The African Union, Boko Haram and women in crisis

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Abstract

The paper considers whether the African Union’s (AU) powers would allow for intervention in protection of the rights of women during armed conflict. In considering that question, this paper evaluates the AU’s legal and policy framework for the protection of women in armed conflict, and discusses the AU’s response to the Boko Haram crisis in Nigeria. It argues that the AU is constrained in its response by conflicting provisions of treaties, traditional international law principles in particular non-intervention in sovereign states, practical and political concerns, and gendered perspectives. The paper concludes that as a result the AU left the protection of women to a territorial state which, for a period of time, lacked the will and the ability to protect women in crisis but rejected external assistance. The paper concludes that protecting women’s rights in conflict zones will require the AU to prioritise human security in every African Union peace and security mandate, for only through action can the AU demonstrate that it attaches value to women’s rights in conflict zones.

#BRINGBACKOURGIRLS; Boko Haram; African Union; Peace and Security; Nigeria; MultiNational Joint Task Force (MNJTF); International Crimes.

INTRODUCTION

The paper considers whether the African Union’s (AU) wide powers would allow for intervention in protection of the rights of women (the term includes girls) during armed conflict. In doing so, this paper discusses the African Union’s support for women’s rights and its response to Boko Haram’s violence against women in Nigeria which had spillover effects in Cameroon, Chad, and Niger. It argues that Boko Haram’s actions against women are sufficient to trigger intervention, but that the AU is constrained in its response by conflicting provisions of treaties, traditional international law principles in particular non-intervention in sovereign states, practical and political concerns, and
gender perspectives. As a result, the AU left the protection of women to a territorial state which, for a period of time, lacked the will and the ability to protect women in crisis but rejected external assistance. The paper argues that in the absence of state consent to the use of force on their territory, the AU’s role is limited to assisting states to provide for their own peace. In the particular instance, the AU’s role was been limited to providing support to the MultiNational Joint Task Force (MNJTF), a military coalition of Nigeria, Cameroon, Chad, Niger and Benin against Boko Haram. But, with the focus on the protection of state sovereignty, the AU’s mandate and concept of operations for the MNJTF was inadequate for action in support of women. At the same time, Nigeria’s attempts at rescue have focused on a group of girls whose abduction generated wide publicity and international outcry, and the rescue of other women seems to have been marginalised. The paper concludes that the issue is important because of the many conflicts in the African region, past and present, in which women’s rights are violated and that if the AU wishes to demonstrate that it attaches value to women’s rights in conflict zones, it will need to prioritise human security over state sovereignty and put the protection of women at the forefront of each and every peace operation mandate.

Section One gives a brief background on Boko Haram, focusing on its abduction of women and girls and the violations committed. It argues that Nigeria withheld consent to external involvement until forced by external pressure arising from neighbouring states alarmed at the growing threat Boko Haram posed, and the international outcry over the kidnapping of a group of schoolgirls in Chibok in 2014. It shows that these factors led to support for a coalition against Boko Haram, outside the AU.

Section Two considers whether the AU gender policy read alongside key African Union treaties allow for a legal right of intervention specifically in protection of women in the context of armed conflict. The treaties that will be considered are those currently in force, the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted in July 2003, in force November 2005), the African Charter on the Rights and Welfare of the Child (July 1990, in force November 1999), the Constitutive
Act of the African Union (adopted in 2000, in force 26 May 2001), and the AU’s Common African Defence and Security Policy 2004. It argues that the AU has a general policy of protecting and advancing women’s rights and an interventionist policy, on paper, but that the AU is constrained by conflicting principles under AU treaties, traditional international law principles, the lack of consent to AU intervention by Nigeria a key AU member and regional power, and the lack of gender parity among decision-makers within the AU.

Section Three considers AU support for the MNJTF. It shows that despite its interventionist legal framework and policies, in the absence of state consent, the AU’s role is limited to assisting states to provide for their own peace. It shows the key role AU organs have played in operationalizing the MNJTF. It argues that the mandate provided for the force and the CONOPS are insufficiently strong, to avoid infringement by states on Nigeria’s territory and also to stay within the confines of international law rules. It shows that the MNJTF has had some success but that Boko Haram continues to deny women the right to liberty, and is increasingly using abducted girls to carry out suicide missions against civilians.

The paper concludes that the AU’s prioritisation of the sovereignty of a key member state leaves a gap in the protection of women in Africa, and that the AU’s course of action does not bode well for women at risk in armed conflict situations. In the light of the AU’s declared support for women’s rights and protection in Africa, the paper argues for the AU to put women at the centre of each mandate it issues in future.

SECTION 1: THE ABDUCTION OF WOMEN BY BOKO HARAM AND INTERNATIONAL LAW VIOLATIONS

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2 AU, Solemn Declaration on a Common African Defence and Security Policy, 28 February 2004, [hereinafter CADSP].
This section gives a broad overview of Boko Haram, and the violence of the group against young women and girls abducted since mid-2013. It shows that the interest of neighbouring states and the international community was engaged both because Nigeria proved unable to protect its territory and because of the kidnapping of one group of women in 2014, the Chibok girls.

a. *Boko Haram*

Mohammed Yusuf, an Islamist cleric in Maiduguri, Borno State, Nigeria established the Boko Haram group in 2002. He rejected Western-style education, and the authority of the Nigerian secular state and preached for *Sharia* law to be implemented over the whole country. Following the death of Yusuf in 2009 while in police custody, Abubakar Shekau became the new leader of the group and he began an armed insurrection against the Nigerian state aimed at imposing Sharia law over the country (jihad). As part of that, from 2011 onwards, Boko Haram carried out hit and run strikes against police stations and prisons, bombed civilians and civilian objects including restaurants, marketplaces, churches, mosques, workplaces, schools, and IDP camps as well as the UN building in Abuja. By May 2013, the conflict between Boko fighters and the Nigerian security forces in northern Nigeria, particularly in Borno, Adamawa and Yobe states, had reached the level of non-international armed conflict. As a result of the conflict, between July 2009-July 2017, 20,000 people in north-east Nigeria have been killed, 1.7 million people displaced, and 200,000 have sought refuge in

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4 Ibid.


neighbouring states, Cameroon, Chad, and Niger.\textsuperscript{9} That conflict, though reduced is on-going.

Boko Haram has been abducting women since 2009, but these initially were random occurrences in which individual women were kidnapped.\textsuperscript{10} From mid-2013 onwards however Boko Haram began targeting large groups of women for abduction, targeting in particular those of the Christian faith, and those attending non-Islamic educational establishments.\textsuperscript{11} A turning point came in April 2014, when Boko Haram abducted 276 girls aged between 12-14 years of age abducted from the Government Day Secondary School in Chibok, Borno (57 of the girls escaped shortly after).\textsuperscript{12} That mass kidnapping led to a campaign for their return by Nigerian civil society which received wide international support including through a twitter campaign #BRINGBACKOURGIRLS. Since then, Boko Haram and has abducted other groups of women. The numbers of women abducted is hard to quantify. But, Amnesty International estimates that by early 2015, Boko Haram had abducted a total of 2,000 women and girls in 38 situations.\textsuperscript{13} That would seem to be a conservative number. Reliable reports suggest that in Nigeria, Boko Haram abducted, among others:

- 500 women and children from Damasak, Borno State in November 2014\textsuperscript{14}
- 500 women and 1,000 children from Gwoza, Borno State between November 2014 and February 2015\textsuperscript{15}

\textsuperscript{13} Ibid, 59.
• 218 women and children from Katarko village, Yobe State in January 2015 (182 of these were released by the group a few weeks later)\textsuperscript{16}
• 22 girls aged 17 and younger from Pulka, Borno State in April 2017.\textsuperscript{17}

Boko Haram has also abducted 30 adults (mainly women) and 50 children aged between 10-15 years of age abducted in January 2015 from Maki and Madi villages in the Tourou district of Cameroon.\textsuperscript{18} Following their abductions, the women and girls are detained in places under Boko Haram control in Nigeria (in particular in the Sambisa Forest area), Chad, and Cameroon.\textsuperscript{19}

In abducting women, Boko Haram clearly intends to cause general insecurity and terror. But other motives for its abductions can be deduced. One motive is to reward fighters with sex. In this respect, Boko Haram fighters carry out sexual assaults and rape of abducted women.\textsuperscript{20} Some captured women and underage girls are forced to marry the fighters,\textsuperscript{21} and the wives of men killed by Boko Haram are ‘inherited’ by its fighters.\textsuperscript{22} The forced marriages may be intended to legitimise rape and sexual violence – there is a widely held view in the African region that coercive sex within marriage is not rape.\textsuperscript{23} At the same time, through abductions, the group has a supplies of women who may be impregnated by the fighters and give birth to a new generation of Islamic militants – the intention is to decimate the Christian population and replace these with a superior breed and religious ideology.

Boko Haram’s motives are only of a sexual nature. Captives also provide an opportunity for the group to recruit new members. Certainly, captives are forced to convert to the

\textsuperscript{16} Amnesty International, Reign of Terror, supra note 3, 63.
\textsuperscript{19} Ibid; Fremon, supra note 11, 251-252; Nossiter, Boko Haram militants, supra note 20.
\textsuperscript{20} Ibid; Amnesty International, Reign of Terror, supra note 3, 5 and 59; ICC-OTP. November 2015, supra note 15 [206].
group’s religious ideology and values, on pain of death, beatings or punishment. Abducted women also provide a source of revenue for the group. Women are treated as slaves and sold for financial gain, traded in exchange for the payment of ransom by their families, or bartered for the release of Boko Haram fighters by state authorities. That conclusion is supported by Shekau’s statements made after the Chibok abductions: ‘I abducted your girls. I will sell them in the market, by Allah, there is a market for selling humans…I will sell women’, and ‘These girls have become our own property as it is the injunction in the Qur’an. We decide what to do with them, yes I repeat, they are now our slaves and acquired property’, and more prosaically ‘the fact remains that these girls remain with us until the Nigeria government releases our brothers and sisters being held in various detention facilities across the country.”

Finally, the abductions provide Boko Haram with women and in particular young girls which it then uses to launch psychological and physical assaults on troops and the wider community. For example, Boko Haram fighters killed their ‘wives’ as the Nigerian army advanced on Gwoza in 2015. Significantly, Boko Haram’s preferred tactic for operations against civilians and soft targets since mid-2014 is to use abducted girls for suicide missions in Nigeria, in Cameroon, and in Niger. Some of these girls are seven years of age. UNICEF estimates that in 2015 girls carried out 75 per cent (33 of 44) of suicide bombings that took place in these three states, with the remainder being carried out by boys. It further estimates that between January-August 2017, 83 children have been used as suicide bombers solely in Nigeria, a four-fold increase on the whole of 2016. Of the 83 children, 55 were girls and the majority of these were

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25 Ibid, 5 and 63.
27 ICC-OTP. November 2015, supra note 15 [207].
29 ICC-OTP. November 2015, supra note 15 [207].
under 15 years of age, and 27 were boys, and one was a baby of undetermined sex strapped to a girl.32

b. The developing external interest

Initially, President Goodluck Jonathan of Nigeria preferred to deal with the Boko Haram crisis as an internal problem, and resisted external assistance.33

One reason is Nigeria’s reputation as a strong and credible military power. It had taken lead roles in peace operations in the region including ECOWAS’ interventions in Chad (1990), Sierra Leone (1997-1999), and Liberia (1990), and supported ECOWAS peacekeeping in Mali (AFISMA, 2013) and Gambia (2016).34 It had provided troops for AU actions, including in Somalia (2007), and AU-UN operations in Darfur (UNAMID, 2005-2007), and for UN operations within and outside Africa, including in Somalia (UNITAF, 1992-1993).35 At 2014, it also had 80,000 troops including 62,000 were soldiers.36

In reality, inadequately equipped or reinforced national forces at various times refused to engage Boko Haram fighters, and where Nigerian forces have engaged they have proved unreliable in protecting territory or people.37 By 2014, Nigeria was unable to

32 That ratio on the use of girls is broadly supported by Reliefweb which estimates that 50 per cent of suicide bombings that took place in January 2017 in Nigeria and Cameroon were carried out by children, with girls carrying 75 per cent of these attacks. 1 April 2016. “Boko Haram attacks Cameroon with kidnapped girls.” Al Jazeera, http://www.aljazeera.com/news/2016/03/weakened-boko-haram-sends-girl-bombers-cameroon-160331175822717.html; Reliefweb. January 2017. “Fact Sheet on Suicide Attacks: Nigeria and Neighboring Countries.”


protect key parts of its territory from Boko Haram’s control, including a large number of towns and villages in northeast Nigeria and those on the borders with Cameroon, Chad, and Niger. The involvement of these neighbouring states became inevitable because of potential spillover effects and the need to limit Boko Haram’s expansion and encroachment on their territory. That concern proved to not be misplaced. As example, in August 2014, Boko Haram captured Gwoza near the Cameroonian border, after Nigerian troops fled, and declared that area an emirate. 38 Following that, Boko Haram launched 336 attacks against Cameroon in the period between August 2014 and end-March 2016. 39 At the same time, the violent activities of Boko Haram had led to large number of refugees fleeing from Nigeria into neighbouring states, and placed a strain on their borders, humanitarian resources, and supply routes. 40

In parallel, the Nigerian government also failed to respond effectively to Boko Haram’s abduction of women. The reasons are complex but centre on a failure of the government to take the mass kidnappings of the girls seriously. That failure was political. The ruling party, the Peoples’ Democratic Party (PDP) believed that the abductions were a political ruse, devised by the opposition party, the All Progressives Congress (APC), to make the government look ineffective in the run-up to presidential elections which were scheduled to take place in February 2015. 41 At the same time, the governor of Borno state, Kashim Shettima (APC), seemed to attach less importance to the mass abduction of women than to the breach of protocol by President Jonathan in not telephoning him about the crisis. 42 The result was that the President and the governor failed to make contact with each on the abductions until 19 days after the kidnappings had taken place. 43 Following that, the government proved unwilling to acknowledge its inability to provide an effective response. That led to a refusal to acknowledge reliable reports of other mass kidnappings of women, including the large group taken in

39 Boko Haram attacks with kidnapped girls, AlJazeera, note 32.
41 Adewunmi, Mark, and Burke, Nigeria’s mass kidnapping, supra note 11; Nwankwo, J. 3 September 2014. “Defeating Insurgency, Long Road Ahead – Jonathan.” Daily Independent, Lagos. The elections were postponed for six weeks, from 14 February-28 March 2015 as a result of Boko Haram violence.
43 Ibid.
Damasak in November 2014. Problematically, the government instead exaggerated its success against the armed group, including claims that it had killed Shekau and rescued abducted women. The result was that at the early critical stages, the Boko Haram threat against women was understated and there was no search for those abducted. That failure enabled Boko Haram to move abductees to and across its strongholds in northeast Nigeria, and Chad and Cameroon in particular.

It was the need to protect women and girls, specifically those abducted in Chibok, which placed pressure on the Nigerian government to work with other actors. In May 2014, Nigeria, Cameroon, Chad, Niger and Benin (which shares Nigeria’s western border) agreed to establish a MultiNational Joint Task Force (MNJTF) and deploy a battalion each (about 700 troops) to fight Boko Haram. That initiative received wide support, and in May 2014, France, the US, UK and EU agreed to provide military, intelligence and training support for the search and rescue of the girls and the fight against Boko Haram. In August 2014, President of the US, Barack Obama referred to the Chibok kidnappings as a key motivation for US involvement. One challenge was that Nigeria proved reluctant to accept that support, leading to negligible results.

At the AU level, the protection of women against Boko Haram was a marginal issue until the external actors became involved, following the Chibok abductions. In August 2014, the AU announced that it planned to deploy a regional force against Boko Haram. That raised prospects of an AU led coalition of states engaging directly with Boko Haram on Nigeria territory. However, the AU did not proceed further. Instead, in November 2014, the AU PSC declared its horror at the kidnapping of the Chibok girls and threw its support behind the MNJTF as an appropriate framework for the regional

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44 Faul, Hundreds of Schoolchildren are missing, supra note 14.  
46 Cameroon Kidnappings, BBC News, supra note 40.  
48 4 August 2014. “Nigeria; Rising Islamist Violence in Focus at Obama Hosted Africa Summit.” Vanguard, Lagos.  
50 Vanguard, Lagos Nigeria; Rising Islamist Violence, supra note 48.  
fight against Boko Haram. It is not known why the AU changed course. But Assanvo et al state that some actors expressed strong reservations about the AU’s involvement, considering this political opportunism and interference in the domestic affairs of a sovereign state. Rather than deploy, the AU engaged instead with Nigeria through a visit of the AU’s Special Envoy on Women, Peace and Security, Bineta Diop, and AU PSC Member from Niger, Diallo Amina Djibo, on 9 December 2014. In Nigeria, Diop was careful to stress AU support for both the government of Nigeria and the families of the missing Chibok girls. Nevertheless, Diop promised to give voice at the AU level to calls by the Bring Back OUR Girls campaigners for increased support in finding the abducted girls. Subsequently, at the AU Peace and Security Open Session on Women, Peace and Security on 16 December 2014, she called on AU states to adopt a collaborative holistic approach to the Boko Haram crisis. It is not clear what Diop meant by the term ‘collaborative holistic approach’. What is clear is that AU continued to prioritise sovereign consent.

The plan to establish the MNJTF was reaffirmed and refined by LCBC states and Benin at an extraordinary meeting of 7 October 2014 when they agreed to complete deployment of their pledged troops by 1 November 2014, and establish force headquarters in Baga, Nigeria three weeks after that. The objective was for the force to act under the authority of the Lake Chad Basin Commission (LCBC) utilising its Multinational Joint Security Force (MJSF) which had been established by the LCBC in

58 Boureima, 5 African states, supra note 47.
1994 for border operations against transnational crimes and revamped in 2012 for actions against terrorists.59 Boko Haram’s capture of MJSF headquarters in Baga in January 2015 and its killing of 2,000 civilians in the area derailed that plan.60 As we will see, that would lead to LCBC states requesting AU legal framework for their action against Boko Haram.

SECTION 2: INTERVENTION IN PROTECTION OF WOMEN UNDER AFRICAN UNION TREATIES: PROSPECTS

This section considers whether AU treaties provide a right to intervene in protection of women, and the procedure for intervention. It also considers the reasons why the AU failed to act against the Boko Haram threat. It argues that AU powers of intervention conflict with other core AU principles, that the AU is unwilling to act without the consent of territorial states in particular a key state like Nigeria, and that it is unwilling also to act without the authorization of the UN Security Council despite the lack of reference in AU treaties to this. It argues that the under-representation of women in senior leadership and peace and security decision-making positions within the AU is another key factor.

a. *AU Powers of Intervention*

The African Union (AU) is a peace and security institution which replaced the OAU on 9-10 July 2002.61 The intention was to provide more effective responses to the current needs of the African region, including the eradication of armed conflicts.62 The AU Constitutive Act came into force on 26 May 2001, and to date 53 of 55 AU states have ratified it.63

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60 UNSC. “Meeting of Ministers of Foreign Affairs and Defence on security situation in Nigeria and the fight against Boko Haram.” UN S/2015/73, Annex, 3 February 2015, [8].
63 The exceptions are South Sudan which was admitted to AU membership on 27 July 2011, and Morocco which was re-admitted to AU membership on 30 January 2017 (Morocco had withdrawn from the OAU
Key among AU instruments to promote protection of women is the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women (Women’s Protocol), which was adopted in 2003, and came into effect in November 2005, after 15 AU states including Nigeria had ratified it. By October 2015, 36 of 54 AU states had ratified it. The Protocol was adopted to eliminate discrimination against women and protect, *inter alia*, women’s right to life, physical integrity, security, and peaceful existence. It prohibits physical, verbal, sexual and psychological and other violence that cause harm to women in peacetime and during armed conflicts. It requires state parties to, *inter alia*, to punish perpetrators and protect women at risk from such occurrence. For our purposes, it is significant that this treaty prohibits and criminalises the exploitation and inhuman and degrading treatment of women, rape, and trafficking in women, the marriage of girls under the age of 18 years of age, and the forced marriage of adult females. State parties must also take *all necessary measures* to ensure children (including girls) do not take part in hostilities and are not recruited to fight (Article 11(4)). The Rights of Women Protocol provides for adjudicative remedies. The African Commission on Human and Peoples’ Rights is to monitor implementation of the Protocol in member states, and the African Court on Human and Peoples Rights is to interpret the Charter. In this respect, the African Commission on Human Rights has issued resolutions and statements calling for Nigeria to take measures to rescue the abducted girls and protect women and girls in particular, and condemning Boko Haram’s escalating use of women and children as suicide bombers.

The Protocol is silent as to whether intervention in prevention or protection is in 1985 over the admission of Western Sahara (Sahrawi Arab Democratic Republic), which Morocco regards as part of its territory).


65 Ibid.


67 Ibid, Arts 4(2) (e) and 4(2)(g), 5(d), and 12.

68 Ibid, Arts 4(1), 4(2)(a), and 4(2)(g).

69 Ibid, Arts 6(a) and 6(b).

70 Ibid, Art 11(4).

permissible. One question is whether the expression *all necessary measures* enables that. The expression is a term of art used in UN Security Council resolutions and legally authorises measures including the use of force in support of UN and mission objectives.72 Adopting that interpretation would allow AU intervention in specific contexts, including under Articles 4(h) and 4(j) of the Constitutive Act (discussed below).

A similar conclusion is permissible under another key treaty, the African Charter on the Rights and Welfare of the Child (Children’s Charter), which is relevant to the protection of young women. The Children’s Charter was adopted in July 1990 and came into force in November 1999 after 15 states, including Nigeria had ratified it.73 By April 2016, 47 of 54 African states had ratified it.74 It is the African equivalent of the 1989 UN Convention on the Rights of the Child.75 One key difference is that the age of protection for girls under the UN framework, which is 15, is raised. Under the Children’s Charter, member states must protect children under 18 years of age children from all forms of sexual exploitation or abuse, including abduction, sale, trafficking, or child marriage.76 The African Children’s Rights Committee is established under the treaty to oversee state implementation of the rights provided. Again, this treaty is silent on the use of force in protection. But as with the Women’s Charter, it places an obligation on state parties to take *all necessary measures* to ensure children do not take part in hostilities for any side during armed conflicts.

This interpretation of the Women’s Protocol and Children Charter would be in line with the Gender Policy which the AU Assembly adopted in 2009 for gender equality and women’s empowerment, in line with Article 4(L) of the Constitutive Act.77 One stated

| 72 For example, in Resolution 1973 (2011) the UN Security Council acting under Chapter VII authorized UN member states, and regional organisations to the use of *all necessary measures* for the protection of civilians during the 2011 armed conflict in Libya. See S/RES/1973 (2011) [4]. |
| 76 Article 21(2) and Art 29. |
The objective of the policy is to enhance the protection of women against violence, rape and other violations in the context of armed conflict. While it does not refer specifically to intervention in support of women and children, it does state that the policy is to be guided by the values and principles stipulated in the AU’s Constitutive Act. Critically, it provides that mandates for humanitarian intervention and peacekeeping should emphasise problems affecting women and children.

The Constitutive Act of the AU is the first international treaty to recognize a right of humanitarian intervention. The key provision is Article 4(h) of the Constitutive Act. It provides for:

“The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”.

These grave circumstances triggers are not defined, however the Protocol establishing the Peace and Security Council of the AU in May 2004 gives guidance on the meaning of “war crimes, genocide and crimes against humanity”. According to Art 7(1)(e) of the PSC Protocol, these are “as defined in relevant international conventions and instruments”. That would include the Rome Statute of the ICC (which Nigeria has ratified), the Statute of the ICTY, and the ICTR. In the particular context of non-international armed conflicts, Article 8 (c) and 8(e) of the Rome Statute of the ICC define as war crimes murder, humiliating and degrading treatment outrages against personal dignity, attacks against civilians (those not taking a direct part in hostilities) rape sexual slavery, forced pregnancy, and other sexual violence forming serious violations of the laws and custom of war in Common Article 3 of the Geneva

78 Ibid, 20, point 5; and 8, and 12.
79 Ibid, 9.
80 Ibid, 20.
82 Art 7(1)(e) PSC Protocol.
Conventions of 1949, as well as the use of persons under the age of 15 in hostilities.\(^{84}\) These acts also constitute crimes against humanity under the Rome Statute Article 7 whether committed during or outside armed conflicts. Persecution of an identifiable group on the grounds of religion is a crime against humanity.\(^{85}\) Significantly, the ICTR established in the *Akayesu* case that rape and sexual violence can constitute genocide if committed with the intent to destroy a particular group, and recognised that as these lead both to serious physical and mental harm of the victim are one of the worst ways of inflicting harm.\(^{86}\) Significantly, the AU Assembly adopted the same definition of rape and sexual violence in 2014 in respect of the proposed African Criminal Chamber for international crimes.\(^{87}\)

Another basis for intervention is Article 4(j) of the AU Constitutive Act. That provides for: “the right of Member States to request intervention from the Union in order to restore peace and security”. Art 4(j) would enable a member state to request assistance from the AU where it is unable to protect its population or its borders. As this provision does not limit the request to the state itself, it may be possible for one state to request intervention in another. That would include where gross violations of international criminal law or international humanitarian law within a state threatens the security or stability of neighbouring states or the region. The AU Common African Defence and Security Policy 2004, adopted under Articles 3(e) and 4(d) of the Constitutive Act, supports this interpretation. Under the CADSP the term “security” is interpreted widely to include human security.\(^{88}\) Internal threats to that security include war crimes, crimes against humanity and genocide, lack of respect for the sanctity of human life, impunity, terrorism, political, and religious extremism.\(^{89}\) The CADSP principles are said to be informed by Article 4 of the Constitutive Act including Article 4(h) and 4(j) of the Constitutive Act which provide for a right of AU intervention.\(^{90}\)

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\(^{86}\) Prosecutor v Akayesu, Judgment, ICTR-96-4-A, ICTR Appeals Chamber, 1 June 2001, [731].

\(^{87}\) Under Article 28(B)(f) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) adopted by the AU Assembly on 27 June 2014.

\(^{88}\) AU, CADSP, *supra* note 2, 3 [6].

\(^{89}\) Ibid, 3-4 at [8(ii)(e)]-{(f)}, and 8 at [13(a)].

\(^{90}\) Ibid, 6 at [11(f)].
b. **Procedure for Intervention**

The AU has an established procedure for intervention. It is the AU Assembly that has final decision-making authority on intervention under Articles 4(h) or 4(j) of the Constitutive Act.\(^91\) The AU Peace and Security Council (PSC), a 15 member “standing, decision-making organ for the prevention, management and resolution of conflicts”, along with the Chairperson of the AU Commission (AUC, Secretariat), recommends intervention to the AU Assembly in respect of Article 4(h) situations, decides on any other matter that may impact on peace and security in the Africa, and has the responsibility of anticipating and preventing conflicts, and policies that may lead to genocide and crimes against humanity.\(^92\) Each of these duties would include the mass and systematic abduction of women and children by Boko Haram. That conclusion is supported by the PSC declaration in May 2004 that: “Henceforth, there will be no conflict on our continent that will be considered to be out of bounds for the African Union. Where grave abuses of human rights, crimes against humanity and genocide occur, the Peace and Security Council must be the first to condemn, and take swift action, consistent with the letter and spirit of the Constitutive Act of the Union and other relevant instruments that we subscribe to.”\(^93\)

Decisions of the PSC to recommend and of the Assembly to intervene are made by consensus or failing that by majority vote.\(^94\) Following a decision of the Assembly, the PSC working with the Chairperson of the AUC approves the modalities for intervention.\(^95\) The Chairperson of the AUC then implements the decisions of the PSC and of the AU Assembly, including decisions on the use of Article 4(h) and 4(j) powers.\(^96\) In carrying out its functions, the PSC has power to authorize and deploy AU

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\(^91\) PSC Protocol, Art 7 (1) (e) and (f).
\(^92\) Ibid, art 7(i) (a) (e) and (r).
\(^94\) AU Constitutive Act, art 7(1) and PSC Protocol, art 8(13).
\(^95\) PSC Protocol, art 7(1)(f).
\(^96\) Ibid, arts 7 and 10.
forces, and provide AU mission mandates. The PSC’s decisions are made on behalf of AU member states, and are binding.

The AU is currently working towards establishing an African Standby Force, for rapid reaction, provided for under Article 13 of the PSC Protocol to carry out the AU PSC’s peace and security mandates enforcement under Articles 4(h) and 4(j). In the meantime, the AU continues to rely on its member states for troop provision on an ad hoc basis. Importantly, the PSC has the power to intervene through subregional mechanisms of the Regional Economic Communities (RECs) of North, South, East, West and Central Africa, which are seen as part of the overall AU architecture for regional peace and security under Article 16 of the PSC Protocol.

c. Why no AU intervention?

It is clear that AU instruments provide a normative framework and wide rights of intervention which are intended to enable the AU respond quickly and effectively to humanitarian crises. It is also clear that the traditional view that violence against women in intra-state armed conflicts are outside the purview of external states and international institutions does not sit easily with the protection of women’s rights. The question then is why has the AU not adopted a more muscular approach to the threat posed by Boko Haram.

Several reasons explain the AU’s inactivity. Firstly, AU intervention without consent would necessarily be in conflict with other AU core objectives. These include Article 3(b) of the Constitutive Act, which provides that the AU is to ‘Defend the sovereignty,

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97 Ibid, arts 7(1) (c) and 7 (1)(d).
98 Ibid, art 7(2).
territorial integrity and independence of its Member States’. Similarly, Article 4(e) of the Protocol Relating to the Establishment of the Peace and Security Council (the PSC Protocol) requires the PSC to be guided by the principle of respect for the sovereignty and territorial integrity of its member states. In line with these, Article 4(f) of the PSC Protocol advocates ‘non-interference in the internal affairs of another’. In this respect, it is important to note that the AU has a right, not a duty, to intervene.\textsuperscript{102} In its practice so far the AU has generally recognised states primary responsibility for protecting their populace and respected state sovereignty, even where the state authorities were responsible for the violence and atrocities.

Secondly, any criticism of Nigeria would be particularly problematic for the AU. Nigeria is a regional power, militarily, politically and economically. It is a founding member of the organisation and a key funder. Under the previous scale of assessments, based on ability to pay, which dated from January 2006-January 2016, Nigeria, along with Algeria, Egypt, Libya, and South Africa each paid a ceiling rate of 15% each of the budget, with the remaining 25% allocated to the other 48 member states.\textsuperscript{103} Under the current scale of assessments for 2016-2018, based on GDP, Nigeria, along with Algeria, Egypt, and South Africa will pay 12 per cent of the AU budget each, with the remainder 52 per cent of assessed dues allotted between the other 50 states.\textsuperscript{104} Even though Nigeria’s assessed due is lower than under the previous allocation, it remains critical to the AU’s ability to fund its operations, programmes and projects.

Thirdly, Articles 4(h) and 4(j) provide wider powers for AU intervention than current international law allows. One challenge is that these provide for a right for intervention other than in self-defence, which strictu sensu could affect the legality of the treaty as a whole. The other is that under current international law, any use of force that does not have the contemporaneous consent of the territorial state would require UNSC authorization but neither Article 4(h) nor 4(j) makes reference to the requirement for

\textsuperscript{104} AU. June 2015. “Decision on the Scale of Assessment and Alternative Sources of Financing the African Union.” Assembly/AU/Dec.578(XXV) [3], [5], and table annexed.
UNSC authorization for the use of force by the AU. These matters have not been tested. The practice so far is that the AU seeks UNSC endorsement of its peace operations, and the UNSC endorses these.\textsuperscript{105} One key reason for that is that the AU is able to act as a vanguard peacekeeping force but it lacks the resources to carry out complex operations, and as a result has been reliant on the UN taking over operations.

Finally, women remain under-represented in senior leadership and peace and security decision-making positions within the AU.\textsuperscript{106} Of 54 Heads of State and Government which form the AU Assembly at the time of writing (3 September 2017), only one is female - Ellen Johnson-Sirleaf of Liberia. Of five AUC Chairpersons elected by AU member states, only one has been female, Nkosazana Dlamini Zuma of South Africa (15 October 2012 to 30 January 2017).\textsuperscript{107} PSC state members are elected under the principle of geographic equitable representation and rotation.\textsuperscript{108} The number of women who have been peace and security councillors is not known. But given that women’s participation at the national level in political representation and leadership or peace processes is low, it is likely that the number of women representatives within the PSC also is likely to be low.\textsuperscript{109} Within the AU, women are under-represented in advisory positions. Of 20 persons appointed Special Representatives or Envoys, only one is female (Bineta Diop, appointed January 2014 by the Chairperson of the African Union Commission),\textsuperscript{110} and of 11 Heads of AU Missions, only four are women.\textsuperscript{111} The exception is the AU Panel of the Wise, which supports the AU PSC through mediation, where women are in a majority of 3-2.\textsuperscript{112} The effect of female under-representation is that decisions on women’s security are largely the responsibility of men. The challenge so far is that in general, the protection of a state’s sovereignty, territory, or government has dominated AU peace support mandates, and people–centred protection has been

\textsuperscript{107} The others are Amara Essy, Ivory Coast (July 2002-September 2003, interim); Alpha Oumar Konare, Mali (September 2003-April 2008); Jean Ping, Gabon (April 2008-October 2012); and Moussa Faki, Chad (14 March 2017–current). African Union. “Chairperson.” https://au.int/en/cpauc/functions
\textsuperscript{108} Art 5(2) PSC Protocol.
\textsuperscript{110} Ibid, 16 and 35.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid, 35.
secondary  As we will see in the next section, the AU has since became involved in the fight against Boko Haram, but only on the request of MNJTF states.

SECTION 3: THE AU and the MNJTF

This section considers the involvement of the AU in the resolution of the Boko Haram crisis. It shows that AU organs have played a crucial role in operationalizing the MNJTF and have worked together well to assist the MNJTF states provide for their own peace. It argues however that the MNJTF is undermined by a weak mandate and concept of operations. It shows that the MNJTF has had some success but that the rescue of girls, other than the Chibok girls, has not been a priority.

A significant shift in the AU’s involvement came on 20 January 2015, when LCBC states referring to ‘violent attacks against civilians’ and abductions of defence and security forces, requested that the AUC Chairperson prepare a report on the decision to utilize MNJTF in fighting Boko Haram, in the context of AU PSC authorization and deployment. In her report, the AUC Chairperson highlighted the threat Boko Haram posed to all African states, and urged support for the MNJTF initiative in keeping with the African Defense and Security Policy.

On 29 January 2015, the AU PSC provided the MNJTF with a 12-month mandate, to among other tasks:

1. conduct military operations to prevent the expansion of Boko Haram and activities of other terrorist groups, and eliminate their presence

113 See, for example, AU. 20 October 2004, “Communique.” (PSC/PR/Comm. (XVII), and 28 April 2005 “Communiqué” PSC/PR/Comm.(XXVIII) in relation to the African Union Mission in Somalia (AMIS II) deployed 20 October 2004-31 December 2007. The mission’s mandate to monitor ceasefire agreements between the conflict parties, contribute to a secure environment for the delivery of humanitarian relief and the return of internally displaced and refugees to their home. Within this mandate, AMISS II could also “protect civilians whom it encounters under imminent threat and in the immediate vicinity”.


2. create safe havens in the areas affected by Boko Haram and other terrorist groups to limit, inter alia, sexual and gender based violence
3. to actively search for and free all abductees
4. to support regional efforts to arrest and bring to justice all those responsible for war crimes and crimes against humanity
5. to protect civilians under imminent threat of death, IDP and refugee camps
6. carry out through joint, simultaneous, coordinated and coordinated operations at border areas.116

The AU PSC has renewed the MNJTF mandate twice, and the force is currently authorised until 31 January 2018.117

Throughout, the AU PSC has used its authority to increase the number of MNJTF troops that LCBC states planned to provide, in order to ensure a better response to the increasing Boko Haram threat. For example, MNJTF states initially agreed to deploy a battalion each.118 However, the PSC in January 2015 authorised instead 7,500 MNJTF military, civilian and police personnel from Benin, Cameroon, Chad, Niger, and Nigeria.119 That followed the assessment of the AUC that an increase was necessary because of the increasing violence of Boko Haram.120 Two months later, on the AU PSC on 3 March 2015 increased the strength of MNJTF to 10,000 troops and other personnel.121 Again that was an increase on the 8,700 personnel announced by MNJTF states, and came at the recommendation of the Chairperson of the AUC following an escalation of the violence in Nigeria and Cameroon, and an expansion of Boko Haram’s activities into Chad and Niger.122

That evolving response to the on-going crisis and the effective operation of AU peace and security organs was however undermined by the PSC’s failure to provide the

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117 Most recently in AU, 29 November 2016. “Communique”. PSC/PR/2.(DCXXXIX) [10].
120 Report of the Chairperson, PSC/AHG/2.(CDLXXXIV), supra note 115, [21].
MNJTF force with an ‘all necessary force’ or ‘all necessary means’ mandate which would have enabled enforcement measures, and by the limitations placed on the use force in protection of civilians. Similarly, the Concept of Operations (CONOPS) adopted by the LCBC states and Benin on February 2015, and by the AU PSC on 3 March 2015 is insufficient.\textsuperscript{123} It does makes reference to the need to reduce ‘violence and abuses against civilians including sexual and gender-based violence’ ‘despicable atrocities’, and ‘atrocities on civilian populations’ in identifying MNJTF tasks.\textsuperscript{124} But state sovereignty is to be prioritized over civilian protection. For example, the MNJTF Force Commander must obtain contemporaneous consent of LCBC states to cross-border operations including any to be carried out in previously agreed areas.\textsuperscript{125}

The mandate and CONOPs are designed both to achieve a political consensus and with the UN framework in mind. That was made apparent in January 2015 when the AUC Chairperson stated that achievement of the CONOPs objectives was based on the assumption of UN Security Council endorsement.\textsuperscript{126} In its 3 March 2015 communiqué, the PSC requested that the UNSC “urgently adopt, under Chapter VII of the UN Charter, a resolution that would: (i) endorse the deployment of the MNJTF.\textsuperscript{127} Although the UNSC had previously encouraged support for the MNJTF, it was not until 31 March 2017 that it responded to this specific request. In Resolution 2349 (2017), the UNSC adopted both the MNJTF concept and the AU PSC mandate for the force, and called for remaining force personnel to be deployed.\textsuperscript{128} In that resolution, the UNSC makes specific reference to gender based violence including sexual exploitation and abuse, and to the use of children in armed conflict.\textsuperscript{129} But rather than providing the MNJTF with a Chapter VII mandate, the UNSC stressed the importance of state sovereignty and states primary responsibility for the protection of their civilian populations.\textsuperscript{130} One reason is that like the AU, the UN is a statist organisation. Another may be that the UNSC is wary of becoming involved in another complex operation in Africa.

\begin{footnotes}
\item[124] Ibid, (LCBC Final Communiqué) [2], [3], and [4(2)].
\item[125] PSC/PR/2.(CDLXXXIX) "Communique", \textit{supra} note 123 [13].
\item[126] Report of the Commission, PSC/PR/2.(CDLXXXIX) “Communiqué”, \textit{supra} note 123 [13].
\item[127] PSC, Communiqué, PSC/PR/COMM.(CDLXXXIX)-REV.1, \textit{supra} note 121, [20].
\item[128] UNSC, SC/12773, 31 March 2017, in particular at [4]-[5] and preamble.
\item[129] Ibid, [1], [4], [11]-[13].
\item[130] Ibid, Preamble, and [12].
\end{footnotes}
Despite this, the MNJTF has had some success. By January 2015, in the run-up to the AU’s provision of a legal framework for the force, Boko Haram had captured most of the territory in Borno State, and large parts of northern Adamawa state and eastern Yobe State.\footnote{ICC-OTP. November 2015, \textit{supra} note 15, [191].} At the time of writing (21 May 2017), major towns and territories have been recaptured from Boko Haram’s control. One reason is better cooperation between Nigeria and other MNJTF states, and more effective military response to Boko Haram by Nigeria.\footnote{Nossiter, Boko Haram militants, \textit{supra} note 20.} That followed the defeat of President Jonathon by Muhammadu Buhari at the presidential elections in mid-2015, partly as a result of his inability to respond to the Boko Haram crisis.\footnote{Ibid.}

However, the situation remains volatile and human security remains fragile. Boko Haram continues to be operational, and since June 2017, has carried out suicide attacks in Cameroon, Chad, Niger, and Nigeria, including in IDP camps.\footnote{‘Women Suicide Bombers Kill 27, \textit{supra} note 28; UN Office for the Coordination of Humanitarian Affairs, \textit{supra} note 9, 2; UNHCR. 2017. \textit{Nigeria Regional Refugee Response Plan - Mid-Year Report, January-December 2017}, 5, https://data2.unhcr.org/fr/documents/download/58915} The frequency and the rate at which it is using children as suicide bombers, the vast majority of these are girls, is increasing (discussed above).\footnote{Reliefweb. January 2017 Fact Sheet, \textit{supra} note 32.}

Some abducted women and girls have been freed. Nigerian forces rescued 1,300 women in 2015, during fights for territory.\footnote{Human Rights Watch. \textit{Events}, \textit{supra} note 45.} In 2016, Nigerian armed forces carried out a mission ‘Operation Rescue Finale’ which the leader of that operation, Major General Lucky Irabor, said was specifically aimed at releasing the Chibok girls and led to the liberation of 5232 abductees.\footnote{Olugbode, M. 24 November 2016. “Military launches operation to free remaining Chibok girls.” \textit{ThisDay}, Nigeria, https://www.thisdaylive.com/index.php/2016/11/24/military-launches-operation-to-free-remaining-chibok-girls/.} There have also been diplomatic initiatives for the release of the Chibok girls, which led to the release of 21 Chibok girls as prelude to negotiations (unsuccessful) between Boko Haram and the Nigerian government, brokered by the Red Cross and Swiss government in October 2016.\footnote{The Boko Haram group may have splintered, leading to a breakdown in negotiations. UNICEF, \textit{supra} note 30, 4.} Further
negotiations led to the exchange of 82 Chibok girls in May 2017 for five Boko Haram fighters.¹³⁹

The campaign for the release of the remaining 100 Chibok girls in captivity is on-going. Regrettably, the fate of other women captives is being marginalised not only at the national level, but also in regional and international discourse. That unfortunately fits into a narrative in which African women are invisible or generally not regarded as of much importance and in which the mass abductions of women is discounted by those in power.

CONCLUSION

The African Union has been established to respond to the current peace and security needs of the African continent, and that includes the promotion and protection of the rights of women. The AU has established and strong principles and procedures for intervention. It is troubling that the AU was unable to provide a stronger and firmer response to the sexual and gender based violence carried out by Boko Haram in the context of its armed conflict with Nigeria. But the reality is that the AU’s responses are constrained by traditional precepts of international law, conflicting principles in AU treaties, strong states and political realities, and its need to remain a credible international actor. They are also constrained by the invisibility of women in key decision making roles on intervention within the AU.

The AU’s limited response leaves women at the mercy of armed groups and at the mercy of territorial states which are unable to protect and unwilling to accept assistance and consent to deployment. That is particularly problematic in a region in which in past conflicts in which armed groups have carried out violence against women and girls with impunity within and across states, including Democratic Republic of the Congo (1996-1997, 1998-2003, 2010), Rwanda (1994), Liberia (1989-2003), Sierra Leone (1991-2001), Somalia (1991-), Sudan (Darfur, since 2003), Uganda (1991).¹⁴⁰ There are


¹⁴⁰ In addition to these seven states, 19 other African countries experienced sexual violence in armed conflict between 1997-2007, Bastick, Megan, Grimm, Karin and Kunz, Rahel. [2007] Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector, Geneva Centre for the
currently many armed and extremist groups operating in the African region, including jihadist groups in Africa, including Al-Qaeda in the Islamic Maghreb (AQIM) and the Movement for Oneness and Jihad in West Africa (MUJAO). These will have learnt lessons from Boko Haram’s tactics against women, and the failure of the African region to respond with a strong and unified response.

The question then is how to respond when future situations arise. The solution is one which the AU Assembly has already adopted in its 2009 Gender Policy framework. That is to put the protection of women firmly at the forefront of each and every peace operation mandate. That will require a change in AU practice and the clear prioritisation of human security over state sovereignty, and a change from words to deeds. Only through concerted action will the AU be able to demonstrate that it attaches real value to women’s rights in conflict zones. There are questions about whether such military intervention by the AU without the authorisation of the UN Security Council would be legal. It remains to be seen but such action is unlikely to face stiff challenge if limited to the objective of halting or averting sexual or other violence committed against women in the context of armed conflict when these constitute genocide, war crimes, and crimes against humanity.

Democratic Control of Armed Forces, 27-68, https://www1.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full%5b1%5d.pdf