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The Effective Prosecution of the Crime of Terrorism and Terrorism Related Offences in Nigeria: Challenges and Prospects

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Abstract

The courts play a crucial role in the fight against terrorism and terrorism financing. Terrorists when arrested are usually brought before a court of law to determine their guilt or innocence, pursuant to section 36 (5), Constitution of the Federal Republic of Nigeria, 1999 (as amended). The section provides that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty. The Terrorism (Prevention and Prohibition) Act, 2022, created terrorism offences, but is, silent on the mode of prosecution. Against this backdrop is the constitutional safeguard in prosecuting suspects within the confines of the rule of law. The paper seeks to unravel the challenges to effective prosecution of terrorism cases and legal provisions to aid accelerated prosecution of such cases. Why are there low rate of prosecution in Nigeria? The author therefore argues that it is a huge task in the light of prosecutorial duties and challenges in the prosecution of various aspects of terrorism, terrorism financing and related offences such as money laundering in a complex society such as Nigeria. The possibility of trial of terrorist in the International Criminal Court is examined because of the extra territorial nature of terrorism offences. The paper maintains that there are guiding regulations that should assist the prosecutor in the effective prosecution of terrorism offences.

Keywords

Terrorism, Terrorism Financing, Money Laundering, Prosecution, Prosecutors

1. Introduction

Modern day concept of terrorism was unknown to Nigeria. However, there were

agitations by groups mainly concerned with resource control resulting in destruction of national infrastructures such as the Movement for the Emancipation of the Niger Delta (MEND), Niger Delta Volunteer Force. Notable acts of terrorism that has brought the menace to the fore include the series of bombing in Maiduguri and neighboring towns, the 2010 New year's Eve bombing of Mogadishu Military Cantonment Mammy Market Abuja, May 29, 2010 Presidential Inauguration bombing in Abuja, October 1, 2010 bombing that disorganized the Independence Anniversary celebration, June 16, 2011 Nigerian Police Force Headquarters bombing in Abuja, August 26, 2011 bombing of UN House in Abuja,[1] November 4 2011 bombing of Army Task Force Operational, December 25, 2011 St. Theresa Catholic Church bombing in Madalla near Abuja. On April 14, 2014, the insurgents attacked the Federal Government College Chibok and abducted 276 girls. Between January 3-7, 2015, Baga was attacked, and the insurgents seized a military base with death of about 2000 people.[2] The list is endless. These acts were attributed to Boko Haram.[3]

Some believed that they are up-shoot of the Maitatsine sect. (Ekpo, 2016) traced the emergence of Boko Haram to 1995 when the group began as *Shabaab* under the leadership of Lawan Abubakar who later left for Saudi Arabia to further his Islamic studies. In his absence, Muhammed Yusuf emerged in 1999 as the leader of the group having been recognized by the *Shakyhs* Committee.[4] Incidentally Yusuf had previous history of activism within the Islamist movement known as *Jama'at Tajdid al-Islam*. He was very radical in his preaching against complacency and called for the return to orthodox Islam through the implementation of Sharia.

Boko Haram is an Islamic fundamentalist group called *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad* which in Arabic means "the Association of the People of the Sunna for Proselytization and Armed Struggle". The group is better known by its Hausa name "Boko Haram" which translated in English means "Western education is forbidden". In Boko Haram's eyes, Western-style education belonged to a larger, evil system encompassing multiparty democracy, secular government, constitutionalism, and man-made laws. To them, all these institutions are both un-Islamic and anti-Islamic.[5]

Several reasons have been identified as responsible for terrorism in Nigeria.

[1]This was the first time the group was attacking an international organization. There is no report of other attacks on international bodies which implies that the group was only involved in domestic terrorism. See Andrew Walker, "What is Boko Haram?" United States Institute of Peace Special Report, accessed https://www.usip.org/sites/default/files/resources/SR308.pdf on 20 November 2019

[2]See Nigeria: Massacre possibly deadliest in Boko Haram history. *Amnesty International* 9 January 2015.

[3]Before 2009, the activities of the group were largely peaceful. See Manuel Reinert & Lougarcon, "Boko Haram: A Chronology" in De Montclos M.P (Ed.), *Boko Haram*: *Islamization*, *Politics*, *Security and the State in Nigeria* (West African Politics and Society Series Vol. 2 African studies Centre Ibadan 2014) 5-13.

[4]S. Oyewole, "Boko Haram and the Challenges of Nigeria's War on Terror" (2013) 29 (3) *Defense and Security Analysis* 253.

[5]https://www.britannica.com/topic/Boko-Haram accessed 08 December 2022.

They may be classified as economic, social, religious, ethnic, and political causes (Adelaja, Abdullahi, & Penar, 2018).

There became a need to make statutory intervention in the fight against terrorism and particularly the prosecution of offenders.

With the promulgation of the Terrorism (Prevention) Act 2011, with subsequent amendment in 2013 and now repealed in 2022, the Nigerian Government had taken steps to create a legal framework for the prevention and combating of terrorism in Nigeria. Although the Act does not specifically define terrorism, it enumerates what constitutes "acts of terrorism" (section 2 (3) (a-xiv) of Terrorism (Prevention and Prohibition) Act 2022. The Attorney General of the Federation is now designated as both the prosecuting agency and the prosecuting authority (sections 3 (1) (c) and 74 of Terrorism (Prevention and Prohibition) Act, 2022). However, the Act does not provide for the procedure for trial and prosecution of terrorism offences. Hence recourse will be had to extant criminal procedural laws (section 2 (1) Administration of Criminal Justice Act, 2015). At the center of these prosecutions are the investigators, prosecutors, and the courts. How would prosecutors effectively prosecute terrorism offences within the law and abide by the ethics of prosecution?

The aim of this paper is to consider the prosecutorial duties and challenges in the prosecution of various aspects of terrorism, terrorism financing and related offences such as money laundering. In doing this, we shall consider several decisions of the court both in Nigeria and other jurisdictions. It will be shown that, although there are guiding regulations that should assist the prosecutor in the effective prosecution of terrorism and other related offences, there is the need for further training, funding, adequate investigation, and manpower development on the part of the prosecutors, judges, and other stakeholders in the administration of criminal justice.

2. Conceptualizing Terrorism and the Problem of Prosecution

There is no universal definition of Terrorism. The question of the definition of terrorism has always been the subject of controversy amongst academic writers due to lack of uniformity in perception and statutory definition (Kent, 2007; Omale, 2013; Young, 2006; Hardy & Williams, 2011; Walker, 2007). This is based on the popular *cliché*: One man's terrorist is another man's freedom fighter. While some statutes attempt to define "terrorism", others mention "acts constituting terrorism" (Article 1(3), OAU Convention on the Prevention and Combating of Terrorism, 1999, Section 2 Terrorism (United Nations Measures) Order 2001, Article 2 International Convention for the Suppression of the Financing of Terrorism. While there is a basic consensus that terrorism has the element of criminal violence intended to intimidate a population or coerce a government or international organization, some of the laws have added an ulterior intention to pursue a political, religious, ethnic or ideological cause (Section 2 Terrorism

(United Nations Measures) Order, 2001, section 5(2) Terrorism Suppression Act, 2002). Similarly, certain international conventions have been incorporated into domestic laws on terrorism (International Convention for the Suppression of the Financing of Terrorism, 1999, International Convention for the Suppression of Terrorist Bombings, 1999, International Convention against the Taking of Hostages, 1979).[6] According to (Saul, 2019), it was only after the terrorist attacks on the United States on September 11, 2001 ("9/11") that most States considered enacting terrorism Acts, spurred on by the perceived threat of global religious terrorism, obligations imposed by the UN Security Council, gaps in existing criminal liabilities and police powers.

The search for a legal definition of terrorism is contextually important because only an offence that meets such a definition can be so punished. Due to the legal consequences of describing someone as a terrorist or a body as terrorist organization, there is the need to have a clear-cut definition of terrorism. Can we limit definition of terrorism only to non-governmental groups or individuals? Can a government or its agencies such as Police or the Army be labeled terrorists, the case of State or non-State actors? At what stage will a popular student agitation turn from mere student unionism to terrorism or the agitation against removal of oil subsidy resulting to the destruction of government property? (Golder & Williams, 2004) The danger of the absence of an acceptable definition in domestic law is that the State may criminalize any act or omission of persons or organizations as terrorism depending on who is involved. It therefore become imperative to state that unless a clear-cut definition of terrorism is made, the legal framework for the war against terrorism may be political and subjective. To what extent can there be a clear-cut definition of terrorism devoid of political or religious connotation?

Where there is no clear-cut definition of terrorism, it becomes impossible to decide whether to prosecute for ordinary cases of murder, armed robbery, breach of the peace or other offences related to terrorism. A typical example is section 46 of the Economic and Financial Crimes Commission (EFCC) (Establishment) Act, 2004 (African Union Convention on the Prevention and Combating of Terrorism, 1999)[7] which defines terrorism as:

(a) any act which is a violation of the Criminal Code or the Penal Code and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or property, natural resources, environmental or cultural heritage and is calculated or intended to

1) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing

[6]International Convention for the Suppression of Terrorist Bombings, 1999, International Convention against the taking of Hostages, 1979, International Convention for the Suppression of the Financing of Terrorism, 1999.

[7]This is similar to Art 1(3) of the African Union Convention on the Prevention and Combating of Terrorism, 1999. See also the Prevention of Terrorism Act, 2002 of Tanzania, Sections 4, 5, 6, 7, 8, 9 and 10 identifies "terrorist acts". Section 12 is on International Terrorism.

any act or to adopt or abandon a particular standpoint, or to act according to certain principles, or

2) disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or

3) create general insurrection in a state.

(b) any promotion, sponsorship of, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organization or procurement of any person, with the intent to commit any act referred to in paragraph(a) 1), 2) and 3).

An examination of the above provision especially section 46 (a) shows that any act which is a violation of the Criminal Code or Penal Code may be interpreted to be terrorism in so far as it:

(a) causes serious injury or death to any person or group of persons or

(b) causes or may cause damage to public property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act or to adopt or abandon a particular standpoint, or to act according to certain principles, or disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or create general insurrection in a state;

It is submitted that the provision can be divided into harm to individuals and harm to public interest and properties. The first part of the definition under the EFCC Act can be accommodated under (section 315, 316, and 319 Criminal Code Act, 2004) or (section 221 and 224 Penal Code Act). Even damage to public interests and properties are already subject of punishment in extant criminal legislation without criminalizing them as terrorism.[8] The dilemma for a prosecutor is whether to charge under the extant criminal legislation or charge under the EFCC Act for terrorism. The most curious rhetorical question to the researchers is what is the provision of terrorism related offenses doing in EFCC Act?

This confusion is further exacerbated by the lack of a clear-cut definition in the Terrorism (Prevention and Prohibition) Act 2022. The Act in section 2(1) prohibits acts of terrorism and Section 3 (a-xiv) itemizes what constitutes acts of terrorism without attempting to define terrorism.[9]

"Acts of terrorism in this law can be classified into:

(a) Acts against the government or international organization with the aim of compelling it to do or refrain from doing an act.

(b) Intimidation whether of the government or international organization.

(c) Causing serious bodily harm or death.

(d) Destruction of public facilities or disruption of social facilities.

(e) Kidnapping.

[8]See sections 76, 77, 451 Criminal Code Act LFN 2004; Section 351 Criminal Law Lagos State 2015 (CL 2015).

[9]It gives a broad definition of terrorism to include acts which may seriously harm or damage a country or an international organization etc.

(f) Acts or omission which constitutes an offence within the scope of a counter terrorism protocol and conventions ratified by Nigeria."

The unwieldy acts of terrorism will certainly pose a challenge to prosecuting terrorism offences under the Act. As argued above, some of the offences can be prosecuted under existing legislation.[10] Where any act or omission also constitutes an offence within the scope of counter terrorism protocol and conventions, it can also be tried in Nigeria if it has been ratified by Nigeria.[11] The dilemma for the prosecutor therefore is to determine under which legislation to try a suspect. This brings to the fore the points made by (Chukwuemerie, 2006) as to dual or double criminality. This result is that in the exercise of prosecutorial discretion, other considerations will come into play. The prosecutor may decide to charge a pipeline vandal under the Terrorism Act rather than the Miscellaneous Offences Act[12] or a kidnapper under the Act rather than the Criminal Code Act or Penal Code Act,[13] Criminal Law or the Anti-kidnapping Law. Prosecutorial discretion could be coloured by political considerations. While a suspect in the ruling party may be arraigned for pipeline vandalism or acts likely to cause breach of the peace or murder or culpable homicide punishable with death under the extant criminal legislation, the suspect from the opposition party will be charged under the Terrorism (Prevention and Prohibition) Act. There is need to curb this wrong use of the prosecutorial discretion[14] to avoid political victimization especially in developing countries like Nigeria.

A curious provision is in section 11 of the Terrorism (Prevention and Prohibition) Act, 2022. It criminalizes an attack on an "internationally protected person". The offences created by the provision are murder, kidnap, attack on the person or liberty or carries out a violent attack on the official premises, private accommodation or means of transport of such a person in a manner likely to endanger his person or liberty.[15] Who is an "internationally protected person" has been defined in section 99 of the Act.[16] It is therefore submitted that these are offences that can be tried under existing legislation aside the Act. The fact that a person is regarded as an "internationally protected person" will not make a difference if a crime is committed against a person within Nigeria. Stiffer punishment will not be an argument for creating this offence under the Terrorism Act. It is our position that the Terrorism Act 2022 does not assist the prosecutor in any way. It suffers from the same criticism as that of the EFCC Act.

[10]For instance, causing serious bodily harm or death can be tried under the criminal code or penal code. Kidnapping can be tried under the Criminal Law of Lagos, section 269, Willful Damage to property, section 348 or endangering vessel sections 253, 254, 256. See also the recent Lagos State Anti -Kidnapping Law, 2017 which prescribes death penalty for kidnapping if death results from the act. Pipeline vandalism, section 7, willful destruction of public property, section 3, Arson of public building, ship, aircraft, railway track etc, section 4, unlawful destruction of highways, section 6 etc can all be tried under the Miscellaneous Offences Act.

[11]See section 12, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[12]Cap M17 LFN 2004, s 1(7).

[13]See CCA s 364 and PC s 272, 273.

[14]An attempt has been made in the Code of Conduct and prosecutorial guidelines for Federal prosecutors, *Federal Ministry of Justice* (2013).

[15]See section 11(a), (b), and (c) of the Terrorism (Prevention and Prohibition) Act, 2022.

[16]ibid Section 99.

3. Ingredients of the Offence of Terrorism and Decisions of Courts

A critical aspect of the offence of terrorism which distinguishes it from other offences of similar nature is the impact of the force used which is not directed at a specific person but is meant to create intense fear and anxiety, both physical and psychological in the minds of members of the public having the effect of coercing, forcing, and intimidating them to do or abstain from doing any act or to adopt or abandon a particular view, policy or position to act according to certain principles (Schmid, 2004).[17] This was the decision of the Supreme Court in the case of Musa Abdulmumini v Federal Republic of Nigeria (2017), Adamu Ali Karumi v Federal Republic of Nigeria (2016). In the former case, the appellant was one of several persons arraigned and tried at the Federal High Court Jos Judicial Division, for conspiracy to commit terrorist acts punishable under Section 5 of the Criminal Code Act, illegal possession of firearms punishable under Section 5 of the same Criminal Code Act, and the commission of terrorist acts punishable under Section 15(2) of the Economic and Financial Crimes Commission (Establishment) Act, 2004. The alleged criminal acts were committed on or about the 8th day of March 2008 in and around Jos and its environs, including Mangu Local Government Area of Plateau State, Nigeria.

The appellant featured in the first and third counts, which respectively accused him and others of conspiracy to commit terrorist acts and committing terrorist acts. In these two charges he was the 7th and 9th defendant. All the defendants, including the appellant herein, were convicted for the two offences alleged in the 1st and 3rd charges. They were each sentenced to 2 years and 10 years imprisonment for committing the said offences of criminal conspiracy to commit terrorist acts and the commission of terrorist acts respectively. The appellant appealed his conviction and sentence to the Court of Appeal sitting at Jos. He was unsuccessful. The Lower Court dismissed his appeal and affirmed the conviction and sentences imposed on him by the trial Federal High Court. On further appeal to the Supreme Court, the concurrent findings of the lower courts that the conduct of the appellant and his group while armed with dangerous weapons and going about menacingly in the area was calculated to instill fear in the members of the public and intimidate them within the meaning of terrorism in section 46 of the EFCC Act.[18]

[17]Is "One Man's Terrorist Another Man's Freedom Fighter"? https://www.e-ir.info/2018/11/29/is-one-mans-terrorist-another-mans-freedom-fighter/ accessed 08 December 2022

[18]The definition of terrorism in section 46 of the EFCC Act includes any act which is a violation of the Criminal Code or Penal Code but intended to endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, force, coerce or induce any government body or institution etc.

[19]The section provides that "Nothing is an offence which is done in the lawful exercise of the right of private defence"

In the case of *Musa Abdulmumini v Federal Republic of Nigeria*, the defendant relied on the defence of self-defence and private property under section 59 of the Penal Code Law of Plateau State of Nigeria.[19] While the court agreed that the appellant was entitled to and in fact the court was bound to consider all defences available to the defendant,[20] the question was whether a defence under a State law could avail a defendant when charged for a Federal offence. The Supreme Court stated a principle of law that the appellant cannot, ordinarily resort to the provisions of a State Law and invoke the defence therein to plead a statutory defence against a Federal offence for which he stands on trial. While affirming this principle, the court agreed with counsel for the appellant that insofar as section 46(a) EFCC Act which defines terrorism to incorporate violations of the criminal code and penal code, the defence in those statutes is also incorporated by implication. While we agree with the Supreme Court on the incorporation of defences in other statutes, it is submitted that this is a challenge to prosecutors who prosecute under the EFCC Act for terrorism. They must constantly scrutinize those other statutes in preparing the charge rather that concentrating on the Act alone.

4. Jurisdictional Powers to Try Terrorism Offences

The Federal High Court located in any part of Nigeria is conferred with exclusive jurisdiction to try terrorism and related offences regardless of where the offence was committed (section 76(1) Terrorism Act 2022).[21] In order to expeditiously prosecute terrorism offences, the various courts have enacted practice directions.[22] The Federal High Court Practice Directions 2013[23] was enacted with the objective of establishing a system of case management that will provide for the fair and impartial administration of criminal cases and the rules made under the practice direction. It is also to eliminate unnecessary delay and expense for the parties involved in the Criminal justice system.[24]

Other objective of the practice direction includes:

(a) Ensure that at trials, parties focus on matters which are genuinely in issue;

(b) Minimize the time spent at trials dealing with interlocutory matters;

[20]See *Ahmed v The State* (1999) 7 NWLR (Pt. 612) 641 at 681, the supreme court restated the principle that a trial court has the duty to consider every defence open to an accused on the evidence whether or not the accused person specifically puts up such a defence.

[21]This provision has taken care of the situation that arose in *Ibori v Federal Republic of Nigeria* (2009) 3 NWLR (Pt. 1128) 94 where the Supreme Court held that although the Federal High Court has jurisdiction throughout Nigeria, territorial jurisdiction is still recognized by virtue of section 45 of the Federal High Court Act; See Nasiru Tijani, "The Territorial Jurisdiction of the Federal High Court in Criminal Trials-One of Form or Substance?" (2015) 7 *The Justice Journal* 1.

[22]See the Federal High Court Practice Directions 2013; Court of Appeal Practice Directions 2013, Supreme Court Practice Directions 2013; Practice Direction by the Chief Judge of the Federal Capital Territory dated July 1, 2014.

[23]Emphasis is laid on the Federal High Court because of its original criminal jurisdiction on Terrorism and related offences.

[24]This is a common feature of all the Practice Directions. See Labaran Shuaibu, "Prosecuting Kidnapping Cases in Nigeria" paper presented at the 9th Africa Prosecutors Association Annual General Meeting and Conference held in Kinshasa, Democratic Republic of Congo on 23 October 2014.

(c) Ensure that possibilities of settlement are explored before the parties go into hearing;

(d) Ensure that trials are not stalled by unpreparedness of the Court or the parties and that the case is fully ready for trial before hearing dates are agreed; and

(e) Minimize undue adjournments and delay.

To achieve the above objective, the Practice direction made it an obligation when filing a charge to ensure the following:

(a) The complainant shall not file a charge unless it is accompanied by an affidavit stating that all investigations into the matter had been concluded and in the opinion of the prosecutor, a *prima facie* case exists against the accused person;

(b) The prosecutor must ensure that the accused is produced in court on the date of arraignment;

(c) Where there is a preliminary objection challenging the jurisdiction of the court to hear a case before it, the court shall ensure that the ruling is delivered within 14 days;

(d) No party may serve a notice of an application on another party on the date scheduled for hearing;

(e) In furtherance of the need to ensure speedy dispensation of justice, Electronic mail and other electronic means may be employed by the court in order to inform counsel of urgent court and case event.

With the practice directions, the prosecution of terrorism offences is given priority by the court and the prosecutor has the responsibility to assist in ensuring that there is quick dispensation of justice by his preparedness and minimizing delays and unnecessary adjournments.

According to (Shuaibu, 2014) a classic example of the speed by which terrorism cases can be speedily tried is the case of (Federal Republic of Nigeria v Mustapha Fawaz & Others, 2013). The case commenced on 29 July 2013 with the prosecution calling ten witnesses and tendering 27 Exhibits. The prosecution closed its case 3 (three) days later while the defence opened on 2 August 2013 and closed on 6 August and Judgment was delivered on 29 November 2013. Dissatisfied with parts of the Judgment of the trial court, the 3rd defendant appealed to the Court of Appeal, Abuja Division in (Abdulla Tahini v Federal Republic of Nigeria, 2014) Division[25] and the Appeal was heard on 12 June 2014 and Judgment was delivered on 18 July, 2014. The matter is pending at the Supreme Courtin (Abdulla Tahini v Federal Republic of Nigeria, 2014).[26] In the case of (Charles Ododo v Peoples Democratic Party, 2015) the Supreme Court in considering the guiding principles of the Supreme Court Practice Direction 2013 especially section 2 (a) and held that terrorism and other mentioned offences[27] shall be given priority in the preparation and publication of the weekly cause list.

[25]Appeal No: CA/A/197C/2014.

[26]Appeal No: SC.418/2014.

[27]Offences such as Rape, Kidnapping, Corruption, Money Laundering and Human Trafficking.

Sections 174(1)(a) and 211(1)(a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) confer the Federal and the State Attorney's General respectively with the powers to institute and undertake criminal proceedings in all courts except a Court Martial. These Powers can be exercised by the Attorney General himself or through officers of his department. Private Legal Practitioners can also exercise this power provided they obtain the fiat of the Attorney General (Federal Republic of Nigeria v. Adewunmi, 2007), (section 268 (1) ACJA, 2015).

However, with respect to prosecution of terrorism offences, only the Attorney General of the Federation has the legal authority to prosecute. Section 3 (1) of the Terrorism (Prevention and Amendment) Act, 2022 provides that the Attorney General of the Federation is the authority for the effective implementation and administration of the Act and shall strengthen and enhance the existing framework to ensure the effective prosecution of terrorism matters and the power to prosecute terrorism and related offences is vested on him (section 74 Terrorism Act 2022). It is submitted that nothing stops the Attorney General from delegating the power to institute and undertake criminal prosecution on his behalf to a State Attorney General or a private legal practitioner (Serah Ekundayo Ezekiel v Attorney General of the Federation, 2017), (Olusola Abubakar Saraki v Federal Republic of Nigeria, 2016), (Ibrahim Shehu Shema v Federal Republic of Nigeria, 2018), (Okon Bassey Ebe v Commissioner of Police, 2008), (Marcel Nnakwe v The State, 2013), and (Godwin Pius v The State, 2016). In the case of (David Amadi v Attorney General of Imo State, 2017) the Supreme Court held that the Attorney General can delegate the power to initiate and undertake criminal proceedings to officers of his department and in (Olusola Abubakar Saraki v Federal Republic of Nigeria, 2016), the court further held that it can even be delegated to private legal practitioners. In the recent case of (Ibrahim Shehu Shema & Ors v Federal Republic of Nigeria, 2018) the Supreme Court restated the principle of the power of delegation of the powers of the Attorney General under section 211 of the 1999 Constitution.

5. Safeguards to the Right of Defendant in Trial for the Offense of Terrorism

One of the constitutional safeguards to a fair trial of a defendant is the right to enjoy his personal liberty pending trial pursuant to section 35(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) by way of bail. However, the courts have been circumspect in granting bail applications in cases of terrorism irrespective of the constitutional right to personal liberty and presumption of innocence under sections 35 and 36(5) of the constitution respectively. The cases show that the national security implication of terrorism outweighs the right to personal liberty, hence the refusal of bail. In the case of (Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria, 2007) the Supreme Court considered the appeal against the refusal of bail by the trial court and af-

firmed by the Court of Appeal. The appellant was arraigned on a five-count charge of conspiracy, treasonable felony, forming, managing, and assisting in managing an unlawful society, publishing of false statement and being a member of an unlawful society. After stating the general principles for grant of bail, the court stated:

> "The pronouncement by the court below is that where National Security is threatened or there is the real likelihood of it being threatened human rights or the individual rights of those responsible take second place. Human rights or individual rights must be suspended until the National Security can be protected or well taken care of. This is not anything new. The corporate existence of Nigeria as a united, harmonious, indivisible, and indissoluble sovereign nation, is certainly greater than any citizen's liberty or right. Once the security of this nation is in jeopardy and it survives in pieces rather than in peace, the individual's liberty or right may not even exist.
> …entirely agree with the court below that a charge of treasonable felony is a very serious offence and is prejudicial to national security. I believe neither the appellant nor his counsel would sit down to fold up his arms, if on the seat of power, to allow any citizen to put his reign into terror and utter hopelessness or despondency while dancing to the music of a citizen who plots a *coup detat* against him. He will certainly fight it to the end".[28]

This principle in the above case was followed in (Ogwu Achem v Federal Republic of Nigeria, 2014) where the appellant was charged on two counts of wilfully providing money with intent that it be used for an act of terrorism contrary to and punishable under Section 15(1) of the Economic and Financial Crimes Commission (Establishment) Act 2004; and providing economic resources in order to facilitate the commission of a terrorist act contrary to and punishable under Section 15(3) of the Economic and Financial Crimes Commission (Establishment) Act, 2004. He was convicted. He appealed against the conviction and applied for bail pending appeal. The court in refusing the application, relied on the case of *Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria*, and held that:

> "It should be mentioned that the applicant was convicted and sentenced for offences relating to terrorism which in recent times have grown in intensity and magnitude and have become a threat to our national security. Courts should therefore be very circumspect in granting bail pending appeal to a person convicted for any offence relating thereto. In the case of *Dokubo-Asari v. Federal Republic of Nigeria* (*2007*) *12 NWLR* (*1048*) *320*, *358-359*, the Supreme Court gave its nod of approval to the refusal to grant bail pending trial to the appellant on the ground, inter alia, of threat to national security".[29]

In (Musa Umar v Federal Republic of Nigeria, 2014) the appellant was charged with two others for breach of several provisions of the Terrorism (Prevention)

[28]Per Muhammad JSC.
[29]Per Ekanem JCA.

(Amendment) Act, 2013. He applied for bail pending the hearing and determination of the charges against him. The trial court refused the application. On appeal, the Court of Appeal recognized that being a case of terrorism which carries severe penalty, the court must be cautious in granting bail. The court owes a duty to protect the society with proper regard to the security of the nation. The appeal was dismissed. The Court of Appeal held that the lower court was right in refusing the application for bail because of the nature of the offence. It held that the court, in an application for bail, owes a duty to protect the society and no principle of law demands that than the crime of terrorism. The implication of the above authorities is that irrespective of the constitutional right to personal liberty guaranteed under section 35(1) of the Constitution, in cases of terrorism, bail will rarely be granted as the offence affects national security.

6. Witness Protection Program and Prosecution of Terrorism Cases

Witness protection is a system whereby potential witnesses are shielded from the members of the public to protect their identity to enable them to freely give evidence. In that case, members of the public will be excluded from the hearing in open court. The challenge with the witness protection program is that it tends to conflict with the constitutional safeguard in section 36(4) of the Constitution that whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal. The contention is that shielding witnesses and not allowing members of the public to be present except legal practitioners and parties is unconstitutional.[30] However, section 36(4) (a) proviso expressly provided that:

> "a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice".

In the trial of terrorism offences, statute has expressly provided for witness protection as an exception to trial in open court. Section 232 of the Administration of Criminal Justice Act, 2015, being the criminal procedural law applicable in trial of terrorism related offenses provides:

"(1) A trial for the offences referred to in Subsection (4) of this Section may not, where the Court so determines, be held in an open Court.

(2) The names, addresses, telephone numbers and identity of the victims of such offences or witnesses shall not be disclosed in any record or report of the

[30]See the proviso to section 36(4) 1999 Constitution of the Federal Republic of Nigeria.

proceedings and it shall be sufficient to designate the names of the victims or witnesses with a combination of alphabets.

(3) Where in any proceedings the Court deems it necessary to protect the identity of the victim or a witness the Court may take any or all of the following measures:

(a) Receive evidence by video link;

(b) Permit the witness to be screened or masked;

(c) Receive written deposition of expert evidence; and

(d) Any other measure that the Court considers appropriate in the circumstance.

(4) The provision of this section shall apply to:

(a) Offences under Section 231 of this Act;

(b) Offences under the Terrorism (Prevention) Amendment Act;

(c) Offences relating to Economic and Financial Crimes;

(d) Trafficking in Persons and related offences; and

(e) Any other offence in respect of which an Act of the National Assembly permits the use of such protective measures or as the Judge may consider appropriate in the circumstances.

(5) Any contravention of the provisions of Subsection (2) of this section shall be an offence and liable on conviction to a minimum term of one year imprisonment".

The Chief Judge of the Federal High Court recently enacted the Federal High Court of Nigeria Practice Directions (On Trial of Terrorism Cases) 2022, to provide measures that will ensure the security and safety of parties; personnel of law enforcement agencies and the Judiciary; as well as members of the public while ensuring expeditious and fair trail of persons suspected of having committed acts of terrorism.[31] The perimeters of the Court are to be secured and no member of the public shall be allowed in the court except officials of court, parties and a number of pre-registered legal practitioners on either side, or any other person directed by the Judge.[32]

The constitutionality of witness protection in criminal trials was considered and upheld by our court in the case of (Col. Mohammed Sambo Dasuki (Rtd) v Federal Republic of Nigeria, 2018), the Complainant had brought an application at the trial court for orders granting leave to the prosecution witnesses to start enjoying witness protection by giving evidence behind screen to be provided by the court; directing that the identities of all prosecution witnesses be not disclosed in any record or report of proceedings which are accessible to the public; permitting all prosecution witnesses to be addressed with pseudonyms in the

[31]See the Explanatory Note to the Practice Directions was signed on 5 April 2022 and takes immediate effect.

[32]Order 11 of the Practice Directions also recognise the application of section 232 of the Administration of Criminal Justice Act, 2015 and section 73 of the Terrorism (Prevention and Prohibition) Act, 2022 on witness protection, reception of evidence by video link, written depositions of expert witnesses, and that no part of the proceedings shall be published. Electronic devises may not be allowed during proceeding. A more draconian provision is Order 1V which prohibits coverage of proceedings.

course of proceedings. The grounds for the application were *inter alia* that the prosecution witnesses whose tour of duty involves carrying out covert operations for the security of the country will have their cover blown if made to testify publicly without any protection hence endangering public security of the country and that exposing the prosecution witnesses to the public will make them easy target of possible attacks from those sympathetic to the defendant who are feared to be in possession of some of the highly sophisticated arms and ammunitions imported by the defendant during his tenure as the National Security Adviser. The learned trial judge granted the application. The defendant appealed to the Court of Appeal. The court in dismissing the appeal held that the provisions of section 232 of the ACJA, 2015 is meant to further amplify the provision of Section 36(4) (b) with respect to certain enumerated crimes therein and does not in any way seek to annoy nor prevent the protective stipulations covered by subsections (5) and (6) of the Constitution, and do not conflict at all (R v Davies & Ackerman J.S v Leepile, 1986) were not followed.

In another case of (Chidiebere Onwudiwe v Federal Republic of Nigeria, 2018), the defendant and others are alleged to be members of the Indigenous People of Biafra (IPOB) and were charged for acts of terrorism. The Complainant brought an application for leave for the prosecution witnesses to be protected by giving evidence behind screen to be provided by the Court; directing that the identities of all prosecution witnesses not to be disclosed in any record or report of proceedings which are accessible to the public and permitting all prosecution witnesses to be addressed with pseudonyms in the course of proceedings. The trial judge granted the application and the appeal against the decision to the Court of Appeal was dismissed. The court relied on the earlier case of *Col. Mohammed Sambo Dasuki* (*Rtd*) *v Federal Republic of Nigeria* and dismissed the appeal.

It is pertinent to state that the Terrorism (Prevention and Prohibition) Act, 2022 empowers the court to protect witnesses by virtue of section 73. The section provides:

(1) "The Court may on its own, or by ex-parte application by the Attorney General or the relevant agency, apply to the court to protect a witness or any person in any proceeding before it, where it is satisfied that the life of the person or witness is in danger and take such measures as it considers fit to keep the identity and address of the witness or person secret".

The procedures of achieving the provisions of section 73 (1) of the Act are enumerated in sub-section (2) of the Act as follows:

(2) "The measures which court may take under sub section (1). Include-

(a) Holding the proceeding at a place to be decided by the court;

(b) Avoiding the mention of the real name and address of the witness or person in its orders, judgments or records of the case, which are accessible to the public;

(c) Issuing a direction for ensuring that the identity and address of the witness or person are not disclosed; and

(d) Undertaking the proceeding in camera in order to protect the identity and location of witnesses and other persons".

Further to this, the Act also gave the court the discretion to decide, in the public interest and national security that all or any of the proceedings pending before the court shall not be published in any manner; and that such proceeding shall be adjourned and the accused persons detained pending when the Attorney-General or the relevant agency is able to guarantee the safety of the witnesses and other persons involved in the matter.[33] As part of the witness protection program, the Act empowers the court to exclude all members of the public, except the parties and their legal practitioners, at the hearing in the interest of public safety or order (Section 73 (4) of Terrorism Act).[34] When a court issues any relevant order, an act of contravention to the court order regarding witness protection is an offence and such person is liable on conviction to imprisonment term of not less than five years (Section 73 (5) Terrorism Act). It is submitted that the above examination show that witness protection is an available tool for an effective prosecution of terrorism cases.

7. Sentencing and Sentencing Guidelines in Terrorism Cases

By section 76(2) of the Terrorism (Prevention and Prohibition) Act, 2022 the court shall have jurisdiction to impose any penalty provided for an offence under the Act or any other related law. Also whenever any person is convicted of an offence under the Act, the court in passing sentence shall, in addition to any punishment which the court may impose in respect of the offence, order the forfeiture of any terrorist fund with accrued interest, terrorist property, article, substance, device or material by means of which the offence was committed, or conveyance used in the commission of the offence, which is reasonably believed to have been used in the commission of the offence or for the purpose of or in connection with the commission of the offence and which may have been seized or is in the possession or custody or under the control of the convicted person, to the Federal Government of Nigeria (sections 76(5) and 77(1) Terrorism)). It is submitted that the implication of this provision is that the penalty under the Act is not exhaustive. It is submitted that if a law of a State provides for punishment for terrorism, the court will be empowered to impose the said punishment (Wagbatsoma v Federal Republic of Nigeria, 2018), (Musa Abdulmumini v Federal Republic of Nigeria, 2017). The Administration of Criminal Justice Act 2015 has also given general guidelines as to sentencing which, it is submitted will be applicable to sentencing for terrorism and related offences. It is provided that the court in imposing punishment shall have regard to the objectives of sentencing which includes the principles of reformation and deterrence, the interest of the victim, the convict, and the community; the appropriateness of non-custodial sentence or treatment in lieu of imprisonment and previous conviction of the convict (Sections 311 and 312 ACJA, 2015).[35]

[33]See section 73 (3) Terrorism (Prevention and Prohibition) Act, 2022; This is codified in the Federal High Court Practice Directions (On Trial of Terrorism Cases) 2022.

[34]This is similar to section 36 (4) of 1999 Constitution of the Federal Republic of Nigeria.

[35]See generally, Code of Conduct and Prosecutorial Guidelines for Federal Prosecutors, Abuja Federal Ministry of Justice, 2013, pp. 28-29.

Nigerian courts have taken a firm position in imposing stiff punishment for terrorism offences. The rationale is based on the nature of the offence, its severity, its impact, and the national security implications. In (Adamu Ali Karumi v Federal Republic of Nigeria, 2016), the appellant was arraigned *inter alia* for acts of terrorism, committing acts preparatory to or in furtherance of acts of terrorism punishable under the Terrorism (Prevention) (Amendment) Act, 2013. He was convicted and sentenced to a total term of imprisonment of 25 years and some of the terms were to run consecutively. The appellant appealed *inter alia* against the sentence urging that the sentence was excessive. The Court of Appeal in dismissing the appeal stated thus:

> "The gravity of the offence of terrorism which involves the use of violence or force to achieve something, be it political or religious, is a grave affront to the peace of society with attendant unsalutary psychological effect on innocent and peaceful members of the society who may be forced to live in perpetual fear. It is an offence that may even threaten the stability of the state. The sophisticated planning and execution of the acts of terrorism show it is an offence that requires premeditated cold-blooded organization. The circumstances under which such a crime is organized calls for appropriate sentencing to deter its recurrence by potential or prospective offenders".[36]

The effect of this decision and similar ones is that sentence for acts of terrorism will invariably be strict irrespective of allocution (section 310 ACJA, 2015). It is suggested that non-custodial sentences with the aim of de-radicalizing terrorist convicts can be explored by the courts.

Non-custodial sentence is one that does not require the convict to be imprisoned. Examples include Suspended Sentences, Community Service, Fines, Curfews, Parole orders, binding over.[37] Nigerian Statutes recognize non-custodial sentences (Sections 460(2), (3), 347 ACJA, 2015).

One of the objectives of sentencing is to rehabilitate the convict and reintegrate him into the society.[38] According to Mann & Bermingham, "Evidence suggests that community orders are effective at meeting some of these sentencing purposes, such as reducing reoffending and offering rehabilitation. Some data suggest that community orders may be more effective than custodial sentences at reducing reoffending".[39] A custodial sentence can give the convict an opportu-

[36]Per Ikyegh, JCA; see also the dictum of Nimpar JCA.; *Ibrahim Usman Ali v Federal Republic of Nigeria* (2016) LPELR 40472 (CA); Ogwu Achem v Federal Republic of Nigeria (2014) LPELR 23202 (CA).

[37]Ugonna Ezekwen, "Exploring Non-custodial Sentencing in Magistrate Courts" (2017) https://nji.gov.ng/images/Workshop_Papers/2017/Orientation_Newly_Appointed_Magistrates/s5.pdf accessed on 09 December 2022, https://www.collinsdictionary.com/dictionary/english/non-custodial

[38]Robert Mann, Rowena Bermingham, "Non-Custodial Sentences" https://researchbriefings.files.parliament.uk/documents/POST-PN-0613/POST-PN-0613.pdf accessed 09 December 2022

[39]ibid.

nity to radicalise other convicts. Hence, the ongoing program of deradicalization and rehabilitation of Boko Haram terrorist convicts by the Nigerian State as one of the non-military strategies to combat terrorism. Labeled as "Operation Safe Corridor," the program is developed under the general framework of counter-terrorism operations of Nigeria, which has the principal objectives of deradicalization, rehabilitation, and reintegration of defectors of Boko Haram.[40] Although the ongoing process has challenges, the present government in Nigeria is going ahead with limited success.[41]

Recently, armed terrorist of the Boko Haram /ISWAP group attached the Kuje Medium Security Correctional Centre in Nigeria's Federal Capital Territory Abuja with explosives and high-caliber weapons to free their imprisoned members. 68 members were released with reports of some of them recaptured.[42] There are reports that other prisoners could be indoctrinated by the prisoners.[43] According to the report by Faye, "In prison, frustration and exposure to various types of vulnerability makes some inmates receptive and sensitive to religious radicalism and violent extremism. This ideology is conveyed by promoters whose chief concern is putting across a radical ideology that imposes itself as the best and fairest response to the unjust situation they are experiencing"[44] hence the call for non-custodial sentence.

8. Code of Conduct for Prosecution of Terrorism Offences

Federal prosecutors have a code of conduct in the prosecution of offences including terrorism offences. A general principle of conduct by prosecuting counsel is in Rules of Professional Conduct for Legal Practitioners (RPC). It is the primary duty of the prosecutor to see that justice is done, and not to convict at all cost (Rule 37(4) RPC 2007; Omisade v. Queen, 1964; Odofin Bello v. State, 1967). The prosecutor is obliged not to institute or cause to be instituted a criminal charge, including a terrorism charge, if he knows or ought reasonably to know that the charge is not supported by the probable evidence (Rule 37(5) RPC 2007). Most importantly, a lawyer engaged in public prosecution shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused person. If there was any evidence that will negate the guilt of the accused,

[40]Sunday Omotuyi, "Operation Safe Corridor: The Missing Components in Nigeria's Deradicalisation Programme as an Effective Counterterrorism Strategy in Northeast" (2022) 3(1) African Journal of Terrorism and Insurgency Research 97-125; Hakeem Onapajo, Kemal Ozden, "Non-military Approach Against Terrorism in Nigeria: Deradicalisation Strategies and Challenges in Countering Boko Haram" (2020) 33(1) *Security Journal*
https://www.researchgate.net/publication/339343161_Non-military_approach_against_terrorism_in_Nigeria_deradicalization_strategies_and_challenges_in_countering_Boko_Haram accessed 09 December 2022.

[41]Omotuyi ibid.

[42]The jail break occurred on July 5, 2022. See Nigeria Kuje prison break: More than 400 missing from Abuja jail https://www.bbc.com/news/world-africa-62069753 accessed 09 December 2022.

[43]Sylvian Landry Faye, "Faces of Religious Radicalization.
in African Carceral Spaces" (2017 Friedrich-Ebert-Stiftung) 9-11.

[44]ibid para. 3.3.

mitigate the degree of the offence, or reduce the punishment, the prosecutor must disclose the existence of the evidence to the accused or his counsel, if represented by counsel (Rule 37(6) RPC, 2007). Some of these provisions have been captured in the Code of Conduct and Prosecutorial Guidelines for Federal Prosecutors.[45] Prosecution of terrorism offences like other offences must be carried out within the confines of proper ethics of the legal profession.

9. Prosecution of Terrorism Offences under International Law

There have been arguments that terrorism being a transnational crime, should be subject to international law and international tribunals, ad hoc or permanent such as the International Criminal Court (Much, 2006; Proulx, 2004). We shall examine the statute setting up these bodies to determine whether terrorism is a crime that can be subject to the jurisdiction of these courts and tribunals. The ICC was created by the Rome Statute with jurisdiction in four areas crime: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression (Article 5 Rome Statute, 2002).

The crime of **genocide** is characterized by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group (Article 6 Rome Statute).

The crimes against humanity are serious violations committed as part of a large-scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement, particularly of women and children, sexual slavery, torture, apartheid, and deportation (Article 7 Rome Statute).

War crimes which are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes (Article 8 Rome Statute).

The crime of aggression[46] is the use of armed force by a State against the sovereignty, integrity, or independence of another State. The definition of this crime was adopted through amending the Rome Statute at the first Review Con-

[45]Office of the Attorney-General of the Federation & Minister of Justice, Abuja (2013) 12. The only set back to the code of conduct which is comprehensive is that it has no force of law unlike the Rules of Professional Conduct for Legal Practitioners which is made by the Attorney-General of the Federation as a subsidiary legislation. See *Adeboye Amusa v. State* (2003) 4 NWLR (Pt. 811) 595; *Abubakar v. B.O. & A.P. Ltd.* (2007) 18 NWLR (Pt. 1066) 319.

[46]Art. 8b was inserted by resolution RC/Res.6 of 11 June 2010.

ference of the Statute in Kampala, Uganda, in 2010.[47] Article 8(1) defines "crime of aggression" as the planning, preparation, initiation, or execution by a person in a position effectively to exercise control over or to direct the political, military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. The "act of aggression" in Article 8(1) Rome Statute, is defined as the use of armed forces of a state against the sovereignty, territorial integrity or political independence of another state or any other manner inconsistent with the charter of the United Nations.

The ICC is intended to complement, not to replace, national criminal systems and hence the principle of complementarity (Article 17 Rome Statute); it prosecutes cases only when States are unwilling or unable to do so genuinely. The court may exercise jurisdiction in:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party; or

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime Article 13 Rome Statute).

It will be observed from the provisions of Articles 6, 7 and 8 that there is no mention of terrorism as a crime for which the ICC will have jurisdiction. However, an inevitable question is if the jurisdiction can be inferred in any of the provisions of these Articles? Should the Rome statute be amended to expressly provide for jurisdiction for terrorism?

To proffer an answer to the above questions, we shall examine the statutory functions of the ICC to determine whether it can accommodate terrorism offences. This will be highly dependent on the cardinal principles for interpretation of international treaty. These are found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[48] Whereas Article 31 gives preference to the treaty's text, Article 32 expands the interpreter's instrument to include also the negotiating history and preparatory work of the treaty. It therefore means that when a treaty is being interpreted, the court has to determine whether to use the literal rule of interpretation, that is the ordinary meaning of the terms of the treaty or look at the purpose the text was attempting to achieve and therefore draw new meanings into it as the circumstances change and realities pose new challenges. This second method of interpretation is called the supplementary means of interpretation. Article 32 states that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning resulting from

[47]On December 15, 2017, the Assembly of State Parties adopted by consensus a resolution on activation of the jurisdiction of the court over crime of aggression as of July 17, 2018. See https://www.icc-cpi.int/about/how-the-court-works.

[48]See https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

the application of Article 31, or to determine the meaning when the interpretation according to article 31 leave the meaning ambiguous or obscured or leads to a result which is manifestly absurd, unintended or unreasonable.

An examination of the crime of genocide enumerates those five possible specific behaviors when committed with a genocidal intent are a crime under Article 6. They are to destroy "in whole or in part a national, ethnic, racial or religious group by killing its members". There is an element of group elimination in genocide. Within the context of the Boko Haram terrorist group, they will not fit into this category although the present spate of attacks on churches and clergymen would suggest so.[49] This is different from what happened in the massacre of Israeli athletes in 1972 Munich Olympic Games where eight Palestinian members of the terrorist organization Black September took hostages and later murdered eleven Israeli athletes. They can be said to be members of a national or ethnic group. It is our opinion that the Munich massacre can come within the jurisdiction of the ICC but not the activities of Boko Haram. There present-day attack cannot be isolated as being against only one group or another. Even Muslims are affected by the actions of the Boko Haram insurgents.

The crimes against humanity under Article 7, encompasses such crimes as murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape, sexual slavery, enforced prostitution, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health etc. From the definition of terrorism in such statutes as the provisions of section 46 EFCC Act, it seems that this is the best provision to which the Rome Statute can be amended or interpreted to try terrorism even domestic terrorism. This is because, there is no reference to group elimination as in genocide or committed within the context of war as in Article 8.[50] There is support for this view from some commentators (Much, 2006). The argument against this proposition is the definition of "crime against humanity" that the enumerated acts must be committed as part of a widespread or systematic attack directed against any civilian population. Can the present spate of bombings and kidnapping come within the definition of crime against humanity? We believe that the attack from the insurgents is directed against civilian population in the northern States in Nigeria. It is also systematic. The *mens rea* can be inferred that they knew the attack will result in murder, suicide attack etc. It is therefore our conclusion that the Boko Haram insurgents can be subject to the jurisdiction of the ICC. They are liable to be tried for crimes against humanity.

Whether the activities of Boko Haram can constitute war crimes under Article 8 that will be subject to the jurisdiction of the ICC will depend on if the activities

[49]See David Cook, "Boko Haram Escalates Attacks on Christians in Nigeria" https://ctc.usma.edu/boko-haram-escalates-attacks-on-christians-in-northern-nigeria/ accessed on 27 January 2020, "Boko Haram Executes Christian Student". https://www.persecution.org/2020/01/24/boko-haram-execute-christian-student/

[50]On war crimes.

can be classified as grave breaches of the Geneva Convention of 12 August 1949 relating to treatment of prisoners of war. The attack must be acts committed as part of a plan or policy or as part of a large-scale commission of such crimes that is so recognized such as willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering, or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly etc. Since war crimes are related to armed conflict, it is our opinion that the definition of terrorism cannot be embodied in the Article 8 of the Rome Statute.

The definition of "Crime of Aggression" was adopted at the Review Conference in 2010. It is defined as the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (Article 8bis Rome Statute). It principally involves act of aggression against another state. The individuals who did the planning, preparation, initiation and execution will then be liable for the crime (Lichtenberg, 2006). It means that groups such as the Boko Haram sect cannot be tried for Crime of Aggression in the ICC. The actions of the insurgents are not directed at another state (state actors).

In summary, from the above analysis, we can say that in trying to fit terrorism within the definition of various crimes created by the Rome statute, one must contend with the scope and necessary intention to commit the offence. Hence crime of genocide cannot accommodate the crime of terrorism since the offence seeks to exterminate or destroy members of group in whole or part. The actions of the Boko Haram group cannot be brought under this head of crime. It is submitted that crime of terrorism can be accommodated as a crime against humanity. This is because the various actions of murder, torture, rape, imprisonment, or other severe deprivation of physical liberty, enforced disappearance of persons can as well be components of the crime of terrorism. War crimes and crimes of aggression would technically be impossible to accommodate terrorism, whether domestic or international. This is because terrorism does not involve armed conflict or other breaches within the Geneva Convention for purpose of war crimes. The newly introduced crime of aggression involves the use of the armed forces of a state. This excludes terrorists' acts committed by non-state actors. It is therefore most unlikely to accommodate terrorism.

10. Challenges to Prosecution of Terrorism Cases in Nigeria

There are several challenges encountered by prosecutors in Nigeria in the prosecution of terrorism related cases. One major challenge to the prosecution of terrorism cases is the absence of definition of terrorism and consolidation of definitions in various statutes such as the EFCC Act, the Criminal Law of Lagos State and that of other States.

Institutional framework for the protection of the prosecutors of these crimes is lacking. Terrorists have supporters who are invariably not visible. A prosecutor and his family can be the subject of attack by fellow terrorists or sympathizers of the terrorists. In the performance of their responsibilities as prosecuting counsel, there should be no reprisal on his person or his family or loved ones as this will adversely affect the criminal justice system.

Another challenge is the manpower deficiency in the investigation and prosecution of terrorism cases. The nature of terrorism requires specialists in investigation and prosecution. Lawyers in the Ministry of Justice are not adequately trained to handle these cases.

Curiously, and one of the greatest challenges is that the heads of the prosecutorial agencies appear to be sympathizers to the terrorist. It seems they are romancing with politicians and accordingly taking instructions from politicians who are their appointors on when and whom to prosecute. This has greatly affected the prosecution of terrorist in Nigeria.[51]

11. Conclusions and Recommendations

Effective prosecution of terrorism suspects is a major plank in the fight against terrorism. Mechanisms for this should be in place in form of not only the legal framework but also the necessary manpower and political will to carry it out. Hence, there is the need for a unified definition of terrorism rather than the present situation where different statutes attempt to proffer divergent definition. This will greatly assist the prosecutor and investigation agencies. Presently, there are several bodies or agencies that can charge a suspect for terrorism in Nigeria-ranging from the Attorney-General of the State such as Lagos State where the Criminal Law creates the offence of terrorism, to the Economic and Financial Crimes Commission under the EFCC Act and the Attorney-General of the Federation under the Terrorism (Prevention) Act. There should be coordination and synergy amongst these agencies and prosecutorial authorities.

Also manpower challenges to effective prosecution in the form of prosecutors or judges will pose a setback. There is therefore the need for continuous training of prosecutors and judges to acquaint them with international best practices in criminal prosecution of terrorism related offences. It is suggested that the prosecutors should be adequately remunerated to guide against the lure of corrupt enrichment.

Finances for forensic investigation should be provided as the instruments of terrorism become more advanced. In fact, we now have cyber terrorism. Without the necessary funds and know how, the investigation and prosecution will be fruitless. Consequently, the budgetary allocation to these agencies should be increased.

The heads of these agencies as much as possible should not be enmeshed in

[51]https://www.ripplesnigeria.com/falana-criticizes-fgs-deliberate-refusal-to-prosecute-financiers-of-terrorism/ accessed 19 July 2022 at 2:27 pm.

politics or should not unduly fraternize with politicians in order not to be compromised. Concerted efforts should be made to separate the office of the Attorney General of the Federation/State from Minister of Justice/Commissioner for Justice to promote unsentimental decisions devoid of politics, ethnicity, and religion.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Adamu Ali Karumi v Federal Republic of Nigeria (2016) LPELR 40473.

Adelaja, O. A., Labo, A., & Penar, E. (2018). Public Opinion on the Root Causes of Terrorism and Objectives of Terrorists: A Boko Haram Case Study. *Perspectives on Terrorism, 12,* 35, 37-39.

Administration of Criminal Justice Act, AJCA (2015).

Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria (2007) 12 NWLR (Pt. 1048) 320 at 358-359; (2007) LPELR 958 (SC).

Charles Ododo v Peoples Democratic Party (2015) LPELR 24738.

Chidiebere Onwudiwe v Federal Republic of Nigeria (2018) LPELR 44499.

Chukwuemerie, A. I. (2006). International Legal War on the Financing of Terrorism: A Comparison of Nigeria, UK, US, and Canadian Laws. *Journal of Money Laundering Control, 9,* 71-88. https://doi.org/10.1108/13685200610645238

Col. Mohammed Sambo Dasuki (Rtd) v Federal Republic of Nigeria (2018) LPELR 43969 (CA).

Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004.

Criminal Law Ch. C17, Vol. 3, Laws of Lagos State, 2015.

David Amadi v Attorney General of Imo State (2017) LPELR 42013.

Ekpo, C. E. (2016). Between Counterterrorism, Human Rights and National Security: The Nigerian Government Dilemma. In *The NAHISS Conference* (pp. 1-21). https://www.academia.edu/29955626/BETWEEN_COUNTERTERRORISM_HUMAN_RIGHTS_AND_NATIONAL_SECURITY_THE_NIGERIA_S_GOVERNMENT_DILEMMA

Federal Republic of Nigeria v Mustapha Fawaz & Others (Appeal No: CA/A/197C/2014; Appeal No: SC/418/2014.

Federal Republic of Nigeria v Mustapha Fawaz & Others. FHC/ABJ/CR/112/2013 (Unreported).

Federal Republic of Nigeria v. Adewunmi (2007) 10 NWLR (Pt. 1043) 399.

Godwin Pius v The State (2016) LPELR 40657.

Golder, B., & Williams, G. (2004). What Is Terrorism? Problems of Legal Definition. *UNSW, Law Journal, 27,* 270.

Hardy, K., & Williams, G. (2011). What Is Terrorism? Assessing Domestic Legal Definitions. *UCLA Journal of International Law & Foreign Affairs, 16,* 77.

Ibrahim Shehu Shema v Federal Republic of Nigeria (2018) LPELR 43723.

International Convention against the Taking of Hostages, 1979.

International Convention for the Suppression of Terrorist Bombings, 1999.

International Convention for the Suppression of the Financing of Terrorism, 1999.

Kent, R. (2007). The Case for Defining Terrorism with Restraint and without Reference to Political or Religion Motive. In A. Lynch, E. Macdonald, & G. Williams (Eds.), *Law and Liberty in the War on Terror* (pp. 39-49). The Federation Press.

Lichtenberg J. (2006). The Crime of Aggression and the International Criminal Court. *Tilburg Foreign Law Review, 13,* 160, 165. https://doi.org/10.1163/221125906X00273

Marcel Nnakwe v The State (2013) LPELR 20941.

Much, C. (2006). The International Criminal Court (ICC) and Terrorism as an International National Crime. *Michigan State International Law Review, 14,* 121.

Musa Abdulmumini v Federal Republic of Nigeria (2017) (2017) LPELR 43726 (SC).

Musa Umar v Federal Republic of Nigeria (2014) LPELR 24051(CA).

Odofin Bello v. State (1967) NMLR 1.

Ogwu Achem v Federal Republic of Nigeria (2014) LPELR 23202 (CA).

Okon Bassey Ebe v Commissioner of Police (2008) 4 NWLR (Pt. 1076) 189.

Olusola Abubakar Saraki v Federal Republic of Nigeria (2016) LPELR 40013.

Omale, D. J. (2013). Terrorism and Counter Terrorism in Nigeria; Theoretical Paradigms and Lessons for Public Policy. *Canadian Social Science, 9,* 96-103.

Omisade v. Queen (1964) NMLR 67.

Organisation of African Union Convention on the Prevention and Combating of Terrorism (1999). Adopted by the Third Ordinary Session of the Assembly of the African Union, Addis Ababa 9th July 2004.

Proulx J. (2004). Rethinking the Jurisdiction of the International Criminal Court in the Post September 11th Era: Should Acts of Terrorism Qualify as Crimes against Humanity? *American University International Law Review, 19,* 1009, 1034.

R v Davies & Ackerman J.S v Leepile (1-3) 1986 (2) S.A 333.

The United Nations Rome Statute of the International Criminal Court (2002).

Rules of Professional Conduct, RPC for Legal Practitioners 2007.

Saul, B. (2019). *Defining Terrorism: A Conceptual Minefield.* Legal Studies Research Paper No. 15/84. https://doi.org/10.1093/oxfordhb/9780198732914.013.2

Schmid, A. P. (2004). Frameworks for Conceptualising Terrorism. *Terrorism and Political Violence, 16,* 197-221. https://doi.org/10.1080/09546550490483134

Serah Ekundayo Ezekiel v Attorney General of the Federation (2017) LPELR 41908 (SC).

Shuaibu, L. (2014). Prosecuting Kidnapping Cases in Nigeria. In *The 9th Africa Prosecutors Association Annual General Meeting and Conference* (p. 5).

Terrorism (Prevention and Prohibition) Act, 2022.

Terrorism (United Nations Measures) Order 2001.

Terrorism Suppression Act, 2002 (New Zealand).

Wagbatsoma v Federal Republic of Nigeria (2018) LPELR 43644.

Walker, C. (2007). The Legal Definition of "Terrorism" in United Kingdom and Beyond. *Public Law, No. 2,* 331-352.

Young, R. (2006). Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Definitions in Domestic Legislation. *Boston College International and Comparative Law Review, 29,* 23.