

# Chapter 9

## The Nigerian ‘Jos Crisis’ from the Perspective of International Criminal Law

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## 9.1 Factual Background to the ‘Jos Crisis’

### 9.1.1 *The Violence in the Jos Area*

In recent years, Nigeria has been in the headlines for repeated acts of violence and terrorism committed on its territory and leading to the deaths of thousands of people.<sup>1</sup> The geographical center of these attacks is Jos, the capital city of Plateau State, situated in North-Central Nigeria. The term ‘Jos crisis’, therefore, refers to the series of attacks that has taken place there.<sup>2</sup>

In this region tensions have existed for over a century between the local ethnic groups, namely, the *Berom*, *Anaguta* and *Afizere* ethnic groups, on the one hand, and the *Hausa/Fulani* ethnic groups,<sup>3</sup> on the other hand. Despite the fact that the conflict in the Jos area has a long history, the situation has not been one of continuous strife. However, in 1994 a major outbreak of violence occurred; between 2001 and 2008 the violence was sporadic; since 2010 it has increased again. The incidents of brute force entail gross violations of human rights such as mass-murders, bombings, arson, looting and the destruction of public and private property. Victims, including children, women and the aged, have been hacked to death, burned alive or murdered in a chain of cruel and indiscriminate killings. Others have “disappeared”, never to be found.<sup>4</sup> The organized manner in which most of these attacks were executed indicates that they were well-planned and sponsored.<sup>5</sup>

Records show that the alleged crimes were perpetrated repeatedly, resulting in the deaths of several thousands in the last few years. The figures range between 3,800 and 10,000 deaths, depending on the time frame used by authors and

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<sup>1</sup> For a summary of the violence in Nigeria see Amnesty International 2013, pp. 196 et seq. See also International Criminal Court Report on Situation in Nigeria, 5 August 2013, pp. 5, 10.

<sup>2</sup> Theoretically, one could speak also of ‘Jos-violence’ or ‘Jos-conflict’, terms that would probably capture the situation in Jos even better. However, the most common description in Nigeria has been ‘Jos crisis’. Therefore, this article will use this terminology. The term does not include a strict geographical ambit, but also refers to the violence which occurred in the neighboring towns and villages to the city of Jos.

<sup>3</sup> The *Hausa* and the *Fulani* are two distinct ethnic groups, but are mostly associated together because they share culture and religion and are the two dominant ethnic groups in North-West and North-East Nigeria. They constitute other groups such as the *Jasawa* and the “*Miyetti* Cattle Rearers Associations”.

<sup>4</sup> See e.g. Human Rights Watch 2011. See also the Government of Nigeria’s “Whitepaper [sic] on the Report of the Commission of Inquiry into the Riots of 12 April 1994 in Jos Metropolis” (Fiberesima Report), 2004, pp. 7 et seq.; the “White Paper on the Report of the Judicial Commission of Inquiry into the Civil Disturbances in Jos and its Environs” (Niki Tobi Report), 2002; as well as “The Report of the Commission of Inquiry into the Unrest of 28th November 2008 in Jos North Local Government area of Plateau State” (Ajibola Report), 2009, pp. 25 et seq.

<sup>5</sup> See Human Rights Watch 2005, pp. 6 et seq.

experts.<sup>6</sup> Groups other than those mentioned above, including the *Yorubas*, *Igbos* and people from the Niger-Delta region, have also become involved in the conflict and have suffered serious losses. From available statistics, by the end of 2011, 630 *Yoruba*, 604 *Igbo* and 430 Niger-Delta people had lost their lives to the violence.<sup>7</sup> Thousands of people have been wounded and hundreds of thousands have been displaced. In addition, it has been estimated that public and private properties worth about 180 billion Nairas (over one billion USD) have been destroyed in the course of the conflict.<sup>8</sup>

Although there has been no major outbreak of violence in recent years, the systematic killing of civilians by armed groups is far from over in Jos.<sup>9</sup> This is especially true since *Boko Haram*, an Islamist terrorist group in Northern Nigeria, has become involved prominently in the conflict. *Boko Haram* has claimed responsibility for numerous attacks in Jos which have resulted in the death of hundreds of people.<sup>10</sup>

It comes, therefore, as no surprise that the Jos crisis has been described by a Nigerian politician as having caused more damage to the country than the bloody Biafra War in the late 1960s.<sup>11</sup>

### 9.1.2 Reasons for the Conflict

The recurrent violence in Jos is attributable to a number of immediate and remote, direct and indirect causes, chief among which are the dispute over the ownership of Jos and the issue of “indigenship”. The latter has manifested itself in a long-standing communal suspicion, distrust and bitterness among the original inhabitants and the *Hausa/Fulani* community in Jos.<sup>12</sup> Although not addressed expressly in the 1999 Constitution of Nigeria, the divide between “indigene” and

<sup>6</sup> See International Crisis Group 2012, p. 2; Kalu 2011; Higazi 2011, pp. 18, 23. See also Danfulani 2006, p. 3.

<sup>7</sup> See Kalu 2011.

<sup>8</sup> International Crisis Group 2012, p. 2.

<sup>9</sup> To give some examples of the current violent attacks in Jos as reflected in the Nigerian media: An attack by persons alleged to be *Fulani* herdsmen carried out on 30 March 2013 led to the death of 19 persons and led 4,500 persons to flee their homes, available at <http://news.naij.com/29736.html> (all internet sources cited in this chapter were accessed on 20 March 2014). Clashes between *Tarok* Christians and *Hausa/Fulani* Muslims resulted in the death of 11 persons, see Niger Reporters, 7 April 2013 <http://www.nigerreporters.com/nigeria-11-killed-in-tarok-village-attacks>. Between 15 and 19 April 2013, over 17 persons were killed in Riyom and Barkin Ladi Local Government, Area of Plateau State, see Adinoyi, This Day, 19 April 2013, available at <http://allafrica.com/stories/201304200130.html>. The list of incidents could be easily amended.

<sup>10</sup> International Crisis Group 2012, pp. 13 et seq.; Williams 2013.

<sup>11</sup> Article available at <http://thenationonlineng.net/new/jos-crisis-worse-than-biafra-war-says-senator>.

<sup>12</sup> See Solomon Lar Report 2010, p. 2.

“non-indigene” is embedded in the policy and administration of virtually every Federal State in Nigeria. It is a source of discrimination which determines distribution of a State’s resources, including political appointments, elections to office, job opportunities, awarding of scholarships and, most importantly, the allocation of land at the local and community level in a State.<sup>13</sup> The indigenes of a State invariably are the primary beneficiaries of its limited resources, thus making indigenship a covetous status.<sup>14</sup> Notwithstanding their claims, the *Hausa/Fulani* groups thus far have not been awarded indigenship status in Jos. Instead, ownership and indigenship of Jos have been assigned to the *Berom*, *Anaguta*, and *Afizere* ethnic groups exclusively.<sup>15</sup> This inequity has caused distrust and rivalry between the ethnic groups, sparking violent attacks and counter-attacks.

The ethnic struggle has been magnified by religious differences amongst the inhabitants of the Jos area, as the *Berom*, *Anaguta*, and *Afizere* groups are Christians, whereas the *Hausa/Fulani* are mostly Muslims.<sup>16</sup> Religion also constitutes the background to the involvement of *Boko Haram* in the conflict. Claiming vengeance for the death of its *Hausa/Fulani* Muslim brothers who were killed in the crisis, it has carried out series of suicide bomb attacks in Jos, killing and injuring many. This, in turn, has led to further clashes between indigene Christians and *Hausa/Fulani* Muslims.

## 9.2 Nigeria’s Reactions to the Jos Crisis

The Nigerian Federal Government and the Government of Plateau State, where Jos is located, have responded by setting up several commissions of inquiry, panels and committees to investigate the causes of the violence, to identify the persons responsible for the crimes, and to make recommendations to help prevent future violence.<sup>17</sup> These include:

- The Commission of Inquiry into the Riots of 12th April 1994 in Jos Metropolis (*Fiberesima* Commission);
- The Judicial Commission of Inquiry into the Civil Disturbances in Jos and its Environs, 2001 (*Niki Tobi* Commission);
- The Plateau Peace Conference (18 August–21 September 2004);

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<sup>13</sup> Section 25(1) of the Constitution of the Federal Republic of Nigeria of 1999, provides for indigenship as condition for citizenship by birth if a person was born before independence, and Section 143 makes indigenship a condition for appointment as Minister of a State. See also Human Rights Watch 2010, p. 2, International Crisis Group 2012, p. 7.

<sup>14</sup> Krause 2011, p. 25.

<sup>15</sup> Solomon Lar Report 2010, p. 2.

<sup>16</sup> Ajibola Report 2009, p. 33.

<sup>17</sup> See Ajibola Report 2009; *Fiberesima* Report 2004; *Niki Tobi* Report 2002; and Solomon Lar Report 2010; as well as the Report of the Plateau Peace Conference 2004.

- The Commission of Inquiry into the Unrest of 28 November 2008 in Jos North Local Government Area of Plateau State (*Ajibola Commission*); and
- The Presidential Advisory Committee on Jos Crisis, 2010 (*Solomon Lar Advisory Committee*).

However, these bodies have also ascribed the ownership and indigenship of Jos to the *Berom*, *Anaguta*, and *Afizere* ethnic groups only, excluding the *Hausa/Fulani* groups.<sup>18</sup> This discriminatory attitude has fuelled the fire of the conflict.

Another response by the Federal Government was the deployment of the Special Task Force<sup>19</sup> to step in whenever there was another outbreak of violence. However, it is evident that these measures have not succeeded in putting an end to the conflict.<sup>20</sup> To the contrary, it has been reported that state forces have also committed crimes against the population.<sup>21</sup>

With regard to prosecution, the Office of the Attorney General of the Federation charged more than 600 persons in connection with the violence that occurred in Jos in January 2010. Of these, 74 were convicted by the Federal High Court for terrorism under Section 15(2) of the Economic and Financial Crimes Act,<sup>22</sup> conspiracy and unlawful possession of firearms under the Firearms Act. Seventeen appealed the judgment but the Court of Appeal upheld the decision of the lower court. More than 100 accused were discharged and acquitted for lack of sufficient evidence. The remaining cases are still on-going.<sup>23</sup>

Although the Nigerian authorities have expended at least some effort to bring to book the perpetrators of the crisis, it has to be noted that no prosecutions have been initiated by the Federal Prosecutors in respect of the numerous violent attacks committed in Jos subsequent to 2010. Sporadically, persons have been tried before the Plateau State High Court in respect of the Jos violence by State Prosecutors for crimes such as murder or causing grievous hurt. However, in these trials grave atrocities committed on a large scale in the protracted Jos crisis did not play a role. Hence, the main perpetrators have still largely not been brought to justice. Therefore, there remain urgent demands from part of the population and NGOs for more to be done in this regard.<sup>24</sup> *Human Rights Watch*, for example, in 2013 came to the conclusion that “[w]ith the exception of a series of successful prosecutions by the

<sup>18</sup> Solomon Lar Report 2010, p. 2.

<sup>19</sup> The Special Task Force is composed of the best trained units in the Nigerian security forces, to which the Central Government has entrusted the task of restoring law and order in Jos and parts of Northern Nigeria. It has been present in Jos since 2010.

<sup>20</sup> See for the statements on the need of the international community to act with regard to the Jos crisis: Nigerian Coalition of the International Criminal Court, Newsletter, vol. 2, 2011, 22.

<sup>21</sup> Amnesty International 2013, p. 197; International Crisis Group 2012, pp. 21 et seq.; Office of the Prosecutor 2013, p. 19.

<sup>22</sup> See Act No. 1, 2004.

<sup>23</sup> These figures are based on information supplied by the Office of the Director of Public Prosecution of Nigeria (letter dated 4 November 2013, Ref: SGF/PS/NHRC/180/T).

<sup>24</sup> See Human Rights Watch 2010a, pp. 2 et seq.; International Crisis Group 2012, p. 21.

federal authorities, following the 2010 violence in Plateau State, those responsible for organizing or carrying out these killings have not been brought to justice”.<sup>25</sup>

It came, therefore, as no surprise that the issue of whether international crimes have been committed in Jos was brought to the attention of the Prosecutor of the International Criminal Court by a coalition of NGOs in Nigeria.<sup>26</sup> Nigeria ratified the Rome Statute on 27 September 2001, although it is yet to domesticate it. Consequently, the International Criminal Court has complementary jurisdiction over international crimes committed in Nigeria after 1 July 2002. The situation is currently under preliminary observation by the Office of the Prosecutor.<sup>27</sup> However, the investigation is not restricted to the Jos crisis but extends to other violent incidents which have occurred in the country.

### 9.3 Legal Analysis of the Violence in Jos

In its reports on the situation in Nigeria published thus far, the Office of the Prosecutor of the International Criminal Court came to the conclusion that there is a reasonable basis to believe that crimes under international law were committed in Jos, but considering only acts of *Boko Haram* as possible crimes under the jurisdiction of the International Criminal Court.<sup>28</sup> However, the Prosecutor also stressed that the investigations were still at an early stage and that the current view might change in the light of new evidence emerging. The following sections seek to analyze, on the basis of the facts available, whether the violent attacks in Jos, including those not committed by *Boko Haram*, can be considered crimes under international law.<sup>29</sup>

#### 9.3.1 Genocide

##### 9.3.1.1 Protected Groups

As the groups involved in the violence in Jos can be distinguished by ethnicity and religion, one may ask legitimately whether the attacks committed against the members of certain groups amount to genocide.<sup>30</sup> Protected groups under

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<sup>25</sup> Human Rights Watch 2013, p. 2.

<sup>26</sup> On the submission of the Jos situation to the International Criminal Court, see International Coalition for the Responsibility to Protect 2010.

<sup>27</sup> See Office of the Prosecutor 2013.

<sup>28</sup> Office of the Prosecutor 2013, pp. 20, 22 et seq.

<sup>29</sup> In determining this, the violence committed before the entering into force of the ICC Statute (1 July 2002) shall be excluded from the discussion.

<sup>30</sup> The Office of the Prosecutor, however, does not seem to consider this crime. At least the Office of the Prosecutor does not mention the crime of genocide in its reports which have so far been published.

international criminal law are national, ethnic, racial or religious groups as they are stable groups, membership of which is involuntary and permanent.<sup>31</sup> Emphasis is placed on the protection of the group's existence because an individual is attacked on the basis of his or her membership of the group.

The victims in the Jos conflict, who are Jos indigenes and settlers from other States, as well as the *Hausas/Fulanis*, are members of recognized ethnic groups in Nigeria. They can be classified equally by religion into Christians and Muslims, thereby fulfilling the definitional requirement of a positive group. However, the targeted groups in the Jos crisis consist of various ethnic groups, so that a clear identification of the victims as a single group under attack is impossible. As stated above, not only the indigenes of Jos but also settler groups such as the *Igbos*, *Yorubas* and *Urhobos* were subject to attacks. The *Hausa/Fulani* are, strictly speaking, two distinct ethnic groups. The fact that the victims in the Jos crisis stem from a range of different ethnic groups leads to the question whether, in a case where a number of different ethnic groups are involved in a violent conflict, an attack by one group on another may amount to genocide.

In this regard, it is accepted widely that a negative definition of a target group, that is, any group other than the group perpetrating the attack, is not acceptable.<sup>32</sup> As was held by the Yugoslavia Tribunal in the *Stakić* case,<sup>33</sup> a group consisting of all groups which the perpetrator does not consider to be a part of his or her own defined group cannot constitute a protected group in terms of the crime of genocide. The Tribunal stated that, unlike positive groups, "negatively defined groups have no unique distinguishing characteristics that could be destroyed".<sup>34</sup>

In the Jos situation one could argue, especially since the involvement of *Boko Haram*, that there are indeed two religious factions constituting two distinct groups of Christians and Muslims who are trying to eliminate each other. However, the fact that the *Hausa/Fulani* Muslims often have included the indigene Muslims and other Muslim settlers in their attacks on Christians<sup>35</sup> has blurred the distinction between Muslim and Christian groups.

Despite these general arguments against the existence of a protected group, an analysis on a case-by-case basis shows that some incidents indeed allow for the presumption that certain groups were attacked on the basis of their ethnicity and religion. One can mention, for instance, the attack by *Fulani* herdsmen on the village of Dogo Nahauwa. This attack was carried out on 7 March 2010 and resulted in the death of more than 300 persons; it virtually wiped out the entire village.<sup>36</sup> It was reported that the victims were targeted on the basis of their

<sup>31</sup> *Prosecutor v. Jelisić*, Judgment, 14 December 1999, para 69; Cassese 2008, p. 130.

<sup>32</sup> See e.g. Schabas 2009, p. 131, Werle 2009, marg no 707.

<sup>33</sup> *Prosecutor v. Stakić*, Judgment, 22 March 2006, paras 16–28.

<sup>34</sup> *Prosecutor v. Stakić*, Judgment, 22 March 2006, para 23. See also Cryer et al. 2010, p. 213.

<sup>35</sup> See Ajibola Report 2009. The indigenes have allegedly also killed fellow indigenes of the same ethnicity because of their faith see Human Rights Watch 2005, p. 10.

<sup>36</sup> See Human Rights Watch 2010b, pp. 1 et seq.

ethnicity (*Beroms*) as well as their Christian faith.<sup>37</sup> Therefore, they constituted a protected group which may be an object of genocide.

### 9.3.1.2 Genocidal Intent

Although there have been incidents in the Jos crisis in which the *actus reus* of genocide was fulfilled, in these cases the existence of specific intent is questionable. For genocidal intent the perpetrator must have aimed for the destruction of the group in whole or in part.<sup>38</sup>

In general, the Jos killings have been largely retaliatory. The indigenes, in particular, often have been provoked into violence by their people being killed by *Hausa/Fulani* Muslims. In addition, the killings were perpetrated with a desire to gain dominance over the opposing group. Therefore, the indigenes intended primarily to *expel* the *Hausa/Fulanis* from the Jos area rather than to *exterminate* them. This is evident in the several attempts to displace the rival groups forcibly from their communities by burning their houses and cattle during outbreaks of violence and chasing them out of their villages. Similarly, violent attacks by the *Hausa/Fulanis* have been motivated largely by revenge and envy, and they followed the same pattern.<sup>39</sup> In this regard, what the 2004 UN Commission of Inquiry into the Darfur Situation stated is valid also for the Jos situation:

[T]he policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.<sup>40</sup>

Hence, the killings that have taken place in the Jos crisis can be described generally as cases of (attempted) “ethnic cleansing”, which has been defined as “a purposeful policy designed by one ethnic group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas”.<sup>41</sup>

The question remains whether, in cases like the raid of the Dogo Nahauwa village in which the *actus reus* of genocide was fulfilled, the motivation of the perpetrators was different and had, indeed, the character of genocidal intent. It is

<sup>37</sup> Kalu 2011; Duffield 2010.

<sup>38</sup> Werle 2009, marg no 760.

<sup>39</sup> See Higazi 2011, p. 29.

<sup>40</sup> International Commission of Inquiry on Darfur 2005, para 518.

<sup>41</sup> Commission of Experts to Investigate Violations of International Humanitarian Law in the Former Yugoslavia 1992, para 130. See also May, 2005, p. 117. The International Court of Justice also distinguished between killing with intent to remove a group from a region and killing with intent to destroy the group in whole or in part, holding that the former constitutes “ethnic cleansing”, *Bosnia and Herzegovina v. Srebrenica and Montenegro*, Judgment, 26 February 2007, pp. 43–240, para 190.

accepted generally that a case of “ethnic cleansing” (which is, in fact, not a legal term) in certain constellations can amount to genocide.<sup>42</sup> However, in the Jos situation there is no evidence that the motivation of the perpetrators might have changed during the crisis, even when it became more deadly and escalated. On the contrary, it has been said that the attack on the Dogo Nahauwa village was driven by “retaliation for the killing of *Fulani* men, women, and children and their cattle in Beron areas in January 2010” as well as by “pre-existing grievances”.<sup>43</sup>

### 9.3.1.3 Conclusion

The acts committed during the Jos crisis do not amount to genocide. This conclusion is supported by the fact that the opposing groups lived together and tolerated one another for periods of peace which occurred between the violence. Therefore, the situation in Jos differs considerably from other ethnic conflicts where genocide has been proved. For example, in Rwanda there was no instance in which both groups lived and related together, then killed one another only to live in peace for a while before resuming the killings.

## 9.3.2 Crimes Against Humanity

As regards crimes against humanity, the main questions center on the issues whether there were “attacks” committed in Jos which have been “widespread” or “systematic” as well as pursuant to or in furtherance of a “State or organizational policy”.

### 9.3.2.1 Attack

An “attack” requires the multiple commission of acts as mentioned in Article 7 of the ICC Statute.<sup>44</sup> It is out of question that acts committed during the Jos crisis fulfilled the requirements of Article 7. From the facts available, acts such as “murder”, “extermination”, “rape”, “enforced disappearance” and “other inhumane acts”<sup>45</sup> were committed in many instances. However, one may ask whether the acts committed by a conflict party constituted only one “attack” that spread over several years or rather many single “attacks”. In its report the Office of the

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<sup>42</sup> See Cassese 2008, pp. 134 et seq.; Gaeta 2009, pp. 103 et seq.; Werle 2009, marg nos 741 et seq.

<sup>43</sup> Higazi 2011, p. 29.

<sup>44</sup> See also Cryer et al. 2010, p. 237; Werle 2009, marg no 801.

<sup>45</sup> Article 7(1)(a), (b), (g), (i), (k) of the ICC Statute.

Prosecutor, although not discussing the issue in detail, speaks of a number of different “attacks”, considering as one attack, for example, the bombing of a Christian church or the raid of a village.<sup>46</sup> This view is reasonable. As there have been longer peaceful periods between the violent outbreaks, it would be difficult (although not impossible) to establish that there was only one single attack upon each ethnic or religious group during the Jos crisis.

### 9.3.2.2 The Nature of the Attacks

A crucial threshold for crimes against humanity is that the “attack on a civilian population”, according to Article 7(2)(a) of the ICC Statute, must be “widespread or systematic”. The ICC Statute defines an attack as the “multiple commissions of any of the individual acts pursuant to a State or organisational policy to commit such an attack”. “Widespread”, on the one hand, refers to “the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.<sup>47</sup> It may also be determined by its spread over a large geographical area.<sup>48</sup> A “systematic” attack is, on the other hand, an organized attack following a regular pattern in execution of a common plan.<sup>49</sup>

If “widespread” is measured quantitatively, the recurrent attacks in Jos since 2002 were certainly widespread in terms of the number of victims: rural fighting which took place between 2002 and 2004 claimed the lives of about 2,000 people; further attacks resulted in the deaths of at least 800 people in 2004, some 781 in 2008, and more than 1,000 in 2010.<sup>50</sup> However, the violence can be regarded also as being “widespread” in that it often covered an extensive geographical area. Militia groups from *Hausa/Fulani* and the different indigenes groups reportedly attacked and destroyed in excess of 100 villages by 2004.<sup>51</sup> The attacks in 2008 began in the Ali Kazaure area of Jos North and soon spread to fourteen other locations in the city.<sup>52</sup> In January 2010 places such as Kuru Jenta, Sabon Gida

<sup>46</sup> Office of the Prosecutor of the ICC 2013, pp. 14 et seq.

<sup>47</sup> *Prosecutor v. Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 10 June 2008, para 84. See also the ICTR in *Prosecutor v Akayesu*, Judgment, 2 September 1998, para 96.

<sup>48</sup> See Werle 2009, marg no 804.

<sup>49</sup> See Werle 2009, marg no 805. See also *Prosecutor v. Kordić and Čerkez*, Judgment, 17 December 2004, para 94; *Prosecutor v. Blagojević and Jokić*, Judgment, 17 January 2005, para 545.

<sup>50</sup> See Krause 2011, pp. 38 et seq.; Higazi 2011, p. 23.

<sup>51</sup> Krause 2011, p. 36.

<sup>52</sup> The names of these places affected by the violence are Rikkos, Tina Junction, Dogon Dutse, Congo Russia, Zolol Junction, Nassarawa, Bauchi Ring Road, Bauchi Road, Kwararafa Area, Zaria Road, Katako, Rock Haven, GadaBiyu and Tudun Wada. See Ajibola Report 2009, pp. 17, 33. For a map of the areas affected by the violence, see Krause 2011, p. 15.

Kanar, Gero, Timtim and others in Jos were destroyed almost completely; March 2010 saw the destruction of the villages of Dogo Nahauwa, Zot and Ratsat in Jos South and the killing of virtually all the villagers.<sup>53</sup> In 2013 clashes still occurred in various communities in Plateau State.<sup>54</sup>

As regards the “systematic” character of the attacks, one may have reference to their organized manner. The perpetrators were, according to *Higazi*, “generally small, highly mobile, well-armed groups with excellent local knowledge and familiarity with the bush”.<sup>55</sup> They were said to have employed weapons such as “AK-47s, machine guns and sub-machine guns, G3 rifles, Mark 4 rifles, single- and double-barrel shotguns, pistols, obsolete firearms (‘Dane guns’), and locally made guns”.<sup>56</sup> In a report on the attack by *Hausa/Fulani* Muslims on the village of Dogo Nahauwa by *Human Rights Watch*, eye witnesses were quoted as testifying that the attackers “were dressed in camouflage like fake soldiers” with their “heads wrapped up in cloths”. It is reported that the men came “with guns, ammunition, and machetes” at 3 am, surrounded the village and “started their operation simultaneously”.<sup>57</sup> In the last several years, the nature of the attacks on the civilian population may be characterized as being more “systematic” than “widespread”, as there were more selected reprisal killings of perceived members or supporters of rival groups on both sides, that is, organized attacks by *Hausa/Fulani* Muslims on Christians and *vice versa*.<sup>58</sup>

In its assessment, the Office of the Prosecutor has not questioned the “widespread” character of the attacks in the inter-communal violence, but has been somewhat hesitant to consider the violence in Jos as “systematic”. However, in the end the Office of the Prosecutor did acknowledge that some of the attacks “have been well-coordinated and systematic in nature”.<sup>59</sup>

The series of bomb attacks by *Boko Haram* in Jos has been, without a doubt, “widespread”. The group has committed hundreds of attacks in more than 12 States in North and Central Nigeria, causing the death of more than 1,000 victims.<sup>60</sup> However, it seems justified to classify the attacks also as “systematic”, as they were certainly well-planned and carried out in an organized manner.<sup>61</sup> For instance, in an attack in July 2012, in which a Senator was killed, the perpetrators were said to have been dressed in military uniform, wearing bullet-proof jackets

<sup>53</sup> Duffield 2010; Higazi 2011, pp. 27 et seq.; Kalu 2011; Human Rights Watch 2010b, pp. 1 et seq.

<sup>54</sup> For details see Amnesty International 2013, p. 198.

<sup>55</sup> Higazi 2008, pp. 107, 110.

<sup>56</sup> Krause 2011, p. 36.

<sup>57</sup> Human Rights Watch 2010b, p. 4.

<sup>58</sup> Amnesty International 2013, p. 198.

<sup>59</sup> Office of the Prosecutor of the ICC 2013, p. 17.

<sup>60</sup> See Office of the Prosecutor of the ICC 2013, p. 22.

<sup>61</sup> The Office of the Prosecutor’s report only refers to the “widespread” manner of *Boko Haram* attacks not mentioning the “systematic” requirement. At the same it neither puts into question that the attacks were “systematic”.

and carrying very sophisticated weapons; they executed the massacre with precision and expertise.<sup>62</sup> In addition, the choice of targets of terrorist attacks shows that they were not random but tended to be organizations that did not embrace the Islamist view of the group. Attacks were directed mostly against churches, police stations, newspapers and schools.<sup>63</sup>

### 9.3.2.3 Policy

According to Article 7(2)(a) of the ICC Statute, the attack must also be committed “in furtherance of a State or organizational policy”. The “policy element” does not require proof of an elaborate political program; its aim rather is to exclude cases of sporadic acts of violence.<sup>64</sup> The “policy” does not necessarily have to be explicitly pronounced; it may be inferred from the circumstances and from the manner in which the acts were committed.<sup>65</sup>

The organized and systematic nature of the attacks in Jos proves that there exists a strategy to use violence to eject the rival groups in the area.<sup>66</sup> The motive behind this, as was explained above, is revenge for earlier attacks;<sup>67</sup> in addition, the attacks were carried out with the goal of dominating the opposing group so as to gain economic and political control of the region.<sup>68</sup> Therefore, it seems justifiable to speak of the existence of a “policy” which is executed through the systematic killing, wounding and displacement of members of the other groups in order to secure the upper hand in the region. As has been reported, a network has been established in Jos for this purpose “which could be convened, mobilized and armed at short notice”.<sup>69</sup>

The policy underlying the involvement of *Boko Haram* is even more obvious. With the religious differences in the region having fuelled the violence, *Boko Haram* is exploiting the Jos crisis to pursue its Islamist goals. As the Office of Prosecutor convincingly put it, the attacks of *Boko Haram* were “committed pursuant to the policy defined at the leadership level of *Boko Haram* aiming at establishing an Islamic system of government in Nigeria”.<sup>70</sup>

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<sup>62</sup> See Bello 2012.

<sup>63</sup> Amnesty International 2013, p. 196.

<sup>64</sup> See Cassese 2008, p. 98; Werle 2009, marg no 811.

<sup>65</sup> See Cassese 2008, p. 8; Cryer et al. 2010, p. 240; Werle 2009, marg no 812. *Prosecutor v. Tadić*, Judgment, 7 May 1997, para 653. This position was confirmed by the International Criminal Court in *Bemba*, para 81.

<sup>66</sup> The Office of the Prosecutor held that the systematic manner in which some of the attacks were carried out “could be a relevant indicative factor in establishing such a policy”. See Office of the Prosecutor of the ICC 2013, p. 16.

<sup>67</sup> According to Higazi 2011, p. 29, e.g. the attack on the Dogo Nahauwa village was driven not only by retaliation but also by “pre-existing grievances”.

<sup>68</sup> See Ajibola Report 2009, pp. 26–28, 92, 95, 132, 151.

<sup>69</sup> Human Rights Watch 2005, p. 6.

<sup>70</sup> Office of the Prosecutor of the ICC 2013, p. 22.

### 9.3.2.4 Organization

According to Article 7(2)(a) of the ICC Statute the attack must be “in furtherance of a *State or organizational* policy to commit such attack” (emphasis added). The crucial question here is whether the violence in Jos can be attributed to an “organization”. Such organization could be identified among the *Hausa/Fulani* Muslims,<sup>71</sup> the various indigenous associations<sup>72</sup> and the *Boko Haram* group. However, such identification depends on the attributes of the element “organization”. The interpretation of this element, which is neither defined in the ICC Statute nor in the Elements of Crimes, lately has been subject to controversy.

The ICC Pre-Trial Chamber II, in the case of *Muthaura and Kenyatta*, held that the “formal nature of a group and the level of its organization should not be the defining criterion” for the “organization”, but rather “a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values”.<sup>73</sup> Hence, “organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population”.<sup>74</sup> In concluding that, in the Kenya situation, the *Mungiki* constituted an “organization”, the Chamber found that it was a hierarchically structured organization which had an effective system of ensuring compliance by the members with the rules and orders imposed by higher levels of command.<sup>75</sup> It highlighted the characteristics of a group which may constitute an organization under Article 7(2)(a) of the ICC Statute as follows:

- (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above mentioned criteria.<sup>76</sup>

The Court, however, stressed that these requirements should not be understood as “a rigid legal definition”, and they do not “need to be exhaustively fulfilled.”<sup>77</sup>

<sup>71</sup> Constituting groups such as the *Jasawa* and the “*Miyetti Cattle Rearers Associations*”.

<sup>72</sup> This includes the “Plateau Youth Council”, the “*Afizere Cultural and Community Development Association*”, the “*Anaguta Development Association*” and the “*Berom Elders Council*”, see Niki Tobi Report 2002, pp. 15 et seq.

<sup>73</sup> Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para 90 (hereafter Kenya Authorisation Decision); *Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the confirmation of charges, 23 January 2012, para 112 (hereafter *Muthaura and others*).

<sup>74</sup> Kenya Authorisation Decision, para 92.

<sup>75</sup> *Muthaura and others*, para 186; Kenya Authorization Decision, para 90.

<sup>76</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the confirmation of charges, 23 January 2012, para 185.

<sup>77</sup> *Ibid.*

A definition which accords with the decision, although being somewhat more straight-forward, has been elaborated by *Werle and Burghardt*. On the basis of the ordinary meaning of the word “organization”, and taking into account the context as well as object and purposes of the Rome Statute, the authors come to the conclusion that an organization “describes an association of persons possessing structures that make it possible, beyond a single concrete situation, to coordinate actions purposefully and attribute actions to the organization”.<sup>78</sup>

However, in his dissenting opinion to the Kenya Authorization Decision, Judge *Kaul* posited that only an organization that has the character of a State (“State-like”) could qualify as an organization under Article 7(2)(a) of the ICC Statute.<sup>79</sup> He stressed that international crimes had to be distinguished from human rights infractions or ordinary domestic crimes since the Court’s jurisdiction was limited to grave crimes which were of the most serious concern to the international community and threatened world peace and security.<sup>80</sup> He concluded that, from a historical perspective, a teleological interpretation of crimes against humanity meant that only a State or a “State-like” organization could commit the crime. A “State-like organization”, according to him, has to be:

- (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.<sup>81</sup>

However, it has been argued that neither the ordinary meaning of the word “organization” nor a teleological nor a systematic interpretation supported such a narrow approach; rather a violation of human rights could amount to a threat to peace, security and well-being of the world without the organization being regarded as “State-like”. In addition, it has been argued that the narrow concept reflected a Eurocentric view which might have been suitable for international crimes committed in the first half of the 20th century but not for many of today’s conflicts in which the main characters are groups that are not “State-like” but have the means to commit massive human rights violations.<sup>82</sup>

The Jos crisis is, indeed, a vivid example in support of the last mentioned argument. Here, to insist in *Kaul’s* requirement of a “State or State-like organization” would exclude all the groups which originally took part in the conflict and

<sup>78</sup> Werle and Burghardt 2012, p. 1166.

<sup>79</sup> Dissenting Opinion by Judge *Hans-Peter Kaul* to Kenya Authorization Decision, paras 65–67. Affirmed in the decisions in the Kenya situation thereafter.

<sup>80</sup> He referred to Articles 1(1), 5(1) and to preambles 4 and 5 of the ICC Statute to support his position.

<sup>81</sup> Kenya Authorization Decision, Dissenting Opinion, para 51. According to *Kaul*, these qualities must be cumulative. See also in support of this opinion Kress 2010, p. 862.

<sup>82</sup> See Werle and Burghardt 2012, p. 1163, as well as Sadat 2013, pp. 369 et seq.

which are responsible for the atrocities in Jos (probably even *Boko Haram*). However, the crimes committed by the Nigerian State Forces that later entered in the conflict could be considered as possible crimes against humanity on this basis as their violent acts (e.g. torture or killings of alleged terrorists) could be attributed to the Nigerian State.<sup>83</sup> Of course, it would be laudable in principle for the Court to consider also crimes that can be attributed to the Nigerian State as possible crimes against humanity (which the Prosecutor did indeed consider in the latest report<sup>84</sup>). However, it would not be consonant with the principle that the International Criminal Court should investigate “the most serious crimes of concern to the international community” (Preamble of the ICC Statute) to restrict investigations in this way and to exclude the acts of the groups that have sparked the conflict and that are responsible for the most serious, as well as the majority, of the human violations in Jos.

### 9.3.2.5 “Organizations” in Jos

On the basis of the majority opinion in the Kenyan Authorization Decision, there is no doubt that in the Jos crisis *Boko Haram* can be regarded as an organization within the meaning of Article 7 of the ICC Statute. *Boko Haram* is a structured Islamist group which has proved that it has the capacity and control to execute heavy attacks on the civilian population. This was confirmed by the Office of the Prosecutor, which held in its preliminary report, that the group “possesses the means to carry out a widespread and/or systematic attack, and displays internal coordination and organizational control required to that end”.<sup>85</sup>

*Boko Haram*, in fact, has been responsible for a smaller number of the victims in Jos in comparison with the inter-communal violence.<sup>86</sup> As regards organizations other than *Boko Haram*, the Office of the Prosecutor, in its preliminary investigation, arrived at the conclusion that “the available information is insufficient to establish whether the attacks on the civilian population [...] were isolated and/or spontaneous acts of violence, or were committed pursuant to a State or organizational policy”. It referred in particular to a “lack of information on alleged perpetrators”<sup>87</sup> and relied, *inter alia*, upon a report of *Human Rights Watch* which

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<sup>83</sup> The commission of a number of human rights violations by the Nigerian police and security forces, in their response to the violence, in particular to the attacks by *Boko Haram*, has been criticized strongly e.g. by Amnesty International 2013, p. 197, and Human Rights Watch 2013, pp. 3 et seq.

<sup>84</sup> Office of the Prosecutor of the ICC 2013, pp. 19 et seq.

<sup>85</sup> Office of the Prosecutor of the ICC 2013, p. 7.

<sup>86</sup> The center of the terrorist actions of this group is the North of the country rather than the Jos area. See Human Rights Watch 2013, p. 1. In addition, in instances in which *Boko Haram* had claimed responsibility for attacks, doubts remained whether these claims were really true. See International Crisis Group 2012, p. 13.

<sup>87</sup> Office of the Prosecutor of the ICC 2013, p. 18.

found that “there are no formal or clearly identifiable armed groups who maintain a visible presence in the periods between the fighting”.<sup>88</sup>

This conclusion is not convincing, especially as the Prosecutor ignored further information in the *Human Rights Watch* report which, in fact, concluded that “the pattern of the larger attacks, in particular, indicates a high level of organization, forethought and planning”; it added that claims “by sympathizers of both sides that these attacks were spontaneous lack credibility”.<sup>89</sup> However, *Human Rights Watch* concedes that it “has proved more difficult to confirm the identity of their political sponsors—the individuals who are paying and arming these young men to attack their opponents”. In other words, that there are, indeed, different “organizations” present in Jos is undeniable (the report of the Office of the Prosecutor does not actually seem to question this either). It is rather the *identification* of the groups’ leaders that has proved complicated. Therefore, to conclude, as the Office of the Prosecutor has done, that there is no “reasonable basis to believe that acts were committed in furtherance of or pursuant to an organizational policy” is fallacious.

In fact, it seems that some of the main qualities that an “organization” must fulfil, as indicated in the majority opinion in the Kenya Authorization Decision, are attributable to groups in Jos, qualifying them as organizations under this heading. The “*Jasawa* Development Association”, for example, constitutes and controls the regional *Hausa/Fulani* Muslim population and is the major contending group in Jos. The association and its leadership have been mentioned in the reports of the commissions of inquiry set up in 1994, 2001 and 2008, which found them responsible for some of the crimes committed during the crisis and for instigating its members to attack Christians.<sup>90</sup> The association is under a command and has an established hierarchy, as well as a youth agency. In addition, the “*Miyetti* Cattle Rearers Association”, an association of *Fulani* herdsmen with a structured leadership, can without a doubt be regarded as an “organization”. It has been involved intimately in the violence, not only suffering tremendous losses of lives and cattle deaths, but also allegedly committing several attacks on the indigenes and Christians in Jos.<sup>91</sup>

It seems, therefore, not unlikely that a deeper investigation could identify the organizations behind the violence in Jos. One gets the impression that the Office of the Prosecutor has shied away from this route in Jos. Obviously, the Nigerian authorities are under an obligation here and, without a doubt, could identify the organizations behind the attacks more easily than the ICC Prosecutor. Therefore, it

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<sup>88</sup> Human Rights Watch 2005, p. 6; Office of the Prosecutor of the ICC 2013, p. 18.

<sup>89</sup> Human Rights Watch 2005, p. 6.

<sup>90</sup> See Ajibola Report 2009, p. 186; Fiberesima Report 2004, p. 26; Niki Tobi Report 2002, p. 108, para 4.94.

<sup>91</sup> These were attacks between 2002 and 2004, the March 2010 slaughter in Dogo Nahauwa, and many more recent attacks. See the entry “Soldiers raid Fulani Settlement on the Plateau” in Beegagle’s Blog, 13 July 2012, available <http://beegagle.wordpress.com/2012/07/13/soldiers-raid-fulani-settlements-on-the-plateau-not-true-say-stf/>.

is encouraging at least that the Office of the Prosecutor also stated that the “initial assessment may be revisited by the Office in the light of new facts or evidence that could enable the identification of specific leaders or organizations allegedly responsible for instigating such violence or the existence of an organizational policy”.<sup>92</sup>

Another question is whether an ethnic group *itself* may constitute an organization within the meaning of Article 7 ICC Statute. This cannot be answered generally. Rather it will depend on the hierarchical structure and how members of the ethnic group in a given territory are organized, as well as on the degree of control the group has over its members. Most ethnic groups in Nigeria have a recognized leadership consisting of kings and chiefs. An example is the *Gbong-Gwom*, who is the paramount leader of the Jos indigenes. However, he has not been implicated in the reports on the violence. Some community leaders have been arrested in connection with attacks.<sup>93</sup> In cases in which such structure existed, the ethnic group may qualify as an organization according to Article 7 of the ICC Statute.

### 9.3.2.6 Conclusion

From the foregoing arguments and from the nature of the crimes committed in the Jos crisis, one may conclude that crimes against humanity were committed. This is true not only with regard to the attacks of *Boko Haram* but also with regard to other attacks perpetrated in the course of the inter-communal violence in Jos. With regard to the latter, the persons behind the attacks still have to be identified. However, the fact that the attacks were carried out “pursuant to an organizational policy” hardly can be contested.

### 9.3.3 War Crimes

It is also conceivable that the parties involved in the Jos crisis committed war crimes. *Boko Haram*, for instance, declared publicly that it is “at war with Christians”. Although, from a legal point of view, it is not decisive how the belligerent parties describe their own conflict, it gives reason to analyze whether the violent acts in Jos may be regarded as part of an armed conflict. The consequence of a positive answer would be that certain attacks, especially those directed against the civilian population, would amount to war crimes.

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<sup>92</sup> Office of the Prosecutor of the ICC 2013, p. 6.

<sup>93</sup> See Adinoyi, This Day Live, 26 April 2012, available at <http://www.thisdaylive.com/articles/attacks-plateau-arrests-3-community-leaders/114565/>.

However, the ICC Statute does not define an armed conflict. In the *Lubanga* Judgment, Trial Chamber I of the International Criminal Court relied upon the jurisdiction of the Yugoslavia Tribunal.<sup>94</sup> According to the ICTY Appeals Chamber, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>95</sup> As there are no foreign states involved in the Jos situation, it could only be an internal armed conflict to which Article 8(2)(c) and (e) of the ICC Statute is applicable. As regards the requirements for such a conflict, reference can be made to Article 1 of Additional Protocol II to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts. According to this Article the Protocol is applicable only where a conflict takes place:

in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement this Protocol.

However, in the Jos crisis the conflict has not involved much “sustained and concerted military operations” between the parties in conflict. Instead, the violence in Jos has taken the form of attacks and counter attacks on the civilian population of opposing groups by militias.<sup>96</sup> Often, victims were attacked at night and burned alive in their homes or places of refuge,<sup>97</sup> or were shot, butchered or stabbed. The only major instances of violent clashes between rival groups were witnessed in 2001 and 2008.<sup>98</sup>

With respect to the requirement of the use of force by the government against the insurgents who are organized as a military force in possession of part of the territory, the Special Task Force indeed is present in Plateau State to control the situation, ensure peace and confront the dissidents should the need arise. However, while the Nigerian army could have been forced to engage armed perpetrators in gun-battle during major attacks in a bid to curb the violence, there have not been any reported cases of confrontations between the attackers and the government. In addition, none of the rival groups has possession of any part of the territory.

Although it has been argued that these conditions are not indispensable in determining whether an armed conflict is being waged,<sup>99</sup> at least the existence of organized armed groups engaged in intense fighting is necessary.<sup>100</sup> As held, for instance, by the Rwanda Tribunal, “the term, armed conflict in itself suggests the

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<sup>94</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 533 et seq.

<sup>95</sup> *Prosecutor v. Tadić*, Judgment, 7 May 1997, para 70.

<sup>96</sup> Krause 2011, pp. 38 et seq.

<sup>97</sup> Ajibola Report 2009, p. 131.

<sup>98</sup> *Ibid.*, p. 33; Niki Tobi Report 2002, pp. 9 et seq.

<sup>99</sup> Dörmann 2003, pp. 386 et seq.

<sup>100</sup> Greenwood 2008, p. 48; Werle 2009, marg no 984.

existence of hostilities between armed forces organized to a greater or lesser extent”.<sup>101</sup> In the Jos crisis, some of the attacks were indeed carried out, as has been described above, in an organized manner. However, it cannot be said that the groups that carried out the attacks were organized, as required, along military lines with a command structure.<sup>102</sup> Therefore, the report of the Prosecutor correctly comes to the conclusion that the violence in the central States of Nigeria fall under the category of “internal disturbances and tensions”.<sup>103</sup>

## 9.4 Conclusion

This chapter has explored the complexity of the Jos crisis: struggle over ethnicity and land, retaliation, religious fanaticism, excessive use of violence by State Forces—all these are features of the conflict. Apart from the political task of curbing the outbreaks of violence, Nigeria faces the challenge of enforcing its prosecutorial efforts and, in this context, of disclosing which organizations are responsible for the attacks and who heads them. The chapter has shown that it is evident from the facts available that the attacks were, in fact, planned and perpetrated by organized groups which are investing many resources into achieving their objectives. Hence, there is good reason to believe that proper and sincere investigations will bring to light facts that are necessary to determine the responsible organizations and their leaders. A foundation has been laid already in the reports of the commissions of inquiry in which certain top echelons within the conflicting groups have been indicted or implicated in witnesses’ testimony.<sup>104</sup> To focus exclusively on the *Boko Haram* attacks, as the ICC Prosecutor has done so far, seems to be the wrong way to deal with the lack of information. Especially questionable is the view of the Office of the Prosecutor that the *Boko Haram* attacks are “a context different from the inter-communal violence”.<sup>105</sup>

There remains an urgent need to intensify the efforts to bring to book the leaders of the organizations responsible for the crimes committed in Jos. Here it is the Nigerian authorities who bear the primary obligation.

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<sup>101</sup> See *Prosecutor v. Akayesu*, Judgment, 2 September 1998, para 620. On the organizational requirement see Cullen 2010, pp. 123 et seq.; La Haye 2008, p. 10; Moir 2002, pp. 36 et seq.

<sup>102</sup> See the requirement for an organized group by Moir 2002, p. 36. According to La Haye 2008, p. 10, other factors, e.g. the existence of headquarters or designated zones of operation, are also to be taken into account, which, however, in the Jos crisis do not exist either.

<sup>103</sup> Office of the Prosecutor 2013, p. 20.

<sup>104</sup> Niki Tobi Report 2002, p. 185. In addition, see the persons indicted in Ajibola Report 2009, pp. 187–257. Likely “organizations” have been identified above in this text.

<sup>105</sup> Office of the Prosecutor of the ICC 2013, p. 6.

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