

The simple way out? Why international crimes must not be prosecuted as terrorism

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The fight against terrorism has become a political priority for many governments in the past years. Unsurprisingly, the judiciary has followed this trend and prosecutions for terrorism are also on the rise. But what exactly do charges for “terrorism” encompass? More importantly, what do they leave out? And paradoxically, could the increased use of terror charges threaten the prosecution of the worst atrocities?

Paris, 5 December 2019. The Court of Appeal of Paris confirms the guilt of Mounir Diawara and Rodrigue Quenum for their participation in a terrorist organization and sentences them to 10 years’ imprisonment. The accused had appeared in photos in combat fatigues in Syria, Kalashnikovs in hand. One of them was brandishing a severed head.

A victory for the fight against impunity for the worst crimes? Not quite. Mounir Diawara and Rodrigue Quenum were brought to court on charges of terrorism, and not international crimes (war crimes, crimes against humanity or genocide). In that precise instance, the suspects could have also been charged, in addition to the terrorism related charges, with outrages upon personal dignity, a war crime clearly defined by the Geneva Conventions. What is in appearance a procedural detail actually reflects a deep – and alarming – legal trend which bears multiple consequences.

Terrorism and international crimes, same difference?

To understand the situation requires a bit of legal and political background. War crimes, crimes against humanity and genocide – known collectively as international crimes – share common features with terrorism. They both concern atrocious crimes, which may be perpetrated in one State but tried in another. In both cases, suspects and victims may be foreign nationals. For this reason, in many States, the same units are in charge of prosecuting both types of crimes – for instance in the United Kingdom, in Germany and in Switzerland. In the present context of scarce resources, it is a zero-sum game: prosecutions for terrorism multiply at the expense of prosecutions for international crimes.

Proving terror charges, especially membership in a terrorist organization, is remarkably straightforward. Convictions have been secured by as few elements as a connection with a known terrorist, or traveling to a zone controlled by a terrorist organization. In comparison, prosecuting international crimes can be a complex and time- consuming matter: more elements must be proved, and prosecutors are usually required to find and interview witnesses and survivors abroad, collect evidence in a context with which they are unfamiliar – and sometimes even conduct their investigations without seeing the crime scenes at all. Put differently, the same evidence may be insufficient to prove international crimes, but may lead to a conviction for terrorism-related offenses. This is what happened in the case against Congolese rebel leaders

As a result, States have increasingly prosecuted suspects under charges of terrorism rather than international crimes. An apparently reasonable choice: suspects appear faster in court, after shorter investigations requiring fewer resources. And yet... terrorism and international crimes have fundamentally different legal bases, and using the former to the detriment of the latter comes with significant drawbacks.

Terrorism has no international definition

First of all, not all prosecutions are created equal. The first and most obvious shortcoming of terrorism is that it does not have a single, internationally recognized definition. Contrary to genocide, torture, enforced disappearance or war crimes, no international treaty circumscribes terrorism clearly. Each State has come up with its own definition, often influenced by current affairs and public opinion.

This creates a loophole for mass atrocities committed by State agents. These actors are hardly ever targeted by anti-terrorism policies, yet they are no less complicit in international crimes. Similarly, charges of terrorism do not encompass the full scope of human rights violations entailed in international definitions of war crimes, crimes against humanity or genocide. For instance, the targeting of a particular ethnic group, such as Yazidi populations in Islamic State (ISIS)-controlled territory, is not punished by terrorism charges per se.

Terrorism prosecutions are not the only – nor the best – way to combat impunity

The determination of States to prosecute suspects must be acknowledged and praised. Not so long ago, domestic prosecutors would feel no incentive to punish atrocities committed abroad. The idea that impunity must be fought globally is gaining momentum and is unequivocally positive. But we

cannot be satisfied with an approach to prosecution that omits a range of crimes.

The German courts, prosecutors added allegations of murder, torture and enslavement – as war crimes and crimes against humanity – to previous charges of participation in a terrorist organization. As a result, new crimes were brought before the judges, including particularly shocking abuses against Yazidi children. France and the Netherlands are also looking into this practice, called cumulative charging.

Terrorism is a crime against State security, not individuals

Assessing the limits of terror charges requires understanding the intent behind the crimes. Fundamentally, terrorism is a threat to State security, whereas international crimes often target individuals.

Several consequences derive from this core difference, the first being the role of victims themselves in judicial proceedings. Terrorism trials are rarely undertaken on the initiative of victims, and victims' testimony plays a lesser part – if any – in the proceedings. Truth and justice for survivors are not the *raison d'e?tre* of trials for terrorism: what is at stake is the security of the State.

For the same reason, a terrorism trial will only tell a part of the story. The purpose of prosecution is to prove a threat to the State itself, not the atrocities suffered by victims. At best, perpetrators may be convicted on partial charges that fail to encompass the range of abuses against the population in question. Here again, those acts fall outside the scope of terrorism, yet undeniably require prosecution and punishment.

Human rights protection in jeopardy

In the longer run, omitting charges of international crimes weakens the very protection provided by international criminal law. By ratifying conventions against genocide, war crimes and the like, States have assumed international obligations. They have agreed to abide by the highest standards of protection against mass atrocities. By resorting to terror charges – domestically defined without any sort of international consensus – they are turning their backs on international norms built collaboratively over decades. Universal jurisdiction itself is a byproduct of this joint endeavor and thousands of people have reaped its benefits. Must the short-term "efficiency" of terror charges sweep aside this precious common legal heritage?

We are witnessing an unprecedented willingness from States to prosecute and punish the worst international criminals. Never has the demand from survivors, affected communities and civil society for accountability for mass atrocities been more powerful. Prosecuting authorities must not cave in to political pressure and limit this progress to terrorism charges. With the support of civil society and rooted in compelling international norms, they must prosecute crimes against humanity, war crimes and genocide for what they are. No more, no less.

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