

Application of Principles of International Criminal Law in Combating Domestic Terrorism in Nigeria

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Abstract

The idea of applying International Criminal Law to violence evolving as a result of terrorism and terrorist groups becomes needful both to international and non-international armed conflicts. This paper aims to analyse the concept of International Criminal Law and its relevance to curbing terrorism which has been a global crime. The paper traces the history of terrorism in Nigeria till the current period of Boko Haram insurgency and examines the advantages and disadvantages of including terrorism as one of the offences within the jurisdiction of the International Criminal Court, thus calling for the need to amend the Rome Statute; which established the International Criminal Court. This paper concludes by asserting that as a matter of law, the road is open for including terrorism as a crime in the Rome Statute and by this to add additional tier to the international fight against terrorism. Following from its antecedent, the International Criminal Court has generated the conviction of perpetrators of the most devastating atrocities such as World War II and the Holocaust, the Rwandan Genocide, the Srebrenica Genocide, and more. It is therefore recommended that the powerful instrument of the International Criminal Court should be employed to combat domestic terrorism in Nigeria.

Introduction

Domestic terrorism refers to terrorist acts which occur within a state and do not extend beyond its boundaries. In other words, where terrorists are nationals of the state where they commit such acts or where a large number of the members of the terrorist group are citizens of the targeted state, such terrorism is referred to as

domestic.¹ The hypothesis is that as the activities of terrorist organizations grow in sophistication, the need arises for them to outsource resources in order to gain advantage over their opponents². It is therefore apt to say that domestic terrorism or home grown terrorism is commonly associated with violent acts committed by citizens or permanent residents of a state against their own people or property within the state in order to instil fear on a population or government as a tactic designed to advance political, religious or ideological objectives.³

Since the return to civil rule in 1999, Nigeria has been battling with series of violent agitations from various geo-political zones in the country.⁴ The trend of domestic terrorism in the country became mind-boggling and reprehensible with the emergence of the nefarious activities of the dreaded religious sect popularly known as Boko Haram.⁵ In fact, on 13 November 2013, the government of the United States officially declared Nigeria's Boko Haram set as a terrorist group,⁶ which is a clear indication that Nigeria is battling with domestic terrorism claiming lives of the citizens almost on a daily basis.⁷ This calls for the need to fashion out a quick legal intervention to combat domestic terrorism in Nigeria.

Historical Analysis of Domestic Terrorism in Nigeria

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¹ *Domestic Terrorism in the United States* available at www.wikipedia.org accessed 28 May 2015.

² Sageman, M. *Leaderless Jihad: Terror Network in the Twenty First Century*, (Philadelphia PA: University of Pennsylvania Press 2008) p. 26

³ Khawla, B. "Understanding Home grown Terrorism" (2010) *The American Thinker*, p. 16 available at www.americanthinker.com Accessed April 9, 2011

⁴ Omidoyin, T.J. "Legal Intervention against Global Terrorism; An Appraisal", vol. 10 (2014) *The Jurist Consult (Essays in honour of Prof. T.I. Akomolede)*, p. 23

⁵ Ibid.

⁶ Allan, H. "U.S. Designates Nigeria's Boko Haram as Terrorist Group", *MCCLATCHY INTERACTIVE* - available at www.mcclatchydc.com accessed 13 November, 2013

⁷ www.saharareporters.com accessed 10 October, 2014

Basically, there are about three main trends in modern terrorism. First, it is loosely organized, self-financed and internationalized network of terrorists. Another trend of terrorism is that which is religiously or ideologically motivated. The third trend is the cross-national linked terrorism operating as a network.⁸ Writers have categorized the evolution of terrorism in Nigeria into three epochs. First, the pre-colonial days, then the need for legitimacy and acceptance that forced colonial authorities to deploy terror to enforce its policies, laws and orders. Notably, the Oke-Ogun uprising of 1921 was the high point of post-colonial terror which saw the colonial government engage the people of present day Oyo and Ogun states in a three year orgy of violence that cost ten thousand lives.⁹

The second epoch related to kinship and affinity. An author noted that these groups were based on strong loyalty and obligation to their kinship group, the town or village where their lineage is located.¹⁰ Examples include Calabar Improvement League, Owerri Divisional Union, Igbira Progressive Union, Naze Family Meeting.¹¹ Some authors have, however refused to establish the link between these groups and terrorism.¹² Terrorism in Nigeria has been mainly carried out by the militia in the Niger Delta area and the Boko Haram in the Northern part.¹³ In 1998, the Niger Delta people adopted series of strategies as a means of freeing themselves from socio-political, economic and environmental marginalization. Among these strategies are petition, litigation, protest, violence and mass mobilization. The last phase of the

⁸ Ojukwu, C.C. "Terrorism, Foreign and Human Rights Concern in Nigeria" Vol. 13, No. 4, (2011) *Journal of Sustainable Development in Africa*, Pennsylvania, University of Pennsylvania, p.15

⁹ Oyeniya, B.A. *Domestic Terrorism in Africa: A Historical Overview of Terrorism in Nigeria* (Institute of Security Studies, Pretoria, South Africa, 2006) p. 43

¹⁰ Coleman, J.S. *Nationalism and Development in Africa* (Selected Essays, USA, California; University of California Press, 2011) p. 15

¹¹ Ibid.

¹² Oyeniya, B.A. (n 10) p. 65

¹³ Abimbola, J.O. & Adesote, S.A. "Domestic Terrorism and Boko Haram Insurgency in Nigeria, Issues and Trends: A Historical Discourse" vol. 4 (2012) *Journal of Arts and Contemporary Society*, Cenresin Publications, p.11

Niger Delta agitation which began in 1998 to the present was marked with the emergence of terror strategies which included outright confrontation, violence, pipeline vandalism, bombing of oil installations, armed resistance, kidnapping and hostage taking.¹⁴ The adoption of this act of terrorism in the region was necessitated by the emergence of various youth militia. Among these militias are Ijaw Youth Council (IYC), the Egbesu Boys, the Niger Delta Peoples Volunteer Force led by Alhaji Asari Dokubo, the Isoko National Youth Movement (INYM), the Movement for the Emancipation of Niger Delta (MEND) led by Henry Okah, Niger Delta Vigilante (NDV) led by Ateke Tom, Niger Delta Liberation Force (NDLF), among others.¹⁵

The activities of restive youth in the Niger Delta area against the Nigerian state on one hand and the transnational oil companies operating in the region on the other, constitute a major threat to national security. In fact, before the adoption of Amnesty Programme by the late President of the Federal Republic of Nigeria, Alhaji Umaru Musa Yar'Adua in 2010, as a positive measure to put an end to domestic terrorism in the region, the region had remained the most dangerous zone to live in the country.¹⁶ The wave of domestic terrorism has drastically shifted to the northern part of Nigeria, the initial threat of terrorism reverberates from Yola to Kano to Maiduguri and Abuja amongst other places, however today, terrorism is an ever present fear both in the hearts of the government and the governed.¹⁷

Domestic terrorism in Nigeria has an uneasy growth, it manifests in civil-government relations as well as interrelationship

¹⁴ Ogbogbo, C.B.N. *The Niger Delta and the Resource Control, 1960-1995* (unpublished PhD thesis, Institute of African Studies, University of Ibadan, 2004)

¹⁵ Abimbola, J.O. & Adesote, S.A. (n 14) p.25

¹⁶ Adesote, S.A. *Government Response to Niger Delta Agitation*, (A paper presented at the Postgraduate Class, HIS709, Department of History, University of Ibadan 2010)

¹⁷ Murray, J. *Policing Terrorism: A Threat to Community Policing or Just a Shift in Priorities* (2005) available at www.ebookbrowse.com accessed 13 January 2011

between different ethnic nationalities making up present day Nigeria.¹⁸ It is characterized by the use of force, brutality towards the people and the deployment of hard power to suppress civil relations, it manifests as ethnic nationalism.¹⁹ It is against this background that some writers described as terrorism acts perpetuated by the state during military autocratic rule.²⁰ They listed the following examples: assassination of Dele Giwa, founding editor of Newswatch Magazine, alleged poisoning of Moshood Abiola and others.²¹

The third relates to groups that were motivated by ethnic nationalism and militancy.²² In fact, Eastern Nigeria has recorded plethora of groups agitating for one thing or the other on behalf of their people.²³ These groups generally perform security services for the people they represent and generally enjoy public support.²⁴

The emergence of Boko Haram in the northern part of Nigeria likewise constitutes the trend of domestic terrorism from the religious perspective. The attempt, however, to forcefully impose religious ideology or belief on the Nigerian society since independence especially in the Northern region is not new.²⁵ The first major attempt in the post-colonial period was led by the leader of the Maitatsine sectarian group in the 1980s and eventually led to large-scale uprisings.²⁶ Although, Boko Haram could be compared in terms of ideology or philosophy and objectives to the Maitatsine Sectarian group, its organizational planning, armed resistance and mode of operation is Taliban.²⁷ There were two other Islamic

¹⁸ Obioma, J.D. *Boko Haram, Domestic Terrorism and the Future of Nigeria* (2014) available at www.theeconomyng.com 19 April 2013

¹⁹ Oyeniyi, B.A. "Terrorism in Nigeria: Groups, Activities and Politics" Vol. 1.1. Quarters 1 (2010) *International Journal of Politics and Good Governance*, p.15

²⁰ Ogundiya, A. & Amzat, H. "Nigeria and the Threat of Terrorism: Myth or Reality", Vol. 10, No. 2 (2008) *Journal of Sustainable Development in Africa*, p.31

²¹ Ibid.

²² Coleman, J.S. (n 11) p. 15

²³ Oyeniyi, B.A. (n 10) p. 21

²⁴ Ibid.

²⁵ Abimbola, J.O., Adesote, S.A. (n 14) p. 10

²⁶ Ibid.

²⁷ Danjubo, N.J. "Islamic Fundamentalism and Sectarian Violence: The 'Maitatsine' and 'Boko Haram' Crises in Northern Nigeria" (2009) *Peace and*

fundamentalist groups that emerged around the same time, the Jama'atu Izalatil Bidi'a Wa'iqamatic Sunna²⁸ founded in 1978 in Jos and known as 'Izala' and the Islamic Movement of Nigeria, a Shiite Movement led by Sheikh Ibrahim El-Zakzaky, allegedly funded by Iran.²⁹

Conceptualizing International Criminal Law and its Application to Terrorism

International Criminal Law is a subset of Public International Law; while International Law typically concerns inter-state relations, International Criminal Law concerns individuals.³⁰ In particular, International Criminal Law places emphasis on individuals—not states or organizations, it prescribes and punishes acts that are defined as crimes by International Law.³¹ International Criminal Law also includes laws, procedures and principles relating to the modes of liability, defences, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance and cooperation issues.³² As International Criminal Law is a subset of Public International Law, the sources of International Criminal Law are largely the same as Public International Law. The five sources of International Criminal Law used by international and hybrid criminal courts generally are:

- (1) Treaty law;
- (2) Customary international law;
- (3) General principles of law;

Conflict Studies Paper Series, Institute of African Studies, University of Ibadan, p. 1-21

²⁸ Translated to mean the Society of Removal of Innovation and Reestablishment of Sunna

²⁹ Mark, D. *Boko Haram Nigeria Terrorists Insurgency Evolves* (2011) available at www.nigeriavillagesquare.com accessed 10 May 2012

³⁰ Cohen, A. *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, (20 MICH. ST. INTL L. REV. 2013) 219 available at <http://digitalcommons.law.msu.edu> accessed 15 July 2015

³¹ Cohen, A. (n 31) 224

³² *Ibid.*

- (4) Judicial decisions (subsidiary source); and
- (5) Learned writing (subsidiary source).

These sources of International Criminal Law can sometimes overlap and have a dynamic relationship. For example, a treaty can become, reflect or influence the development of customary international law and vice versa. A judgment of international court may influence the development of treaty and customary international law. Generally, international and hybrid courts use treaties and custom as the main source of international criminal law, in addition to their own governing instruments (which may include treaties).³³

At the present time, there exist 13 international conventions or protocols which prohibit specific acts of terrorism. These agreements have been developed and are maintained under the auspices of the United Nations, and they stand as the expressed will of the world community.³⁴ In effect, the conventions adopted by the United Nations with respect to terrorism provide an obligation upon each party to the conventions to ensure that individuals alleged to have committed acts of terrorism are brought to book and made accountable for their conduct before a court of law. Arguably, the obligation to prosecute or extradite is binding upon all states, not just those that have become state parties to the convention, given the general acceptance by the international community of the provisions of these conventions. Further, international law imposes a positive duty on all states to obey international law.³⁵ In the case of terrorism, that duty to obey requires and compels states to either prosecute or extradite, and it precludes states from taking no action against an individual or group alleged to have breached international law. However, in the absence of an international judicial institution that could prosecute

³³ Cohen, A. (n 31) 222

³⁴ Lawless, M. "Terrorism: An International Crime?", Paper presented at the 7th Annual Canadian Conference on Ethical Leadership, delivered on 29 November 2006 at the Royal Military College of Canada.

³⁵ Mattias, K. "The Legitimacy of International Law: A Constitutionalist Framework of Analysis," Vol. 15, No. 5 (2005), *The European Journal of International Law*, pp. 907-931

alleged terrorists, individual states have lacked the impetus in many cases to try accused terrorists nationally, or to extradite them to another nation state. The obligation to prosecute imposed upon states has not been entirely ineffective.³⁶

In declaring terrorism to be the subject of universal jurisdiction, the United Nations has made a statement to all non-state actors that resort to violence as a means of securing political change, (terrorists) would no more be subject to sanction when caught within the territorial jurisdiction of the state where they committed the offensive act.³⁷ Rather, the perpetrator of a terrorist act would be liable to criminal sanction wherever and whenever captured by a lawful national authority.³⁸ In general, universal jurisdiction is granted to any nation that obtains control over the perpetrator of certain offences considered especially harmful to humanity generally.³⁹ Thus, a nation can assert jurisdiction, even though there has been no effect upon the territory, security, or sovereignty of the asserting state, and it allows any state to obtain jurisdiction over any person who has been responsible for the bombing of a public place anywhere in the world.

In addition to the 13 noted international conventions that address specific acts of terrorism, following the 11 September 2001 attacks, the United Nations General Assembly and the United Nations Security Council have each adopted resolutions which directly condemn terrorism. In particular, Security Council Resolution 1373 (2001) of 28 September 2001:

...declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century, Further declares that acts of international terrorism constitute a challenge to all States and to all of humanity, Reaffirms its unequivocal condemnation of all acts,

³⁶ Ibid.

³⁷ Hugh, M.K. *International Law: Chiefly as Interpreted and Applied in Canada* (London: Routledge, 1993) p.343

³⁸ Ibid.

³⁹ Ibid.

methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed.⁴⁰

The UN has, since its inception, consistently declared terrorism to be a serious crime and has sought to have individual perpetrators of terrorist acts brought to justice. The United Nations General Assembly, in 1995, imposed a positive obligation on state parties to the Charter of the United Nations as follows:

States must also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:

b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law;⁴¹

In this regard, it is clear that terrorism has been the subject of significant debate in both the General Assembly and the Security Council of the United Nations. Most recently, the United Nations Security Council has once again declared:

...[that] terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security, and further, ...[that] any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed

⁴⁰ United Nations General Assembly, Declaration on Measures to Eliminate International Terrorism, Resolution 1456 (2003), S/RES/1456 (2003)

⁴¹ United Nations General Assembly, Declaration on Measures to Eliminate International Terrorism, Resolution, A/RES/49/60 (17 February 1995) Article 5

and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians.⁴²

Thus, it is simply not possible to assert that terrorism is not prohibited by the international community, or that terrorism is not an international crime.

It is generally believed that there has not for once been a comprehensive international anti-terrorism structure that has failed. Further, in looking to national level structures, it is fair to say that it is not truly possible to assess the effectiveness of any domestic anti-terrorism regime as it is not possible to determine the number of terrorist incidents that have been either prevented or not attempted, given the existing regime(s). Ultimately, the existence of a comprehensive international anti-terrorism regime, including judicial institutions, can only assist in the fight against terrorism, and it cannot be said to be either harmful or an impediment to that cause. As such, the creation of such a structure ought to be at the forefront of the international community's agenda to address global terrorism.

Terrorism and International Criminal Court

Under the Rome Statute, the International Criminal Court does not have jurisdiction over acts of terrorism as a distinct offence. This situation is no accident but rather the express intention of the majority of state parties to the Rome Conference, which rejected the inclusion of terrorism in the Rome Statute.⁴³ The suggested provision defined the crime of terrorism as falling into one of three categories:⁴⁴ first, acts which constitutes terrorism under a

⁴² United Nations Security Council, Declaration on Issue of Combating Terrorism, Resolution 1456 (2003), S/RES/1456 (2003)

⁴³ *See, e.g.*, statements made by the delegates of Syria, Official Records of the Rome Conference, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, 3d plen. Mtg. at 172. 25, U.N. Doc. A/CONF.183/13

⁴⁴ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15- June 17, 1998, *Report of the*

standalone definition that the provision provided;⁴⁵ second, an offence under six existing international counter terrorism conventions;⁴⁶ or third, offences involving the use of firearms, weapons, explosives, and dangerous substances when used as a means to penetrate indiscriminate violence involving death or serious bodily injury to persons or group of persons or populations or serious damage to property.⁴⁷ This proposed provision was not approved by the states parties to the Rome Conference. At the conclusion of the Conference, the only mention of terrorism was in Resolution E in the Annex to the Final Act, which recommended revisiting the issue of including terrorism when a Conference Review met.⁴⁸ Reading the records from the Rome Conference reveals six reasons underlying the rejection of the suggested terrorism provision.⁴⁹

Preparatory Committee on the Establishment of an International Criminal Court, p.21, U.N. Doc.A/CONF.183/2 (Apr. 14, 1998)

⁴⁵ See Report of the Preparatory Committee, (n 42) at p. 22 (defining acts of terrorism as those “undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, group of persons, the general public or populations, for whatever considerations and purpose of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them”)

⁴⁶ The Conventions referred to in this provision are: Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agent; International Convention against the Taking of Hostages; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Act against the Safety of Fixed Platform Located on the Continental Shelf. See Report of the Preparatory Committee, (n 42) at 21.

⁴⁷ Report of the Preparatory Committee, (n 42) at 22

⁴⁸ Official Records of the Rome Conference at vol.1

⁴⁹ See also Bales, E. “Torturing the Rome Statute: The Attempt to Bring Guantanamo’s Detainee within the Jurisdiction of the International Criminal Court”, vol. 16 (2009) *TULSA Journal on Comparative and International Law*, p.173; Martinez, L. “Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems”, vol. 34, (2002) *RUTGERS Law Journal*, p.18; Mazandaran, P.A. “An International Legal response to an International Problem:

The first and foremost obstacle to the inclusion of terrorism in the Rome Statute was the lack of clear and universally accepted definition of what constitutes terrorism, including dissatisfaction with the proposed definition in the text of the draft.⁵⁰ In contrast, an argument has been put forward 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 International Criminal Court.⁵¹ One commentator has even suggested defining terrorism in a “transitional format” until a universally agreed definition will be achieved.⁵² The issue of definition was and remains the most serious obstacle in any discussion of terrorism, and the current discussion is no exception. However, since July of 1998, there have been some developments in the road towards finding a universally accepted definition of terrorism.

The second reason for states’ reluctance to include terrorism in the Rome Statute was the notion that the three core crimes—war crimes, crimes against humanity, and genocide—represented the crimes of greatest concern to the international community, and terrorism does not rise to this level of international concern.⁵³ However, examining the way in which the international community as a whole and states individually have addressed terrorism can lead to the conclusion that nowadays terrorists are as *hostis humanis generis* as war criminals or perpetrators of genocide or crimes against humanity.⁵⁴ For instance, comparing the status⁵⁵ of

Prosecuting International Terrorists”, vol. 6 (2006) *International Criminal Law Review* p. 503

⁵⁰ Bales, (n 47) at 185

⁵¹ Lawless, M. (n 35)159

⁵² *Ibid.*

⁵³ See Official Records of the Rome Conference at p72 (statements made by the delegate of Slovakia)

⁵⁴ Mazandaran, (n 47) at 527

⁵⁵ See UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/viewdetails.aspx?src=untsonline&tabid=2&mtdsg_no=iv1&chapter=4&lang=en#participants (showing the status of the Genocide Convention). Accessed 18 May 2010

the Genocide Convention⁵⁶ to that of the Terrorism Finance Convention⁵⁷ shows that while the former has forty-one signatories and one hundred and forty one parties; the latter has one hundred and thirty two signatories and one hundred and seventy three parties. In addition, the Security Council has affirmed that acts of international terrorism constitute threats to international peace and security.⁵⁸

Even on a more basic level, the notion of an international crime originated with piracy. Piracy hampered transnational trade and was therefore in the common interest of every country to be criminalised. Since piracy occurred on the high seas, no one state could assert the responsibility to combat piracy, and an international cooperation was necessary. Thus, it developed through state practice to be an international crime.⁵⁹ While terrorist acts occur within territorial boundaries, there can be an analogy between piracy and terrorism; terrorists acts were initially considered as “mere” treaty crimes, but as they became more international in nature and carried more disastrous results, they generated a need for an international cooperation to combat them and were the subject of growing international condemnation. Thus, this development has led some commentators to argue that terrorists’ acts have advanced to be regarded as international crimes.⁶⁰ Is terrorism less heinous than piracy? The most likely answer would probably be no. Does it disturb the conscience of the international community just like genocide or crimes against humanity? Ten years ago before 9/11 and the global war on terror, the answer would have been most likely not. Today, it is not that simple. For example, the attacks of 9/11 in the United States and the following attacks in various cities in Europe, North Africa, and South Asia probably troubled more people than the atrocities and genocide committed in Darfur during the same years.

⁵⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277

⁵⁷ International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270

⁵⁸ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)

⁵⁹ Lawless, M. (n 35) 159 at 141

⁶⁰ Bales, (n 47) at 186

The third ground for rejecting the inclusion of terrorism in the Rome Statute was the desire to avoid overburdening the International Criminal Court and the need for a gravity threshold.⁶¹ The counter argument to this claim is that the fear from a work overload of the court is not unique to terrorism and has already been addressed in the Rome Statute itself. The drafters of the Rome Statute knew that the International Criminal Court should be reserved for a special class of the most atrocious acts, and they have put some safety values in the text to accomplish that.

These built-in mechanisms will ensure that the International Criminal Court have jurisdiction over the most severe terrorist acts just like it has jurisdiction over the most severe crimes against humanity or any of the other crimes. Article 1 of the Rome Statute set forth clearly that the International Criminal Court will exercise jurisdiction only for the “most serious crimes of international concern.” Article 5, which specifies crimes within the jurisdiction of the International Criminal Court, reiterates this language. In addition, the principle of complementarities, deigned to prevent an overload of cases in the international court system while the national courts have more direct access to evidence and manpower.⁶² Thus, the fear about overburdening the court with a flood of terrorist cases does not seem realistic in light of the safeguards already directing the Court’s work.⁶³

The fourth argument against the initial inclusion of terrorism in the Rome Statute was that such an inclusion would impede the acceptance of the Rome Statute.⁶⁴ This concern is irrelevant today because the Rome Statute did, in fact, come into force and

⁶¹ See Official Records of the Rome Conference at p.176 for statement made by the delegate of Ukraine

⁶² The other rationale for the principle of complementarity was maintaining state sovereignty. See Michael, A.N. “The Complementary Conundrum: Are We Watching Evolution or Evisceration?” Vol. 8 (2010) *SANTA CLARA Journal of International Law*, p.115,

⁶³ Stephens, T. “International Criminal Law and the Response to International Terrorism”, Vol. 27 (2004) *New South Wales Law Journal*, p.454

⁶⁴ See Official Records of the Rome Conference at 178 for statement by the delegate of Italy.

currently has one hundred and forty four member states. However, similar concerns may rise with respect to the acceptance of a new crime of terrorism, any amendment to the Rome Statute does not apply automatically to all the state parties but rather applies only to those states parties that have ratified it specially.

A fifth argument is based on a more practical level; some states questioned the need to include terrorism in the Rome Statute because, as a treaty crime, there was already in place a system of international cooperation to deal with it.⁶⁵ While it may be true that the counter terrorism conventions attempt to create a regime of “extradite or prosecute” (aut dedere or aut punire), between their member states and ensure the cooperation between them, this is not a good reason enough to deny International Criminal Court jurisdiction. For instance, genocide, an undisputed core crime, was also under the regime of an international treaty already in place in 1948.⁶⁶ In addition, most of the war crimes under the Rome Statute were already dealt with in the Geneva Conventions.⁶⁷

This argument asserts that terrorism has a solid basis as a treaty crime to be dealt with on the international level. This is the exact opposite of the argument made earlier, namely, that terrorism is *not* a well-established crime compared to other core crimes. The fact of the matter is that the existing legal instruments to deal with what the international community perceives as a criminal conduct are simply irrelevant when determining whether a crime should be included in the Rome Statute. The purpose of including an international crime in the Rome Statute is to generate International Criminal Court jurisdiction over it, not to fill a vacuum in international law where there is no existing regime to suppress a

⁶⁵ See Official Record of the Rome Conference at 174 for statement made by the delegate of Sweden.

⁶⁶ Geneva Convention

⁶⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed forces in the Field, Aug, 12, 1949, 75, U.N.T.S 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of the Civilian Persons in Time of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12. 1949, 75 U.N.T.S. 287.

certain crime. And even if it did, it is not at all clear that the current counter-terrorism regime created by these conventions is successful enough to justify not creating International Criminal Court jurisdiction over terrorism as an additional tool.

If the definition of the crime of terrorism will include a reference to counter-terrorism treaties, then a whole array of questions regarding the relationship between the Rome Statute and these Treaties, especially in cases where a country is a party to the Rome Statute but not to a specific treaty. This conundrum notwithstanding, the mere fact that legal instrument exists to suppress certain manifestations of terrorist acts does not preclude in any way the International Criminal Court from exercising jurisdiction over terrorism as well.

The sixth and final objection to the inclusion of the terrorism in the Rome Statute argued that since terrorism is such a politically sensitive term, if the International Criminal Court would deal with cases of terrorism, it will be forced into the political realm and thus will hurt its legitimacy and credibility as an impartial judicial institution.⁶⁸ The first part of this argument is true. Terrorist acts steer political debates about why a certain act is an act of terrorism and not merely a legitimate act of protest.

Having said that, the fear of politicisation is not unique to terrorism alone. In the summer of 2010, the member states activated the International Criminal Court's jurisdiction over the crime of aggression, a matter that was not resolved in the Rome Conference. In the modern reality where non-state actors are operating from the sovereign territory of certain failed states; where most of the armed conflicts are of non-international character; 'and a low-intensity armed conflict short of war' is the title given to one of the prolonged conflicts in the Middle East, there is no doubt that cases involving the crime of aggression will

⁶⁸ See an Official Record of the Rome Conference

touch the very heart and soul of international politics—the infringement on a state’s sovereignty.⁶⁹

Moreover, even with other crimes, the International Criminal Court is not sheltered from concerns of politicisation. For example, the official reason why Israel did not join the International Criminal Court, despite its active role in advocating its importance, is the inclusion of transfer of population as a war crime in a language that would render Israeli settlements in the occupied territories a war crime. This is a highly political issue and one of the recurring themes in the Israeli-Palestinian dispute. More recently, the case of the arrest warrant issued in March 2009 against the President of Sudan, Al-Bashir, on account of his involvement in acts of genocide, crimes against humanity and war crimes committed in Sudan⁷⁰ also illustrates this point.

The conclusion from the above discussion is that out of the six arguments presented in the Rome conference in 1998 against the inclusion of terrorism within the jurisdiction of the International Criminal Court, today, five seem not credible. With the perspective of almost two decades of work of the court and in light of recent development, such as the adoption of the crime of aggression, the stakes have changed. Only one issue may still prove to be a real obstacle. That issue is the lack of an acceptable definition of terrorism.

It worth noting that the result of the Rome Conference with respect to terrorism, was that it will “be considered at a later stage.”⁷¹ About one year later, in the summer of 2010, that “later stage” finally arrived, and the state parties were convened in the review conference held in Kampala, Uganda. The agenda for the review conference, however, did not include terrorism,⁷² and the

⁶⁹ See Keith, A.P, “Sixty Years in the Making: the Definition of Aggression for the International Criminal Court,” Vol.31 (2008) *Hastings International & Comparative Law Review* p.531- 532

⁷⁰ Press Release, International Criminal Court, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al-Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur. (July 14, 2008) available at <http://www.icc-cpi.int> accessed 24 June, 2013

⁷¹ See Official Records of the Rome Conference at Vol.1

⁷² International Criminal Court Provisional Agenda Document

official records of the conference do not mention the words “terrorism” or “terror” even once.⁷³ Despite this failure, a proposal to include terrorism in the Rome Statute does not have to wait another seven years. The crime of terrorism suggested here can be endorsed by state party and amended into the Rome Statute as early as when next the Assembly of State Parties convene.⁷⁴

Prosecuting terrorists in the International Criminal Court offers prominent advantages, and encompasses various issues, from the rights of the accused to the normative message it represents. However, there are practical downsides that should not be underestimated.

Advantages of International Criminal Court Jurisdiction over Terrorism

The International Criminal Court’s advantages in terms of legal procedures are fairly clear.⁷⁵ Compared to some national legal systems, some of which are ineffective or are perceived as ineffective, the International Criminal Court provides a more capable forum.⁷⁶ The International Criminal Court provides the highest standards of due process and secures the rights of the accused to an extent that terrorist suspects will probably not enjoy elsewhere.⁷⁷ The International Criminal Court also allows a great deal of victims’ participation in the proceedings, a concept that is foreign at least in common law systems and may generate wide public support for prosecuting terrorists in the International Criminal Court as opposed to national forums.⁷⁸

⁷³ Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda. May 31-June 11, 2010

⁷⁴ Boister, N. “Treaty Crimes, International Criminal Court?” Vol. 12 (2009) *New Criminal Law Review*, p. 342-348

⁷⁵ For more thorough review of the procedural aspects of the ICC, see BASSIOUNI M.C, *Introduction to International Criminal Law* (2003) p. 522

⁷⁶ Boister, (n 72) 86 at 341

⁷⁷ Maloney-Dunn K, “Humanizing Terrorism Through International Criminal Law; Equal Justice for Victims, Fair Treatment of Suspects and Fundamental Rights at the ICC,” Vol. 8 *SANTA CLARA Journal on International Law* p. 69

⁷⁸ Maloney-Dunn, (n 75) at 74

From the point of view of states parties, the International Criminal Court offers a neutral and impartial forum and will enable them to discard any judicial and political impasses forum that they would have encountered had they pursued the prosecution in national courts.⁷⁹ From the other side of the coin, the International Criminal Court provides a solution to the situation where a terrorist attack affects several state parties which hold competing claims of jurisdiction.⁸⁰ While important and viable, this argument is also slightly naive because if the International Criminal Court had been in place during the Lockerbie incident, Gaddafi would have probably surrendered the Libyan Nationals to the International Criminal Court. While states may be suspicious of other states judicial systems trying their own nationals, the notion that Gaddafi and other leaders of his sort would have trusted the International Criminal Court is, at best, farfetched. We are now experiencing the living proof of this point as the events in Libya and the international intervention against Gaddafi included a statement by the prosecutor that he will start an investigation of the situation in Libya beginning February 15, 2011.⁸¹ It is more plausible that the International Criminal Court will come into play between several like-minded countries with a common interest in International Criminal Court prosecution than by third world leaders on their own initiative surrendering their nationals to the International Criminal Court.

Examining International Criminal Court jurisdiction over terrorism from a counter-terrorism standpoint also reveals several benefits. The scope of the International Criminal Court jurisdiction will cover members of terrorist groups that hold powerful positions within a country's formal institutions, whether political parties or

⁷⁹ Boister, (n 72) 86 at 355

⁸⁰ Lippman, M. "The New Terrorism and International Law," vol.10, (2003) *TULSA Journal on Contemporary & International Law*, p. 297, 354

⁸¹ Press Release, ICC Prosecutor to open an Investigation in Libya (Mar. 2, 2011), available at <http://www.icc.cpi.int/menus/icc/press%20and%20media/press%20releases?statement%20020311> accessed 02 March 2011

others.⁸² This is particularly important since in these cases the prospects of national prosecutions are virtually null.⁸³

Another important feature that makes the International Criminal Court attractive as a counter-terrorism measure is found in Article 25 of the Rome Statute. According to this Article, the International Criminal Court can exercise jurisdiction not only over the main perpetrators of the offence but also over a wide variety of his accomplices. What makes this provision especially important in the terrorism context is the fact that many terrorist acts are committed through some dot of suicide attacks.⁸⁴ In these cases, the perpetrators themselves obviously cannot stand trial, but the people who aided and abetted him, incited him, or otherwise facilitated the act could.

Furthermore, International Criminal Court jurisdiction over terrorism might strengthen domestic enforcement of counter terrorism measures.⁸⁵ Evidently, in the relatively short period since its establishment, the International Criminal Court had the effect of facilitating and strengthening domestic initiatives to outlaw the crimes that were under its jurisdiction.⁸⁶ This is arguably due to the aforementioned complementarity principle. If states were reluctant to find themselves in The Hague with respect to the other core crimes, so as to render their domestic enforcement efforts more effective, the same process could be anticipated with respect to terrorism. Not only that, the International Criminal Court will set out the standards regarding prosecution of terrorists and will thus generate cohesiveness and legal predictability.⁸⁷

In this regard, Professor Nagle argued that the lack of cooperation among states to extradite suspects is an obstacle to seeing terrorism as an international crime within the jurisdiction of

⁸² This assumes that the country would be a State Party to the ICC, which at the current state of events, rules out many key players in the international arena, unless the Security Council would refer a case to the ICC.

⁸³ Bales, (n 47) at 189

⁸⁴ Omidoyin, (n 5) 29

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Bales, (n 47) at 190

the International Criminal Court.⁸⁸ The point made here is exactly opposite. While states may act suspiciously in a bilateral basis or a multi-lateral basis, like the International Criminal Court, the safeguards against abusing rights are higher, and the expectations for cooperation are higher as well. Thus, while a state “can get away” with stalling or refusing extradition of terrorists to another state, it can be argued that it will not have the same leeway to do it before the International Criminal Court. In order to avoid being portrayed as “unwilling” or “unable”, it is expected that International Criminal Court's jurisdiction over terrorism will increase bilateral cooperation, rather than reflect any lack thereof.

Finally, on a more normative level, the International Criminal Court jurisdiction will send a clear signal that the international community condemns terrorism in the utmost way. The International Criminal Court jurisdiction will enhance the universal condemnation of terrorists and will strengthen the rejection of terrorism as a means to bring political change.⁸⁹ As Goldstone and Simpson correctly noted, “the important link between peace and prosecution by an impartial court should not be underestimated.”⁹⁰ From a general human rights perspective, the International Criminal Court jurisdiction over acts of terrorism would arguably presents an alternative to combating terrorism through the use of forceful measures.⁹¹

It must be noted that the International Criminal Court does not have its own police force and is dependent on cooperation from member states in surrendering suspects. It would equally be argued that an International Criminal Court arrest warrant would still require state-parties' covert actions to apprehend the per-petrators of the terrorist act, even if only to eventually transfer them to The Hague.

⁸⁸ Ibid.

⁸⁹ Kirsten, A. *The International Criminal Court on Trial* available at www.academia.edu accessed 25 July 2015

⁹⁰ Goldstone and Simpson, *Evaluating the Role of International Criminal Court* available at www.books.google.com accessed 25 July 2015

⁹¹ Maloney-Dunn, (n 75) at 74.

Disadvantages of International Criminal Court Jurisdiction over Terrorism

The abovementioned values of prosecuting terrorists in the International Criminal Court carry a lot of weight. However, they are being overshadowed by practical disadvantages. As will be elaborated, the downsides of including terrorism within the International Criminal Court jurisdiction are mostly practical ones and derive their strength from the realpolitik of the work of the International Criminal Court and cooperation among states when it comes to terrorism.

First and foremost among those is, as mentioned before, the fact that the International Criminal Court does not have its own police force and is dependent on the good will and cooperation of state parties in every step of the way,⁹² from sharing intelligence, through the collection of evidence, to the apprehension of the suspect.⁹³ At the end of the day, if the International Criminal Court will not be able to get terrorists to stand trial, then why go through all the trouble of a politically sensitive problem of generating jurisdiction over terrorism? Instead, it might prove more useful to put more effort into strengthening domestic legal systems in their fight against terrorism with a tailor made strategy for each country.⁹⁴ Another practical problem is that the United States is currently not a member of the International Criminal Court.⁹⁵ With the United States running its own worldwide campaign against terrorists, introducing International Criminal Court jurisdiction

⁹² A cooperation that State Parties take upon themselves when they sign the Rome Statute, in accordance with the provisions of Part 9 of the Rome Statute.

⁹³ Goldstone & Simpson, (n 88)

⁹⁴ An interesting example of an international cooperation between law enforcement authorities in the field of counter terrorism is found in the European Union, which enacted the European Arrest Warrant (EAW) which offers expedient extradition procedures in cases of terrorist suspects and applies the principle of mutual recognition of judicial decisions.

⁹⁵ Bales, (n 47) at 189; for a more in depth survey of the relationship between the United States and the ICC, see McKey, F. "US Unilateralism and International Crimes: The International Criminal Court and Terrorism", Vol.36 (2004) *CORNELL International Law Journal* p. 455.

over terrorist acts might create two competing routes. Thus, third states might face a dilemma with which of the two to cooperate. Suppose a State party to the Rome Statute has apprehended a terrorist suspect that arrest warrant was issued against but is also wanted by the United States; to whom should state surrender the suspect? Which obligation comes first—an obligation to cooperate with the International Criminal Court or an obligation to respond to an extradition request by the United State?⁹⁶ From the International Criminal Court's own perspective, including terrorism under its jurisdiction might not be self-serving. The International Criminal Court is a relatively young institution that is still developing and proving its credibility and legitimacy. It is struggling with claims against it being a court for "African State"⁹⁷ and with the embarrassing reality of its limited powers, as shown by the non-enforced arrest warrant against Al-Bashir. In this context, bringing an internationally sensitive and controversial matter such as terrorism into the Court's jurisdiction might not contribute to strengthening the Court's reputation and status.

Additionally, prosecuting terrorists in the International Criminal Court, as mentioned previously, is likely to generate more national prosecution of terrorists. This may be seen as a shortcoming rather than an advantage because, as Professor Naomi Norberg argues, "unlike genocide or crimes against humanity, for example, terrorism is the subject of ongoing police operations and measures that at times violate the very human rights the International Criminal Court at least indirectly protects."⁹⁸ She claims that in the name of following ICC's direction, national law enforcement authorities will enjoy a greater shield to violate

⁹⁶ It should be noted that Article 90 of the Rome Statute sets forth the rules governing such a procedure, although it leaves quite a large margin of appreciation to the state to consider whether to surrender the suspect to the OCC or to extradite him to a non-member state. Rome Statute, Art. 90(6).

⁹⁷ Luban, D. *Delegation of Power and Authority in International Criminal Law* available at www.law.huji.ac.il accessed 15 May 2015

⁹⁸ Norberg, N. "Terrorism and International Criminal Justice: Dim Prospects for a Future Together", Vol.8 (2010) *SANTA CLARA Journal of International Law* p.11

human rights of suspects and detainees.⁹⁹ This is indeed a concern, but it is not as threatening as Norberg asserts. Mistreating suspects and detainees could be regarded as a state “unwillingness” or “inability” to exercise a just criminal trial and thus generate International Criminal Court jurisdiction. Within the International Criminal Court itself, as mentioned earlier, the rights of the suspects are vigorously maintained, and arguments as to compromising those rights could cost the prosecution its case.

Finally, from a deterrence point of view, some optimistic views see the international criminal adjudication as the most effective deterrent for future terrorism.¹⁰⁰ This view is questionable at best.¹⁰¹ Terrorist organisations do not hold any respect for the rule of law or they would not choose to work outside the law and target innocent civilians in the first place. They motivate their people by talking in terms of ideology, religion, martyrs, and the like.¹⁰² If a person is willing to wear explosives on his body and bomb himself it is doubtful that his thought wander to The Hague before he pushes the button. A criminal trial will probably not deter the perpetrators or the men who send them, addressing terrorist acts only *ex post facto* makes it seem less attractive than alternatives avenues of international law, such as the laws of armed conflict, which have a more substantial deterrence effect.¹⁰³

Conclusion

Since the end of World War II major institutional developments have happened in international criminal law, the most prominent of those being the establishment of a permanent international criminal court. This institution has been operating for over a decade, and it embodies the aspiration of its Member States to end impunity for the perpetrators of the most heinous of crimes. Though still in its infancy, the International Criminal Court is gaining legitimacy and

⁹⁹ Ibid.

¹⁰⁰ Lawless, (n 35) at 159

¹⁰¹ Norberg, (n 96) at 49

¹⁰² Norberg, (n 96) at 47

¹⁰³ Ibid.

credibility and includes enforcement of international criminal law within national boundaries.

This paper examined the advantages and disadvantages of statutorily including terrorism as one of the offences within the jurisdiction of the International Criminal Court. The advantages of the International Criminal Court are mainly of normative value, such as maintaining due process rights for the accused as well as for the victims; allowing a neutral and impartial forum in the cases of conflicting jurisdictional claims between several states; and reinforcing the international community's denunciation of terrorist acts. The International Criminal Court will also reduce the rate of political influence of the big-powers of individual states in prosecuting terrorism within their municipal courts. Thus, International criminal law can be a powerful instrument in combating terrorism committed in the jurisdiction of any member state, Nigeria inclusive. This position is more convincing having traced the effort of the court in recent years. The court generated the conviction of perpetrators of the most devastating atrocities such as World War II and the Holocaust, the Rwandan Genocide, the Srebrenica Genocide, and more. This powerful instrument should also be employed to combat terrorism. As a matter of law, the road is open for including terrorism as a crime in the Rome Statute and by this to add additional tier to the international fight against terrorism.