

## NEW VOICES

### OF VICTIMS AND VILLAINS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM

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*Producing a satisfactory international definition of terrorism requires the resolution of a number of problems. I argue that one of the biggest challenges stems from the incompatibility of the offence of terrorism and the traditional roles assigned by the criminal justice system to victims, offenders and mediators. The usual paradigm embodies values formed over time and collectively shared by society. As a result, offenders are the 'villains' in the eyes of the community for violating the agreed norms, victims suffer evident harm on an individual basis and courts together with the law enforcement agencies serve as legitimate mediators in the conflict by administering justice on behalf of the public. These roles are, however, often reversed or mixed up in the fight against terrorism. Because of the preventative focus of the laws tackling the problem, terrorist suspects become the new 'victims' if they are tortured, banned from entering a country or mistreated in other ways, executive agencies sanctioning these practices become the new 'villains', and those harmed by the attacks involuntarily become the new 'mediators' because their suffering is intended to transmit a certain message to the rest of the world. The uncertainty about the roles within domestic law, in turn, reduces the possibility of creating a viable international formula defining terrorism.*

**Keywords:** Terrorism, definition, victims, consensus, preventative shift

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### I. INTRODUCTION

This article explores the widening gap between international and domestic efforts aimed at tackling terrorism through legal means. While there is an increasing agreement at an international level about the need to address the crime of terrorism, there is a lack of uniformity of legal approaches to this offence at the level of domestic actors. Such discord at the domestic level stems, to a large extent, from the change of traditional criminal law roles. This, in turn, hampers collective efforts aimed at addressing the problem through juridical means. One manifestation of such dissonance is the absence of a commonly agreed international definition of terrorism that would hold up in courts and serve as an authoritative benchmark for the UN and national actors alike.

The famous UN Security Council Resolution 1373 passed in the aftermath of 9/11 called on the states to prevent and suppress international terrorism while failing to explain what exactly is meant by 'international terrorism'.<sup>1</sup> Fast-forward to 2014, UN Security Council Resolution 2178 on foreign fighters aimed 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 account for what constitutes international

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<sup>1</sup> UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

terrorism.<sup>2</sup> What these two resolutions have in common is their call on *states* to criminalize terrorism domestically and pass measures aiming to tackle the problem. The majority of states – democratic and authoritarian alike – welcomed the call. However, newly passed domestic laws on terrorism are frequently used to suppress political opposition and dispose of internal threats to the ruling party, as happened in Turkey with multiple prosecutions against the Kurds.<sup>3</sup> This phenomenon also occurs in Western Europe, with countries like France using acts of terrorism to justify a state of emergency and derogate from human rights instruments.<sup>4</sup> Without international guidance and the acknowledgement of its clear boundaries, the crime of terrorism is prone to becoming a governance tool in domestic politics.<sup>5</sup>

Thus, the definitional step is important because it paves the way to a more coherent, more regulated and appropriate response by the international community. Notably, translation from the political sphere to the legal arena requires accumulation of collective will. Drawing parallels with human rights, Madsen and Verschraegen argue that these rights gained their traction not only by being grounded in cultural value commitments but also by receiving legal recognition.<sup>6</sup> Recognition at an international level also brings about wider possibilities of enforcement at the level of local actors.

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<sup>2</sup> UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

<sup>3</sup> World Report 2014: Turkey, Human Rights Watch, <<https://www.hrw.org/world-report/2014/country-chapters/turkey>> accessed 11 September 2017.

<sup>4</sup> For instance, in July 2017, France's parliament voted for the sixth time to extend the state of emergency law, first enacted in the aftermath of the November 2015 terrorist attacks in Paris. This law gives power to the government to designate public spaces as secure zones, temporarily close down places of worship suspected of promoting extremism, and conduct individual surveillance. See Yasmeen Serhan, 'Will France's State of Emergency Become Permanent?', *The Atlantic*, 11 July 2017, available at <<https://www.theatlantic.com/international/archive/2017/07/will-frances-state-of-emergency-become-permanent/532848/>> accessed 7 September 2017.

<sup>5</sup> Marina Aksenova, 'Conceptualising Terrorism: International Offence or Domestic Governance Tool?' (2015) 20(2) *Journal of Conflict and Security Law* 277.

<sup>6</sup> Mikael Rask Madsen and Gert Verschraegen, 'Towards a New Sociology of Human Rights? A Review Essay on Hans Joas' *Sacredness of the Person*' (2016) *iCourts Working Paper Series No 43*, 16.

However, the absence of a commonly agreed international definition of terrorism is only the tip of the iceberg. The underlying problem seems to be that the label of terrorism domestically has been tarnished by a number of ideological biases. The biggest challenge to arriving at an international consensus about terrorism is not necessarily the lack of legal tools to distil a definition acceptable to the international community. Rather the shifts within domestic criminal justice system towards prevention are also to blame. As this article will demonstrate, counter-terrorism laws and activities lead to the reversal of roles traditionally assigned to different parties affected by the crime. This is the result of the appropriation of the label 'terrorism' by actors other than courts, such as the media or the government.<sup>7</sup>

The paper dissects this process and explores the circumstances under which terrorism could be conceived as an international crime. Section two of this article presents evidence that the time is right for efforts to reach consensus on an international definition of terrorism. Section three discusses some of the obstacles to reaching international agreement. A stalemate is not only the result of the disagreement between states and other actors over key terms, but is also caused by a more fundamental process. The paper argues that a preventative shift in the fight against terrorism has taken place, resulting in the reversal of traditional roles of victims, villains and mediators. Section four discusses how this shift in roles is at the basis of some of the most controversial debates in defining international terrorism: the issue of intent, questions surrounding the international embedment of the offence of terrorism, as well as debates about which branch of international law (or domestic law) is the most appropriate for tackling terrorism. In order to arrive at a workable definition of terrorism at the international level, it is argued, that these biases must be addressed.

## II. EVIDENCE OF THE EMERGING CONSENSUS

Although there is a lack of consensus on the international definition of terrorism, international practice is moving in this direction. Consensus is essential for a crime to qualify as international in character, providing it with

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<sup>7</sup> Betty Dobratz, Liza Waldner and Timothy Buzzell, *Power, Politics, and Society: An Introduction to Political Sociology* (Routledge 2012) 313.

an element of legitimacy. The core international crimes currently prosecuted by the International Criminal Court (ICC)<sup>8</sup> have historical roots and stem from the expanded notion of war crimes. Only four victorious powers – the UK, the US, the Soviet Union and France – participated in the framing of the charges at the Nuremberg trials. Consequently, the bulk of international offences were shaped by a handful of nations acting on behalf of the broader community of states in the aftermath of the Second World War. This was the time of realization that perpetrators of mass atrocities must stand trial and the international community needs to take a stake in this process.

Therefore, consensus does not require all or even most states to be on board as to the definitional aspects of the prohibited acts, but rather demands a sense of urgency and concern for humanity as a whole. Susan Waltz discussed a similar pattern of consensus building surrounding the human rights movement. She convincingly dismantled the myths related to consensus building, including the assumption that its development is entirely attributable to the atrocities committed by Nazi Germany. Consensus was preceded by the accumulation of political will over a period of time. Waltz outlines a number of indications from the early to mid-twentieth century pointing to the ripening of the idea of the universal human rights. At the same time, she acknowledges that the Nuremberg trials 'galvanized' the support for the universalist human rights project.<sup>9</sup> Legal recognition of the gravest violations of human rights in times of war and peace further propelled this project.<sup>10</sup>

Terrorism is the 'odd one out' when compared to other international crimes. Terrorism was not part of the offences established in the 1945 Charter of the International Military Tribunal of Nuremberg. Hence, terrorism lacks the historical grounding of the other core international offences. However, there is evidence that the moment for translating the offence of terrorism from political into legal language is fast approaching. The attacks perpetrated by contemporary terrorist groups such as the Islamic State of Iraq and the

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<sup>8</sup> Article 5 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

<sup>9</sup> Susan Waltz, 'Reclaiming and rebuilding the history of the Universal Declaration of Human Rights' (2002) 23(3) *Third World Quarterly* 439.

<sup>10</sup> Madsen and Verschraegen (n 6).

Levant ('ISIL'), Al Shabaab and Al Qaeda against civilian populations around the globe have the immediate aim of intimidation and coercion. The short-term impact of terrorist acts is always context and situation specific. Yet, the cumulative long-term effect of these crimes might be an incentive for the international community to overcome the ideological disagreements about various aspects of the definition of terrorism. At the Nuremberg trials, it was human suffering and the horrendous nature of the crimes that created the momentum for consensus over the definition of international crimes. A similar scenario might occur with respect to terrorism in the near future. Abi-Saab referred to the 'shock of recognition' produced by the 9/11 attacks that performed as a catalyst for psychological recognition of the need for collective action.<sup>11</sup> Continuous attacks during the subsequent decade and a half only add to the critical mass required for the mobilisation of efforts.

UN Security Council Resolution 2249 (2015) is another indicator of the impending consensus. This Resolution is somewhat different from its predecessors. It was passed as an express condemnation of the attacks on 26 June in Sousse, on 10 October in Ankara, on 31 October over the Sinai Peninsula, on 12 November in Beirut and on 13 November in Paris, among others. The text still does not provide a definition of international terrorism. What is different, however, is that the Resolution targets ISIL specifically and, although not passed under Chapter VII of the UN Charter, encourages states to use force against those responsible for the attacks.<sup>12</sup> Indeed, the Security Council '[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'.<sup>13</sup> While there is no explicit authorization of the use of force, the Resolution leaves space for states to take coercive measures by calling upon them to take 'necessary measures'. The Resolution is precise about the nature of attacks, referring to them as 'terrorist acts'. The unequivocal rejection of the attacks

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<sup>11</sup> Georges Abi-Saab, 'The Proper Role of International Law in Combatting Terrorism' (2002) 1 Chinese Journal of International Law 311.

<sup>12</sup> Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (*EJIL Talk*, 21 November 2015), <<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>> accessed 7 September 2017.

<sup>13</sup> UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, para 5.

shows a clear indication of a greater ideological unity about these crimes: they are of such gravity that they concern humanity as a whole.

Another piece of evidence that consensus is building at an international level lies in the renewed interest of some states in the creation of the Special Court against Terrorism. In February 2015, Romania, together with Spain and the Netherlands, proposed the establishment of an International Court Against Terrorism (ICT).<sup>14</sup> The countries launched a joint consultation process that may lead to its eventual creation. The jurisdiction of the ICT would be complementary to both national courts and the ICC. Accordingly, it would intervene only when domestic bodies are unable or unwilling to try a terrorism case or when the crimes committed are outside the ICC's jurisdiction.<sup>15</sup> The discussion of a court had been shelved since the 1937 Convention for the Creation of an International Criminal Court designated to try the offence of terrorism, which failed to collect enough signatures for its entry into force prior to the Second World War.<sup>16</sup>

There are some indications that an emerging consensus is developing towards an internationally accepted definition of terrorism. This does not stem from agreement of all states, but rather from a universal condemnation of terrorist acts, which are of concern to humanity. The next section discusses some of the obstacles that prevent such consensus from emerging.

### III. NEW VICTIMS, NEW VILLAINS AND NEW MEDIATORS IN THE FIGHT AGAINST TERRORISM

As discussed above, the point at which different actors in the field of international law and politics agree on a common definition of terrorism might be approaching. Yet, one of the greatest obstacles on the way of this process is the reversal of roles traditionally assigned by criminal law to

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<sup>14</sup> Luca Pantaleo and Olivier Ribbelink, 'The Establishment of a Special Court against Terrorism' (*EJIL Talk*, 7 January 2016), <<https://www.ejiltalk.org/the-establishment-of-a-special-court-against-terrorism/>> accessed 7 September 2017.

<sup>15</sup> MFA officially initiates consultations on Romania's initiative to create an International Court to combat terrorism, Romanian Ministry of Foreign Affairs Press Release, <<http://www.mae.ro/en/node/31628>> accessed 7 February 2017.

<sup>16</sup> 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.



different actors. While there is sufficient accumulation of will from 'above', there is an undercurrent from 'below' that is arguably the root cause of the problem of the lack of commonly agreed definition of terrorism. This section addresses this shift in traditional criminal justice roles.

### *1. Traditional Criminal Justice Roles*

The resistance of the domestic criminal justice system when it comes to the offence of terrorism is best explained through the Durkheimian framework. According to Durkheim, criminal sanction is a passionate reaction of the society to the violation of the intense collective sentiments.<sup>17</sup> A national criminal justice system operates under the assumption that the convicted person has committed a certain wrongdoing for which he or she must bear responsibility and face reprobation. According to this conception, we see the offender as a 'villain' for his or her criminal acts hurt individual victims and society as a whole. The institutions bringing the accused to justice serve as a medium for the expression of the state's response to the infringement. These roles – the offender as a villain, society together with the harmed individuals as victims, and the courts and law enforcement as mediators – rarely come into question. The discussion centres rather on the degree of the 'vilification' of the offender and the amount of suffering they inflicted on victims. The mediators take into account the mitigating factors that might lessen the punishment, such as family circumstances, first-time offending, or remorse.

This rigid paradigm can be explained by the traditionalist nature of domestic criminal law, which is a highly conservative institution aiming to preserve the established order and enforce social norms through criminal sanctions.<sup>18</sup> In Mill's philosophy, self-protection is the sole end for which mankind is allowed to interfere with the individual liberty of any of their number. Consequently, the only purpose for which power can be exercised is to prevent harm to others.<sup>19</sup> The definition of harm depends on the values embedded in society. Usually the ruling classes define these values over time; the threat of penal sanctions for violating them protects the equilibrium

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<sup>17</sup> Emile Durkheim, *The Division of Labour in the Society* (Macmillan 1984) 37.

<sup>18</sup> Andrew Ashworth, *Principles of Criminal Law* (Clarendon Press 1995) 15.

<sup>19</sup> John Stuart Mill, 'On Liberty' in Larry May and Jeff Brown (eds), *Philosophy of Law: Classic and Contemporary Readings* (Wiley Blackwell 2011) 369.



attained in a particular society.<sup>20</sup> Durkheim explains the traditionalist nature of penal law by the fact that it denotes the feelings collectively shared by society.<sup>21</sup> The authority of the penal rule is thus a societal custom formed over time.<sup>22</sup> Domestic criminal law therefore has an indispensable regulatory function: by guarding dominant values shared by its citizens it may be argued to preserve the cohesion of the society. Punishment in domestic law is administered in a systematic fashion because all members of the society are presumed to share the values and agree to submit the offender to censure.<sup>23</sup>

The crime of terrorism challenges this traditional approach altogether. There is a high degree of fragmentation when it comes to the agreement upon what constitutes terrorism. The offence of terrorism thus distorts familiar perception of criminal offences. It provides less clear-cut definitions of villains, victims and mediators. The preventative focus of the fight against terrorism<sup>24</sup> leads to a shifting of these roles.

## 2. *The New Victims*

The 'victim' is fast becoming one of the key players in modern criminal justice discourse.<sup>25</sup> To be sure, the figure of the victim as a bearer of interests that are harmed by the offender has always been implicit in criminal law. What has changed in the past decades is the role that the victim plays in the actual process of administering justice – from being a distant figure and a symbol of injured values in society to an active participant in the trial process, and the holder of distinct rights.<sup>26</sup> Regardless of whether victims have an actual or a symbolic presence in a criminal process, their status as such is not contested. This vision rests on the idea that all members of the society share certain

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<sup>20</sup> Ashworth (n 18) 16.

<sup>21</sup> Durkheim (n 17) 37.

<sup>22</sup> Ibid 35.

<sup>23</sup> Ibid 45.

<sup>24</sup> Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'' (2009) 49(5) *The British Journal of Criminology* 628-645.

<sup>25</sup> Carolyn Hoyle and Lucia Zedner, 'Victims, Victimization, and Criminal Justice', in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5<sup>th</sup> edn, Oxford University Press 2012) 473.

<sup>26</sup> Ibid.

values attacked by the crime, and thus the role of the victim as an individual bearer of injured interests remains intact. This reasoning holds true for regular crimes such as homicide or robbery – it is hardly disputed by anyone that these acts go against the established order and must be punished.

However, it becomes more difficult to argue for the existence of shared identity with respect to ideologically motivated offences, such as terrorism. Modern societies are more fluid and the individual identity of their members is multidimensional, not necessarily linked to a particular state or specific group. People move across borders and exchange information in the variety of contexts. With such an increased mobility of the population, the reality is no longer defined within the borders of a particular state. The circulation of information occurs on many levels, including social media, international press outlets as well as the experiences of those living in a foreign country. Such pluralism of ideas can serve as a fertile ground for radicalization of disenchanted persons wishing to satisfy their need for a sense of belonging. This is not to argue in favour of a monolithic ideology to be put in place as a 'safety net' against radicalization, but rather to stress the proneness of distressed youth to manipulation in the light of the proliferation of various sources of information.

These radicalized individuals involved in hostile acts and recruited by ISIL, and other terrorist organizations, are unlikely to perceive of themselves as offenders. They rather view their actions as reflecting a certain ideology, such as, for example, disapproval of the marginalization of the Muslim community in Western societies. The current European migrant crisis only reinforces the fragmented narrative of the values dominant in a society.

Consequently, when it comes to vilification of terrorist offenders, there is far less unity compared with other crimes. Some would even place them in the category of victims. This is arguably the case if one examines the position of terrorist suspects, who are routinely subjected to various human rights abuses. Those who are tortured, entrapped by the government agents into conspiracies they were not intending to join,<sup>27</sup> and stripped of the possibility

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<sup>27</sup> Jesse Norris, 'Why the FBI and the Courts are Wrong about Entrapment and Terrorism' (2014-2015) 84 Mississippi Law Journal 1257.

to effectively question their detention in court<sup>28</sup> may equally be viewed as 'victims'. Moreover, whole groups of populations become targets of indiscriminate sanctions based on the potential threat they represent. A recent example of this is the executive order restricting the entry into the United States of nationals of several majority Muslim countries, based solely on the fact that '[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001'.<sup>29</sup>

Frequent use of anti-terrorism laws to fight dissent further contributes to the ambiguity surrounding the figure of an offender. The decision of the Cairo court to sentence three Al Jazeera journalists to three years of imprisonment for aiding a terrorist organization is a good example of the reversal of roles of victims and villains.<sup>30</sup> The punishment of journalists as accomplices in terrorism solely for reporting on Egypt in a light, which may not have been seen as favourable by the ruling regime, caused worldwide outrage.<sup>31</sup>

This is clearly not to deny the suffering of the actual victims harmed by terrorist acts. Securing their rights and defining state obligations in protecting those rights is one of the priorities of the current Special

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<sup>28</sup> Richard Fallon and Daniel Meltzer, 'Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror' (2007) 120(8) *Harvard Law Review* 2031. On indefinite detention see, *A. and Others v the United Kingdom* [GC], 2009 ECHR 20, § 190; on the right of those suspected of terrorism to have the lawfulness of that detention reviewed speedily see *M.S. v Belgium* App no 50012/08 (ECtHR, 31 January 2012), § 166.

<sup>29</sup> (Revised) Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States, 6 March 2017 (original order dated 27 January 2017), available at <<https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>> accessed 11 September 2017.

<sup>30</sup> 'FAQ: Al Jazeera's journalists on trial in Egypt' *Al Jazeera*, 29 August 2015, available at <<http://www.aljazeera.com/news/2015/03/faqs-al-jazeeras-journalists-trial-egypt-150317113935704.html>> accessed 6 September 2017.

<sup>31</sup> The journalists were later released from prison following presidential pardon. See 'Al Jazeera journalists freed from Egypt prison' *Al Jazeera*, 23 September 2015 <<http://www.aljazeera.com/news/2015/09/al-jazeera-journalists-pardoned-egypt-150923112113189.html>> accessed 11 September 2017.

Rapporteur for Terrorism.<sup>32</sup> His report published in 2012 called for an international legally binding instrument to provide for compensation, reparation and support to all victims of terrorism, attempting to effectuate the shift towards victims' rights in addressing terrorism. It is noteworthy that the UN Special Rapporteur on Terrorism also expanded the category of victims of terrorism by including 'indirect victims', or individuals subjected to lethal force by a public authority after being mistakenly identified as a suspected terrorist.<sup>33</sup>

### 3. *The New Villains*

National legal systems frequently approach the offence of terrorism from a particular standpoint: there is a paradigm shift of criminal justice from a responsive approach to a preventive approach in addressing terrorism.<sup>34</sup> The justification of this turn lies in the objective to contain or prevent a potential attack, and results in acting on the threat of a potential violation rather than on the actual violation. As a result of this preventative tilt, national anti-terrorism efforts are often aimed not at punishing individuals for what they have done, but rather at identifying groups of persons that might pose a danger in the future. The extraordinary nature of the threat is used to justify extraordinary ways in which domestic legal systems fight against terrorism. Concrete examples of the shifting focus of criminal justice systems in the fight against terrorism are restrictions on the freedom of movement, extended administrative detentions of terrorist suspects, employing the notion of conspiracy that criminalizes the agreement to commit terrorism rather than the act itself and the introduction of the broad legal categories such as 'material support of terrorism' or 'possession of materials likely to be used for terrorism'.<sup>35</sup>

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<sup>32</sup> UNCHR, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', Ben Emmerson, 'Framework principles for securing the human rights of victims of terrorism' (4 June 2012) UN Doc A/HRC/20/14, para 10.

<sup>33</sup> Ibid, para 16.

<sup>34</sup> Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights', in Ben Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007).

<sup>35</sup> Eg UK Terrorist Act (2006); 18 U.S.C. § 2339A; Australian criminal code act 1995, division 101.

This architecture exposes the offence of terrorism to potential abuse by those in power and makes it a governance tool in the hands of authoritarian and democratic regimes alike. Rather than acting as a barrier to such abuse, the judicial branch often complies with the rationale of the executive,<sup>36</sup> while the latter use their extended powers to sanction or overlook abuse for the sake of an alleged common good: security.

There are numerous examples of such abuse. The scheme introduced in the US following *Rasul v. Bush* decision by the Supreme Court, for example, on paper allows inquiry into the lawfulness of detentions at Guantánamo Bay, yet in reality it entirely precludes detainees in the United States or at Guantánamo Bay from challenging their detention or conditions of confinement before a civilian court.<sup>37</sup> The FBI's technique of entrapment, that is inducing otherwise law-abiding individuals to join conspiracies to commit terrorism offences is not only counterproductive in preventing threats,<sup>38</sup> but also challenges universally recognized fair trial standards.<sup>39</sup> The use of 'enhanced interrogation tactics' in the war on terror is another widely used counterterrorism practice.<sup>40</sup> In that vein, the Guantanamo commission declared instruments such as the Convention Against Torture non self-executing, and hence not directly binding on the US.<sup>41</sup> Laguardia argues that increasing acceptance of torture-tolerant narratives in criminal procedure

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<sup>36</sup> Cf The US Court of Appeals for the 9<sup>th</sup> Circuit rejecting the government's argument that suspension of the order preventing entry to the US of nationals of several majority Muslim countries should be lifted immediately for national security reasons. See *State of Washington v. Trump*, United States Court of Appeals for the 9<sup>th</sup> Circuit, Order No 17-35105, 9 February 2017.

<sup>37</sup> *Rasul v. Bush*, 542 U.S. 466 (2004); Fallon and Meltzer (n 28).

<sup>38</sup> Norris (n 27).

<sup>39</sup> See Human Rights Watch, *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* (2014), available at <<https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions>> accessed 11 September 2017.

<sup>40</sup> Francesca Laguardia, 'Imagining the Unimaginable: Torture and the Criminal Law' (2015) 46 *Columbia Human Rights Law Review* 48.

<sup>41</sup> *United States v Khalid Sheikh Mohammed et al*, Order AE 20011 To Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, 16 December 2013, para 6.

doctrine and education is a result of the shift to prevention.<sup>42</sup> Concerns over this shift dominate academic discussions, and, to a lesser extent, public discourse.

The European Court of Human Rights (ECtHR) sometimes strikes down national counter-terrorism measures due to their incompatibility with human rights standards. For example, in *Gillan and Quinton*, the ECtHR ruled that stop and search powers granted to police under the sections 44–47 of the Terrorism Act 2000 were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.<sup>43</sup> In *Finogenov and others v Russia*, the Court found that Russia violated the right to life by indiscriminately using poisonous gas during the anti-terrorist raid while resolving the hostage crisis at a theatre in Moscow in October 2002.<sup>44</sup> In *Al Nashiri v Poland*, the ECtHR declared unacceptable the existence of secret prisons around Europe where terrorist suspects are held without proper access to justice.<sup>45</sup> The latter case emphasised the lack of transparency of counter-terrorism operations, which only adds to the perception of those executing them as villains.<sup>46</sup> This lack of transparency is not only detrimental to the rights of the accused or suspected persons, but also obstructs the emergence of a common understanding of terrorism. International law includes custom and the general principles of law recognized by civilized nations as its sources.<sup>47</sup> Hence, international law cannot develop under such conditions of secrecy and non-transparency.

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<sup>42</sup> *US vs Mohammed et al* (n 41).

<sup>43</sup> *Gillan and Quinton v United Kingdom* App no 4158/05 (ECtHR, 12 January 2010).

<sup>44</sup> *Finogenov and Others v Russia* App nos 18299/03 and 27311/03 (ECtHR, 20 December 2011).

<sup>45</sup> *Al Nashiri v. Poland* App no 28761/11 (ECtHR, 24 July 2014); *Husayn (Abu Zubaydah) v. Poland* App no 7511/13 (ECtHR, 24 July 2014).

<sup>46</sup> There are efforts to improve this state of affairs. The UK draft Investigatory Powers Bill seeks to increase transparency around the powers that the authorities have to intercept our communications. See <[http://www.theregister.co.uk/2016/01/11/strasburger\\_on\\_draft\\_investigatory\\_powers\\_bill/](http://www.theregister.co.uk/2016/01/11/strasburger_on_draft_investigatory_powers_bill/)> accessed 6 September 2017.

<sup>47</sup> The sources of international law are listed in Article 38(1) of the Statute of the International Court of Justice.

#### 4. *The New Mediators*

It is not only the roles of the victims and villains that have undergone a shift in the context of terrorism, but also the mediators between these actors. The traditional criminal justice paradigm presupposes that the courts and the executive branch act as mediators by administering punishment on behalf of society.<sup>48</sup> They apply laws and customs formed over time and via consensus. When it comes to terrorism, however, the sanction is often applied by society as a whole rather than by the courts or law enforcement agencies. This is done through highly responsive anti-terrorism laws frequently passed in the aftermath of the attack. Examples of such laws are the US Patriot Act (2001) passed following the 9/11 attacks, the UK Terrorism Act (2006) introduced as a response to London bombings, and the enhanced surveillance law passed in France following Charlie Hebdo attacks.<sup>49</sup> The Indonesian government considered preventive detention laws to curb terrorism following a number of deadly explosions in Jakarta in January 2016, for which ISIL claimed responsibility.<sup>50</sup> Pakistan's Anti-Terrorism Act of 1997 was amended in 2015 following the attacks on the Marriott hotel in Islamabad (2008) and the Peshawar school massacre (2014) to include the new system of military courts designed to try terrorism offences. The new reactive laws typically include

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<sup>48</sup> Garland points the axiom that punishment is to be understood not only as an instrumental response to a crime but also as a constitutive element of larger social processes David Garland, 'Punishment and Social Solidarity' in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage 2013) 34.

<sup>49</sup> Law on intelligence n 2015-912, dated 24 July 2015, adopted by the National Assembly and Senate, available at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030931899>> accessed 11 September 2017. See also Lizzie Dearden, 'French parliament approves 'intrusive' surveillance laws after Charlie Hebdo attack', *The Independent*, 6 May 2015 <<http://www.independent.co.uk/news/world/europe/french-parliament-approves-intrusive-surveillance-laws-after-charlie-hebdo-attack-10228206.html>> accessed 11 September 2017.

<sup>50</sup> 'Indonesia: Counterterrorism Law Changes Threaten Rights: Reject Proposals to Restrict Speech, Revoke Citizenship' (Human Rights Watch, 12 June 2017), available at <<https://www.hrw.org/news/2017/07/12/indonesia-counterterrorism-law-changes-threaten-rights>> accessed 6 September 2017.



coercive measures and overly broad definitions, granting executives the tools to address a variety of suspicious conduct.<sup>51</sup>

The above laws address the courts and the executives by granting them extra powers to fight or prevent terrorism. However, their aim is not merely to tackle the act per se, but rather to preserve the way of life that terrorist offences aim to undermine.

The victims of terrorist acts become mediators as they carry an additional burden of transmitting a certain message to the rest of the world. Targets of terrorist attacks are often selected for their symbolic value for the rest of the population. The essence of the crime is thus reducing humans to means by exposing the rifts in the texture of modern society. The objects of the attack and its victims spark debates on multiculturalism, diversity and inequality.<sup>52</sup> Alienation of certain groups of individuals and thus their propensity to self-radicalise enters the discourse.

A good example is the UK Counter-Terrorism and Security Act (2015) that was passed as an emergency measure to prevent the threat of terrorist attacks by persons returning from the conflict zones in and around Syria with the skills necessary to carry out the acts. This law places, *inter alia*, a duty on specific institutions, such as universities, to have due regard and to monitor people with propensity of being drawn into terrorism. Entrusting universities with singling out dangerous individuals represents a response of the community as a whole rather than through designated institutions. Constitutional amendments allowing for stripping nationality from French-born dual citizens convicted of terrorism, contemplated but later dropped by the government, would have constituted another example of the community response to terrorism.<sup>53</sup>

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<sup>51</sup> For example, the UK Terrorism Act (2006) allowed for the prolonged detention of terrorism suspects and introduced new offences such as encouraging terrorism, disseminating publications, training, making or possessing devices, and others.

<sup>52</sup> Jean-Pierre Dupuy, *The Mark of the Sacred* (Stanford University Press 2013) 169.

<sup>53</sup> According to *The Economist*, the proposal was backed by 85% of French population. See 'Après Charlie', *The Economist* (Paris, 9 January 2016), available <<https://www.economist.com/news/Europe/21685487-after-year-far-reaching-security-measures-left-thinks-latest-one-step-too>> accessed 11 September 2017.

This section has discussed how traditional criminal justice roles undergo a shift in the context of the fight against terrorism – villains become victims, victims become mediators, and mediators can act as villains. The next section addresses the way this underlying shift affects the development towards an internationally accepted definition of terrorism.

#### IV. COLLECTIVE ACTION IN DEFINING INTERNATIONAL TERRORISM

The UN is currently calling on states to criminalize terrorism, while allowing each state the discretion to decide on the exact scope and definition of the category.<sup>54</sup> As demonstrated in the previous section, this approach leaves room for abuse at the domestic level. The absence of evident definitional constraints at an international level partly lead to arbitrary decisions with respect to terrorism offences at the national level. This, in turn, delegitimizes attempts to tackle the problem both internationally and domestically. It is therefore essential to facilitate inter-state discussions on the definition of terrorism.

Various UN bodies may be of assistance in facilitating cross-state communication, which is required to build the necessary consensus. The work of the Special Rapporteur on Terrorism,<sup>55</sup> the reports issued by the UN Human Rights bodies, fact-finding missions and discussions in the General Assembly and the Security Council are a good start. The former Special Rapporteur on Terrorism initiated the discussion by suggesting the definition of terrorism inspired by the text of UN Security Council Resolution 1566 (2004) passed in the aftermath of the hostage taking in Beslan, Russia in 2004. This particular Resolution resembled all the others in that it expressly called on states to suppress terrorism, but it also provided

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<sup>54</sup> Kim Scheppele argues that UNSC Resolution 1373 prompting states to criminalize terrorism without providing an international definition of the offence led to the situation whereby various local agendas entered into domestic definitions of this crime. See Kim Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2011).

<sup>55</sup> Eg UNCHR, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (6 August 2008) UN Doc A/63/223; (14 February 2010) UN Doc A/HRC/16/51.

some of the elements of the crime. In particular, this resolution clarified the scope of the required intent.<sup>56</sup> The definition by the Special Rapporteur encompassing these considerations reads as follows:

Terrorism means an action or attempted action where:

- '1. The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and
3. The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law'.<sup>57</sup>

This definition is rather comprehensive, but at the same time it shows strong deference to the national law of the member states. One of the elements of terrorism is the commission of a serious offence as defined by domestic law. This is a much-needed compromise. It does not require states to relinquish their authority to legislate in the sphere of counter-terrorism, but still puts in place constraints of international law. There remain several bridges to be built between the model definition of terrorism and actual state practice. Yet it is not enough for states and international institutions to arrive at a common understanding of terrorism and a legal definition. This is because the phenomenon of terrorism involves a shift in traditional criminal justice roles, which must be taken into account. In particular, there are three areas where

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<sup>56</sup> UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, para 3.

<sup>57</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 'Ten areas of best practices in countering terrorism', 22 December 2010, UN document A/HRC/16/51, para 28, practice 7.

this gives rise to particular problems that must be addressed in linking the international and domestic definitions.

First, the problem of intent for the offence of terrorism is not yet entirely resolved. From a criminal law perspective, it seems illogical to label as 'terrorism' only acts with direct intent to coerce or intimidate, while excluding actions that unintentionally lead to the same result. The proponents of excluding the element of 'coercion or intimidation' from the definition of terrorism would refer to any violence meant to advance certain ideology as 'terrorism', regardless of whether intimidation or coercion was an ideological motive underlying the aggressive acts. Indeed, there is validity to the argument that any armed violence against a particular group is bound to intimidate civilian populations. At the same time, expanding the definition to cast the net wide to include additional motivations invites the 'slippery slope' objection. This is particularly acute because terrorism is essentially a political offence used as an instrument to 'frame' certain acts that could otherwise be described as arson, mass murder, hostage taking, and so on. Removing the requirement of the special intent would make the boundary between terrorism and other related offences even more arbitrary. This, in turn, would lead to further misappropriation of the term by various actors, including for governance purposes, and the subsequent 'vilification' of these actors for such a misuse.

The second problem in linking international and domestic definitions of terrorism lies in the unclear contextual embedment of the offence. There is a lot of confusion on an international, regional and state level as to whether the acts of terrorism may be committed in an armed conflict. This lack of clarity speaks to the conception of terrorists as the new 'victims' for their role is contested depending on the audience. The famous statement 'one person's terrorist is another person's freedom fighter' accurately reflects this general sentiment. At the regional level, the EU has been one of the main supporters of current Article 3 of the Draft Comprehensive Convention on International Terrorism (former Article 18), according to which the definition of terrorism excludes 'international law applicable in an armed conflict, in particular those rules applicable to acts lawful under international

humanitarian law'.<sup>58</sup> At the same time, the EU has shown uncertainty in the matter as evidenced by the *Tamil Tigers* case decided by the General Court. The EU added the Tamil Tigers – a party to a non-international armed conflict against Sri Lanka – to the list of banned terrorist organizations. The General Court upheld the listing of the Tamil Tigers on *substantive* grounds (annulling it on procedural grounds).<sup>59</sup>

The African Union also does not consider acts committed during armed conflict as terrorism. The Draft Protocol which amends the Statute of the African Court of Justice and Human Rights explicitly provides that 'the acts covered by international humanitarian law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts'.<sup>60</sup> The same article also excludes from the definition 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces'. The latter provision is a reflection of the colonial past and may give rise to the ideological controversy if ever applied to the specific case.

Third, it is unclear which branch of international law must bear primary responsibility for defining international terrorism. International law is prone to fragmentation or, as some may call it, pluralism. Thus, it is essential to identify which branch of international law is most suitable for developing an international definition of terrorism. If general international law applies, then relevant treaties must be identified for the purposes of establishing the existence of the offence. For example, the violation of which treaties and norms triggers state complicity in terrorism?<sup>61</sup> If one places defining

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<sup>58</sup> Asier Garrido Muñoz, 'Not Only a Matter of Lex Specialis: IHL, the European Union and Its Two Definitions of Terrorism' (*EJIL Talk*, 1 December 2014), available at <<https://www.ejiltalk.org/not-only-a-matter-of-lex-specialis-ihl-the-european-union-and-its-two-definitions-of-terrorism/>> accessed 6 February 2017.

<sup>59</sup> *Ibid*; Joined Cases T-208/11 and T-508/11 *Liberation Tigers of Tamil Eelam (LTTE) v Council* EU:T:2014:885.

<sup>60</sup> Draft Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev 1, 15-16 May 2014, art 28 (G).

<sup>61</sup> See Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011); James Crawford, *State Responsibility: The General Part*

terrorism on the lap of international criminal law by (hypothetically) extending the jurisdiction of the ICC to the crime of terrorism, or, alternatively, by setting up an international court for its prosecution, it is important to be cognizant of the limitations of the discipline.<sup>62</sup> International prosecutions require the mobilization of the resources and cooperation of a variety of actors; its perceived legitimacy is fragile as can be seen with the current debates on the sustainability of the ICC. If the pertinent field is international humanitarian law, then who decides on the existence of an armed conflict? Would these be domestic courts or the organs of the United Nations? If one contends that the domestic law paradigm must be the basis for an international definition of terrorism, then the biases implicit in the internal treatment of the offence must be removed to the greatest extent possible.

## V. CONCLUSION

The aim of this article was not to arrive at a definition of terrorism, but to examine and challenge the underlying conditions that prevent an internationally agreed definition from emerging. The lack of consensus is not only caused by a lack of political will by actors at the international level, but also by a shift that occurs within the criminal justice paradigm. Criminal justice systems often tackle the offence of terrorism as a potential threat, rather than the actual offence itself. This change leads to the shift of roles traditionally assigned to victims, offenders and mediators in a national criminal justice paradigm. Individuals are often punished on the basis of their dangerousness or political stance threatening the regime, making them the new 'victims' in the fight against terrorism. Courts and law enforcement agencies, which normally act as mediators between the victim and the offender, assume villains' role in prosecuting terrorism offences by surpassing human rights guarantees for the suspects and using terrorism as a governance

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(Cambridge University Press 2013), 159–60 cited in Miles Jackson, *Complicity in International Law* (Oxford University Press 2015), 189.

<sup>62</sup> Article 10 of the Rome Statute of the ICC stipulates, 'nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.

tool. The 'traditional' victims – those who are affected by terrorist acts – also become the new 'mediators' in the discourse on terrorism, while their suffering transmits a message of intimidation or coercion. Individual states must cooperate and rely on international bodies, such as the UN to push the agenda forward and set the parameters for future agreement on the international definition of terrorism. Yet, in doing so, they must also address the implicit biases that this paper has discussed. Many of the most controversial issues in the debate on the international definition of terrorism – the issue of intent, the international embedment of the offence, and the most appropriate branch of international law – are each linked to these implicit biases.