

**THE TERRORIST ACROSS LAW AND CRIMINOLOGY: A
COMPARATIVE, INTERDISCIPLINARY AND CRITICAL GAZE**

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ABSTRACT

The ‘terrorist’ has often been depicted as a being transcending the ‘standard criminal offender’. This paper aims at providing the reader with an overview of the concept of ‘terrorist’ considered across different legal systems and criminological perspectives.

The qualification of ‘terrorist’, legal or otherwise, contains in itself more than legal meaning: even more so than the ‘standard criminal offender’, the terrorist tends to be depicted as an abnormal, deviant individual who is unlikely to fit ‘standard’ categories due to the social discredit that is usually associated with infamous terrorist attacks. This, of course, is mirrored by the lack of any hardcoded definition of ‘criminal’ or ‘crime’.

For instance, terrorism itself is a concept associated with those of ‘evil’ and ‘wrongness’, exacerbated by declarations such as that of Mr. George W. Bush, who has defined terrorism as ‘evil incarnate’. On the other hand, terrorists are sometimes described as ‘freedom fighters’, adding to the misconception and uncertainty.

For this reason, the paper, after having examined the definition, or lack thereof, of terrorism across European Union Law, Italian Law and English Law, will provide a critical, criminological analysis of the terrorist persona, highlighting discrepancies and similarities across seemingly different theories. Definitions of both legal and scholarly nature will be provided. A dissenting opinion will then be provided, emphasising how Law and Criminology, in theory, could benefit from a non-static definition while embracing a flexible, entirely context-based approach.

In the last decade, a great deal of legal literature has been produced in relation to the problem of terrorism, obviously ignited by the tragic 9/11 events. It is not an easy task, to produce law concerning terrorism, especially considering that the phenomenon is ill-suited to being contrasted by criminal law alone, nor is history easily compressed in the Halls of Justice (Barberini, 2006).

The international community is also shambolic at uniformly identifying terrorism and punishing terrorists: the state of emergency has indeed prompted to attempt a greater degree of cooperation, including deportation pacts towards the US resisted by European countries, in no small part due to the presence of American 'terrorism tribunals' and the possibility of the death penalty, which is rejected and condemned by most European countries (Barberini, 2006).

Thus, any analysis of terrorism has to acknowledge, first and foremost, that there is no universal definition of terrorism, neither in the social sciences nor in the law (Williamson, 2009; Schmid, 2011). International bodies and government agencies have failed, as of today, to reach a consensus and the magistracy, of course, has to follow suit and act within its own means.

Therefore, it is pretty much impossible to discourse 'the terrorist' without firstly discoursing terrorism. However, the issues belonging to the wider definition affect the narrow one as well. While the Encyclopaedia Britannica does not, indeed, feature a definition of terrorist, the Treccani Encyclopaedia does: "[...] Membro di un'organizzazione politica che si avvale, nella lotta, di metodi terroristici; appartenente a gruppi terroristici [...]" (Treccani.it, 2012). However, as mentioned before, the definition is a tautology: terrorist is the member of political organisations that employ terroristic methods or a member of terrorist groups. In short, the knot lies in the definition of terrorism, and in theory that of terrorist should follow suit.

Laws and regulations often enacted to provide security forces with instruments cannot exist without a definition to build upon, in order create effective laws, impose sentences or confiscate their financial assets. However, because no clear-cut definition exists, legislation has been voided of effectiveness: ordinary criminal law, despite the similarities, cannot solve the problem of terrorism

due to its enormous implications caused by its political dimension and threat to society (Barberini, 2006; Erlenbusch, 2014; Ganor, 2002; Garofoli, 2005).

Being terrorism an international phenomenon, its responses must match this dimension, but an effective strategy would require an agreement – thus, a definition to build consensus upon (Erlenbusch, 2014; Ganor, 2002). International mobilisation against terrorism, otherwise, is doomed to failure, since no international agreements may be formulated or enforced (Erlenbusch, 2014; Ganor, 2002).

An international definition of terrorism, and terrorist, is required to enhance collaboration between countries in the struggle caused by the war on terror and, more importantly, to ensure that the war on terror is won. This necessity is obvious in case of international conventions and treaties when trying to prosecute terrorists and their activities. A possible issue with strict definitions is, of course, that they tend to be instrumental to political ambitions, or be biased by the writer's preconceptions, ultimately leading to unsatisfactory results and, consequentially, policies (Erlenbusch, 2014): it is not a random case that research and definitions of terrorism increase exponentially after an attack (*e.g.* what happened in the UK with the Terrorism Act). Because of this, policies end up being dictated by fear and public outcry, rather than reason.

Actions also require a common ground to build initiative upon. Every attempt to limit the operational capacities of terrorists requires to be supported by a continuous offensive against organisations. This, of course, is difficult in case of asymmetric conflict because States are not supposed to be active, warmongering parts and proactive actions often tend to be ill-perceived and criticised by the population because, due to the uncertainty caused by the definition of terrorist, innocents, human rights or civil liberties tend to be caught in the crossfire, often for very little results if compared to what has been sacrificed (*e.g.* what happened with the 'Snooper's Charter' of the UK).

In the law of the European Union (EU), the most important piece of legislation to reference terrorism is the "Council Framework Decision of 13 June 2002 on combating terrorism", whose article (art.) 1, "Terrorist offences and fundamental rights and principles", recites:

“1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

- (a) attacks upon a person's life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”

The principles established in this definition resonate throughout the entire EU, and are reflected in domestic legal frameworks. As a preliminary observation, however, it is possible to emphasise how this definition aims to be omni-comprehensive (Hoffman, 2006) falling, unfortunately, in the same pitfalls explained at the beginning (politicisation based upon emotions). It also shows a certain degree of rigidity, making it cumbersome to update it when, inevitably, the necessity will arise.

In the *corpus juris* of Italy which, for the purpose of this comparison, represents the *civil law*. Italy, by virtue of the civil law system being more powerful and versatile, does not feature a codified *stricto sensu* definition of terrorism in the *Codice Penale* (Criminal Law Code – CLC). In its

place, it establishes, first of all, a definition of ‘behaviours with purpose of terrorism’ by art. 270-*sexies*CLC:

“Sono considerate con finalità di terrorismo le condotte che, per la loro natura o contesto, possono arrecare grave danno ad un Paese o ad un’organizzazione internazionale e sono compiute allo scopo di intimidire la popolazione o costringere i poteri pubblici o un’organizzazione internazionale a compiere o astenersi dal compiere un qualsiasi atto o destabilizzare o distruggere le strutture politiche fondamentali, costituzionali, economiche e sociali di un Paese o di un’organizzazione internazionale, nonché le altre condotte definite terroristiche o commesse con finalità di terrorismo da convenzioni o altre norme di diritto internazionale vincolanti per l’Italia.”

This particular disposition was introduced in 2005 by Law n° 155, and features a so-called ‘blank closure clause’, allowing for automatic implementation, in Italian law, of binding European and international treaties or agreements. The strongest feature of this legal precept is its adaptability, since the law establishes how every behaviour that may harm a country or an international organisation may be considered as ‘perpetrated with the purpose of terrorism’ (Garofoli, 2005), such as crimes perpetrated by organised crime, *e.g.* the Mafia (La Stampa, 2013).

In the *common law* of England and Wales, terrorism is defined by the, amended, Terrorism Act 2000:

“(1) In this Act “terrorism” means the use or threat of action where—

- (a) the action falls within subsection (2),
- (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
- (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it—

- (a) involves serious violence against a person,
- (b) involves serious damage to property,
- (c) endangers a person’s life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

[...]

(4) In this section—

- (a) “action” includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.”

The Act has been amended almost yearly (Islamic Human Rights Commission, 2013) since its introduction, in no small doubt due to its intrinsic lack of flexibility and omni-comprehensive aims. The most recent amendments, in fact, are aimed at tackling cyber terrorism

As mentioned before, it will be interesting to see how the UK will behave in relation to international treaties and communitarian precepts, in light of its hapless decision to leave the EU.

It is now possible to draw a firm line in the Comparative Criminal Law analysis.

First of all, the ‘terrorist’ is rarely, if at all, defined or identified by statutory law. This, of course, is a consequence of the uncertainty affecting the main definition of terrorism but, in fact, it is not unheard of. ‘Crime’ and ‘criminal’ are terms that suffer the same fate, in the law: while it is possible to enumerate several occurrences of crime and types of criminal, it is very difficult to find, in the legal environment, a proper definition of either term.

Secondly, all definitions emphasise the requirement of fear and intimidation: while terroristic behaviour may be ‘standard’ in terms of criminality, this requirement enjoys a particular emphasis not shared by any other type of crime. In fact, this element is so strong that it overrides any other, even in case of acts perpetrated by non-terrorist entities, such as when the *mafia* murdered Falcone, a prosecutor now symbol of the fight against organised crime in Italy: that bombing was recorded as an act of terrorism, rather than a mere criminal event (La Stampa, 2013).

Unlike other disciplines, criminology has not dedicated terrorism and terrorists the attention it should deserve, especially considering that “terrorism is a form of crime in all essential respects” (Clarke and Newman, 2006: vii) despite its unique distinguishing traits (Forst, Greene and Lynch, 2011).

As said, defining terrorism is not a theoretical, abstract issue, but an operative concern of paramount importance, since terrorism is no more a localised, decentralised issue but an international problem: terrorists may strike across many countries, victims may be of any nationality, terrorist 'infrastructures' may be in places different than the ones hit by attacks, and the support, including financial support, they receive from states and the population is vastly different and widespread (Erlenbusch, 2014; Ganor, 2002).

A practical example of this is caused by issues arising from terrorist extradition and deportation: while countries have signed multilateral agreements for a multitude of crimes, political violence is explicitly excluded, and since terrorism is always political/ideological in nature (Barberini, 2006; Hoffman, 2006; López-Rivera and Headley, 1989), this has led to countries never deporting individuals wanted for criminal activities (Ganor, 2002; Erlenbusch, 2014).

A definition separating the terrorist from the common criminal would also allow the creation of international initiatives tackling the phenomenon in a much more focused way, such as what happened for human trafficking and creating a unified opposition (Erlenbusch, 2014; Ganor, 2002; Hoffman, 2006). However, in order to ensure universal condemnation of terrorism is achieved, countries will need to stop projecting their own political goals and aims in the definition of terrorist, and find a definition which will allow a final, definitive identification of illegitimacy.

Indeed, there is no shortage of definitions of what is a terrorist by academia (Schmid, 1984; Hoffman, 2006). However, each definition is characterised by a significant amount of contradictory traits: on one side, the well-known lack of consensus has caused an abundance of definitions to exist; on the other side, crime and terrorism are still blurred and somehow the assumption exists that seeing acts of terrorism would equate to knowing the perpetrator (Erlenbusch, 2014; Ganor, 2002). The difficulties of the definition of terrorism have led a number of scholars to advise against (Fletcher, 2006; Waldron, 2004).

There is, of course, another factor to take in consideration: the attitude of terrorists towards their own classification, which may appear to be a trivial concept, but it is not (Erlenbusch, 2014; Ganor, 2002). While consent, in this case, could appear as a hilarious oxymoron, demanding the terrorist to accept being qualified as such, the power intrinsic to the word has often been considered as a key factor: not a mere tool, but a true qualifying term, capable of swinging public opinion (Erlenbusch, 2014; Clarke and Newman, 2006).

Because of this, a list of academic definitions of terrorism would be pointless: however, two of the most significant one will be reported, coming from interdisciplinary approaches encompassing criminology and studies of political violence.

The first one will be by Professor Hoffman, possibly the foremost authority on Terrorism, one of the few actually providing a definition of terrorist, in addition to that of terrorism:

“By distinguishing terrorists from other types of criminals and terrorism from other forms of crime, we come to appreciate that terrorism is:

- ineluctably political in aims and motives
- violent—or, equally important, threatens violence
- designed to have far-reaching psychological repercussions beyond the immediate victim or target
- conducted by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia) and
- perpetrated by a sub national group or non-state entity.

We may therefore now attempt to define terrorism as the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change. All terrorist acts involve violence or the threat of violence. Terrorism is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack. It is meant to instil fear within, and thereby intimidate, a wider 'target audience' that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general. Terrorism is designed to create power where there is none or to consolidate power where there is very little. Through the publicity generated by their violence, terrorists seek to obtain the leverage, influence and power they otherwise lack to effect political change on either a local or an international scale.” (Hoffman, 2006: 41).

This definition, of course, is unique in the sense that it deals firstly with the who, rather than the what: a different approach but one, of course, that is to be expected of the leading authority on terrorism. As mentioned before, even professor Hoffman recognises that terrorism is a unique type of crime: thus, the terrorist is a special breed of criminal, one that is more focused on non-material, but ideological results and, because of this, it is more unpredictable and difficult to typise.

The second, of a very different nature, was proposed by Ganor: “the deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends” (Ganor, 2002: 293). This definition is much shorter,

Of course, the same issues shown before appear again in these definition: tendency to be universal, excessive level of detail or, on the other hand, excessive vagueness and quasi-deliberate omissions.

While academia has proved more willing than Law to define terrorists, therefore, the same issues keep tainting efforts, leading to politicised and unfair definitions. At the same time, however, it is important to highlight how criminology and the study of political violence, by not being bound as strictly as the law, is capable of highlighting and valorising elements otherwise left behind.

At the same time, however, both definitions of terrorism shown above do feature an additional common element: the element of fear and terror.

Terror, apparently, is the element that persists across Law and Criminology when defining terrorism and the terrorist, separating it from the common criminal, capable of inflicting harm, but not terror. And yet, how reliable can an emotion be, when trying to create a definition used for policy-making and research? It is because fear, unlike the sense of right or wrong, is a primal evolution, that everyone can understand: while people experience terror due to different things, the emotion is the same. And while emotion has not found its place in Law, it has in the Social Sciences and in Criminology, which may act as bridge between the excessive rigidity of law and the fluidity of social sciences.

Ultimately, there is no right or wrong answer concerning the issue whether a definition of terrorist should exist or not: some view it as a frustrating exercise, others will see its necessity justified by the fluidity and flexibility of terrorism itself. Reasons affecting the meaning of terrorism vary across time and societies, in addition to being dependent on a plethora of factors depending on nature, history. It is, at the same time, impossible to ignore the regular patterns of terrorism, the common elements that transcend time, such as the element of fear, persisting and characterising terrorism for what it is.

Finally, the best approach might be the recognition of terrorism as a concept that is both rigid and variable, with a typical but variable identity. No discipline alone, ultimately, will be able to explain it: Law and Criminology, together, might be a good starting point, without failing to take into account that the terrorist is no common criminal: it is a faster, more adaptable breed, and any successful approach will require something capable of creating confrontations on equal footing. Italy, surprisingly enough, has proved to be a step above others in this regard: the Civil Law, therefore, by virtue of its greater flexibility and power, can show the way to go forward, if integrated by other disciplines.

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