The concept of terrorism: time to abandon the national approach to international law[1]

Abstract

Today's challenges scream for a different type of response. Globalization and the emergence of new transnational threats, such as terrorism, have created new realities and fundamentally changed the nature of the purpose of international law. International law can help set up a framework, but terms of homeland defence to make the country less vulnerable have to be set by each country.

Until now, no international definition of terrorism has been produced, creating tensions between states and allowing states to enact laws against the opponents to the regime. At the same time, one of the reasons for the lack of definition at international level is that countries stick to their national vision of terrorism. This vicious circle raises the question of whether it is not time to abandon the domestic approach to international law in order to successfully define terrorism at international level.

Key words: terrorism; definition; national approach; international law; new approach

[1] Declarations of interest: none

1. Introduction

International law has traditionally been a separate set of legal rules only governing relationships among States. The classical model of international law, which is omnipresent, separates international law from the domestic realm as traditionally, international law sought to address state-to-state cooperation and treatment of nationals. The traditional purpose of international law has always been interstate and not intrastate. Consequently, under this view, claims made by individuals could only reach the international sphere if the home State so decided. (Mavromatis Palestine Concessions (Greece v. Gr. Brit.), 1924, p. 12; Nottebohm Case (Liech. v. Guat.), 1955) Yet this decision is mainly one of domestic politics as the State has no obligation to do so. This traditional approach reflects the principle of state sovereignty, the Westphalian principle[2], which is based on the idea that a state reacts as a human being. Even though this classic model has started to change, with international law regulating the relationship between governments and their citizens, mainly using human rights and criminal law, this traditional approach is no more adequate to the new challenges faced. (Slaughter & Burke-White, 2002) Indeed, today's challenges scream for a different type of responses.

Globalization and the emergence of new transnational threats, such as terrorism, have created new realities and fundamentally changed the nature of the purpose of international law. Modern day transnational terrorism is emerging as a global problem and damaging monarchic, dictatorial and democratic states. (Murphy, 1982; Evans, 1980) Over the last decade, terrorism has changed and expanded to an international phenomenon, requiring stricter measures and a greater international cooperation. Despite a greater international cooperation, terrorism and terrorist groups are still flourishing.

The major difficulty with terrorism, on top of political sensitivity surrounding it, is that it is an international problem with domestic roots and these two approaches are not aligned. (Sharf & Newton, 2011) Terrorism, as an expanding global phenomenon, needs an international response, but such response can only be reached if clear measures are taken at national level. At the same time, issues at global level differ from those at national level, rendering some national laws inapplicable. While international law cannot entirely resolve the problem, having a universal definition could set up a framework to fight terrorists and avoid abuses.

[2] This principle defined the state as a specific physical territory "within which domestic political authorities are the sole arbiters of legitimate behavior"

Developments, such as Daesh, the Islamic State and the Arab Spring, have challenged the approach to counter terrorism. These new challenges coupled with the pressure on protecting human rights have rendered the enactment of counter-terrorism law complicated. Indeed, in the confrontation between terrorism and the protection of the principle of democracy, it seems that the former is holding an advantageous position. In fact, the ultimate struggle between terrorism and democracy could be regarded as one for legitimacy. Otherwise, it can turn democracy into a monitoring of its population and begins to mirror the terrorist opponent.

Producing a satisfactory international definition of terrorism requires the resolution of a number of problems. Although there is an increasing agreement at international level about the need to address the crime of terrorism, there is still a lack of uniformity in legal approaches at national level. This hampers collective efforts aimed at addressing the problem through legal instruments. The lack of an international definition endangers of fundamental rights on many level. First, while the main fundamental rights are recognised by the international community, and remedies are provided for, (Watkins, 2009, p. 559) acts of terrorism are left to be defined and penalised at national level. Such discrepancy in the norms applicable, between national laws and international laws, for a phenomenon that requires intrusive measures to be used but that has never been defined, is problematic. The lack of a definition allows states to combat "terrorism" based on the best interest of each state which in turn does not guarantee the protection of fundamental rights. As summarised by Ganor "one man's terrorist is another man's freedom' fighter." (Ganor, 2010) Without an international definition, liberation movements and freedom fighters can easily be oppressed. As Marina Aksenova noted, "without international guidance and the acknowledgement of its clear boundaries, the crime of terrorism is prone to becoming a governance tool in domestic politics." (Aksenova, 2017, p. 19)

While the need for an international definition that could be used in courts and serve as a benchmark for national actors and UN alike is undeniable. However, the failure to reach a successful definition raises the question as to whether it is not time to stop relying on the national approach of international law in order to focus on international needs instead. This paper is based on the argument that the lack of an international definition of terrorism is due to the national approach to international law. Under this approach, each state tries to push its ideas of terrorism as being the most viable, creating so many variations to the concept of terrorism that reaching a definition becomes impossible. A universal argument approach is taken because

universal arguments are not self-consciously limited to specific constituencies or defined groups. A purely universal rights claim would, at least in theory, encompass any person within the relevant political community. (MacCormick, 1978) The content of the international rule is not part of the discussion, although the best approach would be to follow the Genocide Convention approach.[3] The Genocide Convention obliges all the participating countries to prevent and punish acts of genocide in both war and peacetime. The same type of rules would be necessary for terrorism. The lack of definition of terrorism is due to the lack of consensus caused by the nationalist approach to international law, instead of an approach to terrorism as a global phenomenon. To demonstrate such hypothesis, the article will first look at the attempts to achieve an international definition before looking at which is the best approach: international or national approach.

2. International law and terrorism

Terrorism is a global phenomenon that existed in different forms for centuries. (Opukri & Imomotimi Ebienfa, 2013) The term was probably first used in international legal circles in 1931 during the Third Conference for the Unification of Penal Law in Brussels. (Mani, 1978; Young, 2006; Zlataric, 1975, p.481) A definition was adopted during the Sixth Conference in Copenhagen in 1935, however it was not adatpted to transnational terrorism.[4]

Modern-day transnational terrorism is a global problem which can damage all kind of states; monarchy, dictatorial and democratic states. (Murphy, 1982; Evans, 1980) The coverage by the media of these contemporary acts of terrorism has further broadened the scope of its international aspect. (Sayre, 1984, p. 481) The complexity and difficulty of the issues need to be recognised. At a global level, the issues are different than at national level. Indeed, international law can help to set up a framework but terms of homeland defence to make the country less vulnerable have to be set by each country. The same holds true for intelligence gathering information, criminal investigation and prosecution. The inability to formulate a workable legal definition for ‘terrorism’ stems from its inherent indeterminate, subjective and multi-dimensional nature.

[3] Article 2

[4] Article 1: “International acts directed against the life, physical integrity, health or freedom of a head of state or his spouse, or any person holding the prerogatives of a head of state, as well as crown princes, members of governments, people enjoying diplomatic immunity, and members of the constitutional, legislative or judicial bodies [if the perpetrator creates] a common danger, or a state of terror that might incite a change or raise an obstacle to the functioning of public bodies or a disturbance to international relations.”

a. Terrorism: A multi-dimensional problems

The problem is multi-dimensional and multi-layered requiring a response with the same characteristics. As was recognised by the High Level Panel, the strategy needs to incorporate coercive measures, but at the same time, it needs to be broader. Kofi Annan articulated in Madrid the five basic pillars or the 'five Ds': dissuade, deny, deter, develop and defend. (Tisovszky, 2005) Among all the basic pillars, deterrence and defend are the two most important elements. The international community should defend human rights as far as possible and deter people from engaging in terrorist acts. Deterrence is necessary to contain and counter this emerging problem by enacting new laws at both national and international level. Generally, terrorism could be dealt with domestic and international legislation or by domestic law and international law. Terrorism is a serious offence and is addressed within national courts under national legislation whereas the modern transnational terrorism amount to an international crime and is addressed within international customary law. (Cassesse, 2001, p. 994; Acharya, 2009)

One of these multi-dimensional aspects is linked to the motives. Since terrorism is a mean or a tactic to pursue ideological or political ends, it renders the use of domestic criminal laws inappropriate. The motives, the size of the attack and the jurisdiction in which it was committed, define the scope of a terrorist act as a national or international act. (Franck & Lockwood, 1974) An act of terrorism at a national level may be a response to national politics whereas international acts of terrorism are the purview of the international community to protect international peace, security and stability. Needless to say, that the motives of some acts of terrorism may be nationalistic where individuals seek to overthrow the domestic regime while other acts of terrorists are designed to be an attack on the values of a particular country. (Opukri & Imomotimi Ebienfa, 2013, pp. 111-112) Two examples perfectly illustrate this argument; the Arab Spring and the 9/11. Some may view the acts committed in the lead up to the Arab Spring as acts of terrorism but what motivated these acts was the will to free countries from successive dictators. These acts required a domestic response due to the root of the problem. However, acts of aggression such as those in the US on the September 11^{th,} 2001 by Al-Qaida were primarily motivated as an assault on the values of the American political system. (Gray & Wilson, 2006, p. 24) The response could only be international as it could be regarded as a declaration of war in a sense. This shows how important the motives are. Therefore, any

definition must make reference to the motives because not every armed acts or preparatory act of aggression are acts of terrorism.

Motivation is only one part of the problem. Another aspect is certainly the different forms of terrorisms but also that the concept undergone drastic changes over time. Before 9/11 Islamist Jihadist terrorism was only viewed as marginal. (Schmid, 2004, p. 398) Smith argued that there are four main reasons for the difficulty to define terrorism "1. Because terrorism is a "contested concept" and political, legal, social science and popular notions of it are often diverging; 2. Because the definition question is linked to (de-)legitimisation and criminalisation; 3. Because there are many types of " terrorism", with different forms and manifestations; 4. Because the term has undergone changes of meaning in the more than 200 years of its existence." (Schmid, 2004, p. 395)

Another important challenge, that democratic nations are facing, is how to effectively respond to the threat of terrorism without damaging the fundamental human rights principles that are the hallmark of democratic society. Indeed, what is labelled 'terrorism' implies a moral judgement. As Jenkins noted "if one party can successfully attach the label terrorist to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint." (Jenkins, 1980, p. 2) This makes it harder to reach a definition as such definition could be used against opponents. Indeed, labelling someone of 'terrorist' has the capacity to dehumanise that person. (Clere, 2012)

However, until now no universal legal definition of terrorism has been reached, creating tensions between public security and the protection of human rights. The lack of a universally acceptable definition is also a big hurdle in devising effective counter-terrorism measures. (Paust, 1975) Indeed, a universal definition would facilitate coalition building and strengthen the legitimacy of the 'war on terror' while reducing the gap between international and domestic efforts in the tackling of terrorism.

b. Failed attempts

The international community has attempted to define terrorism since 1937 with little success, only resulting in endless discussions. (Walter, 2004, p. 5) The first international efforts to curb terrorism is found in the League of Nations' Convention for the Prevention and Punishment of Terrorism (1937 Terrorism Convention). Already in 1937, it was obvious that "that the rules of

international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation . . .” (Nawaz & Singh, 1977, p. 68) following the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in October 1934. The Convention was only concerned with transnational terrorism perpetrated by non-state actors.[5] Acts of terrorism were defined in paragraph 1 as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.” States were required to enact legislation criminalising terrorism and certain other acts.[6] Unfortunately, this convention was signed by 24 states, but only India ratified it due to the broad definition of terrorism.

The quest restarted in 1972 with an *Ad Hoc* Committee on Terrorism established by the UNGA to develop legislation to prevent terrorism after the Munich attacks in 1972. (Gilbert, 2004; G.A. Res. 3034, 27 U.N. GAOR Supp., 1972) A consensus could not be reached among states. The dividing question was whether there was a need to distinguish the acts of terrorism from the national liberation movements. (Ferencz, 1980, p. 547) The US point of view was that all terrorist acts should be condemned and objected to differentiate between terrorist acts. (Ferencz, 1980, p. 578) Without such a consensus, it was impossible for the community to draft a definition that would please all the stakeholders involved. The community attempted to define terrorism comprehensively but was unsuccessful. (Schlagheck, 2006, p. 25) As Richard Baxter noted in 1974 “We have cause to regret that a legal concept of “terrorism” was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.” (Baxter, 1973)

One of the most significant resolution is the Declaration on Measures to Eliminate International Terrorism of 1994 (Elimination Declaration). It was the first time, the General Assembly was able to agree on a political definition of terrorism; “2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society; 3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a

[5] Article 1(2) of the Convention
[6] Article 2 (1) to (5)

political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them . . .” (G.A. Res. 49/60, U.N. Doc. A/RES/49/60, 1995) Although this resolution seeks to criminalise a number of armed activities, which can be ‘terrorist’ in nature, it does not define terrorism as such. The third paragraph follows the same ideas as in the 1937 Terrorism Convention but augments the definition. Even though paragraph 3 is not binding it was influential because it was adopted by consensus and therefore, “enjoys a high level of legitimacy.” (UNODC, 2018) Resolution 49/60 recognised the need for codification of anti-terrorism norms in paragraph 12. The 1996 Supplement to the 1994 Declaration reinforces the notion that the definition was not supposed to carry any legal weight such task was delegated to the Ad Hoc Committee on Negotiating a Comprehensive Treaty of Terrorism. The Committee was, unfortunately, unable to formulate an accepted definition. Although the definition is not binding, the Elimination Declaration was endorsed in subsequent resolutions. (Noteboom, 2002, p. 564) Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism 1999 and Article 7(2) of the Rome Statute 1998 also offer somewhat of a definition.

c. 9/11: Change in perception

The perception of terrorism changed after the September 11th, 2001 attacks. (Gray & Wilson, 2006, p. 23; Gilbert, 2004) The acts of terrorism perpetrated on September 11th were not, in themselves, the catalyst leading to the development of new international laws. In fact, few international conventions were adopted post 9/11. However, the September 11th represented the impetuous that hastened the scope and reach of international counterterrorism law. The events triggered new determination to ensure strict compliance with existing legislation as well as a rapid and uncoordonated process of norm-creation. (Gilbert, 2004, p. 542)

Even if the famous UN Security Council Resolution 1373 passed in the aftermath of 9/11 called on the states to prevent and suppress international terrorism, it fails to explain what exactly is meant by ‘international terrorism.’ (UNSC Res 1373 , 2001) It encourages governments to take action by, *inter alia*, imposing significant obligations on states to enact domestic legislation. Resolution 1373 established the Counter-Terrorism Committee (C.T.C.), which monitors the implementation of the obligations under Resolution 1373 and provides assistance to states. (Rosand, 2003) The fact that the obligations in Resolution 1373 have not been incorporated in the draft Comprehensive Convention on International Terrorism (CCIT) might indicate some tensions between the General Assembly and the Security Council concerning the United

Nations' management of anti-terrorism efforts. Such tensions can only be explained by some states imposing their views on other states.

To remedy the absence of definition in Resolution 1373, Resolution 1566 was adopted in 2004. Paragraph 3 defines 'terrorism' as "criminal acts, including against civilians, committed with intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature." Because the Security Council is a political body, the 'definition' in paragraph 3 only contains a strong political message but not a comprehensive definition. (United Nations, 2004) At the same time, Resolution 1566 has played an important role in assisting the harmonization of some national definitions of terrorism. (Young, 2006)

The negotiations of the CCIT have been deadlocked due to important differences over a legal definition of terrorism which is both consensual and fully consistent with the principle of legality. Article 2(1) of the Draft CCIT defines terrorist as: "Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes [underlying criminal conducts] when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act." Compared with the General Assembly and Security Council Resolutions, some important differences can be noted in the terminology. For instance, a major difference between paragraph 3 Resolution 1566 and Article 2 is the absence of reference to a specific group in Article 2. Indeed, the Resolution makes it possible to criminalise a conduct directed against a specific group which is not possible under Article 2. Similarly, Article 2 is less clear with regard to which grounds will never justify terrorist acts.

Similarly, the UN Security Council Resolution 2178 (2014) on foreign fighters which aims at preventing the 'recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the

perpetration, planning of, or participation in terrorist acts' still failed to define 'international terrorism.' (UNSC Res 2178, 2014) Both resolutions require states to criminalise terrorism domestically and pass measures to tackle the problem, which was done but most newly enacted laws on terrorism are used to suppress political opposition.[7]

The UN Security Council Resolution 2249 (2015), which is somewhat different from its predecessors, is another indicator of the impending consensus. The Resolution was passed as an express condemnation of the attacks in Ankara, in the Sinaï Peninsula, in Beirut and Paris, among others. The text still does not define international terrorism. However, unlike its predecessors, the Resolution targets specifically ISIL and encourages states to use all possible means against the responsible for the attacks. (Akande & Milanovic, 2015) Paragraph 5 makes the aim of the Security Council clear by stating that it "[c]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law […] to prevent and suppress terrorist acts committed specifically by ISIL." While it is not explicitly written that the use of force is authorised, the Resolution leaves room for states to take 'necessary measures.' Even though there is no definition of terrorism, the Resolution, however, refers to 'terrorist acts.'

The Security Council via *inter alia* its Chapter VII Resolutions has strongly condemned international terrorism. The Council has systematically pointed out that international terrorism is criminal and unjustifiable. One of the most serious threats to international peace and security, which requires cooperation and enforcement mechanisms to suppress it, such as Resolution 2462 (2019).

Resolution 2462 requires all UN member countries to criminalize financial assistance to terrorist individuals or groups "for any purpose," even if the aid is indirect and is provided "in the absence of a link to a specific terrorist act."

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[7] For instance, in Turkey: (Human Rights Watch, 2013)
In July 2017, France extended its state of emergency law for the sixth time, see: (Serhan, 2017)
Bahrain: Sit-ins, gatherings and rallies are banned in the capital. The new measures extend the powers of the police by explicitly mentioning "the security bodies all required and appropriate powers to protect society from terror incidents and prevent spreading them." Finally, the amended version of the 2006 law states that it is allowed to "take all necessary measures…to impose civic security and peace whenever law is violated". Interestingly enough the new laws mention that "basic liberties, particularly freedom of opinion…to strike a balance between law enforcement and human rights protection." A 2010 Human Rights Watch (HRW) report highlighted that in August 2010, an estimated 250 persons were detained, including non-violent critics of the government, and websites of opposition were shut down relying on provisions of the terrorism law 2006. See: (Human Rightd Watch, s.d.)

Most attempts to universally define terrorism has failed mainly due to political sensitivities surrounding it. (UNODC, 2018) The Resolutions only act as "soft law guideposts" by indicating the direction of the development of international law on terrorism. (Schachter, 1964, p. 964)

d. Customary definition of terrorism

Although there is no universal legal definition of the term, there has been some debate regarding the possible existence of a partial customary definition based on the judgment of the Special Tribunal for Lebanon in 2011. The Tribunal established that "As we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element." (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, 2011, p. 83;85)

This definition has been criticised in academia due to the partial lack of precision of its objective (*actus reus*) and subjective (*mens rea*) elements. The Tribunal relied primarily upon relevant United Nations policies, practices, and norms, as well as upon national and international jurisprudence to reach its conclusion. However, as Saul noted the Appeals Chamber seems to have "misread, exaggerated, or misinterpreted every one of those decisions." (Saul, 2011, p. 691) At national level, it seems that only one decision explicitly ruled that terrorism has crystallised into a customary crime. However, unlike the decision by the Appeals Chamber, the Italian Supreme Court established that motive is indispensable. (Corte di Cassazione, 2007) Consequently, there is not much support for the contention that a comprehensive universal definition of terrorism exists.

However, references to terrorism within a United Nations instrument, such as a resolution, it should not be understood as implying the existence of a customary definition. One of the

reasons is the lack of consistency among those instruments. For instance, Resolution 49/60 of the General Assembly requires a political purpose, but not the draft Comprehensive Convention. Similarly, Security Council Resolution 1566 (2004) does not require any special intent or motive.

According to Saul, although the Tribunal sought to rely on regional instruments against terrorism as partial evidence for its findings, a correct reading of them in fact reveals that no agreement exists regarding a common definition of terrorism. In fact, he stated that "In the absence of a general crime of terrorism in treaty law, no parallel customary rule can arise out of those treaties." (Saul, Civilizing the Exception: Universally Defining Terrorism, 2012, p. 3)

3. The dangers of a lack of a universal definition and the national approach

The implications of the lack of a universal definition of terrorism are wide-ranging. The most worrisome consequence is the possible misuse of the term terrorism to curb non-terrorist activities and muzzle democracy. (Schmid, Terrorsim and Democracy, 1992) Without a common understanding of whom or what to fight, the obligations in the Resolution can be avoided, or counter-terrorism obligations can be used to mask human rights abuses.

One of the reasons of the underlying issues we are now facing is that traditionally, terrorism was considered a term without any legal significance. As Rosalyn Higgins argued "Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both." (Higgins, 1997, p. 13) The term 'terrorism' is, therefore, used to mask human rights abuses but also for political purposes.

a. Human rights violations

Human rights organisations have reported acts of repression against legitimate political dissidents or opposition under the pretext of terrorism fighting. (Human Rights Watch, 2003) Amnesty International stated that, "often 'suppression of terrorism' has been used as an excuse for laws and practices designed simply to stifle dissent and opposition. In many cases this has amounted to a "war" against political opposition of whatever kind, with the use of a repressive catalogue of violations of human rights including the right to life, the right not to be tortured, the right not to be detained arbitrarily and the right to a fair trial." (Amnesty International, 2005) The *Miranda* case in the UK is probably one of the best-known examples of such repression.

(R. (on the application of Miranda) v Secretary of State for the Home Department [2014] 1 W.L.R. 3140; Guardian news and media ltd & Ors v Erol incedal and M Rarmoul-Bouhadjir, Case No: 2014/02393C1, 2014) The partner of a former Guardian journalist who was covering the Edward Snowdon case, was detained at Heathrow Airport- based on Schedule 7 to the Terrorism Act 2000- because it was believed that he had "highly sensitive stolen information." (BBC, 2014)[8] Consequently, a clear definition of terrorism would help to prevent abuses.

Although democracy is not mentioned in UN documents, such as the International Covenant on Civil and Political Rights, most authors agree that the state should protect democracy. (Li, 2005; Eubank & Weinberg, Does democracy encourage terrorism?, 1994; Eubank & Weinberg, Terrorism and democracy: Perpetrators and victims, 2001) Such prerequisite creates a relationship, between democracy and counter-terrorism law, which is rather conflicting. This conflicting relationship between the fight against counterterrorism and the protection of human rights is found around the globe. For instance, Walker, while referring to the Terrorism Act 2000, stated that the Act represented a useful initiative "to fulfil the role of a modern code against terrorism." However, he criticised the legislation for failing to reach expected standards in all respects. Accordingly, he observed "there are aspects where rights are probably breached, and its mechanisms to ensure democratic accountability and constitutionalism are even more deficient." (Walter C. , 2002, p. 60)

b. Politicization

The lack of definition may also facilitate the politicization of the term. As Saul noted "the absence of a definition enables states to unilaterally and subjectively determine what constitutes terrorist activity, and to take advantage of the public panic and anxiety engendered by the designation of conduct as terrorist to pursue arbitrary and excessive counter-terrorism responses." (Saul, Defining Terrorism in International Law, 2006, p. 5) For instance, US sanctions against Cuba have been criticized as more determined by broader policy conflicts than by terrorism concerns *per se*. (Hufbauer, Schott, & Oegg, 2001) Recently, the Trump administration has returned "Cuba to the U.S. list of state sponsors of terrorism." (Spetalnick, 2021) This move seems to be mainly motivated by a form of political opportunism rather than facts. The possibility for a country as powerful as the US to harm the reputation and financial situation of another country on dubious basis is worrying and raises the question of whether it

[8] More general information on freedom of expression and the ECHR (Council of Europe, 2007)

is not time to abandon the domestic approach to international law in order to successfully define terrorism at international level. Any international response must safeguard the democracy principle. (Schmid, Terrorsim and Democracy, 1992)

Similarly, Bahraini Law on Protecting Society from Terrorist Acts 2006, which contains a broad definition of "terrorism," was criticised as serving "more the government and the rulers' interests" than to combat terrorism effectively. (Alzubairi, 2011, p. 2) Indeed, Article 1 of the Bahraini anti-terrorism law defines "terrorism" as: "Any threat or use of force or violence, whatever the motives or the purposes, resorted to by the criminal in carrying out either an individual or collective criminal project, in order to disable the provisions of the constitution or the laws or the rules, to disrupt the public order; to expose to danger the safety and security of the kingdom; or to harm the national unity or the security of the international community, if the act harms individuals or disseminates among them horror or panic or puts in danger their lives, freedoms or security; or damages the environment; the public health; the national economy; the public or private facilities, buildings and properties; or their occupation or obstructing their work, or obstructing the public authorities or religious buildings or educational faculties from doing their work." This definition is broader than any definition at international level. Indeed, unlike other definitions, Article 1 does not require specific motives, such political, religious or ideological cause, which means that the Act could easily be used against opponent to the regime. Moreover, this Act is transnational in scope, making it a very powerful weapon. (UN, 2020)

More recently, media attention turned to India where there has been an unprecedented wave of arrests against political opponents under the terrorism prevention act. This Act "allows the State to imprison any individual suspected of terrorism without a trial." (Denis, 2020) Similarly, Amnesty expressed its concerns regarding the enactment of the Anti-Terrorism Act in the Philippines. This Act grants the government unchecked and extensive powers which not only could endanger human rights but could easily be used to muzzle opponents. (Amnesty International, 2020)

These examples demonstrate the increase use of anti-terrorism laws as political tools to instore fear rather than serving their original purposes. By enacting a uniform definition, a paradigmatic foundation can be created. By considering terrorism as a distinct category of legal harm, it will be able to protect certain values while limiting the acceptable methods of political actions. (Saul, Civilizing the Exception: Universally Defining Terrorism, 2012, p. 87)

c. Principle of legality

Ambiguous domestic laws can offend the principle of *nullum crimen, nulla poena sine lege*, also called the principle of legality. This maxim means that criminal law cannot be applied retroactively. Consequently, a person can only face criminal punishment if the act was criminalized at the time it was allegedly committed. The Inter-American Commission and Court on Human Rights have both "found certain domestic anti-terrorism laws to violate the principle of legality because, for example, those laws have attempted to prescribe a comprehensive definition of terrorism that is inexorably overbroad and imprecise, or have legislated variations on the crime of "treason" that denaturalizes the meaning of that offense and creates imprecision and ambiguities in distinguishing between these various offenses." (Inter-American Commission on Human Rights, s.d., p. 226) Consequently, terrorists could escape charges based on the existing domestic ambiguities.

d. Mixed legislative approaches

The vagueness of the definitions led to assume that general norms of international law were sufficient to criminalise terrorism. (Golder & Williams, 2004, p. 272) Indeed, it was thought that the law of armed conflict, international humanitarian law and the principles of state responsibility were sufficient. However, over time it became clear that these approaches were fundamentally flawed because they link principles from different bodies of law that serve different purposes. More importantly, this approach resulted in the enactment of numerous sectoral treaties to complement existing norms that were insufficient.[9] These sectorial treaties

[9] the UN has formulated 13 multilateral instruments: Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, entered into force 4 December 1969; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, entered into force 14 October 1971; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, entered into force 26 January 1973; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, entered into force 20 February 1977; International Convention against the Taking of Hostages, 17 November 1979, entered into force 3 June 1983; Convention on the Physical Protection of Nuclear Material, 26 October 1979, entered into force 8 February 1987; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, entered into force 1 March 1992; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, entered into force 1 March 1992; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 February 1988, entered into force 6 August 1989; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991, entered into force 21 June 1998; International Convention for the Suppression of Terrorist Bombings, 15 December 1997, entered into force 23 May 2001; International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, entered into force 10 April 2002; International Convention for the suppression of Acts of Nuclear Terrorism, 13 April 2005, entered into force 7 July 2007; International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23

only targeted specific methods employed by terrorists such as hijacking. Other international law instruments, especially aviation and maritime treaties, also prohibit terrorism more broadly, however, without a unified definition, such conventions are interpreted differently at national level depending on the interest involved. None of these treaties, individually or collectively draw a comprehensive picture of what constitutes terrorism. As Saul argued "The sectoral approach was adopted precisely because states could not reach agreement on 'terrorism' as such." (Saul, Civilizing the Exception: Universally Defining Terrorism, 2012, p. 3)

The lack of a uniform definition resulted in mixed legislative approach by States. For instance, Resolution 1373 required States to take effective national actions to counter terrorism but without defining the concept. The domestic responses followed different approaches which in some case had the potential to hinder rather than facilitate international cooperation. Moreover, the absence of a universal definition results in the adoption of various terminology describing 'terrorism' adding a layer of complexity to an already very complex topic.

4. Best approach; international law and not domestic law

At a global level, the issues are different from national level. An act of terrorism at a national level may be a response to national politics whereas international terrorism is designed to be an attack on the values of a particular country. (Opukri & Imomotimi Ebienfa, 2013, pp. 111-112) The social practice of law, as advocated by Bourdieu, is, therefore, double in the quest of a definition of terrorism; there is the national social practice of law and the international practice. Indeed, the range of possible actions and their limits are different and depend on the willingness of states. (Bourdieu, 1987, p. 816)

Terrorism is a serious offence and is addressed within national courts under national legislation whereas the modern transnational terrorism amount to an international crime and is addressed within customary international law. (Cassesse, 2001, p. 994) The national approach to terrorism lacks the practical evaluation of a specific case because of the limits of national law in an international context. As a result, international law can help to set up a framework, but terms of homeland defence have to be set by each country. A core definition at international level would serve as a yardstick against which to measure domestic terrorism legislation and which will help prevent the use of counter-terrorism measures against lawful opponent.

March 1976; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, entered into force 3 September 1953.

Unfortunately, as Bourdieu noted, "the juridical field is the site of a competition for monopoly of the right to determine the law." (Bourdieu, 1987, p. 817) The above examples of all the failures, since 1937, to reach a definition demonstrate a strong confrontation among actors and their 'legitimised' version of the social world. By acknowledging the existence of this confrontation, it is possible to question the relative autonomy of the law in relation to external pressures. The search for a comprehensive definition of terrorism at international level exemplifies the competition for control the legal resources. If ever a definition is reached, the 'dominated' will have to accept it as a legal norm which might not be in line with their social vision of the society. Nonetheless, the language use will combine elements taken from a common language with elements foreign to the system which will create a universalisation effect on top of a neutralisation effect. (Bourdieu, 1987, p. 820)

To make the acceptance of a universal definition, recourse to the margin of appreciation, which permits a degree of latitude in the compliance of the states' obligation under the Convention of Human Rights and Fundamental Freedoms (1950) (ECHR), is conceivable. "The margin of appreciation was created to allow the European Court of Human Rights to balance State sovereignty with the need to safeguard Convention rights and an individual's rights against the general interest." (Smith, 2010) The margin of appreciation refers to the room of manoeuvre the institutions in Strasbourg are prepared to accord to national authorities for fulfilling their obligations under the Convention. Indeed, the ECtHR has granted respondents varying degrees of a margin of appreciation allowing them to operate without infringing the protected rights within the ECHR. (Yourow, 1996) The term is not defined in the Convention, nor the *travaux préparatoires* but was first introduced in 1958 in a Commission's report in the *Cyprus Case*.[10] The doctrine plays a pivotal role in ensuring that the ECHR is workable for all the Contracting States despite the differences found in the national systems. Such doctrine allows for the respect of sovereignty while imposing common rules. The doctrine is not unique to the Strasbourg Court, however, as it can be found in civil administrative law systems in Europe.

Linked to the margin of appreciation and the place that democracy occupies in each state. Indeed, any international response must safeguard the democracy principle. Otherwise anti-terrorist laws could be used as a mean to muzzle the democracy and opposition. (Schmid,

[10] *Greece v. the United Kingdom* (1958-59) 2 Yearbook of the European Convention on Human Rights, 172-197

Terrorism - The Definitional Problem, 2004) In fact, democratic principles render States vulnerable to terrorism. Democracy weakened the State power as it prohibits States to introduce laws that are contrary to fundamental rights, based on the principle of proportionality. Two schools of thought regarding the role of democracy, the strategic school and the political access school, exist. According to the strategic school, democratic regimes decrease the price of violence and therefore encourage terrorism while for the political access school, democratic regimes decrease the price of non-violent political expression and thereby decrease the probability of terrorism. Joe Eyerman concluded in his article comparing the two schools that established democracies are less likely to experience terrorism than non-democratic states and that newly formed democracies are more likely to experience terrorism than other types of states. (Eyerman, 1998; Puddington, 2015) In the same line of thoughts, some authors suggested that states pursuing a more isolationist foreign policy against terrorism are less likely to be targeted by terrorism than states actively involved in international politics. (Savun & Philips, 2009, p. 878) According to them, the states actively involved in international politics are more likely to create resentment abroad and therefore be targeted. Eubank and Weinberg have argued that the openness of the democracies render them vulnerable while Gause demonstrates that Terrorism stems "from factors much more specific than regime type". (Eubank & Weinberg, Does democracy encourage terrorism?, 1994; Gause III, 2005)

The mobility of international terrorists allows them to select their place of operation and target beyond their home state's borders. Simply prohibiting terrorism in one state is not sufficient to stop the phenomenon. A common definition is needed to provide a least common denominator. However, an international definition, if ever agreed on, is likely to be broad and vague. Even if all terrorists' acts should be regarded as crimes in all countries, indeed most terrorist acts are illegal notwithstanding terrorism prohibitions, a consensus is not yet possible. (Flory, 1997, p. 31) Especially, since the current approach uses of domestic criminal law to eliminate international terrorism giving great weight to national definitions which are very diverse. It seems that in the search for a definition, states have forgotten that a definition of the term will only have the effect of determining the practical effects and that the interpretation of the legal texts will remain with their national courts.

Within universal arguments, the harms created by terrorist acts are not a matter that affects only a clearly defined segment of the polity with no consequences for all others. To the contrary, universal arguments suggest that the definition of terrorism is the concern of all because its

absence affects nearly everyone. Furthermore, given their wide scope, universal arguments are fundamentally rooted in general principle, and unlike particular-arguments, they have an obvious defence against any critique of being merely self-referential.

As Bourdieu argues, "while the juridical field derives the language in which its conflicts are expressed from the field of conceivable perspectives, the juridical field itself contains the principle of its own transformation in the struggles between the objective interests associated with these different perspectives." (Bourdieu, 1987, p. 816) The difficulties to achieve a balance between the conceivable perspectives and the objective interests is present in the struggle to find a definition at international level.

Moreover, there are uncertainties as to which branch of international law is primarily responsible for defining international terrorism. There is a form of structural hostility between the different institutions, such as the UN, the EU and the Council of Europe, with each institution believing that their interpretation of the phenomenon is authorised interpretation. All these institutions have different forms of competences and play different roles within the judicial field, while still being complementary. Maybe this structural hostility gave the incentive to some states to create an international court dealing with terrorism to resolve this problem. The discussion about the creation of an international court to try the offence of terrorism is not new. Instead, the discussion started since the 1937 Convention for the Creation of an International Criminal Court.[11] However, it failed to collect enough signatures. The international interest in fighting terrorism is renewing with some states, such as Romania, Spain or The Netherlands, which advocate the creation of the Special Court against Terrorism. (Pantaleao & Ribbelink, 2016) The jurisdiction of the ICT would be complementary to both the ICC and national courts. This court would only intervene when domestic courts are unable to deal with the terrorism case or when the crimes are outside of the ICC's jurisdiction. (Romanian Ministry of Foreign Affairs, 2015)

The absence of a commonly agreed definition is only the tip of the iceberg with the main underlying problem being the label of terrorism domestically which has been biased by various ideologies. Without international definition, domestic counter-terrorism measures can contain flagrant violations of human rights and international treaties, especially after the 9/11 attacks.

[11] League of Nations Document, C.547(I).M.384(I).1937.V, reprinted 7 Hudson, International Legislation, No 500, 878; opened for signature 16 November 1937

Indeed, most European countries have adopted a 'war on terror' rhetoric which threatens to weaken international human rights protection. This rhetoric is based on the belief that existing legal instruments are incapable of effectively combating terrorism. The discourse advocates that the risks to the national security take precedence over individual human rights, recalibrating the fair balance approach. (Goold & Lazarus, 2007) The War on Terror discourse is based on the idea that the rule of law and the legal regimes enacted before 9/11 are incapable of dealing with the threat posed by the new form of international terrorism. A universal definition would, therefore, resolve the problem of patchy regulations at domestic level.

The national approach to the international definition is not only noticeable in the UN but also in more homogenous congress such as the Council of Europe which failed to reach a definitional consensus on the definition for the European Convention for the Suppression of Terrorism. (Council of Europe, n.d.) As a result, the Convention does not provide a definition. Instead, it criminalises public provocation to commit a terrorist offence and recruitment and training for terrorism. The differences in national approaches to terrorism render cooperation more difficult. For instance, the definition of international terrorism in the US refers to violent acts or acts dangerous to human life while in Australia, the definition targets more Australian engaging in and returning from conflicts in foreign states. The Law 22/2015 of Tunisia defines six specific cases of terrorism while in Canada, terrorism is defined in the Penal Code and the Anti-Terrorism Act 2015. In other countries, the scope of new enacted laws and vagueness of the wording raise concerns about potential abuses. The EU has only defined terrorism in the Council Framework Decision 2002/475/JHA on combating terrorism, which is not binding, as acts committed with the aim of "seriously intimidating a population", "unduly compelling a government or international organisation to perform or abstain from performing any act", or "seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization." Even at European level, with the EU having the competences to act under Article 31(1)(e) TEU, the measures are so diverse, and the topic is touchy, that no real consensus was obtained.

Although various instruments have been passed over the years, there remain fundamental differences concerning the definition of terrorism. While there is a move towards a general definition, the remaining difference are not small inconsistencies.[12] Instead, they reflect

[12] Anglo-Norwegian Fisheries Case (UK v. Norway) (1951) ICJ Rep 116 at 13

fundamental disagreements. The main division remains as to what constitutes terrorism and how to differentiate from the exercising of peoples' right to self-determination. Interestingly, the right to self-determination is enshrined in an international instrument, the UN Charter, and therefore does not necessitate a domestic view.

Instead of having national approach conflicting, it would be more productive to make some compromise such as leaving the definition of a what constitutes a serious offence to domestic law. Such compromise does not require states to relinquish their authority to legislate, but it still creates an international constraint. Counter-terrorism measures involve a shift in traditional criminal justice roles.

By hoping for a consensus to define international terrorism, the approach followed is an instrumentalist, whereby the interests of dominant groups are expressed, and the definition will be used as an instrument of domination. The formalist approach is not much more appropriated as such approach is too far from social determination which is important for the definition. (Bourdieu, 1987)

5. Conclusion

Up until now, the national approach to international law has prevailed rendering any attempt to define terrorism at international level pointless. However, the need for an internationally accepted definition of terrorism is clear. Leaving states to use their national definitions opens the door to a fragmented approach and possible abuses. This fragmented approach can sometimes undermine international cooperation which is counterproductive as transnational terrorism requires stricter measures and greater international cooperation. A universal definition would pave the way to a more coherent and regulated response. It also moves the response from the political sphere to the legal arena.

Despite broad consensus that the threat of terrorism needs to be addressed urgently, the positions adopted by individual countries, regional and international organisations have resulted in a patchwork of approaches. Although there is a lack of consensus on the international definition of terrorism, international practice is moving in this direction after the attacks perpetrated by the Islamic State of Iraq and the Levant ('ISIL'), Al Qaeda and Al Shabaab against civilians. Already in 1992, Brian Jenkins, referring to a definition of terrorism in more broadly than just in legal terms, said that "a rough consensus on the meaning of terrorism is

emerging without any international agreement on the precise definition." (Schmid, The Problems of Defining Terrorism, 1997, p. 18)

A universally accepted definition is crucial, as it harmonises the operation and interaction of the overlapping domestic criminal jurisdictions. However, national laws and opinions should not influence such definition. Instead, the long-term effect of terrorism might be an incentive to overcome the ideological disagreements on the aspects of the definition of terrorism. Moreover, the consensus could come from universal condemnation of terrorist acts, instead of the agreement of all states, following the universal argument. There is a universalisation of the reasons for taking action in a specific situation, which is in line with the universal argument. (Maccormick, 2017, p. 149) Moreover, the rules and principles universal can be constructed from generalisation implied from the reasons underlying particular rights. These generalisations can be used as general orientations, which would be the main purpose of an international definition of terrorism. Indeed, to answer the particular question of how to deal with terrorism it is important to answer the universal question, what is terrorism. As MacCormick noted "it involves giving a ruling on a point of law enunciating a norm as a justifying norm of the legal system. Just as with the problem of interpretation, the problem of relevancy involves making a choice between two rival norms as acceptable propositions of law." (Maccormick, The Constraint of Formal Justice, 1978, p. 81)

The lack of consensus is not only caused by the lack of political will but also is caused by the shift in criminal justice paradigm. Indeed, criminal justice system rather than tackling the actual offence, it tackles the offence as a potential threat. The courts which normally plays a role as mediators, in case of terrorism, assume the role of villains by prosecuting terrorism offences sometimes surpassing human rights guarantees.

Moreover, it allows for a politization of the term. The lack of a definition allows states to combat "terrorism" based on the best interest of each state which in turn does not guarantee the protection of fundamental rights. While the main fundamental rights are recognised by the international community, and the remedies are provided for, (Watkins, 2009, p. 559) acts of terrorism are left to be defined and penalised at national level. Such discrepancy in the norms applicable, between national laws and international laws, for a phenomenon that requires intrusive measures to be used but that has never been defined, is problematic. In fact, this discrepancy creates legal loopholes which can advantage terrorists.

With an uniform definition, the gaps between sectoral treaties would no longer be an issue, or at least would be a lesser problem. As Marina Aksenova, “Terrorism is the 'odd one out' when compared to other international crimes.” (Aksenova, 2017, p. 21) Indeed, because terrorism was not part of the offences established in the 1945 Charter of the International Military Tribunal of Nuremberg, it lacks historical grounding that other international offences have.

The absence of a universally accepted definition has forced the UN to adopt a pragmatic approach to counter-terrorism cooperation. Especially so, since it is unclear which branch of international law is primarily responsible for defining international terrorism, due to its pluralism. The creation of an international court dealing with terrorism could resolve this problem. The absence of definition only makes it harder to fight terrorism and is due to a national approach to an international problem.