The Threat of Terrorism: Putting Human Rights to the Test
– Assessing the Counterterrorist Policies of France in the Aftermath of the 13th of November 2015 Terrorist Attacks

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Abstract:
The terrorist attacks that occurred in Paris on the 13th of November 2015, mark a shift for counterterrorism in France. Indeed, the magnitude of the terrorist attacks persuaded the French government to call for stricter counterterrorist policies. However, the effects of these measures on human rights have been interrogated widely. Therefore, in this thesis, I wish to address the conflict between state security and individual human rights. First, I will assess if the current situation of France in relation to terrorism, call for these tough restrictions on human rights. Then, I present the ethical implications of rights restrictions in this particular conflict of interests. Finally, I analyse a few of these measures in more detail in order to evaluate if there are grounds on which to allow the restrictions of rights and if so, under what conditions. I conclude by stressing the risks of curtailing rights especially under the threat of terrorism.

Key words:
terrorism, counterterrorism, human rights, Paris attacks, war, crime, restrictions, slippery slope, security, state of emergency, applied ethics
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Chapter 1: Introduction

The 13th of November 2015, France survived its most deadly terrorist attack since the Second World War (Le Figaro, 2015). In that single evening, 130 people were killed. The victims were from all nationalities, race and religion. The attackers didn’t spare anyone. This experience of such brutal violence was lived by the Parisians community as a shock and a striking reminder that we are never safe from terror. Indeed, this attack was the second one of the year for France.

Already then, experts had warned against the rise of Islamic terrorist groups like ISIS and their hate of liberal democracies such as France. In the meantime, the French government had already started to take action on tougher security measures in France (LeGouvernement.fr, 2016).

However, the 13th of November attacks accelerated the implementing of these measures and furthered the French efforts to increase security control over France. Shortly after the attacks, The French President announced four different measures to be taken as direct responses to these terrorist acts (Le Monde, 2015a). Some of these were highly debated or publicised such as the deprivation of nationality, which lead to the Justice Minister Christiane Taubira’s resignation and the rejection of the measure all together (MetroNews, 2016). Others were simply accepted with hardly any resistance in the government, like the establishment of an extended state of emergency with a vote of 551 for its extension and only 6 against (Le Monde, 2015b).

Thus, in this thesis I will be looking at the concatenation of these policies. More precisely, I will be debating the counterterrorist measures that directly affect the French population’s liberties. Indeed, there have been many contestations on the ethical value and the democratic nature of the implementation of state of emergency policies in the French civil code or the specifics of some of these measures (Le Figaro, 2015b). Thus, while the State insists it is a necessary step to take to protect the French society (LeGouvernement.fr, 2016), many argue these are liberticidal policies that open the gate to a state of fear and suspicion (Apcars, 2016).

Hence, in this thesis I raise the question: Does France have justifiable grounds on which to restrict human rights in its counterterrorist policies and if so under what conditions?
More precisely, first I ask if the current way the French society understands terrorism as part of a war framework, impacts the current counterterrorist measures and if there is a different alternative to perceive terrorism?

Furthermore, I wonder what the moral implications of restrictions of human rights entail? And question how one evaluate the ethical justification of a counterterrorist measure?

Therefore, in this thesis I wish to address and comprehend the discourses that minimize the restriction of human rights. Also I wish to evaluate the conflict between the government’s interest for state security and the French people’s interest in human rights.

Thus, first I will describe in more detail the terrorist attacks and the counterterrorist measures installed. Secondly, I will conceptualize the discourse in which terrorism is framed in the contemporary French society, in order to understand how the rights restrictions in the current counterterrorist measures came about. Thirdly, I will give in more detail what the ethical dilemmas of restricting human rights actually entail. Fourthly, I will critically assess using the Universal Declaration of Human Rights and the European Council’s Guidelines for Human Rights and the Fight against Terrorism, the measures presented in the second chapter of the thesis, in order to balance the conflict between security and rights’ interests. Finally, I will give my normative conclusions on these counterterrorist policies and state the conditions on which human rights can be restricted, furthermore, answering my research questions and giving further recommendations.

**Chapter 2: Presenting the background to the Paris terrorist attacks**

Here, I will present the chronological evolution of these attacks and describe in more detail its direct aftermath. In the final part I will give an overview of the different opinions about these policies.

**1. The 13th of November Paris terrorist attacks**

Around 9:20 pm, the first three suicide bombers exploded themselves next to the French football stadium in the outskirts of Paris. These individuals being unable to sneak inside the stadium decided to commit suicide just outside of it. Inside the stadium people heard the
explosion but the match continued. Everyone was still unaware of what was going on. Outside the blast has killed one person and made a dozen of gravely injured civilians (Le Figaro, 2015a).

Five minutes later, in the centre of East Paris, in the lively neighbourhood of the 10th and 11th arrondissement, three terrorists in a black car started randomly shooting at civilians sat on terraces of popular bars and restaurants. Eventually, one of the terrorists sat at a terrace of a busy bar and exploded him while the other two fled in their car. This deadly strike caused the death of 39 people and injured 31. During the attacks witnesses recall the criminals shouting “Allah Akbar” and “This is for Syria” (in French) (Le Figaro, 2015a).

At 9:40, three different men walked into the concert hall the ‘Bataclan’, also situated in the 11th arrondissement, and started shooting while people were watching the Eagles of Death Metal perform on stage. They killed 90 individuals before taking hostages and hiding inside a corridor on the first floor of the concert hall (Le Figaro, 2015a).

At 10:15 the RAID and the BRI², special unit forces of the French police, entered the concert hall. At 00:20 they forced their way through to the terrorists hiding behind hostages upstairs and shoot them down (Le Figaro, 2015a).

Shortly after, the French president, François Hollande, issued a speech urging for a three daylong national mourning period and the immediate implemention of a national state of emergency. At the same time, ISIS (Islamic State of Iraq and Sham) released on the web a statement to claim responsibility for the Paris terrorist attacks and declared these attacks were a direct response to France’s involvement in the Syrian war and more precisely to their bombing of ISIS controlled parts of Syria¹ since September 2015 (TIME, 2015).

Three days later, on the 16th of November, François Hollande reunited all deputies and senators in Paris, to give a public speech about the immediate counterterrorist measures to be taken to protect the French state against terrorism. He outlined four particular measures (Le Monde, 2015c). The first one was to extend the state of emergency from its original twelve-day period to a three months period. However, the state of emergency has currently been extended further for reasons I will outline later (Le Monde, 2016d).

¹RAID stands for Research, assistance, intervention, dissuasion and BRI for: Brigade of research and intervention. CAPITALS ARE USED TO STRESS THE IMPORTANCE OF THE CLEARLY UNDERSTOOD AND WELL-REMEMBERED IMPORTANT FACTS NECESSARY FOR THE READER TO UNDERSTAND THE CONTEXT.
²ISIS is a very organised terrorist group that has managed to acquire resources financially and materially that represent 15% of the whole Iraqi GDP (ARTE, 2015). They also dispose of a territory as big as France’s that stretches between Iraq and over the border to Syria, which is where the French military launched their attacks against the terrorist group.
The state of emergency entails shifting the judicial powers to the executive ones (such as the police or the presidential powers). This entails allowing the executive powers to make restrictions and changes in the regulations and laws that protect the freedoms and rights of the French civilians, without needing approval from the judicial system. The presumption is that the curtailment of freedoms and rights will help the state to move forward quicker in the investigation. The use of forced house arrest, house searches without warrants, longer interrogations and custody periods (up to 120 hours), the closing of suspicious public places or the increasing surveillance measures, are examples of state of emergency measures (Le Monde, 2015c).

The second measure was to increase the security forces with added jobs in the police, borders and intelligence forces and giving more power and independence to the armed forces inside of France. This measure is also a direct outcome of the state of emergency, as both measures complement each other (Le Monde, 2015c).

The third measure is an intensification of the military attacks on Syria and a commitment to increase the military budget of France (Le Monde, 2015c).

The fourth measure Hollande called for is, the implementation of a law, which can deprive French by birth bi-nationals from their French citizenship if they are involved in any terrorist activity. This would entail France being allowed to evict individuals or strip rights away from citizens who possess another nationality than the French one. However for its implementation, this measure would necessitate the two parliaments of France (the Senate and the National Assembly) to come to an agreement on the specifics of the law and vote on it (Le Monde, 2016c).

These four measures have given rise to debates and ethical questions on the implications they will have nationally within France but also internationally in Syria. However, in this paper, I will only address the measures that directly affect the civilians in France. Consequently, I will not address the third or fourth measures. Indeed, the measure on France’s military involvement in Syria although it indirectly affect the French population, as it implies portioning the French budget in other areas in order to increase funding on the military budget, its action remains outside of France and therefore, goes beyond the scope of this thesis (MetroNews, 2016). Additionally, the deprivation of nationality although it is a very interesting case, is a measure that was dropped because the French government was unable to
come to an agreement on it (Le Monde, 2016i). Therefore, it doesn’t directly impact French civilians like the other two measures do.

In the following part, I will describe in more depth these counterterrorist policies. I choose these particular examples because they cover the diversity of moral dilemmas France faces through its counterterrorist measures. However, the reader should keep in mind that these are only a few of the many measures of the counterterrorist policies of France and that many more are in effect.

2. The Paris Attacks aftermath

2.1. The state of emergency

Following a wave of terrorist attacks in France during the Algerian war, in 1955 the government agreed on the installation of a state of emergency (Le Monde, 2015e). This allows the government to change the system of laws usually set in place to answer to the current crisis. Usually it entails certain restrictions of rights of civilians and a shift of powers within the government. These resolutions are similar to the defining circumstances of a state of siege with a few nuanced differences. Under siege, in France, the government allows the military to take control of the executive powers, still under the control of the President, because the country finds itself at war, or in such a state of insecurity, that it becomes crucial that the military forces have a greater power in regards to decision-making, than they usually do in times of peace. Under a state of emergency, executive powers remain entirely the government’s under the usual peace time structure. However, in both state of exception, derogations of certain laws and regulations become possible (Humphreys, 2006, 678).

Thus, under the context of a terrorist attack, France proclaimed a state of emergency (Nouvel Observateur, 2015). However, its temporal limitation has been extended. First, the government voted on extending this measure for three months. Then, following the terrorist attacks that occurred in Brussels on the 22nd of March, the state of emergency was extended further to the 26th of May (The Economist, 2016). Finally, the big sports events planned throughout the Summer 2016 (European Football Cup and Tour de France) gave further grounds for the government to extend the state of emergency until the end of July (Le Monde, 2016d).

In parallel, the National Assembly has recently adopted a project of law to reinforce the fight against terrorism and organised crime and to improve the efficiency of the criminal
procedure (LeGouvernement.fr, 2016). This project consists of installing in the civil code, different measures that up to now were exclusive to the state of emergency (LeGouvernement.fr, 2016). Thus, first of all, the state of emergency’s extension of executive powers is furthered into the civil code. More precisely, the government has agreed that in order to make the fight against terrorism effective, the judicial chain of agreement should be shortened. This means that the exterior judicial oversight of a judge that use to be the only possible agent to give an agreement on the application of counterterrorist measures in practice, has now been deprived from its position and these powers have now been given directly to prosecutors and reeves of the police investigation (Le Monde, 2016e). Some examples of the measures that can now be decided with no judicial oversight involve regulations on house arrests and searches without warrants, and the use of surveillance measures, such as microphones inside apartments or the use of IMSI-catchers (which are surveillance engines able to track emails and telephone conversations) (RTL, 2016). Furthermore, the law project provides the executive power of the police to treat organised crime activity under the same regulations as terrorist activity (RTL, 2016). Therefore, France is completely reforming its counterterrorist measures, which also involves increasing the security forces’ powers.

2.2. Increase in security forces’ powers and autonomy

The Interior Minister, Bernard Cazeneuve, has taken on the wish of the French President to increase the police and intelligence forces’ powers. Indeed, he is in the process of increasing the police presence all around France. Furthermore, the French government is improving the surveillance technologies and weapons the security forces will have access too (LeGouvernement.fr, 2016). An example of these measures is the application of a similar model of surveillance as the USA called the Passenger Name Record (PNR). This measure allows the intelligence forces to track someone’s name, address, journey plan, telephone number, email, and credit card information for each flight one is registered on. This information is accessible for 6 months and then stocked for 5 years (LCI, 2016).

More particularly, there are also a variety of measures concerning the police that are being revised in order to give them more autonomy under the civil code. For example, their use of weapons is being relaxed. They will not be held responsible if they fire their weapon under ‘absolute necessity’ (Apcars, 2016). Furthermore, they will also be allowed to keep custody of individuals for a longer period than before (regardless if they are minors or regardless of the
presence of a lawyer) on the grounds that there are serious reasons to think this person has ‘ties with terrorist activity’ (Volatirenet, 2016).

Thus, France has gone through a whole remodelling of its counterterrorist procedures. Now, I will present two practical examples that are direct results of the state of emergency and the increase in security forces. The first one remains exclusive to the state of emergency and the second will be included in the civil code.

2.3. The resulting measures

2.1.1 Closing of suspicious public places: the case of Mosques
If a religious establishment is under suspicion of promoting ideas that might harm the country, the government is allowed to temporary close it under the state of emergency. Thus, two mosques around the Parisian region were closed. After searches without a warrant in one of the religious establishments, where nothing related to terrorism or radicalisation was actually found, the police still required the closing of the mosque for the whole duration of the emergency period (Amnesty International, 2016, 25). Therefore, taking away a Muslim community’s place of worship for the whole period.

2.1.2 House searches without a warrant and house arrests
Searches without a warrant imply that the police are allowed to enter someone’s home or private property without their consent or their presence being required, at whatever time of the day or night and without the approval of a judge. The official statistics show 3242 searches without warrants between the 14 of November to the 29 of January (Amnesty International, 2016, 10). Currently it appears all these searches have led to a total of 344 police custodies, and 65 convictions, however not all related directly to the November attacks (Le Monde, 2016f).

In parallel to this process is the use of forced house arrest. This law entails being obligated to stay at home under the whole period of the state of emergency, in some cases under video surveillance. Other times, this entails having to present yourself once to several times a day at a police station and having to hand over your passport to authorities (Amnesty International website). At the moment there are 285 house arrests taking place and only 58 have been suspended (Le Monde, 2016f).

Both these measures have been furthered into the French civil code but under different restrictions that I will list in the fourth chapter. Nonetheless, these particular measures and the
counterterrorist policies in general have raised opposing opinions about the effectiveness and need for such policies.

3. Opinions about the French counterterrorist measures

Indeed, many different parties have reacted to these measures and their instalment in our civil code. For example, Amnesty International questioned a number of people who have experienced house searches without warrants and house arrest (Le Monde, 2016j). They pointed out that the police were not always giving clear reasons for their interventions, have sometimes used violence unnecessarily, and more generally targeted minorities such as the Muslim community. Furthermore, the National Commission of Human Rights of France wrote a twenty-page report to outline the controversial nature of these measures and their rushed application (2016). In sum, the main concerns with the State of Emergency’s extension and the rise in police’s autonomy seem to be the targeting of certain groups and individuals, in addition to the diminution of the role of justice in the French political system.

Nonetheless, the French government has defended the state of emergency and the implementation of some measures under the civil code. Indeed, they point out that these measures have enormously helped to move forward with the Paris attacks’ investigations. It is true that all the known missing terrorists that fled the 13th of November attacks were either killed or found, and are currently being interrogated in prisons in Belgium or France. Additionally, through the cooperation of Belgian and French intelligence systems and police forces, the authorities have been able to dismantle some of the terrorist networks that have existed between their countries. Indeed, Bernard Cazeneuve stated in a published interview that 101 individuals in direct link to terrorism have been arrested since January 2016 (Le Monde, 2016g). Furthermore, the terrorist attacks that occurred in March in Brussels legitimized the lengthening of the state of emergency. Indeed, this terrorist attack occurred just after the arrest of Salah Abdelslam, one of the accomplices to the plot of the Paris attacks. Evidence found later on, proved that the Belgian terrorist cell responsible for the Brussels attacks, were also responsible for the Paris attacks. Furthermore, they found that they were plotting a new attack in Paris until the arrest of Salah Abdelslam, convinced them to target Brussels instead (Le Figaro, 2016c).
Thus, it is interesting to evaluate if the state of emergency and the measures taken by the French government help to quicken the process of dismantling terrorist networks and benefit France’s safety and furthermore should be measures established in the civil code or if by justifying security methods, the state and its counterterrorist policies has crossed the line of what is ethically acceptable in regards to right infringements in a democratic system.

Hence, first, I presented the chronological evolution of the Paris terrorist attacks and its direct aftermath. Then, I described in more detail what the state of emergency and the increase in security forces autonomy actually entails. Finally, I outlined the opposing opinions about the ethical value of these counterterrorist measures. Therefore, I will evaluate if the counterterrorist measures of the French government have justifiable grounds on which to restrict human rights. Thus, in the following part, I will present how France perceives terrorism and more precisely ISIS, in order to understand how the government frames the context that allows these counterterrorist policies in the first place.

Chapter 3: The ‘War against Terrorism’: Understanding the framework of France’s counterterrorist measures

The way the Paris attacks were defined and framed by the French government and the media says a lot on how the current counterterrorist measures came about. Therefore, it is important to define the terms and comprehend the discourses that came to shape the current French terrorist response. First, I will define what terrorism is, and explain the nature of that violent strategy in order to understand ISIS, the terrorist group responsible for the Paris attacks. Afterwards, I will examine the discourses that came to define terrorism as a war and explain the implications of that framing. Finally, I will bring forth the alternative of defining terrorist acts as crimes.

1. Defining terrorism

To identify if ISIS is a terrorist group, I wish to define terrorism in itself. Seumas Miller gives the following extensive definition:

Terrorism is a political or military strategy that:

1- consists in deliberately using violence against X (target of the terrorists) and/or deliberately using violence of type M (legitimate types of violent attacks),
2- consists of violent actions that ought to be criminalized,
3- is a means of terrorizing the members of some social or political group in order to achieve political or military purposes,
4- relies on the violence receiving a high degree of publicity, at least to the extent necessary to engender widespread fear in the target political or social group (2009, 53).

This definition is broad because terrorism is a very complex and multi-faced violent strategy. However, I believe it needs precisions if one wants to follow it throughout this paper.

Firstly, I believe the physical violence is key in an act of terrorism and a political aim is the primary cause behind the use of this sort of violence (Richardson, 2007, 4). Indeed, in the case of ISIS their wish to avenge their ‘dead brothers’ fallen to the French air strikes in Syria (ARTE, 2015) are their reasoning behind their use of terrorist violence. Therefore, the aim was revenge and their ends were violent. Furthermore, for many current terrorist groups their political aims are intertwined with their religious beliefs. Hence, for Islamic terrorist groups their role as terrorists is to carry out their religious duty; their interpretation of the Quran and their political leaders orders, dictate them to undertake God’s work by fighting the ‘Holy War’ (ARTE, 2015). Therefore, in the case of ISIS, their political aim is also closely related to their religious beliefs. Secondly, the second point on the criminalization of terrorism, although it is essential, I don’t think it is entirely a component of terrorism in its nature but rather a response to it. Therefore, I do not think it belongs in this definition. However, I will address this in the following part, as it is an essential component of the way terrorism is framed. Thirdly, I feel Miller misses an important point in his definition. Although I believe this is what he meant by ‘terrorize’ in the third point, I believe a better notion to use here is the ‘unexpected’ nature of terrorism. “One minute all is ordinary and the next all is extraordinary” (Sylvester, 2014, 19). Thus, the fact that terrorism always occurs at an unexpected time and place gives it a particularity that differentiates it from other forms of violence and helps to raise the feeling of insecurity and fear in the targeted population (here the French population). Finally, the fourth point reinstates this by pointing out how terrorism as a strategy uses our media as a tool to promote further fear in the larger public.
Thus, I would define terrorism as a violent strategy\textsuperscript{3} motivated by (religious) political aims that deliberately uses violence unexpectedly in order to create fear and suspicion in a targeted group and that uses the media in order to increase the targeted population’s feelings of insecurity.

Therefore, the ISIS perpetrators of the Paris attacks motivated by their extreme religious and political ideology and their wish of revenge against France’s involvement in Syria, used suicide-bombing attacks and armed shootings as violent tools to create a chaotic environment in the French capital, in order to develop further feelings of fear and suspicion in the French population, and to publicize their image through the French and international media. Thus, ISIS can clearly be defined as a terrorist group as they enter the defining terms of terrorism.

However, the scope of their violence and their particular relation to France seems to raise further debates on how to criminalise it and how to respond to it efficiently.

2. Terrorism as war?

The Paris terrorist attacks have been described as ‘Acts of War’ rather than crimes. This raises important questions on the framework in which the French society understand the threat of Islamic terrorism, as it directly impacts that country’s counterterrorist response. Thus, I will explain the framework, which permits France to define terrorism as ‘Acts of War’ and after explain the ethical implication of this.

2.1. Background information

To start with, already in January 2015, France suffered the death of 17 people, eight of them being part of the satirical newspaper \textit{Charlie Hebdo}, to the hands of attackers that also claimed their allegiance to ISIS (Le Figaro, 2016d). Furthermore, as I already stated, France has been involved in air strikes in the ISIS territory of Syria. Also, witnesses, fire fighters and paramedics compared their experience of the November attacks as similar to events of a battlefield (Francetvinfo, 2015a). Indeed, in the Bataclan, 90 people were killed in less than 30 minutes.

\textsuperscript{3} As Miller states: “Terrorism is a strategy that involves methods as targeted killings, indiscriminate killings, torture, hostage taking, kidnapping...” (…) “empirical claim based on a consideration of the violent methods actually employed by those groups generally agreed to be terrorists” (2009, 33) Therefore, terrorism is a strategy of violence that uses these different forms of violent action.
Finally, the French President Francois Hollande, in his speech following the Paris attacks, defined the terrorist attacks as ‘Acts of War’ and called for a ‘War against Terrorism’ (Le Monde, 2015h). Interestingly enough, Le Monde pointed out that his speech closely mirrored George W. Bush’s one after the 9/11 attacks (2015h).

Therefore, the extreme violence showed by the Paris perpetrators, the already present confrontation of ISIS with France in the recent past, and the President’s framing of these acts as ‘Acts of War’, give grounds for understanding these terrorist acts as more complex than a simple crime. However, this perspective calls for justifications. Thus, in order to evaluate if France can define its recent terrorist attacks as elements of war, I believe it is important to define what a war actually entails, before I can go further to present their ethical implication.

2.2. The War framework

First, it is essential to point out that war in itself is a hard term to define. In particular when a state uses it to define terrorism, as it has moral implications that need consideration. Indeed, as Brysk states: “When terrorist violence is framed as war – an uncontrollable, external, absolute threat to existence and identity – it disrupts the democratic functioning and global ties of target societies” (2007, 1). Thus, because ‘the democratic functioning’ of France is at stake once we define terrorism as war, it is essential to use a neutral definition of war, in order to evaluate if terrorism can be defined as such in the first place.

The Britannica Encyclopaedia defines ‘war’ by saying it is “a conflict among political groups involving hostilities of considerable duration and magnitude” (2014). I will assume France and ISIS can be defined as ‘political groups’. However, the magnitude and duration of the context of ‘War on Terrorism’ remains abstract. Indeed, as I already defined, terrorism as a strategy entails not knowing the time or space of its unfolding. Furthermore, “‘wars’ are fought against other states, have a definite duration, and conclude when one of the parties is acknowledged as the victor” (Banks, 2009, 262). Therefore, in the context of an actual war, the limits of its duration and the magnitude of its violence are clearly set. But, under the current circumstances of terrorism, the magnitude and the duration of its occurrence are unknown. Thus, this differentiates terrorism from war. Hence, following a neutral definition of war, it is clear that it is a different form of violence than terrorism and although they might overlap in their motivation or aims, their ends differentiate them (Richardson, 2007, 2)
Furthermore, as I pointed out in my second chapter, France under its current law has to declare a state of siege if it finds itself in a context of war. Indeed, when in war, the French government would have to share its executive powers with the military. However, the executive powers remain strongly in the hands of the French government in peacetime, which means that the Paris terrorist attacks do not match the typical features of a war, and therefore do not call for the implementation of a state of siege. Indeed, it is rather a state of emergency that was installed, which entails that the current state of France cannot be defined as a theatre of war.

Thus, the terminology of ‘war’ and the actual framing of ‘War against Terrorism’ show some illogical and misguided conceptions, but still some particular measures exclusive to a state of war have been taken. This has some moral implications on the counterterrorist response.

2.3. The implication on counterterrorism with the war framework

As I have established, the current situation of France has entailed an establishment of a state of emergency as opposed to a state of siege. In both these states though restrictions of rights are possible. Indeed, the assumption here is that the situation in which the country finds itself is delicate enough that some restrictions of individual rights are necessary in order to protect society. Therefore, as Agamben calls it the state of exception creates ‘an extra judicial’ space in which the state is allowed to make restrictions of rights, because the common law does not permit to take the adequate measures to secure the safety of the state (Humphreys, 2006, 682). However, the problem with the war framework is not necessarily allowing a state of emergency, rather it is furthering it in the common law. The idea is that state of emergency measures are furthered into the Constitutional law and therefore entail legitimizing restrictions of human rights under the common law for state security reasons. Therefore, the judicial oversight that usually acts as the monitor and guardian of limitations of rights restrictions in the common law is taken away. Thus, in the context of France, the assumption is that the threat of terrorism is so consequential that the normal legal system will never be able to solve this crisis with its current judicial oversight, and consequently needs to apply some of the rights curtailments allowed under the state of emergency in its common law in order to defeat terrorism.

Therefore, the war framework allows the implementation of a state of emergency, which leads to rights restrictions that are then furthered into the common law. These restrictions raise
further issues that I will address in the following chapter. However, another framework than the war one might be interesting to pursue in order to evaluate how another perspective would perceive right restrictions and state of emergencies under the threat of terrorism.

3. The alternative: the terrorism-as-crime approach

Hence, Miller poses a strong case for the treatment of terrorism within a crime framework rather than as a war. This implies having to treat terrorist attacks within the usual legal procedure of the common law (Miller, 2009, 87). In other words, this framework would not allow changes in the common law that restrict human rights. Nonetheless, he does recognise that the state of the country antecedent to the terrorist attack and the scope of the terrorist acts implicate different counterterrorist responses. He makes a difference between well-ordered societies in peacetime, theatres of war in the context of war between states and theatres of war in the context of a war with non-state actors (2009, 85). However, as I have already argued although the Paris attacks have been defined as ‘Acts of War’, France in itself is in no case a ‘theatre of war’. Therefore, France fits Miller’s description of a ‘well-ordered society in peacetime’. For Miller this first implicates that terrorism should be treated as a normal crime rather than a war crime, which implies keeping the normal judicial criminal framework with which the state usually treats crime.

However, even within the terrorism-as-crime framework, counterterrorism measures still depend on the scope of the terrorist attack. Indeed, Miller does believe that if a state goes through what he refers to as a ‘disastrous’ event such as a large-scale terrorist attack (2009, 121), the state has a right to install legal measure to restrict the broader populations’ rights in order to guarantee security. Nonetheless, pointing out that, “There are significant in-principle limits on what a liberal-democratic state is entitled to do, even in order to protect the lives of its citizenry” (2009, 116). Thus, he proposes a state of emergency under certain conditions:

“an imposition of a state of emergency must be comprehensive legally circumscribed in respect of: the geographical area in which it is in force and the time period, the conditions under which it can be imposed (and the conditions under which it must be terminated); the precise powers granted to government and security agencies during the state of emergency. Moreover, the imposition of state of emergency, and the granting and use of emergency powers, must be subject to judicial oversight” (...) “decisions in peace time – including under a state of emergency – that will potentially result in large scale loss of life are to be made (wherever possible) by the government, and not by the police (or the military) leadership” (2009, 131-132)
Therefore, if France was to respond to terrorists acts in a crime framework rather than through a war framework it would first, have to understand a terrorist act as a crime, and respond to it in the current criminal procedure. Additionally, if we assume that the Paris attacks are understood as ‘disastrous’, the state could create restrictions of the French population’s rights under clear and limited conditions, within a state of emergency, under judicial oversight. So, within this alternative framework to respond to terrorism, right restrictions are allowed exclusively under a state of emergency and never extended to the civil code. However, the current French policies enter the war framework because there is no judicial oversight and the state of emergency measures have been extended to the civil code.

Hence, in this chapter, I gave an extensive definition of terrorism to include ISIS. I then defined why the Paris attacks were framed as part of the war framework. However, pointing out that this framework is misguided and has negative implications on counterterrorist policies in the civil code. Finally, I gave Miller’s terrorism-as-crime framework as an alternative that takes judicial oversight and rights restrictions more seriously than the war framework. Indeed, the current French counterterrorist measures have implied restrictions on the population’s rights. Thus, in the following chapter, I will address how the war framework impacts the human rights of the French population and the ethical concerns they raise.

Chapter 4: Human Rights under the threat of terrorism: the limitations of counterterrorist policies

As the previous chapter showed, the framework in which terrorism has been framed implies restrictions and changes of the French civilians rights. However, the diversity of rights and the moral implication of curtailing rights, require an analysis. Thus, first I will define what a human right is. Then, I will explain what restriction of those human rights entails. And finally, I will present how to balance the different rights and interests at stake in the context of a terrorist threat.

1. What is a Human Right?
A human right is a right we are entitled to, simply because we are human (Encyclopaedia Britannica, 2016). Therefore it is important to define what being human means. Griffin gives a clear definition of this, that I believe will help to encapsulate the complexity of a human right:
“Human Rights can then be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one’s own path through life – that is, not be dominated or controlled by someone or something else (call it ‘autonomy’). And (second) one’s choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes. And none of this is any good if someone then blocks one, so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this ‘liberty’). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected.” (2009, 33)

In other words, being a human right’s bearer entails being a free agent, able to make informed choices on what one wants to pursue in one’s life, and have the minimum means and protection to achieve these life goals.

This definition though, remains quite abstract. One has to know where to draw the line between what constitute an essential need for an individual and what constitute a simple desire. In other words, one has to differentiate between what constitutes a basic and fundamental human right and a simple right. Indeed, especially if in this thesis, I desire to assess the restrictions of the French government over its population, I need to be able to find the right terms to define what restrictions actually constitute a curtailment of a human right. However, evaluating if all rights constitute fundamental ones is a long and tedious task. Therefore, in order to help the discussion of this thesis, I think it is important to have a concrete list of human rights to evaluate which human rights the French government has been restricting.

Thus, I have chosen to use the list of Human Rights from the Universal Declaration of Human Rights to define which rights are the ‘human rights’ we will be discussing here. It seems appropriate since it was first written ensuing the French Revolution in 1789, and proclaimed in 1948 by the UN as the official Universal List of Human Rights (UN.org). However, I will point out here that in my analysis, the French government does not violate all 30 Articles of the UDHR. Indeed, I will only address the Article 2, 12, 17, 18 and 28. Therefore, in the following part, I will specify what the implications of the curtailment of human rights are under the threat of terrorism, in the context of the French war-framework.

4: The list of Human Rights I will address is the following: Article 2: Right to no discrimination, everyone is entitled to the same rights and freedoms regardless of their differences, Article 12: Right to privacy, Article 17: Right to private property, Article 18: Right to religion and to practice it, Article 28: Right for the Universal Declaration’s articles to be realised
2. The ethical dilemmas of rights’ restrictions

To start with, as I have already settled terrorism in its nature, is a threat that we cannot grasp, it is a strategy that uses the uncertainty of its spatial and temporal occurrence to spread fear. Therefore, this puts into question how to figure out the relevance and the efficiency of counterterrorist measures. Indeed, “There are limits to our capacity to calculate consequences” (Griffin, 2009, 70). As Dworkin points out, the government “must take its decisions under conditions of high uncertainty, and the institutions of rights, taken seriously, limits its freedom to experiment under such conditions” (2000, 202).

In other words, for Dworkin, rights are actually here to protect people from governments’ creating uncertain right restrictions in uncertain contexts. Indeed, taking a decision at the present time might seem like the most efficient way, but later, it will possibly lead to defective results. For example, installing measures of the state of emergency in the common law might seem like an effective way to respond to terrorism currently, but, with the uncertainty of the future, giving such liberties to the governing state could lead to nondemocratic measures depending on who is governing the state. Indeed, Agamben warns against the rise of extreme right wing parties that could use these restrictions for ends that are not democratic (Le Monde, 2015).

Indeed, in the context of France post-terrorist attacks, the political climate illustrates this worrisome fact. The National Front (the extreme right wing party of France) was the only party of France that saw itself really progressing in regards to its scores in the regional elections (Le Parisien, 2015), while the scores and the image of the left wing parties was mostly weakened. Therefore, if one makes the supposition that the rise of the extreme right wing party increases enough to become the leading party, having emergency state rules established in the civil code might become this unsettling uncertain future which one was worried about. Furthermore, as Agamben would point out that in the past the state of emergency’s instalment in the current law has led to dictatorship (Le Monde, 2015). Indeed, he gives the example of the history of Germany. Even before the rise of Hitler to power, Weimar’s socio-democratic party had established the state of emergency so many times that even before 1933, Agamben argues Germany wasn’t a democracy anymore. Therefore, Hitler used the already unstable nature of the country to impose a state of exception that was never revoked (Le Monde, 2015e). Thus, with the uncertainty of the future comes a fear of a slippery slope of further restrictions of all people’s rights as authoritarian parties get closer to power.
In addition, another serious concern with the restriction of rights is discrimination of minorities through unclear rules and vague linguistics of these restrictions. Indeed, for Dworkin rights help to slow the state wanting to impose its rule on the ‘weaker’ links of society (2000, 204). In other words, rights are the only barriers protecting minorities from discrimination and creating restrictions of rights allows discriminative practices to pass as acceptable measures.

Indeed, this is evident through the actual formulation of the counterterrorist French laws, which target the Muslim community. As Agamben says, “any person with regard to whom serious reasons exist to think that their behaviour constitutes a threat to public order and security” “has no legal meaning, and, insofar as it appeals to the arbitrariness of the person who “thinks,” can be applied at any time to anyone”(Le Monde, 2015e). In other words, the laws lack transparency, as the language used remains vague and open to interpretation. Thus, this entails making generalisation. And as Bonino states, in relation to the Muslim community: “their distinctive body markers and signs (e.g.: skin colour, beard, the hijab) endanger the employment of front stage techniques that would help negotiate their identities and interactions on a socially more equal level” (2013, 391). Therefore, the vague formulation of the French terrorist profiling measures puts the Muslim community in a disadvantage position because of the physical markers of their religion and the already existing stigmatizing correlation between Islam and terrorism.

Finally, a further concern is the normalisation of these rights’ restrictions through the common law as I have already pointed out. In France, while the normal justice system disappears through the state of emergency and the slow establishment of some of its measures in the common law, rights restrictions become the ‘new normal’. Indeed, Burgess warns for the risk of a slippery slope as a gradual step-by-step process of restrictions settles within a society. He explains that the habituation to unethical consideration is ‘the bottom of the slope’ and therefore the biggest fear one can have with the process of the slippery slope (1993, 171). Furthermore, Burgess points out that the ethical dilemmas already raised here are also factors that can be associated to the slippery slope argument. Indeed first, he argues the vagueness of the language used in laws can allow stretching to unnecessary restrictions especially with the absence of a judicial oversight (1993, 170). Secondly, he also points out that the instalment of a totalitarian regime as head of the state can lead to discrimination of minorities through their framing as the main cause of that country’s instability (1993,172). Although I cannot go into detail in the step-by-step process by which the French case can be framed as a slippery slope
example, it is interesting to see how the arguments presented here as the ethical dilemmas with right curtailments can also be understood as risks in regards to what constitute the factors to a slippery slope.

Thus, in the context of France, the uncertainty of consequences, the targeting of the Muslim community and the normalisation of the state of emergency in the common law are all processes that constitute the ethical risks with right curtailment, and factors that lead down the dangerous slippery slope of further rights curtailment. Therefore, in the context of terrorism, there are clear concerns to be aware of when curtailment of rights occurs.

However, the French government’s wish to impose security on the state can be assumed to be a genuine concern too. Additionally, it has been argued that the preconception that in order to prevent terrorism and accomplish security, we need to respect and comply with all human rights is an unrealistic approach based on no empirical proof (Dunér, 2007, 91). Indeed, this is the position taken by the French government that emphasised very much the importance of weighing the safety of the state over some individual rights. Thus, how do we solve the conflict between society’s interest in security and the respect of human rights in the context of the terrorist threat?

3. Solving the conflict between state security and individual rights

Dworkin has an approach to solving conflicts between society’s role to guarantee security and individual rights (2000, 194). He argues that each single individual’s rights have the ability to trump collective justification (Griffin 2009, 21). Thus, a single individual has enough moral weight to put into question a measure taken by its government, even if it is already part of the Constitution (Dworkin, 2000, 196). Therefore, if a government believes the security of the state outweighs some individual rights, then it has to prove it following either one of these three conditions:

“The government might show that the values protected by the original right are not really at stake in the marginal case or are at stake only in some attenuated form. Second, it might show that if the right is defined to include the marginal case, then some competing right would be abridged. Thirdly it might show that if the right were so defined, then the cost to society would not be simply incremental, but would be a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved” (Dworkin, 2000, 200).

Consequently, in the context of France, the government would have to explain why the state’s security is more important than individuals’ rights. Either by proving that if security is not
provided, then further individual rights will be violated. For example, if the government does not prioritise state security over rights, terrorists would have more freedom to violate the rights to life or the freedom of movement or freedom of expression... Or by arguing that the cost France would have to pay as a democratic country is a lot higher than if it simply enforced security over rights. For example, proving that the democratic and liberal nature of the country is at risk, if security doesn’t outweigh some individual’s rights.

This perspective, however, might be seen as difficult to apply in reality especially under the potential threat of terrorism. Therefore, Whittaker proposes another ethical evaluation exclusively related to addressing a terrorist conflict. He points out that because each terrorist attack is different, so each needs a different assessment (2002, 169). He proposes a piecemeal approach where all aspect of the particular case is evaluated before taking action on counterterrorist measures (2002, 181). In other words, for Whittaker, in order to give a good evaluation of a counterterrorist measure one should weigh all aspects of that measure and its affect on human rights before taking a decision. Although, I could argue further that Dworkin’s perspective would hold a stronger claim for the preservation of rights than Whittaker’s, they both desire to solve the issue of state security and individual’s rights interests using methods that will balance out the benefits and costs of restrictions and justify counterterrorist measures on their moral grounds, rather than exclusively on their cost to society. Thus, both these methods try and find alternatives to right restrictions, which is essential to a practical evaluation of counterterrorist measures, as I will initiate in the following chapter.

Hence, in this chapter I explained what a human right is and presented the Universal Declaration of Human Rights as the instrumental basis of my assessment. I then raised the main ethical concerns with these rights restrictions in the context of the terrorism-as-war framework. Finally, I presented methods to assess the moral value of the French counterterrorist measures taking into account the moral dilemmas with restricting rights. Therefore, keeping in mind the ethical limitations of right restrictions and ways to evaluate the conflict between society’s security interest and individual rights, I will assess in more detail the counterterrorist measures and the particular cases presented in the second chapter, in order to evaluate if these are morally justified derogations.
Chapter 5: Ethical evaluation of France’s counterterrorist measures

In this chapter I will go through the different counterterrorist measures presented in Chapter two and raise the different right restrictions they entail. I will evaluate if there are grounds on which France can restrict these, following the list of Universal Declaration of Human Rights (UDHR) and taking the alternative of the terrorism-as-crime framework. Additionally, I will use the ‘Guidelines on Human Rights and the Fight against Terrorism’ (HR and FAT) that were agreed upon by the European Council following the 9/11 terrorist attacks. Indeed, this list of guidelines is a landmark to evaluate the ethical value of counterterrorist measures.

1. The state of emergency

The state of emergency in itself has been debated on its moral implications. However, the implementation of state of emergency measures in the French civil code is what really calls for ethical evaluation.

Indeed, the will of the state to install some of these measures in the civil code seems problematic in regards to human rights interests. Article 28 of the Universal Declaration of Human Rights states: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized” (1948, 8). Therefore, society should always follow an order in which rights can be applied. However, as the terrorism-as-crime framework has argued in the face of a terrorist threat, some derogations of rights are plausible through the establishment of a limited and controlled state of emergency. The ‘Guidelines on Human Rights and the Fight Against Terrorism’ give directions on how to go about these limitations and conditions under a state of emergency (I will only address the conditions that are related to this thesis):

3. The circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist. (2002, 12)

Thus, in accordance with this guideline of the HR and FAT, rights can only be restricted if they are reinstalled entirely further down the line and according to the UDHR, a state should always allow a context where all these human rights are realizable.
However, in the current French context, if not all citizens can find themselves in a position where all their rights are respected because the state of emergency’s limitations of these have been set under the civil code, then all their rights cannot be ‘realized’.

Additionally, from a terrorism-as-crime framework, the state of emergency under the threat of terrorism should be ‘subject to judicial oversight’ and have clear imposition of time limit (2009, 131-132), like the HR and FAT also orders. However, if the judicial oversight is taken away and the time period is extended to the French civil code, the rules set by the state of emergency do not respect the UDHR or the Guidelines of HR and FAT.

Furthermore, it is essential as I pointed out in the previous chapter to search for alternatives to right restrictions before allowing them. Indeed, NGOs such as Amnesty International listed recommendations for the French government to consider before taking into practice the imposition of state of emergency measures in the current law (2016, 36-37). Indeed, even Dunér who is a firm believer that security can outweigh individual rights under a potential terrorist attack argues, “A line needs to be drawn between legitimate and illegitimate tradeoffs between security ad human rights” (2005, 99). He proposes that listening to ‘genuine popular’ representatives’ (2005, 99), can help find laws that balance NGOs’ and the population’s concerns for human rights with the State’s security concerns.

Therefore, the inscription of rules from the state of emergency in the civil code are debatable on the grounds that it doesn’t respect clear limitations or conditions, has no judicial oversight and doesn’t consider alternative voices.

2. Increase in security forces’ power and autonomy

One of the main issues with the increase in police and security forces’ power and autonomy has to do with the right to privacy. Indeed, the progress in security forces’ access to new technologies that will improve the quality and quantity of its intelligence’s information, and the worry that the police will abuse of their power for different ends than counterterrorist ones, (Mediapart, 2016) raise clear concerns on the human right to privacy (UDHR, 1948, 4). When it comes to the violation of this right, the European Council’s HR and FAT 5th guideline points out:
“5) Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:
1. (i) Are governed by appropriate provisions of domestic law;
2. (ii) Are proportionate to the aim for which the collection and the processing were foreseen;
3. (iii) May be subject to supervision by an external independent authority.” (2002, 9).

Thus, as the guideline of HR and FAT states, for the French policies to enforce security and surveillance they need to stay transparent and consistent with their liberal democratic government, and have objective and neutral supervision from exterior neutral parties. Additionally, following Dworkin’s solution to solve the conflict of state security and individual rights, the state would have to find legitimate ways to show how the restriction of the right to privacy is essential in order to protect the country from further right’s abridgement. For example, the state could argue that if they remain with no infringement of the right to privacy, the French population might be at severe risk of insecurity. Furthermore, according to Miller, under the terrorism-as-crime framework, the government can excuse restricting privacy rights under the threat of terrorism. Indeed, he states that holding that right, as a moral fundamental is unsustainable in the fight against terrorism, as he believes that restricting a right to privacy through stricter rules of surveillance doesn’t always highly impact individuals’ rights to freedoms (2009, 110).

However, Maras defends that a right to privacy is essential to a democratic society because “it fosters and encourages the autonomy of its citizens” (2012, 76), and creating a society where fear and suspicion is constant could lead to a mistrust in all the nation’s visitors and civilians, that could also later down the line lead to a slippery slope of further rights curtailments.

Thus, if France wants to derogate the privacy right it has to be aware of the risks run by such restrictions and give clear and transparent restrictions for the curtailment of that right, especially if these measures will be furthered under the civil code.

Therefore, I will now look at the effect of the state of emergency and increase in security power’s autonomy on human rights in the cases already raised in the second chapter.

3. Practical examples of these counterterrorist policies

3.1 Closing of suspicious public places: the case of the Mosque
In the second chapter, I raised the example of a Mosque being closed under the whole state of emergency period on unjustified grounds. This case was criticised on the grounds that this restriction of access to faith was discriminative and based on a generalisation of a whole community. Indeed the mosque was characterised as fundamentalist, while only one or two of its attendees were suspected to be seriously radicalised in their faith (Amnesty International, 2016, 25). Therefore, a whole religious community was penalised, which seems unfair. Indeed, the criticism made by Amnesty International pointed out the discriminative nature of such a measure. This violates the second Article of the UDHR, which states:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” (1948, 2)

Additionally, it violates the Article 18, which states:

“All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.” (2002, 8).

Thus, all three rules point out the absolute prohibition of discriminatory measures on grounds of religion or race. In addition, as I presented in the previous chapter, Dworkin warns for the risk of derogating rights in regards to minorities because of possible discriminative measures like this one. Thus, in this particular case the measure seems to point to a non-respect of the right to religion and non-protection from discrimination. Hence, it holds on weak moral grounds as it points directly to the discrimination problem raised by right restrictions in the past chapter.

However, for Allhoff these forms of measures of ‘exceptionalism’ point out how generally states target groups rather than spatial and temporal factors (2009, 277). Indeed, for counterterrorist measures the time and the place don’t matter as much as the group in itself,
because, terrorism as a violent strategy could occur any time, any place. Thus, the measures that target groups are most effective according to Allhoff (2009, 281). Nonetheless, he does point out the importance of limiting profiling measures to specific group and not generalising it to the broader community (2009, 280).

Furthermore, “Discriminatory measures such as racial or religious profiling tend to reduce community cooperation with the police and reduce immigrants’ integration, especially in vulnerable immigrant communities that may have information on transnational terror networks.” (Brysk, 2007, 180).

Therefore, France in their search to control their terrorist threat should not generalise a whole community as they run the risk of discriminating its minorities and strain the integration of these communities within society (Bonino, 2013, 392). I would point out however, that this rule will not enter the civil code and remains restricted to the state of emergency. Nonetheless, this does not solve the discrimination problem, as I will address in the following chapter.

3.2 House searches without warrants and house arrests

In the case of searches without a warrant and house arrests, the right to privacy and property stated by the Article 12 and 17 of the UDHR (1948, 4-5) seem to be restricted. However, as I already argued in the ethical evaluation of security forces, under an ethical point of view these measures are negotiable under the threat of terrorism only under the transparent and clear limitations, especially when it concerns house searches without a warrant, as this measure will be furthered to the civil code.

However, the ethical concerns I would like to raise first are based on the practical use of these security measures. Indeed, Amnesty International pointed out after interviewing several witnesses that the police was showing unnecessary signs of violence such as breaking and damaging of residents’ properties and the use of violent language or actual physical aggression for no apparent reason (Amnesty International, 2016, 6). Additionally, they also reported that the interventions were usually very poorly explained to the residents and sometimes had no apparent connection to counterterrorist purposes (Amnesty International, 2016, 13).
Indeed, as Amnesty International exemplified, under the state of emergency, the government forced the home residency of 26 ecologists for the entire time of the COP21\(^5\) (Amnesty International, 2016, 18). But it appears on the one hand, they were poorly explained the reasons for their house arrests and on the other hand, it appears these individual had never been charged or accused of any crimes and had no relation to terrorist affiliations at all (2016, 18). Thus, it seems the authorities did not respect the rules of house arrests, and used the state of emergency to include goals that had nothing to do with counterterrorism.

Hence, these criticisms go against the third Guideline of the European council’s agreement on HR and FAT that states:

“1- All measures taken by States to combat terrorism must be lawful.

2- When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.” (2002, 8)

Therefore, it seemed here that although in principle the restriction of privacy and property can be accepted under certain conditions, in practice it has been abused and unjustified.

Thus, as Whittaker pointed out it is important that each case, especially house arrests, be balanced and assessed differently for each individual’s personal affiliation to terrorism (2002, 169), and in accordance to transparent rules of counterterrorism.

Secondly, when it comes to the instalment of these measures in the current law there are some further aspects to consider. For house arrests, the state has ordered some precise limitations of one month for a person who comes back from a theatre of terrorist activity, and a further 6 months of intense surveillance of one’s movements and communication (LeGouvernement.fr, 2016). Therefore, the moral value of these measures is actually set in the state’s ability to comply with its rules and limitations. In other words, the terms are acceptable in principle but need evaluation in practice.

However, when it comes to house searches without warrants, this measure will fully come into affect under the current rule of law with no clear limitations. Indeed, the rule just states that house searches without a warrant at night time will be allowed “only in matters concerned with terrorism and in cases that risk a harm to life” (LeGouvernement.fr, 2016).

\(^5\): Thus, during the Climate change conferences of the COP21 hosted in Paris, only a couple of weeks after the terrorist attacks, the government decided to cancel all the demonstrations that were planned along the period of the conference. The government explained that this measure was taken in order to prevent violence from occurring and to avoid the diversion of mobilisation of police forces (Amnesty International, 2016, 19).
These terms remain vague, with no temporal or spatial limitations and therefore remain debatable on ethical grounds.

Thus, in this chapter, I have shown how the state of emergency and the increase in security powers and autonomy has allowed a lot of restrictions of human rights in principle and in a practical sense too. It entails a restriction of the right to religion, privacy, personal property, but also has entailed violent, poorly justified and discriminatory interventions of the police and security forces. Therefore, using the terrorism-as-crime framework, in addition to Dworkin and Whittaker’s methods to conflicting interests, I showed that the ethical value of restricting human rights is not always justified, especially in the case of rules that will apply to the current rule of law. Thus, in the following part, I will give my normative conclusions on the French counterterrorist policies, and the implementation of some of these in the current law, in order to give an overview of this evaluation.

Chapter 6: Conclusion

So, in this thesis, I first described the November 2015 Paris attacks, their direct aftermath and the debates it raised. Then, I introduced the terrorism-as-war framework in which the current terrorist attacks have been understood. I explained the inconsistency with taking such a perspective and proposed an alternative with Miller’s terrorism-as-crime framework. In my fourth chapter, I went deeper into the problems with taking a war approach by addressing the ethical concerns the restrictions of human rights can raise, in regards to creating a slippery slope of further right curtailments and allowing discriminative laws in its constitution. Thus, I then addressed two different ways to balance the state’s wish for security and the human right’s interests in counterterrorist measures. Finally, in chapter five, I assessed the different measures I raised by evaluating their particular problems in order to define if these rights restrictions and counterterrorist policies in general are justifiable. Therefore, in this conclusive chapter, I will unveil the answers to my research questions about the ethical value of these counterterrorist measures and give my conclusive remarks on the conflict between the French state’s wish for security and individuals’ human rights.
1. Normative Conclusions

1.1. Transparent laws with clear limitations and neutral external oversight in principle and in practice

First, the laws set in place by the state of emergency and the increase in security forces’ power seem to lack transparency and clear limitations. In order for restrictions under a state of emergency or not, to be justifiable, there needs to be clearly set limits in principle but also in practice.

In principle, all the measures pointed out in chapter five need to be more clearly defined. In other words, the terms used to allow house searches without a warrant or house arrests need to be clarified in order not to allow the authorities crossing the line of what are justifiable measures. Indeed, the problem with having such abstract rules is allowing the state or police to bend the rules, especially if the judicial oversight is shortened. Indeed, as I previously illustrated, France has restricted the judicial hierarchy. In order for the police or the investigators to take decisions faster, the government has taken out the overarching judicial oversight of neutral judges and given it to the direct prosecutors of the affair. However, one of the most repeated point from the ethical evaluation of counterterrorist policies is that in order for these to be legitimate, there needs to be an outside, neutral point of view that can assess these on their basic formulation and practice (Miller, 2009, 131). It would be unfortunate to find that authorities are taking advantage of such loose rules because no legitimate judicial oversight can control the extent of their power. Indeed, without an external and neutral advisor like a judge, it seems that little protection on individuals’ interests is given. As Dworkin pointed out, rights are supposed to protect us from the state moving further and faster (2000, 204). Thus, if rights are to be derogated, limits are to be set so to protect each individual from unjust laws.

Even when it comes to the right of privacy, although it has been argued previously that its restriction can be excused, in order to stay on track with its counterterrorist purposes France needs to be transparent about the use of these measures, the same way it has to be with all other measures. However, it is important to explain the problems with having transparent rules in regards to this right. Indeed, in order for the fight against terrorism to be effective secrecy is essential to outdoing terrorist plans before they come into actions. Furthermore, if people involved with terrorist affiliation are aware they are being watched, their behaviour will change and the terrorist trail will be lost. Therefore, the security forces need to have
effective ways to outdo terrorist intelligence without getting caught, but also whilst avoiding unnecessarily violating the human right to privacy. Indeed, the risk of restricting the right to privacy too much is the whole French population becoming the ‘others’ (the terrorist profile) (Maras, 2012, 78), which could lead to a population that doesn’t trust the government’s justification for restricting privacy. Indeed, as Sorell says: “The potential benefits of trust for counterterrorism are as great as the moral risks of secret surveillance” (Sorell, 2011, 19). In other words, both the secrecy interests of the government and the trust concerns of the population need to be recognised. Therefore, once again here I believe it is essential to have an exterior party overlooking the work of surveillance entities in France. This entity should be neutral and driven by transparent legal norms, while also promising to remain faithful to an oath to secrecy. Thus, ethics need to be set within the surveillance policies, but also within the exterior party’s monitoring the practical use of these policies.

Furthermore, in practice, the police’s use of house searches without a warrant and house arrests has not always shown to be models of ethical behaviour. People who find themselves victims to these measures must be clearly explained the reasons and the procedures of their house arrests or house searches in order to fully understand the accusations they are subject too. Indeed, for these measures to be justified a clear assessment of the different cases needs to be done. Thus, the neutral entity in charge of assessing the counterterrorist policies of France should also be in charge of making sure that the practical evolution of these are correctly undertaken. As Whittaker proposed, each case should be attentively assessed (2002, 169), as each situation shows differences and entail different levels of restrictions. Thus, in principle or in practice, transparency and limitations on derogations of rights is key. Also, an external advisor should take a case-to-case approach to assess situations in order to reach clear and ethical solutions.

1.1 Abstaining from discriminative policies and practices

Secondly, the French government must be fully aware of the possibility of discrimination in its measures, especially with the Muslim community. Although the example treated here about the closing of Mosque will not be furthered into the civil code, the targeting of the community does not stop here, and there are other measures that will be implemented in the current law that could lead to Islamophobia. Indeed, for example, the right of the police to hold someone, controlled in the street, under custody for four hours, with no lawyer, on the ground that “there is serious reasons to think that their behaviour is related to terrorist natured
activities” (Le Monde, 2016e), could lead to discriminative profiling. Once again, similarly to the terms used for searches without warrants, the limitations are vague and allow a generalisation of a group. As Bonino says: “many Muslim’s position in social situations is situated a priori, to the extent that discrimination and stigma can be attached on the basis of visual contact as a socially constructed way to classify them as ‘discredited’ individuals and inform mass social behaviour” (2013, 391). Thus, by allowing physical markers such as the Islamic veil for women or the long beard for men, to become socially constructed prejudice about someone’s behaviour, the French State’s measures could lead to the targeting of the whole Muslim community, rather than the few dangerous individuals inside the community, and further down the line, create assumptions and misunderstanding about the broader community. Indeed, if the wrong profiling measures are the norm, the Muslim community as a whole becomes the ultimate ‘other’.

This issue unfortunately seems to be rooted in the French history with the integration of the Muslim community. Indeed, the Muslim community in France has long been disintegrated. Indeed, a majority of the Muslim community finds itself in the working class and have limited opportunities in education and employment (Bigot, 2012, 16). Furthermore, their exclusion is also spatial. Their presence is in great majority found in the French ‘banlieues’ of big cities of France. This is without mentioning the long inability of the French State to harmonise its model of integration (laïcité) with the Muslim identity. Thus, France’s inability to integrate the large and diverse Muslim community mirror these discriminative counterterrorist measures (Bigot, 2012,14). Although, I cannot go into further detail, as it would have to entail a whole other thesis, I believe it is essential to point out that France needs to address its integration problems in order to stay ethical in its counterterrorist measures too. Indeed, the government is already aware that one of the most effective measures to solve terrorism is by preventing it (LeGouvernement.fr, 2016), however having such vague and controversial terms in their counterterrorist measures will not help to solve this discrimination problem.

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6: “Nowadays, immigrants still seem to be less educated than the rest of the population. Thus, only 17% of the mainstream population has no qualification or a low qualification. (...)In fact, this proportion varies a lot among the different communities of immigrants: it reaches 65% among the immigrants of Sub-Saharan Africa, 60% among Turkish immigrants, 45% among Moroccan or Tunisian immigrants, or 43% among Algerian immigrants” (Bigot, 2012,16) and “their spatial integration is also a blatant failure. Indeed, most of these communities live in banlieues, that is, the suburbs. (...) The spatial segregation is so important that nowadays, Islam and banlieues are too often considered together”. (Bigot, 2012, 17) France pursues excessively restrictive policies towards the Muslim communities, which participate in an anti-Muslim climate and infringe on personal freedoms. The issue of the coexistence of laïcité and Islam shows a deeper, even existential, crisis of integration in the French State (Bigot, 2012, 16)
Thus, by insisting on targeting an already discriminated community, France will only worsen the situation. Therefore, I would propose that in order to come to grips with terrorism, the French government should look for long-term solutions that involve improving the situation of the Muslim community in France. Therefore, there should be a specification of profiling rules, in a way that does not focus simply on visual appearance or a light suspicion but rather on clear evidence. Additionally, I believe it is necessary for France to focus its effort to fight terrorism at its root, by preventing radicalisation in the first place.

1.2 Alternative voices

Thirdly, it seems essential for the government to consider the alternative voices that have an opinion on the ethical value of counterterrorist measures. Indeed, in chapter five I gave the example of Amnesty International proposing alternatives to the restrictions of rights (2016, 36). Although I do not argue here that Amnesty International’s propositions were the right ones, I believe even taking into consideration the alternatives given by concerned parties can legitimise the state’s decision and improve the democratic nature of the country. Indeed, as Dunér states governments could “profit immensely from NGO participation” in the decisions about counterterrorist measures (2007, 100). I would even go further by saying that France needs to unite with the globalised voices that are also concerned with finding effective solutions to terrorism while remaining faithful to human rights.

The UN7 or the European council are good alternative voices. Indeed, the European Council’s guidelines of the Human Rights and the Fight against Terrorism, should help the French government to evaluate and bring back ethical value to their measures. Therefore, a communication between countries and the International community should be constant and effective in order for all parties to improve from the past mistakes and to walk towards a better handling of human rights in the fight against terrorism. In addition, France could also use the help of the international community (here the UN or the European Council) to comment on their current counterterrorist practices and to play the role of a neutral evaluator of these. Indeed, France has claimed its wish to address this global terrorist crisis with the international community (Le Monde, 2015a).

7: although I didn’t use this source of data here, the UN also has a Human Rights and fight against terrorism factsheet that outlines the challenges and possible responses of a government in relation to terrorism (Fiche d’information n°32, 2009).
Thus, if the French government wants to honour its engagement, and have a more ethical approach to counterterrorism, it should allow international parties and NGOs to participate in taking the decisions on counterterrorist measures, in order to give possible alternatives that might not involve as many rights restrictions.

Thus, I conclude that the state needs to show clearer and more transparent rules on its restrictions with external and neutral oversight. Also, it needs to be more aware of the risk of discrimination in its laws and address this issue at its core through integration rather than discriminative profiling. And finally, it needs to look for alternative options to rights restrictions with the help of the International communities and NGOs to promote their cooperative means to defend themselves against terrorism. All these measures will at the same time help not to go down the slippery slope of further right restrictions and the deepening of the already present issues of discrimination for example. However, none of this is possible if the state doesn’t approach terrorism in a different framework.

2. Keeping the state of emergency for emergencies: Avoiding a slippery slope towards a surveillance and discriminative state

As I argued in the third chapter, the misconceptions about terrorism in a war framework are what allow all these right restrictions in the first place. Indeed, under a war framework the state finds itself able to restrict rights and limit the power of the judicial oversight in ways that do not benefit rights of civilians.

Indeed, it rather creates a new extra judicial space in which any restrictions can be normalised under the excuse of guaranteeing the state’s security. Nonetheless, the alternative terrorism-as-crime framework also admits that some measures that restrict rights are plausible but only through external neutral oversight, clear and transparent laws and serious considerations of alternatives, for a limited amount of time, under a state of emergency. Therefore, the terms of restrictions of rights under the war framework are a lot more abstract than for the terrorism-as-crime framework.

The major problem with the terrorism-as-war framework is the absence of time limitation on restriction of rights. Indeed, once measures of the state of emergency are implemented in the civil code it seems the time limit has evaporated and the bottom of the slippery slope has been reached. Taking the slippery slope argument into consideration, it is the instalment of these measures within the civil code, which mark the risks of further right curtailments. In other
words, the security of the state is placed above the rights of the French civilians, a perspective that the terrorism-as-crime framework would not allow and the slippery slope argument denounces as extremely risky. Indeed, with the threat of extreme right-wing parties getting stronger, or other terrorist attacks occurring, the danger for further restrictions is a real concern, and point towards the risks of an establishment of paternalistic and authoritarian traits in the regime that go against the nature of a liberal democracy and the protection of human rights.

3. Conclusion overview

France’s understanding of terrorism as an ‘Act of War’, frames the terrorist attacks in a way that allows rights restrictions in a state of emergency and further in the civil code. However, Miller’s alternative framework of terrorism-as-crime shows there is a more ethical way to perceive terrorism that does not necessitate rights’ curtailment in the civil code and address rights’ restrictions only within a controlled and transparent state of emergency.

However, here is an overview of the conditions following which the French government can take a more ethical perspective in its counterterrorist measures that curtail human rights:

- The use of transparent laws with clear limitations and neutral external oversight in principle and in practice.
- Abstaining from discriminative policies and practices and pushing a long-term progress in the integration of the Muslim community in France.
- Listening and working with alternative voices of NGOs and international communities.

Therefore, I conclude that human rights curtailment is not an issue that should be taken lightly even in the face of terrorist threat, because the risk of a slippery slope towards worse measures is a reality. Thus the French government should keep in mind the following quote, while it is slowly legitimizing human rights restrictions in its Constitution:

“All possible moral state of the world can be reached from any other such state through a long enough series of gradual steps, just as any musical pitch can be reached from any other through a sufficiently long glissando.” (Burgess, 1993, 172)
References


