

*Review*

# Redefining Terrorism: Shifting the Focus from Criminal Events to Individual Acts in International Criminal Law

Emeka C. Adibe

Department of International Law and Jurisprudence, Faculty of Law, Enugu Campus, University of Nigeria, Nsukka, Enugu, Nigeria.

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This study is born out of the conviction drawn from Tadic case (ICTY,IT-94-1-A, 15July 1999), that legitimate judicial activity proceeds on the basis of the identification of the gap or ambiguity in the law that must be resolved in the interests of justice. Terrorism has come to stay. But be it as it may, controversies exist within both domestic borders and international fora about its definition and the best strategies to effectively combat it. At every corner, embers are being fanned to dissuade, deescalate and prevent its occurrence and impact or threat to international peace and security. International law leans heavily on domestic law enforcement for the purpose of bringing to justice those accused of terrorism at both domestic and or transnational spheres. This work adopts a critical and contextual analysis of extant body of international criminal law and argues that the focus needs to shift from terrorism as a criminal event to individual acts that make an event a crime of terrorism. The essence of this is to move away from the more complex question of what constitutes terrorism, a result of which the ICC was denied jurisdiction. The trajectory resulting from this approach enables the International Criminal Court (ICC) with its extant law, the Rome Statute assume jurisdiction to prosecute these terrorist acts such as murder, mass executions, genocide, violent sexual crimes, imprisonment and torture which are within the threshold of international crimes provided in the International criminal law.

**Key words:** Terrorism, international criminal court, criminal law, United Nations, security council, crime, rome statute.

## INTRODUCTION

The dramatic evolution of terrorism into trans-boundary and transnational game has exacerbated its threat to international peace and security as these terrorists thrive in „conditions of insecurity and injustice, fragility and failed leadership“ (UNGAA/HRC/31/65, 2016). Apart from the recommendations to shift response to terrorism from strict security based counter-terrorism measure to focusing on other underlying factors that feed it, there is

an impending need to evolve a criminal law initiative to enable the world criminal court entertain petitions around criminal responsibility for acts of terrorism which states refuse or neglect to bring to justice. The background to this essay draws from the international criminal law regime found only „The Rome Statute of International Criminal Law (ICC) 1998“. Specific crimes are earmarked as international crimes in that international legislation

E-mail: [emekaadibe2002@yahoo.com](mailto:emekaadibe2002@yahoo.com), [emeka.adibe@unn.edu.ng](mailto:emeka.adibe@unn.edu.ng).

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without more. These crimes are: crimes against humanity, genocide and war crimes (art 5,6, 7, 8 of Rome Statute of ICC). International crimes so referred are defined as the „most serious crimes of concern to the international community as a whole” (Rome Statute of ICC, Art. 5).

This essay seeks to demonstrate the increasing significance of the subject of terrorism in the global agenda and community, which speaks to the dictates in the preamble to the Rome Statute that “the primary motivation for the establishment of the ICC was to put an end to impunity”. The Statute further notes that “grave international crimes threaten peace and the prosecution of such crimes contributes to the maintenance of international peace and security.” (Rome Statute, ICC, Preamble, para 3, 1998). This essay makes a departure from the apparent extant principle that the International Criminal Court does not have jurisdiction to try any person accused of terrorism merely because the court exclusively accommodates only crimes defined in its statute namely genocide, crimes against humanity, war crime and aggression.

Granted this fact, in its first and second part, the paper locates terrorism within its genre of criminal law by properly identifying its *actus reus* and *mens rea*. It draws attention away from terrorism as a complete offence to the various ways or tools and tactics employed to bring about terrorism such as murder, kidnapping, persecution, rape, mass execution, some of which are elements of the offences described in the Rome Statute as international crimes within jurisdiction for the ICC. In the next part, in conducting a contextual analysis of the regime of international crimes namely crime against humanity and crime of genocide, it argues principally that even in the absence of any unanimous definition of terrorism, a new approach needs to evolve for the purpose of considering acts of terrorism as necessary forms of international crimes already indistinguishable from extant crimes within the ICC jurisdiction. This works subtly recommends and is hopeful that the international body should consider it expedient to amend the Rome Statute for the purpose of accommodating terrorism as a substantive crime and included among the serious crimes of concern for the global community as a whole.

## **CRIME OF TERRORISM: A CRIMINAL LAW PERSPECTIVE**

Amidst the uncertainty and conundrum surrounding the definition of terrorism, most states had adopted a definition of what should be understood by terrorism in their national legal order with semblance and influence from what is obtainable in the international scene. However, Young (2006) argues that there is still need for a universally acceptable definition which is crucial for the

purposes of harmonizing counter terrorism operation and facilitating possible interaction between states for counter terrorism purposes, for example, in facilitating extradition. For Young, “An accepted definition would enhance intelligence sharing and international cooperation and permit tighter goal definition in the war against terrorism which might facilitate coalition building and strengthen the legitimacy of the war. Imposing sanctions and criticizing states that support terrorism would attract broader support once a definition of terrorism is established” (Young, 2006).

Understanding a terrorist act is critical to understanding what we are fighting against, so that we isolate terrorist act and not people. Such an analysis is necessary in order to arrive at a comprehensive and inclusive approach to defining terrorism and to properly locate it within the subject matter of criminal law. In fact, it is apposite to consider the objective and subjective element of terrorism. In this connection, a discussion of the *Actus Reus* (Objective element) and *Mens Rea* (the Subjective element) of terrorism would be inevitable.

The introduction of these two aspects of crime derives from the popular Latin maxim: *Actus non facit reum, nisi mens sit rea*- The Act itself does not give rise to guilt unless done with a guilty intent.” Similarly put, the intent and the act must both concur to constitute a crime. Thus, the prosecution bears the burden of proving all the elements described in the definition of the offence. In modern criminal law, there is a movement to relinquish the use of these terms in the definition of offences. However, its popularity among criminal lawyers and courts has made it resilient and unavoidable in describing modern crimes and offences. It has therefore been affirmed that: “The argument in favour of keeping the terms, *Actus Reus* and *Mens Rea* in common use is that they are the customary language of the courts” (Stuart and Coughlan, 2006).

### **(a) Actus Reus (external element) of terrorism**

Generally, under common law, definition of any offence/crime under the law, must tow a desired pattern. Crime is considered a public wrong whose commission will result in criminal proceedings, which may in turn result in the punishment of the wrong doer. Terrorism because it often results in loss of lives and destruction of property has attracted the attention of all and sundry, hence its classification as inherently evil in all its ramifications. The *Actus Reus* of terrorism (which we otherwise call external element include more than just the act but also contemplates both the circumstances and consequences) addresses the question of what elements constitute terrorist acts. These may include single events or incidents, tactic and campaigns.

“*Actus Reus* consists in act or omission. It also includes consequences and such surrounding circumstances if any be required, as are material to the definition of the crime” (Redmond, 1990). Thus, they are referred to as the essential elements of an offence in the absence of which an offence cannot be said to have been committed. *Actus Reus* simply refers to the prohibited act. However not all crimes can be adequately described simply by reference to the act; most require proof of accompanying circumstances and some proof of a particular consequence.

Thus, strictly speaking, “the concept of „*actus reus*’ is a package which embraces acts, circumstances and consequences which collectively constitute the physical elements of the crime (Dugdale et al., 1996). *Actus Reus* asks the question “what is the event, action, consequence or situation prohibited by the offence or act of terrorism? The prosecution must establish beyond reasonable doubt that the *Actus Reus*- the event, action, consequence or situation was prohibited by the relevant legislation- has occurred. In other words, any definition of terrorism must set out to itemize situations, actions and consequences that constitute the criminal activity. The reason for requiring an *actus reus* suggests Stuart and Coughlan (2006) is the impossibility of proving a purely mental state, following the popular saying of Brian C. J „that the thought of man is not triable, for the devil himself knoweth not the thought of man.”and approved by Latham CJ in *Greene v The Queen* (HCA, 1997).

A review of the many definitions of terrorism reveals that the consensus opinion underlies and refers to violence against persons as a sufficient criterion designed to represent the *Actus Reus* of terrorism. Some definitions also prefer to refer to the consequences of acts without specifying the act or event that resulted to those consequences. Externally speaking, a terrorist act always carries with it either an explicit or implicit threat of future and immediate act of violence, hence the name terrorism. It is in this connection that the general understanding of terrorism involves an act in which violence or force is used or threatened, 2) and is intended to cause fear or terror 3) is primarily an act with symbolic political burst often directed against civilian population.

In the light of some of the attempts<sup>i</sup> at describing or defining terrorism, the objective element of terrorism would include the following: violence, political purpose and terror driven or threat of it. An immediate analysis of these definitions in terms of the *Actus Reus* tends to show a consistent reference to a number of common denominators. Cohen underscores this opinion in these words: “The number of definitions given to terrorism might directly correspond to the number of people asked. This diversity notwithstanding, most of the definitions of terrorism address the core elements” (Cohen, 2012).

There is no doubt that terrorism falls within the genre of

crime but not limited to it. Be it as it may, the common denominator in these definitions include: (1) Acts committed with intent to cause death or serious bodily injury with a purpose to provoke a state of terror in the general public, (2) with the aim to compel a government or international organisation in furtherance of political goal. (3) Activities that involve unlawful use of violent or life-threatening act. (4) Against civilian population or combatant personnel unprovoked. The Security Council in its 4413<sup>th</sup> meeting in 2001, adopted resolution 1377 where it avoided a definition of terrorism but maintained categorically that „The only common denominator among variants of terrorism was the calculated use of deadly violence against civilians for political purpose”. It was this common denominator that provided the United Nations with a common cause and common agenda to combat terrorism. Adoption of these guides as the content of *Actus Reus* in a consistent fashion amongst States and international organisation would enable States to create a rather more universally accepted and consequently more effective counter terrorist policies that admit of measures that are location specific.

It is apposite to reference in this context, the various tactics most favored by terrorists in these more recent times. Some of these tactics include but not limited to: bombings, assassinations, kidnappings, hostage situations and hijacking, indiscriminate shooting, suicide attacks, car bombing, armed assaults in the public places, cyber warfare, letter bomb, use of vehicle/trucks to run into crowds or public places etc. However, beyond these generalizations underscoring the behavior and operations of terrorists, it is critical to note that it is virtually impossible to stereotype terrorist behavior given the fact that most terrorist planning and activity is covert, hence the difficulty of gathering enough statistical data in that realm of study.

### **(b) *Mens Rea* of terrorism (subjective element)**

*Mens Rea* as a technical term speaks to the relationship or the connection between the act prohibited and the mental disposition of the perpetrator. Dinstein remarks that *Mens Rea* is an indispensable component of international crimes (Dinstein, 2005). This can effectively be spoken of all crimes. The Rome Statute of ICC underscores this simple but important principle when it states in its article 30 that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly (Rome Statute, ICC, art. 30).

In other words, it expresses the criminal law requirement that an "accused person be proved to have had a specified cognitive relationship to the various elements or the *actus reus* in order to be guilty (Cairns, 2002). For example, in order to convict a person for murder, it is necessary to inquire whether the accused intended death of a human being as the possible outcome of his action or conduct. While for theft; the *mens rea* is an intention to deprive the owner of the property permanently, fraudulently and without claim of right. In this connection, Dugdale et al. (1996) writes, "In many cases, the proof of the required *mens rea* is the critical element in the prosecution and the determination of criminal liability." Except for strict liability offences, intention and the proof of that intention remains the crucial factor and epitome of *mens rea*. Although negligence and recklessness are known and included as forms of *mens rea*, intention remains the critical factor in differentiating other forms of violence from the terrorist violence. The offence of terrorism requires particular kind of intention or knowledge. One fundamental element that cannot be taken away from any attempted definition of terrorism is the creation of climate of terror and fear within the civilian or combatant population or parts of it.

It however suffices to have the intention to create such atmosphere objectively judging from the nature of the conduct or the *actus reus* or consequences of it. However, one must not lose sight of the political undertone behind every terror incident. Upendra Acharya subscribes to the shift from who is a terrorist to what constitutes terrorist acts. He canvases as follows: "The focus is not and should not be whether a group is a terrorist group, but rather what activities or actions constitute terrorism (Acharya, 2009). With this trajectory, he maintains that it will help states and international community to understand the nature of the fight in which we exclude terrorist acts, without excluding people.

Similarly, isolated terrorist acts must in the first place be unlawful; the *mens rea* of these (terrorist) acts themselves must be intended as to its consequences, foreseen and desired for one to conclude that a terrorist incident has occurred. The intentional act must however include the intent to incite fear or the threat of fear as a

consequence of the act performed. The narrative in view is that the act performed which is the constitutive act of terrorism is not end in itself but a means to an end- an instrument or vehicle of terror. The Security Council Resolution 1566 identifies the *mens rea* when it speaks of "acts done with the purpose to provoke a state of terror... or to intimidate" (S/RES/1566 (2004)). The International Convention for the Suppression and Financing of Terror<sup>ii</sup> in its article 2 uses explicit language to accommodate the *mens rea*. The word „willfully“ denotes a voluntary and premeditated act. While the word „intended to cause death or injury“ with a purpose to cause fear...“ constitute clearly the *mens rea* of terrorism for the purposes of this convention. This convention therefore requires a form of desired foresight with respect to the consequences of the proscribed act which is to incite fear and intimidate.

From a rather different wave of advocacy, Kaplan raises a few concerns that speak to the resistance of scholars in including terror as an element of terrorism. These concerns include: 1) that it is sometimes difficult to determine whether the motives of terrorists are primarily aimed at eliciting terror or at some other end. 2) The problematic rhetoric of labeling all incidences of violence with terror consequences as terrorism. 3) The probability that putative act of terrorism may not be followed with attendant terror or will fail to elicit terror. 4) The nebulous signature of terror that attends to the label of terrorism. Kaplan insists that as with 9/11 attacks, that without a perceived threat of future violence, there would not exist an act of terrorism (Kaplan, 2005).

It is a possibility that sometimes the terrorist's motives may not be clearly apparent, nevertheless surrounding circumstances may likely clarify the motive to sustain the designation of terrorism. It is also a remote possibility that a violent or terror threatening action may not elicit necessary terror as a consequence, but that does not make it less an act of terrorism so long as all other features of terrorism already identified are present. Significant as these concerns are, what it brings to the conversation is that the *mens rea* of terrorism must not be separated from the deliberate intention to incite fear with or without any attendant political backlash. Thus, Walter concludes that, "While the intention of creating terror and fear within the population is an uncontroversial element of definition, the degree of influence on the government decision-making, which is necessary in order to speak of terrorism, varies." (Walter, 2003) However, this essay acknowledges with Shawn Kaplan and other scholars that terrorism for all intents and purposes involves, "An act or threat of violence to persons or property that elicits terror, fear, or anxiety regarding the security of human life or fundamental rights and functions (occasionally-sic) as an instrument to obtain further ends" (Kaplan, 2005).

## **IS TERRORISM AN INTERNATIONAL CRIME? THE INTERNATIONAL LEGAL FRAMEWORK OF TERRORISM**

In international context since 9/11, terrorism is considered a volatile contemporary phenomenon which presents complicated legal problems. The United Nations as well as other regional bodies have made and will continue to work out strategies towards responding effectively to the menace of all acts of terrorism which has been regarded as a threat to international peace and security (SC/Res 1368, 2001). At the regional level, that is, European Union, African Union, and in the Middle East, so many measures were also adopted. The charting of an international law strategy for Counter Terrorism under the United Nations framework is a story of efforts of specific committees, their reports, and eventual resolutions and treaties emanating from the General Assembly of the UN and the Security Council with a consequent call for states to walk the talk.

All forms of terrorism are dealt with exclusively by way of domestic law enforcement and arrangement. Even international terrorism, that is transnational or trans-boundary in nature must need the force of domestic law enforcement with the consequential cooperation of states that are impacted by the incident. The legal backing from international conventions and resolutions as provided under the umbrella of the United Nations has not been clearly spelt to speak to international law prosecution and punishment of terrorism. Analysis shows that there is no single international law prescription or forum which addresses the prosecution and punishment of terrorism.

The United Nations has never been in the back bench when responding to horrible acts of terror. Its position was ineluctably manifested in the immediate aftermath of 9/11 attacks on the United States, where the Security Council moved quickly and adopted Resolution 1373, which empowered all member states to take specific action to counter terrorism. The United Nations has the capacity to enact and establish binding directives for the purpose to eliminating any threat to international peace and security, of which terrorism was declared as a prominent one (SC/Res 1373(2001)). However the immediate response of the United Nations Security Council to the 9/11 incident cannot be considered the first ever reaction or effort of UN towards counterterrorism. In fact, even before the 9/11, the counter terrorism measures and efforts of the UN has not only demonstrated its keen interest in the area of terrorism, it has also shown how critical the need to stem the tide of terrorism in the international system. Its sustained interest in effectively combating terrorism is obvious in the many multilateral treaties, the resolutions and the subsequent Global Counter Terrorism Strategy adopted to address various forms of terrorism which have become rife in the last

three decades.

All UN decisions or instruments do not carry the same weight. The level of importance attached to each depends on the kind of document they appear in and the body of the UN that issued them. For instance, the Security Council resolutions are taken more seriously than the General Assembly resolution and are mandatory on member states, while treaties which are legally binding between state signatories are attached more seriousness. Because issues of terrorism are of grave concern to the UN, they often emanate as treaties/conventions or resolutions of the Security Council.

UN Conventions cover all legally binding international agreements which are distinguishable from international customary rules and general principles of international law. Although conventions are binding upon states who are parties to it, sometimes, they are adopted by international organisations by way of a resolution. In such a case, it is incorporated as an operational principle of such group or organisation. With the end of cold war, governments and states turned to the UN to deal with ethnic, nationalist and international conflict that often pose a threat to international peace and security.

Prior to the adoption of resolution 1373 [UNSC/Res. 1373 (2001)] and the establishment of the Counter-Terrorism Committee, the international community had already promulgated 12 of the current 16 international counter-terrorism legal instruments. However, the rate of adherence to these conventions and protocols by United Nations Member States was low (<https://www.un.org/sc/ctc/resources/international-legal-instruments/>). As a result of the attention focused on countering terrorism since the events of 11 September 2001 and the adoption of Security Council Resolution 1373 (2001), which calls on States to become parties to these international instruments on counter terrorism, the rate of adherence has increased. Some two-thirds of UN Member States have either ratified or acceded to at least 10 of the 16 instruments, and there is no longer any country that has neither signed nor become a party to at least one of them. (<https://www.rcc.int/p-cve/docs/64/united-nations-security-council-resolution-1373-2001>).

In fact, between 1963 and 2004, under the auspices of the United Nations and its specialized agencies, the international community developed 19 international counter-terrorism instruments which are open to participation by all Member States. Suffice it to say that both the General Assembly and the Security Council has also focused on terrorism as an international problem within the last three decades and have continued to address the issue intermittently through resolutions and declarations.

Aside of these legal instruments from the various organs of the UN, the statement of Kofi Annan, the then

United Nations Secretary General provides an invaluable resource for the purpose of understanding where UN stands in the face of terrorism. In the preface to the International Instruments Related to the Prevention of Terrorism<sup>iii</sup>, he describes the increasing danger faced by world community and maintains that, Terrorism strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law and human rights and stability. Globalisation brings home the importance of a truly concerted effort to combat terrorism in all its forms and manifestations.

The watershed of United Nations approach to Counter terrorism can be found clearly in none other document than the Security Council Resolution 1373(2001) where it declared that acts, methods and practices of terrorism were contrary to the purposes and principles of United Nations and in SC/Res 1368 (2001); it describes any act of international terrorism as threat to international peace and security. It therefore calls on all member states to take necessary steps to prevent commission of terrorist acts. In addition to this, the Council called on member states to fully implement (domesticate) the relevant international conventions and protocols relating to terrorism. The United Nations by sounding this legislative announcement just after 9/11 attacks leaves no one in doubt that they expect states to use all legal means to stamp out the evil of terrorism but not outside the principles of rule of law upon which its legitimacy stands. More significantly, Resolution 2349 (UNSC 2349, 2017) of 31 March 2017, the SC directs its energy and focus on the security crisis brought about by the Boko Haram and other allied terror networks such as ISIL in Lake Chad region which include Nigeria, Chad, Niger Republic and Cameroon (S/RES/2349, 2017). In that Resolution, the SC reaffirms that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomever it is committed. Its expresses its determination to further enhance the effectiveness of the overall effort to fight this scourge at all levels. In the article 7 of that Resolution, the SC condemns all terrorist attacks, violations of international humanitarian law and abuses of human rights by Boko Haram in the region. It calls upon countries to prevent, criminalize, investigate, and prosecute those who engage in such organized crimes like terrorism. This Resolution also speaks to the greater need for active cooperation and coordination among states in their counter terrorism mechanism. In view of this, the states have been called upon even more concretely since 9/11 to enact their anti –terrorism laws and take steps to co-operate with other nations in their various counter terrorism measures. These conventions and resolutions provide the basis for each state's criminal justice initiative. Terrorism as global problem in the eyes

of the United Nations requires that each state should keep its house in order by doing all that is recommended under these conventions and resolutions to stem the tide of terrorist attacks and organisations.

In spite of these inroads in the area of terrorism, one is left to wonder, the reluctance of the world body in putting terrorism in the same threshold as the war crimes or genocide, under the jurisdiction of the ICC in order to expand the counter terrorism efforts and create a default forum for the punishment of terrorism offences where the states are incapacitated or unable to do so for political motives. Following this need under international law context, the next subject is to explore alternate approaches for the purpose of bringing terrorism within the provenance of international crime so declared under United Nations Convention and Security Council Resolution and possibly within the jurisdiction of ICC without having to amend the extant law.

## **TERRORISM, ROME STATUTE AND INTERNATIONAL CRIMINAL COURT (ICC) JURISDICTION**

The greater part of criminal law is established and enforced under the national law of individual states. While it is generally recognised that many terrorist acts fall within the jurisdiction of the domestic law for prosecution purposes; it is not out of place that in the light of several forms of conflict and the development of humanitarian sensitivity of modern international law, a body of international criminal law has emerged in the light of which international law has come to prescribe certain acts as crimes in some of its instruments. In the same vein, it has also developed procedures thereto by way of tribunals established to try certain defined crimes. These crimes have to be regarded as international crimes and regulated by the developing system of international criminal law. In the light of the need to advance the system of International criminal law, the international system has also established the International Criminal Court (ICC) to try such named crimes defined under the Rome Statute of International Crime. International criminal law therefore includes those aspects of substantive international law that deal with defining, prosecuting and punishing international crimes as well as the various mechanism and procedures used by states to facilitate international cooperation in the investigation and enforcement of national criminal law. However, international law has defined a few crimes prescribing only crimes generally viewed as serious threat to the interests of the international community as a whole or to its most fundamental values. In many instances where there are serious crimes that threaten the interests and values of the international community, it sets up *Ad Hoc* Criminal Tribunals, defines its power and jurisdiction and

enabling it to try and punish such international crime. This is reason for the creation of *ad hoc* International Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR). For instance, the ICTY was established to try persons responsible for serious violations of international humanitarian law (Breaches of Geneva Conventions (laws of war- Jus in Bello), genocide, war crimes and crime against humanity) committed in that territory during the armed conflict in the former Yugoslavia. The tribunal is located in Hague, in the Netherlands. Similarly, the International Criminal Court for Rwanda ICTR was established by the UNSC Resolution 955 in 1994, to prosecute persons suspected of Rwandan Genocide and other serious violations of international law in the territory of Rwanda and nearby states during the Rwandan conflict (S/Res/955 (1994)). It is located in Arusha, Tanzania. Before it was disbanded and its role taken over by the ICC, the tribunal succeeded in trying about 50 cases and handing down necessary punishments to persons convicted of crimes defined as such under the law establishing such tribunal.

In fact, recognising that the pursuit of international criminal law on ad hoc basis has not been very satisfying for want of very clearly defined norms, the UN established its first permanent tribunal tagged International Criminal Court (ICC), in order to prosecute and punish persons for the commission of international crimes as clearly defined in the statute setting up- the Statute of International Criminal Court (Rome Statute).

A great deal of our argument recognises that terrorism is first and foremost a matter for domestic law enforcement hence the penchant for many resolutions of the United Nations requiring states to create comprehensive regimes for anti-terrorism. Again, the UN itself recognises that the cardinal principle of international law is sovereignty of states which entails each state's jurisdiction over its own territory and citizens. Following this understanding, states have also enacted their various anti-terrorism laws with a definition which, although may differ in specifics with other definitions in some international documents, contain the major elements of terrorism which are the use or threat of use of violence, indiscriminate targeting of civilians and political purpose (Cohen, 2012). The individual states naturally assume the first obligation to prosecute crimes of terrorism as defined under their domestic national laws. This also has not been as successful as demands the serious nature of the threat posed by terrorism to international peace and security. The international community do have vested interest in the prosecution of individuals suspected of committing acts of international terrorism since 9/11 as the scale and methods of crimes of terrorism has exponentially multiplied and drastically changed respectively. Unfortunately, there is no judicial forum in international system to specifically deal with the

prosecution of crimes of terrorism. Although there have been a number of non judicial measures from the international community to suppress terrorism, these have failed to exploit critical opportunities to extend and bring terrorism into the ambit of international criminal law. Some of the transnational terrorist attacks were adequate to attract the establishment of special tribunals: the likes of ICTY or ICTR in order to prosecute the suspects. Some of these examples include the massacre of Israeli Athletes in the 1972 Munich Olympic Games where eight Palestinian members of the terrorist organisation- Black September took hostage and later murdered eleven Israeli athletes and the Pam- Am Flight 103 bombing which exploded over Lockerbie, Scotland killing all the persons on board in which investigations revealed the involvement of Libyan government and Libyan intelligence personnel. Libya later surrendered two suspects who were tried under Scottish anti-terrorism criminal law and admitted responsibility for the attack and began paying reparations to the families of the victims. In the same vein, the terrorist attack of September 11, 2001 took the United States into armed conflict in Afghanistan, leading to the capture of many persons linked to Al Qaeda, the terrorist network responsible for the attack.

Regrettably, the response in each of these events was different. It ranged from a single state operating in covert operation to international sanctions mechanism and in some cases, full scale war. In the absence therefore of an ad hoc tribunal for the trial of the suspects of these terrorist incidences by the International Community which would have been welcomed given the outrage associated with them, the window available for prosecution where national courts are inept, was to invite the operational mode of ICC, which unfortunately may have to confront the technical barriers of lack of jurisdiction.

Therefore, there is need to evolve within the extant international regime, ways to complement the efforts of the individual states by default principle, to prosecute and punish terrorism under a legitimate round in international law. This can be done effectively by way of re-interpreting international crimes to admit of acts of terrorism within the existing international crimes rather than terrorism as a substantive crime.

Under the Rome Statute, the ICC does not have jurisdiction over acts of terrorism as a distinct offense simply because the proposals to include it, was rejected by majority of state parties during the negotiation because of lack of any unanimous definition of what constitutes terrorism (Mundis, 2002). In the preamble to the Rome Statute, it was clearly stated that „the primary motivation for the establishment of the ICC was to put an end to impunity, noting emphatically that grave international crimes threaten the peace and that prosecution of such crimes contributes to the maintenance of international peace and security” (Rome

Statute ICC, 1998). It is important to note that a case is admissible before the ICC only where a state with immediate jurisdiction is unwilling or unable or persists in activity, (McAuliffe, 2013). Article 17 of the Rome Statute provides expressly that a case is inadmissible where it is being genuinely investigated or prosecuted by a state which has jurisdiction over it, (Adams and Richards, 2000; Rome Statute ICC, art 17, 1998).

Cohen argues that the lack of acceptable definition should not stand in the way of employing a workable definition and move along with the prosecution of terrorists in the ICC. Article 5 of the Rome Statute of ICC provides for the specific crimes within the jurisdiction of the court. These crimes include the crime of genocide (Art. 6), crimes against humanity (Art. 7), war crimes (Art. 8) and the crime of aggression. As terrorism become more international in nature with more disastrous results, there is a growing need for an international policy framework to combat it not only in the realm of policing but also in arena of prosecution.

Since the Rome Statute indicates clearly in its Article 1, that ICC will exercise jurisdiction only for the most serious crimes of international concern, it is being proposed notwithstanding that the ICC will often defer to national jurisdictions as indicated in Art. 17<sup>iv</sup>, nothing precludes the ICC from assuming jurisdiction to entertain terrorist crimes brought to it under the crimes of genocide in Article 6 and crimes against humanity in Article 7 bearing in mind that the crime of terrorism has gained the most currency in contemporary international criminal law.

## ACTS OF TERRORISM AND GENOCIDE

The definition of Genocide found in the Genocide Convention of 1948 was adopted verbatim in the Rome statute in its Article 6. Precisely Art 6a- 6c speak directly to our conversation. It provides as follows: Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The *actus reus* of genocide requires that the perpetrators target one or more persons merely because they belong to a particular national, ethnic, racial or religious group, inflict bodily injuries, commit murder and carry attacks that have the potential of obliterating such identifiable group. The *mens rea* is the genocidal intent, which is the „intent to destroy in whole or in part, a national, ethnical, racial or religious group“ (Smith, 2013) without which genocide cannot be sustained. The thrust of the argument here is that act amounting to genocide can reasonably occur through acts of terrorism which

could be sponsored by a state or carried out by identifiable terrorist organisation or individuals with transnational or trans-boundary presence.

A snapshot of some of the terrorist activities of groups like Boko Haram with more presence in Nigeria and ISIL in Syria and Iraq demonstrate that terrorism has since become an instrument for committing heinous crimes such as genocide. In Nigeria, abundant reports exist that tell stories about the Boko Haram sect and the Fulani herdsmen<sup>v</sup> entering villages in Middle Belt region of Nigeria or other parts of Northern Nigeria, killing everything that moves with least provocation, chasing away the women and the children leading to the permanent displacement of entire ethnic group or village while the government looks on. The Fulani herdsmen in the circumstances are not indistinguishable from the Boko Haram considering that: both originate from the same ethno-religious region of Nigeria; are militant; use coercion; intimidation and instill fears in people by the mode of operation and objectives. The 2019 Global Terrorism Index (GTI) reports that violence perpetrated by Fulani herdsmen have killed and rendered more Nigerians homeless in 2018 as against the number killed by Boko Haram and Islamic State in West African Province (ISWAP) terrorists.<sup>vi</sup> In the Middle East, the ISIL has been noted by the UN as the leading perpetrator of genocide of the Yazidis<sup>vii</sup> in Iraq. In fact, in August 2014, they became victims of genocide by the Islamic state of Iraq and Levant (ISIL) in its campaign to rid Iraq and its neighbouring countries of non-Islamic influences. ISIL's actions against the Yazidi population have resulted in approximately 500,000 refugees and several thousand killed and kidnapped.<sup>viii</sup> This is another eloquent case of using terrorism to commit genocide. In the light of these few illustrations, under the Art 6 of the Rome Statute, one needs not argue more vigorously that there is a scope to prosecute terrorist related violence as genocide under the current framework of law.

## ACTS OF TERRORISM AND CRIMES AGAINST HUMANITY

Modern international criminal justice enterprise began at the Nuremberg Tribunal to address a number of atrocities committed leading to the Second World War. The essence of these trials was not only to punish the offenders for these atrocities but directed at „deterrence over and above retribution“ (Cronin-Furman and Taub, 2013), in order to dissuade those who will attempt in the future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights (Prosecutor and Kambanda, 1998). The Nuremberg Tribunal is generally adjudged to be the cradle for the development of international criminal law



with respect to crimes against humanity by bringing to justice some big fish for their crimes. It thus reaffirms that individual responsibility for crimes obtains not only in domestic sphere but as well as international sphere. The untold suffering of millions in concentration camps in parts of Europe during the Nazi regime motivated the creation of courts of law within the international space in order to condemn Nazi barbarity. The Nuremberg Tribunal was therefore a watershed and a flash in the pan for the judicial condemnation of crimes against humanity which was officially codified in the ICC Rome Statute.

Article 7 (1) of the Rome Statute describes the various component of crimes against humanity<sup>ix</sup> for easy and succinct identification. The most relevant aspects of this Article 7 from terrorism perspective are contained in subsection (a) (d), (e) (f), (g) (h) and (k) which admit of crime of murder, forcible transfer of population, and imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, serious sexual related crimes or offences, all forms of persecution against an identifiable group and other inhumane acts that intentionally cause serious mental, physical or bodily harm or suffering respectively. It was a deliberate choice to exclude the act of extermination posted in Article 7(2)b because extermination which includes the mass killing of civilians through the intentional infliction of conditions of life calculated to bring about destruction of part of population is remarkably analogous to the crime of genocide considered in the previous discussion. In this connection, it cannot be overemphasised that terrorism as a crime is often employed as smokescreen for committing such acts as forcible transfer of population which involves the displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present as defined in the Rome Statute, Art 7(2)d. In the same way, terrorism is often a mask for indulging in torture which the Statute defines as the intentional infliction of pain or suffering upon a person under the control of the accused. (See Art. 7(2)e of Rome Statute, ICC). Furthermore, indulging in other forms of sexual violence/rape, enforced disappearance of persons and persecution (severe deprivation of fundamental rights by reason of identity of a group) are other related crimes covered by the Rome Statute of ICC which constitutes the smokescreen for the offence of terrorism. An illustration with the abduction of 276 Chibok girls in Borno State of Nigeria by the Boko Haram in 2014 and the abduction of Dapchi school girls numbering about 110 in 2018 by the same gang should not just be taken only as a tactic of terror but may be considered in isolation to constitute an international crime against humanity under Article 7 of the Rome Statute.

From these analyses, it is understandable that under the rubrics of crimes against humanity, many actions which are constitutive of the offence of terrorism are

actually disparate criminal offences resulting in individual criminal responsibility. And these disparate offences, such as crimes against humanity, are within the jurisdiction of ICC and may be prosecuted effectively without classifying them as terrorism in a bid to take it outside the jurisdiction of the International Criminal Court.

## CONCLUSION

Modern forms of terrorism often propelled by religious extremism engage in these forms of crimes identified in the Rome Statute as a means of fostering their campaigns.

In this work, we have undertaken a critical analysis of the legal and judicial framework within the extant laws of international community for dealing with offenses considered as international crime. The Rome Statute of ICC provided the legal framework while establishing the ICC with judicial authority to prosecute such offences. Given the concern of the world body regarding terrorism as a crime that threatens international peace and security, the unreadiness of international community to bring terrorism within the legal framework of international crime due to political differences is one pole short of a global scandal. This research has undertaken to ameliorate that scandal by evolving an uncommon approach which is intended to create an alternate gate for admitting terrorism, prosecuting it, and punishing it within the sphere of existing international framework while maintaining the jurisdictional barriers imposed by the extant law of the Rome Statute.

However, in any event, its jurisdiction will be limited to natural persons since ICC is precluded from entertaining claims against a state (Art. 25 Rome Statute, ICC). The success of this research is not found in non-creation an independent international crime of terrorism which would be outside the jurisdiction of ICC technically. The novelty of the research is to be located in the expansion of the interpretation of the existing provisions notably Article 1, Article 6 and 7 to highlight criminal acts that results from terrorism but are also element of international crimes which necessarily fall within the jurisdiction of ICC.

Employing the purposeful interpretation rules for treaties and legislations, Article 1, expressly indicates that the purpose for the establishment of ICC was for the prosecution of most serious crime of international concern. Terrorism is at that threshold and nothing precludes its inclusion by way of reference to individual acts used by terrorist within the established crimes under ICC jurisdiction.

## CONFLICT OF INTERESTS

The authors have not declared any conflict of interests.

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<sup>i</sup> UN Security Council Resolution 1566 (2004) gives a definition: criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.

The European Union defines terrorism for legal/official purposes in Art.1 of the Framework Decision on Combating Terrorism (2002). This provides that terrorist offences are certain criminal offences set out in a list comprised largely of serious offences against persons and property which given their nature or context, may seriously damage a country or an international organization where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

<sup>ii</sup> Art. 2 (1) Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:(a)An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b)Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

<sup>iii</sup> International Instruments Related to the Prevention and Suppression of International Terrorism (*United Nations Publication*, Sales No. E.01.V3).

<sup>iv</sup> - ICC can gain jurisdiction only when domestic legal systems are unwilling and genuinely unable to carry out an investigation or prosecution of an accused person.

<sup>v</sup> Tragedy struck again on 4 March 2018 in Omusu village, Ojigo ward in Edumoga, Okpokwu local government area of

Benue state as suspected herdsmen unleash terror of their victims leaving 26 people, including and children, dead.

[https://en.wikipedia.org/wiki/Agatu\\_massacres](https://en.wikipedia.org/wiki/Agatu_massacres).

<sup>vi</sup> [https://www.panapress.com/Fulani-herdsmen-killed-more-Nigeria\\_630615618-lang2.html](https://www.panapress.com/Fulani-herdsmen-killed-more-Nigeria_630615618-lang2.html)

<sup>vii</sup> The Yazidis are an endogamous and mostly kumanji -speaking group of contested ethnic

origin, indigenous to Iraq, Syria, and Turkey. The majority of Yazidis remaining in the Middle East today live in Iraq. Their religion is monotheistic.

<sup>viii</sup> "ISIS Terror: One Yazidi's Battle to Chronicle the Death of a People".

MSNBC. 23 November 2015

<sup>ix</sup> "Crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection

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with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.