Faculty of Law

Victoria University of Wellington – Te Herenga Waka

LAWS 532 Counter Terrorism and Security

Research Essay

The Definitional Struggle of the International Counterterrorism Regime: Can Institutional Deference Solve the Problem?

Word Count: 7,037 words (excluding table of contents and footnotes)

Submitted: 4 June 2021

Table of Contents

1. Introduction 3

2. The Definitional Struggle in Counterterrorism 4
   2.1 A Political Struggle?
   2.2 Fragmentation and the Global Counterterrorism Regime
   2.3 A Legal Solution?

3. Institutional Deference 10
   3.1 What is Institutional Deference?
   3.2 Institutional Deference as a Coordination Mechanism
   3.3 Flow Trends and Features of Institutional Deference
   3.4 Why Deference is an Attractive Mechanism
   3.5 Criticisms

4. Applying Institutional Deference to the Definitional Struggle 18

5. Further Implications of Institutional Deference 22

6. Conclusion 23

Bibliography 26

1. Introduction

A feature of modern terrorism is its truly global scale. In the case of the attacks on September 11th 2001, it was planned in mostly in Afghanistan, occurred within the territory of the United States by 19 individuals of four different nationalities (Egypt, Saudi Arabia, UAE, Lebanon) resulting in nearly 3,000 immediate victims of various national, ethnic and societal backgrounds.[1]

The transnational characteristic of terrorism has triggered an array of international mechanisms to prevent, deter and punish terrorist acts. But ironically, the international society has been doing this without a common definition. Even for the most well-rounded definition available in the existing counterterrorism regime[2] which has the support of 189 States, reservations against it by a number of States and declarations by others questioning the legality of such reservations[3] reflects the unsettled disagreements between States on a comprehensive definition. The absence of a comprehensive definition of terrorism has also cultivated a regime that is significantly fragmented both in terms of governance and law.

Nonetheless, global counterterrorism measures are being actively discussed, created and applied in the international fora. Although nothing is perfect, the continued efforts of international bodies to respond to terrorism and strive toward coherence in their response without a central definition begs the question of 'how' and whether this behaviour mitigates the problems arising from a lack of a comprehensive legal definition in international law.

This paper aims to answer this question by identifying a practical method of 'institutional deference' that international bodies are using to work through the complex architecture of international law on terrorism and maintain that, despite the method being an effort to reduce overlap and conflict of rules, it ultimately does not make meaningful contribution to relieve the problems of the definitional struggle.

---

[1] CNN Editorial Research, "September 11 Terror Fast Facts" (18 September 2020) CNN < https://edition.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html>.
[2] International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197 (opened for signature 10 January 2000, entered into force 10 April 2002), art 2(1)(b).
[3] Based on the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980), art 19(c).

The paper will be structured into four sections. The first section will describe the definitional struggle as a political struggle which cultivated a fragmented regime. The second section will introduce the concept of institutional deference and elaborate on the effects of its flow trends and features. The third section will apply institutional deference to the definitional struggle to reveal that its impact on both the political elements of the problem and its legal consequences is critically limited. Lastly, the fourth section will discuss why institutional deference may still have relevance to the counterterrorism regime and its struggles despite its limitations.

2. The Definitional Struggle

2.1 A Political Struggle?

The definitional struggle in the counterterrorism encompasses a host of complex political, cultural and societal issues and often involves longstanding historical grievances. Because these contributing factors come intertwined, pursuing the cause of the struggle can produce academic findings in various fields in their own right. Especially, analysing the definitional struggle with a focus on international law invites difficult discussions on setting the scope in terms of where the political ends and the legal begins or how extensively one intends to consider the interrelationship between domestic, regional and international laws.

Amidst these difficult questions, the focus of this paper is planted on the view that the definitional struggle and its implications for international law are based on the political struggle between States. On the global level, the centre of the deadlock is placed around contesting views of States and the failure of the international society to agree on carve out a common legal definition which shows that the problem at hand is inherently political, and one with critical legal implications.

Based on this view, the paper intends to shed light on two main flashpoints regarding the definitional struggle that are key to understanding the debate as a *political* struggle: 1) terrorist or freedom fighter and 2) a case-by-case approach or codified legal definition.

The issue of 'your terrorist, my freedom fighter' has been a long-standing issue in the discussion of international terrorism. It has been a recurring argument for Third World

countries that suffered colonialism and sought exemption for political struggles fought for national liberation or self-determination using violent methods.[4] After political gridlock since the 1950s, there was breakthrough most notably with the 1994 General Assembly resolution or 'Measures to Eliminate International Terrorism'.[5] It was the first United Nations (UN) resolution that did not specifically mention exemptions for a 'legitimate struggle for freedom and independence' and was passed without a vote[6]. Disagreement around exempting national liberation movements persisted into the 21st century[7], but UN resolutions including Security Council resolutions continue to adopt this approach.

The conflicting views of States on this issue can also be understood as whether to declare no exceptions for any motive regarding violent 'terrorist' acts, or in other words, acknowledge there are some motives that should justify violent action. Compared to the discussions back in 1950s, modern terrorism has departed from anti-colonial or pro-national liberation to violent extremism which left the 'freedom fighter' narrative to lose relevance nowadays. Therefore, this issue may seem subdued by the growing consensus among States in general toward condemning all forms of terrorism, but as discussed below regarding the Draft Comprehensive Convention, the problem is yet to be fully unresolved.

Another political flashpoint is the underlying power struggle between States that prefer to determine terrorism on a case-by-case basis or based on a solid legal definition. Friedrichs refers it as the power "to determine the enemy" and that a hegemon would prefer a system in which terrorism could be identified on a case-by-case basis for it to exercise maximum influence.[8] As the power to determine whether a case is terrorism over another is reserved by powerful states, they also use normative discussions to associate certain types of terrorism – such as 'jihadist terrorism' – as 'bad' and redefine what is 'appropriate' or acceptable for counterterrorism in order to promote their own national security objectives or steer legal responses that is favourable.[9] On the other hand, some States may argue the necessity of a

[4] Thomas Weigend "The Universal Terrorist" (2006) 4 JICJ 912, at 921.
[5] *Measures to Eliminate International Terrorism* GA Res 49/60 (1994).
[6] Weigend, above n 4, at 920.
[7] Jörg Friedrichs "Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism" (2006) 19 LJIL 69, at 77.
[8] Friedrichs, above n 7, at 89; also see M. Cherif Bassiouni "Legal Control of International Terrorism" (2002) 43 HarvIntlLJ 83, at 92.
[9] R. Heller, M. Kahl and D. Pisoiu "The 'Dark' Side of Normative Argumentation: The Case of Counterterrorism Policy" (2012) 1 Global Constitutionalism 278.

legal definition precisely because it is such arbitrary power that must be limited by legal boundaries.

As States remain the key player in the development of international law, their political struggle and disagreement is a natural barrier for the discourse on a comprehensive definition to go forward. The flashpoints above have been key drivers in fueling a diversified legal response that ultimately led to intensifying the fragmentation of the global counterterrorism regime.

2.2 Fragmentation and the Global Counterterrorism Regime

Fragmentation in global regimes and architectures is understood as an inevitable phenomenon in the globalised world we now live in – the question should be to what degree are regimes and architectures fragmented rather than its existence.[10] The global counterterrorism regime is no exception. This section will focus on the influence of the definitional struggle and its main political drivers on fragmentation of the global counterterrorism regime.

The phenomenon of fragmentation can be generally applied where global architectures or regimes are consisted of various international organisations, treaties, and where state and non-state actors contribute to its rule-making that can simultaneously overlap, complement or conflict with one another.[11] If a regime has one or a small number of organisations or treaties that have a central role with other institutions that function as satellites, the level of fragmentation is relatively low. For example, the international trade regime has the World Trade Organisation at its center while other regional bodies (e.g. Asia Pacific Economic Cooperation) or 'clubs' (e.g. Group of 20), numerous bilateral trade agreements between states are also included in the regime that support the overall architecture. The regime is still fragmented but with a strong centerpiece that others adhere to in terms of laws, principles and regulations, it can be seen as a relatively centralised regime.

[10] F. Biermann, P. Pattberg, H. von Asselt, F. Zelli "The Fragmentation of Global Governance Architectures: A Framework for Analysis" (2009) 9 Global Env Pol 14, at 17-18.
[11] The climate change regime is one of the most familiar international regimes we know that experience significant fragmentation. See also R. Keohane and D. Victor "The Regime Complex for Climate Change" (2011) 9 Persepctives on Pol 7; Biermann et al., above n 10.

On the other hand, the counterterrorism regime manifests a higher level of fragmentation. There is no 'law of terrorism' because of no foundational legal instrument nor an agreement around a general definition of terrorism, which can all be traced back to the underlying political tensions of the definitional struggle.[12] Compared to the case of the Kyoto Protocol and the Paris Agreement negotiated and adopted under the umbrella of the UN Framework Convention on Climate Change – the central legal instrument in the climate change regime – the host of conventions for the suppression of specific terrorist acts are effectively stand-alone treaties that rarely speak to each other and there is no overarching international organisation or body adequate to lead harmonisation between them. The International Law Commission (ILC) Report describes such fragmentation as "the emergence of specialised and relatively autonomous spheres of social action and structure," that leads to "conflicts between rules or rule-systems, deviating institutional practices".[13]

Especially for the counterterrorism regime, new legal instruments have been introduced to address a new threat, but on the foundation of existing bodies of law and principles which revealed particularly difficult questions on how to apply relevant law coherent with this new threat. The interrelationship between international humanitarian law (IHL) and international human rights law (IRHL) is an example that reveals those particularly difficult questions. IHL is the body of law applicable to situations of armed conflict while IHRL is applicable in both armed conflict and peacetime situations. Because often in terrorist contexts the line is blurred with added political sensitivities, the two legal regimes face situations where real substantive differences[14] and controversial interpretations[15] appear despite sharing the same starting point in terms of objective or principles such as the right to life or fair trial.

This sharply comes into perspective when we must determine the applicable law in the appropriate way within 'the terrorist versus freedom fighter' context. This not only produces conflicting views and legal approaches on similar situations but also aggravates

---

[12] Larissa van den Herik and Nico Schrijver "The fragmented international legal response to terrorism" in L van den Herik and N. Schrijver (ed) *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press, 2013) 1 at 21.
[13] Sean D. Murphy "Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project" (2013) 27 TempleIntlCompLJ 293, at 294.
[14] Helen Duffy "Harmony or conflict? The interplay between human rights and humanitarian law in the fight against terrorism" in L van den Herik and N. Schrijver (ed) *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press, 2013) 482 at 489.
[15] Duffy, above n 14, at 511.

fragmentation and hinders opportunity for future harmonisation. One of the legal solutions suggested in the ILC report to address such tensions between fragmented laws which is utilising the relationship between special and general law. The *lex specialis* is applied when there is special law applicable specifically to the situation at hand, and IHL is often understood as the *lex specialis* in situations of armed conflict. But as Duffy points out, jurisprudence has shifted toward acknowledging a more fluid approach particularly in the terrorism context where both laws can be deemed applicable.[16] Because the law is not monolithic on this issue, it ultimately leaves terrorism-related situations more vulnerable to political influence.

Another example is the *aut dedere aut judicare* principle. The obligation to prosecute or extradite is founded in international criminal law which is critical to the international effort against terrorism because it refuses to allow safe havens for terrorists. The obligation is explicitly or implicitly incorporated across the fragmented counterterrorism regime's conventions on the suppression of specific terrorist acts and key UN Security Council and General Assembly resolutions[17]. While the obligation itself has the potential to help reinforce legal obligations, norms and principles[18], the obligation to criminalise terrorist acts domestically that is often paired with *aut dedere aut judicare* in the absence of an international legal definition has led to States using the obligation to legislate "in a most subjective manner to delegitimise and demonise political opponents, associations, or other States"[19] – a particular vulnerability in relation to the political flashpoint on 'the power to define the enemy'.

---

[16] Duffy, above n 14, at 496-498.

[17] For example, International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197 (open for signature 10 January 2000, entered into force 10 April 2002), art 10(1); International Convention for the Suppression of Terrorist Bombings 2149 UNTS 256 (open for signature 12 January 1998, entered into force 23 May 2001), art 8(1); Convention on the Physical Protection of Nuclear Materials 1456 UNTS (open for signature 3 March 1980, entered into force 8 February 1987), art 10; International Convention for the Suppression of Acts of Nuclear Terrorism 2445 UNTS 89 (open for signature 14 September 2005, entered into force 7 July 2007), art 11; Convention for the Suppression of Unlawful Seizure of Aircraft 860 UNTS 105 (open for signature 16 December 1970, entered into force 14 October 1971), art 7; SC Res 1373 (2001), para 2(e); SC Res 2396 (2017), para 17, 23; *Measures to Eliminate International Terrorism*, above n 5, para 5(b); *UN Global Counter-Terrorism Strategy* GA Res 60/288 (2006), para 3.

[18] For example, see The Terrorism Financing Convention art 10; The Convention for the Suppression of Unlawful Seizure of Aircraft, art 7

[19] Michael A. Newton "Terrorist Crimes and the Aut Dedere Aut Judicare Obligation" in L van den Herik and N. Schrijver (ed) *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press, 2013) 68 at 76.

However, the principle of *aut dedere aut judicare* can have a positive influence on the coherency of the counterterrorism regime as an interlocked normative framework[20] and show unique merit in that it can be readily replicated in domestic criminal codes for States parties which in turn generates a regularity of enforcement.[21] But when normative discussions can be framed or pushed toward a certain direction based on political objectives of powerful states, as mentioned in the above section[22], it is impossible to eliminate the political element and prevent it from disrupting opportunities for legal solutions.

Interestingly, it is important to note that fragmentation does not necessarily entail normative value and is utilised as a framework to assess effectiveness in global architectures.[23] Trapp depicts the development of treaty-making in the counterterrorism context as reactive law-making[24]; her explanation on the lack of coherence is resonated in the two examples above while the potentialities pointed out by her such as relative responsiveness can be juxtaposed with positive elements of fragmentation such as flexibility and adaptability.[25]

Overall, fragmentation is a key feature of the counterterrorism regime which is endorsed and reinforced by the political drivers behind the definitional struggle. Then, does this mean the international society has been avoiding all discussions about a legal solution? The short answer is no.

2.3 A Legal Solution?

Efforts of the international society to formulate a comprehensive definition can be found in key UN resolutions and documents including the 'Measures to Eliminate International Terrorism', the UN Global Counterterrorism Strategy[26] or the 2006 UN Secretary General's Report on Uniting Against Terrorism[27].

---

[20] Newton, above n 19, at 81.
[21] Newton, above n 19, at 78.
[22] Heller, above n 9.
[23] Murphy, above n 13, at 294; Biermann et al., above n 10.
[24] Kimberley N. Trapp "The Potentialities and Limitations of Reactive Law Making: A Case Study in International Terrorism Suppression" (2016) 39 UNSWLJ 1191.
[25] R. Keohane and D. Victor, above n 11.
[26] GA Res 60/288 (2016)
[27] *Uniting Against Terrorism: Recommendation for a Global Counter-Terrorism Strategy* UN Doc A/60/825 (27 April 2004).

A Draft Comprehensive Convention on International Terrorism[28] was proposed by India in 2000 and has been debated in the Sixth Committee of the General Assembly since. Despite the numerous discussions in the Sixth Committee and consensus-building efforts, the proposal is lacking a finishing momentum with the issue of 'freedom fighters' or legitimate struggles for national liberation as one of the persisting causes.[29]

The major obstacle to a legal solution, whether it be the Draft Convention or other legal efforts to develop or crystallise norms, can be identified as the political tensions that are left unresolved which are also consolidating the regime's fragmentation. Instead of being paralysed by the political, the international society continues to utilise the existing multilateral legal framework on counterterrorism.

How do States face the challenge of navigating through the complicated structures of governance and international rules? An interesting observation suggests States may have found a practical solution: international bodies are found to often rely on the rules made by other bodies either because they possess higher level of expertise on a specific issue-area or harness binding power that impose obligations for States. This behaviour is described as 'institutional deference'.

3. Institutional Deference

3.1 What is Institutional Deference?

Multifaceted regimes such as the counterterrorism regime are constantly on a quest to achieve harmonisation of rules and effective ways of governance. International bodies develop functions stemming from their constituent instrument but in that process, many sub-bodies are created which adds to the complexity and fragmentation of rules in the international legal sphere. For example, the Counter Terrorism Committee was established through Security Council Resolution 1373 (2001) to monitor the implementation of the actions outlined in the resolution.[30] Despite its clear hierarchical relation with the Security

[28] *Draft Comprehensive Convention on International Terrorism* A/C.6/55/1 (not yet in force).
[29] Statement by the Representative of the Islamic Republic of Iran before the Sixth Committee of the 74th Session of the United Nations General Assembly (7 October 2019) at 2 < https://www.un.org/en/ga/sixth/74/pdfs/statements/int_terrorism/nam.pdf>.
[30] SC Res 1373 (2001), para 6

Council as its 'subsidiary organ'[31], its relationship with other organisations engaging in counterterrorism such as the Office on Drugs and Crime (UNODC) under the Secretariat or specialised agencies like the International Civil Aviation Organisation (ICAO) is unclear.

As an effective counterterrorism effort requires rule-making and coordination from and between these bodies, States grapple with such tasks. The fragmented legal and governance structure has created mixed implications that are not always conducive for finding creative ways to form a coherent response. But even with this environment, international organisations have been adopting an interesting mechanism to bring together scattered rules while avoiding redundancy: institutional deference.

Institutional deference[32] is studied and developed by Pratt where he identifies international organisations and bodies using deference to avoid duplication of efforts and address weak compliance in this context. The act of deference occurs when an organisation or international body chooses to utilise a set of rules from other regimes or organisations – mostly ones with specific expertise that is relevant to solve particular problems – to clarify scopes of regulatory authority to reduce jurisdictional overlap.[33] For example, the expertise of the International Atomic Energy Agency is acknowledged in numerous international bodies. It is also a key body supporting implementation of treaty obligations in relation to nuclear terrorism. States that are party to relevant instruments rely on guidelines of the International Atomic Energy Agency (IAEA), monitoring and verification processes to implement their treaty obligations.[34]

In order to understand how institutional deference occurs, this section will begin with identifying the environment in which institutional deference thrives, key trends or flows of

---

[31] Charter of the United Nations, art 29.

[32] Deference here should not be used interchangeably with deference in the meaning of judicial deference. The idea of giving up power or authority over an issue it can exercise such power over is a concept that is shared by both types of deference; however, they are used in completely different contexts. Judicial deference is performed upon the relationship or dynamics between the judiciary and executive in a domestic setting which is inadequate and inappropriate to discuss the interactions of institutions on a supra-national level as is the case of the counterterrorism regime. For further reading on judicial deference in the context of counterterrorism, see RH Wagstaff "Judicial Deference" in RH Wagstaff (ed) *Terror Detentions and the Rule of Law* (Oxford University Press, 2014) 282.

[33] Tyler Pratt "Deference and Hierarchy in International Regime Complexes" (2018) 72 IO 561, at 562.

[34] Convention on the Physical Protection of Nuclear Materials 1456 UNTS 124 (opened for signature 3 March 1980, entered into force 8 February 1987); International Convention for the Suppression of Acts of Nuclear Terrorism 2445 UNTS 89 (open for signature 14 September 2005, entered into force 7 July 2007), art 8.

deference and examine why deference is an attractive coordination mechanism in the context of the counterterrorism regime.

3.2 Institutional Deference as a Coordination Mechanism

Institutional deference is a mechanism States and international bodies use to coordinate amidst regime complexes such as the counterterrorism regime. These are regimes with a "rich ecosystem of diverse regimes and types of laws" where States engage in regulatory arbitrage[35] – if there are multiple rules on the same issue, States have a range of options and platforms to choose from and decide what suit their interests best. The result is not only inconsistency of rules and standards but that the overall environment rarely translates into governments signing up for more legal obligation and thus leading to a net effect of reduced compliance of rules, norms and standards.

In this environment, adopting rules and standards already set by other international organisations through deference is a practical solution for coordinating responses rather than harmonisation of rules or institutional centralisation. The differences between membership, mandates and decision-making mechanisms between multiple organisations make either harmonisation or institutional centralisation an impossible political and legal task.[36] In the case of aircraft hijacking, the Convention for the Suppression of Unlawful Seizure of Aircraft specifically points to the International Civil Aviation Organisation (ICAO) as the coordinating international organisation for States on this issue.[37] It was a natural choice for States grappling with an increasing level of hijacking incidents at the time to view ICAO as the best platform to deal with not just the problem at hand but also for ongoing responses related to aviation-related terrorism in the future. If States were to incorporate or rearrange the large body of ICAO rules and measures that have counterterrorism implications with other areas of counterterrorism in the name of harmonisation or centralisation, it would have been a truly mammoth task that creates immense duplication of efforts.

[35] Annelise Riles "Managing Regulatory Arbitrage: A Conflict of Laws Approach" (2014) 47 CornellIntlLJ 64, at 65.
[36] Pratt, above n 32, at 567.
[37] Convention for the Suppression of Unlawful Seizure of Aircraft 860 UNTS 105 (open for signature 16 December 1970, entered into force 14 October 1971), art 10.

The sustaining effect of deference in relieving such duplication is the division of labour. Pratt identifies is a division of labour that is strengthened between organisations engaging in deference. He uses the example of the European Union (EU), Organisation for Security and Cooperation in Europe (OSCE) and Shanghai Cooperation Organisation (SCO) to illustrate that division of labour on sub-issues such as terrorism financing and transportation security is enhanced between organisations that actively engage in deference compared to those that do not.[38] Each organisation, despite having jurisdictional overlap, can gradually reorient or reallocate its resources and consensus-building momentum toward specific issue-areas that it can specialise on instead of trying to take on all the relevant issues in counterterrorism.

However, an interesting feature is that by engaging in deference, these bodies are essentially choosing to effectively "accept another's exercise of authority" or "give up" its rule-making authority at the price of becoming a rule-setter.[39] There is a key difference between surrendering authority through delegation and other mechanisms of global governance such as delegation. At the international level, delegation occurs when States transfers parts of its sovereign authority to establish rules to organisations. Because such organisations are set up by States to establish rules, their operations and functions are often steered by the interests of States parties. In this sense, delegation of authority is a way to pursue state interests by using international organisations.[40] On the other hand, deference departs from delegation on three points. First, the main actor of deference is international organisations not States. Second, because membership and mandates between organisations involved in deference are mostly – if not in all cases – different, the deferring organisation does not have the same kind of authority to "give up" as is the case with States and their sovereignty. Third, organisations that adopt rules of other organisations are not placed under the direct influence or steered by the deferred organisation in the way international organisations reflect the interests of its States parties.

3.3 Flow Trends and Features of Deference

[38] Pratt, above n 32, at 576-579.
[39] Pratt, above n 32, at 562.
[40] D. Hawkins, D. Lack, D. Nielson and M. Tierney "Delegation under anarchy: states, international organizations, and principal-agent theory" in D. Hawkins, D. Lack, D. Nielson and M. Tierney (eds) *Delegation and Agency in International Organizations* (Cambridge University Press, 2006) 3.

Pratt identifies a number of trends and features of institutional deference in counterterrorism, and it is useful to mention three trends that has particular relevance in understanding the implications of deference within the context of the definitional struggle. First, institutional deference flows predominantly in one direction and is rarely reciprocated.[41] Among two organisations have jurisdictional overlap within the regime, Pratt's analysis showed that it usually results in one of those organisations pre-dominantly at the receiving end of deference. In the case of the counterterrorism regime, the most popular recipient of deference was the Security Council and other UN organs and bodies including the General Assembly.

For example, the Asia-Pacific Economic Cooperation (APEC) is a regional economic forum that promotes the Asia-Pacific region's economic prosperity and growth through regional economic integration.[42] But it has also been dedicated to support the global efforts on counterterrorism by issuing high-level statements[43] and establishing the Counter Terrorism Working Group (previously Task Force from 2003) in 2013 which mandate has been renewed through its Strategic Plans.[44] Reflecting its economic roots, APEC defers to Security Council resolutions particularly around its sanctions regime and the financing of terrorism through its Working Group[45]. However, deference to APEC on its regional efforts have not been reciprocated by the Security Council.

Secondly, deference patterns reflect the cooperation problem of the regime.[46] Effective cooperation in counterterrorism requires the effort of a strong majority of states if not all; if one state fails or is unwilling to cooperate, the consequences fall on everyone. Under this cooperation problem, it is important to set up a central platform with a wide audience to reiterate obligations as well as construct a normative narrative that highlights the urgency and

---

[41] Pratt above n 32, at 573-574.
[42] "What is Asia-Pacific Economic Cooperation?" APEC Homepage <https://www.apec.org/About-Us/About-APEC>.
[43] APEC Leaders' Statement on Counter-Terrorism (21 October 2001); APEC Statement on Fighting Terrorism and Promoting Growth (26 October 2002)
[44] APEC COUNTER-TERRORISM WORKING GROUP STRATEGIC PLAN 2018-2022 (updated 9 October 2017) <https://www.apec.org/About-Us/About-APEC/~/-/media/Files/Groups/CT/18_sce1_006_CTWG-strategic-plan-2018-2022_PRINT.docx?la=en&hash=E6099F85D9AF76B96DB0CE768089C03DB592DE6F&hash=E6099F85D9AF76B96DB0CE768089C03DB592DE6F>.
[45] For example, APEC Counter Terrorism Working Group, *Halt Terrorist Financing: APEC Workshop on Targeted Financial Sanctions Regime*, E Booklet (2018), at 4-9; APEC Consolidated Counter-Terrorism and Secure Trade Strategy (updated 21 September 2019), at 8.
[46] Pratt, above n 32, at 573.

importance of everyone's participation. This explains the high flow of deference towards the General Assembly; despite its limited legal power, the General Assembly is the most authoritative body with the largest audience among international organisations which plays a crucial part in building global consensus and creating or crystallising norms.

An interesting pattern was that the frequent point of deference by the General Assembly was often non-binding but symbolic and comprehensive documents such as the UN Counter Terrorism Strategy (CTS). The CTS was developed by the Office of Counter-Terrorism under the UN Secretariat as an instrument to enhance national, regional and international efforts to counter terrorism[47] and addresses not only measures directly addressing terrorist acts but also underlying social issues of modern terrorism in a comprehensive manner. The principles outlined and emphasised in the CTS such as human rights or gender equality are critical in that it consolidates the view that interpretation and implementation of counterterrorism measures and law requires a comprehensive and coherent approach, and lays a working foundation for consensus-building among Member States.

Lastly, deference reveals an informal hierarchical structure between organisations involved.[48] The Financial Action Task Force, for example, is an inter-governmental body established by the G-7 that lack legal hierarchical – or any for that matter – relationship with the UN but is singled out as the international body that the Security Council relies on in relation to the financing of terrorism. Similarly, but within the UN structure, deference between the Counter-Terrorism Committee under the Security Council, Office of Counter-Terrorism and the UNODC under the Secretariat could also reveal a hierarchy of rules where there is no formal relationship directly between them.

3.4 Why Deference is an Attractive Mechanism

Among the three regimes tested by Pratt in his model of institutional deference, the counterterrorism regime revealed the most hierarchical structure shaped by trends of deference. A high volume of deference was flowing toward the UN organs and bodies which is explained by the outstanding trends and features mentioned above. In an effort to ask why

[47] UN Doc A/60/825, above n 27.
[48] Pratt, above n 32, at 574.

some organisations are preferred over others in the act of deference, Pratt argues that it is because States take a functionalist view of international organisations, but at the same time, seek to use these organisations to maximise their own regulatory authority.[49]

Both views are rooted in the rationalist theory of international relations that view States as the principal actor (but not the only actor) in global affairs which set up organisations and institutions to cooperate with others in order to pursue national interest. Stemming from this view, the functionalist view explains that preference among organisations is a result of States ultimately trying to solve problems more efficiently and effectively. Based on this logic, preference toward organisations that harness binding power is reflection of States' desire to ensure enforcement and effective action.

On the other hand, States are also seen as actors rationally pursuing national interest on the international stage which entails actions and strategies that maximises their power. Despite the act of deference is described as "giving up" power to make rules, if it means surrendering power to another organisation where those powerful states have stronger influence, the result is reinforcing those states' hegemonic status. This puts the finding of the Security Council being the most popular recipient of deference into perspective – if the Security Council defers to FATF guidelines, in reality this could translate into powerful economic powers having their rules embedded in the international governance and legal structure, plus the extra decision-making power established through the P-5 system.

3.5 Criticisms

Institutional deference is a highly useful mechanism for States to carry on with practical challenges of the counterterrorism regime but also for scholars trying to understand how the regime functions but also studying the implications in international law in a field where international judicial proceedings are limited due to legal restraints upon international courts such as the International Criminal Court to claim jurisdiction over terrorist crimes.[50] However, three main points of criticism can be drawn on the analysis of institutional

[49] Pratt, above n 32, at 579-581.
[50] Madeline Morris "Arresting Terrorism: Criminal Jurisdiction and International Relations" in Y. Naqvi and A. Bianchi (eds) *Enforcing International Law Norms Against Terrorism* (Bloomsbury Publishing Plc, 2005) 63 at 69-78; van den Herik and Schrijver, above n 12, at 17.

deference based on its theoretical premise, incomplete list of international bodies involved in counterterrorism and lack of sophistication in elaborating the difference between sources of international law.

Throughout his research, Pratt is heavily influenced by and relies on the school of neo-liberalism in international relations which views international organisations as an agent that serves the interests of member states. While this theory is well established and produces many useful theoretical frameworks to assess the behavior of States and international organisations, it overlooks the fact that legal instruments and discussions amidst States and international organisations can also be shaped by socio-cognitive factors.[51] The understanding (or misunderstanding) of government officials and legal experts change over time as well as their preferences that reflect the changing social relations they are embedded with[52], and the rationalist theory lacks the explaining power in this regard.

Moreover, the model of institutional deference includes a total of 16 international and regional organisations in various shapes and sizes that are engaged in counterterrorism measures on varying levels. Although the model covers a good sample of relevant organisations, in reality there are more than 16 international or regional bodies and agencies that are directly and indirectly engaged with terrorism or counterterrorism which was not included in the list. For example, the International Maritime Organisation (IMO) is a key institution for maritime security in the fight against terrorism but was not included for Pratt's examination in relation to institutional deference. It was the IMO that initiated global action in this context by adopting resolutions and laying foundational work for measures against terrorist acts at sea.[53] This groundwork eventually led to the Convention for the Suppression against the Safety of Maritime Navigation.[54] Considering that the IMO is an international organisation with expertise in maritime regulations and safety, it is possible to assume that the patterns of deference would largely resonate with similar cases such as ICAO; but

[51] Grégoire Mallard "Crafting the Nuclear Security Complex (1950-1975): Dynamics of Harmonization of Opaque Treaty Rules" (2014) 25 EJIL 445, at 446-447.
[52] Mark Granovetter "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91 AJS 481.
[53] IMO resolution A.584(14) (1985); IMO Circular MSC/Circ.443 (1986)
[54] Convention for the Suppression against the Safety of Maritime Navigation 1678 UNTS 221 (open for signature 10 March 1988, entry into force 1 March 1992).

nonetheless, this proves that the exhaustive list of organisations used by Pratt was incomplete and therefore open to criticism.

Lastly, the documents examined by Pratt includes materials that are different sources of international law.[55] The premise of institutional deference takes organisations or institutions as the main actor in the act of deference, and as a result, policy documents from these bodies have been examined to test Pratt's hypothesis.[56] Deference to obligations arising from treaties weigh much heavily than deference to technical guidelines established by specialised agencies. But because the research was conducted with a quantitative approach, it is impossible to assess the difference in these situations and equally difficult to conclude how the two situations can contribute to interpretations of law on their own merits. Thus, there is a critical limitation in viewing the volume of deference corresponding to legal significance.

4. Applying Institutional Deference to the Definitional Struggle

Based on the findings and implications of institutional deference in counterterrorism, this paper argues institutional deference would not necessarily have a positive influence on the definitional struggle for two reasons: deference 1) reinforces the political power dynamics between States and 2) provides little legal contribution to the harmonisation of principles and norms of the counterterrorism regime.

Two underlying phenomena in the trends and features identified in the previous section heavily suggests that institutional deference will reinforce and intensify the power dynamics of states pointed out as a political flashpoint in the definitional struggle. First is that deference has a very limited distributional effect and second is that there is preference in deferring to organisations with weighted voting schemes.

In the previous section, it was found that the flow of deference was asymmetric and that an informal hierarchy is revealed. A deeper look uncovers an interesting relationship between these two trends: the receiving end are mostly organisations with the power to produce binding rules than regional bodies or institutions that "lack the force of international law"[57].

[55] Statute of the International Court of Justice, art 38.
[56] Pratt, above n 32, at 563.
[57] Pratt above n 32, at 575.

In the aggregate, this is what reveals the informal hierarchy of institutions in the counterterrorism regime where only the rules of top institutions are respected and replicated but the favour is almost never returned unless the 'weaker' organisation has expertise on a certain sub-issue as is the case with organisations such as ICAO. This lack of distributional effect of institutional deference simply reaffirms the authority that organisations with binding power or specialised agencies in certain sub-issues already possesses. This brings back the example of the FATF and the Security Council; the P-5 countries consolidating its stronghold on current and future counterterrorism measures while deferring to organisations such as the FATF – which on the surface seems like "giving up" rule-making power – which is actually a mechanism for strong economies to incorporate their preferred rules that were developed outside the broader consensus into the fold.

But it is when the lack of distributional power is coupled with the preference toward organisations with weighted voting schemes[58] that it effectively contributes to a recipe for hegemons or powerful states to reinforce their "power to define the enemy". In the model of institutional deference, an international organisation is said to have a weighted voting structure either if the legislative or executive interstate body distributes votes reflective of the population or the size of a country's economy or if a subset of Member States have reserved seats in an executive body.[59] For the counterterrorism regime, the Security Council is the most obvious interstate body with a weighted voting structure.

Despite Pratt arguing deference can be used to avoid difficult bargaining problems[60], – deadlock situations caused by a consensus or super-majority mechanisms – one has to be cautious of the reversed situation. If the likelihood of the Security Council receiving deference against any other regime is overwhelmingly higher, it can be also said that the powerful P-5 countries of the Security Council have significant sway over defining the terrorist enemy across various sub-issues or regions. This is poignant considering that the power imbalance entrenched in the Security Council creates a favourable environment for the

[58] Pratt above n 32, at 583.
[59] For assessing weighted voting structures in international organisations in the counterterrorism regime, Pratt relies on the data provided in Hooghe and Mark's (2015) study, *Delegation and Pooling in International Organizations*, in which either "a) if there is weighted voting in a legislative or executive interstate body or b) if a subset of member states have reserved seats in an executive body" in an international organisation, it would be considered having a weighted voting structure. Examples include the European Union for the former, and the UN Security Council for the latter types of weighted voting structures. (p. 316)
[60] Pratt, above n 32, at 580.

side arguing for a case-by-case definition of terrorism. As counterterrorism measures become more developed and refined, these trends and preference are highly likely to entrench existing political power dynamics making it even more difficult to reconcile the colliding views of how terrorism should be defined in international law.

Secondly, the contribution of institutional deference to harmonisation of legal rules may be very limited. The ILC report has been an integral guidebook for addressing situations of legal conflict in fragmentation in which legal interpretation of treaty rules in accordance with article 31(3)(c) of the Vienna Convention on the Law of Treaties has been highlighted as a way to harmonise legal rules, principles and norms.[61] Institutional deference may seemingly bring together rules from different international organisations to address fragmentation, however, examining the effects of institutional deference on the counterterrorism regime and its definitional struggle show it is critically limited in contributing to harmonisation because of its 'division of labour' effect and the institutional deference mechanism itself oriented to the deference of regulations than legal principles or norms.

Instead of looking into the fundamental fault lines of fragmentation, States have chosen to use deference mostly as a practical tool to keep the fragmented rules organised and relevant. The Post-9/11 era has seen an explosive momentum behind counterterrorism and the end point of measures often were the Security Council. Over the years, Security Council resolutions covered various areas of counterterrorism measures including establishment of specialised bodies dedicated to terrorism[62], nuclear terrorism[63], foreign terrorist fighters[64] and aviation security[65] just to name a few. Especially in the fields of nuclear terrorism[66], aviation security[67] and terrorist financing[68], regulations and guidelines provided by the lead international bodies were often directly referenced and urged for the Member States to follow instead of the Security Council drafting and establishing its own counterterrorism measures.

---

[61] Nele Matz-Lück "Norm Interpretation across International Regimes: Competences and Legitimacy" in MA Young (ed) *Regime Interaction in International Law* (Cambridge University Press, 2012) 201 at 202.
[62] SC Res 1373 (2001); SC Res 1535 (2004).
[63] SC Res 1540 (2004).
[64] SC Res 2178 (2014).
[65] SC Res 2309 (2016).
[66] IAEA GC(50)/RES/11 (September 2006), para 6.
[67] SC Res 2309, para 5.
[68] FATF Information Note (19 March 2013), at 2; SC Res 2462 (2011), para 4

One could argue that such deference converging toward the Security Council, incorporating even technical guidelines and best practices[69] from specialised agencies, are helpful in gathering scattered rules and encourage coherent interpretation of such rules. However, because deference encourages the division of labour for engaging international bodies, it could inversely increase the reliance on specialised agencies to establish issue-specific regulations which in turn reinforces the fragmented architecture. Simply put, ongoing deference to ICAO regulations will naturally reduce the need for the Security Council to establish separate counterterrorism measures related to aviation security. Or, APEC need not establish its own regime for counterterrorism measures related to maritime safety when it can implement standards set by IMO.[70] A long-term effect of the division of labour is the reallocation of regulatory effort in the direction of higher reliance on specialised organisations – essentially reaffirming the current fragmented counterterrorism regime.

Furthermore, the subject of institutional deference are rarely legal principles or norms that are often at the heart of fragmentation of the counterterrorism regime. Because the act of deference is fundamentally an acceptance of authority or regulations set by other international organisations on a given set of issues rather than legal discussions on the interpretation of principles and norms in conflict, institutions cannot defer if the main recipient of deference rarely addresses this issue. Using the case of the interrelationship between IHL and IHRL, it can be argued that deference may have very little effect in promoting a harmonious co-application of these two bodies of law in armed conflict situations.[71] It is valid to point out that in a wider context, the importance and application of both IHL and IHRL reiterated through a number of other UN forums (e.g. Human Rights Council) and official documents such as the UN Counter-Terrorism Strategy have undoubtedly made its way into Security Council resolutions, and that high level of deference to the Security Council has disseminated this to some extent. However, while most resolutions acknowledge the need to apply, ensure and abide by both laws in armed conflict situations, it lacks in precision and does not directly address the issue of competing norms.

[69] Counter Terrorism Executive Directorate "Technical Guide to the Implementation of Security Council Resolution 1373" (2009).
[70] APEC Consolidated Counter-Terrorism and Secure Trade Strategy (updated 21 September 2019), at 7.
[71] Duffy, above n 14, at 493-495.

For example, schools are not a legitimate target under IHL but if it is used as a site for hostage-keeping as well as a basecamp for a militia linked to government forces, the school in question becomes a contested subject of how IHL and IHRL should be applied. Security Council resolution 2573 (2021) warns in its Preamble that while the military use of schools is a violation of applicable international law, "such use may render schools legitimate targets of attack".[72] Even if this resolution were to be deferred by another organisation, this would hardly have any meaningful legal contribution in co-applying the two laws in the hypothetical situation above.

There are positive effects of deference and it would be hasty to disregard them entirely. Deference does bring together dispersed rules and standards across a range of sub-issues which can contribute to a combined set of guidelines to help unpack and interpret counterterrorism obligations more coherently. It also combines different sources of international law and presents it to international platforms with various shapes and sizes – these activities could have implications for the overall normative discussion that could ultimately influence legal harmonisation in the future. But it is difficult to project what influence it could create at this moment in time, and the limited scope of deference as it currently stands will have marginal contribution for harmonisation.

5. Further Implications of Institutional Deference

Application of institutional deference to the definitional struggle has found that despite deference being used as a useful tool for States and international organisations to navigate and coordinate complex regulations of the counterterrorism regime, there is a critical limitation in directly addressing the political and legal challenges that stands at the center of the definitional struggle. Then, should we be left to think that deference will only exacerbate power imbalances between States and neglect the tension caused by conflicting legal principles and norms? This section will attempt to answer in the negative to this question by arguing that institutional deference remains relevant to the counterterrorism regime and its definitional struggle by being a guidelight for detecting change in regulatory discussions and for identifying areas that require further qualitative research.

[72] SC Res 2573 (2021), preamble.

First, understanding institutional deference and flow trends can help detect change in regulatory discussions where active treaty-making has nearly ceased. Since the mid-2000s, the active law-making in counterterrorism in the form of treaties have significantly dwindled. Although treaty obligations remain at the centre of counterterrorism law, institutional deference and its flow trends support the observation that discussions have increasingly moved on to the UN that plays a significant role in carrying on with its implementations on the international level. Therefore, the discussions in the UN as well as the subject and trend of deference will be valuable resources in detecting what type of counterterrorism regulations are being emphasised, replicated and disseminated around other global and regional bodies. For instance, reduced deference to the Security Council could indicate a less receptive global environment against its overarching obligations or approach, while increased deference to the General Assembly could indicate that 'weaker' states are also increasingly using deference to create a more balanced counterterrorism regime.[73]

Also, institutional deference can be a useful guide in identifying areas that warrant further qualitative studies. The concept of institutional deference is a novel approach to help our understanding of how the counterterrorism regime works through its complexities, which has been studied and tested by a quantitative research model. Because one of the biggest strengths of quantitative research is its ability to present forecasts and projections, it can point directions to topics that require a closer, qualitative approach. One such area could be the legal implications and status of documents created as a result of deference. International organisations of all shapes and sizes in the counterterrorism regime engage in deference – these organisations have different memberships, mandates and legal powers. The subject of deference also varies from binding Security Council resolutions to issue-specific but nonetheless non-binding IAEA guidelines for nuclear safety. As deference increases the possibility of such various legal sources being mixed and matched, the legal implication or status of documents mixing obligations with soft law instruments would be an interesting topic that needs further qualitative investigation.

6. Conclusion

[73] Peter Romaniuk "Institutions as swords and shields: multilateral counter-terrorism since 9/11" (2010) 36 RevIntlStud 591, at 600-601.

The issue of defining terrorism in international law is inherently and inevitably political while its legal repercussions are critical for our response going forward. The definitional struggle has been circling around debates of 'your' terrorist being 'my' freedom fighter and whether terrorism should be defined case-by-case or based on a comprehensive legal definition. Both debates are inextricably linked to the competing political views and power dynamics of States on either side of the debate in which a resolution remains to be found. The legal implication of this political struggle is a fragmented development of the counterterrorism regime. The counterterrorism regime not only has scattered law and regulations across an array of sub-issues but also conflicting principles and norms that hinder the regime's ability to form a coherent legal response when dealing with the complicated realities of terrorism.

This paper attempted to examine institutional deference, a practical method used to connect the dots spread across the counterterrorism regime, in order to assess whether this method could alleviate the problems of the definitional struggle and its legal consequences. The conclusion is that institutional deference is inadequate to address the problem because it reinforces the current political power imbalances while contributing marginally to resolve legal conflicts of the regime – in other words, failing to deal with both the political roots and legal consequences of the definitional struggle. Ultimately, institutional deference may be a useful method in a practical sense, but it further entrenches the current fragmentation of the regime thus prolonging the status quo.

Despite the conclusion did not include a solution to the problem, this paper hopes to add contribution to the academic literature as being part of a journey towards finding the most adequate answer to the definitional struggle. On this note, it is important to acknowledge that power dynamics and fragmentation is an inseparable and inevitable force for any international regime. The principal actors of international law are states, and it is this state consent which is a key foundation and source of legitimacy in international law. As for fragmentation, Biermann and colleagues rightly view that fragmentation is an inevitable phenomenon in global affairs – the question should be focused on what the degree of fragmentation is rather than its existence.[74] The struggle for power on the international state and creating a fragmented structure in the process should be viewed as a phenomenon to embrace rather than reject. The benefit of institutional deference may not be significant in

[74] Biermann et al., above n 10, at 17-18.

relation to the definitional struggle, but its merit may be better understood as a way the international society found to embrace this very phenomenon.