁹ have, therefore, been hesitant to implement the Shari'a regime and/or have intervened in its implementation. For example, some governors require that they must approve the carrying out of severe punishments provided for under the Shari'a system such as amputations.⁸⁰

Questions arose as to the legality of broadening the scope of issues that could be dealt with under the Shari'a system to include criminal activity in the northern states. Arguments in support of the constitutionality of this move focus on the issue of appeals from Shari'a courts to the Shari'a Court of Appeal, bypassing the High Court. Article 277(1) of the Constitution states:

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

Subsection (2) then lists a number of issues concerning personal law, including marriage, inheritance etc. However, a literal interpretation of the phrase 'in addition to other jurisdiction as may be conferred upon it by the law of the State' leaves the provision open to include criminal activities also, even if this is contrary to the intention of the drafters.⁸¹

However, a number of legal questions remain as to the legality of imposing Shari'a law in the northern states of Nigeria, including the validity of such a move given that Article 10 of the Constitution states that there is no State religion, the issue of the constitutional ban on discrimination based solely on religion,⁸² the consistency of Shari'a-based punishments with the constitutional ban on cruel inhuman and degrading treatment,⁸³ and Nigeria's

⁷⁸ GJ Weimann, *supra* n 15, 171.

⁷⁹ P Ostien and A Dekker, *supra* n 65, 592.

⁸⁰ See GJ Weimann, *supra* n 15.

⁸¹ P Ostien and A Dekker, *supra* n 65, 581.

⁸² Constitution of Nigeria 1999, Article 42.

⁸³ *Ibid*, Article 34.

international human rights obligations. However, as individuals are unwilling to take these questions before a Court in Nigeria, these issues remain unresolved.⁸⁴

It seems, therefore, that under the current Shari'a Penal Codes in force in the northern states of Nigeria, members of Boko Haram, who are charged with crimes could be prosecuted in Shari'a courts and, taking a literal interpretation of Article 277 of the Constitution, any decision could be appealed to a state Shari'a Court of Appeal. It is therefore necessary to understand the actions of members of this group from an Islamic law perspective.

3 Boko Haram's Ideology and Practices

While Boko Haram's violence can be attributed in part to political, economic and social factors,⁸⁵ the primary reason for the violence is an ideologically-skewed religious rhetoric.⁸⁶ Surprisingly, no academic study of the ideology of Boko Haram and its diversion from the fundamental tenets of Islam has yet been conducted. This may be because Boko Haram is a movement with the primary target to attack or counterattack with less focus on rationalising or theorising their ideology in a written document. However, there is a vast amount of oral material produced by some Boko Haram members for supporters and sympathisers that are only available in Hausa or other local languages.⁸⁷ To reach a relatively fair and objective analysis of Boko Haram, and to locate their practices within the realm of Islamic criminal law, the two signature issues of their *jihādi* ideology and practices need to be presented and evaluated.⁸⁸

The first signature issue concerning the ideological inclinations espoused by Boko Haram members can be understood in light of two main elements: first, the leaders of the movement and their theological training and second, their attitude towards employing *jihād* and martyrdom in the Nigerian context to fit their agendas and to therefore, justify their practices.

⁸⁴ AM Yawuri, 'On defending Safiyatu and Amina Lawal', in P Ostien (ed), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook*, Vol V (Spectrum Books Limited, Ibadan 2007) 129-139

⁸⁵ B Maiangwa, 'Killing in the Name of God? Explaining the Boko Haram Phenomenon in Nigeria' (2013) 38(1) *Journal of Social, Political and Economic Studies* 55-79, 65.

⁸⁶ C Sedikides, 'Why Does Religiosity Persist?' (2010) 14(1) *Personality and Psychology Review* 3-6, 4.

⁸⁷ Anonymous Author, 'The Popular Discourses of Salafi Radicalism and Salafi Counter-radicalism in Nigeria: A Case Study of Boko Haram' (2012) 42(2) *Journal of Religion in Africa* 118-144, 119, 142. The author here preferred to remain anonymous to avoid violence against them, their colleagues and informants.

⁸⁸ It should be noted that objectivity, especially in the field of religious studies, is an aim that is very difficult to achieve though still helpful and essential. D Marshall, *God, Muhammad and the Unbelievers: A Qur'anic Study* (Curzon Press, Richmond 1999), 6.

According to one commentator, the murdered leader of Boko Haram, Mohamed Yusuf, ‘received instruction in Salafi radicalism and was a protégé of Ibn Taymiyyah’,⁸⁹ a sign of how this late charismatic leader was inspired by the medieval thinker Ibn Taymiyah's (1263-1328 CE) views on *jihād*.⁹⁰ The whereabouts of the instruction - the contextual interpretations of Ibn Taymiyah's views on *jihād* with which Yusuf and his followers were influenced by - is not actually known. However, there is a common element between this religious learning acquisition and ideological preference embraced by the Boko Haram prominent members and that of Quṭb,⁹¹ members of the militant Islamic group in Egypt in the 1970s as well as late and current leaders of al-Qaeda who were influenced by the same line of thinking of Ibn Taymiyah.⁹² The undeniable influence of Ibn Taymiyah's views on such groups in past and present reveals that Boko Haram and their like-minded followers depend heavily on persons rather than texts in formulating their views. This demonstrates their inability to deduce Islamic rulings from their original sources. Unfortunately, this inherited personal influence of the Boko Haram leaders is easily communicated to ordinary and senior members of the group to the extent that Abu Dujana, a senior member of Boko Haram, would ‘give up his job, and kill in the name of God.’⁹³ Since members of Boko Haram have not had a religious education capable of giving them scholarly insight, their views about Muslim-non-Muslim relations are neither scholarly nor authoritative. They are not considered to be trained theologians or scholars well-versed in their fields.

3.1 *Jihādī Ideology of Boko Haram*

⁸⁹ DE Agbibo, ‘Living in Fear: Religious Identity, Relative Deprivation and the Boko Haram Terrorism’ (2013) 6(2) *African Security* 153-170, 160.

⁹⁰ For an account of *jihād* in Ibn Taymiyah's thought, see Aḥmad Ibn ‘Abd al-Ḥalīm Ibn Taymiyah, *Fiqh al-Jihād li-Shaykh al-Islām al-Imām Ibn Taymiyah*, ed. Zuhayr Shafiq al-Kabbī (Beirut: Dār al-Fikr al-‘Arabī li al-Ṭibā‘ah wa al-Nashr, 1992/1412), 71. See also M Sharif, ‘Jihād in Ibn Taymiyyah's Thought’ (2005) 493 *Islamic Quarterly* 183-204.

⁹¹ Sayyid Quṭb Ibrāhīm Ḥassan al-Shādhilī, famously known as Sayyid Quṭb, was born in 1906 in a village in Upper Egypt. During his lifetime, Quṭb was arrested and imprisoned three times. During his period of imprisonment, Quṭb is widely believed to have ‘developed a radical approach, rejecting the then state system as illegitimate and “un-Islamic”.’ BHE Zollner, *The Muslim Brotherhood: Hasan al-Hudaybi and Ideology* (Routledge, London 2009), 3. As a result, some see him as the ideologue of most of the modern terrorist groups, going as far as to include the perpetrators of the 11 September 2001 attacks as well as al-Qaeda and its leader Osama bin Laden. Others see him ‘as a victim of state persecution who developed a theology of liberation in reaction to his maltreatment.’ See, *ibid*, 2.

⁹² El-Sayed Amin, *Terrorism from a Qur‘ānic Perspective: A Study of Selected Classical and Modern Exegeses and Their Interpretation in the Modern Context* (PhD thesis, The University of Birmingham 2010) at 165-169; El-Sayed Amin, *Reclaiming Jihad: A Qur‘ānic Critique of Terrorism*, (Kube Publishing, UK 2014). See also G Fuller, *The Future of Political Islam* (Palgrave Macmillan, New York 2003), 52.

⁹³ B Maiangwa, *supra* n 85, 66-67.

In a statement attributed to Boko Haram's founding leader Yusuf, 'Our land was an Islamic state before the colonial masters turned it into a kafir land. The current system is contrary to true Islamic beliefs.'⁹⁴ Therefore, the authority of the Nigerian state is, according to him, based on unbelief (*kufr*).⁹⁵ Here, Yusuf is using almost the same classical classification of the world into what is famously known as *dār al-Islām*⁹⁶ (territory of Islam) and *dār al-ḥarb*⁹⁷ (territory of war). Surprisingly, this dichotomous classification is profoundly un-Qur'ānic.⁹⁸ The only *ḥadīth* (pl. *ahādīth* – meaning the sayings of the prophet that relate to Islam),⁹⁹ narration cited in reference to it is hard to find in the collections of authentic *ḥadīth*, which throws doubt on the authenticity of the classification, at least in the understanding of the first two sources of Shari'a.¹⁰⁰ It seems that this dichotomous classification embraced by Boko Haram and other movements and groups, is a product of a juristic *ijtihād* (exertion of intellectual reasoning in understanding laws) mainly based on the attitude of the Muslim state towards its enemies and friends during the second Islamic century.¹⁰¹ More interestingly, the geographical location of the Muslim state compared to other non-Muslim states at that time

⁹⁴ A Salkida, 'Nigeria: Sect Leader Vows Revenge', available online at <<http://allafrica.com/stories/200907270879.html>> (visited 18 January 2014). See also, J F Forest, *Confronting the Terrorism of Boko Haram in Nigeria*, Joint Special Operations University, (2012) at 14, available online at <http://cco.dodlive.mil/files/2012/09/Boko_Haram_JSOU-Report-2012.pdf> (visited 18 January 2014).

⁹⁵ Anonymous Author, *supra* n 87, 127.

⁹⁶ Because it is beyond the scope and capacity of this paper to cite and then evaluate all the classical and modern definitions of *dār al-Islām* and *dār al-ḥarb*, it is helpful to mention Haykal's definition of *dār al-Islām*: 'The country where the dominant ruling system is the Muslim rule. At the same time, the internal and external security systems are in the hands of Muslims even if non-Muslims help them to establish this security as long as their help is restricted to the minimal level.' M Haykal, *Al-Jihād wa al-Qitāl fī al-Siyāsah al-Shar'īyyah* Vol. 1 (3rd ed Dār al-Bayāriq, Beirut 1996), 669.

⁹⁷ According to Haykal, *dār al-ḥarb* or *dār al-kufr* is: 'The country that is not governed by the Muslim rule even though its (internal and external) security is in their hands. Or it is governed by Muslim rule but its security is not in their hands. Or neither its rule nor its security is in the hands of Islam and Muslims.' *Ibid*, 677. See also, M Parvin and M Sommer, 'Dar al-Islam: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East', (1980) 11(1) *International Journal of Middle East Studies* 1-21, at 3; A Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, New York 2011), 169; K Abou El Fadl, 'Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventh Centuries' (1994) 1(2) *Islamic Law and Society* 141-187, 162, n 57.

⁹⁸ According to Abou El Fadl, the only *dār* (territory, abode) the Qur'ān speaks of is 'the abode of the Hereafter and the abode of the earthly life, with the former described as clearly superior to the latter [Qur'ān 29: 64]', K Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (HarperCollins, New York 2005), 227. JT Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania State University Press, Pennsylvania 1997), 51, 68

⁹⁹ According to Haykal, this *Ḥadīth* is: "The house of Islam constitutes the source of inviolability for its residents, and the house of polytheism constitutes the source of violability for its residents." Haykal states this 'Ḥadīth' is only cited by al-Mawardī, and is not found in the authentic collections of *Aḥādīth*. M Haykal, *supra* n 96, 660.

¹⁰⁰ Namely, the Qur'ān and the Sunnah. According to Khadduri, 'The classical theory of the Islamic law of nations is found neither in the Qur'ān nor in the Prophet's utterances, although its basic assumptions were derived from these authoritative sources; it was rather the product of Islamic juridical speculation at the height of Islamic power.' M Khadduri (trans), *The Islamic Law of Nations: Shaybānī's Siyar* (Johns Hopkins Press, Baltimore, Maryland 1966), 19.

¹⁰¹ *Ibid*, 194.

was certainly a determining factor in forming this dichotomous vision, as well as the binary division of *jihād* into two modalities: defensive and offensive.

Moreover, the “international” un-Qur’ānic classical division of the world cannot, in our view, be justifiably transferred and adopted to a completely different modern multi-faiths Nigerian context where Muslims and non-Muslims have to live side-by-side, as the leader(s) of Boko Haram has claimed. This binary and eccentric attitude of Boko Haram’s understanding of modern international relations claims that the “*jihad*” they are launching within the Nigerian territories is for self-defence,¹⁰² where the Nigerian government, military, police, the Muslim elite, Christians, and the UN ‘represent manifestations of non-Islamic outer world.’¹⁰³

The above claim about Boko Haram’s defensive *jihād* cannot be justified, either Islamically or Qur’ānically, for the following reasons.¹⁰⁴ First, Boko Haram unilaterally declares its attacks against Muslims and non-Muslims in a total disregard for the Qur’ānic conception of diversity, human brotherhood, and peaceful relations between Muslims and non-Muslims, referred to, for example, in Qur’ān 2:148; 5:48; 49:13. According to Boko Haram, anyone, ‘even if he is a learned Muslim teacher, if we confirm that he exposes us to the [Nigerian] government, his children will become orphans and his wife will become a widow.’¹⁰⁵ This way of repelling aggression against Muslims and other fellow humans stands in total contrast to the clear Qur’ānic message in which God says, ‘if anyone kills a person—unless in retribution for murder or spreading corruption in the land—it is as if he kills all mankind, while if anyone saves a life it is as if he saves the lives of all mankind.’¹⁰⁶

Second, the claim of exercising ‘defensive *jihād*’ as a way of establishing an Islamic state through crushing ‘all institutions represented by government including security agencies like police, military and other uniformed personnel’,¹⁰⁷ is nothing but a lame excuse because

¹⁰² H Onapajo and U Uzodike, ‘Boko Haram Terrorism in Nigeria: Man, the State, and the International System’ (2012) 21(3) *African Security Review* 24-39, 28.

¹⁰³ D Cook, *supra* n 76.

¹⁰⁴ See M Ssenyonjo, ‘Jihad Re-Examined: Islamic Law and International Law’ (2012) 10(1) *Santa Clara J. Int’l L.* 1-33.

¹⁰⁵ I Sheme, “‘No Reconciliation’ Boko Haram Leader Blows Hot in First Video”, News Diary Online, available online at <http://newsdiaryonline.com/boko_haram_video.htm> See also, H. Onapajo and U Uzodike, *supra* n 102, 28.

¹⁰⁶ See Qur’ān 5:32. M Abdel Haleem, *The Qur’an: A New Translation* (Oxford University Press, Oxford 2005) at 71.

¹⁰⁷ N Danjibo, ‘Islamic Fundamentalism and Sectarian Violence: the “Maitatsine” and “Boko Haram” Crises in Northern Nigeria’, Institute of African Studies, University of Ibadan, available online at <<http://www.ifra->

Boko Haram leaders and their followers—compared to the rest of Muslim population in Nigeria—constitute a tiny minority. Moreover, the declaration of *jihād* is the prerogative of the ruler of the Muslim state or his deputy¹⁰⁸ and Boko Haram members, as non-state actors, are not allowed to declare it. Alternatively, the declaration of *jihād* should be reserved for national armies, which are found in almost all Muslim majority countries.¹⁰⁹ Undoubtedly, Boko Haram in Nigeria cannot be considered a national army. Therefore, its alleged declaration of *jihād* is baseless.¹¹⁰

3.2 Suicide Misrepresented as Martyrdom to the Impressionable Followers of Boko Haram

Martyrdom in Boko Haram's understanding is a self-sacrificing ideology in which the main, and probably only, source of inspiration, understanding, and motivation is the main leader(s) of the movement. Most of the members who are 'an assemblage of youths who were school drop-outs and university graduates who were not gainfully employed',¹¹¹ have a tarnished understanding of the noble concept of martyrdom in Islam similar to that of *jihād*. It is not known whether Boko Haram members have a published treatise of their understanding of martyrdom in Islam and how they employ it. These members, unfortunately, depend almost entirely on leaders such as Abubakar Shekau for their 'knowledge, inspiration, and daily survival'.¹¹² Such leaders, who are themselves poorly-educated in Islamic studies, impart their misconstrued claims about martyrdom to their manipulated and emotionally-victimised followers.

Here, it is worth shedding some light on the meaning and concept of martyrdom and suicide in Islam, as two opposing concepts which are probably (ab)used by Boko Haram members and their staunch opponents. As far as the term martyrdom (*istishhād*) is concerned, the word *shahīd* (pl. *shuhadā'*) refers to one who is killed in the path of Allah. The verbs *ustushhida* or *istashhada* and *tashahhada* mean 'he was killed as a *shahīd*', he sought martyrdom

[nigeria.org/IMG/pdf/N- D- DANJIBO - Islamic Fundamentalism and Sectarian Violence The Maitatsine and Boko Haram Crises in Northern Nigeria.pdf](http://nigeria.org/IMG/pdf/N-D-DANJIBO-Islamic_Fundamentalism_and_Sectarian_Violence_The_Maitatsine_and_Boko_Haram_Crises_in_Northern_Nigeria.pdf) (visited 18 January 2014)

¹⁰⁸ JT Johnson, *supra* n 98, 37; A Sachedina, *The Islamic Roots of Democratic Pluralism* (Oxford University Press, New York 2001), 120.

¹⁰⁹ M Kamali, 'Issues in the Understanding of Jihād and Ijtihād', (2002) 41(4) *Islamic Studies* 617-633, at 633.

¹¹⁰ On that regard see Dar Al-Ifta Al-Missriyyah <<http://eng.dar-alifta.org/foriegn/ViewArticle.aspx?ID=439&CategoryID=5>>

¹¹¹ N Danjibo, *supra* n 107, 7.

¹¹² A Bagaji, et al, 'Boko Haram and the Recurring Bomb Attacks in Nigeria: Attempt to Impose Religious Ideology through Terrorism?' (2012) 8(1) *Cross-cultural Communication* 33-41, 37.

(*shahādah*) respectively.¹¹³ The closest word, which conveys a similar meaning in English language, is the word ‘martyr’. It refers to a ‘person who is killed or made to suffer greatly because of his/her religious or other beliefs’,¹¹⁴ including ‘political beliefs.’¹¹⁵ However, ‘martyr’, although the closest, is not a precise, translation of ‘*shahīd*’, because the meaning generally attached to the Arabic term conveys being killed on the battlefield, as compared with the English word ‘martyr’, which connotes death as a result of defending religious and non-religious beliefs.

The term *shahīd* occurs ‘no less than fifty-six times’¹¹⁶ in the Qur’ān in different singular and plural forms denoting five different meanings: a witness as in 2:282, being attentive as in 50:37, being present as in 4:72, being a watcher as in 5:117, and being a judge or arbitrator as in 10:29.¹¹⁷ With the exception of the first meaning, none of the above conveys an apparent commonality with the English word ‘martyr’. Quite often, the noun *shahīd* is used in the Qur’ān to refer to one who witnesses an event as in 4:41. Allah is also a *shahīd* or a witness to His creatures, especially the People of the Book as in the Qur’ān 3:98.¹¹⁸ *Al-Shahīd* is one of the Divine attributes of Allah.¹¹⁹ Thus, it is clear that the Arabic term *shahīd* is very much associated with the English word ‘witness’, especially when the former is used for meanings other than dying on the battlefield. Of the two apparently close equivalents to the Arabic term *shahīd*, the seemingly equivalent word ‘martyr’ will be used interchangeably in the discussion below unless otherwise indicated in order to remove any ambiguity. Moreover, the technical/juristic definitions of the term *shahīd* are also important because of its centrality to our assessment of Boko Haram practices in Nigeria. The followers of the four Sunnī schools give various definitions for this term.

¹¹³ Jamāl al-Dīn ibn Manẓūr, *Lisān al-‘Arab*, Vol. 3 (6th ed Dār Ṣādir, Beirut 1997) at 242.

¹¹⁴ A Hornby, *Oxford Advanced Learner’s Dictionary of Current English*, Jonathan Crowther, (ed) (5th ed Oxford University Press, Oxford 1995), 719.

¹¹⁵ University of Birmingham, *Collins COBUILD Advanced Learner’s English Dictionary* (4th ed HarperCollins Publishers, Glasgow 2003), 881.

¹¹⁶ B Lawson, ‘Martyrdom’, in John L. Esposito (ed), *The Oxford Encyclopaedia of the Modern Islamic World*, Vol 3 (Oxford University Press, New York 1995), 54.

¹¹⁷ M Badawi and M Abdel Haleem, *Arabic-English Dictionary of Qur’anic Usage* (Brill, Leiden 2008), 499.

¹¹⁸ M Mutawallī al-Sha’rāwī, *Tafsīr al-Sha’rāwī*, Vol. 3 (Akhbār al-Yawm, Cairo 1991), 1645.

¹¹⁹ B Freamon, ‘Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History’ (2003) 27(1) *Fordham International Law Journal* 229-369, 317.

Some of the early jurists,¹²⁰ especially the followers of the four widely-respected Sunnī schools of Islamic jurisprudence, did much work on defining the concept of martyr. All of them assert that he/she is a person killed by unbelievers on the battlefield. The Ḥanafī jurist al-Zaylaʿī (d. 743) states that the *shahīd* is ‘the one who is killed by the enemy of Muslims, by the brigands or by his fellow Muslims unjustly.’¹²¹ The famous Mālikī scholar Abū al-Barakāt (d. 1201), defines him/her as, ‘the one who is killed by the enemy of Muslims whether killed inside or outside the Muslim territory.’¹²² The Ḥanbalī jurist ibn Muflīḥ (d. 884), states that the *shahīd* is ‘the one who is killed by the unbelievers on the battlefield.’¹²³ The Shāfiʿī jurist al-Khatīb al-Shirbīnī (d. 977), repeated almost the same definition by ibn Muflīḥ.¹²⁴

The above juristic definitions encapsulate all the literal explanations given to the term ‘*shahīd*’, such as presence, knowledge and witnessing, referred to above. The *shahīd*, according to those literal definitions, is named as such because he is physically present on the battlefield, and others know that if he is killed, he will be admitted to Paradise and the angels will bear witness to his dignified status in Paradise. This depends on a sincere intention to uphold Allah’s rule.

Furthermore, the technical/juristic definitions transcend such literal meanings to include the Muslim who is killed by unbelievers on the battlefield. Of the above definitions, the Ḥanafī one appears to be the most comprehensive as it adds brigands and unjust killing by fellow Muslims to the category. In contrast to the Ḥanafī definition, the other three definitions refer only to unbelievers as being the killers.

Boko Haram members view martyrs as ‘any member who fights and dies - by suicide bombing or otherwise - in the process of establishing a Sharia state would automatically

¹²⁰ These following juristic definitions constitute the foundation upon which modern scholars, such as Lewis, depend when they attempt to define martyrdom in Islam. For Lewis’s definition of martyrdom, see B Lewis, *The Crisis of Islam: Holy War and Unholy Terror* (The Modern Library, New York 2003), 38.

¹²¹ F al-Zaylaʿī, *Tabyīn al-Ḥaqqāʿiq: Sharḥ Kanz al-Daqqāʿiq*, Vol. 1 (Dār al-Kutub al-Islāmī, Cairo 1895-6/1313), 247.

¹²² A Abū al-Barakāt, *Al-Sharḥ al-Kabīr*, (ed) Muḥammad ʿAllīsh, Vol. 1 (Dār al-Fikr, Beirut n.d.), 425.

¹²³ I ibn Muflīḥ, *Al-Mubdiʿ Sharḥ al-Muqniʿ*, (ed) M al-Shafiʿī, Vol. 2 (Dār al-Kutub al-ʿIlmiyyah, Beirut 1997), 237.

¹²⁴ S al-Shirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifat Alfāz al-Minhāj*, (ed) M ʿAytānī, Vol. 1 (Dār al-Maʿrifah lil-Ṭibāʿah wa al-Nashr wa al-Tawzīʿ, Beirut 1997), 520.

become a martyr and gain the reward of *Aljanna* - paradise or heaven.¹²⁵ Generalised rhetoric as such is religiously unacceptable and undermines Boko Haram claims about martyrdom for various reasons. First, the claim that all Boko Haram members killed while fighting against the Nigerian government, churches, or even against fellow Muslims are *shuhadā'*, is not true because this understanding stands in total contrast to the very definition(s) of the *shahīd* cited above. Ironically, such claims about martyrdom and paradise rewards are unilaterally-declared by religiously unqualified leaders and members of Boko Haram to dress their practices in religiously acceptable attire through which current and hopeful recruits and supporters become more convinced of the attacks perpetrated, unfortunately, in the name of Islam.

Second, the tragic incidents where non-Muslim places of worship, including Nigerian churches, are targeted,¹²⁶ throws doubt on the *shahīd* status of the perpetrator in case of his death. Surprisingly, such atrocious attacks constitute a total disregard of Qur'ānic verses, such as 34:40. As a religion, Islam calls for the protection of five main collective objectives, famously known as *al-Kulliyāt al-Khamsah*: religion, self, intellect, honour, and property. The destructive acts of Boko Haram here violate the sanctity of religion, self, and property and are, therefore, strongly prohibited. It is internationally understood that the Nigerian government and the non-Muslims in Nigeria are not at war with Muslims in general or the Boko Haram minority in particular. Therefore, equitable, fair, tolerant, and righteous treatment should be applied by both sides. The Qur'ān instructs Muslims in 60:8 saying, 'Allah does not forbid you to deal justly and kindly with those who fought not against you on account of religion and did not drive you out of your homes. Verily, Allah loves those who deal with equity.'

Third, the response to such unsubstantiated claims of martyrdom has not as of yet, according to our best understanding, been put in a more detailed and Islamically evidence-based manner before international legal bodies, such as the ICC. Generalised responses which decry the un-Islamic actions of Boko Haram are still dominating the scene inside Nigeria itself.¹²⁷ Outside the Nigerian territories, renowned organisations, such as al-Azhar in Egypt, follow the same line of generalised condemnation. In what can be described as its only published statement so far,

¹²⁵ B Maiangwa, *supra* n 85, 66; See also, A Bagaji, et al., *supra* n 112, 37.

¹²⁶ The Office of the Prosecutor, *supra* n 4, at para. 31.

¹²⁷ B Maiangwa, *supra* n 85, 72.

Sawt al-Azhar, the official mouthpiece of the internationally-renowned al-Azhar establishment in Egypt, quoted the Sheikh of al-Azhar¹²⁸ as saying:

Sheikh Al-Azhar extremely denounces the attacks which took place in Nigeria that were linked to the “Boko Haram” group. The Grand Imam condemns such actions committed by some stray groups; such as these vicious bombings, bloodshed of innocent lives, as well as flagrant attacks on places of worship. The Grand Imam emphasized that Islam is innocent of such irresponsible actions. Islam incriminates such unlawful and vicious acts and punishes such crimes.¹²⁹

Therefore, it can be safely deduced that Boko Haram attacks are considered suicidal bombings where innocents are unjustifiably killed, rather than martyrdom. However, well-articulated and detailed responses are still needed of reputable Muslim international organisations, such as al-Azhar, because of their international impact to expose the practices of Boko Haram. Serious evidence-based studies also help stem the spread of the ideological tide of Boko Haram and other similar groups internationally.

3.3 Inciting to and Committing Suicide

Through their emotionally-driven inciting rhetoric, religious leaders undisputedly goad their followers to violence. They even, sometimes, ‘increase the likelihood of conflict onset.’¹³⁰ As for the second signature issue, it can be stated that while Boko Haram members think that they may not contribute to feeding religious violence, the skewed religious discourse they employ makes them religiously responsible for fomenting religious tension that eventually lure their adherents to commit suicide in the name of Islam.¹³¹

¹²⁸ According to Kelsay, the Sheikh of al-Azhar is considered the most authoritative Islamic figure in Egypt and, supposedly, the world of Sunnī Islam. J Kelsay, *Arguing the Just War in Islam* (Harvard University Press, Cambridge 2007), 133.

¹²⁹ ‘The Grand Imam Denounces Nigeria Attacks’, *The Weekly: Sawt Al-Azhar*, Vol.13: 640, 30 December 2011, available online at <http://www.alazhar.gov.eg/sawt_alazhar/640/SawtAlAzhar_Issue_640.pdf> (visited 5 March 2014).

¹³⁰ M Basedau, et al., ‘Do Religious Factors Impact Armed Conflict? Empirical Evidence from Sub-Saharan Africa’ (2011) 23(5) *Terrorism and Political Violence* 752-779, 756.

¹³¹ M Basedau, et al., ‘What Drives Interreligious Violence? Lessons from Nigeria, Cote d'Ivoire and Tanzania’ (2013) 36(10) *Studies in Conflict & Terrorism* 857-879, 870.

Before clarifying the Islamic stance on the prohibition of committing suicide—which members of Boko Haram wrongfully conceive as martyrdom as earlier explained—it is equally important to also clarify the attitude of Islam concerning incitement to violence. Incitement (*tahrīd*) and supporting (*'i'ānah*) (i.e. in committing a criminal act) are two terms frequently quoted in such a context. In Islamic law, *tahrīd* is to lure a person to commit a crime irrespective of whether the act itself leads to a crime or not. Inciting others to commit a crime is, according to Muslim jurists, a punishable crime on its own. It is also a sinful act (*ma'siyah*) and a command to commit that which is evil (*munkar*).¹³² Incitement is also a criminalised act under international law.¹³³ *'i'ānah* is also a crime like *tahrīd*. The person offering logistic support for the perpetrator is a collaborator (*mu'īn*) in the crime.¹³⁴ It is clear, according to Muslim jurists from the way they discussed *tahrīd* and *'i'ānah*, that they go as far as to encompass verbal and non-verbal forms. Both inciting and supporting verbal and non-verbal techniques are employed by Boko Haram leaders towards their followers and sympathisers who are 'nurtured, sheltered, rendered pliant, obedient to only one line of command, ready to be unleashed at the rest of the society.'¹³⁵ The late Boko Haram leader, Yusuf, for example, used to emphasise his own ideas when addressing his followers in a broader and more sweeping condemnation of the many things which he considered Islamically-prohibited.¹³⁶ Thus, Boko Haram leaders who incite and offer spiritual, moral, and logistic support to their followers are certainly participating in the crimes committed and, therefore, deserve punishment under Islamic law as well as international law.

As for the ordinary Boko Haram members who irrationally follow their own leaders and are lured to commit suicide attacks, they are committing an abominable crime which secures its perpetrator an abode in the Hellfire according to Qur'ān 4:29-30. It is also a crime which is 'strictly prohibited in Islamic law'.¹³⁷ Interestingly, there are various occurrences of the expression *qatl al-nafs* in the Qur'ān (2:54, 195; 4:29-30, 66; 18:6; 26:3). In these

¹³² S al-Shirbīnī, *supra* n 124, 331; Al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, pp. 216-218; A al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'*, Vol 7 (Dār al-Kitāb al-'Arabī, Beirut 1982), 180.

¹³³ Y Ronen, 'Incitement to Terrorist Acts and International Law' (2010) 23(3) *Leiden Journal of International Law* 645-674, 646, 648, 673.

¹³⁴ A al-Shirbīnī, *supra* n 124, 331; Al-Dardīr, *supra* n 132, 180. See also, 'Udah, *Al-Tashrī' al-Jināi' fī al-Islām, Muqāranan bi al-Qānūn al-Wad'i*, Vol 1 (13th ed., Mu'assasat al-Risālah li al-Tibāh wa al-Nashr wa al-Tawzī, Bierut, 1994), 406.

¹³⁵ B Maiangwa, et al., 'Baptism by Fire': Boko Haram and the Reign of Terror in Nigeria' (2012) 59(2) *Africa Today* 41-57, 45. See also B Maiangwa, *supra* n 85, 66, n 4.

¹³⁶ Anonymous Author, *supra* n 87, 126.

¹³⁷ M Munir, 'The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law' (2011) 93 (881) *International Review of the Red Cross* 81-102, 100.

occurrences, terms such as *qatl al-nafs*, *tahlukah* (self-destruction), and *bakh*¹³⁸ (killing oneself because of sorrow) are used. The Qur'ān never uses the word '*intihār*' (suicide), although some exegetes, such as al-Sha'rāwī, have interpreted *qatl al-nafs* as *intihār*.¹³⁹ *Intihār*, or suicide, as the self-inflicted action of killing oneself intentionally. The term does not occur in classical Arabic lexicons.¹⁴⁰ Kamali states that 'suicide bombing has no precedent in Islamic law and history and it is a new issue, open in that sense to fresh contributions.'¹⁴¹ In a clear prohibition of suicide and mutual killing, God says in the Qur'ān: 'You who believe, do not wrongfully consume each other's wealth but trade by mutual consent. Do not kill each other [do not kill yourselves], for God is merciful to you. If any of you does these things, out of hostility and injustice, We shall make him suffer Fire: that is easy for God.'¹⁴²

Most classical mainstream exegeses support the interpretation of the Qur'ānic phrase '*walā taqtulū anfusakum*' (do not kill yourselves) as a prohibition against mutual killing.¹⁴³ The famous Egyptian exegete al-Sha'rāwī takes the view that '*qatl al-nafs*' in this verse may mean four things: individual suicide, individual *mukhāṭarah* (risking one's life), killing others with the consequence of being killed in retaliation, and mutual killing.¹⁴⁴ He does not give preference to one explanation over another, although he gives fuller consideration to individual suicide. He appears to be the only modern exegete who gives a definition of suicide.¹⁴⁵ He also turns to the Sunnah to buttress his argument, citing the following Prophetic Hadīth as a clear evidence for the prohibition of suicide:¹⁴⁶ Jundub ibn 'Abdullāh narrates that Prophet Muḥammad is reported to have said: 'A man from those previous to you felt apprehensive about a wound he sustained. Therefore, he severed his hand with a knife and died from loss of blood. Whereupon Allah said: My servant anticipated my action by

¹³⁸ M Badawi and M Abdel Haleem, *supra* n 117, 78. See also, F Rosenthal, 'On Suicide in Islam' (1946) 66(3) *Journal of the American Oriental Society* 239-259, 241.

¹³⁹ M Mutawallī al-Sha'rāwī, *supra* n 118, 2148.

¹⁴⁰ See Majma' al-Lughah al-'Arabiyyah, *Al-Mu'jam al-Wajīz* (Egyptian Ministry of Education, Cairo, 1994/1415) at 605; A Hornby, *supra* n 114, 1195.

¹⁴¹ M Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications, Oxford, 2008) at 283. See also, A Abdel-Khalek, 'Neither Altruistic Suicide, nor Terrorism but Martyrdom: A Muslim Perspective' (2004) 8(1) *Archives of Suicide Research* 99-113, 100.

¹⁴² Qur'ān 4:29-30. See also, M. Abdel Haleem, *supra* n 106, 53.

¹⁴³ See for example, Al-Ṭabarī, *Jāmi' al-Bayān 'an Ta'wil Al Qur'ān*, Vol. 2, 35; M al-Qurṭubī, *Al-Jāmi' li Ahkām al-Qur'ān* (Dār al-Sha'b, Cairo n.d.), Vol. 5, pp. 156 f; 'Abd al-Rahmān al-Suyūṭī, *Al-Durr al-Manthūr fi al-Tafsīr bi al-Ma'thūr* (Dār al-Fikr, Beirut 1993), Vol. 1, 524.

¹⁴⁴ M Mutawallī al-Sha'rāwī, *supra* n 118, 2148.

¹⁴⁵ Suicide, according to him, is an act committed by someone who fails to cope with his life affairs and hence resorts to self-murder. M Mutawallī al-Sha'rāwī, *supra* n 118, 2146.

¹⁴⁶ *Ibid*, 2147.

taking his own life; therefore, he will not be admitted into Paradise.’¹⁴⁷ Thus, when members of Boko Haram launch attacks even against Islamic clerics opposed to the group¹⁴⁸ and some of their members die as a result, then the act itself is a crime according to the Qur’ānic prohibition of mutual killing as well as the Prophetic Hadīth above.

In addition to killing themselves through suicide, members of Boko Haram might be committing other crimes according to Islamic law. Firstly, in their suicide attacks, civilians are killed and the taking of human life, based on his/her faith,¹⁴⁹ race, or geographical location is strongly prohibited according to the Qur’ān 17:33. It is clear that civilians who are killed at places of worships, markets and other places as a result of Boko Haram attacks are merely targeted because of their religion, faith, cult, or otherwise.¹⁵⁰ Al-Rāzī states that the Qur’ān 17:33 indicates that taking of a human life without a just cause is the greatest sin after associating partners with Allah. He emphasises that *al-ḥurmah al-mughallaḏah* (strong prohibition) is the original ruling that governs killing others unjustly, affirming that killing can only be legitimate if clear reasons are established;¹⁵¹ which is not actually the case with Boko Haram members targeting and killing non-combatants.¹⁵² Secondly, in their suicide attacks civilians’ bodies are mutilated and a ‘number of victims are burned alive’¹⁵³ which is also another crime in its own rights and which is strictly prohibited in Islam. In a farewell address to Muslim soldiers heading for a battle with the Byzantines, Caliph Abu Bakr, said:

I recommend to you that you fear Allah and obey Him. When you engage the enemies do not loot, do not mutilate the dead, do not commit treachery, do not behave cowardly, do not kill children, the elderly or women, do not burn trees or damage crops, and do not kill an animal unless lawfully acquired for food. You will come across men confined to hermitages in which they claim to have dedicated their lives to worshipping God, leave them alone.¹⁵⁴

¹⁴⁷ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 3463, in *Mawsū‘at al-Ḥadīth al-Sharīf: Al-Kutub al-Sittah*, (ed.) Ṣāliḥ bin ‘Abd al-‘Azīz Āl al-Shaykh (Dār al-Salām li al-Nashr wa al-Tawzī‘, Riyadh 1999), 282.

¹⁴⁸ The Office of the Prosecutor, *supra* n 4, at para. 79.

¹⁴⁹ ‘Abd al-Mun‘im al-Ḥifnī, *Mawsū‘at al-Qur’ān al-‘Azīm*, Vol. 2 (Maktabat Madbūlī, Cairo 2004) at 2450; Maḥmūd Shaltūt, *Al-Islām: ‘Aqīdah wa Sharī‘ah* (15th ed., Dār al-Shurūq, Cairo 1988), 337.

¹⁵⁰ The Office of the Prosecutor, *supra* n 4, at para. 88.

¹⁵¹ F al-Rāzī, *Al-Tafsīr al-Kabīr aw Mafātīḥ al-Ghayb*, Vol. 20 (Dār al-Kutub al-‘Ilmiyyah, Beirut 2000), 159

¹⁵² The Office of the Prosecutor, *supra* n 4, at para. 79.

¹⁵³ *Ibid*, at para. 40.

¹⁵⁴ A Tamimi, ‘The Islamic Debate over Self-inflicted Martyrdom’, in M Al-Rasheed and M Shterin (eds) *Dying for Faith: Religiously Motivated Violence in the Contemporary World* (IB Tauris London, 2009), 97 quoted in SM Bassiouni, *Al-Wathā‘iq al-Dawliyyah al-Ma‘niyyah bi Ḥuqūq al-Insān*, Vol 2 (Dār al-Shurūq, Cairo 2003), 35.

If the above quotation is meant for enemy combatants, it is prohibited, *a fortiori*, for Boko Haram members to commit such suicide attacks in which, according to Cook, civilians are frequently killed.¹⁵⁵

Thirdly, in their suicide attacks, properties belonging to others are destroyed which is also a prohibited act that is considered, according to the Qur'ān 5:33, corruption (*fasād*).¹⁵⁶ According to al-Sha'rāwī, the '*fasād*' in this verse generally refers to the prohibition of causing corruption to humans by targeting them as well as destroying fauna and flora.¹⁵⁷ These include, for example, 'the destruction and burning down of houses and religious objects of a specifically targeted community.'¹⁵⁸ Finally, during and right after the suicide attacks committed by Boko Haram members, there are certainly Muslim and non-Muslim passers-by who are terrified, resulting in having their rights infringed upon, paths obstructed, and possessions seized which are also prohibited acts according the Qur'ān 5:33.¹⁵⁹

3.4 Boko Haram Practices in Light of Islamic Criminal Law

Having attempted to clarify that Boko Haram practices are neither *jihād* nor martyrdom but rather criminal acts encouraged by ill-informed people about their own Islamic tradition and executed by members who are mostly intellectually-hijacked by their leaders, it is time now to raise two concluding questions. Under which criminal category can the practices of Boko Haram members be classified within the Islamic criminal law?

To answer the first question, it is essential to state that crime (*jarīmah*) in Islamic law refers to a prohibited act for which Allah sets a deterring punishment either through a fixed penalty (*ḥadd*) or through a discretionary one (*ta'zīr*).¹⁶⁰ It is submitted that the crimes committed by members of Boko Haram, discussed above, fall within the category of *ḥudūd* (pl. *ḥadd*); namely the crime of *ḥirābah* (brigandage, banditry, highway robbery); which is an essential

¹⁵⁵ D Cook, 'Suicide Attacks or "Martyrdom Operations" in Contemporary Jihad Literature', in D Rapoport (ed), *Terrorism: Critical Concepts in Political Science*, Vol. 4 (Routledge, London 2006), 134.

¹⁵⁶ F Denny, 'Corruption', in JD McAuliffe (ed), *The Encyclopaedia of the Qur'ān*, Vol. 1 (Brill, London 2001), 439.

¹⁵⁷ M Mutawallī al-Sha'rāwī, *supra* n 118, 3090.

¹⁵⁸ The Office of the Prosecutor, *supra* n 4, at para. 43.

¹⁵⁹ Al-Ṭabarī, *Jāmi' al-Bayān*, *supra* n. 143, Vol. 6, 211.

¹⁶⁰ 'A al-Mawardī, *Al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah* (Dār al-Fikr li al-Ṭibā'ah wa al-Nashr wa al-Ṭawzī', Cairo 1983), 189; idem, *Al-Aḥkam As-Sultaniyyah: The Laws of Islamic Governance*, trans. Asadullah Yate (Ta-Ha Publishers, London 1966, repr. 2005), 309.

category of *ḥudūd* within the Islamic criminal law system *stricto sensu*.¹⁶¹ Within the Sunnī legal theory, there are three terms that are widely used for *ḥirābah*; the first is *ḥirābah* itself, the second is *qaṭ' al-Ṭarīq* (highway robbery), and the third is *sariqah kubrā* (great theft, larceny).¹⁶² The first term is employed here because of its strong relevance and similarity to the actual crimes committed by Boko Haram members, and the fact that the term *ḥirābah* itself covers the two other terms. While *ḥirābah* is a crime, the punishment for which is mentioned in the Qur'ān 5:33-34, it is not noticeable to find classical or modern Qur'ān interpreters working on a definition for this concept. Rather, they pick the definition(s) for the term from relevant original Islamic law sources for their own exegetical use. Recently, an attempt has been made to reach a comprehensive definition of *ḥirābah* based on selected major Sunnī Islamic law sources from classical and modern sources. The definition arrived at goes as follows:

Ḥirābah is the premeditated act of a sane and mature individual (or group of individuals) aimed at frightening, robbing, killing and/or transgressing against non-combatants' dignity, carried out from a position of *shawkah* (power). The targets in *ḥirābah* may be Muslims or non-Muslims, in any setting, be it a village, a city, at sea or in the air.¹⁶³

Certain main elements can be extracted from the above definition. First, the act of terrorising people. Undoubtedly, innocent civilians who are not primarily targeted by Boko Haram attackers or suicide bombers are terrorised. Mālikī jurists consider any action intended to terrorise people to be a core act of *ḥirābah*, irrespective of whether a weapon is used or not. This element is considered the greatest common denominator between *ḥirābah* and terrorism because it is a distinctive characteristic of both crimes.¹⁶⁴ Second, causing corruption (*fasād*).¹⁶⁵ Abou El Fadl states that the classical jurists, almost without exception, argued that those who attack residents and wayfarers in order to terrorise them are corrupters of the earth (*mufsidūna fī al-Arḍ*),¹⁶⁶ something that Boko Haram attackers certainly do with or without

¹⁶¹ R Peters, 'The Islamization of Criminal Law: A Comparative Analysis' (1994) 34(2) *Die Welt des Islams* (1994) 246-274, 247.

¹⁶² N Wajis, 'The Crime of *Ḥirāba* in Islamic Law' (PhD thesis, Glasgow Caledonian University 1996), 63; S. Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117 *Recueil des Cours* at 223-323, 287.

¹⁶³ El-Sayed Amin, *supra* n 92, 307.

¹⁶⁴ N Wajis, *supra* n 162, 70.

¹⁶⁵ According to Wajis, the closest equivalent to the English word 'corruption' is the Arabic word '*fasād*'. Ibid, 71.

¹⁶⁶ KA El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press, Cambridge 2001), 242.

intention. Importantly, ‘frightening the secured, destroying their public interests, life essentials and human dignity for the purpose of sowing aggression and corruption on earth’¹⁶⁷ was the definition of terrorism given by the Islamic Research Academy at al-Azhar in Cairo¹⁶⁸ on 1 November 2001. Abou El Fadl also adds that, the Qur’ān refers to various forms of corrupting the earth, such as terrorising residents and wayfarers, as well as other attacks in which non-combatants are targeted.¹⁶⁹ However, the main form of corruption that is directly related to terrorism from a Qur’ānic perspective is taking the life of a human being unjustly, irrespective of his/her faith,¹⁷⁰ race or geographical location. Such terrorist acts are strongly prohibited in the Qur’ān 17:33. Unquestionably, Boko Haram members who carry out the attacks target the above categories in a blatant violation of the core principles of international law as well as Islamic law texts and, more importantly, the definitive (*qaṭ’ī*) Qur’ān texts. Third, based on the Qur’ānic verses 5:32-33 Al-Sha’rāwī argues that *fasād* is of two types. In the first type, the perpetrator personally attempts to take revenge for a previous aggression against him initiated by the other party, which is a common occurrence with Boko Haram. This personal revenge, according to al-Sha’rāwī, is prohibited not because it is reciprocating aggression, but because of the violation of Islamic law, which prohibits people from taking the law into their own hands. They would be applying their own laws, disregarding the authoritative bodies appointed to settle personal grudges primarily through legal channels.¹⁷¹ The second type, according to al-Sha’rāwī, is the terrorisation of people with whom there is no cause for dispute. Examples of this are the Boko Haram attacks against both church and Mosque goers. According to al-Sha’rāwī, this is the most apt example of *ḥirābah*,¹⁷² as it perfectly relates to the essence of the two verses referred to. Indeed, this description of *ḥirābah* generally corresponds to terrorism as in this latter example there is also no dispute between the terrorist/suicide bomber and his innocent victims. The targets are targeted not because of their own status, but to subdue those in authority, such as rulers or governments, so that they succumb to the perpetrators’ demands. This is also a clear example of Boko Haram practice. Therefore, the violent acts of Boko Haram in Nigeria are considered *ḥirābah* acts based on the above definition and the extracted elements. Accepting the common view

¹⁶⁷ Sālim al-Bahnasāwī, *Al-Taṭarruf wa al-Irhāb fī al-Manzūr al-Islāmī wa al-Dawlī* (Al-Mansūrah, Dār al-Wafā’ li al-Ṭibā’ah wa al-Nashr wa al-Tawzī’ 2004), 64.

¹⁶⁸ Al-Azhar in Egypt is regarded as the most important seat of Islamic learning. O Ashour, *The De-Radicalization of Jihadists: Transforming Armed Islamist Movements* (London/New York, Routledge 2009), 167.

¹⁶⁹ KA El Fadl, *supra* n 166, 242.

¹⁷⁰ M Shaltūt, *Al-Islām: ‘Aqīdah wa Sharī’r ah* (15th edn, Dār al-Shurūq Cairo, 1988/1408), 337.

¹⁷¹ M Mutawallī al-Sha’rāwī, *supra* n 118, 3090 et seq.

¹⁷² *Ibid*, Vol. 15, 3091.

that the classical *ḥirābah* crime 'corresponds in its most salient features' to the modern crime of terrorism,¹⁷³ the current practices of Boko Haram members especially those related to the main elements of *ḥirābah* discussed above are all punishable acts of terrorism according to international law and Islamic law.

As far as the Islamic law is concerned, if the alleged members of Boko Haram proved to be guilty of committing acts of *ḥirābah*—which has been proven to be slightly different from or almost identical to modern perverted acts of terrorism—and are to be tried before a court which applies solely Islamic law, then the punishments for *ḥirābah* applies to them. Interestingly, the punishments are mentioned in the following Qur'ānic verses:

Those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the Hereafter, unless they repent before you overpower them— in that case bear in mind that God is forgiving and merciful.¹⁷⁴

Classical and modern Qur'ān interpreters and jurists are in agreement that the punishments mentioned in the above verse (Qur'ān 5:33) are the prescribed punishments for *ḥirābah*. The punishments are execution, crucifixion, the amputation of a hand and a foot on opposite sides, or banishment from the land. There are two main approaches to these four alternative punishments.¹⁷⁵ The first approach seeks to establish proportionality between the crime and the punishment, whereas the second approach authorises the Muslim ruler to use his discretion in applying the punishment. Abou El Fadl calls the first approach '*tartīb*' and the second '*takhyīr*'.¹⁷⁶ These punishments are considered the most severe punishments in Islam.¹⁷⁷

¹⁷³ El-Sayed Amin, *supra* n 92, 292. See also, A Al-Dawoody, *supra* n 97, 232; N Wajis, *supra* n 162, 165; KA El Fadl, *supra* n 166, 243.

¹⁷⁴ Qur'ān 5:33-34; M Abdel Haleem, *supra* n 106, 71.

¹⁷⁵ F Vogel, 'The Trial of Terrorists under Classical Islamic Law' 43:1 *Harvard International Law Journal* (2002) 53-64, 59.

¹⁷⁶ K Abou El Fadl, *supra* n 166, 57.

¹⁷⁷ S Jackson, 'Domestic Terrorism in the Islamic Legal Tradition' (2001) 91(3-4) *The Muslim World* 293-310, at 295; Al-Sayyid Sābiq, *Fiqh al-Sunnah*, Vol. 2 (Al-Faḥ li al-'I'Lām al-'Arabī, Cairo nd), 296.

It has become clear now that the Qur'ān does not condone terrorist acts. Indeed, terrorist acts are crimes for which the most severe punishments are prescribed. The four alternative punishments, ranging from execution to exile, are set as a deterrent for heinous crimes committed by Boko Haram members and similar groups committing the same acts. Although the punishment may seem cruel at first glance, this falls into perspective when the interest of the whole society is taken into consideration.¹⁷⁸

Finally, the four worldly punishments for terrorism put forward by the Qur'ān above, provide workable mechanisms for those in authority if they want a moral and practical basis to combat terrorism.

4 General Remarks and Conclusion

The dissatisfaction with the socioeconomic situation in Nigeria together with the lack of comprehensive understanding about the meaning of Islam among the majority of the Muslim population have paved the way to unqualified *sheiks*, and other (self-) titled religious “leaders” ‘to advance their views by propagating erroneous notions of Islam that the largely ignorant masses are ready to accept and follow, than true religious scholars.’¹⁷⁹

As evident from the present study, suicide attacks, the indiscriminate killings of civilians, spreading terror among civilian population and the destruction of religious places can under no circumstances be justified with reference to Islamic religion and ‘no amount of doctrinal rationalization by certain politically motivated or insufficiently informed Muslim theologians and political activists can alter this conclusion.’¹⁸⁰

There is no room in Islamic law for excuses or justification for such atrocious acts and Shari'a confers on every citizen the right to refuse to commit a crime, should any government or administrator order him to do so.¹⁸¹ The Prophet is reported to have said ‘there is no obedience in transgression: obedience is required in righteousness.’¹⁸²

¹⁷⁸ For a study on how the application of legal punishments can bring about positive change in society, see, M al-Dhahabī, *Athar Iqāmat al-Ḥudūd fī Istiqrār al-Mujtama'* (Maktabat Wahbah, Cairo 1986/1407), 19-65.

¹⁷⁹ C Bassiouni, *The Shari'a and Islamic Criminal Justice in time of War and Peace*, (Cambridge University Press, Cambridge 2014), 5-6.

¹⁸⁰ *Ibid*, 3.

¹⁸¹ See M E Badar, ‘Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court’ (2011) 24(2) *Leiden Journal of International Law* 411-433, 430.

¹⁸² Abu Dawūd, *Sunan Abu Dawūd*, no. 2625 in *Mawsū'at al Hadīth al-Sharif: Al-Kutub al-Sittah*, ed. Sālih al-Shaykh (Dar al-Salam li al-Nashr wa al-Tawzi).

As noted by Bassiouni, 'Islam rejects the postulate the ends justify the means because it is a religion grounded in values that require that ends and means conform to its specific dictates, and to its higher values and principles.'¹⁸³ His observations on the contemporary meaning of jihad are very significant to our current discourse:

In the last 40 years, jihad as political violence has become nothing more than a revolutionary doctrine to justify those who engage in it by appealing to the legitimacy of their self-proclaimed ends. The theological technique used to achieve this ends is to cherry-pick among verses of the *Quran*, the *Hadith* (the sayings of the Prophet), historic events and practices, *fatwa(s)*, and theological pronouncements. This technique, which is contrary to the accepted techniques of *'ilm usul al-fiqh*, and also contrary to *fiqh* (doctrine), has permitted all sorts of self-serving interpretations, which are essentially distortions of the *Shari'a*. Those who engage in this method use a discourse of political rhetoric couched in theological terms that blurs the distinction between the lawful and the unlawful. The rhetoric, however, becomes powerful in its popular effect.¹⁸⁴

The study also reveals that armed jihad can only be declared by a lawful authority 'which is to be granted when the country is threatened with invasion'.¹⁸⁵ According to Ibn Qudamah, 'declaring jihad is the responsibility of the Ruler and it depends on his independent consideration and judgment. The citizen's duty is to obey when jihad is duly declared by a lawful Ruler.'¹⁸⁶ There is also consensus among the majority of Muslim jurists that 'Islam does not permit recourse to violence that disturbs peace and order in society even if it be against a government of questionable legitimacy so long as that government stays short of blatant indulgence criminality and *kufir* (denial and rejection of Islam)'.¹⁸⁷

It is also simplistic to equate suicide bombing with martyrdom as Boko Haram has claimed and can be refuted based on the following reasons as rightly observed by Kamali:

- a) Suicide bombings challenges two fundamental principles of Islam: the prohibition against suicide and the deliberate killing of civilians;

¹⁸³ C Bassiouni, *supra* n 179, 3.

¹⁸⁴ C Bassiouni, 'Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence' in C Bassiouni and A Guellali, *Jihad and Its Challenges to International and Domestic Law* (Hague Academy Press, The Hague 2010) 11-38, 13.

¹⁸⁵ M Kamali, 'Jihad and the Interpretation of the Quran: Contextualising Islamic Tradition' in C Bassiouni and A Guellali, *supra* n 184, 49.

¹⁸⁶ M Ibn Qudamah, *Al-Mughni*, Vol. 9 (Matba'at al Manar, Cairo 1947) 184 quoted in M Kamali, *ibid*.

¹⁸⁷ M Kamali, *supra* n 185, 57.

- b) The Prophet Muhammad clearly sought to draw a line separating martyrdom in battle from suicide;
- c) The Prophet repudiated and denounced those who deliberately took their own lives in the course of battle, even by a warrior suffering from severe wounds;
- d) The Muslim fighters enters the battle not with intention of dying, but with the conviction that if he should die, it would be for reasons beyond his control;
- e) Martyrdom does not begin with suicidal intention, let alone the linkage of that intention with the killing of civilians;
- f) Suicide bombers intentionally set out to kill themselves and other civilians and thus violate the norms of Islamic law and ethics.¹⁸⁸

In his survey on the doctrinal prescriptions of Islam in the conduct of foreign policy Gene W. Heck arrived to the following conclusion:

In short, as its roots, Islam rightly prides itself as a “religion of tolerance” (“*dīn al-tasāmuh*”) and there is little within its doctrine to suggest otherwise. As such, the practices of modern terrorist groups that purport to operate under its banner may be seen as antithetical to its very teachings.

For in its prescriptions, *Qur’ānic* doctrine directly refutes, rather than supports, the modern tactics of militant “*jihadi*” networks. This is the most critical of findings. For recognition of this reality is critical to any strategy that seeks to mitigate the spread of terrorism and spare future generations from the nihilism of terror now perpetrated in Islam’s sacred name.¹⁸⁹

Islam also prohibits accusing others of disbelief or *takfīr* an infidelizing ideology which has been adopted by some members of Boko Haram for achieving personal aims and political gains. The Grand Sheikh of Al-Azhar, Sheikh Ahmed Al-Tayyeb, has recently described *takfīr* as a ‘blind sedition and a catastrophe for Islam.’¹⁹⁰ He stressed that *takfīr* aims to distort the image of Islam and criticized the spread of *takfīri fatwas* in the Muslim world and those who issue such *fatwas*.¹⁹¹ Recently, Dar al-Ifta Al-Missriyyah warned against this ideology and emphasised that accusing other of disbelief is governed by certain principles,

¹⁸⁸ M Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, (Islamic Text Society, Cambridge, 2008) 33.

¹⁸⁹ G Heck, *The Islamic Code of Conduct for War and Peace: An Inquiry into the Doctrinal Prescriptions of Islam in the Conduct of Foreign Policy* (King Faisal Center For Research and Islamic Studies, Riyadh, 2006) 96.

¹⁹⁰ Addressing a ceremony held in Cairo on Monday 13 January 2014 to celebrate the birthday of Prophet Muhammad (PBUH) available online at <<http://abna.ir/data.asp?lang=3&Id=496697> and

<http://english.riib.ir/news/world/africa/item/180468-al-azhar-ulema-warn-against-takfiri-thought>>

¹⁹¹ Ibid.

provisions, and rulings.¹⁹² It added, ‘that the danger of such an infidelizing ideology lies in killing and unlawfully consuming the wealth of the person accused of disbelief, lying and hypocrisy under the pretext of Allah’s cause and finally executing terrorist operations and killing peaceful civilians.’¹⁹³

As for the acts of spreading terror amongst civilians and the indiscriminate and systematic killings of civilians and children as practiced and continued to be practiced by members of Boko Haram the present study arrived to the conclusion that these acts amount to the crime of *hirābah*, a *had* (pl. *hudūd*) crime explicitly proscribed in the Qur’ān where punishment is mandatory.¹⁹⁴ It is worth pointing out that the deadly attacks against school children and the prohibition of English education in Nigerian schools by members of Boko Haram was recently condemned in an official statement by the Grand Mufti of Egypt.¹⁹⁵ He quoted the following verse from the Qur’ān in order to emphasize the respect of the sanctity of life and the prohibition of aggression against it, be it Muslim or non-Muslim.¹⁹⁶

On that account: We ordained for the Children of Israel that if any one slew a person – unless it be for murder or for spreading mischief in the land – it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people. Then although there came to them Our messengers with clear signs, yet, even after that, many of them continued to commit excesses in the land. Qur’ān 5:32 [Yusuf Ali translation]

The primary purpose of the ICC is to provide justice for victims of such heinous crimes as those suffered by Nigerian civilians at the hands of Boko Haram. However the selection of certain situations and not others for prosecution before the ICC has drawn heavy criticism on the Court. Adding to this the choice of mainly western inspired law to be applied at the Court makes the institution seem even more imperialistic and can damage the perception of its legitimacy in Africa and elsewhere. With the appointment of the first African jurist to be the Court’s prosecutor, the ICC seems to be trying to change its image of ‘white people

¹⁹² Dar al-Ifta Al-Missriyyah, ‘The Egyptian Society is Exposed to Rolling of Systematic Infidelization’ available online at < <http://eng.dar-alifta.org/foriegn/ViewArticle.aspx?ID=472&CategoryID=1>>

¹⁹³ Ibid.

¹⁹⁴ See El Sayed A Amin, *supra* n 92.

¹⁹⁵ ‘Grand Mufti of Egypt Denounced Boko Haram’s Attack on School Children and Interdiction of Languages in Nigerian Schools’, The Media Centre of Dar al-Ifta Al-Missriyyah 11 March 2014 available online at <http://www.dar-alifta.org/Viewstatement.aspx?ID=2950&type=1>

¹⁹⁶ Ibid.

prosecuting black people' however one could argue that a stronger step away from the perceived imperialistic patronising attitude would be for the Court to acknowledge the cultures and legal systems of the countries from which the situations stem. If the Nigerian investigations eventually lead to prosecution, the acknowledgement in all phases of the trial that these crimes are not merely criminalized in the international or western legal systems, but also under Islamic Law, would prove that the Court is truly universal, that it has the knowledge and respect for different cultures and legal systems, even if it does not strictly apply their laws and last but not least it would give a sense of dignity to the victims themselves.¹⁹⁷