

ESCOLA DE COMANDO E ESTADO-MAIOR DO EXÉRCITO
ESCOLA MARECHAL CASTELLO BRANCO

Cel Inf RICARDO LUIZ DA CUNHA RABELO

**THE DEFINITION OF TERRORISM AND THE
CURRENT BRAZILIAN LEGISLATION**



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¹Ricardo Luiz da Cunha Rabelo

ABSTRACT

Terrorism is a tough challenge to the security of the 21st century. Different countries, powerful or emerging ones, are facing terrorist attacks within their own societies, or in the context of the conflicts they are involved in. At the same time, as the term “terrorism” assumed a negative meaning in a general way, and it also lacks a clear and a worldwide accepted definition, the use of a biased definition may fit into political interests to condemn any opposing political movement. Therefore, this paper argues that it is essential to develop internal legislation in accordance to a neutral and phenomenological perspective regarding terrorism in order to cooperate with the effort of security forces and the judiciary branch to prevent and fight it. From this perspective, this paper concentrated in identifying the core constituent elements from the historical development of terrorism, as well as from common academic definitions of terrorism, so as to reach *sine-qua-non* characteristics of terrorism as a phenomenon. After that, these core aspects were compared to the Brazilian legislation against terrorism, focusing on the Law n° 13,260/2016, in order to identify possible lack of coherence that could undermine the internal or the international efforts to prevent or fight terrorism. The findings of this paper indicate that there are some gaps or mistakes in Brazilian current legislation that can lead to a lack of coherence of legal framework in comparison to the academic phenomenological perspective. Therefore, this paper recommends some changes to the Brazilian legislation in order to refine the definition of terrorism, reinforcing the core aspects of the academic definition, and also restating what is not terrorism, avoiding misunderstandings which could undermine the effort to prevent the occurrence of terrorism.

Keywords: Terrorism. Brazilian legislation. Definition of terrorism. Legal coherence.

1 INTRODUCTION

Terrorism is present in modern society since the French Revolution, when, at the end of the XVIII century, the means used by the empowered government to achieve its political objectives were based on the summary elimination of opponents by the death of guillotine. This practice spread fear amongst all political class, once it was not clear who could be the next target of those decisions. Because of this, as it will become clear during this paper, that period of government

¹ Colonel of the Brazilian Army. Student of Brazilian Army Strategic Studies International Course. Brazilian Army Command and General Staff School. Rio de Janeiro, Brazil

became known as “*Regime de la Terreur*”, the meaning that later gave birth to the term "terrorism", being used to describe a similar phenomenon.

Throughout the history, it is easily observed the occurrence of terrorism in different countries, carried out by groups with varied motivations, often with a great impact for affected societies and governments. From the end of the World War II, throughout the “cold war”², the threat represented by terrorist actions was also present, following the global and regional contexts, performing the merely tactical role on the achievement of political and strategic objectives of the parties in conflict. During that period, the planning process, the execution, the target selection, and the desired effects (objectives) of terrorist organizations incorporated new patterns that conditioned the phenomenon “terrorism”, which still posed a significant threat to the involved countries, mainly in Europe, Asia, Africa, and America.

After the end of the Cold War and the collapse of Soviet Union, the global order was structured around the existence of a hegemonic power, the USA, whose unparalleled military potential was known and recognized by the world after the 1st Gulf War, in 1991. This aspect encouraged USA opponents not to try to beat its military force directly in the battlefields, but, instead, through small-scale confrontations, within the context of irregular warfare. This new way of confrontation gathered the tactics, techniques, and procedures of guerrilla warfare, insurgency, and also of terrorism. Among these three methods, the terrorism presented the best cost-benefit relation, with considerable less risk, as well as the smallest initial investment to begin actions, and the most touching effect considering the global audience.

At the same time, terrorist actions multiplied around the world, achieving an international scale, what presented the main threat for western countries, all of them counting with large military apparatus, and, often, counting also with a well-structured array of security forces. Undoubtedly, the fact that characterizes the pattern of this period is the attack on the Twin Towers of the World Trade Center, in the heart of the USA, in September, 11Th of 2001. This attack was conducted by a non-state organization, Al-Qaida, based inside Afghanistan, with ramifications in different countries of the Middle-East and Africa, and supposedly supported by other states. After this shocking attack, Spain became a target of Al-Qaida terrorist attacks, followed by United Kingdom (UK), France, and Italy.

Nowadays, there is frequent news reporting cases of terrorism in newspapers, on television, or on the internet. Recent attacks conducted by the auto-proclaimed group Islamic State of Iraq and Syria (ISIS) shocked by the violence, cruelty, and, mainly, by the random character of chosen

²After the WWII, a forty-five lasting global order was formed based on a bipolar dispute led, for one side, by the United States of America (USA), and, for the other, by the Soviet Union. Since both of them were nuclear power States, and a nuclear conflict would result in a mutual destruction, their confrontation happened indirectly, through third actors, such as proxy States, in a context that was described as “cold war”.

victims. As soon as the phenomenon acquired an international character, the terrorism spread its functional activities throughout different countries, increasing its capacity to act simultaneously in different countries, as well as enhancing the possibilities of recruitment, fund collection, and procurement of critical resources. As a consequence, many different countries face illegal activities related to terrorism, such as money laundering, recruitment, extremist violence propaganda, training bases, and smuggling of weapons, explosives, or other resources required by terrorist attacks. Some other States are accused of providing safe haven for wanted terrorists. Therefore, terrorism is undeniably a present threat to a great number of countries around the world, including Brazil, and many different government authorities are engaged in an effort to stop this criminal activity for the safety of modern society.

Around the question of preventing and combating a criminal activity, there must be considered the legal framework that gives legitimacy for security forces to act and protect the society. Thus, the first question that a legislator must ask is: what does define the illegal act? After that, legislators work to define a conduct that must be avoided, since it is not acceptable by the society, and attribute a penalty for those who break the law. Considering that the rule of law is established, the efficiency of a law is largely affected by its coherence with the definition used to describe the respective criminal action. When this action is simple and well defined, it is easier to build a strong body of law to avoid it. On the other hand, when the criminal action is complex, it is difficult to address all conditions that may define such behavior, giving uncertainty to judge an action or, better, to prevent it from happening. This is exactly what occurs with terrorism, a complex phenomenon that has been happening internationally and in different manifestations.

Therefore, considering the vulnerability presented currently by any country, including Brazil, to the terrorist threat, this paper tries to identify in what way Brazilian legislation against terrorism matches a phenomenological (unbiased) definition of terrorism. That means identifying possible conceptual gaps or mistakes in Brazilian legislation against terrorism that could enhance the threat or undermine the effort to prevent and fight it.

In order to achieve this objective, this research is divided into three parts. In the first part, this paper studies the historical evolution of the meaning of terrorism so as to understand the dynamic of conceptual evolution and to identify the main traits that have defined terrorism throughout the history. After that, with this historical support, it analyzes, still in the first part, several academic definitions to establish the “*sine-qua-non*” elements which permit identify the phenomenon among other extremist violent acts. In sequence, the research will analyze, in the second part, the current Brazilian legislation against terrorism, focusing on the recently approved Law n° 13,260/2016,

which regulates a constitutional³ dispositive that considers terrorism as a serious crime, being not subject to amnesty or act of grace. In the third part, from the comparison of the analyzed legislation to the definitional elements of terrorism, this paper identifies possible gaps or mistakes in this legislation. Finally, at the conclusion of this paper, some recommendations are presented in order to strengthen the support of Brazilian legislation to the effort developed by joint interagency security forces in Brazil to prevent and fight terrorism.

The methodology used to conduct this research focused on a qualitative perspective, and an inductive approach, through the collection of documental and bibliographic sources of recognized authors in the international academic environment. In order to develop the elements that define terrorism, this paper looked into the concepts presented by Alex P. Schmid, Bruce Hoffman, Louise Richardson, and Boaz Ganor, among others. These authors were chosen because they are the most prominent academic voices in the western hemisphere, exactly the part of the world with which Brazil is more likely to interact in order to coordinate efforts, being essential the conceptual convergence among these countries. The analysis of Brazilian legislation against terrorism was executed through the collection of primary sources of official documents.

The major finding of this paper is that a comparison between the main traits of terrorism and the legislation revealed some gaps or mistakes that can lead to a lack of coherence of legal framework with the academic phenomenological perspective. Therefore, the Brazilian legislation needs to refine the definition of terrorism, reinforcing the core aspects of the academic definition, and also restating what is not terrorism, avoiding misunderstandings which could block the effort to prevent the occurrence of terrorism.

2 A CONCEPTUAL FRAMEWORK OF TERRORISM

What is terrorism? The words bring with itself an exact meaning, expressing a common understanding of a subject, a fact, an action, or at least a qualification of these. However, some words, as it synthesizes complex facts or phenomenon, may lead to a different interpretation.

To reach a common definition about this subject, or at least one that satisfies the majority of countries is still a not overcome challenge. Two main ideas dominate debates whenever this discussion is conducted: the first one is about the necessity of developing a consensual definition, and the second idea gravitates towards the relative subjectivity that a given definition is interpreted.

Those who defend the needless of a consensual definition of terrorism state that each country has already developed a legal framework which covers all acts considered terrorism, being efficient to prevent and to judicially treat all infractions of the law, such as homicide, robbery, kidnapping,

³ Brazilian Federal Constitution, article 5°, item XLIII. (Brazil, 1988, p. 13.)

among others. Even though those crimes are present in the penal body of law, it must be recognized as more solid and sound the theory according to which terrorism differentiates itself from other crimes because of its political nature, and indeed do not attack other citizens (who may suffer the consequences of those acts), but the National State, and, as a consequence, its sovereignty, heavily impacting its basic and social functions.

Additionally, still within the context of the first idea, terrorism is an international phenomenon (Gregor, 2013), spreading its functional activities through different countries. Nowadays, it is indeed common to observe terrorist organizations recruiting simultaneously from more than one country, while it keeps training bases in other countries, and gets funds from illegal activities developed in a third country. Therefore, it is urgent that the international community reaches a consensual understanding regarding terrorism so as to unify efforts to fight this phenomenon in a simultaneous and coordinated way.

The second idea that undermines the effort to reach a common definition of terrorism is the relativism around the interpretation of a fact. Therefore, their defenders use to say that one man's terrorist is another man's freedom fighter, as shown by Boaz Ganor:

The statement, "One man's terrorist is another man's freedom fighter," has become not only a cliché but also one of the most difficult obstacles in coping with terrorism. The matter of definition and conceptualization is usually a purely theoretical issue—a mechanism for scholars to work out the appropriate set of parameters for the research they intend to undertake. (Ganor, 2010)

Analyzing this argumentation with attention, and giving substance to the point of view of Boaz Ganor, it leads to a consideration that this idea only thrives if the study of terrorism and its considerations do not focus on the act itself, but on the people who drive it or on the morality of the pursued goals. It is not acceptable that an analysis loses its focal point and fails to recognize that terrorism is the means used to achieve an end. On the other hand, freedom or liberation of a region may be the end pursued. Thus, it is not correct to compare a means, terrorism, to the end, freedom. (Schmid, 2011)

As it is stated by Alex P. Schmid, the problem of definition is a crucial element in the attempt to coordinate international collaboration. As a consequence, this research will keep its focal point on the phenomenological observation, with analytical distance, conducted impartially, with the exemption, and critical independence. This is the reason to study the historical evolution of the terrorism meaning, in order to understand the dynamics of its evolution and identify the core of its definition. After that, it will be possible to point out the main characteristics that define the phenomenon.

2.1 The Evolution of the Meaning of “Terrorism”

This word was popularized during the French Revolution and, on the contrary to its contemporaneous meaning, terrorism had a positive connotation at that time. The "*Regime de la Terreur*" of 1793, from where came the term still used nowadays, was adopted as a means to promote the order in the middle of a period of relative anarchy and instability that followed the French Revolution. Hence, unlike terrorism is commonly understood today, meaning a revolutionary activity conducted by marginalized groups, the "*Regime de la Terreur*" was conceived as an instrument of governance to promote the stability of the Revolutionary State, by intimidating counterrevolutionaries, subversives, and all other dissidents whom the new regime regarded as “enemies of the people”. The death by guillotine, proclaimed from the State instruments on service of the Revolutionary Government⁴, was a powerful lesson conveyed to any who might oppose the revolution or grow nostalgic feeling for the “*ancien regime*”, all of them considered “traitors to the revolution”.

The “Regime of Terror” ended when Robespierre announced to the National Convention that he had a new list of traitors. Fearing that their names could be on the announced list, extremists and moderates gathered unified to repudiate the regime and its leader. As a result, Robespierre and his closest followers were all sentenced to same death by guillotine, just like the former condemned by the regime, roughly a total of forty thousand. This was the way that “terror” arrived at its end, and, from that moment on, “terrorism” would be associated with the abuse of power, with criminal implications. This term was first used by Edmund Burke in 1795, in a critic to the French Revolution, when he described: “Thousands of hellhounds called Terrorists...let loose on the people" (Letter IV to Earl Fitzwilliam)⁵.

One of the most significant results of the French Revolution was the political awakening in Europe, inspiring national movements, which led to the creation of new States, and to the repulse feeling to absolutist monarchic regime⁶, as it happened in Germany, Italy, and later in Russia. At the same time, social and economic changes imposed by the industrial revolution, and a consequent exploration of the working class (which used to keep a distance from politics, or was alienated from the process) established the ideal environment to the emergence of new ideologies. During this period of intense change in Europe, the concept of terrorism expanded and evolved.

⁴ The Revolutionary Government was comprised by the Committee of Public Safety (elected by the “convention” and from then the effective governing body), and the General Security Committee, which controlled the police and justice, being subordinate to the Revolutionary Court. On the basis of the "law of the suspects," the traitors of the revolution were sentenced to guillotine death, a powerful message to regime opponents. (Kerr, 1927)

⁵ Law, 2009, p. 65.

⁶ Even though the United Kingdom had already been governed by a Constitutional Monarchy since 1688, with the triumph of Glorious Revolution, and the approval of the “bill of rights” in 1689, as well as the “Act of Settlement” in 1701, the other European countries started to challenge, or at least limit, the monarch’s “divine power” only after the French Revolution.

In the middle of national, liberal, and anarchical movements, one of the emerged revolutionary concepts was developed by the Italian republican extremist *Carlo Pisacane*. He defended that the propaganda of ideas was an illusion. For him, the ideas resulted from facts, not the other way around. In this way, his theory of “propaganda by deed” reasoned that the violence was necessary not only to attract attention to the cause, but also to inform, educate, and position the mass (audience) as support to the revolution.

Despite not achieving the desired success against the Bourbon dynasty, on the north of Italy, *Pisacane* inspired other movements, such as the Russian *Narodnaya Volya*, which proposed, at the end of the 19th century, power limitation to the Tsar, with the adoption of a Constitutional Monarchy. This group refined the theory of “propaganda by deed”, conducting a selective targeting of specific individuals whom the group considered the embodiment of autocratic, oppressive state⁷, avoiding unnecessary deaths; an idea expressed by the group collective believe: "not one drop of superfluous blood" should shed in pursuit of aims, however noble or utilitarian they might be (Hoffman, 2006).

Even though it was dismantled, the Russian group added meaning to the term terrorism, bringing a moral concern to adequate the means used to the pursued ends. Ironically, the success obtained with the Tsar Alexander II assassination in March, the 1st of 1881, led to its end. After the assassination, the full weight of the Tsarist state fell on the heads of the group. As a contribution from the Russian group, the tactic of using more than one perpetrator to attack the target and with the second using explosives that provoked the death of both the Tsar and the group agent, *Narodnaya Volya* inspired other revolutionary groups. To the nascent anarchist organization, it provided a model to be emulated.

Following those actions, the anarchist movement applauded the death of the tyrant Tsar and, at the height of euphoria, founded the "International Anarchist" movement. Whilst the movement inspired a revolution in global proportion, the lack of material and capacity of coordination permitted only isolated actions, executed by small cells, what turned it difficulty to the police to detect, inspiring fear of unjustified proportion within the population. Furthermore, the notorious bombing attacks were systematically directed against Heads of State, or Heads of Government, such as the assassination of US President William McKinley⁸ in 1901 and so many others around the

⁷ The group positioned against terrorism in open, democratic societies. In 1881, for example, the executive committee of *Narodnaya Volya* publicly denounced, for this reason, the alleged anarchist political motive behind the assassination that year of USA President James Garfield. According to the group, terrorism could be justified only in extreme circumstances, denouncing all such movements in countries that permitted "normal political activity". See *Political Terrorism: Theory, Tactics, and Countermeasures* (Wardlaw, 1989, p. 23)

⁸ McKinley was assassinated by a young Hungarian refugee, Leon Czolgoaz, who, even though was not a member of an anarchist movement, was definitely influenced by it. This action led the US Congress to approve a law banning all known anarchists, or any other person who opposed to an established govern.

world⁹. Despite these acts had little impact, both in domestic and regional politics, the anarchist movement gave its contribution to the development of terrorism in the conceptual field with the maintenance of the idea of directing the action against a selected target, avoiding collateral damage to the objectives pursued¹⁰.

In the middle of the nineteenth century, overlapping the existence of the anarchist movement, some movements developed in Europe, whose motivation was nationalist. One of the most active was the Irish movement, initially known as the “Fenian Brotherhood” and the “Irish Revolutionary Brotherhood”, which operated from Ireland and Irish groups that migrated to the United States¹¹. In that context, Jeremiah O'Donovan Rossa, leader of the United Irishmen, was arrested and sentenced to life in Ireland, being released after abuse evidences in prison, being exiled to the United States.

In exile, O'Donovan resumed his subversive activities, with the support of Patrick Ford, editor of the “Irish World” newspaper, the main vehicle used to spread the ideas of the movement. The direct association of a media vehicle with the Irish Republican movement, which advocated the action of small groups (the Skirmishers) as a way of inflicting damage on British economic development and forcing the Government to give in to the idea of Irish independence, was a recognition of the media power¹² when used in favor of terrorist actions on an international scale. In the same way, it shows that the ill-treatment of eventual terrorists kept under the care of States has the potential to strengthen the appeal for recruitment and adherence to the revolutionary cause, something that today is seen as a stimulus to terrorist actions in France, in Belgium and, against the United States, in other countries.

The *modus operandis* of the United Irishmen (*Clan na Gael*) was based on the action of small groups and the formation of a money fund to finance the “skirmishers fund”, asking for contributions through the Irish World. The execution of attacks directed against the London Underground and Railway stations, with the use of homemade bombs and primitive time-delay fuses detonators, although not aimed at reaching the innocent users of that means of transport,

⁹ Besides McKinley, the anarchists attempted against the life of the German Kaiser in 1878; killed the President in 1894, and the King Umberto I, in 1900, both from Italy; the Austria-Hungary Empress Elizabeth, in 1898; and the Spanish Prime Ministers in 1897 and 1912.

¹⁰ Another important contribution of the anarchist movement to the development of terrorism was the dissemination of instructions on the preparation and use of explosives, as well as the planning and execution of attacks (“how to” or “do-it-yourself” manuals). Doctrinal production has influenced the organization of terrorist cells and the execution of terrorist attacks around the world. The use of tools of information technology is recognized as one of the predecessors on the use of “information revolution”, experienced in the present century, for the doctrinal dissemination of tactics, techniques, and procedures of terrorism (Hoffman, 2006).

¹¹ The action from the territory of the United States can be considered the first effect of the diaspora of nations, or of the migratory movement, to the development of terrorist activities. The support, through ideas, financing, recruiting, or even hiding wanted members, will be essential for the globalization of the terrorism phenomenon.

¹² Together, O'Donovan and Ford developed a new strategy for the republican movement, stated in the column signed by Ford in the edition of December 4th, 1875: “We are not advising a general insurrection...on the contrary, we should oppose a general insurrection in Ireland as untimely and ill-advised. But we believe in action nonetheless. The Irish cause requires a little band of heroes...” (Beiner, 2014, p. 210)

ended up marking "the impossibility of controlling the effects of an attack ", at least with those characteristics, and, consequently, the abandonment of the dominant view among the anarchists, in order to avoid the shedding of innocent blood. Undoubtedly, terrorism, with this, began to acquire a negative and objectionable trait, making the defense of its acts increasingly more difficult.

In the same environment, with a nationalist motivation, just before World War I, a group of Bosnian Serbs, known as *Mlada Bosnia* (Young Bosnians), rose against the tyrannical rule of the Austrian-Hungarian Habsburg monarchy over the territories of the Balkans, who concentrated a population with Slavic origins in its majority. In one of the group's most famous action, Gavrilo Princip, one of its members, assassinated the Austrian Archduke Franz Ferdinand, initiating the sequence of events that would culminate with the outbreak of World War I. The aspect considered new in this case was the external support offered by ultranationalist Serbian groups (*Narodna Obrana* - People's Defense), in the name of pan-Slavism, to the Young Bosnians.

Although the connection between the Serbian government and the subnational groups was not clear, in 1911 a faction of the *Narodna Obrana* separated and founded another group (Union of Death), better known as the Black Hand. This group was largely composed of Serbian military personnel, such as the head of the Serbian General Staff Intelligence Department, Colonel *Dragutin Dmitrievich*. This is not to say that the Serbian government controlled or manipulated the Bosnian movement, nor did it support the plan drawn up by the Black Hand. Yet, while maintaining the revolutionary significance of terrorism, a parallel can be made to what is now termed state-sponsored terrorism, when a foreign government smuggles, stimulates, funds, and provides training to a terrorist movement.

Although it is only a semantic differentiation, some researchers use the term "terror" to refer to acts perpetrated by states, while reserving the term "terrorism" for acts carried out by subnational groups. This classification, however, reveals the concern to differentiate the (causal) author of the phenomenon, being the source of large dissention about the definition of terrorism, since it removes the focus of the phenomenon itself. Indeed there is no sense in keeping this difference when pursuing the intrinsic characteristics of terrorism as a phenomenon.

From 1930, the meaning of terrorism underwent a new change and was then related to acts of violence conducted by authoritarian governments against the citizens of their own country. This was the case in Nazi Germany, Fascist Italy and the Stalinist Soviet Union. In the first two examples, the formation of pro-government groups, the "brown shirts" and the "black shirts", was used as a weapon to intimidate and coerce the opponents of the regime. Stalin used the system of successive purges to acquire supreme powers by eliminating the opposition, especially the ones considered the most prepared, intelligent, and capable of leadership. It should be noted that, unlike the French terror regime, the measures cited were not launched at a political moment of crisis or chaos and still

characterized abuse of the exercise of power, keeping the negative bias from the end of the regime of terror of Robespierre.

According to Bruce Hoffman (Hoffman, 2006), similar events occurred when the so-called squads or extermination groups, in conjunction with flagrant political intimidation of opponents, were the instruments of right-wing dictatorial governments, such as in Chile and Argentine, or even elected governments, such as in El Salvador, Guatemala, Colombia, and Peru, these latter during the violent left-wing revolutionary movements in the 1980s. The same could be said of the current situation in Venezuela, where the elected government promotes intimidation, through pro-government groups and state agencies, against opponents, dissidents, and labor leaders.

After World War II, several revolutionary movements inspired by freedom appeared against the colonialist or imperialist powers. In the same way, countless movements had the inspiration, or the veiled support of the two hegemonic world powers, the United States of America and the Soviet Union. It was in this context that the so-called "liberation wars" were born, with a widespread use of terrorist attacks to promote the achievement of the political objectives, such as forming a new state, changing the regime of government, overthrowing a certain government ruler, or expel an occupation force from a country. Faced with the negative connotation that the term terrorism had developed, the so-called terrorist movements assumed, at that time, politically neutral designations, such as "freedom fighters"¹³, "revolutionary", or "urban guerrilla".

During the 1960s and 1970s, the understanding of the term terrorism continued to contemplate the revolutionary context, but it also began to contemplate the actions of nationalist and ethnic-separatist groups, in addition to the several movements with strong ideological and political roots, characteristic of the cold war period when revolutionary groups resorted to terrorist actions to attract local, regional, and even international attention to their causes. Already during the 1980s, the bipolar dispute environment had reached its climax and the Kremlin's strategy of promoting the expansion of the socialist regime through sub-national groups that were against the prevailing political-economic order had been denounced by the writer Claire Sterling in her book "The Terror Network"¹⁴.

It was also at that time that several suicide bombings were directed against diplomatic representations and US military targets in the Middle East, all attributed to state-sponsored organizations that could not openly and directly combat the United States, but resorted to terrorism

¹³ Yasser Arafat, leader of the Palestine Liberation Organization, addressed the United Nations General Assembly in a speech on November, 13th 1974 on the difference between the terrorist and the freedom fighter: "The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists, cannot be possibly be called a terrorist." (Ivianski 1989, p. 146)

¹⁴ Sterling, Claire. *The Terror Network: The Secret War of International Terrorism*. New York: Berkley Publishing Corporation, 1982.

to target them and discourage them to continue defending their objectives in the region. Examples of these regimes are Syria, Iran, Iraq, and Libya. One such attack was the bombing of a US military base in Beirut on October 23rd, 1983, killing 241 US soldiers, an attack attributed to Hezbollah, which was supposedly sponsored by Iran and Syria¹⁵.

As a consequence of these facts, the concept of terrorism expanded even more, including, and sometimes, confounding with revolutionary and guerrilla movements. The fluidity of the concept, according to the perspective of the one who judged the act, allowed to deliberately labeling violent actions as terrorists, taking advantage of the negative meaning assumed by the term terrorism.

The concept of terrorism became even more imprecise when, in the 1990s, terrorist activities linked to criminal activities, such as "narcoterrorism", and the "gray area phenomenon" emerged.

Narcoterrorism, although not limited to this meaning, was conceived to designate movements, according to the conspiracy theory launched by Claire Sterling, which was orchestrated by Moscow and used the drug traffic to enable or accelerate the achievement of intended objectives, according to the French criminologist and specialist in terrorism, *Xavier Raufer*. While the concept was consistent with the work of various "Marxist-Leninist" groups linked, for example, to the Soviet Union, Cuba, Bulgaria, or Nicaragua, other criminal groups began to establish strategic alliances with terrorist and guerrilla organizations or even began to use violence to achieve political goals. The growing power of drug cartels in Colombia and Peru, as well as their continued attempts to discredit elected governments and the political system of these countries, are classic examples of this trend.

The gray area phenomenon, in turn, constituted a theory to designate the complex and uncertain nature of the threats characterized by subnational groups in the post-Cold War period. In fact, military doctrine in various countries had to adapt to a new set of threats, whose actions did not constitute acts of war, according to the understanding consolidated throughout the twentieth century but was also sufficiently destabilizing to characterize the situation of peace. In short, they demanded a military response, without a clear declaration of war. It is during this period that military operations of "no war" or "other than war" arouse.

In the midst of this period, terrorism assumed an immense complexity, being not seen as an individual phenomenon of subnational violence to assume a multidisciplinary pattern, constituted of several constituent characteristics in an environment of violence.

¹⁵ The 1983 truck bombing of a US Marine Corps base, which was part of a United Nations multinational force to secure a ceasefire in Lebanon, left 241 US soldiers dead. Its authors were not determined, but the investigations attributed its execution to Shiite Muslims, Hezbollah representatives, linked to Iran and supported by Syria. (Frank, Benis M., *US Marines in Lebanon: 1982-1984*. Washington-DC, History, and Museums Division Headquarters. US Marine Corps, 1987, p. 24, 44, 152)

This trend did not begin abruptly at the end of the twentieth century but developed throughout the century. Notably, Claire Sterling, Bruce Hoffman and David Rapoport, three scholars and authors of literary works on the subject, point, for example, the Mini-manual of the Urban Guerrilla¹⁶, written by the Brazilian *Carlos Marighella* in 1969, as a work that served as a backbone for the structuring of several terrorist organizations around the world, such as the German group *Baader-Meinhof* and the Italian organization *Brigada Rossa*. In the document, Marighella devotes part of his manual to defining himself as an "urban guerrilla", establishing a list of the guerrilla's personal qualities, showing a clear effort to differentiate him from a mere terrorist¹⁷. As already described in the text, another designation that members of terrorist organizations or sympathizers preferred to use for themselves was "freedom fighter," of better accepted connotation, because of the status of the struggle for liberation against the invader.

The September 11th, 2001 terrorist attack on the United States, by the way it was conducted and by the result achieved, ended up sealing the negative connotation attributed to terrorism, linking it to activities stemming from radicalism, extremism, the inability to live with diversity, or with the need force the approval and acceptance of a point of view defended by the organization, regardless of majority thinking.

In conclusion to the historical analysis, the term terrorism had a positive meaning during the nationalist and anarchic movements at beginning of the 20th century, when terrorists used to proudly state their difference from common criminals. At that time, the attacks were centered at those authorities invested with the power that terrorists were fighting against, always trying to overthrow a government or to change a regime. However, when the violence of actions started to be addressed against citizens, by randomly attacking members of a society, who were not the center of power that terrorists were trying to overthrow, movements lost the legitimacy, and the term "terrorism" acquired a negative meaning. Those movements, with nationalist motivations, seeking independence or autonomy, incorporated also the ideological bias, whilst keeping the pursuit of political objectives. This situation led terrorists to define themselves in a different perspective, giving emphasis to the legitimacy of the objective pursued, in an attempt to escape from the

¹⁶ "To be called an aggressor or a terrorist in Brazil is now an honor to any citizen, for it means that he is fighting, with a gun in his hand, against the monstrosity of the present dictatorship and the suffering it causes." (Marighella, 1969, apud Hoffman 2006, p. 21).

¹⁷ Although not the original version of the Mini-manual of the Urban Guerrilla, this document is referenced in several literary works and, in digital form, available in electronic sites. A version of this document, obtained and compared between the websites <https://www.documentosrevelados.com.br/wp-content/uploads/2015/08/carlos-marighella-manual-do-guerrilheiro-urbano.pdf> and <https://www.marxists.org/portugues/marighella/1969/manual> (both of them were accessed in October, 25th 2017), presents the following same text: "The accusation of "violence" or "terrorism" without delay has a negative meaning...Today, being "violent" or a "terrorist" is a quality that ennobles any honest person because it is an act worthy of a revolutionary engaged in the armed struggle against the shameful military dictatorship and its atrocities" (translation by the author).

negative meaning of terrorism, as well as the term was to be used to label violent acts from opponents to delegitimize them.

In sum, the evolution of the terrorism, according to its meaning, shows the constant presence of use of violence to spread fear, or panic, in order to change the behavior of an audience in support of desired political outcomes.

2.2 The Academic Approach to Define Terrorism

The term terrorism has no precise or widely accepted definition. Academics, politicians, security experts and journalists, all use a variety of definitions of terrorism. Some definitions focus on the terrorist organizations' mode of operation. Others emphasize the motivations and characteristics of terrorism or the "*modus operandis*" of individual terrorists.

Working with many different perspectives confuses the audience and may serve to a specific interest. Virtually any especially abhorrent act of violence perceived as directed against society – whether it involves the activities of anti-government dissidents or government themselves, organized crime, people engaged in militant protests – is often labeled as “terrorism”. (Hoffman, 2006)

In attempting to establish the meaning of terrorism, resort to the dictionary definition does not prove productive. The Aurelio Dictionary, although it enjoys great authority and respect in the Portuguese language, presents a little revealing definition and nothing substantial: "Terrorism: A way of coercion, combat or threatening by the systematic use of terror." In search of greater precision, one could look up, in the same dictionary, for the vernacular terror: "1. State of great dread. 2. Awe." (Ferreira, 2008. Translated by the author).

Even in other languages, dictionaries have very historical or even very literal definitions, as Hoffman has recorded in his book *Inside Terrorism*, by the example of the definition found in the Oxford English Dictionary:

“Terrorism: A system of terror. 1. Government by intimidation as directed and carried out by the party in power in France during the revolution of 1789-94; the system of terror. 2. gen. A policy intended to strike with terror those whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized.” (Oxford: Oxford University Press, 1971, apud. Hoffman, 2006)

As can be seen, the definitions are very vague, the first being connected to the historical fact itself, which retains the origins of the term terrorism. The second meaning presents at least the fear-inducing characteristic present in terrorist actions, but it has such a wide meaning that it admits its corresponding attribution to a great variety of violent acts, even if they are not properly acts of terrorism.

The attempt to establish a definition of terrorism that can be accepted anywhere in the world, regardless of the interests involved, may raise the question of the necessity of this measure, as

shown in the introduction of this paper. In truth, this goal, with such audacity, sounds as impossible; suggesting, in substitution, the highlight of essential characteristics that constitute a terrorist action, which allows any State, or institution, to construct a precise, coherent and impartial definition. Accordingly, to point out the main elements that define the phenomenon, this paper will resort to academic impartiality of recognized researchers.

Therefore, as it was observed during the study of the evolution of the meaning of terrorism, and considering that its meaning assumed a negative connotation, as well as the self-denying behavior that supposed terrorists developed in their defense, it was developed a new “rhetoric battle” around the classification of a fact as terrorism. Indeed, as stated by Brian Jenkins¹⁸, to classify an act as terrorism implies a moral judgment. In order to avoid the moral judgment of an action, evaluating its perpetrators, or the pursuit objectives, the research will concentrate on the phenomenological analysis of the action, especially in its intrinsic characteristics, which can distinguish this event from others.

The 2011 Routledge Handbook of Terrorism Research provides 261 definitions for the word terrorism. How can a word have so many different interpretations? Bjørgo argues that this is due to the fact that terrorism is "an extremely complex set of phenomena, covering a great diversity of groups with different origins and causes"¹⁹. Nowadays, terrorism includes not only the action, but also raising funds, gathering critic resources to use in action, staying invisible to security forces, using false documents, using information technology (IT) to communicate inside and outside the organizations, among other activities, all of them requiring a degree of attention as criminal activities related to terrorism.

Alex Schmid and Albert Jongman in “Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature”, analyzed 109 different definitions of terrorism, the result of a survey conducted with recognized authors and researchers, within the context of the study of the phenomenon, belonging to the academic environment. From its analysis, the authors analyzed and tabulated the 22 elements that appeared most frequently in the definitions studied, according to Table 01, described below:

Element	Frequency (%)
1. Violence, force	83,5
2. Political	65
3. Fear, terror emphasized	51
4. Threat	47
5. (Psychological) effects and (anticipated) reactions	41,5
6. Victim-target differentiation	37,5
7. Purposive, planned, systematic, organized action	32
8. Method of combat, strategy, tactic	30,5
9. Extranormality, in breach of accepted rules, without	30

¹⁸ Jenkins, 1980, p.1.

¹⁹ Bjørgo, 2005, p.1.

humanitarian constraints	
10. Coercion, extortion, induction of compliance	28
11. Publicity aspect	21,5
12. Arbitrariness; impersonal, random character; indiscrimination	21
13. Civilians, noncombatants, neutrals, outsiders as victims	17,5
14. Intimidation	17
15. The innocence of victims emphasized	15,5
16. Group, movement, organization as perpetrator	14
17. Symbolic aspect, a demonstration to others	13,5
18. Incalculability, unpredictability, unexpectedness of occurrence of violence	9
19. Clandestine, covert nature	9
20. Repetitiveness; serial or campaign character of violence	7
21. Criminal	6
22. Demands made on third parties	4

TABLE 01 – Frequency of present elements in 109 definitions of terrorism. (Schmid & Jongman, 1988, p. 5 e 6)

At the end of this exhaustive exercise, Schmid asks “whether the above list contains all the elements necessary for a good definition”. The answer he presents is “probably no”. It might bring frustration or lead to a conclusion that it is impossible to reach a consensus regarding the elements that define terrorism. That is the reason that this paper focus on the act itself, isolating it as a phenomenon, and avoiding confusion because of intervenient or dependent variables. Some of the elements presented on the table are closely related, or keep the same meaning to one another, while others refer to external aspects of the action. It partially explains the apparent failure of Schmid and Jongman at that time.

Nevertheless, the effort to define terrorism persisted with Schmid. He conducted other researches publicized in 2004 and continued trying to reach a consensus. Thus, Schmid arrived at a conclusion of ten elements that provide a fair and good enough description of what, in common academic view, can be said to constitute terrorism²⁰.

1. The dual character of the term terrorism (this paper uses the phenomenological character once it focuses on the fact, not seeing it as a philosophy or an ideology);
2. Threefold context (confirming this research position, do not differentiate or exclude contexts from the phenomenological study);
3. Perpetrator as a source or agent of violence (terrorism demands an agent to deliberately and intentionally execute the action that causes terror, fear, or panic);
4. Political (terrorism is political, not merely “criminal”, or “psychotic” violence – it will be discussed deeply furthermore);
5. Violent act (the use of violence or the threat to use violence is the generator of terror, fear, or panic. Without violence, terrorists cannot send their message);

²⁰ Schmid, 2011, p. 76-83.

6. Threat-based communication (behind the violence, there is a random factor of targeting with violence that works in benefit of transmitting a terrorist message. A terrorist action is a way to communicate through the use of violence);

7. Differentiation between direct civilian victims and the ultimate target audience (the direct victim of violence is different from the ultimate target. For this, anyone can become a victim of terrorism. Additionally, it brings up a discussion of whether a target is a lawful combatant or an innocent civilian. It requires a deeper consideration, which will be conducted in this paper afterward);

8. Terror, fear, dread (the deliberate act of violence is designed to produce a psychological effect out of proportion to its physical result. To achieve this, the terrorist cleverly exploits the inherent bias of the news value system);

9. Intent (terrorist action demands intention to execute the violent act and to generate terror. It cannot come from an unprovoked act);

10. Campaign (a single act can strike temporary terror in a target population. To have some chance of becoming effective, it requires a campaign of terrorist attacks).

Coherent with his long research, Schmid presented in 2011 (23 years after his first large attempt to define terrorism), through a book edited by him, *The Routledge Handbook of Terrorism Research*, an academic consensual definition for terrorism:

Terrorism refers on the one hand to a doctrine about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and noncombatants, performed for its propagandistic and psychological effects on various audiences and conflict parties²¹.

After a thorough and careful job conducted by Schmid, it is worth checking other academics definitions of terrorism before this paper reaches its partial conclusions. Thus, according to Louise Richardson²², Terrorists are subnational actors who **violently** target **noncombatants** to **communicate a political message** to third parties (emphasis added by the author). Bruce Hoffman defines terrorism “as the deliberate creation and exploitation of fear through **violence** or the **threat of violence** in the pursuit of **political change**”²³ (emphasis added by the author). Boaz Ganor in his turn defines terrorism as “the intentional use, or threat to use, **violence** against **civilians** or against **civilian targets**, in order to attain **political aims**”²⁴ (emphasis added by the author). Finally, David J. Whittaker concludes that “terrorism, in the most widely accepted contemporary usage of the term, is fundamentally and inherently **political**. It is also ineluctably about power: the pursuit of power, the acquisition of power, and the use of power to achieve **political change**. Terrorism is thus

²¹ Schmid, 2011, p.86.

²² Richardson, 2007, p. 20.

²³ Hoffman, 2006, p. 40.

²⁴ Ganor, 2010, p. 4.

violence – or, equally important, the **threat of violence** – used and directed in pursuit of, or in service of, a **political aim**²⁵ (emphasis added by the author).

In this sense, looking into the definitions presented by the distinguished authors cited above, it is possible to identify three convergent points of their definitions, which also are the elements that this paper points as the ones in which the majority of the academics would agree: **use of violence**, **civilian targets** and **political message** (or objective).

The first element is violence. “If an act does not involve violence or threat of violence, it is not terrorism”.²⁶ Violence or the threat of violence is so symbolic to terrorism because it is the instrument used to instill fear, to terrorize a target audience, and with this, attain psychological objectives. The use of violence or threat to use it comes from the idea of "propaganda by deed", as shown during the analysis of the evolution of the meaning of terrorism, and, since then characterizes the way terrorists sensitize an audience, causing fear and panic. As Schmid stated, few academic pieces of research dispute that terrorism is a special form of use of (political) violence without moral restraints.

The destructive acts themselves are criminal offenses outside the context of war and tend to qualify as war crimes in a context of war if civilians and non-combatants are deliberately targeted. The violent act is generally meant to be ‘exemplary’ and serves the aim of intimidating, impressing or coercing third parties linked, directly or indirectly, to the victims.²⁷

Through the use of violence, a group, or movement obtain compliance from a society and pressure a government to act according to the terrorist desire, as shown by Kydd and Walter:

...terrorist violence is a form of costly signaling. Terrorists are too weak to impose their will directly by force of arms. They are sometimes strong enough, however, to persuade audiences to do as they wish by altering the audience’s beliefs about such matters as the terrorist’s ability to impose costs and their degree of commitment to their cause. Given the conflict of interest between terrorists and their targets, ordinary communication or “cheap talk” is insufficient to change minds or influence behavior. If al-Qaida had informed the United States on September 10, 2001, that it would kill 3,000 Americans unless the United States withdrew from Saudi Arabia, the threat might have sparked concern, but it would not have had the same impact as the attacks that followed. Because it is hard for weak actors to make credible threats, terrorists are forced to display publicly just how far they are willing to go to obtain their desired results.²⁸

The pressured government, however, as it has the monopoly of the legitimate use of force (including lethal force), may decide to use it against the violent perpetrators of the act to protect the society, causing an escalation on violence and maybe leading to overreaction by security forces. As a consequence, the violence of terrorism has second and third effects which are the main objectives of violence. Nevertheless, only violence is not enough to point to the occurrence of terrorism.

The second element is the political message or objectives that terrorism tries to communicate through the violent acts. For years, media has reported terrorism as the use of violence without any

²⁵ Whittaker, 2003, p. 5.

²⁶ Richardson, 2006, p.4.

²⁷ Schmid, 2011, p.78.

²⁸ Kydd and Walter, 2006, p. 50.

goal beyond revenge, or desire to produce fear in an enemy population (Kydd and Walter, 2006, p. 51). However, one must recognize that Terrorism is not merely “criminal” or psychotic violence, it must have political objectives. In political science, Schmid explains, politics is usually defined in terms of one or several of the following concepts: policy, power, authority, state, resource allocation and/or conflict (Schmid, 2011, p. 77). It is essential to differentiate common criminal violence from terrorism, and determining the political nature of terrorism is indeed one of the most important distinctive elements. As it presents a quite broad concept, the context of an action will classify its political aspect. Kydd and Walter developed a study considering the goals of terrorist actions, where they concluded:

Although the ultimate goals of terrorists have varied over time, five have had enduring importance: **regime change, territorial change, policy change, social control, and status quo maintenance**. (emphasis added by the author)²⁹

The five enduring terrorist goals present a political nature that, even though do not limit the possible objectives, give context to the interpretation, as the authors continued explaining each one of them:

Regime change is the overthrow of a government and its replacement with one led by the terrorists or at least one more to their liking. Most Marxist groups, including the Shining Path (Sendero Luminoso) in Peru have sought this goal. **Territorial change** is taking territory away from a state either to establish a new state (as the Tamil Tigers seek to do in Tamil areas of Sri Lanka) or to join another state (as Lashkar-e Tayyiba would like to do by incorporating Indian Kashmir into Pakistan). **Policy change** is a broader category of lesser demands, such as al-Qaida’s demand that the United States drop its support for Israel and corrupt Arab regimes such as Saudi Arabia. **Social control** constrains the behavior of individuals, rather than the state. In the United States, the Ku Klux Klan sought the continued oppression of African Americans after the Civil War. More recently, anti-abortion groups have sought to kill doctors who perform abortions to deter other doctors from providing this service. Finally, **status quo maintenance** is the support of an existing regime or a territorial arrangement against political groups that seek to change it. Many right-wing paramilitary organizations in Latin America, such as the United Self-Defense Force of Colombia, have sought this goal. Protestant paramilitary groups in Northern Ireland supported maintenance of the territorial status quo (Northern Ireland as British territory) against IRA demands that the territory is transferred to Ireland³⁰.

Observing the five goals showed by Kydd and Walter, it is particularly difficult to find the relation between “social control” and political message. Even the authors recognize that in a table, placed at pages 54 and 55, there is no terrorist organization, among the 42 Foreign Terrorist Organizations recognized by the US State Department, and listed there that pursued social control as their objective. However, they warn that that list is not exhaustive, nor representative of all terrorist groups, and add that some domestic groups are more interested in social control. Disputing the argument presented by the authors, this paper proposes that social control can be a secondary objective of a terrorist organization, as a tool to intimidate, to provoke a reaction, or to force compliance of a group in order to obtain the government maintenance of status quo (keeping a policy), or to force government to change its policy. Therefore, social control will not be sought

²⁹ Kydd and Walter, 2006, p.52.

³⁰ Ibid, p. 52-53.

alone, but correlated to other political objectives, and thus this paper will consider as a context of political objectives to define terrorism, only the other four presented by Kydd and Walter: regime change, territorial change, policy change, and maintenance of status quo.

The third element is the targeting of civilians. The threat-based communication of terrorist deeds works only because anyone can become a victim of terrorism, being this random factor what gives strength to the message. Targeting civilians or civilian targets is the element that sets it apart from other forms of violence. Richardson states that “The final and most important defining characteristic of terrorism is the deliberate targeting of civilians. This is what sets terrorism apart from other forms of political violence, even the most proximate form, guerrilla warfare³¹”. When defining this characteristic, this paper, in the same way that Richardson and also Ganor indicate, prefers to use civilians, instead of designating as innocents, or non-combatants.

“Innocent” (as opposed to “civilian”) is a subjective concept, influenced by the definer’s viewpoint, and therefore must not be the basis for a definition of terrorism. The use of the concept “innocent” in defining terrorism makes the definition meaningless and turns it into a tool in the political game³².

Richardson agrees with Ganor and shows how the term “innocent” can lead to different interpretations, giving room to relativism:

Terrorists have elevated practices that are normally seen as the excesses of warfare to routine practice, striking noncombatants not as an unintended side effect but as a deliberate strategy. They insist that those who pay taxes to a government are responsible for their actions whether they are Russians or Americans. Besayev declared “all Russians fair game because they pay taxes. They give approval in word and deed. They are all responsible”. Bin Laden similarly said of Americans, “He is the enemy of ours whether he fights us directly or merely pays his taxes”³³.

Considering all these arguments, it does not present importance whether the political objectives of a group are considered just, or morally justifiable, if this group deliberately targets civilians in order to achieve those ends, it must be classified as terrorism, no matter one supports or likes their objectives³⁴.

After taking into consideration all academic arguments, as well as the evolutionary meaning of terrorism, this research will define terrorism as the deliberate use of violence, or threat of violence, to target civilians, or civilian targets, to achieve political objectives. Even though the definition with which this paper will work seems to be too narrow for a complex phenomenon, as well as for all academic arguments considered, there must be considered that all academic studies give context to the legislator produce the law, and to the Judicial system apply the fair judgment. Even Schmid, one

³¹ Richardson, 2006, p. 6.

³² Ganor, 2010, p. 4.

³³ Richardson, 2006, p. 6.

³⁴“Most terrorists consider themselves freedom fighters...Whether they are fighting from repression or freedom to impose a repressive theocracy, to suggest that a freedom fighter cannot be a terrorist is to confuse ends and means. The fact that terrorists may claim to be freedom fighters does not mean that we should concede the point that all citizens of a democracy are legitimate targets because they have the option of changing their government...and therefore responsible for their governments' actions.” (Richardson, 2006, p. 9-10)

of the most respectful researchers about terrorism, when discussing a definition of terrorism that could be accepted by everyone, argued that "Such a full consensus will never be reached. Yet what we can hope for is that a majority of academic analysts can agree on the core elements³⁵".

As a consequence, since this paper will compare a widely accepted academic definition with anti-terrorist legislation, it must be considered that the text of legal documents defines a criminal act that must be avoided for the sake of life in society. Such text is written within a context and clearly states what the criminal action is. Therefore, working in a consensual academic definition with this objective, a not too large text with the elements that define the action might be better understood, as well as more efficiently applied. Furthermore, according to cultural characteristics, or regional context, the other definitional elements recommended by Schmid may be added to the article of that law, in form of paragraphs and items, in order to refine the definition or clarify any needed aspect.

Finally, in this sense, it is also important to avoid confusion and to register in the body of the law what terrorism is not. In Schmid's opinion, this list should contain the following ten elements:

1. mere acts of property damage, as well as acts of sabotage such as interrupting the flow of an oil pipeline, even when the saboteurs are engaging in acts of terrorism on other occasions;
2. attacks on military installations, aircraft, navy vessels, barracks, and the like, which are guarded, even when those who attack military installations or personnel are otherwise also engaging in acts of terrorism;
3. attacks on police stations and armed police on patrol during an armed conflict in zones of combat;
4. cases of collateral damage where the targeting of civilians was not deliberate (e.g. when an attack on a police station misfires and civilians are (also) victims);
5. cases of attacks on secular or religious symbols unless such an attack is combined with the victimization of people (an attack on a church known to be empty would not qualify; an attack on a church, mosque or synagogue where people are sheltering would);
6. certain types of assassinations, for example, when the direct victim is the only target, as opposed to de-individuated murder where the victim serves only as a message generator to reach a wider audience;
7. acts which if a situation of war existed would not qualify as war crimes, nor be crimes against humanity or grave breaches of the laws of war;
8. guerrilla warfare activities that are not war crimes, crimes against humanity or grave breaches of humanitarian law;
9. acts of legal use of force by legitimate authorities to impose public order when acting with restraint and in proportion to the threat and within the boundaries of the rule of law;
10. acts of (collective) political violence which are spontaneous, as in riots, demonstrations and other forms of public protest and dissent; industrial action (strikes) and revolts.³⁶

3. THE BRAZILIAN LEGAL FRAMEWORK AGAINST TERRORISM COMPARED TO ITS HISTORICAL CONTEXT AND ACADEMIC DEFINITION

From the legal perspective, Brazil addresses terrorism in its higher legal document, the Federal Constitution, approved in 1988. In its Article 4, the country establishes the repudiation of

³⁵ Schmid, 2011, p. 85.

³⁶ Schmid, 2011, p. 84.

terrorism as a principle of the Federative Republic of Brazil, showing, with a list of other nine principles, the conditions to fight this threat internally, or to cooperate with others in this subject:

Article 4 – The international relations of the Federative Republic of Brazil are governed by the following principles:
 I – national independence;
 II – **prevalence of human rights**;
 III – **self-determination** of the peoples;
 IV – **non-intervention**;
 V – equality among the States;
 VI – defense of peace;
 VII – peaceful settlement of conflicts;
 VIII – **repudiation of terrorism** and racism;
 IX – cooperation among peoples for the progress of mankind;
 X – granting of political asylum.³⁷

Following this article, the constitutional text still deals with the subject in the Article 5, item LXIII, stating that the practice of terrorism shall be considered by law as non-bailable and not subject to grace or amnesty, and their principals, or agents shall be held liable. (Brazil, 1988, p. 13)

Similarly, in the international context, Brazil has signed, among others, the Convention to Prevent and Punish Acts of Terrorism in 1973, from the Organization of American States, which was ratified by Brazilian Congress only in 1999³⁸:

The contracting states undertake to cooperate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this convention, to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes³⁹.

All international agreements signed and ratified by Brazil expressed the intention to cooperate with the international effort to prevent and punish acts of terrorism. Nevertheless, even though the Federal Constitution and international agreements address terrorism in their texts, recognizing it as a crime that must be repudiated, as well as its authors must be submitted to the justice, the national legal framework typified this crime only in 2016, approving the Law number 13,260 in the March 16th of 2016, a few days before the beginning of the Olympic Games in Brazil.

This law is the main Brazilian legal instrument to put in practice the intentions expressed in the Constitution and in international agreements. For the first time, Brazilian legislators defined terrorism as:

Article 2 – Terrorism consists of the practice by one or more individuals of the acts foreseen in this article, for reasons of xenophobia, discrimination or prejudice of race,

³⁷ Brazil, 1988, p. 11. (emphasis added by the author)

³⁸ Brazil is a signatory of international treaties that promote the fight against terrorist practices and is therefore subject to them. This is the case of the International Convention against the Taking of Hostages (Decree No. 3.517 / 2000), the International Convention on the Suppression of Terrorist Bombings (Decree No. 4,394 / 2002) and the International Convention for the Suppression of the Financing of Terrorism (Decree No. 5.640 / 2005), for example. However, as they are not the subject of this research, they will not be listed or analyzed.

³⁹ Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, available at <http://www.oas.org/juridico/english/treaties/a-49.html>, retrieved on April 17th, 2018.

color, ethnicity and religion, when committed with the purpose of provoking social or generalized terror, exposing danger to a person, property, public peace or public safety⁴⁰.
(translated by the author)

The definition presented by this law was so open and poorly framed that the legislator felt the necessity to clarify the concept, giving a list of the acts that must be considered terrorism on Paragraph 1 of Article 2:

Paragraph 1 – The acts of terrorism are:

I - use or threaten to use, transport, store, carry or bring with oneself explosives, toxic gases, poisons, biological, chemical, nuclear or other means capable of causing damage or causing mass destruction;

II - (VETOED);

III - (VETOED);

IV - to sabotage the operation or to seize, with violence, a serious threat to the person or using cybernetic mechanisms, the total or partial control, even temporarily, means of communication or transportation, ports, airports, railway or bus stations, hospitals, health homes, schools, sports stadiums, public facilities or places where essential public services operate, power generation or transmission facilities, military installations, oil and gas refining and processing facilities and institutions banking and its service network;

V - attempt against the life or physical integrity of a person:

After reading and analyzing the definition of terrorism in this law, it is clear that the legislator did not take into consideration the academic perspective of terrorism, nor the historical evolution of its meaning.

Looking into the definition of the crime presented on the heading of the Article 2, it is possible to see that from the three elements that characterize the phenomenon terrorism in the academic environment, the use of violence is present through the interpretation of the acts listed as terrorism on the paragraph. On the other hand, there is no provision of the threat of use of violence, which proved to be important means to instill fear, keeping the random character of their victims.

The other essential element to define terrorism, the civilian nature of targets is poorly addressed. In fact, the nature of targets is listed, instead of being defined as civilian persons, or civilian targets. The legislator opted for giving an exhaustive list of possible targets that permits identify an act as terrorism, but, according to this research, the civilian nature of the target is essential to differentiate terrorism from other types of political violence, and therefore must be characterized on the definition.

Finally, the third definitional aspect of terrorism, its political message, was not mentioned in the text of the law, which makes it difficult to differentiate terrorism from other types of crimes. Instead of it, the legislator presents some motivations, related to xenophobia, or discrimination for ethnic and religious reasons, since that the perpetrator has the intention of generating social terror. This is arguably a wide concept for any purpose and does not keep coherence with the political nature of terrorism.

⁴⁰ Available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/113260.htm, retrieved in March 29th, 2016.

Furthermore, this law has been criticized by lawyers and law researchers and academics because this law also criminalizes the preparatory acts in its Article 5, “Carry out preparatory acts of terrorism with the unequivocal purpose of consummating such a crime” (translated by the author). The critics state that the preparatory acts are part of “*Iter Criminis*”, also known as “Path of Crime”, which deals with the steps of the agent to commit a particular crime. Thus, first, there is the cogitation, which is when the agent plans in his mind the typical fact. Subsequently, the preparatory actions, which refer to the moment when the agent begins to obtain the necessary means for the practice of the crime. The following step is the execution actions, which is treated when the agent begins to practice the crime; and finally the consummation when the agent reaches its objective.

As a consequence, some researchers defend that this provision is indeed illegal, but the problem here is merely definitional. As the law fails to identify the threat of use of violence at the same level of the use of violence when defining terrorism, the legislator made it not clear that the crime of terrorism is yet on its execution once a person has a plan of action, and has already gathered the means to execute a violent action. As it was made evident during the analysis of academic definitions of terrorism (item 2.2 of this paper), the threat of use of violence has an important function to keep the random possibility of attacking anyone, anywhere, at any time. Therefore, if the law definition of terrorism had included the “use of violence, or the threat of use of violence”, there would have no necessity to state in the law that the preparatory acts are punishable, once the designated preparatory acts are actually the execution of terrorism, as explained before. Notwithstanding, it is crucial to characterize the threat to use violence, with solid evidence of the intention (planning, communication), the material to be used, and the capability to execute the plan, causing some sort of damage, or putting civilian persons or civilian targets at risk.

Additionally, the legislator found it necessary to determine what is not to be terrorism, as it is in paragraph 2 of Article 2 of the law:

Paragraph 2 – The provisions of this article do not apply to the individual or collective conduct of persons in political, social, trade union, religious, class, or professional categories, directed by social or demanding purposes, in order to question, criticize, protest or support, with the purpose of defending constitutional rights, guarantees and freedoms, without prejudice to the criminal classification contained in law. (translated by the author)

With this provision, as it is understood by this paper, the legislator expresses its thorough care in order not to mistake the definition of the criminal action, warning that persons of social movements or class organizations, when are demanding purposes in a democratic regime, should not be considered terrorists. Besides this aspect, it is essential to assure the freedom of assembly and speech, as some of the imperative aspects of the rule of law. This same issue was presented by Schmid (2011), following the advice of Thomas H. Mitchell who, given the heterogeneous nature of

the terrorist phenomenon, suggested that a definition of terrorism must clearly establish what terrorism is not. (Schmid, 2011, p. 84).

However, the text of the Paragraph 2, Article 2 grants law protection for eventual terrorist actions from that group of persons, what does not keep coherence with the academic idea about the subject, since the academic research recommended not to consider terrorism only the “acts of (collective) political violence which are **spontaneous**, as in riots, demonstrations and other forms of public protest and dissent; industrial actions (strikes) and revolts.” (Schmid, 2011, p. 84) (emphasis added by the author)

This means that once a movement with social, political, or labor (or any) motivation begins a legit action, and it spontaneously turns into a violent action, it must not be considered terrorism. This is because terrorism must be the deliberate use of violence, with a previously developed plan and assembled material. Therefore, considering this specific lack of coherence with academic definition of terrorism, this paragraph grants a safeguard for those listed persons to practice terrorist actions under the protection of the law, which cannot be considered adequate.

Nevertheless, the anti-terrorism law brings important aspects to criminalize terrorism. As it became a multidisciplinary action, when addressing this issue, it is imperative that the related activities also be criminalized. This what this law does when defines as illegal and punishable the actions in support of terrorist actions, such as: the association to terrorism (to promote, to provide assistance); to recruit; to give protection or hide terrorists; to provide, offer, obtain, guard, or store resources for the planning, preparation, or execution of acts of terrorism; to take part in specific training; to raise funds, to cooperate to raise funds, or collaborate to money laundering. (Articles 3, 5 and 6 – Law 13,260/2016).

4. RECOMMENDATIONS

The approval of the Law 13,260/2016 is a significant step towards Brazil’s intentions expressed in its Constitution and international agreements signed over the past. After a thorough research of the definitional aspects of terrorism, as well as their comparison to the main legal instrument of Brazilian legal framework, this paper presents some conclusions and recommendations in order to strength the judicial security and enhance effectiveness to the fight against terrorism.

First of all, it is essential that the law defines terrorism addressing the three main elements that allow anyone to identify an act as terrorism: the use of violence and the threat of use of violence; to attack civilian persons or civilian targets; and the political message intended with the actions. It means to replace the Article 2 of the law for a text that presents all the three elements

listed here. As a suggestion, it is presented the following definition: “terrorism is the deliberate use of violence, or the threat to use violence, to attack civilians, or civilian targets, in order to achieve political objectives”.

Considering that the definition needs to explain what the political objectives are, the suggestion is to establish a group of objectives that characterize the crime against the State, or its sovereignty, as it was presented by Kydd and Walter (2006). This idea should be a paragraph of the article that defines terrorism. As a proposition, it could include: Paragraph 1- The political objectives referred on the head of this article should represent an aggression against the State, whether being Brazil or other countries, including I – Regime Change; II – Territorial Change; III – Policy Change; and IV – Status Quo Maintenance.

Further research into the definition of what can be considered “political objectives”, deepening the meanings to the findings of Kydd and Walter, may give even more accuracy to the constituent items of the proposed law

Additionally, as the definition of terrorism contains the three elements of the academic definition, it is not necessary to keep the list of actions that must be considered terrorism, being recommended suppress the Paragraph 1 of Article 2. The same way, as the criminal definition upholds the threat of use of violence as important as the use of violence, it is not necessary to keep Articles 5 and 10 on the text of the law. If it is decided to keep it, it must avoid the expression "preparation actions", replacing it by "the threat of use of violence, characterized by previous planning, communications or other actions of coordination for a terrorist act, or the property of the correspondent material to be used ". On the other hand, it is essential to keep the ideas expressed in Paragraph 1 and 2 of Article 5.

Finally, it is recommended to adequate the definition of what terrorism is not, as the Paragraph 2 of Article 2, passing it to be written in this suggested way: “in order to assure the freedom to assemble, and the freedom of speech, acts of collective political violence, as an unplanned spontaneous consequence of riots, demonstrations, strikes, and other forms of public protest and dissent must not be considered terrorism”.

As a conclusion, it must be considered that keeping coherence with an impartial academic definition, Brazil will assure better conditions to cooperate in an international effort to eliminate this global threat, as well as it will have the acknowledge and authority to avoid, or to disapprove biased definitions regarding terrorism. This step will reinforce Brazil’s role in the regional and global order, showing the traditional impartiality that characterizes its foreign relations policy throughout history.

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