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A critical concept of terrorism for criminal prosecution

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Abstract

One of the main difficulties of the terrorist phenomenon is finding a complete and univocal notion of this concept. Moreover, it seems abundantly clear from the existing scientific literature that this is ultimately a utopian goal. For this reason, the following pages do not seek to provide an explanation which inevitably ends up concluding yet again that a permanent definition of terrorism is untenable. On the contrary, the purpose of this paper is to offer a legal concept for its insertion in a social reality at a specific time and place, which should serve as a useful tool when interpreting the criminal offences for punishment of terrorist acts, and also to critically assess the criminal policy. Therefore, the concept proposed does not possess nor pursue an unattainable universality. Its aim is much more limited, although still valuable: to pose a definition of terrorism, firstly in sociological and subsequently in legal terms, which is valid for use in modern criminal legislation. To this end, firstly terrorism is analysed from a sociological perspective, establishing the foundations of this phenomenon and the characteristics of the so-called 'new terrorism'. Based on these criteria, a legal analysis is then undertaken of terrorism, with formulation of a hypothesis which is tested using criminal phenomena that may be considered terrorism or, as a minimum, political violence.

To conclude, a legal definition of terrorism is proposed for use in current criminal legislation.

1. Introduction

The definition of terrorism has occupied countless pages in many different branches of study for decades now. According to Silke, since the 9/11 attacks alone more than 635,000 articles have been published that include the word 'terrorism' in their titles (2019a). The conclusion to be drawn is that defining terrorism is a utopian goal, at least if one seeks to elaborate a concept that describes the phenomenon in any period and context. In fact, part of the literature maintains that it is more correct to speak of the existence of various 'terrorisms' rather than a phenomenon "that can be spoken of in the singular" (Ottenhof, 1989; Di Filippo, 2014; Terradillos 2016, Llobet, 2016). These 'terrorisms' would embrace acts of a very diverse nature, ranging from violent subversive actions, through to those institutionalised in public power in the case of regimes that use violence or the threat of violence (in short, terror) to subjugate the population or a group of citizens (García San Pedro, 1992).

However, all these acts should be encompassed under the term "violence for political purposes" or "political violence" (González Calleja, 2017), a generic term which captures their true nature. The exercise of this type of violence has been studied from the perspective of numerous disciplines, including psychology, history, political science, sociology and, of course, criminology and criminal policy, which have sought to translate the phenomenon into legal language by classifying this violence into an amalgam of criminal offences: from the classic offences of high treason or rebellion through to current anti-terrorist legislation.

For this reason, the following pages are not concerned with the more traditionalist

conclusion that a complete and univocal definition of terrorism is impossible (Laqueur, 2003), a hypothesis that has already been proven by the existing literature. Rather, the purpose of this paper is to offer a legal concept for a specific social reality at a specific time and place which serves as a tool when interpreting the criminal offences regulating terrorist behaviour, and also to critically assess the criminal policy. The concept proposed does not, therefore, possess nor pursue an unattainable universality; its aim is much more limited.

A concept of terrorism that achieves these objectives needs clear margins to delimit its proposed scope. Poorly defined concepts that rely on any kind of violence to establish certain serious crimes or any kind of behaviour, whether violent or not, but with a certain (terrorist) purpose, are therefore insufficient. The interpretation and critical assessment of punitive legislation drafted to combat a certain phenomenon must start from a basic premise: the social reality that it seeks to regulate and prevent. This is because such legislation will only be legitimate and necessary when such conduct, delimited by a concept that encompasses and justifies it as a phenomenon differentiated from other realities requires a specific punitive response because it violates absolutely essential legal rights.

This concept cannot be derived from anywhere other than the social reality itself, both past and present, given that knowledge and analysis of the human behaviour that generates social conflict is paramount when it comes to its legal regulation. This is particularly so in the case of criminal legislation, which must protect the legal rights the violation of which generates the conflict in question (Roxin, 1997).

2. Political violence as a social phenomenon

2.1. Political violence and terrorism

The concept of political violence, which includes the notion of terrorism, encompasses various acts with the constant presence of aggression to achieve ulterior ends (Honderich,

1976). These ends, which are presented as justifications for the violence used, are labelled 'political' because they involve a questioning of the spheres of public power. Thus, political violence challenges the status quo by attacking it, at times with the aim of replacing it and establishing itself as a new power, and on other occasions in pursuit of partial objectives to change the policies of the government in power (Ferrajoli, 1981).

Ferrajoli differentiates other forms of violence from purely political violence on the basis of the revolutionary character that political violence grants to its acts. This allows us to distinguish political violence from violent activities which, although they may have ulterior aspirations, are exhausted following execution of the act itself. For example, this would be the case of occasional public disorder or riots. Kriesberg (1975) considers that these phenomena do not even seek to provoke a rupture of the established power or decision-making processes. Violence is used in these cases to force public opinion or the government itself to pay attention to a problem that is not being resolved.

Along the same lines, Lamarca Pérez considers that not all actions aimed at substantially changing the established regime may be considered political violence. For example, civil disobedience "is also characterised as a form of political participation outside the rules of the system, although, as is well known, the attitude of the civil disobedient is public and non-clandestine, peaceful and non-violent" (2016a).

On the other hand, violence used to disrupt the established order need not have a negative connotation *per se*. In this regard, Terradillos (2010) points out the need to further distinguish between violence of oppression and violence of emancipation, the distinction lying in whether or not it generates fear among citizens: for example, killing a tyrant may not provoke terror among the population but, on the contrary, greater security. Accordingly, violence does not have an absolute legal-political value, as it can operate both as a vehicle for liberation or for the most execrable tyranny (González Calleja, 2017). The question therefore arises as to whether political violence aimed at overthrowing an

oppressive regime could be considered terrorism under criminal law. It is precisely in this regard where the so-called 'schizophrenia' of the term lies. Zuinaga (2011) affirms that "terrorism is simply a term used to discredit an enemy, so that whoever is a terrorist for some may be a freedom fighter for others" (for the contrary opinion, Ambos [2008] and Richards [2019], an indication of the conflicting opinions on this point: Malkki & Sallamaa, 2018). In fact, little or nothing at all separates some events now considered "praiseworthy" from other more current events that are deemed reprehensible (see Blumenau & Müller, 2021). It is society which subjectively defines what is deemed a terrorist act at a given time and place (Martin [2010], Kühne [2006]). Ferrajoli (1981) considers that "violence, even armed violence, is certainly legitimate when it is a defensive violence shared by an entire people or by an entire social class: that is, a violence that has and achieves no other aim than the immediate one of guaranteeing the survival and integrity of members of society (…)."

According to the above references, three basic characteristics are attributed to a behaviour or phenomenon for it to be considered political violence: 1) it is violent behaviour (Lamarca); 2) the violence is politically motivated (Ferrajoli); and 3) the violence and its ends are not susceptible, ex ante, to univocal condemnation (Terradillos).

The concept of political violence does, of course, include terrorism. In order to differentiate terrorism from all the other phenomena that may be considered political violence, it is necessary to study the peculiar features that make it unique. Merari (2007) classifies expressions of politically motivated violence according to the agents involved: a) if the parties are both states: a war between states; b) if they are citizens against the state: guerrilla warfare, coups or terrorism; and c) if the violence is exercised by the state against its citizens: repression (legal or illegal).

Despite the difficulties finding a definition that has survived the passage of time (McGowan, 2015), it seems to be widely accepted by the social sciences that terrorism

works as a "communication strategy, as provocation of power" (Cancio, 2010a).

In this sense, the aim of terrorism is not to exterminate an individual or group, but rather to use homicidal violence as an instrument for other purposes, achieving psychological effects on the population (Cassese, 2006; Walker, 2007). The real purpose is to send a message to the public, the aim of which is to either terrorise or incite rebellion. This is what the literature equates with the notion of "propaganda by the deed", a fundamental idea forming the basis of the actions of the so-called insurrectionary anarchists of the 19th century (Laqueur, 2012). It is therefore a common practice in terrorism to choose random targets to terrorise the population, with the aim of "generating a generalised threat, a mass intimidation which is equivalent to the threat of the use of military force" (Cancio Meliá, 2010a).

This does not mean that with terrorism there is no specific selection of victims within each group: the assassination of a series of figures declared 'enemies' by the organisation (police officers, politicians of a certain party...) also plays a very symbolic role: here the emphasis is not so much on the randomness of the act but rather the illusion thereby generated; the idea that anyone could be next is enough to generate terror (Margarity, 2017).

This aspect of the terrorist phenomenon has reached unprecedented levels with the proliferation of mass media, which in turn have also undergone a further exponential leap due to the rise of the internet, a fundamental communication tool for today's global terrorism.

However, this does not explain why these violent movements have arisen. In recent times, a doctrinal current has emerged known as 'progressive diagnosis' which understands the origin of terrorist groups as being a response to the social inequality, political oppression or imperialism prevailing in a given territory, period or geopolitical context (e.g., Avilés & Herrerín [2008], or for the contrary opinion see Walklate & Mythen [2015]). There is

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accordingly no shortage of authors who maintain that terrorism is due to the lack of legitimacy of certain social structures insofar as, for example, they opt for an unequal distribution of resources, fail to respect human dignity and cultural differences, or in the case of more developed social structures, apply exclusionary economic strategies. On the other hand, some authors argue that looking for the causes giving rise to terrorism is tantamount to seeking to legitimise such acts (Bjørgo, T., Silke, A., 2019).

However, even if we were not to challenge the above view, it would still not explain the reasons behind the emergence of terrorist phenomena. While it is true that, for example, ethno-nationalism and religious fundamentalism have occasionally led to terrorism, it is also true that not all separatist political movements, nor all radical religious movements, have succumbed to this phenomenon.

This matter has been analysed by the literature applying two approaches, one strategic and the other epidemiological. According to the strategic approach, terrorism is understood as a conflict with asymmetrical forces (Molano Rojas, 2010). It is presented as an ideological posture in opposition to the established power which lacks majority support, the reason they cannot obtain a victory in the ballot box, foster an insurrectionary movement or initiate an armed conflict (Rodríguez Morales, 2012). Framed in such terms, opting for terrorism would be no more than a rational choice, the result of a purely economic cost-benefit analysis which identifies it as a viable option precisely because of one of the key aspects of terrorism as a media strategy: terrorism has a major impact on the media and politics. This high impact can be achieved with limited resources, allowing terrorists to take on a much more powerful 'enemy', usually the state.

Meanwhile, the epidemiological approach is based on the idea of 'contagion' of terrorist ideas. This approach has mainly been studied from a psychological perspective, with the terrorist being represented as a hero or martyr. Once again, the media play a crucial role in this representation, serving as the vehicle for protagonism and propaganda.

Under this approach, in theory terrorists do not seek any personal gain, but rather act in pursuit of a common cause (revolution, proclamation of the Islamic Caliphate, etc.). Thus, they create mental representations to overcome any misgivings about the goodness of their behaviour: a justification of the means (the violent actions) by the ends (the common cause they are pursuing). The use made of language (Kühne, 2006) and the responses by states play an important role in this respect. These are based on what is commonly referred to as the action-reaction spiral, whereby followers are attracted for the establishment of the terrorist narrative: if their action engenders a reaction from the state, they stand as a real threat with a chance of victory, despite being the weaker party in the conflict. This is all the more so the more extreme the reaction by the state (Wilkinson, 2015). Finally, this escalation of violence (state vs terrorists) can lead to one of the possible objectives of terrorism, a popular uprising: in the face of a state response that gives rise to an intolerable grievance, violence may seem to be the only possible reaction (Cancio, 2010).

These ideas allow us to differentiate terrorism from other expressions of political violence, although admittedly a clear delimitation will not always be easy in all the varied situations that can arise in reality. Nonetheless, it can offer a classification that draws broad distinctions between the different phenomena.

Thus, war and other warlike conflicts could be characterised as a dispute between symmetrical forces which seek the military defeat of the enemy (González Calleja, 2017). Although terrorism poses the narrative of being in the same scenario, the end sought in a military conflict is primarily the surrender of the enemy, either because the victor has demonstrated its military superiority or because of the enemy's total annihilation. In terrorism, 'defeat' would consist of getting the 'enemy' to sit down and negotiate what it could never take by force.

Guerrilla warfare is more difficult to differentiate from terrorism. Some authors consider it a sub-type of terrorism and others as a minor warfare technique (Laqueur, 2003). The

fact is that this phenomenon has clear similarities with terrorism, since the techniques of guerrilla warfare are designed to be used by those who have less power than their enemy, a means of 'wearing the opponent down' to allow direct confrontation when its military strength wanes. However, the aim of guerrilla warfare remains the same as that of military conflict (even if the path or strategy is different): defeat of the enemy, either by surrender or complete annihilation. In fact, guerrilla fighters and other types of insurrectionary uprisings represent a direct strategy for seizure of power (Avilés Farré, 2009). On the other hand, in the case of terrorism the attacks are more of a symbolic act than an actual movement aimed at producing a 'military advance' against the enemy. Another major defining feature of guerrilla warfare is that it usually involves military occupation of the territory, an element that is normally absent in the case of terrorism. However, as will be seen below, the effective power that certain new terrorist organisations such as the Islamic State have achieved has made it possible to speak of terrorism linked with territorial occupation.

On occasions, certain organisations that have acquired the necessary power to initiate a non-international armed conflict against a state have simultaneously used guerrilla warfare and the usual practices of terrorism to give the conflict a higher profile than that granted by the military confrontation alone. A good example is Peru's Shining Path, an organisation which throughout the 1980s brought its 'proletarian revolution' from the countryside to the city, leaving the rural guerrilla fighters of the Andean highlands in the rear-guard (Paredes, 2017).

A coup, meanwhile, is therefore an action intended to usurp public power, which would normally be carried out by a group with sufficient strength and means to achieve its purpose of attaining and maintaining public power. In this case there is no symbolism in their actions, but rather a strategy directly aimed at usurping the power of the state (González Calleja, 2017).

2.2. The new terrorism

Although many states have long been concerned about terrorism, the attacks on 11 September 2001 marked a turning point. At that time, terrorism had begun to be perceived as a new form of global threat, with terrorist acts reaching unprecedented scales and justifying a marked expansionist trend in the field of criminal law that is still far from losing its impetus. Since then, international structures have taken steps to form a global counter-terrorism strategy, aligning their criminal legislation to raise a solid front against this new common enemy.

The characteristics of this new 'fundamentalist' or 'global' terrorism are based on its transnational nature. Cano Paños (2009) differentiated this new phenomenon from previous forms of terrorism that had already had an international impact on the basis that while this international terrorism posed a threat outside the borders where the group was based, the aim was to draw the world's attention to their demands, meaning that their scope remained local. On the other hand, the terrorist phenomenon has now lost its local basis and has become 'transnational': it is a globalised movement affecting the entire planet. Accordingly, the current 'delocalisation' of terrorist acts is a consequence of the fact that the political objectives of this new phenomenon are themselves necessarily global. Terrorism is no longer the problem of a single state but a complicated matter of an international scope which therefore calls for joint state solutions. This explains the wave of regulations by international organisations that are striving to take measures to forge a common front against a threat that has existed for some time now but which has assumed a new persona in the 21st century.

The internal organisation of current terrorist movements has also changed. One peculiarity is the emergence of the so-called 'lone wolf', usually second-generation immigrants who self-radicalise (via the internet) and act individually or in coordination with others of the same nature to commit attacks autonomously but pursuant to the same

jihadist ideology (Hellmuth, 2016).

However, it is also true that this model of a 'leaderless' jihad with self-financed groups and no external contacts is not the modus operandi of recent terrorist attacks on European soil. Media reports following the attacks have corroborated the connection of the material executors with external agents who engage in the radicalisation of their followers in an organised manner and establish links between future attackers through financial or other tangible material support.[2] If we consider Spanish jurisprudence on indoctrination or transfer to conflict zones, it can be seen that people who start with self-indoctrination often end up establishing direct relations with implicated third parties who provide them with airline tickets, telephone numbers of contacts on the ground, etc.

However, the organisational structures of current and past terrorist movements may not be as different as they seem, despite the fact that 'classic' organisations tend to have a pyramid structure with strong hierarchical relationships (Poynting & Whythe, 2012). Terradillos Basoco (2019) points out that the new 'individual terrorists' are not really terrorists, but rather operate with a criminal organisation through connections that have evolved in the same manner as all forms of communication in the 21st century. He applies a fitting analogy when he affirms that the organisation does not disappear but is 'Uberised'. Thus, it seems more accurate to acknowledge that today's terrorist movements are not totally lacking in organisational structure, but rather have found new ways of operating that are more closely related to new social structures (Schuurman, B., Lindekilde, L., Malthaner, S., O'Connor, F., Gill, P., Bouhana, N., 2017).

In any case, there is no cause for confusion between these so-called 'lone wolves' and

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[2] For example, see in relation to the Nice attack in 2016: <https://www.latimes.com/world/europe/la-fg-nice-attack-20160717-snap-story.html>, < https://www.wsj.com/articles/two-more-detained-in-france-attack-probe-1468775193>, < https://www.telegraph.co.uk/news/2016/07/15/who-is-the-nice-terror-attacker-everything-we-know-so-far/> [Accessed: 9 February 2022]. On the 2017 attacks in Catalonia: < https://www.elperiodico.com/es/barcelona/20170819/iman-ripoll-lider-celula-terrorista-atentados-barcelona-cambrils-6233469> [Accessed: 9 February 2022].

'individual terrorists', a label given by the media to individuals who commit serious crimes with certain political motives: such is the case of the Unabomber or the more recent case of Anders Breivik. In reality, these individual terrorists are little or no different from 'lone wolves' when they actually behave as such (i.e. acting outside the scope of any organisation, even if they share a common ideology). Without the backing of an organisation and, therefore, without its capacity to cause harm, there is no sense in specific legal regulation, not only from a criminal but also a procedural-law enforcement perspective (looser regime for the interception of communications, use of undercover agents, rewards for informing on the perpetrators, etc.). All these types of special provisions are ultimately designed to tackle organised crime.

3. Terrorism as a legal phenomenon

In view of the preceding pages, we may conclude that the term 'terrorism' clearly has multiple meanings and that it has been used to describe very serious but also very diverse criminal phenomena. However, the content that is socially and colloquially attributed to a term does not always coincide with the offences that are actually included under that heading in criminal law. Moreover, it must be borne in mind that the legal interpretation of the phenomenon constructed on the basis of criminal legislation may very easily vary over time: a legal reform that eliminates only one of the requirements of the corresponding criminal offence can introduce an endless number of new acts that may be characterised as terrorism, and all at the whim of the legislator's interests. This is also no small matter, given that the more polysemic the concept, the more legitimacy the institutional apparatus will feel it has to deal with it.

Regardless, terrorism as a legal phenomenon has normally been characterised by two essential elements, one of which is teleological and the other structural. The teleological element refers to the need for the acts to be committed for a specific purpose, that of

seriously disturbing public order or subverting the constitutional order. The second requirement is that the acts must be perpetrated by a criminal organisation or group. The first part of this section is devoted to an analysis of these two elements, before going on to propose a definition of terrorism not in terms of its regulatory elements (which are ever-changing), but rather its essence and characteristics, in order to differentiate it from other crimes with similar elements. The combination of both aspects in this study gives rise to a legal concept of terrorism that may be of use for assessment of its current regulation and *lege ferenda* proposals.

3.1 Delimitation of terrorism based on its classic regulatory elements: structural and teleological elements

The structural element refers to the commission of violent acts by an armed organisation with a relatively stable structure, and the teleological element to the pursuit of a specific end (the 'cause' or the greater good) by the terrorist(s). This identifies organised *political* violence and terrorist crime (Terradillos, 1998; Cancio, 2018; Lamarca, 2018).

These elements have traditionally provided the justification for a specific punitive response to terrorism and the separation of this phenomenon from others such as: violent and organised actions without political motives (common organised crime); violent conduct with political motives but which is not organised (usually constituting other crimes against public order, such as attacking or resisting authority); and criminal behaviour with political motives but without the use of violence. The traditional approach requires a combination of both elements, structural and teleological, in order to establish the existence of a terrorist offence.

With regard to the former element, until recently the key was the hierarchical structure of terrorist groups, a structure which granted the phenomenon its internal unity. Indeed, many authors consider that without such a structure terrorist groups cannot be deemed to

exist, as it would be impossible to affect the structure of a state without the assistance of an organisation.

Nonetheless, there is currently debate as to whether this structural element should continue to be considered innate to the terrorist phenomenon, precisely because of the characteristics of the so-called new terrorism and its manifestations, such as the aforementioned 'lone wolf' (Pérez Cepeda, 2017). Without entering into an assessment of the above for the moment, it may be affirmed that this transformation of the objective or structural element of terrorist crime seems to be a response to the supposed characteristics of this new terrorism, which is more distanced from classic hierarchical structures.

On the other hand, it is evident that the structural element is currently a feature of common organised crime, while the terrorist phenomenon is distinguished from the former by the ends pursued. In turn, this teleological element is based on the premise that the use of violence to create a situation of social alarm or insecurity always pursues a specific end. From this perspective, it may be argued that in the case of terrorist acts the criminal activity, which may take the form, for example, of murder, bodily harm or kidnapping, has the implicit aim of coercing the public authorities or society in order to achieve a certain objective of the armed group. Indeed, it is precisely the attempt to achieve this objective through violent means that engenders society's repulsion towards terrorism to a greater degree than that shown towards any other type of equally violent crime (Cancio, 2018).

In conclusion, the problems posed by an interpretation that characterises terrorism in terms of these structural and teleological elements give an indication of the complexity of defining this phenomenon in legal terms or as a concept with a minimum notion of permanence which is not the product of dogmatic whim; the legislator's response must be within the bounds of reality, and not the product of some random inclination (Welzel,

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2004). This grounding in reality is essential in order to respect the principle of minimum intervention, according to which the legislator must justify any decision that restricts rights. Moreover, this can only be achieved by offering a defined, stable concept of terrorism which materially legitimises the specific response under the *ius puniendi*.

3.2. Delimiting terrorism from other criminal phenomena

Given the difficulty of deducing a definition of terrorism from the elements of its positive regulation, a more appropriate method consists of establishing a hypothesis and then checking by means of examples what may be considered terrorism and what may not in accordance with this hypothesis.

Thus, based on the characteristics studied above the initial definition of terrorism proposed is *"the creation or exploitation of fear to demand compliance with a condition by the public authorities*." This initial definition conjures up an image very similar to that of a conditional threat, although in the case of terrorism there is an important differentiating nuance: terrorists threaten with acts the effectiveness of which have previously been demonstrated, which is why they not only threaten but also effectively terrorise (González Calleja, 2017; Paredes Castañón, 2018a).

With regard to the condition demanded, this essentially involves decisions affecting the configuration or exercise of the constitutional model or state sovereignty itself. According to Cancio Meliá (2010a) "only if the emergence of the organisation is linked in this manner with the actual increase in danger this represents is the specific meaning of the collective action of criminal organisations clearly perceived, the questioning of the state monopoly on violence: it is a veritable challenge to the state as a whole." And while this is the underlying basis of the legal-criminal unjustness of criminal organisations in general, in the case of terrorist organisations this dispute or arrogation of power through the exercise of violence is used for markedly political ends; this exercise of violence

wrested from the public authorities is instrumentalised to achieve what embodies the teleological element of terrorism.

From the very definition of terrorism, which is based on an ontological substratum, it also follows that it is a phenomenon stemming from an organisation, because in no other way would it be capable of simultaneously terrorising and challenging the state to the extent that it can dispute its monopoly on violence. In legal terms: only organised crime is capable of harming or endangering the legal rights targeted by terrorism. It should be remembered that in order to justify the existence of a terrorist phenomenon, the organisation must meet both premises: the creation of fear and the dispute of power (in pursuit of its political ends). As alluded to above, a serial killer may be terrifying, but that does not constitute terrorism. Not every criminal act involves a dispute of power. It is true that a criminal who decides to infringe a legal right is disregarding a democratic decision, since society has decided through its legitimisation processes to prohibit such behaviour. The criminal therefore resolves to disregard this consensus and act contrary to it, but this is not equivalent to arrogating to oneself areas of power reserved for state sovereignty.

After integrating the above clarifications, the definition of terrorism would be: *the creation or exploitation of fear by an organisation to demand compliance with a condition by the public authorities relating to characteristics of the state organisation or model.*

Having established this hypothesis, it is now time to review the various historical and current phenomena which in one way or another have been labelled as 'terrorism' and see whether they confirm our hypothesis.

3.2.1. *State-sponsored violence*

3.2.1. a) *Crimes against humanity*

The Nuremberg trials to prosecute the Nazi deeds marked the first-time acts were

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identified and judged as crimes against humanity (Huhle, 2011). Similar criminal acts were carried out during the military regime of Augusto Pinochet, and during the National Reorganisation Process in Argentina (Crenzel, 2008).

The hypothesis posed in the following pages is that in order to merit the status of crimes against humanity such criminal acts must be committed by a public power, whether institutional or *de facto*. Although they are certainly actions that can induce fear among the population, their purpose is not to achieve compliance by the state with a demand, which would be the starting point of terrorism. If we consider the case law to test this hypothesis, the superiority of crimes against humanity over the crime of terrorism has at times been established. Terrorism would therefore be of residual application when the acts do not attain the necessary intensity (in terms of their generalised or systematic nature) to be considered crimes against humanity.

Although this could be a plausible solution, crimes against humanity seem to contain an added unjustness which justifies reinforced protection and the exceptional rules that are applied for their prosecution and punishment (Landa Gorostiza, 2003). Indeed, even before the emergence of the ICC, the International Criminal Tribunal for the former Yugoslavia stated that "crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity." (ICTY, *Prosecutor v. Drazen Erdemovic,* No. IT-96-22-T, 29 November 1996, para. 28).

Following this line of argument of the ICTY, a new proposal may be raised to distinguish between the two crimes: the perpetrators of a crime against humanity target a group of people because of their *political motivation*, whereas terrorism threatens to attack, or attacks, victims (often randomly selected) who need not be politically defined. Crimes against humanity involve killings, deportations, rape, kidnapping and so on because of

the personal characteristics of the victim. Terrorism today is characterised precisely by a denial of the victim's personality: the individual is seen as a nobody, a mere instrument to achieve a political end. Terrorists attack anyone, producing anonymous victims with the aim of intimidating (terrorising) to achieve their ends. Crimes against humanity have a clear target, a group of the civilian population selected based on its characteristics: people of a certain race or religion, a certain sexual orientation, certain political ideas, etc. These characteristics are present in the violent acts by the totalitarian regimes of the 20th century, allowing their undisputed categorisation as crimes against humanity.

Taking as a reference the initial hypothesis that defines terrorism as the creation or exploitation of fear to achieve compliance with a demand by the state, the aspects that differentiate terrorism from crimes against humanity may be defined as follows:

- Terrorism does not originate from the public authority itself, for in that case there could be no threat to the public authority, a core element of the hypothesis (Perruca, 2019; Nacos, 2019; Mira González, 2008). Furthermore, crimes against humanity cannot demand any action from the established power, given that such actions would have to originate from that same power (either institutional or de facto*).*

- In light of the above, in the case of crimes against humanity the criminal acts are part of the policy of a state or organisation (although not just any organisation, but rather one that has quasi-institutional power). See in this sense Vacas Fernández (2011); Liñán Lafuente (2007) and CPI *Prosecutor vs. Jean Pierre Bemba Gombo. ICC-01/05-01/08. 21 March 2016, paragraph 158.*

- Crimes against humanity require, on the one hand, a sufficient level of intensity of the attacks and, on the other hand, the presence of a discriminatory motive for such attacks.

With regard to the perpetrator of attacks constituting crimes against humanity, the Rome

Statute establishes in Article 7(2)(a) that the course of conduct constituting the attack against a civilian population must be pursuant to or in furtherance of a "State or organisational policy." Meanwhile, the Elements of Crimes, a regulatory text describing the typical elements of the crimes set out in the Rome Statute, also provides that the "policy to commit such attack" requires that the state or organization *actively promote or encourage* such an attack against a civilian population. This legal wording has been interpreted by the jurisprudence of the ICC in the Katanga case (ICC, *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, para. 396 et seq.), which held as follows: "Such a policy may be made either by groups of persons who govern a specific territory or by an organisation with the capability to commit a widespread or systematic attack against a civilian population". In support of this interpretation, the ICC Judgement itself mentions the 1991 Draft Code, which initially clarified that such acts could be committed by "*private individuals with de facto power or organized in criminal gangs or groups*" (ICC, *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, footnote 507).

In turn, the only conceivable context in which a state (or an armed group with military power equivalent to that of the state) commits indiscriminate attacks against civilians is in armed conflict, where they are used as a method of warfare to achieve military ends or the surrender of the enemy. Such attacks could easily be subsumed under war crimes (Art. 8(2)(b)(i) RS), as they constitute grave breaches of the Geneva Conventions.

3.2.1. b) Terrorism-State confrontation as a non-international armed conflict

Another relevant scenario that the doctrine has taken into consideration is the possible designation of the confrontation between the terrorist group and the state as a situation of non-international armed conflict, where international humanitarian law would apply and

the scope of (non-military) criminal proceedings would be drastically reduced. However, delimiting the exact moment at which a situation changes from internal unrest to armed conflict is no simple matter. On many occasions terrorism is far removed from the characteristics that would equate it with armed conflict, while on others the distinction will not be so clear.

Initially, the decision lies in the hands of the public authorities, insofar as it determines the intensity of the state's reaction to the violence. And this is no small matter, as it makes a major difference when it comes to determining the applicable law. If it is considered a case of armed conflict, terrorist attacks against state security forces would become legitimate attacks against military objectives. At the same time, the state would be authorised to kill the members of these organisations as they lose the consideration of 'civilians' and become 'legitimate targets' to be defeated in pursuit of military objectives (Olásolo, H., Pérez, A. I., 2008). Finally, as already mentioned, attacks directed against the civilian population by both sides of the conflict could constitute war crimes.

To resolve this problem, Olásolo and Pérez (2008) have proposed that the occupation or non-occupation of territory by the armed group delimits the existence of a non-international armed conflict, in accordance with the requirement of Article 1(1) of Additional Protocol II to the Geneva Conventions of 1949. Thus, if the terrorist group exercises "such control over a part of its territory as to enable them to carry out sustained and concerted military operations" the provisions relating to such conflicts will be fully applicable. All other situations would qualify as mere "*internal disturbances and tensions*" and so terrorist offences would be applicable in such cases.

3.2.1. c) State terrorism

There are other scenarios bordering on the above in which there is also a disproportionate and illegitimate use of violence by the public authorities, such as the so-called "state terrorism" (González, 2012; Berdugo, 2008; Díaz, 2018). This phenomenon consisting of

using 'dirty war' tactics against terrorism (or any other criminal phenomenon), unlike what occurs with 'true' terrorism (as defined in the starting hypothesis) does not seek to impose any conditions or demands on public power through this strategic threat or violence, for the acts are committed by the public power itself.

In any event, given that this kind of violent action committed or encouraged by the State does not seem to be the most appropriate response to terrorism, two different scenarios may arise which could be subject to different legal-criminal designations. Thus, if the 'dirty war' has acquired such a magnitude that the violence exercised by the public power may be characterised as generalised or systematic (for a definition of systematic in the context of crimes against humanity see *Katanga*, para. 1111), the acts will be designated crimes against humanity *(La Cantuta v. Peru*, para. 42). On the other hand, if these attacks by the State are neither generalised nor systematic, it would be necessary to resort to crimes against life (murder, homicide), freedom (illegal detentions, kidnapping), physical integrity (injury), moral integrity (torture, degrading treatment), etc., in addition, of course, to the corresponding crime of membership of a criminal organisation or group, embezzlement of public funds and the aggravating circumstance of undue advantage, where applicable (Perruca, 2019).

3.2.2. Magnicides and other isolated coups to topple the established power

Initially, attempted coups constituting a direct assault on public power cannot be included in the proposed definition of terrorism. These actions seek to seize power by force by overthrowing the authority in power (personified in a particular individual or political institution), and accordingly the perpetrators do not use violence (terror) as a tool to vindicate or publicise political demands. The population is not subjected to indiscriminate violence to force compliance with a demand or condition by the public powers, but rather those public powers are effectively usurped by means of what is intended to be an irresistible force.

At this point, it is worth recalling the characteristics of the terrorist phenomenon analysed previously, namely: violence strategically directed by those who cannot take power directly, instrumentalising the population by using their fear (generated through terror) as a bargaining chip to force governments to give in to their demands. However, in the case of coups there is no such instrumentalization typical of terrorism (Cancio, 2010B), as they are essentially focused on eliminating the figureheads of the power being overthrown: historically monarchs and nowadays leading members of the ruling social class (Avilés & Herrerín, 2008). At times it will not even be necessary to resort to killings; the mere brandishing of weapons or physical force for violent occupation of symbolic buildings such as parliaments or other representative houses will suffice.

The legal characterisation, although it will depend on the circumstances of the case, will be closer to other criminal offences: in addition to common crimes to punish the specific violent acts committed (murders, homicides, kidnappings, wounding, etc.), it will be necessary to resort to other types of crimes that reflect their seriousness due to the attack they represent on public power, e.g., crimes against the Crown, attacks on authority or rebellion.

3.2.3. Guerrillas

The case of guerrilla warfare is particularly problematic. In principle, this takes place in the context of an armed conflict (which usually increases in intensity over time) between one or more insurgent groups and the State. Of course, the complicated task of determining the existence of an armed conflict, whether the group in question is a guerrilla group with legitimate combatants or whether they are terrorists and therefore civilians, is not left to the State, the organisation itself or a formal declaration of war, but rather to the terms of the international law of armed conflict.

It is worth recalling at this stage the nature of the process leading to the emergence of guerrilla warfare, which has already been discussed above: recourse to this strategy is

normally due to the difficulties of mounting a classic armed conflict involving two forces with similar armed strength. With guerrilla warfare, the attrition suffered by the enemy can lead to a conflict with similar forces and subsequently to victory. Therefore, the further the military actions are from classic warfare (i.e. violent actions that are more symbolic than of strategic military value), the closer they are to terrorism than to armed conflict in the strict sense.

However, it is true that organisations and their strategies, as well as the conflicts themselves, evolve over time, and therefore these categories should not be seen as immovable. It would be perfectly feasible for a guerrilla group to become a group that only executes isolated terrorist attacks in a certain area of the state. It is also possible to imagine the opposite scenario: the armed organisation, through attrition operations, topples an unstable government (e.g. with the help of third-party states, thus turning it into an international conflict), so that what began as an irregular guerrilla group eventually ends up assuming governmental power.

3.2.4. Organised crime

Terrorism is a manifestation of organised crime, but of course not all organised crime constitutes terrorism (Muñoz, 1999). The differentiation seems clear in view of the starting hypothesis, given that only terrorism involves coercion of the state, a factor that both accompanies and characterises this phenomenon. Accordingly, we may exclude from the scope of terrorism other manifestations of organised crime the aim of which is not to threaten (terrorise) citizens in order to obtain compliance with a condition by the public authorities, but rather to manipulate the existing order to favour their (private) interests, normally in the form of economic benefits.

It is true that in recent decades certain criminal organisations have achieved great power, with spectacular displays of violence which terrorise the population (for example, the

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Maras in Latin America; see Goubaud, 2008). However, in the terms understood here, terrorism not only causes terror (which can occur with the mere repetition of violent crimes), it also uses that terror to gain access to power by bending the will of the public authorities (Terradillos, 2016). The terror of the population is not, therefore, an end in itself, but the means to achieve the terrorists' objectives (Castellví, 2015), hallmarks that allow comparisons to be drawn between prototypical terrorist acts and coercion or threats.

3.2.5. Armed organisations in the 20th century and 'individual terrorism' today

Despite the lack of homogeneity of armed groups in the second half of the 20th century, there are certain similarities explaining why they were considered prototypical terrorist organisations at the time. They all had a hierarchical structure sustained over time; a clear political purpose vindicated following each violent action for propaganda purposes; specific claims that were demanded from the executive power in exchange for the cessation of their violent activity; and a scenario in which the armed group was substantially less powerful than the rival power. Their indiscriminate targets were clearly instrumentalised to create the illusion that they were strong enough to overpower the state. Examples include organisations such as the Italian Red Brigades, ETA and GRAPO in Spain, the IRA in Ireland, Al Qaeda and, with certain singularities, ISIS or the Islamic State. All these movements effectively constitute organisations that impose clear demands on institutional power. These demands are issued to the state through assassinations, kidnappings, extortion and other serious crimes committed to generate terror and which would theoretically cease upon fulfilment of their demands. These conditional threats are particularly shocking for citizens and are preceded or followed by a show of force (the terrorist attack). The above-mentioned phenomena meet all the requirements of the proposed starting hypothesis and are, in fact, what led to the emergence of anti-terrorist legislation after World War II.

At risk of repetition, it is nevertheless advisable to recall certain reflections regarding the

new terrorist movements. On the one hand, relating to the structural element, although it is true that the hierarchical structures characterising classic terrorist organisations have been relaxed, this does not mean that Al Qaeda, for example, lacks an organisational structure. The typical references to 'individual terrorists' and 'lone wolves' may only be considered correct in a journalistic or colloquial context to distinguish a new modus operandi in terrorist organisations, but not as a means of categorisation that conceives terrorism without any structural elements. The "capability to commit repeated acts of serious violence" is essential to terrorism, a quality deriving from the structure of cohesive groups (Terradillos, 2016; on repetition and the label of terrorism see: Malkki & Sallamaa, 2018).

4. Conclusions

In order to systematise the ideas underpinning the legal notion of terrorism proposed herein, we may reach the following provisional conclusions:

(1) Terrorism is a phenomenon within the sphere of organised crime, because only through the capacity of these organisations can the state's monopoly on violence be challenged. Terrorism should therefore exclude forms of criminal activity that lack these structures.

(2) Terrorism, by means of threats, instrumentalises the terror engendered by the repetition of violent acts to achieve an ultimate political end. The terror is therefore not an end in itself. Violent acts that generate terror as an end in itself or for economic benefit are excluded from the definition of terrorism.

(3) Terrorism consists of threats whereby conditions are demanded from the public powers, which is why it cannot be committed by those public powers themselves. If terror is used as a tool to subjugate the population or a sector of it, it will be necessary to resort to other concepts such as crimes against humanity.

(4) Terrorism creates the illusion that 'anyone could be next' in order to maintain a state of terror without the need for the victims to be identified by common characteristics.

(5) Terrorism is identified with an asymmetric conflict where the real chances of success are slim. Where the forces are proportional and depending on the specific circumstances, the existence of an armed conflict may be considered. Attacks on the civilian population in such a context will constitute war crimes.

(6) A single violent action (or planned but expeditious course of violent action) to overthrow the established power is not terrorism. Other offences already regulate such situations involving exercise of violence to seize power, such as rebellion and sedition. In these cases, there is no use of fear as a means to negotiate political conditions, but rather the use of violence (or the mere threat of it) to secure those political conditions.

(7) The legal definition of terrorism justifying a legal-penal response must be based on its consideration as "the creation or exploitation of fear by an organisation to demand compliance with a condition by the public power referring to characteristics of the state organisation or model."

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