



TERRORISM AND WAR CRIMES: TWO SIDES OF THE SAME COIN?

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Abstract

The definition of terrorism is not consensual, even within the same country. Indeed, in the United States of America, a country where the fight against terrorism is one of the present political priorities, the definition varies depending on whether the source is the Department of Defense (DoD), the US Code, the Federal Bureau of Investigation (FBI) or the Department of State, but this lack of consensus does not mean that terrorism is not considered a crime according to the Resolution 49/6026 of 17 February 1995 of the United Nations General Assembly. However, many experts on the thematic do not accept the definition of terrorism as an international crime in time of peace defending that terrorism is essentially the violation of domestic laws which have their genesis in treaties to which states may or may not adhere, and this explains why some countries refuse to reduce their sovereignty and do not accept to transfer the jurisdiction for crimes of international terrorism to supranational institutions. According to this vision, terrorism must be included as a subtype in one of the four modalities that are already recognized by international law. This article reflects on the relationship between terrorism and the modalities of war crimes judged by the International Criminal Court (ICC) and seeks to show that the seriousness of the terrorist threat justifies that terrorism should be considered an autonomous international crime.

Keywords

Terrorism, War Crimes, Geneva Convention, and International Criminal Court

Introduction

On September 11, 2001, the world, namely the Western civilization, was shocked when two planes plowed into the Twin Towers, while a third plane “was flown into the Pentagon in Washington, DC [and] a fourth plane, presumably headed for the White House or the U.S. Capitol, was heroically diverted by passengers and ended up crashing in an empty field in Pennsylvania”¹, leading the President of the United States to declare war against terrorism. However, as Lawless (2008, p. 31) states, “prior to the attack on the World Trade Center, and the clear demonstration of the devastating effect a single coordinated terrorist attack could produce, there was little impetus for the international community to do more than declare terrorism to be an offence against international law”. Thus, only after that terrorist attack, “it became abundantly clear that it was necessary to do more than simply declare terrorism to be contrary to law”, becoming “necessary to deal with the issue on a global basis.”. For him, “international law is clear – terrorism is a crime.”

However, the previous vision is far from consensual, because “the lack of a unique definition of terrorism, which would assist with clarification of terrorism as a crime directed against international security, also harms its characterization as a crime in international criminal law.” (Trifunović, 2021, p. 114). As it is well-known, “terrorism can occur during armed conflict or during peacetime (defined as the non-existence of armed conflict)” (Van Schaack & Slye, 2020, p. 363) and this situation has obvious implications on the definition of terrorism and in its designation as a war crime when there is no war.

In fact, as Scheinin & Vermeulen (p. 21) recognize, “although the United Nations has adopted a whole series of international treaties related to specific forms of terrorism such as hostage-taking, nuclear terrorism, and terrorist bombings, work towards a comprehensive convention against terrorism is still underway” because “Governments have been unable to agree on the definition of terrorism.”

¹ Huiskes, K. Timeline: The September 11 terrorist attacks. Available at <https://millercenter.org/remembering-september-11/september-11-terrorist-attacks>.

Returning to the 11 September attack, according to Rapoport's typology, the 2001 terrorist attack was just an act of the fourth wave of global terrorism. Indeed, despite terrorism being an ancient phenomenon, the term was only "coined in the nineteenth century to describe acts conducted by the French Republic" (Forst, 2009, p. 9), and it started to become global only by the end of that century thanks to the development of the mass media due to the increasing circulation of newspapers. After that, terrorism has long transcended national borders and is "no longer a threat only to sovereign states but also to international peace and the security of both the individual and society as a whole." (Trifunović, 2021, p. 112)

Thus, after an initial phase or wave, the anarchist one, during which the terrorists murdered kings and princes, in one case leading to the World War I, the fight for decolonization, namely in Africa, has corresponded to the second wave, the anticolonial terrorism, obviously only on the colonial powers' vision, because one person's terrorist is another person's freedom fighter. Indeed, the U.N. General Assembly Resolution 46/51 of 9 December 1991, about the measures to eliminate international terrorism, in its point 15, considered that "nothing in the present resolution could in any way prejudice the right to self-determination, freedom and independence", and so, it recognized that all the peoples "under colonial and racist regimes or other form of alien domination" had "the right to struggle legitimately to this end", i.e. they should not be considered as terrorists. This point helps to understand Yasser Arafat's words, when he has affirmed that nobody can be labelled as a terrorist when he fights for a fair cause. Moreover, it can also explain the support provided to terrorist groups by a part of the population, even when, as it is occurring nowadays in Gaza, the terrorists use the population as human shields.

Later, there was the emergence of a far-left wing terrorist wave that has kidnapped and murdered some European politicians. Then, "violent left-wing extremist organizations and individuals have carried out the majority of politically motivated terrorism in the West" and "between 1970 and 1980, 93 % of attacks and 58 % of deaths occurred in relation to this cluster" because "small cells of revolutionary Marxist or anarchist terrorist groups carried out most of these attacks,"² being "the RAF and the Red Brigade the most well-known examples" (Bakker, 2006, p. 4).

According to many scholars, the fourth wave, the religious one, began when, in 1979, Ayatollah Khomeini reached the power in Iran and the *jihad al-ashgar* became a real threat to the Western civilization, despite Bakker (2006, p. 4) defending that "Jihadi terrorism only emerged in the 1990s."

As terrorism never stops, Rapoport mentions a fifth wave, after the January 6 Capitol attack, the far-right wing one, due to the well-known support of several far-right American groups to the former President Donald Trump.

It is noteworthy that the emergence of a new phase does not imply the end of the previous one and so the concept of waves should be replaced by the word 'strains.' As Pinto (2019, p. 1) affirms, "Rapoport's proposal is not the only one", and, for example, Tom Parker & Nick Sitter (2015) do not accept the word «waves», opting for «strains» because "the notion of waves suggests distinct iterations of terrorist violence driven by successive broad historical trends" while "the concept of strains and contagion emphasizes how terrorist groups draw on both contemporary and historical lessons in the development of their tactics, strategies, and goals". Their typology counts on four distinct strains: socialist, nationalist, religious, and exclusionist."

Marchuk (2014, pp. 70-71) affirms that "given the dynamic development of international criminal law, the obvious question is whether other categories of crimes live up to the standard of the 'most serious concern' threshold, and thus shall be incorporated within the jurisdiction of international criminal courts and tribunals." However, she recognizes that there is still a long road because "apart from the contentious crime of aggression, which undisputedly satisfies the required high threshold, attempts to include drug trafficking, terrorism, and prohibition of threat or use of nuclear weapons within the jurisdiction of the ICC failed during the latest ICC Review Conference in Kampala." It is noteworthy that some of the criminal activities which were analyzed in Kampala can be included under the umbrella of terrorism, as modern terrorism "poses a substantial threat because it may be transnational and use organized network to obtain illicit funds through activities such as trafficking in human beings, arms and drugs." (Pinto & Silva, 2023, p. 371)

This chapter aims to prove that terrorism should be considered not a subtype of the existing modalities of international crime, namely crimes against the humanity and war crimes, but an autonomous crime.

Typologies of Terrorism

As the definition of terrorism is not consensual, there is not a sole typology of the phenomenon. For example, in the United States, the Department of Defense defines terrorism as "the unlawful use of, or threatened use of, force or violence against individuals or property", while the US Code presents a different definition: illegal violence that attempts to "intimidate or coerce a civilian population ... influence the policy of a government by

² Available at https://home-affairs.ec.europa.eu/system/files/2021-11/ran_vlwae_in_the_eu_analysing_threats_potential_for_p-cve_112021_en.pdf.

intimidation or coercion; or... affect the conduct of a government by assassination or kidnapping to coerce and intimidate governments or societies, often to achieve political, religious, or ideological objectives.” Moreover, the Federal Bureau of Investigation (FBI) defines terrorism as “the unlawful use of force or violence against person or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives”, and the Department of States considers it as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”

Despite their differences, the previous definitions point at the effective or threatened unlawful use of violence with a political goal, even when the motivations belong to other dimensions, namely the religious one, as it happens in all the Islamic terrorist attacks.

Baena (2006, pp. 120-126) identifies six premises to identify three characteristics of a terrorist. The premises are these:

“«1. Terrorism is the intended use of violence converted from a crime or threat of violence; 2. Terrorism is a deliberate selection of a tactic to effect change; 3. Terrorism is targeting innocent people, including military personnel; 4. Terrorism is the use of symbolic acts to attract the media and gain a large audience; 5. Terrorism is an illegitimate form of combat, even in war; 6. Terrorism is never justified.”

These premises led to the following conclusions:

"(a) Any person who conducts a terrorist act must always be classified as terrorist. b) A captured terrorist is not a political prisoner. He's a criminal. The justice for their actions falls in the criminal sphere; c) A terrorist is not a fighter protected by the laws of war. He is, and must be, deprived of these laws."

According to my vision, the two last characteristics are quite important to consider terrorism as an autonomous international crime.

Forst (2009, pp. 8-12) defends that

“particular terrorist groups and individual acts of terrorism fall into any of a variety of categories, based on the following dimensions: whether or not politically motivated: whether or not operating under state authority; degree of association with larger terrorist organizations or networks; extent of organization and planning: whether justified in religious or ethnic terms; whether aimed primarily at people or at symbolic targets, and the types of people targeted”.

According to these seven dimensions, he proposes the following typology: politically and nonpolitically motivated terrorism, terrorism by the State, terrorism by militant religious extremists, and ethnic terrorism.

As it was already said, this typology is not consensual. For example, Martin (2014), after recognizing that “terrorist typologies are descriptive classifications explaining the quality of political violence arising from distinct political and social environments”, affirms that “many terrorist typologies are accepted without controversy by analysts [but] some are the subject of definitional debate”. According to his vision, “accepted typologies include the following: the new terrorism, state terrorism, dissident terrorism, religious terrorism, ideological terrorism, and international terrorism”, while “sub-classifications of accepted typologies include nationalist terrorism, ethno-national terrorism, and racial terrorism”. However, “in contradistinction to accepted typologies, other classifications are conceptually ‘cutting-edge’ and the subject of definitional debate”, namely “gender-selective terrorism and criminal terrorism (often referred to as ‘narco-terrorism’).” Finally, he proposes his own typology including eight modalities: the new terrorism, State terrorism, dissident terrorism, religious terrorism, ideological terrorism, international terrorism, criminal dissident terrorism, and gender-selective terrorism.

There are also typologies including less types of terrorism. For example, the Global Terrorism Index 2023 (GTI), produced by the Institute for Economics & Peace (IEP), using data from Terrorism Tracker and other sources, only mentions the following modalities: religious terrorism, nationalist/separatist terrorism, and ideological terrorism. Furthermore, we should note that Terrorism Tracker does not include the following as acts of terrorism:

“acts of warfare, either irregular or conventional; criminal violence orientated exclusively for profit, even if they emulate terrorist tactics such as car bombings and beheadings; violent anti-social behavior; civil unrest, isolated acts of violence by unbalanced individuals such as active shooter incidents, unless there is clear evidence the motives of the attack are consistent with our

definition of terrorism; state purges and acts of state repression; war crimes and acts of genocide.” (GTI 2023, p. 6).

This point requires attention for two reasons. Firstly, because the GTI does not include the terrorism of State and, in many countries, mainly in authoritarian and totalitarian regimes, the State uses terrorist strategies against its inhabitants, as it is happening in Afghanistan, after the return of Taliban to the Government or in Russia under Putin’s authoritarian regime. Secondly, the non-inclusion of war crimes and acts of genocide as acts of terrorism proves, once again, the necessity of considering terrorism acts as an autonomous international crime, even accepting that “there is no one single document in international law that codifies all war crimes” and so “lists of war crimes can be found in both international humanitarian law and international criminal law treaties, as well as in international customary law.”³

Defining International Crime

The core international crimes are four: aggression⁴, crimes against humanity⁵, war crimes⁶, and genocide⁷, and the International Criminal Court in The Hague prosecutes those accused of them. However, this typology is not consensual among scholars and institutions. For example, Cassese (2013) also includes torture and terrorism, in the list of international crimes, and Bassiouni (2013) identifies 28 international crimes.

Before defining international crime, it is necessary to explain the meaning of the word ‘crime’. Thus, reflecting on the concept of crime, Marchuk (2014, p.8) states that “the commission of an act prohibited by criminal law or an *actus reus* is not sufficient ground for imposing criminal liability, as it must be accompanied by a necessary mental element or *mens rea*.” Moreover, he explains that “the very essence of *mens rea* is the attribution of criminal responsibility to persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behavior and its consequences.” Thus, a person “is not criminally liable unless the requisite state of mind coincides with the prohibited *actus reus*.” This point is noteworthy because there are children used as suicide bombers.

Nowadays, concerning the definition of international crimes, the existence of an international component is not enough to classify a crime as international, as it happens, for example, with piracy. It is a long story because “initial notions of the concept of international crimes began to emerge in the Roman Empire with the writings of jurist Marcus Tullius Cicero and the concept of *hostes humani generis*, the enemies of humanity. This concept was used by writers as from the 17th century to refer to the perpetrators of international crimes such as piracy and slavery”⁸, proving that, in the past, piracy was considered an international crime.

Returning to the typology of international crimes, Marchuk (2014, pp. 70-71) identifies the following modalities: genocide, war crimes and crimes against humanity, and Lawless (2008, p.27) states that “it is generally accepted that ‘international crimes’ are crimes that are considered so heinous that any member of the ‘community’ of nations may prosecute the offender”, and points out a long list of international crimes, such as piracy, slavery, war crimes, hijacking and sabotage in civil aircraft, and genocide, proving, once again, that there is no common typology because “the concept of international crimes is surprisingly elusive.” (Greenawalt, 2020, p. 1). This is why I defend that terrorism, in its transnational and international dimensions, should be an autonomous international crime.

According to Criminal Law there are two types of deviant behaviors: *mala prohibita* and *mala in se*. The former modality is not immoral, and it can become legal in the future. Moreover, it can be forbidden in a society and acceptable in other communities. However, the latter type is immoral, and it can never be justified. In my opinion, terrorism should be included in this category.

³ Available at <https://www.un.org/en/genocideprevention/war-crimes.shtml>.

⁴ Counting on seven acts, “regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.” – article 8 *bis*.

⁵ Including eleven acts “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” – article 7.º.

⁶ Counting on eight acts “against persons or property protected under the provisions of the relevant Geneva Convention.” – article 8.º.

⁷ It includes five “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” – article 6.º.

⁸ Available at <https://www.asser.nl/nexus/international-criminal-law/international-crimes-introduction/>.

Terrorism as an International Crime

Cassese (2006) defends that “contrary to what many believe, a generally accepted definition of terrorism as an international crime in time of peace does exist. This definition has evolved in the international community at the level of customary law”. However, he recognizes that “as a consequence of disagreement on terrorism in armed conflict, states have so far been unable to lay down a general definition of the whole phenomenon of terrorism in a general treaty.”

Furthermore, he states that “under current customary international rules terrorism occurring in a time of peace and which is international in nature (i.e. not limited to the territory of a state and showing transnational connections) may, depending on the circumstances, constitute a discrete international crime, or a crime against humanity” while in time of armed conflict, terrorism “currently amounts to a specific war crime (crime of terror)” or “crimes against humanity (if part of a widespread or systematic attack on the civilian population).”

As it was previously said, global terrorism only started in the last decades of the 19th century, but that is not the reason why terrorism is not considered an international crime. In the same way, the number and the political importance of the victims were not enough to that categorization. However, after the 11 September terrorist attack, there are no doubt at all about the existence of transnational terrorism. Moreover, the development of the new technologies of information is not only a fertile ground for radicalization of people living in all the areas of the world, but also a toll allowing a terrorist group to relate to other terrorist groups. Thus, the domestic terrorist actions become increasingly international ones.

It is usually accepted that international crimes are offences whose elements are defined by international law while domestic crimes are defined by domestic law. However, in contrast to other approaches to defining international crimes, Greenawalt (2013, p. 2) argues that “as both a descriptive and a normative matter, there is no hard and fast distinction between international offences and so-called ‘ordinary’ offenses.” Thus, he presented several cases proving that ICL instruments “have provided relative (although changing) clarity on the ‘chapeau’ or ‘internationalizing’ elements that most distinguish international offences from their domestic counterparts, but they have failed to provide critical details necessary to the actual prosecution of the crimes.” (Greenawalt, 2013, p. 7). The last part of the sentence is important because the actual prosecution of the crimes and the transnationality of terrorism explain the reasons why, according to my vision, terrorism should be included in the international crimes.

In fact, nowadays, when a terrorist attack takes place in a country its consequences are usually felt not only in that country. Moreover, the terrorist group that perpetrates the act is usually connected or affiliated to other terrorist groups and may receive support from a third country, as it is occurring in Gaza due to Iran’s support to Hamas in its struggle against Israel. In a globalized world, it makes no sense not to consider terrorism as an international crime because its effects go beyond the borders of a country. In fact, even accepting the existence of lonely wolves, there are few situations of domestic or internal terrorism, i.e. a terrorist attack made inside a country by one or more of its citizens against a personality or an institution of the country without any kind of foreign support, namely concerning monetary or military help.

An international crime requires the identification of the objective element – *actus reus* – and of the subjective element – *mens rea*. Thus, we’ll need to identify those elements in terrorism crime.

Concerning the objective element, Cassese points out all the deviant behaviors that are already criminalized by the domestic law, with international nature. In what respects to the subjective element, we should refer the *dollus specialis* because terrorism spreads fear and panic throughout the civilians leading to a breakdown of trust between the population and the political institutions.

Conclusion

This chapter recognizes that the ongoing world order – a multi-orders world, in which each ruling power imposes its own vision on the principles – can make it difficult to consider terrorism as an international crime. For example, after his reelection, Putin delivered a speech in which he defended that there is no democracy in the West, not mentioning that before his victory the potential rivals have been exiled, jailed, or murdered. As Moreira (2001) affirms, the states never accept that they commit terrorist acts when they persecute or murder their citizens. There is a big official silence covering those acts. In authoritarian and totalitarian countries, the unlawful use of force is a reality whose existence is officially hidden behind the so-called national interest. These countries always refuse to be considered as terrorists or even as sponsoring terrorist groups, providing them weapons and serving as a sanctuary.

Till now, terrorism is seen as a war crime or a crime against humanity, two modalities of international crime. However, after the 2001 terrorist attack, the phenomenon became an increasing reality, and this fact seems to point out to the urgency of considering it as an autonomous or discrete international crime because terrorist attacks occur both in war time and in peaceful time and they often challenge not only a country but also a region, becoming a threat to the peace in the world. Moreover, it does not seem difficult to separate domestic terrorism – that one whose impact is limited to the borders of a country – from international terrorism. Thus, the International

Criminal Court (ICP) that “investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community” should also be able to judge international terrorism acts as autonomous international crimes. Till now, despite terrorism be a threat for international order, the words ‘terrorism’ and ‘terrorist’ are not mentioned in the Rome statute of the International Criminal Court

References

- Baêna, M. (2006). Nos bastidores do terrorismo. In P. Barbosa, R. Pereira, J. Anes, M. Baêna & A. Ribeiro (2006). *As teias do terror. Novas ameaças globais* (pp. 115-162). Lisboa: Ésquilo.
- Bakker, E. (2006). Jihadi terrorists in Europe. Their characteristics and the circumstances in which they joined the jihad: an exploratory study. The Hague, Netherlands Institute of International Relations *Clingendael*.
- Bassiouni, M. (2013). *Introduction to International Criminal Law: second revised edition*. Leiden/Boston: Martinus Nijhoff Publishers.
- Cassese, A. (2013). *International Criminal Law*. Oxford: Oxford University Press.
- Cassese, A. (2006). The multifaceted criminal notion of terrorism in international law, *Journal of International Criminal Justice*, Volume 4, Issue 5, 933–958
- Farinelli, F. & Marinone, L. (2021). Contemporary violent left-wing and anarchist extremism (VLWAE) in the EU: Analyzing threats and potential for P/CVE. Luxembourg: Publications Office of the European Union
- Forst, B. (2009). *Terrorism, crime, and public policy*. New York: Cambridge University Press.
- Greenawalt, A. (2020). What is an international crime? In K. Heller, F. Mégret, S. Nouwen, J. Ohlin & D. Robinson (2018). *The Oxford Handbook of International Criminal Law*. Oxford: Oxford University Press.
- Lawless, M. (2008). Terrorism: an international crime?, *Canadian Military Journal*, vol.9, n.º 2, 27-39.
- Marchuk, I. (2014). *The Fundamental Concept of Crime in International Criminal Law. A Comparative Law Analysis*. Berlin Heidelberg: Springer-Verlang.
- Martin, G. (2014). Types of terrorism. In M. Eid (ed.) *Exchanging Terrorism Oxygen for Media Airwaves: The Age of Terroredia* (pp. 81-95). USA: IGI Global.
- Moreira, A. (2001). *Ciência Política*. Coimbra: Almedina.
- Parker, T. & Sitter, N. (2015). The four horsemen of terrorism: it's not waves, it's strains, *Terrorism and Political Violence*, vol. 28, issue 2, 197-216.
- Pinto, J. (2019). Global Religious Terrorism, a Troubling Phenomenon, *Global Journal of Human-Social Science*, vol. XIX, issue 1, version I, 1-7.
- Pinto, J. & Siva, S. (2023). The battle against global terrorism: the role of private security in the USA and in the EU. In A. Akande (ed.). *Politics between Nations. Power, peace, and Diplomacy* (pp. 371-395). Switzerland: Springer Nature.
- Scharf, M. (2004). Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects, *Case Western Reserve Journal of International Law*, vol. 36, issue 2, article 7, 359-374.
- Scheinin, M. & Vermeulen, M. (2010). Unilateral exceptions to international law: Systematic legal analysis and critique of doctrines that seek to deny or reduce the applicability of human rights norms in the fight against terrorism, *Corte Interamericana de Derechos Humanos*, 20-56.
- Trifunović, D. (2021). International criminal law and terrorism, *Nationality security and the future*, 1-2 (22), 111-142.
- Van Schaack, B. & Slye, R. (2020). *International criminal law: intersections and contradictions (concepts and insights series)*. Foundation Press.