

International law and terrorism*: Assessment of the international legal regime against terrorism

This article is a first draft version of a research-based analysis of the international legal regime against terrorism. It presents the first results of a comparative analysis of the structure of current international treaties and agreements on the topic. This comparison allows: (1) to underline the perennial difficulty of the definition of terrorism from a legal vantage point -despite some recent developments in international law on the fight against threats to international security and peace; (2) to identify common elements to the treaties which make up the "hard-core" of the international legal regime against terrorism. Finally this document will outline some challenges including the necessity to adopt a more comprehensive convention against terrorism.

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Droit international et terrorisme: radiographie du régime juridique international sur terrorisme

Cet article développe les résultats d'une recherche préliminaire sur le régime international juridique du terrorisme. De tels résultats ont été obtenus à partir de l'analyse comparée des accords et traités internationaux universelles qui régulent le sujet. Cette comparaison a permis: 1) de signaler la persistance du problème proposé par la définition du terrorisme dans la domaine normative, bien que les développements du droit international conventionnel à la lutte contre cette menace contre la paix et la sécurité internationales sont très importants; et 2) d'identifier quelques éléments communs aux différents traités, lesquels constituent le centre du régime international du terrorisme. Finalement, on s'inventerait de quelques défis suggérés para la recherche, au-delà de la nécessité d'avancer vers l'adoption d'une convention compréhensive sur le terrorisme.

1. Introduction

The origin of the international legal regime against terrorism dates back to the second half of the 20th century. During the first global cycle of terrorism (Molano 2009) and after the terrorist attacks in Marseille on the 9th October 1934 –where King Alexander of Yugoslavia and the French Minister of Foreign Affairs Louis Barthou were killed- France presented in 1937 two bills before the League of Nations: one relative to the establishment of an international criminal court (direct predecessor of the Rome Statute 1998) and a second one relative to the prevention and punishment of terrorism. However, neither of the two ever came into force (Arend & Beck, 1993:144-145)¹.

Nevertheless, it was only after the second global cycle of terrorism –the so called *emancipatory cycle*, characterized by the progressive trans-nationalization of terrorism (Molano, 2009) - that a set of legal instruments of international law was developed in order to standardize, synchronize, and universalize the fight against terrorism. In several cases, these instruments resulted as a reaction to terrorism, such as the first convention² on Aerial Piracy and Aviation Security established by the International Civil Aviation Organization (ICAO) as a response to hijackings and other terrorist activities during the 1960s.

In addition to its reactive and consequently fragmented nature, the process leading to the construction of an international legal regime against terrorism is characterized by the difficulty posed by the so called “definitional problem” (Schmid, 2004). The definitional problem is one of the main remaining challenges yet to be satisfactorily resolved, given that the absence of a universal and comprehensive definition “questions the existence of an international legal regime against terrorism despite the number of existing legal sources (including soft law and hard law) (Molano, 2010:245).

1 However, as stated by Ramón (1993) the topic had been studied by the 3rd Conference for the Unification of the Criminal Law (Brussels 1930) the 4th (Paris 1931) –where the term “terrorist act” was first used- the 5th (Madrid 1934) –where “social terrorism” was discussed as well as the need to establish a “universal jurisdiction” for such crimes- and the 6th (Copenhagen 1935) –where international terrorism was defined as “any conduct threatening world peace”. See Ramon.

2 The Tokyo Convention of 1963, the Haye Convention of 1970, and the Montreal Convention of 1970 are “ the first stage in the development of an international regime for controlling the aircraft hijacking. (Evans, 1974: 247).

Despite all its limitations, however, the international legal regime against terrorism is a legal instrument, the result of a dozen universal international treaties³ (additional protocols and amendments), complemented by 16 conventions of limited scope adopted by several international or regional organizations.

International Universal Treaties against Terrorism	
Year	Name
1963	The Tokyo Convention on offences and certain other acts committed on board aircraft
1970	The Hague Convention on the unlawful acts of seizure or exercise of control of aircraft in flight
1971	Montreal Convention on unlawful acts against the safety of civil aviation
1973	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.
1979	International Convention against the Taking of Hostages
1980	Convention on the Physical Protection of Nuclear Material
1988	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.
1991	Convention on the Marking of Plastic Explosives for the Purpose of Detection
1998	International Convention for the Suppression of Terrorist Bombings
1999	International Convention for the Suppression of the Financing of Terrorism
2005	International Convention for the suppression of acts of nuclear terrorism
2010	Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation

Figure 1. International Universal Treaties against terrorism (the author)

Regional International Treaties against Terrorism	
Year	Name
1971	Organization of American States Convention to prevent and Punish the acts of terrorism taking the Form of. Crimes against Persons and Related extortion that are of International Significance.
1977	European Convention on the Suppression of Terrorism
1987	South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism
1998	Arab League. Convention on Terrorism
1999	Convention of the Organization of the Islamic Conference on Combating International Terrorism
1999	The African Union Convention on the Prevention and Combating terrorism
1999	Commonwealth of Independent States. Convention on Combating International Terrorism
2001	Shanghai Convention on Combating Terrorism, Separatism, and Extremism
2002	Organization of American States Inter-American Convention against Terrorism
2005	Council of Europe Convention on the Prevention of Terrorism
2005	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

Figure 2. Regional International Treaties against terrorism (the author)

3 This means that the treaties are open and subject to ratification or accession by any country and differ from other regional instruments limited to a specific number of states or a region; therefore, their scope and application is much more limited than other universal international treaties.

The purpose of this article is to make a brief assessment of the international legal framework against terrorism. The document identifies common structural elements of current legal instruments against terrorism as well as the prevention, punishment and suppression of the different forms of terrorism.

This research –descriptive-comparative- leaves out other international norms (which proceed from other international sources) that may contribute to the development of the international regime against terrorism. Nevertheless, these norms are worth mentioning.

The first of these norms are the resolutions adopted by the United Nation Security Council. Chapter VII of the UN Charter sets out the UN Security Council's powers to maintain peace. Despite their lack of precision these resolutions have significantly contributed to the development of the legal framework in the fight against terrorism.

To date, the UN Security Council has adopted nearly forty resolutions against terrorism⁴. Some of the resolutions are merely descriptive and reflect the international community's rejection of terrorist attacks⁵. Others impose sanctions either by enforcing coercive measures against a country or an individual or a group of individuals involved in committing terrorist attacks⁶. Finally, other resolutions are more explicit. They clearly state the principles, norms and regulations against terrorism⁷, however, none of them includes an explicit definition of terrorism.

The General Assembly of the United Nations has also explored the topic. Since the 1970s over 60 resolutions have been adopted, most of them after 2001. The topic was first part of the General

Assembly's daily work under the name "Measures to prevent International Terrorism". Later it was changed to "Measures to eliminate International Terrorism" (Peterson, 2004:175-176).

The resolutions adopted by the General Assembly of the United Nations, unlike those of the Security Council, have no legal force, and are a typical example of *soft law*. However, their role in the consolidation of the international legal regime against terrorism should not be underestimated. They are the cornerstone of several international conventions and treaties that have been ratified by several countries.

On the other hand, these resolutions often contain medium and long term action plans. For example, resolution 60/288 of 2006 adopted "the United Nations Global Counter-Terrorism Strategy"⁸ which has an undeniable influence in the way terrorism is both tackled and understood in the international arena.

Several general characteristics and traits can be identified in the way the UN General Assembly has tackled terrorism:

- a) For some time, terrorism was directly linked to the relationships among states (Resolutions 25/2625 and 25/2734 of 1970 and resolution 39/159 of 1984).
- b) All forms of terrorism are unequivocally condemned (Resolution 40/61 of 1985)
- c) Lastly, both, the resolutions adopted by the UN General Assembly and the Security Council, lack a specific definition of terrorism due, for the most part, to the unfeasibility of reaching a conceptual definition of terrorism⁹.

4 The first resolution was adopted in response to a terrorist attack. The UN resolution adopted in September 1970 reflects the global concern regarding "the threat to innocent *civilian* lives from the hijacking of *aircraft*" (Mouangué, 2008). However, it is only after 1990 that the UN Security Council adopts a firm posture regarding terrorist attacks.

5 For example, The United Nations adopted Security Council Resolution 1465 on February 13, 2003 condemning the attack against the Club el Nogal in Bogota Colombia, by the Revolutionary Armed Forces of Colombia (FARC).

6 For example, resolutions 1054 and 1070 of 1996 impose an air and economic embargo on Sudan after the assassination attempt on President Hosni Mubarak of Egypt and denying extraditing a number of suspects involved in such investigation.

7 Resolution 1373 of 2001, adopted after the terrorist attacks on September 11, is a paradigmatic example of such resolutions. It includes decisions adopted in other international treaties that had not been ratified at the time; this decision made these treaties binding and they became applicable in themselves (self-executing).

8 A similar resolution had been adopted in 1994, Resolution 49/60 which adopts "The declaration on Measures to eliminate International Terrorism" as well as resolution 51/210 of 1996.

9 For example, the work developed by the Ad Hoc Committee created by Resolution 28/3034 of 1973 regarding the relationship between terrorism and national liberation movements or wars of self-determination.

➤ 2. Terrorism, the definitional problem

Undoubtedly, as we mentioned before, the definitional problem remains the most important obstacle in the fight against terrorism internationally; furthermore, the definitional problem is the most characteristic trait common to all the instruments that make up the international legal framework against terrorism.

As a result, the quest for a unitary paradigm for structuring a comprehensive definition that resolves the conceptual misunderstandings and that consolidates the current legal framework is a problem constantly being tackled by the international community. However, little progress has been made toward developing an acceptable definition of terrorism.

The main problem is (but not exclusively) political. It has to do with the use of the term in the political discourse, the nature of terrorism and the accumulated prejudice (Molano, 2010:234). This is perfectly exemplified by the debate on the relationship between terrorism and the movements of national liberation (Higgins, 1997:15, Ganor, 2001)¹⁰. In fact, while several universal treaties and conventions against terrorism do not comprise any differences or exceptions in the relationship between terrorism and the movements for national liberation, several regional conventions¹¹ recognize the legitimacy of the fight for self-determination and independence. Hence, a number of actions with liberation purposes (including several forms of violence) would not be considered as terrorism.

The United Nations is currently working in order to cut the *Gordian Knot* of the definitional problem,

10 An example of its influence is seen in the Rome Statute which establishes the International Criminal Court. The difficulties posed by the definitional problem of terrorism, prevented the adoption of measures against terrorism among the crimes within the jurisdiction of the Court. However, some terrorist attacks fall under the jurisdiction of the court: in the end, terrorism is an illegal form of clandestine warfare, according to the International Law of Armed Conflict (Marcinko, 2008).

11 The Arab convention on terrorism of April 1998; The Convention of the Organization of the Islamic Conference of 1991 regarding the fight against international terrorism, and the OAU Convention of 1999 on the Prevention and Combating of terrorism.

however, no definite solution has been devised to completely overcome the problem, which means that, there are no conventions specifically giving a general description of what could be considered a terrorist attack. Nevertheless, the UN General Assembly, through resolution 54/110 of 2000 establishes the elaboration of a comprehensive convention on international terrorism.

➤ 3. The hard core of international treaties against terrorism

Despite the atomization and breakdown of the definition of terrorism, it is possible to infer, through an analysis of the numerous treaties and conventions (international and regional), a series of characteristics and structural elements that make up the “hard core” of the international legal regime against terrorism. These common elements give the regime some coherence, despite the lack of a comprehensive definition, since they provide a point of convergence for states to prescribe conducts, proscribe certain actions and synchronize expectations.

3.1. The characteristics of the conventional international law against terrorism

Before making the inventory of the elements that constitute the “hard core” it is important to note certain characteristics of the conventional international law against terrorism.

First, it is an eminently reactive legal form, in other words, it is the gradual reaction or response to international or transnational terrorist acts¹² and to the evolution of terrorism throughout the global cycles of terrorism (Molano, 2009).

These types of instruments have inter-party effects, and therefore, the commitments that emanate from them can not be imposed upon states

12 The distinction between the different forms of terrorist actions is not random (Reinares, 2005).

that have not ratified them -unless there is some sort of legal remission from other treaties that such state might have ratified¹³. It should be remembered that international law against terrorism is fundamentally decentralized as it establishes legal relationships among coordinated and not subordinated entities (Countries).

As we mentioned before, the conventional law against terrorism lacks a comprehensive definition. This explains why all the conventions whether restrict their reach in function of a definition applicable only to the execution of their own pronouncements (and therefore, inapplicable to other situations) or prefer to list a number of typified conducts as terrorist acts, and therefore, punishable under the terms and conditions established by the law without actually defining terrorism *per se*.

Lastly, to a certain degree, the efficacy of all the international treaties and conventions against terrorism is conditioned by the fact that states must consent to the jurisdiction of an international tribunal to sit in judgment over the dispositions contained in them.

3.2. The hard core of conventional International law against terrorism

If the treaties and conventions on international law are analyzed, it will be possible to find that all of them share a number of common features, some of which are identical from treaty to treaty. These common features can be called the “hard core” of the conventional international law against terrorism since they are the foundation over which the international regime against terrorism is built. They are the main framework within which such international regime will evolve and take shape.

Therefore, the hard core allows establishing the fundamental principles of the international fight against terrorism, as well as delimiting the basic structure of international treaties on terrorism. This basic structure comprises:

1. The classification of a series of conducts as terrorist acts. Countries have to incorporate these conducts in their legal systems and establish the listing and other regulations including sentences.
2. Clauses that stipulate that an international binding instrument is a precondition for the application of the treaty or the convention.
3. Jurisdictional regulations.
4. Norms regulating the procedures for capturing and prosecuting a suspect of a terrorist attack and the way other countries are notified of such events.
5. Establishment of the principle *aut dedere, aut iudicare*.
6. Confirmation of the guarantee of territorial sovereignty.
7. Non-refoulement intended to ensure the defense of the fundamental rights of the defendant.
8. Prohibition of the “political crime exception”
9. Guarantee of the due process and equal protection clauses.
10. Clauses substitution the extradition treaty
11. Delegation for the resolution of controversies

3.2.1. Classification of conducts

Given the difficulty to establish a definition of terrorism, the international law has laid down a series of guidelines to determine the illegal and deliberate actions that are qualified as terrorist acts. Without regard of the situation, countries should prevent, suppress, and punish any of these actions and include them in their legislation. It is worth noting that the international regime against terrorism is, to some extent, a criminal regime and, therefore, it is subject to the general principles of law.

As a result, member countries are compelled to follow the policies comprised in the accords and to take the necessary measures to avoid terrorist acts within and outside their borders. Moreover, countries are committed to exchanging the necessary information as well as to taking the necessary measures to detect, prevent, suppress and investigate any of the crimes and conducts comprised in the treaty.

¹³ For example, this is the case of the Inter-American Convention against Terrorism and the Shanghai Convention on combating Terrorism Separatism and Extremism. Another exception

The way the criminal conducts are formally laid out in the numerous treaties follows the same pattern as most national criminal legislations: “a person commits and offence when...”, followed by the description of such conduct and the circumstantial elements (time, place, *modus operandi*) which, therefore, set out the type of crime and the sanctions to be imposed on the offender.

3.2.2. The international component

The applicability of all treaties is subject to the country where the terrorist acts take place. This means that a terrorist (widely understood), the victim, or the place where the terrorist act occurs have to connect at least two different countries (Gilbert, 1995; Williams, 1988).

3.2.3. Jurisdictional regulations

Given the international character of the crimes under the jurisdiction of the international regime against terrorism, national jurisdictions are applicable even to crimes committed outside national borders when the crimes have direct effect on the country or when they are committed by a national of that country. This is one of the most peculiar characteristics of this regime (Freestone, 1997).

The treaties and conventions on terrorism point out that, member-states must exercise their jurisdiction if:

1. *Competence ratione loci* related to the arrest of ships *in* maritime zones. The territorial jurisdiction of courts extends over the state’s territory.
2. *Pro ratione personae* related to jurisdiction based on the nationality of the suspect.
3. A crime was committed on board the ship during its passage or landing with the suspect on board.
4. The refusal of a country to extradite suspects or criminals to another country that has established its contradiction.

In general, countries have the right to exercise their jurisdiction if the offence is committed against a national of that State; or, if the offence is committed against a State or government facility of that State abroad.

This does not mean that countries have some sort of universal jurisdiction based on the nature of the crime without any regard to other considerations such as the time and place of the crime. However, it is undeniable that, a number of broad regulations have been developed in order to prevent terrorist from taking advantage of legal gaps, the legal incapacity of certain countries or claims over sovereignty rights.

3.2.4. Arrest procedures and notification of other states

Any arrest, detention, or other commitment to custody which results in a foreign national being incarcerated triggers consular notification requirements under the treaty or convention signed by the Country making the detention. Moreover, the host country must immediately initiate procedures for the purpose of clarification.

Every country legitimately concerned must be immediately notified of the detention in order to start extradition proceedings where required.

3.2.5. Conscrption of the *aut dedere, aut iudicare* principles

An obligation to prosecute or extradite is present in various forms in a number of multilateral conventions and other treaties dealing with the suppression of terrorism. The imposition of that obligation with respect to terrorism bespeaks widespread and increasing recognition of the principle that states are bound to act, either through prosecution or through extradition, to ensure that individuals who perpetrate harms detrimental to fundamental interests of the international community are brought to justice (Cassese, 1989).

It is possible that a state may refrain from exercising its jurisdiction fearing some sort of retaliation on the part of other state. This principle solves the problem of impunity by creating an international network to prosecute and bring to justice expeditiously the perpetrators and those responsible for terrorist acts¹⁴.

¹⁴ This does not guarantee “dodging” the sentence. The obligation that results from this principle, it is worth noting, is judging (not sentencing). This is in order to guarantee the suspects their rights. Nevertheless, this may also result in impunity. See Münchau, 1994.

On the other hand, it is a mechanism to protect the sovereignty of states by giving them the possibility to judge each case individually. Paradoxically, impunity is also possible in states with weak or not very independent legal systems.

3.2.6. Territorial impenetrability

Several international treaties and conventions ratify the principle of non intervention in the internal affairs of another country which is established by article II of the UN Charter. Moreover, these documents have adopted the “anti-Entebbe clause”¹⁵ (Levitt, 1989), which states that “Nothing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations”

3.2.7. Non-refoulement

This principle finds its origin in the International Regime for Refugees¹⁶, it establishes (despite the principle of *dedere aut iudicare*) the idea that it is illegal for states to expel or return (“refouler”) refugees who have a well-founded fear of persecution given their race, religion, nationality, ethnicity, political views, or when the extradition supposes a threat to the well-being of a person.

3.2.8. Banning the Political Offence Exception

Any demands of extradition or legal assistance should not be denied on the basis of a political offence or in relation to a political offence inspired by political reasons. Terrorists acts are not considered a political offence and therefore they aren't part of the Political Offence Exception (Gilbert, 1985).

Recent developments of this principle are included in the International Convention for the Suppression of the Financing of Terrorism. The convention states that “a Party shall not decline to render mutual legal assistance for criminal matters within the scope of such convention on the ground of bank secrecy (which in many cases do not necessarily represent a basis for extradition or arrest).

3.2.9. Guarantee of due process and fundamental rights

Differences between the fight against terrorism and the protection of human rights grew after the terrorist attacks in September 2001 when the United States decided to tighten its national security measures; which in many cases is right on the international human rights law borderline. These differences have echoed more or less strongly in the United Nations General Assembly where they have become an issue during the adoption of a resolution.

Paradoxically, all the conventions adopt a series of instruments related to the protection of human rights and the treatment of a terrorism suspect. For example, the due process is guarantee to all suspects including legal assistance as well as other legal rights adopted by most international agreements on human rights.

International criminal law has impacted prisoners' rights in ways that they should not interfere with other obligations and responsibilities of countries (such as protection of their diplomats and its citizens). Moreover, prisoners suspected of having committed terrorist acts should be recognized their rights, fair treatment including their right to enjoy the legal privileges accorded to the rest of the population, the applicable dispositions of the International Law, including the International law on Human Rights.

3.2.10. Substitution clause to extradition agreements

In principle, extradition is operational only after an extradition agreement has been signed by two member-states of one of the international treaties or conventions. However, when no agreement exists, or the offense is not an offense listed in the agreements, then the international conventions and treaties on

15 Operation Entebbe was a hostage-rescue mission carried out by the Israel Defense Forces (IDF) at Entebbe Airport in Uganda on 4 July 1976. The government of Uganda was never consulted about the rescue mission. What Uganda perceived as a clear violation of its sovereignty was seen by Israel as an act of legitimate defense. Despite pressure by the government of Uganda, the UN security Council never gave any declaration on the case. These facts constitute a cornerstone on the fight against terrorism and the treatment of the sovereignty of states. The “anti-Entebbe clause” was first used in 1979 in the International convention against the taking of hostages and has ever since been included in all international treaties on terrorism.

16 See, article 33 of the Convention relating to the status of Refugees (1951).

terrorism will fill the gap (serve as substitutes) and provide all the legal foundations for extradition.

This clause complements the *aut dedere aut iudicare*, principle which, considers that the agreements on extradition between the parties comprise all the offenses of other international treaties on terrorism signed up to date, and shall include any future agreements.

3.2.11. The delegation of dispute settlement

In the event of a dispute between Parties as to the interpretation or application of a Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, within a time span no longer than necessary. In case this and other instances are exhausted, the parties may decide on the submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice (Article 36 of the Rome Statue), as agreed upon by the Parties concerned.

It is worth noting that, states party to a convention or treaty on terrorism may use reserves regarding the clause of dispute settlement.

Conclusions

The comparative analysis of these twelve international universal law treaties and conventions against terrorism reveals that, despite the legal differences between them, regardless of the number of regional agreements, and in spite of the lack of a clear definition of terrorism, there is, in practice, an international regime that provides the necessary tools (although they may be insufficient sometimes) to cooperate in the fight against terrorism.

This regime has been developed thanks to the accumulation of experience and the lessons learned after a collective effort of the international community to fight terrorist threats. The number of international agreements and accords on terrorism make up the

structure for a standard international instrument against terrorism, which this document has identified as the hard-core of the fight against this threat. It is there, where an integral legal framework can be found, in other words, a comprehensive international convention against terrorism which, may eventually and at least legally, find a solution to the “definitional problem”.

Nonetheless, this is but one of the many pending challenges. It is still important to perfect the existing mechanism and to create better ones in order to make the fight against terrorism a more efficient and coordinated internationally.

For example, the elaboration -by the United Nations Security Council- of a “universal list” of terrorist organizations subject to the international regime against terrorism could be one of the first mechanisms against terrorism. This could contribute to the elimination of ambiguities normally present in the treatment of terrorism among countries and other organizations. However, this is not an error free process.

Another alternative is that, in the mid-term, the International Criminal Court would have jurisdiction over offenses considered as terrorist acts by the international regime studied here. It is a plausible possibility, given that the ICC has already advanced towards acquiring consensus and establishing a legal framework among nations.

A more ambitious step would be the express recognition of a principle of “universal jurisdiction”. However, this possibility faces several major consensual difficulties including the definition of terrorism.

On the other hand, the victims have gone unnoticed, as though they were invisible to the eyes of the international regime against terrorism as it is today. There is no doubt that (as in the case of the international criminal law and the international law of armed conflict) the international law against terrorism has adopted a number of instruments relating to the protection, assistance and reparation of any damages

caused to individuals. Some declarations made by the UN General Assembly and the UN Security Council seem to be aimed in that direction.

Lastly, it is essential to insist on the importance of the international regime on terrorism as a point of reference for the settlement of disputes among nations, and the protection of liberty and justice for all people in the fight against terrorism. It is possible that this process has, in recent years, taken a few steps backwards threatening certain democratic values and liberties.

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